

No. _____

In the
Supreme Court of the United States

ARLEN FOSTER and CINDY FOSTER,
Petitioners,

v.

TOM VILSACK,
Secretary of Agriculture, in his official capacity,
Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

**PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Farming in wetlands, as determined by the United States Department of Agriculture, can limit eligibility for Department programs. The Department identifies wetlands in part by the prevalence of wetland vegetation. Where vegetation has been altered or removed, 7 C.F.R. § 12.31(b)(2)(ii) requires the Department to examine a comparison site “in the local area,” which an interpretative field circular states is a variant of the term “adjacent.”

The Department concluded that 0.8 acres of Arlen and Cindy Foster’s farm contains wetland plants, solely because a preselected site, 33 miles away, contains wetland plants. In this case, the agency construes “in the local area” to mean a 10,835-square-mile “major land resource area” that includes the Fosters’ land.

The questions presented are:

Should federal courts defer, under *Auer v. Robbins*, 519 U.S. 452 (1997), to an agency construction of an interpretative field manual (“second level *Auer* deference”), as have the Sixth Circuit and the Eighth Circuit decision below, or not, as the Fifth Circuit has held?

Does the use of a remote comparison site, preselected ten years prior and without notice to the Fosters or an opportunity to be heard, as the sole means of determining that their land supports wetland plants, violate their rights to due process of law under the Fifth Amendment?

LIST OF ALL PARTIES

The parties to the proceeding are Petitioners Arlen Foster and Cindy Foster. The Respondent is Tom Vilsack, Secretary, United States Department of Agriculture.

**CORPORATE
DISCLOSURE STATEMENT**

There are no parent corporations or publicly held companies in this case.

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USDA, Agriculture Handbook 296,
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USDA, MLRA Definitions (Dec. 15, 2005),
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PETITION FOR WRIT OF CERTIORARI

Arlen Foster and Cindy Foster respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued an opinion on April 11, 2016. It was reported at *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016). The opinion is reproduced here as Appendix A. The United States District Court for the District of South Dakota's unreported decision issued on October 31, 2014, and is reproduced as Appendix B. The Director Review Decision of the United States Department of Agriculture issued on July 16, 2012. It is the final agency action from which suit was taken, and is reproduced here as Appendix C. The hearing officer of the National Appeals Division of the United States Department of Agriculture issued his Appeal Decision on January 10, 2012. It is reproduced here as Appendix D. The Natural Resource Conservation Service issued a wetland determination on June 23, 2011. It is reproduced here as Appendix E.

JURISDICTION

The date of the decision sought to be reviewed is April 11, 2016. The district court had jurisdiction under 5 U.S.C. § 704. On July 12, 2016, Justice Alito granted the Petitioners' application for an extension of time in which to file their Petition, to August 9, 2016.

The Court has jurisdiction to review under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL, STATUTORY, AND
REGULATORY PROVISIONS AT ISSUE**

The Fifth Amendment of the United States Constitution provides: “[N]o [person] shall be . . . deprived of life, liberty, or property, without due process of law.”

The statutes at issue are 16 U.S.C. § 3801(a)(27) and 16 U.S.C. § 3822. The statutory provisions are reproduced verbatim, in relevant part, as Appendices F and G, respectively.

The regulations at issue are 7 C.F.R. § 12.2(a), 7 C.F.R. § 12.30(a), 7 C.F.R. § 12.31(b). They are reproduced verbatim, in relevant part, as Appendices H, I, and J.

INTRODUCTION

This case involves agency interpretation of statutes, regulations, and field manuals, and the level of deference due to these interpretations. For clarity and consistency, the Petitioners use the following descriptive conventions. Regulations, which may be eligible for *Chevron* deference under appropriate conditions, are generally said to interpret the relevant statutes, or to be *interpretive*. Agency publications like field manuals and circulars that are based on the regulations, and which may be eligible for *Auer* deference, are generally referred to as *interpretative*.

And for agency statements which interpret field manuals or circulars, the verb “construe” and the noun “construction” are generally used. This petition asks whether such “constructions” are entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997).

STATEMENT OF THE CASE

A. Factual Background of Petitioners Arlen and Cindy Foster

Ten millennia ago, the most recent glacial period came to a close in North America. As the ice sheets receded, they exposed large parts of what is now the American Upper Midwest to the sun for the first time in 100,000 years, leaving innumerable small depressions that regularly hold snow melt until they dry out as warmer weather arrives in the spring. This landscape, called the Prairie Pothole Region, comprises portions of the modern U.S. states of Montana, North and South Dakota, Minnesota, and Iowa, as well as areas of Canada. This region was extensively settled and farmed during the United States’ westward expansion in the 19th Century, and much of it retains this rural and farming character today.

Petitioners Arlen and Cindy Foster are third generation farmers in Miner County, South Dakota, growing corn, soybeans, and hay, and raising cattle. The wetland determination below limits how the Fosters can farm their land in the future, and forces them to choose between farming in the most productive way, and eligibility for United States Department of Agriculture programs, such as federal crop insurance. Arlen’s grandfather bought the original tract of land in 1900, with a \$1,000 loan. A house and barn that were on the property in 1900 still stand today. Arlen’s father

planted a tree belt on the south end of the farm in 1936, as a soil conservation measure. The tree belt collects deep snow drifts in the winter. A shallow depression, to which the snow melt from the tree belt drains as the weather warms, is the subject of this litigation, designated as “Site 1.” An aerial photograph of the relevant portion of the farm is included at App. E–13 (lower right corner).

Arlen Foster started farming with his father in 1972, and bought a part of his uncle’s estate in 1974. The Fosters, with their daughter and son-in-law and six grandchildren, strive for responsible conservation practices on their farm, which include preserving tree belts and no-till farming. The Fosters hope that their grandchildren will have the opportunity to follow in their footsteps.

B. Legal Background

1. Wetland Delineations by the Department of Agriculture Under the Food Security Act

The “Swampbuster” provisions of the Food Security Act of 1985, Pub. L. No. 99-198 (Dec. 23, 1985) (codified as 16 U.S.C. § 1301, *et seq.*) (the Act) were adopted to impose a disincentive for farmers to convert wetlands, by limiting farmers’ eligibility for various U.S. Department of Agriculture (Department) programs, such as federal crop insurance, if they do so. 16 U.S.C. §§ 3801(a)(27) (definition of wetland); 3821(a) (farming that converts wetlands a violation of the Act and renders violator ineligible for various Department programs). *See generally, Clark v. U.S. Department of Agriculture*, 537 F.3d 934, 935-36 (8th Cir. 2008). The Department is required to conduct

wetland delineations on farms, 16 U.S.C. § 3822(a), and delegates this responsibility to the National Resources Conservation Service (Service), an agency of the Department, 7 C.F.R. § 12.30(a)(3).

The Act defines wetlands as having three characteristics: wetland soils, wetland hydrology, and wetland plants. 16 U.S.C. § 3801(a)(27), *see also* 7 C.F.R. § 12.2 (defining wetland similarly). The agency regulations expand on the statutory directive to perform wetland delineations, 16 U.S.C. § 3822(a), by providing procedures and methodology for the Service to use in making on-site wetland identifications. 7 C.F.R. § 12.31(a) (hydric soils); 7 C.F.R. § 12.31(b) (hydrophytic vegetation). The regulations also require determination of the presence of wetland plants using the “current Federal wetland delineation methodology in use by NRCS at the time of the determination.” 7 C.F.R. § 12.31(b)(3); 7 C.F.R. § 12.2 (prevalence of hydrophytic plants is required factor for a finding of wetlands).

Farming may alter or remove vegetation that would normally grow in a given area (whether that area is a wetland or not). Where farming has altered or removed otherwise naturally occurring plants, the Service’s regulations direct an examination of whether “a prevalence of hydrophytic vegetation typically exists *in the local area* on the same hydric soil map under non-altered hydrologic conditions.” 7 C.F.R. § 12.31(b)(2)(ii) (emphasis added).

The Service publishes its interpretative National Food Security Act Manual, and various field circulars, based on these regulations. The field circular relevant to this case, dated December 1, 2010, provides “wetland identification features to be used when

making wetland determination and delineations for the Food Security Act of 1985, as amended.” App. K-1. In keeping with 7 C.F.R. § 12.31(b)(3), the 2010 Circular generally adopts the methods in the 1987 Army Corps of Engineers Wetland Delineation Manual¹ as the “on the ground” methodology for identifying wetlands under the Department regulations. The 1987 Manual is the statutorily required methodology by which the United States Army Corps of Engineers identifies wetlands under the Clean Water Act, *see* Energy and Water Development Appropriations Act of 1993, Pub. L. No. 102-377, 106 Stat. 1315, 1324 (Oct. 2, 1992), given that “wetlands are not simply moist patches of earth.” *See generally Rapanos v. United States*, 547 U.S. 715, 761 (2006) (Kennedy, J., concurring in judgment).

Although it generally follows the 1987 Manual, the 2010 Circular² lists some specific variations, based on the Service’s regulations, in making wetland delineations where the naturally occurring vegetation has been altered or removed. Under Clean Water Act practice and the 1987 Manual, the Army Corps may encounter this situation in a wide variety of contexts, including sites that have been graded for construction, or excavated for mining. 1987 Manual, paragraph 71, *et seq.*, at 73. In these situations, the 1987 Manual prescribes a multi-step process for determining

¹ U.S. Army Corps of Engineers, Wetlands Delineation Manual (Jan. 1987), <http://www.cpe.rutgers.edu/Wetlands/1987-Army-Corps-Wetland-Delineation-Manual.pdf> (1987 Manual).

² USDA, Food Security Act Wetland Identification Procedures (2010), http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_036356.pdf.

whether wetland vegetation was prevalent on the investigated site prior to its disturbance. 1987 Manual, paragraph 73, at 74-77. One step in this process is to examine the “adjacent vegetation” for clues to the vegetation that had been altered or removed on the site itself. 1987 Manual, paragraph 73, Step 3(d), at 76.

The interpretative 2010 Circular, paragraph 5-30, uses the Service’s regulatory term “in the local area,” as a variant³ of the Manual’s term “adjacent vegetation.” App. K-1-2. The 2010 Circular directs the examination of a comparison site for this purpose, which must be “in the local area.” What comprises a “local area” is thus constrained by the Service’s description of that term as a variant of the term “adjacent” in the interpretative circular.

The purpose of the comparison site is to determine whether the investigated site would, in its natural state, support wetland plants. In other words, the comparison site is a proxy for the investigated site; if the comparison site supports wetland vegetation, then the Service will deem the delineated location to do so as well. Thus, the selection of the comparison site determines whether the delineated location meets the wetland vegetation criterion.

2. Agriculture Handbook 296 and Major Land Resource Areas

The Service and the Department publish USDA Agriculture Handbook 296, *Land Resource Regions and Major Land Resource Areas of the United States, the Caribbean, and the Pacific Basin* (3d ed. 2006)

³ In the sense that the two terms are similar but not identical.

(Handbook 296)⁴ to “provide[] a basis for making decisions about national and regional agricultural concerns.” Handbook 296, Introduction, at 1. Handbook 296 generally divides the United States (including Alaska and the U.S.’s non-continental possessions) into 28 Land Resource Regions, which are then further divided into 278 Major Land Resource Areas, which assist “statewide agricultural planning and ha[ve] value in interstate, regional, and national planning.”⁵ A map showing all of the major land resource areas in the continental United States is available on the Service’s website.⁶ The Fosters property is located in the 10,835-square-mile Southern Black Glaciated Plains major land resource area, #55C, which is part of Land Resource Region F. *See* Handbook 296 at 137, 150.

Handbook 296 would have no relevance to this case, but for the fact that when delineating Site 1 on the Fosters’ farm, the Service construed, via staff testimony, the “local area” of the Fosters’ farm to be the 10,835-square-mile major land resource area.

C. Administrative History Before the Department of Agriculture

In July 2008, the Fosters asked the Service to reconsider an earlier wetland delineation it had performed on their farm. Because the investigated area

⁴ http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_050898.pdf

⁵ http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/survey/geof/?cid=nrcs142p2_053625

⁶ Service website at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_051846.pdf.

has been disturbed and thus the naturally occurring vegetation is altered, the Service used a comparison site as a proxy to determine whether the 0.8-acre Site 1 supports wetland plants. District Court Decision, App. B-2, B-13. The Service ultimately determined on June 23, 2011, that Site 1 is a wetland. NRCS Determination, App. E-1. Among the three factors for determining the presence of a wetland, the NRCS Determination concluded that wetland vegetation was present at Site 1 based on examining “the approved Tetonka⁷ Reference site.” App. E-2.

The “Tetonka Reference site” is located in Kingsbury County, South Dakota, approximately 33 miles from the Fosters’ property. App. B-22-23. It is included in a previously approved list of comparison sites, App. B-22-23, and serves as the only proxy comparison site for wetland determinations for any delineation being done on similar soils anywhere within the nearly 11,000 square mile major land resource area 55C. App. D-10-11, Findings of Fact 31 and 34. The Service selected the Tetonka site in 2000, when it collected data to establish that the reference site supports wetland plants. App. D-21-22. There is no evidence or findings that wetland plant data for the Tetonka site have been updated at any time since 2000.

After the Service’s June 2011 Determination, the Fosters appealed to the Department’s National Appeals Division. Among other issues, the appeal contested the Service’s use of the Tetonka Reference site to determine the presence of wetland plants at the Fosters’ Site 1, on the basis that the Tetonka Reference

⁷ Tetonka refers to a type of soil, shared by the Reference site and Site 1.

site is not “in the local area” as required by 7 C.F.R. § 12.31(b)(2)(ii) and the 2010 Field Circular. The Fosters also contended that use of a preselected site with known wetland vegetation improperly predetermined the outcome of the vegetation factor. The Appeals Division held a field hearing in Mitchell, South Dakota, during which a Service staff member, Mr. Luebke, testified that the Service construes “the local area” to mean the “Major Land Resource Area” as designated in Handbook 296. App. D–23. On January 10, 2012, the Division hearing officer issued a decision upholding the NRCS Determination, including the Service’s construction of the term “local area” as “Major Land Resource Area,” App. D–21, which in this case is 10,835 square miles.

Following the Division hearing officer’s decision, the Fosters pursued their final administrative appeal with the Director of the National Appeals Division. On July 16, 2012, the Director’s Deputy issued an order upholding the hearing officer’s decision and the NRCS Determination. Director Review Determination, App. C. The Director Review Determination stated the legal standards for determining the presence of wetland plants, starting with the statute, then the agency regulations, and finally the interpretative manuals and circular. App. C–6-8 (citation of statute, regulations, and field manuals and circulars), *id.* at C–12-13 (legal standards for selecting reference sites, citing regulations and field manual). The Director Review Determination upheld the use of the preselected Tetonka Reference site as a comparison site to conclude that the Fosters’ Site 1 would normally support wetland plants. App. C–26-27. In doing so, the Determination rejected the Fosters’ objection that the Tetonka Reference site is not in the “local area” as

required by the regulation and field circular.⁸ App. C–27. The Director Review Determination deferred to Mr. Luebke’s testimony that the agency construes “local area” to mean “major land resource area” under *Auer v. Robbins*, 519 U.S. 452 (1997). App. C–28.

D. Procedural History In the Federal Courts

On May 31, 2013, the Fosters filed suit in the U.S. District Court for the District of South Dakota against Agriculture Secretary Tom Vilsack, challenging the Director Review Determination. Following cross-motions for summary judgment, the District Court issued its Opinion and Order, upholding the Director Review Determination, on October 31, 2014. App. B–1. The district court upheld the use of the Tetonka Reference site against the Fosters’ arguments that it was not in the “local area.” The district court also upheld the preselection of a reference site known to have wetland plants, and its use as the proxy for all determinations on similar soils in the 10,835-square-mile major resource area. App. B–26, B–31. The district court applied a legal standard similar to that used in the Director Review Determination for identifying wetlands and wetland plants: the statute (16 U.S.C. §§ 3801(a)(27), 3822(a)(1)), the interpretive regulations (7 C.F.R. §§ 12.2(a), 12.30(a)(4), 12.31(b)(2)(ii)), and then the various interpretative field manuals (1987 Army Corps Wetland Delineation Manual and Regional Supplement and 2010 NRCS Circular). App. B–8-9, B–21-22.

⁸ The Fosters also appealed the Service’s determination of wetland hydrology, which is not an issue in this petition.

The district court questioned whether the Service testimony, that a “local area” was the same as a “major land resource area,” was an official interpretation of the regulation, but concluded that even if *Auer* deference was not warranted, *Skidmore* deference was. App. B–30-31; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

On December 22, 2014, the Fosters filed a timely appeal to the United States Court of Appeals for the Eighth Circuit. App. A–6.

E. The Eighth Circuit Defers to Agency Staff Testimony, Construing an Interpretative Field Circular, Based on a Regulation, Interpreting a Statute

The Eighth Circuit rejected the Fosters’ argument that the Southern Black Glaciated Plains MLRA is not a “local area,” by deferring to Mr. Luebke’s testimony to the contrary. App. A–10 (“Like Site 1, the Kingsbury County comparison site is located within [MLRA 55C], and thus meets the regulatory criteria under the agency’s reasonable interpretation, to which we owe deference.”). Oddly, the Eighth Circuit did not cite *Auer* or even *Skidmore* to support judicial deference to agency construction of its regulations, but to an Eighth Circuit decision that stands for deference to agency fact-finding when it is dependant on specialized expertise. App. A–10 (citing *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999)). However, the text of the decision below shows that the Eighth Circuit employed the *Auer* standard of deference to the agency staff’s testimony asserting that the Service construed “local area” to mean “major land resource area.” App. A–10. The

Eighth Circuit ignored the 2010 Circular’s official construction of “local area” as a variant of the term “adjacent” as used in the 1987 Corps Manual.⁹

REASONS FOR GRANTING THE WRIT

I

**THE COURT SHOULD RESOLVE A
CIRCUIT CONFLICT ON WHETHER TO
DEFER UNDER *AUER V. ROBBINS*
TO AGENCY CONSTRUCTION
OF INTERPRETATIVE MANUALS**

This Court has held that when an agency adopts ambiguous regulations and then issues interpretative manuals and other statements based on those regulations, the federal courts are to defer to the agency’s interpretation of its regulations. *Auer v. Robbins*, 519 U.S. 452. Such deference may be owed both to formally adopted publications such as agency manuals and to litigation positions taken by the agency in amicus briefs. *Auer*, 519 U.S. at 462. Hence, *Auer* deference is more expansive than *Chevron* deference, which generally follows from agency notice and comment rulemaking or similar interpretive procedures. *Bigelow v. Department of Defense*, 217 F.3d 875, 878 (D.C. Cir. 2000).

Members of this Court and the Circuit Courts of Appeals have expressed significant skepticism about the continuing validity of *Auer* deference, on separation

⁹ The Eighth Circuit did not address the Fosters’ argument that using a site preselected ten years prior and known to have wetland vegetation illegally predetermined the outcome of the Service’s delineation of wetlands at the Fosters’ Site 1.

of powers and other grounds. This petition does not ask the Court to reconsider *Auer*, but it does ask the Court to resolve a circuit split as to whether the doctrine should be extended beyond agency manuals and other statements that interpret regulations, to additional statements which construe the interpretative manuals.

**A. Judicial Skepticism of *Auer*
Warrants Cabining the Doctrine**

Auer deference has come under increasing scrutiny and skepticism on this Court. *See, e.g., Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring) (“It may be appropriate to reconsider [*Auer* deference] in an appropriate case.”); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part) (“I believe that it is time to [reconsider *Auer*].”); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part) (judicial deference to agency interpretation of regulations ripe for Supreme Court review), *id.* at 1211-13 (Scalia, J., concurring in judgment) (judicial interpretation of regulations should be free of deference to agency interpretation), *id.* at 1213-25 (Thomas, J., concurring in judgment) (judicial deference to agency interpretation of regulations violates separation of powers and should be revisited in appropriate case). *See also United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (doubts over future scope of *Auer* well founded).

Judges on the Second, Sixth, and Seventh Circuit Courts of Appeals have also expressed concerns regarding the role and scope of *Auer* deference.

In *Berlin v. Renaissance Rental Partners, LLC*, 723 F.3d 119 (2nd Cir. 2013), the court granted *Auer* deference to a Department of Housing and Urban Development interpretation of its regulation defining “lot” as an interest in land that “includes the right to the exclusive use of a specific portion of the *land*” as including a condominium in a multi-story building. 723 F.3d at 124-25. Judge Jacobs dissented, refusing to accord deference to HUD’s interpretation of its regulation, citing Justice Scalia’s dissent in *Decker*. 723 F.3d at 130 (Jacobs, C.J., dissenting) (quoting *Decker*, 133 S. Ct. at 1339 (Scalia, J., dissenting)). Judge Jacobs read the relevant regulatory definition of “lot” as involving “exclusive use of a specific portion of the land” and concluded that the natural reading of this definition excluded high-rise condominiums, because each condominium owner shares the use of a specific portion of the land. *Id.* See also *Berlin v. Renaissance Rental Partners, LLC*, 748 F.3d 98, 98 (2nd Cir. 2013) (Jacobs, J., dissenting from denial of rehearing en banc) (calling to address scope of *Auer* deference where federal agency had interpreted “exclusive use of a specific portion of the land” to mean “any interest in real estate”).

Judge Sutton of the Sixth Circuit has observed that application of *Auer* deference eviscerates the rule of lenity. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732-33 (6th Cir. 2013) (Sutton, J., concurring). *Carter* also dealt with a HUD interpretation, this time of a statutory safe harbor for related business entities referring clients to each other in real estate transactions, within the overall statutory prohibition on referral fees. 736 F.3d at 724; see generally 12 U.S.C. § 2607(a) (referral fee prohibition); *id.* § 2607(c)(4) (three part safe harbor test for affiliated

business arrangements). The plaintiffs in the case argued that the defendants violated the safe harbor even though all three statutory requirements were conceded to be satisfied. 736 F.3d at 724. Plaintiffs relied, to prove liability, on a HUD policy that added a fourth requirement, which defendants had not satisfied. *Id.* The district court ruled for defendants, and upon plaintiffs' appeal, the United States intervened to defend the enforceability of HUD's policy statement. *Id.* at 725. Judge Sutton's opinion for the panel declined to afford *Chevron* or *Skidmore* deference to the HUD policy statement, agreed that the three statutory safe harbor factors were established, and affirmed the district court judgment in favor of defendants. *Id.* at 726. One of the factors in the court's refusal to afford *Chevron* deference was that the statute at issue imposed criminal penalties for violation of the referral fee prohibition. *Id.* at 727.

Judge Sutton also wrote a separate concurrence in *Carter* addressing the interaction of the rule of lenity with various standards of deference to agency interpretations. *Id.* at 729.

Auer v. Robbins . . . adds another complication. It says that, when a regulation interpreting an ambiguous statute itself contains an ambiguity, the agency's interpretation of the regulation receives essentially complete deference. Unless the rule of lenity applies to agencies, *Auer* would give each agency two ways of construing criminal laws against the defendant—by resolving ambiguities in the criminal statute and by resolving ambiguities in any regulation. What's more, the range of

documents eligible for deference under *Auer* is broader than under *Chevron*. Even an interpretation contained in a brief may receive deference.

Carter, 736 F.3d at 732-33 (citations omitted).

In *Bible v. United Student Aid Funds, Inc.*, the Seventh Circuit declined en banc rehearing in a case examining how different types of student loan repayment agreements should be interpreted. 807 F.3d 839, 840 (7th Cir. 2015). The rehearing petition asked the en banc court to address whether a Department of Education interpretation of its regulations was entitled to *Auer* deference. *Id.* at 841. Concurring in the denial of rehearing, Judge Easterbrook cited the three concurrences in *Perez*, and agreed that en banc decision of the specific application of *Auer* in the case “would [not] be a prudent use of [the] court’s resources . . . when *Auer* may not be long for this world.” *Id.* And dissenting from denial of certiorari in this case, Justice Thomas wrote that “[a]ny reader of this Court’s opinions should think that [*Auer*] is on its last gasp.” *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. at 1608 (Thomas, J., dissenting from denial of certiorari).

Given the level of judicial skepticism of *Auer* expressed above, it is important for the Court to decide whether the doctrine should be extended, as it was in the decision below.

B. The Court Should Resolve Whether Courts Should Permit “Second Level *Auer* Deference,” as the Eighth and Sixth Circuits Do, or Refuse This Extension, as in the Fifth Circuit

1. The Fifth Circuit Has Refused *Auer* Deference to Agency Constructions of Interpretative Manuals

The Fifth Circuit has expressly refused to afford “second level” *Auer* deference to agency constructions of their interpretative manuals. *Elgin Nursing and Rehabilitation Center v. U.S. Dep’t of Health and Human Services* dealt with how the agency construed an interpretative procedural manual based on regulations for the safe cooking of eggs for service to elderly residents of nursing homes. 718 F.3d 488 (5th Cir. 2013).

An HHS interpretive procedural manual stated both that eggs should be cooked for at least 15 seconds at 145 degrees, and that the yolk should not be runny. *Id.* at 491-92. The procedural manual’s syntax left unclear whether these requirements were conjunctive or disjunctive, and HHS construed them as conjunctive, *i.e.*, that the nursing home violated the regulation because it had not cooked eggs both for 15 seconds at 145 degrees *and* until the yolks were not runny. *Id.* HHS asked for *Auer* deference to this construction of its interpretative manual. *Id.* at 492.

The Fifth Circuit explained the nature of the problem it called “*Auer* squared” deference, giving three reasons against it. First, it would encourage agencies to write ambiguous interpretative manuals,

based on ambiguous regulations, and enhance their ability to do so. Second, such deference would leave no role for the courts, entirely ceding the judicial function of interpreting the law to the Executive Branch. Third, such deference would allow punishment of violations for which no person would have fair warning. *Elgin Nursing and Rehabilitation Center*, 718 F.3d at 492-94. The court then construed the interpretative manual using “traditional tools of textual interpretation,” without any deference to the agency, and read the criteria to be disjunctive. *Id.* at 494.

In *Elgin*, even before this Court’s decision in *Perez v. Mortg. Bankers Ass’n*, the Fifth Circuit supported its rejection of “second level” *Auer* deference with citations to this Court’s recent decisions and critical opinions on the subject of *Auer* itself. 718 F.3d at 493 n.6 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting, joined by Stevens, O’Connor, and Ginsburg, JJ.); *Decker*, 133 S. Ct. at 1341 (Scalia, concurring in part and dissenting in part); *id.* at 1338 (Roberts, C.J., joined by Alito, J., concurring) (expressing agreement)). *Elgin* also cites Justice Alito’s caution that despite valid reasons for deference to interpretation of regulations, such deference empowers agencies to regulate vaguely and then interpret to taste later. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). Clearly, the Fifth Circuit reads this Court’s *Auer* jurisprudence as a warning sign against extending the doctrine without this Court’s sanction.

2. The Eighth Circuit Below Gave “Second Level *Auer* Deference” to the Department Staff’s Construction of an Interpretative Field Circular

The decision below gives *Auer* deference to agency staff testimony construing “the local area.” App. A–10.¹⁰ But the Service had already issued its officially interpretative 2010 Circular, under which the regulatory term “the local area” is a variant of the term “adjacent,” as that term is used in the 1987 Corps Manual. When the Service’s Mr. Luebke testified that the agency reads “the local area” to mean “major land resource area,” App. B–30, he was construing the 2010 Circular. Thus, the court below gave “second level” *Auer* deference to an agency construction of an interpretative manual, not ordinary *Auer* deference to an agency interpretation of its regulations.

The significance of this deference is clear when one applies ordinary canons of construction to determine whether the best reading of “local area” in the 2010 Circular is “major land resource area.” The 2010 Circular uses the “local area” as a variation on “adjacent” as used in the 1987 Corps Manual. According to the maxim *noscitur a sociis* (a word is known by the company it keeps), these two terms should be construed consistently. *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). Thus, the scope of the term “local area” must be circumscribed geographically by the term “adjacent.” Accordingly, the Service generally must identify comparison sites that are at least proximate to, if not directly abutting, the

¹⁰ As addressed above, the deference afforded is that established by *Auer*, even if the Eighth Circuit cited other types of deference.

site being investigated. *Cf. Summit Petroleum Corp. v. U.S.E.P.A.*, 690 F.3d 733, 741 (6th Cir. 2012) (“adjacent” in EPA Clean Air Act regulations requires some physical proximity).

By comparison, there is little merit (absent deference) to the Service’s contention that the 2010 Circular should be construed as calling for a comparison site anywhere within the relevant major land resource area of nearly 11,000-square miles. The 2010 Circular nowhere says that, and it uses “local area” in an analogous sense to the Corps Manual’s use of the term “adjacent.” Because there are only a few hundred major land resource areas in the entire Lower 48, under Handbook 296, the implausible outcome of the Service’s reading of Circular 2010 is that there are only a few hundred “local areas” in the continental United States. Given that Handbook 296 describes major land resource areas as providing information relevant to regional, interstate, and national agricultural policy, how few major land resource areas there are, and their enormous geographic scope, nothing in the 2010 Circular suggest that a “local area” has such an expansive meaning.

Arguably the only way for a court to conclude that the 2010 Circular should be read to mean “major land resource area” where it says “local area,” is to take a government official’s word for it.

3. The Sixth Circuit Also Defers to Agency Constructions of Interpretative Manuals

In *Atrium Medical Center v. U.S. Dep’t of Health and Human Services*, the Sixth Circuit afforded *Auer* deference to the Secretary of Health and Human

Service's construction of an interpretative manual based on complex agency regulations. 766 F.3d 560 (6th Cir. 2014). The case dealt with how the Center for Medicare and Medicaid Services (Center), an agency of the Department of Health and Human Services, administers reimbursement rates to hospitals which accept Medicare payments. *Id.* at 564. The legal regime governing hospital reimbursements starts with the Medicare reimbursement statute, 42 U.S.C. § 1395ww(d)(3)(E)(I), then proceeds to regulatory interpretation of the statute at 42 C.F.R. § 413.24. The regulation is then the basis for the interpretative Provider Reimbursement Manual, which provides step-by-step guidance on how to report costs. *Atrium Medical Center*, 766 F.3d at 564.

The dispute in the case centered on how the Center construed specific provisions in the manual. *Id.* at 565. The amount that hospitals are paid depends in part on how much they spend in payroll and the amount of time for which its employees receive compensation. Differences in what is considered compensated time can ultimately increase or reduce the amount of Medicare reimbursement that the federal government pays to the hospital. *Id.* In this case, the hospital argued that the Center should only count the number of hours actually worked by hospital staff under a flexible work schedule program. *Id.* at 574. In contrast, the Center construed the manual as requiring the imputation of additional hours for the program. Because the additional imputed hours had no corresponding pay, the effect was to lower the reimbursement owed to the hospital. *Id.* at 575.

After a thorough analysis of both the facts and various deference issues, the Sixth Circuit expressly afforded *Auer* deference to the Center's construction of the manual. *Id.* at 574.¹¹

**4. The Sheer Quantity
of Interpretative Agency
Field Manuals Raises an
Important Legal Question
With Nationwide Implications**

This question is an important issue because of the breadth to which agency constructions of interpretative manuals purport to direct the lives and businesses of nearly all Americans. Two examples illustrate this.

The Ninth Circuit held that the interpretative Forest Service Manual, by which the Forest Service (another agency within the Department of Agriculture) implements its forest management regulations, is entitled to *Auer* deference. *Public Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192, 1199 (9th Cir. 2012). The court deferred even though the Forest Service Manual lacks the force and effect of law under Ninth Circuit precedent, and therefore is not even binding on the Forest Service. *Western Radio Services Co., Inc. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996). Are Forest Service staff constructions of the Forest Service Manual entitled to *Auer* deference under the decision below and *Atrium Medical Center*? Or are they not, in keeping with *Elgin Nursing and Rehabilitation Center*?

¹¹ The Sixth Circuit first afforded *Chevron* deference to the relevant portions of the manual, due in part to references to it in annual notices in the Federal Register, and despite the manual itself never having been published in the Federal Register. *Id.* at 572.

Under the Clean Water Act, the United States Army Corps of Engineers has promulgated regulations to define waters of the United States, including wetlands. 33 C.F.R. § 328.3(a) (stayed by *In re E.P.A.*, 803 F.3d 804 (6th Cir. 2015)). As discussed above, the Army Corps' 1987 Wetland Delineation Manual is the basic interpretative manual for the agency's regulatory wetland definition. The Fourth Circuit held that the 1987 Manual is entitled to *Auer* deference in *United States v. Deaton*, 332 F.3d 698, 713 (4th Cir. 2003). The Army Corps also publishes a series of Regional Supplements, which construe the 1987 Manual based on regional variations.¹² The decision below, and the Sixth Circuit's decision in *Atrium Medical Center*, raise the question whether the Regional Supplements are also entitled to *Auer* deference.

In light of Judge Sutton's concurrence in *Carter* on the rule of lenity, it merits noting that the discharge of dredged or fill materials to waters of the United States without a Corps permit is a crime. 33 U.S.C. § 1319(c). This Court has observed on numerous occasions that both the statute and regulations defining waters of the United States are ambiguous. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *U.S. Army Corps of*

¹² http://www.usace.army.mil/Missions/Civil-Works/%20Regulatory-Program-and-Permits/reg_supp/

Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring, noting persistence of troubling questions regarding Clean Water Act). One impact of that ambiguity is that land owners lack fair warning whether they are discharging to waters of the United States. The 1987 Manual is afforded *Auer* deference on this question. *Deaton*, 332 F.3d at 713. If, under the decision below and *Atrium Medical Center*, agency constructions of the 1987 Manual, including the Regional Supplements and even Corps policy memos and amicus briefs, are to be deferred to under *Auer* as well, how will land owners ever actually know if their unpermitted actions are taken in waters of the United States and are therefore crimes?¹³

This Court should grant the petition to clarify whether *Auer* reaches beyond agency interpretative manuals to subsequent agency staff constructions of those manuals.

¹³ There are no criminal penalties in the Food Security Act's provisions for plowing in wetlands, but at least one farmer has been found civilly liable for the same action (plowing in wetlands) without a Corps permit under the Clean Water Act, a statute that does carry criminal penalties. See *Duarte Nursery, Inc. v. U.S. Army Corps of Engineers*, No. 2:13-cv-02095-KJM-DB, E.D. Cal., June 10, 2016, Order, ECF 195 at 24-35 (farming company liable as a matter of law for plowing vernal pools without a Corps permit).

II

**THE COURT SHOULD DECIDE
WHETHER THE DUE PROCESS
CLAUSE ALLOWS PREDETERMINATION
OF ADJUDICATORY DECISIONS
THAT DENY PUBLIC BENEFITS**

**A. Eligibility for Public Benefits
Is Protected by the Fifth
Amendment’s Due Process Clause,
Which Prevents the Government from
Using Proxy Findings To Predetermine
the Outcome of Hearings**

“No person shall be . . . deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V. “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

The Food Security Act’s relevant provisions limit farmers’ eligibility for a variety of the Department’s programs for assistance to farmers when, under certain circumstances, they farm in areas that the Department determines to be wetlands. 16 U.S.C. § 3821(a), (d); *see also* 16 U.S.C. § 3821(b) (listing programs for which violators may be ineligible). Determination of ineligibility begins with the Department’s determination of whether wetlands, as defined in the Act, are present. This determination of the presence of wetlands is subject to procedural Due Process protections. *See generally Goldberg v. Kelly*,

397 U.S. 254 (1970) (due process applies in proceedings to terminate government benefits).

Due Process thus required that the Fosters receive notice and a hearing on the selection of the comparison site, since the wetland vegetation on the Tetonka site was used as a proxy to determine that factual question as to Site 1. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process requires notice reasonably calculated to apprise interested parties of pendency of action and afford opportunity to present objections); *Morgan v. United States*, 304 U.S. 1, 18 (1938) (right to hearing embraces reasonable opportunity to know claims of opposing party and meet them).

These due process protections apply to adjudicatory or quasi-judicial actions, but not to legislative actions. *Compare Londoner v. City & County of Denver*, 210 U.S. 373, 385 (1908) (due process protections apply where government applies general principles of law to specific acts on a single parcel of property), *with United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973) (railroad company has no due process claim to challenge quasi-legislative rulemaking); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (no due process right to challenge a quasi-legislative increase in all property tax assessments in the City of Denver). The necessary implication of this distinction is that government should not be permitted to substitute its legislative determinations (*i.e.*, those public actions that are not subject to due process protections) as proxies or substitutes for factual determinations that would otherwise be made in proceedings to which due

process protections attach. And yet, that is precisely what the Department did in this case.

**B. The Department's
Determination That the
Fosters' Property Contains Wetlands
Relies on Predetermination of One
Factor, Without Notice to the Fosters
or Opportunity for Them To Comment**

Farming may alter or remove vegetation that would normally grow in a given area (whether that area is a wetland or not). The prevalence of certain kinds of vegetation (*i.e.*, hydrophytic) is a required factor that the Service must demonstrate in its wetland determinations. 16 U.S.C. § 3801(a)(27); 7 C.F.R. § 12.2. Where farming has altered or removed otherwise occurring plants, the Service's regulations direct an examination of whether "a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map under non-altered hydrologic conditions." 7 C.F.R. § 12.31(b)(2)(ii). The 2010 Circular directs the examination of a comparison site for this purpose, and, based on the regulation, defines "local area" as a variant of "adjacent" as that term is used in the 1987 Corps Manual. If the comparison site does not support wetland vegetation, then the delineated site will be determined not to. But if the comparison site does support wetland vegetation, then the Service will determine that the delineated location does as well. Under this legal standard, the selection of the comparison site is dispositive of whether the delineated location will be determined to meet the wetland vegetation criterion.

The Service investigated the Tetonka Reference site in 2000 and determined that it met all three

criteria as a wetland under the Act and regulations, including a prevalence of wetland vegetation. App. D–7-11. The Service then added the Tetonka Reference site to a list of preselected comparison sites, to be used whenever a wetland determination in MLRA 55C required the use of a comparison site. App. B–22-23. The Tetonka Reference site is the *only* comparison site used for wetland determinations on similar soil types in the 10,835-square miles of major land resource area 55C. App. D–10-11, Findings of Fact 31 and 34. The investigation and preselection of the Tetonka Reference site were both done without reasonable notice to the Fosters or an opportunity to comment.

The Service’s occasional selection of sites that are valuable for research, or to train its staff in delineation techniques, or for other similar purposes, would not implicate the Fosters’ due process rights because they would not deprive the Fosters of any liberty or property interest. *Mathews v. Eldridge*, 424 U.S. at 332. But, when the Service uses a preselected site to determine the outcome of a contested question in a subsequent adjudicatory proceeding (indeed, all subsequent adjudicatory proceedings involving the same soil type in the same major land resource area¹⁴), the government violates the due process rights of those

¹⁴ Handbook 296 establishes land resource regions and major land resource areas for the purpose of aiding in development of national, regional, and interstate agricultural policy. Handbook 296 at 1. The current third edition was published jointly by the Department and the Service in 2006, *id.*, without notice (or at least notice that would satisfy due process) to the Fosters. Such lack of notice would not ordinarily implicate the Fosters’ due process rights, except that the designation of the 10,835-square-mile MLRA in which their farm is located has also now contributed to the predetermination that their 0.8-acre Site 1 supports wetland plants.

who are subject to the adjudicatory proceedings.¹⁵ When an unnoticed selection, essentially legislative in character, is used to later predetermine the outcome of a contested element in a hearing, the hearing participant has no opportunity to challenge the selection when it is actually made.¹⁶ Due process requires an adjudicatory decision-making process. As applied to wetland delineations under the Act, where reference sites must be used, due process requires the Service to make an ad hoc (or adjudicatory) selection of a reference site, based on the characteristics of the investigated site. Due process should not allow a prior legislative selection to be used as a proxy for the adjudicatory determination otherwise required.

Since the Tetonka Reference site is the only possible comparison site that the Service would use when determining, in 2011, whether Site 1 supports wetland plants, and the Service had already concluded ten years earlier that the reference site supports such plants, the preselection of the reference site also predetermined the outcome of the vegetation portion of the delineation of Site 1. In essence, the Service used the fact that the Tetonka Reference site supports wetland plants as a proxy answer to the question whether Site 1 supports such plants.

¹⁵ The fact that the Fosters had the opportunity to cross-examine the Service staff regarding the selection of the reference site at the hearing in 2012 does not change the fact that the Service had already selected the site in 2000, without notice to the Fosters or opportunity to comment.

¹⁶ The Fosters' reading of the 2010 Circular, as discussed in the section on *Auer* deference, would avoid the constitutional due process issue, by requiring the Service to start at the investigated site itself and work outward, for each delineation, to locate the nearest (or most "adjacent") suitable comparison site.

The Court should grant the petition to resolve whether agencies may use such preselected “proxy facts” without violating the due process rights of those against whom such findings are made.

CONCLUSION

For the reasons stated, the petition should be granted.

DATED: August, 2016.

Respectfully submitted,

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Appendix A-1

**United States Court of Appeals
For the Eighth Circuit**

No. 14-3887

Arlen Foster; Cindy Foster

Plaintiffs - Appellants

v.

Tom Vilsack, Secretary, United
States Department of Agriculture

Defendant - Appellee

Appeal from United States District Court
for the District of South Dakota - Sioux Falls

Submitted: November 18, 2015

Filed: April 11, 2016

Before SMITH, BYE, and BENTON, Circuit Judges.

BYE, Circuit Judge.

Arlen and Cindy Foster brought this action to challenge the United States Department of Agriculture's (USDA's) determination that a portion of the Fosters' farmland is a wetland within the meaning of the pertinent federal statutes and regulations. The

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district court granted¹ summary judgment in favor of the USDA after concluding the agency’s final decision was not arbitrary, capricious, or contrary to the law. We affirm.

I

Arlen and Cindy Foster own and farm land in Miner County, South Dakota. Miner County is located within what is generally referred to as the Prairie Pothole Region covering some of South Dakota, North Dakota, Minnesota, and parts of three Canadian provinces. The USDA uses its own nomenclature to describe various land areas within the United States; under that nomenclature larger Land Resource Regions (LRRs) are subdivided into Major Land Resource Areas (MLRAs). The Fosters’ farm is located within LRR F, or the Northern Great Plains Spring Wheat Region, and more specifically within an MLRA called the Southern Black Glaciated Plains. For purposes of this appeal, the MLRA where the Fosters’ farm is located is relevant for determining the types of soils found within the MLRA, which in turn is relevant for determining what types of vegetation would exist when a particular soil is in its natural state, including vegetation which would naturally be found in a wetland.

In 1985, Congress passed the Food Security Act of 1985 which contains “Swampbuster provisions authoriz[ing] the USDA to make determinations as to whether certain lands qualify as wetlands and whether wetlands that have been manipulated qualify as converted wetlands.” *Clark v. United States Dept. of*

¹ The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

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Agric., 537 F.3d 934, 935 (8th Cir. 2008). Swampbuster was passed “[i]n order to combat the disappearance of wetlands through their conversion into crop lands[.]” *Gunn v. United States Dep’t of Agric.*, 118 F.3d 1233, 1235 (8th Cir. 1995). Significantly, “a person determined to have converted wetlands may become ineligible to receive farm program payments” from the federal government. *Clark*, 537 F.3d at 935.

This appeal concerns a wetland determination made by the USDA affecting just under an acre (0.8 acres) of the Fosters’ farm, a prairie pothole² which the parties call Site 1. On June 3, 2002, Arlen Foster initially sought a wetlands determination from the Natural Resource Conservation Service (NRCS), an agency within the USDA, for a larger tract of land which included Site 1. After a number of intermittent agency proceedings not relevant to this appeal, the NRCS ultimately certified Site 1 as a wetland on June 23, 2011. The Fosters appealed the June 2011 determination to the USDA National Appeals Division (NAD), a separate agency within the USDA established to address certain claims and disputes, including wetland determinations.

In the first step of the NAD appeal, the Fosters bore the burden of proving the NRCS’s determination “was erroneous by a preponderance of the evidence.” 7 C.F.R. § 11.8(e). Both the Fosters and the NRCS were permitted to present evidence and conduct cross-examination at a hearing held in October 2011. On January 10, 2012, the NAD hearing officer issued

² A prairie pothole is simply a small, shallow depression found in glaciated portions of the United States which frequently has standing water for parts or all of a growing season in years where the precipitation is normal or above average.

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a detailed fourteen-page decision determining the NRCS followed the proper procedures and had appropriately found that Site 1 was a wetland, and that the Fosters had not met their burden of proving the NRCS's determination was erroneous. Appellant's App. at 4-17.

In the second step of the NAD appeal, the Fosters sought review of the hearing officer's decision by the NAD director's office pursuant to 7 C.F.R. § 11.9. On July 16, 2012, the NAD director's office issued a decision upholding the hearing officer's decision, which in relevant part held the NRCS proved the presence of the three controlling criteria for a wetland determination by showing that Site 1:

- (a) had a predominance of hydric soils,
- (b) was 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
- (c) under normal circumstances would support a prevalence of hydrophytic vegetation.

Appellant's App. at 33; *see also* 16 U.S.C. § 3801(a)(27); 7 C.F.R. § 12.2 (setting forth the three criteria used to determine whether a specific area of land qualifies as a wetland under federal law). The NAD director's office also held the Fosters "did not prove by a preponderance of the evidence that the [NRCS] decision was erroneous." Appellant's App. at 34. The decision from the NAD director's office constituted the USDA's final agency decision on the matter.

In May 2013, the Fosters filed a complaint in federal district court seeking judicial review of the

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USDA’s final agency decision. Both parties filed motions for summary judgment. In the summary judgment proceedings, the Fosters did not dispute that Site 1 contains a predominance of hydric soils³ (the first of the three relevant criteria), but challenged the final agency decision with regard to whether Site 1 had the requisite hydrology⁴ to qualify as a wetland and whether its soil would support a prevalence of hydrophytic vegetation⁵ under normal circumstances (the last two of the three relevant criteria).

The district court granted USDA’s motion for summary judgment and denied the Fosters’ motion for summary judgment. The district court concluded the NAD’s factual findings were supported by substantial (at times, uncontroverted) evidence and the record supported the NAD’s legal conclusions. The district court therefore determined the Fosters had failed to show the USDA’s final agency decision was arbitrary,

³ A hydric soil is a soil that is “formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part. This definition includes soils that developed under anaerobic conditions in the upper part but no longer experience these conditions due to hydrologic alteration such as those hydric soils that have been artificially drained or protected (e.g., ditches or levees).” Changes in Hydric Soils Database Selection Criteria, 77 Fed. Reg. 12234-01, 12234-35 (Feb. 29, 2012).

⁴ Hydrology refers to the degree of flooding or soil saturation present on the land.

⁵ Hydrophytic vegetation means “a plant growing in . . . water . . . or . . . a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.” 16 U.S.C. § 3801(a)(13); *see also* 7 C.F.R. § 12.31(b). Examples of hydrophytic vegetation are cattails and rushes.

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capricious, or contrary to the law. This timely appeal followed.

II

We review the district court’s grant of summary judgment de novo. *Doud v. Toy Box Dev. Co.*, 798 F.3d 709, 712 (8th Cir. 2015). The issue before the district court was whether the USDA’s final agency decision was proper under the Administrative Procedures Act (APA), 5 U.S.C. § 706. Under the APA, judicial review of an agency decision is limited to determining whether the agency action is “arbitrary, capricious, [] an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). If the agency’s decision is supportable on any rational basis, the court must uphold it. *Voyageurs Nat’l Park Ass’n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004).

A

The Fosters first contend the USDA erred in determining Site 1 had the requisite hydrology to qualify as a wetland. More specifically, the Fosters challenge the methodology the NRCS used to determine the presence of wetland hydrology at Site 1’s pothole. In this case, the methodology used by the NRCS included viewing aerial photographs of the pothole when it was under normal environmental conditions. The NRCS chose to view aerial photographs because Site 1 was drier than it would have been under normal conditions at the time of the agency’s on-site visit in November 2010, and the Fosters had tilled the pothole so it was not in its natural condition.

Although the Fosters generally acknowledge the legitimacy of using aerial photographs to determine whether a site has the requisite hydrology to qualify as

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a wetland, they contend the NRCS improperly relied upon “color tone” differences in the aerial photographs as an authorized “signature” of a wetland. The Fosters argue that relying on color tone differences as a signature of hydrology is contrary to the prescribed methodology used to make a wetland determination.

The parties agree there are ten recognized signatures the NRCS may rely upon when using aerial photographs to determine a site’s hydrology, which are set forth in the South Dakota Mapping Conventions. The ten wetland (or wetness) signatures are listed on a form labeled SD-LTP-33 (Form 33) and are as follows: (1) hydrophytic vegetation; (2) surface water; (3) saturated conditions; (4) stressed crops due to wetness; (5) differences in vegetation due to different planting dates; (7) inclusion of wet areas as set-aside or idled; (8) circular or irregular areas of unharvested crops within a harvested field; (9) isolated areas that are not farmed with the rest of the field; and (10) areas of greener vegetation (especially during dry years). Admin. Record at 451. The parties also agree that if any of these signatures appear in over half of the normal rainfall year photographs, the presence of wetland hydrology is established.

In this case, Michelle Burke, an agricultural engineer employed by the NRCS, testified at the October 2011 hearing that she identified some of these signatures at the site of the pothole in seven out of ten years in which the area had normal rainfall. The Fosters did not cross-examine Burke on this testimony. Instead, the Fosters rely upon a form Burke completed to document the presence of wetlands called Form 28. Instead of using the ten authorized signatures identified in Form 33, Form 28 lists four shorthand

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abbreviations for those ten signatures, one of which is “CT” for “color tone” differences. When filling out Form 28, Burke used this abbreviated shorthand to document the signatures she identified on the aerial photographs of the Fosters’ pothole.

The Fosters contend that checking CT on Form 28 amounts to an improper consideration of “color tone” to identify a wetland, even though “color tone” is not an authorized wetland signature. As the district court noted, however, CT is nothing more than an abbreviation used on one of the agency’s forms. Burke’s unchallenged testimony established that she actually identified some of the ten authorized signatures at Site 1 in the requisite number of normal rainfall years. She did not testify that she merely saw changes in “color tone” in the aerial photographs. Burke’s testimony was therefore sufficient to support the agency’s final decision, and the Fosters’ contention is merely an attack upon an alleged deficiency in an agency form.

B

The Fosters next contend the USDA improperly determined that Site 1 would support a prevalence of hydrophytic vegetation under normal circumstances. More specifically, the Fosters claim the USDA improperly used a comparison site too far away from their farm to make its determination, that is, the agency’s comparison site was outside the “local area” required by the governing regulation.

When “the vegetation on [a disputed site] has been altered or removed,” as was the case here because the Fosters had tilled the pothole located at Site 1, the pertinent federal regulation authorizes the NRCS to “determine if a prevalence of hydrophytic vegetation

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exists in the *local area* on the same hydric soil map unit under non-altered hydrologic conditions.” 7 C.F.R. § 12.31(b)(2)(ii) (emphasis added). In other words, when a disputed site is not in its natural vegetative state, the NRCS must use a comparison site in the local area which contains the same soil type as the disputed site to determine what vegetation would typically be found if the disputed site had not been altered.

In this case, the NRCS verified that Site 1 was located in a Tetonka hydric soil map unit (one of approximately twenty soil series identified by the USDA within the Southern Black Glaciated Plains MLRA), and the Fosters do not dispute that fact. The NRCS next chose an unaltered comparison site within the same Tetonka hydric soil map unit, a site located about forty miles away from Site 1 in Kingsbury County, South Dakota. The NRCS chose the Kingsbury County site for a number of other reasons, such as its inclusion on an approved list of sites established as comparison sites due to their undisturbed nature, and the fact that it was a prairie pothole similar to Site 1. In choosing the Kingsbury County site, the NRCS considered but rejected two closer alternative sites proposed by the Fosters on their own farm land (described as two grassed pasture/hayland fields that had recently been cropped, hayed, grazed and/or sprayed) neither of which were ever established by the Fosters as meeting the required regulatory criteria (i.e., located on the same hydric soil map unit as Site 1, or undisturbed and thus under non-altered hydrologic conditions).

Despite their failure to establish that their alternative sites satisfied the regulatory criteria, the

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Fosters contend the NRCS improperly chose its comparison site because their proposed sites were within the “local area” while the Kingsbury County site was not. We reject this contention, which is unsupported by any authority. The unchallenged testimony of Kevin Luebke, an NRCS biologist who testified at the October 2011 hearing, established that the USDA interpreted the “local area” referenced in § 12.31 to mean the same MLRA as the disputed site. Like Site 1, the Kingsbury County comparison site is also located within the Southern Black Glaciated Plains MLRA, and thus meets the regulatory criteria under the agency’s reasonable interpretation, to which we owe deference. *See Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999) (requiring deference “to the informed discretion of the responsible federal agencies” when an analysis of the relevant information requires a high level of expertise); *see also Downer v. United States*, 97 F.3d 999, 1003-04 (8th Cir. 1996), *affirming Downer v. United States*, 894 F. Supp. 1348, 1354, 1354 n.7 (D.S.D. 1995) (upholding the USDA’s use of a comparison site which satisfied the regulatory criteria set forth in § 12.31 despite the landowner’s complaint that the site was too far away (thirty miles) to be considered). We therefore conclude the agency’s use of the Kingsbury County site as a comparison site was not arbitrary, capricious, or contrary to the law.

III

We affirm the district court.

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D. South Dakota,
Southern Division.

Arlen FOSTER and Cindy Foster, Plaintiffs,

v.

Tom VILSACK, Secretary, United States
Department of Agriculture, Defendant.

No. CIV. 13-4060-KES.

Signed Oct. 31, 2014.

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MEMORANDUM OPINION
AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT AND DENYING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

KAREN E. SCHREIER, District Judge.

Plaintiffs, Arlen and Cindy Foster, brought this suit under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06, against defendant, Tom Vilsack, Secretary of Agriculture, United States Department of Agriculture (USDA). Plaintiffs ask this court to set aside the USDA National Appeals Division's (NAD) final order, which upheld the Natural Resources Conservation Service's (NRCS) determination that 0.8 acres of land of plaintiffs' property was a wetland. The parties have filed cross motions for summary

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judgment. For the following reasons, defendant's motion for summary judgment is granted, and plaintiffs' motion for summary judgment is denied.

BACKGROUND

The undisputed facts are:

Plaintiffs own and farm land within Miner County, South Dakota. Defendant, as Secretary of the USDA and acting through the NRCS, is given the authority by Congress to make and approve wetland determinations, delineations, and certifications. The parties contest whether a 0.8 acre portion of plaintiffs' land, known as "Site 1," has properly been determined to be a wetland.

In November 2004, the NRCS made an initial determination that Site 1 (then referred to as "Site 18") was a wetland. In July 2008, plaintiffs filed a request for the agency to reconsider its determination. In 2009, the NRCS made a second determination that Site 1 was a wetland, but rescinded its determination on January 15, 2010.¹ On November 23, 2010, the NRCS returned to Site 1 in order to conduct field work. On June 23, 2011, the NRCS made its third determination that Site 1 was a wetland. A.R. 5-7.

Following the June 23, 2011, determination, plaintiffs appealed to the NAD, an independent agency within the USDA. Pursuant to USDA statutes and regulations, plaintiffs bore the burden of proving the NRCS's determination "was erroneous by a preponderance of the evidence" in order to be

¹ The agency's reason for rescission of the 2009 determination related to date changes within procedural manuals used by the agency. A.R. 200.

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successful on appeal. *See* 7 U.S.C. § 6997(c)(4); 7 C.F.R. § 11.8(e). On October 18, 2011, a hearing was held in Mitchell, South Dakota, where the parties were allowed to present exhibits, elicit witness testimony, and conduct cross-examination. On January 10, 2012, the hearing officer issued his decision, in which he determined the NRCS followed proper wetland determination procedures, that Site 1 was a wetland, and that plaintiffs had not met their burden of proving the NRCS's determination was erroneous. *See* A.R. 225-238.

On February 13, 2012, plaintiffs filed a request for the NAD director to review the hearing officer's decision. A.R. 244-252. On July 16, 2012, the deputy director issued his final review determination, upholding the hearing officer's decision. Finally, on May 31, 2013, plaintiffs filed this suit seeking relief from the deputy director's final determination. Docket 1. Pending before the court are motions for summary judgment from both parties regarding the NAD's final decision and order.

LEGAL STANDARD

Generally, a motion for summary judgment may be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Clark v. Kellogg Co.*, 205 F.3d 1079, 1082 (8th Cir. 2000). Although presented as motions for summary judgment, the parties are seeking this court's review of an agency's decision. Thus, the court must follow the standards set forth in the APA. *See Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004); 5 U.S.C. § 706(2). Because agency decisions are reviewed, "the issue is not whether the

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material facts are disputed, but whether the agency properly dealt with the facts.” *Lodge Tower Condo. Ass’n v. Lodge Properties, Inc.*, 880 F. Supp. 1370, 1374 (D. Colo. 1995). Therefore, the function of this court is to determine, as a matter of law, whether the agency’s decision is supported by the administrative record and is consistent with the APA standards of review. *See, e.g., Occidental Eng’g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985); *Troy Corp. v. Browner*, 120 F.3d 277, 282 (D.C. Cir. 1997); *Girling Heath Care, Inc. v. Shalala*, 85 F.3d 211, 214 (5th Cir. 1996).

Pursuant to the standards of review provided in the APA, this court will set aside an agency’s decision if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Sierra Club v. E.P.A.*, 252 F.3d 943, 947 (8th Cir. 2001) (quoting 5 U.S.C. § 706(2)(A)). As the Supreme Court has explained, agency action is “arbitrary or capricious” if

[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Additionally, this court “must also accept the agency’s factual findings if they are supported by substantial evidence.” *Maverick Transp., LLC v. United States Dep’t of Labor, Admin. Review Bd.*, 739 F.3d 1149, 1153 (8th Cir. 2014). “Substantial evidence is relevant

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evidence that a reasonable mind would accept as adequate to support the [agency’s] conclusion.” *Id.* (quoting *Steed v. Astrue*, 524 F.3d 872, 874 (8th Cir. 2008)) (alteration in original).

Although this court’s review of the facts before the agency is “searching and careful,” the “standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). If the agency’s decision “is supportable on any rational basis,” it must be upheld. *Voyageurs*, 381 F.3d at 763 (citing *Friends of Richards–Gebaur Airport v. FAA*, 251 F.3d 1178, 1184 (8th Cir. 2001)). “This is especially true when an agency is acting within its own sphere of expertise.” *Id.* Thus, “[w]hen the resolution of the dispute involves primarily issues of fact and analysis of the relevant information ‘requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.’” *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989)).

Nonetheless, “[t]he agency must articulate a ‘rational connection between the facts found and the choice made.’” *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). While this court cannot “supply a reasoned basis for the agency’s action that the agency itself has not given,” it may “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Id.* at 285-86 (internal citations

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omitted). This court’s review is limited to the administrative record as it existed before the agency, rather than encompassing new evidence presented here for the first time. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

DISCUSSION

A. Agency Action

This case is before the court pursuant to the APA. Because there appears to be disagreement on which agency action—that of the NRCS or that of the NAD—is subject to review, clarification is warranted. *See, e.g.*, Docket 19 at 16 (arguing the NRCS’s use of the Tetonka reference site was arbitrary and capricious); Docket 23 at 9 (describing this appeal as concerning the NAD deputy director’s determination).

Following the NRCS’s determination that Site 1 was a wetland, plaintiffs properly filed an appeal to the NAD. *See, e.g.*, 7 C.F.R. §§ 12.6(c)(9); 614.1. Although the NAD and NRCS are both within the USDA, the NAD is an agency “independent from all other agencies and offices of the [USDA], including [USDA] officials at the state and local level.” 7 C.F.R. § 11.2(a). Initially, appeals before the NAD are assigned to a hearing officer who issues an appeal determination. *See* 7 U.S.C. § 6997(d). Either party may then appeal to the NAD director for a review of the hearing officer’s decision. 7 U.S.C. § 6998. Thus, “[t]he hearing officer’s decision on the merits could then be appealed to the NAD Director, and the Director’s decision on the merits then would become a final agency action subject to judicial review in accordance with the Administrative Procedure Act.” *Bartlett v. United States Dep’t of Agric.*, 716 F.3d 464, 474 (8th Cir.

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2013);² *see also Lane v. United States Dep't of Agric.*, 120 F.3d 106, 109 (8th Cir. 1997) (detailing NAD hearing and appeal process).

Therefore, it is the “final determination of the [NAD],” rather than the determination of the NRCS, which “shall be reviewable . . . in accordance with” the APA. *See* 7 U.S.C. § 6999; *see also Bartlett*, 716 F.3d at 470. Because it is the NAD’s final determination that is being reviewed, the question is not whether, for example, the NRCS itself acted arbitrarily or capriciously with respect to its wetland determination procedures. Rather, the inquiry is whether the NAD acted arbitrarily or capriciously by concluding that the NRCS followed proper wetland determination procedures when it found that Site 1 was a wetland and that plaintiffs had not met their burden of proving the NRCS’s determination was erroneous. *See, e.g., Dawson Farms v. Risk Mgmt. Agency*, 698 F.3d 1079, 1083 (8th Cir. 2012) (subjecting the NAD deputy director’s decision to the arbitrary or capricious standard); *Clason v. Johanns*, 438 F.3d 868, 870-71 (8th Cir. 2006) (determining whether the NAD’s conclusion was arbitrary or capricious); *Von Eye v. United States*, 92 F.3d 681, 685 (8th Cir. 1996) (explaining the court “must uphold the [NAD’s] decision unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”)

² Pursuant to USDA regulations, the director is permitted to delegate review authority to deputy or assistant directors within the USDA, whose final determination is considered to be that of the director’s. 7 C.F.R. § 11.9(d)(3).

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(quoting 5 U.S.C. § 706(2)(A)).³ Although only the NAD’s final decision is being reviewed, the court will nonetheless construe the parties’ arguments aimed at the NRCS’s procedures as if they were directed toward the NAD’s decision.

B. Wetland Determination

As part of the Food Security Act of 1985, Congress enacted what are commonly referred to as “Swampbuster” provisions “[i]n order to combat the disappearance of wetlands through their conversion into crop lands[.]” *Gunn v. United States Dep’t of Agric.*, 118 F.3d 1233, 1235 (8th Cir. 1997) (citing 16 U.S.C. §§ 3801, 3821-24); *see also Barthel v. United States Dep’t of Agric.*, 181 F.3d 934, 935 (8th Cir. 1999). Originally, Swampbuster made anyone “produc[ing] an agricultural commodity on converted wetland” ineligible for certain USDA benefits. *See* 16 U.S.C. § 3821(a)-(b). Beginning in 1990, however, Congress expanded the reach of Swampbuster to affect individuals whose conversion of wetlands made “the production of an agricultural commodity possible[.]” § 3821(d). Although Swampbuster did not make the conversion of wetlands for agricultural purposes illegal, it “did provide that any agricultural production on a converted wetland would cause the farmer to forfeit his eligibility for a number of federal farm-assistance programs.” *Gunn*, 118 F.3d at 1235.

Under Swampbuster, the USDA is directed to determine, delineate, and certify wetlands on farmland. 16 U.S.C. § 3822(a)(1). The NRCS, an agency

³ In the *Von Eye* decision, the Eighth Circuit denoted the National Appeals Division as the “NDS” rather than the NAD. *See Von Eye*, 92 F.3d at 682. The alteration here is for clarity.

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within the USDA, is specifically charged with making the technical wetland determinations, delineations, and certifications. 16 U.S.C. § 3822(j); 7 C.F.R. § 12.30(a)(3). In order for a parcel of land to be declared a wetland, three criteria must be present: (1) the land has a predominance of hydric soils; (2) the land has sufficient wetland “hydrology;”⁴ and (3) under normal circumstances, the land supports a prevalence of hydrophytic vegetation. 16 U.S.C. § 3801(a)(27); 7 C.F.R. § 12.2(a).

To assist the NRCS in making wetland determinations, the agency was directed to “[d]evelop and utilize off-site and on-site wetland identification procedures[.]” 7 C.F.R. § 12.30(a)(4). To this end, the NRCS relies on several technical manuals and publications that describe the scientific procedures NRCS employees must follow when making a wetland determination. The manuals relevant to this discussion are:

1. National Food Security Act Manual (NFSAM); Part 527, Wetland Identification Procedures (Dec.2010) (A.R. 452-473)
2. NFSAM; Part 514, Wetland Determination & Labels (2010) (A.R. 907-928)
3. 1987 U.S. Army Corps of Engineers Wetland Delineation Manual (COE Manual), Parts I & IV (A.R. 485-492; 520-571)

⁴ The phrase “hydrology” is used as a shorthand for the statute’s second criteria that a wetland “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.” 16 U.S.C. § 3801(a)(27).

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4. COE Manual Regional Supplement (CEO Regional Supplement): Great Plains Region Version 2.0 (March 2010) A.R. 617-770)
5. NRCS South Dakota Mapping Conventions for Determining Potential Wetlands (A.R. 437-451)
6. Fish & Wildlife Service's National List of Plant Species that Occur in Wetlands: North Plains (May 1988) (A.R. 819-891)

Reference will be made to these manuals in conjunction with the procedures described below.

i. Hydric Soils

To establish the first criterion for a wetland determination, the land must have “a predominance of hydric soils.” 16 U.S.C. § 3801(27)(A); 7 C.F.R. § 12.2(a). The term “hydric soils” is further defined as “soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.” 16 U.S.C. § 3801(12).

The deputy director agreed with the hearing official that Site 1 had a prevalence of hydric soils. A.R. 292. The deputy director also noted that plaintiffs did not challenge the NRCS's finding that Site 1 did, in fact, have a predominance of hydric soils. *Id.* Here, similarly, plaintiffs do not challenge this finding, instead focusing on the hydrology and hydrophytic vegetation criteria. *See* Docket 19 at 28-29 (“ . . . the only reliable, untainted finding made by the Agency, using lawful wetland procedures, was that the area contained hydric soil.”). Although the predominance of

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hydric soils on Site 1 is not disputed, a brief description of the agency’s procedure and findings will be useful during the subsequent discussion.

USDA regulations direct the NRCS to “identify hydric soils through the use of published soil maps which reflect soil surveys completed by NRCS or through the use of on-site reviews.” 7 C.F.R. § 12.31(a)(1). Pursuant to procedures provided in the NRCS South Dakota Mapping Conventions, the agency initially reviewed a soil survey that revealed the presence of the “Clarno–Stickney–Tetonka” complex in the area of Site 1. A.R. at 65. This complex, referred to as “Tetonka,” was listed on the county’s hydric soils list. *Id.* The NRCS also reviewed its prior determinations regarding Site 1, investigated whether there had been any manipulations to the area prior to 1985, consulted national wetland inventory maps, and viewed other data within the agency’s possession. *Id.* at 64-65. Based on these data, the NRCS determined Site 1 had wetland characteristics. *Id.* at 69.

Additionally, a soil scientist within the agency took ten soil samples. *Id.* at 115.⁵ Of the eight soil samples taken from within Site 1, six were determined to be hydric. *Id.* at 124; *see also id.* at 355-364 (soil survey data sheets). Specifically, the six soil samples that were determined to be hydric were consistent with the Tetonka variety of hydric soils. *Id.* at 118. The other two samples taken from the surrounding area outside of Site 1 did not contain indicators of hydric soils. *Id.* at 129-130. Because six of the eight samples from within Site 1 were hydric, the agency determined

⁵ An aerial map depicting the location of the sample sites was included within the agency record. *See* A.R. 354.

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Site 1 contained a predominance of hydric soils. *Id.* Thus, the first wetland criterion was established.

ii. Hydrology

The deputy director upheld the hearing officer’s conclusion that Site 1 exhibited wetland hydrology. *Id.* at 295. The deputy director also explained that plaintiffs had not presented “any evidence or expert testimony to refute NRCS’s conclusion[s]” or otherwise met their burden to show the NRCS’s determination was wrong. *Id.* Here, as argued before the NAD, plaintiffs contend the NRCS improperly relied on so-called “color tone changes” observed from aerial photography to determine Site 1 had wetland hydrology. *See, e.g.*, Docket 19 at 22. Defendant responds that its use of aerial photography was permissible, and that plaintiffs misconstrue the agency’s use of “color tone changes” in order to fill out data summary forms. *See, e.g.*, Docket 23 at 27-29.

In order to satisfy the second wetland criteria, the NRCS must determine if a parcel of land exhibits wetland hydrology. *See* 16 U.S.C. § 3801(a)(27)(B); 7 C.F.R. § 12.2(a). According to the COE Regional Supplement, South Dakota—and therefore Site 1—is located within the “Great Plains Region” of the United States. A.R. 631. Regarding hydrology in this region, the COE Regional Supplement explains:

Wetlands are areas that are flooded or ponded, or have soils that are saturated with water, for long periods during the growing season in most years . . . However, some wetlands in the Great Plains do not become inundated or saturated in some years and,

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during drought cycles, may not inundate or saturate for several years in a row.

A.R. 745. Michelle Burke, an agricultural engineer with the NRCS noted that, at the time of the agency's November 2010 on-site visit, Site 1 was drier than it would be under normal environmental conditions during the spring growing season. *Id.* at 67. When seasonal or annual changes prevent normal environmental conditions from being present within areas less than 5 acres in size, like Site 1, the COE Manual directs the NRCS to follow the procedures in Part IV, Subsection G. *Id.* at 537-38.

Part IV, Subsection G, of the COE Manual is titled "Problem Areas." *Id.* at 569. It specifically identifies one type of problem area known as a "prairie pothole." *Id.* at 570.

Prairie potholes normally occur as shallow depressions in glaciated portions of the north-central United States During dry years, potholes often become incorporated into farming plans, and are either planted to row crops (e.g., soybeans) or are mowed as part of a haying operation. When this occurs, wetland indicators of one or more parameters may be lacking. For example, tillage would eliminate any onsite hydrologic indicator, and would make detection of soil and vegetation indicators much more difficult.

Id. Burke explained that, at the time of the agency's visit, Site 1 was "located on cropland with herbaceous vegetation removed generally by cropping and tillage." *Id.* at 71. She also explained Site 1 existed in "a pothole region with many small depressions in the

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area.” *Id.* at 67. Subsequently, Site 1 was determined to be a prairie pothole that may lack indicators of hydrology. *Id.* at 74; 78. On this point, the parties are not in dispute. *See* Docket 19 at 24 (“Site 1 is a prairie pothole, which is an area that periodically lacks indicators of wetland hydrology.”); *see also* Docket 23 at 26.

The COE Regional Supplement notes that “hydrology determinations are based on indicators,” and that some areas may lack indicators “particularly during the dry season or in a dry year.” A.R. at 745. During its on-site inspection, the NRCS was unable to detect sufficient indicators of wetland hydrology at Site 1. *Id.* at 91. If a potential wetland periodically lacks hydrology indicators, the COE Regional Supplement identifies a three-step procedure to follow. *Id.* at 746-751. The first step requires that “indicators of hydrophytic vegetation and hydric soil are present or absent due to disturbance or other problem situations.” *Id.* at 746. The second step requires verification that “the site is in a landscape position that is likely to collect or concentrate water.” *Id.* The third step directs the NRCS to employ one or more approaches to determine if hydrology at the site is present. *Id.*

Regarding the first step, as previously discussed, the NRCS established the presence of hydric soil indicators in Site 1. Additionally, as discussed more fully below, the NRCS also determined indicators of hydrophytic vegetation had been removed or altered due to plaintiffs’ farming operation. *Id.* 141. With respect to the second step, Burke explained Site 1 was “a concave area” that would “naturally pond water.” *Id.* at 77. Regarding the third step, of the several approaches listed in the COE Regional Supplement,

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the NRCS chose to evaluate multiple years of aerial photography. *Id.* at 78. As explained in the COE Regional Supplement,

The procedure uses five or more years of growing-season photography and evaluates each photo for wetness signatures that are listed in “wetland mapping conventions” developed by NRCS state offices Only photos taken in normal rainfall years, or an equal number of wetter-than-normal and drier-than-normal years, are used in the analysis. If wetness signatures are observed on photos in more than half of the years included in the analysis, then wetland hydrology is present.

Id. at 750.⁶ The NRCS South Dakota Mapping Conventions identify ten wetland signatures the agency should look for: (1) hydrophytic vegetation; (2) surface water; (3) saturated conditions; (4) flooded or drowned-out crops; (5) stressed crops due to wetness; (6) differences in vegetation due to different planting dates; (7) inclusion of wet areas as set-aside or idled; (8) circular or irregular areas of unharvested crops within a harvested field; (9) isolated areas that are not farmed with the rest of the field; and (10) areas of greener vegetation (especially during dry years). *Id.* at 451. If any of the wetland signatures appear in greater than fifty percent of the “normal” rainfall year photos, the presence of wetland hydrology is established. *Id.*

⁶ These photos are taken by the Farm Service Agency (FSA) each year to monitor farmlands involved with USDA programs. A.R. at 749-50.

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Burke explained that the agency reviewed aerial photographs of Site 1 from the past twenty years. *Id.* at 91. Between 1991 and 2010, the agency determined that ten out of those twenty years received normal amounts of rainfall. A.R. 389-90.⁷ After analyzing the aerial photos, Burke determined there were wetland signatures present at Site 1 in seven out of the ten normal rainfall years. *Id.* at 97. Because more than 50 percent of the normal rainfall years contained wetland signatures, the NRCS concluded Site 1 met the wetland hydrology criterion. *Id.* at 99.

Here, plaintiffs raise two challenges regarding the aerial photograph procedure. First, plaintiffs briefly contest that because they filed an appeal with the NAD, the NRCS was precluded from using any off-site investigation methods such as aerial photography to determine if Site 1 was a wetland. Docket 23 at 28 (citing 7 C.F.R. § 12.30(c)(3)). On this point, defendant responds that plaintiffs have conflated two separate issues with respect to the need for an on-site determination. Docket 23 at 27.

Initially, the Eighth Circuit has, in general language, upheld the use of aerial photographs in order to establish wetland hydrology. *See Downer v. United States*, 97 F.3d 999, 1003 (8th Cir. 1996) (concluding “[a]gency regulations bear out the agency’s contention” that the use of aerial photographs are “standard in its field of expertise and soil conservation.”). Nonetheless, the regulation cited by plaintiffs provides

⁷ The small “N” near the upper-left corner of the box containing the date indicates that year was a “normal” one for rainfall purposes. *See* A.R. 389-90.

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In the case of an appeal, NRCS will review and certify the accuracy of the determination of all lands subject to the appeal to ensure that the subject lands have been accurately delineated. Prior to a decision being rendered on the appeal, NRCS will conduct an onsite investigation of the subject land.

7 C.F.R. § 12.30(c)(3). The NRCS did, in fact, conduct an on-site investigation at Site 1 in November 2010. There is nothing in the language of the regulation that precludes the use of additional off-site tools as the procedural manuals instruct. Thus, plaintiffs have not shown that a wetland determination must be made solely by on-site methods.

Second, plaintiffs argue that it was improper for the agency to rely upon the so-called “color tone difference” wetland signature in order to determine Site 1 had wetland hydrology, because “color tone difference” is not one of the signatures provided for in the NRCS South Dakota Mapping Conventions. *See* Docket 19 at 25-26. Further, plaintiffs contend that the aerial photographs themselves demonstrate how unreliable differences in color tone can be, and that the NRCS offered no explanation for how the differences in the photos documented any wetland signatures. *Id.* at 26-27. The deputy director upheld the hearing officer’s rejection of plaintiffs’ “color tone differences” argument, noting that plaintiffs had not attempted to discredit Burke’s testimony regarding the presence of wetland signatures nor had plaintiffs presented their own evidence sufficient to satisfy their burden of proof. A.R. 294-95. In its response, defendant argues it properly used the “color tone difference” shorthand in order to fill out its data summary forms and,

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furthermore, that the agency never claimed “color tone difference” was an independent wetland signature. Docket 23 at 28-30.

The NRCS South Dakota Mapping Conventions specify ten wetland signatures that the agency should look for when using aerial photography to establish wetland hydrology. These wetland signatures are found on what is labeled “form SD-LTP-33” (form 33). *See* A.R. 451. Further instruction provides that “[t]he results of the [form 33] procedure must be documented correctly on form SD-LTP-28 [.]” *Id.* at 450. This second form, SD-LTP-28 (form 28), is titled as a “data summary,” which lists four abbreviations that can be used to document the presence of wetland signatures. *See id.* at 390. The four abbreviations are listed as “NC = No crop; INU = Inundation; CT = Color tone difference; PHM = Potential Hydrological Manipulation[.]” *Id.* Burke used the “CT” abbreviation when she filled out form 28. *See id.* at 390-91.

While plaintiffs are correct that “CT” or “color tone difference” is not one of the ten wetland signatures provided in the NRCS South Dakota Mapping Conventions, defendant is correct that “CT” is one of only four options available to fill out form 28. Because form 33 directs the NRCS to document their findings on form 28, and because form 28 specifically provides only four abbreviations that can be used, one of which is “CT,” the court finds that defendant is correct that Burke completed form 28 as it was intended to be used. *See* Docket 23 at 30.

Additionally, Burke testified that her analysis of the aerial photographs revealed the presence of wetland signatures in seven of ten normal rainfall years. A.R. at 97. Her testimony also provided some

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details of how portions of form 28 were filled out before arriving at her conclusion. *See id.* at 94. Plaintiffs chose not to cross-examine Burke regarding the contents of form 28, however, and they did not ask her to clarify which signatures were observed. Plaintiffs bore the burden of proving the NRCS’s determination was erroneous by a preponderance of the evidence. While not specifying which signatures she found, Burke’s testimony indicated that wetland signatures were observed during a sufficient number of normal rainfall years in order to establish the hydrology criterion. As the deputy director explained, although parts of Burke’s testimony were “abbreviated and conclusory,” plaintiffs failed to meet their burden because they did not challenge her testimony regarding the presence of wetland signatures. *See id.* at 295. Plaintiffs’ concern that “[w]hat the color changes identify specifically is completely unknown beyond the particular Agency reviewer,” Docket 19 at 27, could have been addressed during cross-examination of Burke or by presenting their own expert witness to analyze the photographs. But plaintiffs did neither.

Moreover, plaintiffs’ opinion regarding the reliability of using observable color tone differences from the aerial photographs is problematic for several reasons. First, as discussed, the record shows that Burke filled out form 28 in accordance with NRCS procedures. Second, Burke testified she is a licensed professional engineer with 21 years of experience working with the NRCS. A.R. at 61. Her position involves engineering and wetland hydrology determination responsibilities. *Id.* By contrast, plaintiffs have no comparable scientific expertise that would be relevant to interpreting the aerial photographs for wetland hydrology signatures. Third,

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Burke testified that she observed wetland signatures in seven of the ten normal rainfall years. Plaintiffs’ rhetorical question, “[w]hat does the green dot [in one photo] show that is not present in the other green areas,” Docket 19 at 27, would have been more appropriately asked during Burke’s cross-examination than in their brief.⁸ Consequently, plaintiffs’ hindsight effort to undermine the credibility of the agency’s witness and the aerial photography is unpersuasive.

Finally, the bedrock of plaintiffs’ argument is that the agency should have provided a better explanation with respect to which signatures the “color tone differences” shorthand corresponds. Plaintiffs fault the NAD’s final decision because “[n]o evidence from the Agency has been presented that indicates the color changes identify wetland signatures.” Docket 19 at 27. As the deputy director observed, however, the NRCS offered testimony that a sufficient number of wetland signatures were present to establish the hydrology requirement. A.R. 295. Additionally, as the deputy director concluded, because plaintiffs did not challenge this testimony or offer any expert testimony to the contrary, plaintiffs did not meet their burden of proving the NRCS’s determination was erroneous. *Id.* Ultimately, the deputy director agreed with the hearing officer’s determination that Site 1 met the hydrology criterion. That the NAD ultimately found the unchallenged expert testimony of the NRCS persuasive cannot be said to be an “explanation for its

⁸ Defendant offered an answer to plaintiffs’ question of what specific signatures may have been observed. *See* Docket 23 at 31. The scope of this court’s review, however, is limited to what appeared in the record before the agency, and does not extend to new evidence offered for the first time on appeal. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973).

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decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43. Because of the evidence before it and the allocation of the burden of proof between the parties, the court concludes the NAD articulated “a ‘rational connection between the facts found and the choice made.’” *Bowman Transp.*, 419 U.S. at 285 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Therefore, the court finds the deputy director did not act arbitrarily or capriciously by upholding the hearing officer’s conclusion that Site 1 exhibited wetland hydrology.

iii. Hydrophytic Vegetation

The deputy director agreed with the hearing officer that Site 1, after following the NRCS’s reference site procedure, met the hydrophytic vegetation criterion. A.R. 297. Plaintiffs assert the NRCS’s use of the Tetonka reference (or “comparison”) site was improper because it allowed the agency to circumvent the need for establishing all three wetland criteria and is otherwise inconsistent with USDA regulations. *See, e.g.*, Docket 19 at 16-17. Defendant argues use of the reference site under the circumstances was proper. *See, e.g.*, Docket 23 at 17-18.

The term “hydrophytic vegetation” is defined as “plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.” 7 C.F.R. § 12.31(b). In order to establish this third wetland criterion, the NRCS must determine whether, “under normal circumstances,” the land supports a prevalence of hydrophytic vegetation. 16 U.S.C. § 3801(27)(C); 7

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C.F.R. § 12.2(a). If the land’s vegetation has been altered or removed, however, the NRCS must “determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions.” 7 C.F.R. § 12.31(b)(2)(ii). The COE Regional Supplement further explains that the NRCS should “[e]xamine the vegetation on a nearby, unmanaged reference site having similar soils and hydrologic conditions.” A.R. 735. Following this procedure, the agency may then “[a]ssume that the same plant community would exist on the [altered] site in the absence of human alteration.” *Id.* Additionally, “[r]eference sites should be minimally disturbed and provide long-term access.” *Id.* at 738.

Kevin Luebke, a biologist with the agency, testified that Site 1’s vegetation had been altered or removed by plaintiffs’ farming operation, which made an on-site determination of the prevalence of hydrophytic vegetation unreliable. *Id.* at 141.⁹ Because the hydrophytic vegetation determination could not be made on Site 1, the agency used a reference site for comparative purposes. *Id.* at 144. The site chosen was referred to as the “Tetonka reference site,” and is located in Kingsbury County, South Dakota. *Id.* at 146; *see also id.* at 960. The Tetonka site was “from an

⁹ Plaintiffs cite *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947) for the proposition that the NAD’s decision cannot be sustained because the NRCS failed to adequately present evidence that shows how the Tetonka reference site met the USDA regulation’s requirements in order to show Site 1 had a prevalence of hydrophytic vegetation. *See* Docket 25 at 7. Plaintiffs bore the burden of proving the NRCS’s determination was erroneous. For that reason, and for the reasons that follow, the court disagrees with plaintiffs’ contention.

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approved list of sites previously established.” *Id.* at 146. According to Luebke, these reference sites were established to insure that suitable reference sites would be available for future use. *Id.* Additionally, a map attached to the administrative record shows the Tetonka site is located approximately 33 miles from Site 1. *Id.* at 1117. Luebke described the Tetonka site as a pothole, similar to Site 1. *Id.* at 151. Further, according to his testimony, both the Tetonka site and Site 1 received between 18 and 25 inches of rain per year. *Id.* at 152.

Luebke also testified that the agency had acquired the Tetonka site’s hydrophytic vegetation data from around the July 2000 growing season. *Id.* at 147. Because the site has been preserved as a reference site, it would still retain those same vegetative characteristics. *Id.* at 147-49. According to Luebke, the reference site bore the same Tetonka hydric soils as Site 1 and contained similar wetland hydrology as Site 1. *Id.* at 150-51. Luebke also explained that the Tetonka reference site was on the same “major land resource area” (MLRA) as Site 1, which, according to his testimony, was the agency’s interpretation of the regulation’s “local area” language. Thus, according to Luebke, the Tetonka site met each of the USDA regulation’s requirements and could be used as a reference site to determine Site 1’s hydrophytic vegetation. *Id.* Following a comparison to the reference site, the agency concluded Site 1 would have supported a prevalence of hydrophytic vegetation in the absence of human alteration. *Id.* at 153. Notably, plaintiffs chose not to cross-examine Luebke. *Id.*

The parties do not dispute that the vegetation on Site 1 has been altered or removed. *See* Docket 19 at

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17; Docket 23 at 17. Additionally, the parties do not dispute that the NRCS may use reference sites to make the hydrophytic vegetation inquiry under such circumstances. Rather, the parties dispute whether use of the reference site in this instance allowed the NRCS to bypass determining the other wetland criteria, as well as the precise meaning of the USDA regulation’s “local area” language.

a. Conflation of Wetland Criteria

First, plaintiffs contend that the use of a pre-determined wetland as a reference site will always result in the conclusion that areas compared to it will be found to have hydrophytic vegetation. Docket 19 at 17. According to plaintiffs, this allows the agency to conflate the separate requirements that the land have a prevalence of hydric soil with the requirement that the land support a prevalence of hydrophytic vegetation. *Id.* at 19 (citing *B & D Land & Livestock Co. v. Schafer*, 584 F. Supp. 2d 1182, 1194-95 (N.D. Iowa 2008)). Defendant responds that the agency gave consideration to each wetland determination criteria, and, citing *Downer*, notes that the Eighth Circuit has upheld the use of reference sites. Docket 23 at 25. While plaintiffs’ conflation argument was not specifically raised before the NAD, the deputy director ultimately concluded that the NRCS’s use of a reference site was permissible. A.R. at 297.

Although first discussed in conjunction with the NRCS’s use of aerial photographs, the Eighth Circuit has also, in general terms, upheld the agency’s use of comparison sites. *See Downer*, 97 F.3d at 1003-04. Plaintiffs contend, however, that the Eighth Circuit has not considered specific challenges to the use of comparison sites because the only issue raised by the

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plaintiff in *Downer* was whether the use of off-site tools was acceptable. Docket 25 at 11 (citing *Downer*, 97 F.3d at 1003)). Regardless, plaintiffs’ characterization of the reference site procedure is flawed for several reasons.

The USDA regulation contemplates use of a reference site to establish the hydrophytic vegetation criterion if the vegetation on a potential wetland has been altered or removed. Further, if the regulatory requirements for using a reference site are met, then the agency may assume the same plant community that exists on the reference site would also exist on the altered site had its vegetation not been altered or removed. *See* A.R. 735. Pursuant to the USDA regulation, the reference site must be in the “local area,” as well as on the “same hydric soil map unit” which is “under non-altered hydrologic conditions.” *See* 7 C.F.R. § 12.31(b)(2)(ii). Thus, the regulation required the NRCS to establish an equivalence between the hydric soils found on Site 1 and the reference site, as well as a connection between the hydrologic conditions on Site 1 and the reference site. Additionally, the agency needed to select a reference site located within the “local area.” Luebke’s testimony that the agency made each of these findings went unchallenged, and the deputy director concluded the reference site met all of the regulatory requirements. *See* A.R. 296-97.

The present situation is therefore different from that described in the *B & D Land & Livestock* decision where the agency simply treated the prevalence of hydrophytic vegetation as sufficient to establish the wetland hydrology criterion. *See B & D Land & Livestock*, 584 F. Supp. 2d at 1199. Here, because the natural conditions of Site 1 had been altered or were

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temporarily lacking, the USDA regulations required the “local area” and “non-altered hydrologic conditions” to be met. *See* 7 C.F.R § 12.31(b)(2)(ii). Rather than conflating the wetland criteria, the agency followed the proper regulatory procedure that applied to the circumstances present on Site 1.

Further, plaintiffs’ objection that the reference site had previously been determined to be a wetland is answered by the COE Regional Supplement’s policy, which directs reference sites to be “minimally disturbed and provide long-term access” for comparative purposes. A.R. 738. Thus, using an established and maintained wetland as a reference site allows the agency to compare potential sites to it for a longer period of time, as well as ensuring the “non-altered hydrologic conditions” requirement can be analyzed. Moreover, it would make little sense for the agency to attempt to compare a potential wetland to a parcel of land whose properties were unknown. Finally, even without regard to the COE Regional Supplement’s policy, as the hearing officer explained, plaintiffs “cite[d] 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 [regulatory] requirements[.]” A.R. 236. Thus, although not specifically argued before the NAD, the record shows that the NRCS did not conflate the separate wetland criteria by using a reference site.

b. The “Local Area” Requirement

Second, regarding use of the specific Tetonka site itself, plaintiffs raise a series of arguments with respect to the “local area” requirement of the USDA regulation. One of the regulatory elements for using a reference site is that the site be “in the local area.” *See*

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7 C.F.R. § 12.31(b)(2)(ii). The parties have provided no prior legal authority interpreting the “local area” language, and instead, offer competing definitions and examples.

Kevin Luebke testified that the NRCS interprets the “local area” requirement as encompassing the land within an MLRA. A.R. 151-52.¹⁰ According to Luebke, because Site 1 and the Tetonka reference site were both within the MLRA designated as “55C,” use of the Tetonka reference site satisfied the regulation’s “local area” element. *Id.* at 151-52. Luebke concluded that because each of the regulation’s other requirements were satisfied as well, the Tetonka site could be used as a reference site. *Id.*

Regarding the meaning of the “local area” language, the deputy director ultimately found that the “NRCS’s interpretation of its own regulation is reasonable” and therefore, entitled to deference. A.R. 297 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The deputy director considered but rejected plaintiffs’ argument that the Tetonka site was not within the “local area” as contemplated by the regulation. *Id.* Thus, the deputy director concluded that, because Site 1 and the Tetonka site were within the same MLRA, the Tetonka site was in the “local area.” *Id.*

Here, plaintiffs argue that deference is owed instead to the authors of the NFSAM. Docket 19 at 21. Plaintiffs do not specify an alternative definition for the “local area” language, but they assert that the

¹⁰ MLRAs are described as “geographically associated land resource units” which are demarcated after a consideration of characteristics such as their “physiography, geology, climate, water, soils, and land use.” A.R. 403.

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NRCS should have limited its investigation to land adjacent or in close proximity to Site 1. *Id.* at 21-22. Ultimately, plaintiffs argue that no deference is due to the explanation offered by Luebke. *Id.* at 20-21. Defendant argues the definition supplied in Luebke’s testimony is consistent with the statute. Docket 23 at 20. Additionally, defendant asserts that plaintiffs’ construction of the “local area” requirement would not meet the regulation’s additional constraints. *Id.* at 23.

There are several problems with plaintiffs’ arguments. First, while plaintiffs contend that the authors of the NFSAM are entitled to a measure of deference, the portion of the NFSAM cited by plaintiffs merely restates the same regulatory language found in 7 C.F.R. § 12.31(b)(2)(ii). *See* Docket 19 at 21 (citing A.R. 909). Plaintiffs do not explain how the NFSAM’s circular reference to the regulation shines any new light on the “local area” requirement. Consequently, even if some level of deference were owed to the authors of the NFSAM, there is nothing for the court to defer to here. Rather, it appears that the NFSAM simply directs the NRCS to follow the USDA regulation—the very contention the NRCS argues it has done.

Second, in support of what appears to be their own definition, plaintiffs point to two sites on their land that were offered to the agency in 2009 for comparison purposes.¹¹ Docket 19 at 18. These sites were located within one mile from Site 1 and, according to plaintiffs, would satisfy the “local area” requirement. *Id.* As

¹¹ When asked if plaintiffs had offered the NRCS comparison sites, Mrs. Foster replied, “Yes, I did. That was not in this November of 2010 visit. It was in the previous one in 2009.” A.R. 186.

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defendant argues, however, although plaintiffs' comparison sites may literally be more local than the Tetonka site, the USDA regulation also requires the comparison site to be "on the same hydric soil map unit" and "under non-altered hydrologic conditions." Docket 23 at 23 (citing 7 C.F.R § 12.31(b)(2)(ii)). As the hearing officer observed, plaintiffs offered no evidence that these additional requirements were met by their comparison sites. A.R. 236. Further, the agency's soil samples revealed differences in the hydric soil content within a short distance from Site 1, which undermines plaintiffs' argument that proximity alone is sufficient to satisfy the regulation. Moreover, the NRCS explained that

[A]t the [plaintiffs'] request we conducted a visual assessment of two grassed pasture/hayland fields for potential vegetative reference sites. These fields were cropped, hayed, grazed, and/or sprayed in their recent history. Most of the onsite vegetation was unidentifiable due to disturbance The Tetonka reference site in Kingsbury County (NW 1/4 S27, T110 R56) was used. A.R. 1021. Thus, the agency determined plaintiffs' reference sites did not meet the regulation's requirements and, as the hearing officer pointed out, plaintiffs have presented no evidence which suggests that determination was wrong. *See id.* at 236. Consequently, plaintiffs' own construction of

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the “local area” requirement cannot satisfy the regulation’s other requirements.¹²

Therefore, the remaining issue is whether deference is owed to the “local area” interpretation offered in Luebke’s testimony. The specific regulation at issue provides that the “*NRCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area . . .*” 7 C.F.R. § 12.31(b)(2)(ii) (emphasis added). Thus, the regulation explicitly charges the NRCS with making the “local area” determination as part of its investigation. To this end, Luebke’s testimony purports that “the agency is defining” and “the agency is saying” it interprets the “local area” requirement as encompassing land within an MLRA. *Id.* 151. Typically, as the deputy director observed, an agency’s interpretation of its own regulation is entitled to deference. *See* A.R. 297; *Auer*, 519 U.S. at 461. Whether the definition offered by Luebke in fact represents the agency’s interpretation, however, is unclear.

Nonetheless, plaintiffs had the opportunity to cross-examine Luebke’s testimony about the agency’s interpretation, but chose not to. Moreover, while Luebke’s statement arose during testimony before the

¹² In addition to the proximity argument, plaintiffs also argue the Tetonka site received “dissimilar precipitation levels” and had a “much deeper depression” than Site 1. Docket 19 at 18. According to Luebke’s unchallenged testimony, however, both sites received an average of 18-25 inches of rain per year and both sites were determined to be similar potholes. A.R. 151-52. Luebke’s testimony indicates the agency took this information into account when selecting a reference site. Plaintiffs have not shown, beyond a bare assertion, that the range of rainfall shared by both locations or the differences in the depth of the potholes renders the Tetonka site insufficiently “local.”

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hearing officer on October 18, 2011, the NRCS’s earlier summary report dated June 15, 2011, also uses the same equivalence between the “local area” and an MLRA. *See* A.R. 346 (explaining the Tetonka site “is located within the same Major Land Resource Area 55C (local area)”). Thus, the definition supplied before the hearing officer was not solely offered as a “post hoc rationalization[]’ for agency action, advanced for the first time” as a litigation position. *See Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 156 (1991). Additionally, making the “local area” determination—as well as the wetland determination itself—implicates “complex matters within the [agency’s] area of expertise[.]” *See Clason*, 438 F.3d at 871. While not controlling, the court concludes that, based on these factors, the interpretation offered by Luebke and accepted by the NAD “give[s] it power to persuade.” *See Godinez–Arroyo v. Mukasey*, 540 F.3d 848, 851 (8th Cir. 2008) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Therefore, the court finds the NAD did not act arbitrarily or capriciously by choosing to defer to the interpretation offered by the NRCS. Thus, the court finds the NAD did not act arbitrarily or capriciously by concluding that, because Site 1 was located within the same MLRA as the Tetonka site, the “local area” requirement was satisfied.

In summary, the Tetonka site met each of the USDA regulation’s requirements for use as a reference site, and the NRCS could consider the vegetation on the Tetonka site in order to determine if Site 1 would support a prevalence of hydrophytic vegetation in the absence of human alteration. The deputy director did not act arbitrarily or capriciously by concluding Site 1 met the hydrophytic vegetation criterion following the

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NRCS's comparison. Additionally, the NRCS did not conflate any of the three wetland criteria by comparing Site 1 to an otherwise proper reference site in order to establish Site 1's hydrophytic vegetation. Thus, the court concludes the NAD has articulated "a 'rational connection between the facts found and the choice made.'" *Bowman*, 419 U.S. at 285 (citation omitted). Therefore, the court finds the deputy director did not act arbitrarily or capriciously by upholding the hearing officer's conclusion that Site 1 met the hydrophytic vegetation criterion.

C. Plaintiffs' Evidence

Finally, plaintiffs contend the NRCS ignored evidence that would have demonstrated Site 1 was not a wetland. According to plaintiffs, this evidence undermines the findings of the NRCS with respect to the hydrology and hydrophytic vegetation criteria. For example, plaintiffs argue the NRCS refused to consider the effects from snowmelt of a nearby shelterbelt that causes water to drain onto Site 1. Docket 19 at 31. Additionally, plaintiffs contend that the NRCS refused to consider two holes plaintiffs dug which, according to their own observations, revealed an absence of long-term water ponding. *Id.*¹³

First, plaintiffs cite the *B & D Land* decision, noting that the court faulted the NAD for ignoring the credibility of the plaintiff's expert evidence. Docket 19 at 30 (citing *B & D Land*, 584 F. Supp. 2d at 1199.). Plaintiffs, however, have presented no expert

¹³ Plaintiffs also contend that the NRCS refused to consider the two locations on plaintiffs property offered as reference sites. Docket 19 at 31. The NRCS did consider the sites offered by plaintiffs, however, and rejected them because those sites did not meet the USDA regulation's requirements.

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testimony or evidence with respect to the agency’s wetland determination procedures. Additionally, as the hearing officer explained, plaintiffs themselves possess no expertise in making wetland determinations. A.R. 234. Thus, comparison to the *B & D Land* decision on this point is inapposite.

Second, the administrative record shows that the NRCS did not ignore plaintiffs’ findings, but rejected them based on other considerations. With respect to melting snow from the shelterbelt running off into Site 1, Michelle Burke testified that the possibility Site 1 could be an artificial wetland was investigated and dismissed. A.R. 155. According to her testimony, in order for an area to be an artificial wetland, it would first have to be a non-wetland that was transformed over time. *Id.* Regarding the soil samples taken from Site 1 and its surrounding area, the sample taken nearest to the shelterbelt was not hydric, nor was the snow that would collect and melt into water sufficient to create hydric soils. *Id.* at 156. As the hearing officer explained, “[i]f 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.” *Id.* at 237. Additionally, plaintiffs estimated that the shelterbelt was planted in 1936, Docket 19 at 12, but the NRCS determined the soil profile in Site 1 dated back to glaciation. A.R. 156-57. Here, too, the hearing officer noted that this “indicates the necessary hydrologic conditions were present long before the shelterbelt existed.” *Id.* at 237. Thus, the hearing officer agreed with the NRCS that the shelterbelt was not the only source of water draining into Site 1, that the hydric soils were only found within

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Site 1, and that the soil profile within Site 1 predated the shelterbelt’s existence. *Id.* at 237-38.

With respect to the two holes plaintiffs dug in order to observe water levels, Burke testified that this information was also considered by the NRCS. *Id.* at 157-58. According to her testimony, the test holes near the trees and in the wetlands responded similarly to rainfall. *Id.* at 158. The agency’s observations were also noted in the June 15, 2011, summary report. *Id.* at 346 (concluding the data provided by plaintiffs was “Consistent with NRCS findings.”). Moreover, as the hearing officer explained,

[Plaintiffs] [c]ited no regulation or authority for this procedure. [Plaintiffs] stated there were no measuring devices, like a piezometer, used to measure the water entering or leaving the holes. [Plaintiffs] stated that there was no tubing or structure of any kind inside the holes and that it was “just dirt.” . . . Therefore, this data is unreliable and not suitable for drawing conclusions about whether Site 1 is a wetland or not.

Id. at 234-35. Thus, the hearing officer concluded the NRCS’s conclusions were not only supported by expert testimony but also by the proper procedures for making wetland determinations. *Id.*

This court must “accept the agency’s factual findings if they are supported by substantial evidence,” and “[s]ubstantial evidence is relevant evidence that a reasonable mind would accept as adequate to support the [agency’s] conclusion.” *Maverick Transp.*, 739 F.3d at 1153 (citations omitted). The foregoing discussion shows that neither the NRCS nor the NAD ignored

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plaintiffs' findings. Instead, plaintiffs' findings were considered and, as detailed by the hearing officer, rejected as being inconsistent with wetland determination procedures or otherwise scientifically unreliable. Plaintiffs bore the burden of proving the NRCS's determination was erroneous by a preponderance of the evidence. Throughout the NAD appeal procedure, however, plaintiffs chose to either not challenge NRCS experts regarding their findings and conclusions, and to present only lay evidence that both the NRCS and NAD addressed and rejected. After reviewing the agency record, the court concludes the NAD's factual findings are supported by substantial—and, at times uncontroverted—evidence.

In sum, the NAD considered each of the three wetland criteria, as well as the NRCS procedures required to establish those criteria. Ultimately, the NAD concluded that each of the three criteria had been established, and that plaintiffs had not met their burden of proving the NRCS's determination was erroneous. A.R. 297. The court finds the administrative record supports the NAD's conclusions, and that plaintiffs have not shown the NAD “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Moreover, the court concludes the agency has made a rational connection between the facts found and the choice made. *Bowman*, 419 U.S. at 285 (citation omitted). Thus, the court finds that plaintiffs have not shown the NAD acted arbitrarily or capriciously. Summary judgment in favor of the defendant is granted.

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CONCLUSION

Plaintiffs have failed to show that the NAD acted arbitrarily or capriciously with respect to its conclusions that the NRCS properly followed its wetland determination procedures, that Site 1 was a wetland, and that plaintiffs failed to meet their burden of proving the NRCS's determination was erroneous. Accordingly, it is

ORDERED that the motion for summary judgment by defendant (Docket 22) is granted.

IT IS FURTHER ORDERED that the motion for summary judgment by plaintiffs (Docket 26) is denied.

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USDA

*United States Department of Agriculture
Office of the Secretary
National Appeals Division*

Dated July 16, 2012

DIRECTOR REVIEW DETERMINATION

In the Matter of)
)
ARLEN FOSTER) Case No. 2011W000619
CINDY FOSTER)
)
and)
)
NATURAL RESOURCES)
CONSERVATION)
SERVICE)

On February 13, 2012, Arlen and Cindy Foster (Appellants) filed a request for Director review of a National Appeals Division (NAD) Hearing Officer Appeal Determination issued on January 10, 2012. The Hearing Officer determined that the Natural Resources Conservation Service (NRCS or Agency) adverse decision, dated June 23, 2011, was not erroneous. In the adverse decision, NRCS determined that Appellants' land contained 0.8 acres of wetland.

I uphold the Hearing Officer's determination as I have concluded upon Director review that it is supported by substantial evidence in the record and that the adverse decision is consistent with applicable

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regulations. In arriving at this decision, I have reviewed the applicable laws and regulations; the case record, including the hearing testimony and the Hearing Officer's determination; Appellants' request for Director review; and NRCS's response to Appellants' request for Director review.

Issue in This Case

The dispute in this case is whether NRCS followed appropriate procedures when it determined that Appellants' farm contained 0.8 acres of wetland. To resolve this dispute, I must determine whether the area in question (a) has a predominance of hydric soils, (b) 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 (c) under normal circumstances does support a prevalence of hydrophytic vegetation.

Background

On July 23, 2008, Appellants requested a wetland determination by completing FSA Form AD-1062. File 4, Tab 15, Agency Record, Page 33. NRCS issued a certified wetland determination on December 4, 2009, but rescinded the determination on January 15, 2010. NRCS reevaluated Appellants' farm on November 23, 2010, and it issued a certified wetland determination on June 23, 2011 (i.e., the adverse decision). File 4, Tab 15, Agency Record, Page 41. In its adverse decision, Agency determined that a 0.8-acre area of Appellants' farm (the Pothole) was a wetland. File 1, Tab 1.

In making its wetland determination, Agency reviewed the soil survey, in which Agency mapped the

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Clarno-Stickney-Tetonka complex in the area. Tetonka is on the county's hydric soils list, and it is listed as pothole soil. File 3, Tab 5, Hearing Testimony, Pages 23 and 28-30. Agency reviewed prior determinations and did not find any manipulations prior to 1985. File 3, Tab 5, Hearing Testimony, Pages 23-24. Agency reviewed the national wetland inventory map, which revealed that the site is in a pothole region with many small depressions in the area and that the area is an emergent wetland. File 3, Tab 5, Hearing Testimony, Pages 25-27. After considering such information, Agency identified the site as a potential wetland.

Agency then conducted an on-site inspection. Agency took eight samples from the Pothole, and all eight samples exhibited indicators of hydric soils. File 3, Tab 5, Hearing Testimony, Page 76; *see generally* File 3, Tab 5, Hearing Testimony, Pages 70-88; *see also* File 4, Tab 15, Agency Record, Pages 52-62.

When NRCS conducted the on-site inspection of the Pothole, NRCS determined that normal environmental conditions were not present because it had been drier than normal, and NRCS proceeded to analyze the Pothole as a "problem area" under Part IV, Section G of the 1987 Army Corps of Engineers Wetlands Delineation Manual (Corps Manual). File 3, Tab 7, Hearing Testimony, Pages 25, 29-32, and 43-49. NRCS determined that the Pothole was a concave depression, which was conducive for collecting water. File 3, Tab 5, Hearing Testimony, Pages 35 and 42-43

NRCS proceeded to analyze multiple years of aerial photography. File 3, Tab 5, Hearing Testimony, Page 49. NRCS examined the last twenty years of aerial photography and determined that ten photos were taken in years with normal rainfall. File 3, Tab 5,

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Hearing Testimony, Pages 49-55; *see* File 4, Tab 15, Agency Record, Pages 84-93. Of the ten normal-year photographs, NRCS observed wetness signatures in seven. File 3, Tab 5, Hearing Testimony, Pages 55-56; *see* File 4, Tab 15, Agency Record, Pages 87-88. Because NRCS observed wetness signatures on photos in more than half of the years included in the analysis, NRCS determined that wetland hydrology was present at the Pothole. *See* Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 446-447; *see also* File 4, Tab 15, Agency Record, Page 149 (SD-LTP-33).

NRCS determined that indicators of hydrology were problematic because the Pothole temporarily lacked hydrology due to dry conditions. File 3, Tab 5, Hearing Testimony, Pages 44-49; *see* File 4, Tab 15, Agency Record, Pages 72-83. Thus, NRCS evaluated problematic vegetation by determining whether hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions. File 3, Tab 5, Hearing Testimony, Pages 99-110; Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 426 and 432. NRCS determined that the vegetation had been disturbed or altered by Appellants' farming operation, making the remaining vegetation insufficient or unreliable for making a hydrophytic vegetation determination. File 3, Tab 5, Hearing Testimony, Pages 99 and 102. Thus, NRCS used a reference site, located approximately 30 or 40 miles from the Pothole, to make its hydrophytic vegetation determination. File 3, Tab 5, Hearing Testimony, Pages 99 and 102.

NRCS selected a reference site that was included in the same Tetonka hydric soil map unit and was in

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the same major land use area, which Agency defined as the “local area on the same hydric soil map unit” within the meaning of 7 C.F.R. § 12.31(b)(2)(ii). *See* File 3, Tab 5, Hearing Testimony, Pages 107-108. The hydrophytic vegetation sampling on the reference site was conducted in July 2000, and the reference site is still currently preserved grassland (i.e., it is minimally disturbed and provides long-term access). *See* File 3, Tab 5, Hearing Testimony, Page 105; *see also* File 7, Tab 15, Agency Record, Pages 655-662. The reference site is a prairie pothole similar to the Pothole. *See* File 3, Tab 5, Hearing Testimony, Page 108. The precipitation is similar between the reference site and the Pothole, and both sites had similar hydrologic regimes. File 3, Tab 5, Hearing Testimony, Page 109.

The reference site was a wetland and met all criteria, including the predominance of hydrophytic vegetation under normal circumstances. File 7, Tab 15, Agency Record, Pages 655-667; *see* File 3, Tab 5, Hearing Testimony, Pages 104-111. Because the reference site exhibited the necessary indicators of hydrophytic vegetation, the Pothole was considered to have the same plant community absent human interference. *See, e.g.*, File 4, Tab 15, Agency Record, Pages 43 and 46; *see also* File 6, Tab 15, Agency Record, Page 432. Therefore, NRCS concluded the Pothole would support a prevalence of hydrophytic vegetation under normal circumstances. File 3, Tab 5, Hearing Testimony, Page 110.

Having found that the Pothole exhibited all three criteria necessary to label the Pothole a wetland, NRCS issued a certified wetland determination on June 23, 2011. File 1, Tab 1. On August 12, 2011, Appellants filed an appeal with NAD. File 1, Tab 2. On

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October 18, 2011, the Hearing Officer conducted an in-person hearing to resolve the issues raised on appeal. File 1, Tab 4. After considering arguments and evidence on appeal, the Hearing Officer issued an Appeal Determination upholding NRCS's adverse decision. File 1, Tab 7. On February 13, 2012, Appellants filed a request for Director review of the Hearing Officer Appeal Determination issued on January 10, 2012. File 1, Tab 8. NRCS filed a response to the request for Director review. File 1, Tab 9.

Legal Standards

The "Swampbuster" (i.e., Wetland Conservation) provisions of the Food Security Act (16 U.S.C. § 3801 and §§ 3821-3824), as amended, contain the statutes applicable to this case. *See generally Clark v. USDA*, 492 F. Supp. 2d 1085 (S.D. Iowa 2007). Part 11 and Part 12 of Title 7 of the Code of Federal Regulations (C.F.R.) contain the regulations applicable to this case. The 2010 Food Security Act Wetland Identification Procedures outline the current wetland delineation methodology used by NRCS. *See* National Food Security Act Manual Part 527, Appx., Circular No. 6; 2010 Food Security Act Wetland Identification Procedures; File 4, Tab 15, Agency Record, Pages 150-171. Except as varied by the 2010 Food Security Act Wetland Identification Procedures, Part IV of the Corps Manual and the approved Corps regional supplements comprise the foundation of wetland identification procedures under the Act. *See* National Food Security Act Manual Part 527, Appx., Circular No. 6; 2010 Food Security Act Wetland Identification Procedures; File 4, Tab 15, Agency Record, Pages 150, 154, and 159. Version 2.0 of the Regional Supplement to the Corps of Engineers Wetland Delineation

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Manual: Great Plains Region (Regional Supplement) contains information on evaluating difficult wetland situations in the Great Plains region. *See* Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 424-467. In addition to the offsite procedures provided in the Corps Manual and Regional Supplement, states have the option of utilizing state mapping conventions or state offsite methods. Food Security Act Manual Part 527, Appx., Circular No. 6; 2010 Food Security Act Wetland Identification Procedures; File 4, Tab 15, Agency Record, Page 154.

Under the Food Security Act, any person who produces an agricultural commodity on highly erodible land or designates such land for conservation use, plants an agricultural commodity on a converted wetland, or converts a wetland shall be determined to be ineligible for certain benefits provided by the United States Department of Agriculture (USDA) and agencies and instrumentalities of USDA. 7 C.F.R. § 12.1(a); *see* 7 C.F.R. § 12.4; 16 U.S.C. § 3821(a)(2). The term “wetland” means land that (a) has a predominance of hydric soils, (b) 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 (c) under normal circumstances does support a prevalence of hydrophytic vegetation. 16 U.S.C. § 3801(a)(27); 7 C.F.R. § 12.2(a) (definition of wetland).

NRCS is charged with making or approving wetland determinations, delineations, and certifications. 7 C.F.R. § 12.30(a)(3). NRCS has the sole responsibility to make wetland determinations and delineations for USDA program eligibility. *See* NRCS

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Circular No. 6, Part 527, Appendix; File 4, Tab 15, Agency Record, Page 150; *see also* 7 C.F.R. § 12.30(a)(3) and (6). A “wetland determination” is a decision regarding whether an area is a wetland, including identification of wetland type and size. 7 C.F.R. § 12.2(a) (definition of wetland determination). Under Part IV of the Corps Manual, if NRCS conducts a routine wetland determination and discovers that sufficient information is available to make a wetland determination, then an on-site inspection is unnecessary. Corps Manual, Part IV, Section D, Subsection 1; File 5, Tab 15, Agency Record, Pages 227-228. However, if available information is insufficient to make a determination, then an on-site inspection is required. Corps Manual, Part IV, Section D, Subsection 1; File 5, Tab 15, Page 231.

Predominance of Hydric Soils

First, when making its wetland determination, NRCS must determine whether an area of a field or other parcel of land has a predominance of hydric soils. 16 U.S.C. § 3801(a)(27); 7 C.F.R. § 12.31(a)(2). The term “hydric soil” means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. 16 U.S.C. § 3801(a)(12); *see also* 7 C.F.R. § 12.2(a) (definition of hydric soils). The Secretary of USDA has developed criteria for the identification of hydric soils and has developed lists of such soils. *See* 16 U.S.C. § 3801(b). NRCS identifies hydric soils through the use of published soil maps that reflect soil surveys completed by NRCS or through the use of on-site reviews. 7 C.F.R. § 12.31(a)(1); *see* 7 C.F.R. § 12.30(a)(1). If a soil map unit has hydric soil

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as all or part of its name, that soil map unit or portion of the map unit related to the hydric soil shall be determined to have a predominance of hydric soils. 7 C.F.R. § 12.31(a)(2)(i). If a soil map unit includes hydric soils, that portion of the soil map unit identified as hydric soil shall be determined to have a predominance of hydric soils. 7 C.F.R. § 12.31(a)(2)(iii). The local NRCS office must maintain and make available an official list of hydric soil map units, including a list of nationally-recognized hydric soils in the area and any soil map units or areas that the state conservationist determines meet certain criteria. *See* 7 C.F.R. § 12.31(a)(3)(ii).

Wetland Hydrology

Second, NRCS must determine whether an area of a field or other parcel of land 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. *See generally* 7 C.F.R. § 12.31(b); *see also* 16 U.S.C. § 3801(a)(27). NRCS refers to this determination as “wetland hydrology.” National Food Security Act Manual Part 514.6; File 7, Tab 15, Agency Record, Page 606.

Wetland hydrology determinations are based on indicators, many of which are designed to be used during dry periods when the direct observation of surface water or a shallow water table is not possible. However, some wetlands may lack any of the listed hydrology indicators, particularly during the dry season or in a dry year. The evaluation of wetland hydrology requires special care on any site where indicators of hydrophytic vegetation and hydric soil are present but hydrology indicators appear to be absent.

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Among other factors, this evaluation should consider the timing of the site visit in relation to normal seasonal and annual hydrologic variability and whether the amount of rainfall prior to the site visit has been normal. Much of the Great Plains region is characterized by long, hot summer dry seasons. During the dry season, surface water recedes from wetland margins, water tables drop, and many wetlands dry out completely. Superimposed on this seasonal cycle is a long-term pattern of multi-year droughts alternating with years of higher-than-average rainfall. Wetlands in general are inundated or saturated in most years (at least five years in ten, or fifty percent or higher probability) over a long-term record. However, some wetlands in the Great Plains do not become inundated or saturated in some years and, during drought cycles, may not inundate or saturate for several years in a row. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 442. Some wetlands can be difficult to identify because wetland indicators may be missing due to natural processes or recent disturbances. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 424.

When conducting the on-site inspection of an area less than five acres, if NRCS determines that normal environmental conditions are not present, then NRCS may proceed to analyze the area as a “problem area” under Part IV, Section G. Corps Manual, Part IV, Section D, Subsection 2; File 5, Tab 15, Agency Record, Pages 231-237. Section G specifically identifies “prairie potholes” as problem areas. Prairie potholes normally occur as shallow depressions in glaciated portions of the north-central United States. Many are landlocked, while others have a drainage outlet to streams or other potholes. Most have standing water for much of the

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growing season in years of normal or above normal precipitation but are neither inundated nor have saturated soils during most of the growing season in years of below normal precipitation. During dry years, potholes often become incorporated into farming plans and are either planted to row crops or are mowed as part of a haying operation. When this occurs, wetland indicators of one or more parameters may be lacking. For example, tillage would eliminate any onsite hydrologic indicator and would make detection of soil and vegetation indicators much more difficult. Corps Manual, Part IV, Section G; File 5, Tab 15, Agency Record, Pages 267.

In order to evaluate wetland hydrology where hydrology indicators appear to be absent, NRCS must (1) verify that indicators of hydrophytic vegetation and hydric soil are present or are absent due to disturbance or other problem situations; (2) verify that the site is in a landscape position that is likely to collect or concentrate water (e.g., concave surface such as a depression or swale); and (3) use one or more of the following approaches to determine whether wetland hydrology is present and the site is a wetland: (a) determine whether the site visit occurred during the normal annual “dry season,” (b) determine if this is a period with below-normal rainfall, (c) determine whether the area has been subject to drought, (d) if indicators of hydric soil and hydrophytic vegetation are present on a site that lacks wetland hydrology indicators, the site may be considered to be a wetland if the landscape setting, topography, soils, and vegetation are substantially the same as those on nearby wetland reference areas, (e) “Hydrology Tools” is a collection of methods that can be used to determine whether wetland hydrology is present on a potential

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wetland site that lacks indicators due to disturbance or other reasons, particularly on lands used for agriculture, (f) evaluating multiple years of aerial photography, or (g) long-term hydrologic monitoring. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 442-448.

Each year, the Farm Service Agency (FSA) takes low-level aerial photographs in agricultural areas to monitor the acreages planted in various crops for USDA programs. NRCS has developed an off-site procedure that uses these photos, or repeated aerial photography from other sources, to make wetland hydrology determinations. If wetness signatures are observed on photos in more than half of the years included in the analysis, then wetland hydrology is present. Wetness signatures for a particular state may include surface water, saturated soils, flooded or drowned-out crops, stressed crops due to wetness, differences in vegetation patterns due to different planting dates, inclusion of wet areas into set-aside programs, unharvested crops, isolated areas that are not farmed with the rest of the field, patches of greener vegetation during dry periods, and other evidence of wet conditions. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 446-447; *see also* File 4, Tab 15, Agency Record, Page 149 (SD-LTP-33).

Hydrophytic Vegetation

Finally, when making its wetland determination, NRCS must determine whether such area or parcel would support a prevalence of hydrophytic vegetation under normal circumstances. *See generally* 7 C.F.R. § 12.31(b); *see also* 16 U.S.C. § 3801(a)(27). The term “hydrophytic vegetation” means a plant growing in water, or plants growing in a substrate that is at least

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periodically deficient in oxygen during a growing season as a result of excessive water content. 16 U.S.C. § 3801(a)(13); 7 C.F.R. § 12.2(a) (definition of hydrophytic vegetation); *see also* 7 C.F.R. § 12.31(b). The term “normal circumstances” refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed. 7 C.F.R. § 12.31(b)(2)(i). NRCS must determine the prevalence of hydrophytic vegetation in accordance with the current Federal wetland delineation methodology in use by NRCS at the time of the determination (i.e., the Corps Manual and Regional Supplement). 7 C.F.R. § 12.31(b)(3). The Secretary of USDA has developed criteria for the identification of hydrophytic vegetation and has developed lists of such vegetation. *See* 16 U.S.C. § 3801(b); *see* File 6, Tab 15, Agency Record, Pages 516-588.

Many factors affect the structure and composition of plant communities in the Great Plains, including climatic variability, long-term grazing, fires, groundwater withdrawal, and other human land-use practices. As a result, some wetlands may exhibit indicators of hydric soil and wetland hydrology but lack any of the hydrophytic vegetation indicators, at least at certain times. To identify and delineate these wetlands may require special procedures or additional analysis of factors affecting the site, including recent changes in hydrologic conditions that may not be reflected in the current vegetation on a site. To the extent possible, the hydrophytic vegetation decision should be based on the plant community that is normally present during the wet portion of the growing season in a normal rainfall year. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 425.

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When evaluating problematic hydrophytic vegetation, NRCS recommends the following procedures: First, NRCS should verify that at least one indicator of hydric soil and one primary or two secondary indicators of wetland hydrology are present. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 425; *see* File 4, Tab 15, Agency Record, Pages 147-148 (for local primary and secondary hydrology indicators). If indicators of either hydric soil or wetland hydrology are absent, the area is likely nonwetland, unless soil or hydrology are also disturbed or problematic. If indicators of hydric soil and wetland hydrology are present (or are absent due to disturbance or other problem situations), then NRCS should verify that the area is in a landscape position that is likely to collect or concentrate water (e.g., concave depression or swale). Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 425. Next, NRCS may use one or more approaches to determine whether vegetation is hydrophytic, including the approach for areas that have been altered and are managed to meet human goals. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 426 and 432.

Many natural plant communities throughout the Great Plains have been altered and are managed to meet human goals. Examples include clearing of woody vegetation on rangelands, periodic disking or plowing, mowing, planting of native and non-native species (including cultivars or planted species that have escaped and become established on other sites), irrigation of pastures and hayfields, suppression of wildfires, and the use of herbicides. These actions can result in elimination of certain species and their replacement with other species, changes in abundance of certain plants, and shifts in dominant species,

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possibly influencing a hydrophytic vegetation determination. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 432.

In the event vegetation has been altered or removed, NRCS must determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions. 7 C.F.R. § 12.31(b)(2)(ii). If the natural vegetation has been altered through management to such an extent that a hydrophytic vegetation determination may be unreliable, NRCS may (1) examine the vegetation on a nearby, unmanaged reference site having similar soils and hydrologic conditions (and assume that the same plant community would exist on the managed site in the absence of human alteration); (2) for recently cleared or plowed areas (not planted or seeded), leave representative areas unmanaged for at least one growing season with normal rainfall and reevaluate the vegetation; (3) if management was initiated recently, use off-site data sources such as aerial photography, national wetland inventory maps, and interviews with the land owner and other persons familiar with the site or area to determine the plant community present on the site before the management occurred; (4) if the unmanaged vegetation condition cannot be determined, make the wetland determination based on indicators of hydric soil and wetland hydrology. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 432.

Regarding reference sites, if indicators of hydric soil and wetland hydrology are present at the primary site, the primary site may be considered to be a wetland if the landscape setting, topography, soils, and

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vegetation are substantially the same as those on nearby wetland reference sites. Hydrologic characteristics of wetland reference sites should be documented by application of direct hydrologic observations. Reference sites should be minimally disturbed and provide long-term access. Soils, vegetation, and hydrologic conditions should be thoroughly documented and the data kept on file in the district or field office. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 434; *see* File 4, Tab 15, Agency Record, Page 170; *see also* 7 C.F.R. § 12.31(b)(2).

Appeal to NAD

A program participant that receives an adverse decision from an agency may appeal to NAD. 7 U.S.C. § 6996(a); 7 C.F.R. § 11.6(b). A wetland determination is an adverse decision. *See* 7 C.F.R. § 11.1 (definition of adverse decision). On appeal to NAD, an appellant bears the burden of proving by a preponderance of the evidence that the adverse decision of the agency was erroneous. 7 C.F.R. § 11.8(e); *see* 7 U.S.C. § 6997(c)(4). On Director review, an appellant must state specific reasons why the appellant believes the Hearing Officer's determination was incorrect. 7 C.F.R. § 11.9(a).

Analysis

On Director review, Appellants dispute NRCS's determination that the Pothole was 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 (i.e., NRCS's wetland hydrology determination). Appellants argue that NRCS

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failed to provide substantial evidence upon which the Hearing Officer could base his conclusion that the aerial photographs NRCS reviewed showed wetness signatures in seven of the ten years. *See* File 1, Tab 8.

On Director review, Appellants also argue that the reference site used to determine hydrophytic vegetation was not in the “local area” within the meaning of 7 C.F.R. § 12.31(b)(2)(ii). Appellants estimated that the reference site was approximately forty miles away from the Pothole. *See* File 1, Tab 8.

While Appellants raise other arguments on review, the arguments either address the wrong standard of review or do not show by preponderance of the evidence that the adverse decision was erroneous. Therefore, I will only address the material arguments previously mentioned.

The dispute in this case is whether NRCS followed appropriate procedures when it determined that Appellants’ land contained 0.8 acres of wetland. To resolve this dispute, I must determine whether the area in question (a) has a predominance of hydric soils, (b) 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 (c) under normal circumstances supports a prevalence of hydrophytic vegetation. For the reasons outlined below, I uphold the Hearing Officer’s determination. I have concluded upon Director review that the Hearing Officer Appeal Determination is supported by substantial evidence in the record and that NRCS’s adverse decision is consistent with applicable regulations.

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Predominance of Hydric Soils

I conclude that substantial evidence in the record supports the Hearing Officer's finding that the Pothole has a predominance of hydric soils. On Director review, Appellants do not challenge Agency's finding that the Pothole has a predominance of hydric soils. Therefore, I briefly discuss this prong of the wetland criteria. See 7 C.F.R. § 11.9(a).

Agency determined that the Pothole has a predominance of hydric soils. In doing so, Agency followed the five basic steps necessary to make a preliminary determination, as outlined in the local mapping conventions, including (1) reviewing the soil survey, (2) reviewing prior determinations, (3) reviewing national wetland inventory maps, (4) determining if prior manipulations had occurred, and (5) reviewing other evidence of a potential wetland. File 3, Tab 5, Hearing Testimony, Pages 23-30. Agency reviewed the soil survey, in which Agency has mapped the Clarno-Stickney-Tetonka complex in the area. Tetonka is on the county's hydric soils list, and it is listed as pothole soil. File 3, Tab 5, Hearing Testimony, Page 23 and 28-30. Agency reviewed prior determinations and did not find any manipulations prior to 1985. File 3, Tab 5, Hearing Testimony, Pages 23-24. Agency reviewed the national wetland inventory map, which revealed that the site is in a pothole region with many small depressions in the area and that the area is an emergent wetland. File 3, Tab 5, Hearing Testimony, Pages 25-27. After considering such information, Agency identified the site as a potential wetland.

Agency then conducted an on-site inspection. Agency took eight samples from the Pothole, and all

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samples exhibited indicators of hydric soils. File 3, Tab 5, Hearing Testimony, Page 76; *see generally* File 3, Tab 5, Hearing Testimony, Pages 70-88; *see also* File 4, Tab 15, Agency Record, Pages 52-62. Therefore, I conclude that Agency followed applicable regulations and that substantial evidence supports the Hearing Officer's finding that the Pothole has a predominance of hydric soils and meets the first criterion for identification of a wetland. *See* 16 U.S.C. § 3801(a)(27); 7 C.F.R. § 12.2(a) (definition of wetland).

Inundation or Saturation Supporting Hydrophytic Vegetation (i.e., Wetland Hydrology)

On Director review, Appellants' dispute NRCS's determination that the Pothole was 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 (i.e., NRCS's wetland hydrology determination). Appellants argue that NRCS failed to provide substantial evidence upon which the Hearing Officer could base his conclusion that the aerial photographs NRCS reviewed showed wetness signatures in seven of the ten years. *See* File 1, Tab 8.

In making its routine wetland determination, NRCS discovered that insufficient information was available to make a determination without an on-site inspection. *See* File 3, Tab 7, Hearing Testimony, Pages 23-41. Thus, an on-site inspection was required. Corps Manual, Part IV, Section D, Subsection 1; File 5, Tab 15, Agency Record, Page 231.

When NRCS conducted the on-site inspection of the Pothole, NRCS determined that normal environmental conditions were not present because it

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had been drier than normal, and NRCS proceeded to analyze the Pothole as a “problem area” under Part IV, Section G of the Corps Manual. File 3, Tab 7, Hearing Testimony, Pages 25, 29-32, and 43-49; *see* Manual, Part IV, Section D, Subsection 2; File 5, Tab 15, Agency Record, Pages 231-237. Section G specifically identifies “prairie potholes” as problem areas. Prairie potholes normally occur as shallow depressions in glaciated portions of the north-central United States. Many are landlocked, while others have a drainage outlet to streams or other potholes. Most have standing water for much of the growing season in years of normal or above normal precipitation but are neither inundated nor have saturated soils during most of the growing season in years of below normal precipitation. During dry years, potholes often become incorporated into farming plans and are either planted to row crops or are mowed as part of a haying operation. When this occurs, wetland indicators of one or more parameters may be lacking. For example, tillage would eliminate any onsite hydrologic indicator and would make detection of soil and vegetation indicators much more difficult. Corps Manual, Part IV, Section G; File 5, Tab 15, Pages 267.

In order to evaluate such problem area under Section G (i.e., to evaluate wetland hydrology where hydrology indicators appear to be absent), NRCS was required to first verify that indicators of hydrophytic vegetation and hydric soil were present or absent due to disturbance or other problem situations. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 442-448. As discussed above, NRCS verified that hydric soils were present in the Pothole. NRCS took eight samples from the area at issue, all of which exhibited indicators of hydric soils. File 3, Tab 5,

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Hearing Testimony, Page 76. Thus, the next consideration was whether indicators of hydrophytic vegetation were present or problematic. As discussed in more detail below, NRCS determined that hydrophytic vegetation was removed or altered. File 3, Tab 5, Hearing Testimony, Pages 31 and 35. Therefore, NRCS satisfied the first element of its analysis by determining that hydric soils were present and that hydrophytic vegetation was absent due to disturbance.

Next, NRCS was required to verify that the site was in a landscape position that was likely to collect or concentrate water. In this case, NRCS determined that the Pothole was a concave depression, which was conducive for collecting water. File 3, Tab 5, Hearing Testimony, Pages 35 and 42-43; *see* Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 442-448.

Next, in evaluating the problem area, NRCS was permitted to use several approaches to determine whether wetland hydrology was present and whether the site was a wetland, including but not limited to determining whether the site visit occurred during the normal annual “dry season” or during a period with below-normal rainfall and evaluating multiple years of aerial photography. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 442-448. In this case, NRCS first determined that it visited the site during a period with below normal rainfall and that wetland hydrology indicators were lacking. File 3, Tab 5, Hearing Testimony, Pages 44-49; *see* File 4, Tab 15, Agency Record, Pages 72-83.

NRCS proceeded to analyze multiple years of aerial photography. File 3, Tab 5, Hearing Testimony, Page 49. NRCS examined the last twenty years of

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aerial photography and determined that ten photos were taken in years with normal rainfall. File 3, Tab 5, Hearing Testimony, Pages 49-55; *see* File 4, Tab 15, Agency Record, Pages 84-93. Of the ten normal-year photographs, NRCS observed wetness signatures in seven of the years. File 3, Tab 5, Hearing Testimony, Pages 55-56; *see* File 4, Tab 15, Agency Record, Pages 87-88. Because NRCS observed wetness signatures on photos in more than half of the years included in the analysis, NRCS determined that wetland hydrology was present at the Pothole. *See* Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 446-447; *see also* File 4, Tab 15, Agency Record, Page 149 (SD-LTP-33).

On Director review, Appellants argue that NRCS failed to provide substantial evidence upon which the Hearing Officer could base his conclusion that the photographs showed wetness signatures in seven of the ten years. Appellants argue that the Hearing Officer lacked evidence to conclude that color-tone changes were indicative of wetness signatures. File 1, Tab 8. I disagree.

NRCS stated that it observed wetness signatures in seven of the ten normal-year photographs. Although NRCS did not offer much explanation regarding which wetness signatures were indicated by certain color-tone changes, NRCS's experts testified that the color-tone changes were indicative of various wetness signatures. *See* File 3, Tab 5, Hearing Testimony, Pages 49-56. Wetness signatures include surface water, saturated soils, flooded or drowned-out crops, stressed crops due to wetness, differences in vegetation patterns due to different planting dates, inclusion of wet areas into set-aside programs, unharvested crops, isolated areas

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that are not farmed with the rest of the field, patches of greener vegetation during dry periods, and other evidence of wet conditions. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 446-447; *see also* File 4, Tab 15, Agency Record, Page 149 (SD-LTP-33).

At the hearing, Appellants did not cross-examine NRCS's witness regarding his evaluation of wetness signatures in the aerial photography. *See generally* File 3, Tab 5, Hearing Testimony, Pages 60-68. Moreover, Appellants did not present any evidence or expert testimony to refute NRCS's conclusion that various wetness signatures were apparent in seven often normal-year photographs. The burden is on Appellants to show error in NRCS's adverse decision, and Appellants were required on Director review to state specific reasons they believed the Hearing Officer's determination was erroneous. *See* 7 C.F.R. §§ 11.8(e) and 11.9(a). Where NRCS has come forward with a *prima facie* case, NRCS will prevail unless the evidence is discredited or rebutted by Appellants. While NRCS's expert testimony might have been abbreviated and conclusory, Appellants failed to meet their burden because they did not challenge or discredit NRCS's testimony. Therefore, I uphold the Hearing Officer's determination that the Pothole exhibits indicators of wetland hydrology, meaning that the Pothole fulfills the second criterion for identification of a wetland because it was 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.

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Hydrophytic Vegetation

Finally, when making its wetland determination, NRCS must determine whether such area or parcel would support a prevalence of hydrophytic vegetation under normal circumstances. *See generally* 7 C.F.R. § 12.31(b); *see also* 16 U.S.C. § 3801(a)(27). In the event the vegetation has been altered or removed, NRCS must determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions. 7 C.F.R. § 12.31(b)(2)(ii).

As discussed above, NRCS determined that hydric soils were present. NRCS next needed to verify that one primary or two secondary indicators of wetland hydrology were present. *See* File 6, Tab 15, Agency Record, Page 425; *see* File 4, Tab 15, Agency Record, Pages 147-148. NRCS was unable to do so. File 3, Tab 15, Agency Record, Page 49. Typically, if indicators of either hydric soil or wetland hydrology are absent, the area is nonwetland, unless hydrology is also problematic. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 425. In this case, NRCS determined that indicators of hydrology were problematic because the Pothole temporarily lacked hydrology due to dry conditions. File 3, Tab 5, Hearing Testimony, Pages 44-49; *see* File 4, Tab 15, Agency Record, Pages 72-83. Thus, NRCS evaluated problematic vegetation by determining whether hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions. File 3, Tab 5, Hearing Testimony, Pages 99-110; *see* 7 C.F.R. § 12.31(b)(2)(ii); *see also* Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Pages 426 and 432.

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Many natural plant communities throughout the Great Plains have been altered and are managed to meet human goals (e.g., periodic disking or plowing, mowing, planting, irrigation, herbicides). These actions can result in elimination of certain species and their replacement with other species, changes in abundance of certain plants, and shifts in dominant species, possibly influencing a hydrophytic vegetation determination. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 432.

When natural vegetation has been altered to such an extent that a hydrophytic vegetation determination may be unreliable, NRCS may examine the vegetation on a nearby, unmanaged reference site having similar soils and hydrologic conditions (and assume that the same plant community would exist on the managed site in the absence of human alteration). Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 432. In this case, NRCS determined that the vegetation had been disturbed or altered by Appellants' farming operation, making the remaining vegetation insufficient or unreliable for making a hydrophytic vegetation determination. File 3, Tab 5, Hearing Testimony, Pages 99 and 102. Thus, NRCS used a reference site to make its hydrophytic vegetation determination. File 3, Tab 5, Hearing Testimony, Pages 99 and 102.

Regarding reference sites, if indicators of hydric soil and wetland hydrology are present at the primary site, the primary site may be considered to be a wetland if the landscape setting, topography, soils, and vegetation are substantially the same as those on nearby wetland reference sites. Hydrologic characteristics of wetland reference sites should be

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documented by application of direct hydrologic observations. Reference sites should be minimally disturbed and provide long-term access. Soils, vegetation, and hydrologic conditions should be thoroughly documented and the data kept on file in the district or field office. Regional Supplement, Chapter 5; File 6, Tab 15, Agency Record, Page 434; *see* File 4, Tab 15, Agency Record, Page 170; *see also* 7 C.F.R. § 12.31(b)(2).

In this case, NRCS selected a reference site that was included in the same Tetonka hydric soil map unit and was in the same major land use area, which Agency defined as the “local area on the same hydric soil map unit” within the meaning of 7 C.F.R. § 12.31(b)(2)(ii). *See* File 3, Tab 5, Hearing Testimony, Pages 107-108. The hydrophytic vegetation sampling on the reference site was conducted in July 2000, and the reference site is still currently preserved grassland (i.e., it is minimally disturbed and provides long-term access). *See* File 3, Tab 5, Hearing Testimony, Page 105; *see also* File 7, Tab 15, Agency Record, Pages 655-662. The reference site is a prairie pothole similar to the Pothole. *See* File 3, Tab 5, Hearing Testimony, Page 108. The precipitation is similar between the reference site and the Pothole, and both sites had similar hydrologic regimes. File 3, Tab 5, Hearing Testimony, Page 109.

The reference site was a wetland and met all criteria, including the predominance of hydrophytic vegetation under normal circumstances. File 7, Tab 15, Agency Record, Pages 655-667; *see* File 3, Tab 5, Hearing Testimony, Pages 104-111. Because the reference site exhibited the necessary indicators of hydrophytic vegetation, the Pothole was considered to

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have the same plant community absent human interference. *See, e.g.*, File 4, Tab 15, Agency Record, Pages 43 and 46; *see also* File 6, Tab 15, Agency Record, Page 432. Therefore, NRCS concluded the Pothole would support a prevalence of hydrophytic vegetation under normal circumstances. File 3, Tab 5, Hearing Testimony, Page 110.

On Director review, Appellants argue that the reference site used to determine hydrophytic vegetation was not in the “local area” within the meaning of 7 C.F.R. § 12.31(b)(2)(ii). *See* File 1, Tab 8. Appellants estimated that the reference site was approximately forty miles away from the Pothole. File 3, Tab 5, Hearing Testimony, Pages 146-147. NRCS defined the “local area on the same hydric soil map unit” for purposes of 7 C.F.R. § 12.31(b)(2)(ii) as being within the same major land use area and on the same hydric soil map unit. *See* File 3, Tab 5, Hearing Testimony, Pages 108-109.

I conclude NRCS’s interpretation of its own regulation is reasonable. Generally, an agency’s interpretation of its own regulation is entitled to substantial deference, unless the interpretation is plainly erroneous or clearly inconsistent with the regulation interpreted. *See Auer v. Robinson*, 519 U.S. 452, 461 (1997); *see also Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994). On Director review, although Appellants’ interpretation is not unreasonable, my task is not to decide which among several competing interpretations best serves the regulatory purposes. Rather, I must defer to NRCS’s interpretation unless the plain language of the regulation compels an alternative reading. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512

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(1994). Appellants failed to show that the plain language of the regulation compels an alternative reading. Therefore, NRCS's interpretation is reasonable, and I conclude that the reference site is in the "local area on the same hydric soil map unit" for purposes of 7 C.F.R. § 12.31(b)(2)(ii) because it is in the same major land use area and on the same hydric soil map unit.

That said, I conclude that the Hearing Officer's finding that the Pothole would support a prevalence of hydrophytic vegetation under normal circumstances is supported by substantial evidence in the record. *See* File 4, Tab 15, Agency Record, Pages 43 and 46; *see also* File 6, Tab 15, Agency Record, Page 432; *see also* File 3, Tab 5, Hearing Testimony, Page 110.

To summarize, I have concluded that the Hearing Officer Appeal Determination, specifically that the Pothole (a) had a predominance of hydric soils, (b) was 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 (c) under normal circumstances would support a prevalence of hydrophytic vegetation, is supported by substantial evidence in the record and that NRCS's adverse decision is consistent with applicable regulations.

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Conclusion

Based on the discussion above, I uphold the Hearing Officer Appeal Determination. I conclude that the Appellants did not prove by a preponderance of the evidence that the adverse decision was erroneous.

s/ James T. Murray
James T. Murray
Deputy Director

July 16, 2012
Date

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**UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION**

In the matter of) Dated Jan. 10, 2012
ARLEN & CINDY)
FOSTER)
)
And)
)
NATURAL RESOURCES) Case No. 2011W000619
CONSERVATION)
SERVICE)

APPEAL DETERMINATION

Arlen and Cindy Foster (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 South Dakota has not adopted an offsite methods manual. Additionally, Appellant's

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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's 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

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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?**

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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 Miner County South Dakota. (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

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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 Great Plains 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)

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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. Michelle Burk is an Agricultural Engineer for NRCS. She has a B.S. degree in Agricultural Engineering and is a licensed agricultural

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engineer in the state of South Dakota. 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 $\frac{3}{4}$ and $1\frac{1}{2}$ 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

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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. Eugene Preston (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,

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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

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a hydric soil. (AR page 61, Agency Testimony, HA Track 2, 00:51:01 - 00:54:38)

Hydrophytic Vegetation

29. Kevin Luebke 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 Kingsbury 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)

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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 South Dakota Mapping Conventions for Determining Wetlands (SD 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**

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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

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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. (FOP 6) NRCS also studied six soil samples taken from Site 1 and three from the surrounding area. (FOP 21 & 28) NRCS found F6, FS, and A11 soil profiles with redox concentrations within the boundary of Site 1. (FOP 22 & 23) NRCS used the Field Indicators of Hydric Soils to identify the F6, FS and A11 profiles with redox concentrations as hydric soils. (FOP 22) NRCS also identified an agrillic horizon from the soil samples taken within the boundary of Site 1. (FOP 24 & 25) An agrillic horizon is a characteristic found in Tetonka hydric soils. (FOP 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

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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* SD Mapping Conventions SD-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* SD Mapping Conventions SD-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

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- 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 SD Mapping Conventions SD-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 SD Mapping Conventions SD-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 SD Mapping Conventions, SD-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.

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Remote Sensing and SD 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 South Dakota 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

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and NRCS to approve wetland delineation procedures. In South Dakota, the required agencies have approved the SD Mapping Conventions. (AR page 135) Therefore, the procedures contained in the SD Mapping Conventions are appropriate for wetland determinations. SD 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.

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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 SD Mapping Conventions, SD-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 SD-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.

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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

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of having any expertise in determining water saturation or inundation, or in making wetland determinations. Appellant cited 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 SD 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.

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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

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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 these 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

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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, its 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

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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

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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

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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.

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

Dated and mailed this 10th day of January 2012.

s/ Chris Barley

Chris Barley

Hearing Officer

National Appeals Division

Attachments:

Notice of Right to Request Director Review and/or

Copy of Audio Recording

Request for Director Review

* * * * *

Appendix E-1

United States Department of Agriculture

NRCS

Natural Resources Conservation Service

200 Fourth Street SW Phone: (605) 352-1200
Huron, South Dakota 57350 Fax: (605) 352-1270

CERTIFIED MAIL – RETURN
RECEIPT REQUESTED

June 23, 2011

Arlen and Cindy Foster
24314 421st Ave
Fulton, SD 57340

Dear Mr. and Mrs. Foster:

As a result of your request for a certified wetland determination on July 23, 2008 via form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification, from the Miner County Farm Service Agency Office, based on a site visit of November 23, 2010, the NRCS has made a preliminary certified wetland determination on the outlined portion of Tract # 400, located in SE1/4, Section 28, T105N R58W, in Miner County, South Dakota (SD).

Please refer to the attached certified wetland map(s) provided as a part of this preliminary technical determination to help you understand the explanations contained in this letter. All areas identified on the attached certified wetland determination maps are considered part of the preliminary technical

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determination. The remaining areas of the tract not covered by this preliminary technical determination retain their original wetland determination. Please also refer to Section 2 of the NRCS-CPA-026E, Highly Erodible Land and Wetland Conservation Determination, for a listing of the wetlands identified. Additional information may be found in the accompanying report.

The results of this preliminary technical determination confirm that Site 1 is a wetland farmed under natural conditions and meets the definition of a wetland as set forth at 7 CFR Part 12.2(a) because the site has predominance of hydric soils; 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 under normal circumstances does support a prevalence of such vegetation.

Further, Site 1 is *not* an Artificial Wetland (AW) as defined in 7 CFR Part 12.2(a) because the site was not formerly a non-wetland; non-hydric soils were found in other locations within the mapped soil unit (Clarno-Stickney-Tetonka complex) potentially affected by snow accumulation in the shelterbelt; the Tetonka soil is listed as a hydric soil unit on the Miner County Hydric Soil Interpretation; the Tetonka soil is pothole landform; and the approved Tetonka Reference site (which did not contain a shelterbelt) meets the definition of a wetland because the reference site has a predominance of hydric soils; 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

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saturated soil conditions; and under normal circumstances does support a prevalence of such vegetation.

The Wetland Conservation (WC) Provisions of the Food Security Act (FSA) of 1985 prohibit United States Department of Agriculture (USDA) program participants from converting wetlands to agricultural use. Persons who convert wetlands (CW) after November 28, 1990, are ineligible for USDA program benefits, until the CW's are restored or mitigated.

This preliminary technical determination has been conducted for the purpose of implementing the WC Provisions of the FSA of 1985. This determination may not be valid for identifying the extent of the COE Clean Water Act jurisdiction for this site. If you intend to conduct any activity that constitutes a discharge of dredged or fill material into wetlands or Other Waters, you should request a jurisdictional determination by contacting the COE, (605) 224-8531, Pierre, SD, before starting the work.

There may be opportunities to utilize mitigation if you have an interest in converting the labeled wetlands (W's), farmed wetlands (FW's), and farmed wetland pasture (FWP), found in this determination. Mitigation is the compensation of lost wetlands through wetland restoration, enhancement, or the creation of new wetlands. Mitigation can not occur at the expense of the federal government. Mitigated wetlands must be in the same local watershed as the wetlands you wish to convert. The landowner must grant an easement that remains in effect as long as the original W(s) remains converted and the easement will be recorded on public land records for the mitigated wetlands. All of the

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above activities, as well as, a mitigation plan, must be completed before any wetland conversions could occur.

You may appeal this preliminary technical determination in accordance with the laws and federal regulations set forth at 7 CFR 614, the NRCS Appeals Procedures, 7 CFR 780, the Food Security Act Appeals Procedures, and 7 CFR 11, the National Appeals Division (NAD) Rules of Procedure, as follows:

- (1) Reconsideration with a field visit will be made by the NRCS to review with you the basis for our preliminary technical determination, answer any questions you have concerning the determination, and to gather additional information from you concerning the preliminary determination.

Within 15 days of the field visit, the NRCS will reconsider the preliminary technical determination:

- A. If the reconsidered determination is no longer adverse to the participant, a final technical determination will be issued.
- B. If the reconsidered determination remains adverse the preliminary technical determination and agency record will be forwarded to the assistant state conservationist for field operations for a final technical determination; a final technical determination will be issued as soon as practicable. The technical determination issued becomes a final technical determination upon receipt by the participant.

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OR

- (2) Mediation may be used in an attempt to settle your concerns with the preliminary technical determination:

Contact: Gerald E. Jasmer
State Resource Conservationist
Natural Resources Conservation
Service
200 Fourth Street SW
Huron, South Dakota 57350-2475
Phone: (605) 352-1234
Fax: (605) 352-1261

If none of the previously discussed options have been selected, **this determination becomes final 30 days after the date this letter is received.** If the final technical determination is a result of the expiration of the 30-day period following receipt of this preliminary technical determination, it may be appealed to either of the following, within 30 days of the determination becoming final:

- Appeal to the Miner County Farm Service Agency County Committee

OR

- Appeal to the NAD at the following address:
National Appeals Division, Western
Regional Office
755 Parfet Street, Suite 494
Lakewood, Colorado 80215-5506
Phone: (800) 541-0483 or (303) 236-2862
TTY: (800) 497-0253
Fax: (303) 236-2820

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If you are the owner of this tract of land and have a tenant, I urge you to discuss this letter and accompanying NRCS-CPA-026E with your tenant. Likewise, if you are the tenant of this tract of land, I urge you to discuss this letter with your landlord.

Sincerely,

s/ Kirk Lindgren
Kirk Lindgren
District Conservationist

Attachments

Cc: Curtis Elke, ASTC(FO), NRCS, BFSO (without attachments)
Gerald Jasmer, SRC, NRCS, Huron SO (without attachments)
Leah Turgeon, CED, FSA, Howard SC (without attachments)

USDA United States Department of Agriculture Natural Resources Conservation Service NRCS-CPA-026E 9//2000

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

| | | | | | |
|---|---|---------------|---------|--------------|-------|
| Name Address: | Arlen & Cindy Foster 24314 421st Ave Fulton, SD 57340 | Request Date: | 7/23/08 | County: | Miner |
| Agency or Person Requesting Determination | Farm Service Agency | Tract No. | 400 | FSA Farm No. | 1612 |

Section I - Highly Erodible Land

* * * * *

Section II - Wetlands

| | | |
|--|--|---|
| Are there hydric soils on this farm? | | Y |
| Fields in this section have had wetland determinations completed. See the Definition of Wetland Label Codes for additional information regarding allowable activities under the wetland conservation provisions of the Food Security Act and/or when wetland d | | |

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| <u>Field(s)</u> | <u>Wetland Label*</u> | <u>Occurrence Year (CW)**</u> | <u>Approximate Acres</u> | <u>Determination Date</u> | <u>Certification Date</u> |
|--|-----------------------|-------------------------------|--------------------------|--------------------------------|---------------------------|
| 5 | NW | | 43.5 | 6/23/11 | 6/23/11 |
| 5 | W | | 0.8 | 6/23/11 | 6/23/11 |
| * * * * * | | | | | |
| The wetland determination was completed in the | | | Field | It was mailed to the person on | 6/23/2011 |
| <p>Remarks: As a result of a request for reconsideration of a previously certified final technical determination dated November 10, 2004. This determination only covers the outlined portion of Tract 400 on the attached map.</p> <p>I certify that the above determinations are correct and were conducted in accordance with policies and procedures contained in the National Food Security Act Manual.</p> | | | | | |
| Signature | | | | Designated Conservationist | Date |
| s/ Kirk Lindgren | | | | | 6/23/2011 |

* * * * *

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* DEFINITIONS OF WETLAND LABEL CODES

| | |
|-------|--|
| AW | Artificial Wetland. An area that is artificial or irrigation induced wetland. These wetlands are not subject to the wetland conservation provision. |
| AW/FW | An area that contains both AW and FW. |
| AW/W | An area that contains both AW and W. |
| CC | Commenced Conversion exemption. |
| CPD | Corps Permit Decision. Corps of Engineers permit decisions regarding section 404 of the Clean Water Act will be relied upon to satisfy the wetland conservation provisions of the Food Security Act of 1985, as amended. |
| CMW | An area that receives a Categorical Minimal Effect determination. |
| CW | Converted Wetlands. An area converted between December 23, 1985 and November 28, 1990. IN any year that an agricultural commodity is planted on these converted wetlands, you will ineligible for USDA benefits. |

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| | |
|-----------|--|
| **CW+year | An area converted after November 28, 1990. You will be ineligible for USDA program benefits until this wetland is restored. |
| CWNA | Converted Wetland Non-Agricultural use. A wetland area converted to other than agricultural commodity production. |
| CWTE | Converted Wetland Technical Error. An area converted or commenced based on an incorrect NRCS determination or misinformation from a NRCS or FSA employee. |
| FW | Farmed Wetland. An area that is farmed wetland; was manipulated and planted before December 23, 1985, but still meets wetland criteria. These may be farmed and maintained in the same manner as long as they are not abandoned. |
| FWP | Farmed Wetlands Pasture. An area that is pasture or hayland, manipulated before December 23, 1985 but still meets wetland criteria. These may be farmed and maintained in the same manner as long as they are not abandoned. |

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| | |
|--------|--|
| MIW | Mitigation Wetlands. Wetlands on which a person is actively mitigating a frequently cropped area or a wetland converted between December 23, 1985 and November 28, 1990. A converted wetland, farmed wetland, or farmed wetland pasture on which functions and |
| MW | Minimal effect Wetland. An area determined to be minimal effect. These wetlands are to be farmed according to the minimal-effect agreement signed at the time the minimal-effect determination was made. |
| MWM | An area determined to be minimal effect with mitigation. |
| NI | Not Inventoried - No wetland determination has been completed. |
| NW | Non-Wetland. An area that does not contain a wetland. |
| NW/NAD | An area determined to be a non-wetland resulting from a decision from the National Appeals Division. |
| OW | Other Waters of the U.S. An area that fall under the jurisdiction of the Clean Water Act. |

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| | |
|-------|--|
| PC | Prior Converted cropland, which as drained filled, or manipulated before December 23, 1985; was cropped prior to December 23, 1985; was not abandoned; and does not meet FW criteria. These are not subject to the wetland conservation provision unless the a |
| PC/NW | An area that contains both PC and NW. |
| TP | Third Party Exemption. |
| W | Wetlands. An area meeting wetland criteria, including wetland farmed under natural conditions. If you plan to clear, drain, fill, level or manipulate these areas, contact NRCS and the Army Corp of Engineers prior to any such activity. |
| WX | A wetland area that has been manipulated after December 23, 1985, but was not, for the purpose of making production possible and production was not made possible. These include wetlands manipulated by drainage maintenance agreements. |

Appendix E-13

Certified Wetland Determination

Field Office: Howard FO

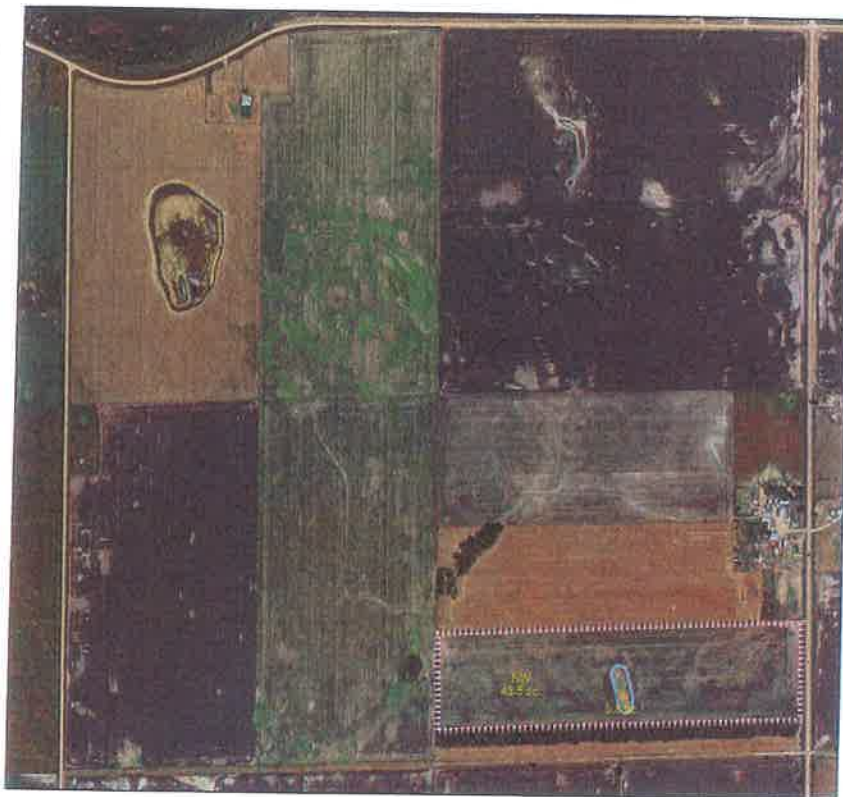
Certified By: Kirk Lindgren

Legal Desc: South 1/3 SE4 S28, T 105N, R 58W

Agency: USDA-NRCS

Certified Date: 6-23-2011

Tract: 400



Legend

- Certified Wetland Determination Boundary
- Wetlands
- Wetlands
- Drain
- Watercourse
- Tile



W Wetland
FW Farmed Wetland Drained or modified & cropped prior to 12-23-1985, but still meets wetland criteria
PC Prior Converted
NW Non Wetland
NI Not Inventoried Potential Waters of the US
See NRCS CPA-Q28E for definitions and additional info.



Appendix F-1

16 U.S.C. § 3801 Definitions

* * * * *

(a)(27) The term “wetland”, except when such term is part of the term “converted wetland”, means land that—

(A) has a predominance of hydric soils;

(B) 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

(C) under normal circumstances does support a prevalence of such vegetation.

For purposes of this Act, and any other Act, this term shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils.

(b) The Secretary shall develop—

(1) criteria for the identification of hydric soils and hydrophytic vegetation; and

(2) lists of such soils and such vegetation.

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16 U.S.C. § 3822 Delineation of wetlands; exemptions

(a) Delineation by Secretary

(1) In general

Subject to subsection (b) of this section and paragraph (6), the Secretary shall delineate, determine, and certify all wetlands located on subject land on a farm.

(2) Wetland delineation maps

The Secretary shall delineate wetlands on wetland delineation maps. On the request of a person, the Secretary shall make a reasonable effort to make an on-site wetland determination prior to delineation.

(3) Certification

On providing notice to affected persons, the Secretary shall—

(A) certify whether a map is sufficient for the purpose of making a determination of ineligibility for program benefits under section 3821 of this title; and

(B) provide an opportunity to appeal the certification prior to the certification becoming final.

(4) Duration of certification

A final certification made under paragraph (3) 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.

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(5) Review of mapping on appeal

In the case of an appeal of the Secretary's certification, the Secretary shall review and certify the accuracy of the mapping of all land subject to the appeal to ensure that the subject land has been accurately delineated. Prior to rendering a decision on the appeal, the Secretary shall conduct an on-site inspection of the subject land on a farm.

(6) Reliance on prior certified delineation

No person shall be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary. The delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person under paragraph (4).

(b) Exemptions

No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances:

(1) As the result of the production of an agricultural commodity on the following lands:

(A) A converted wetland if the conversion of the wetland was commenced before December 23, 1985.

(B) Land that is a nontidal drainage or irrigation ditch excavated in upland.

(C) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation.

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(D) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(E) Land that is an artificial lake or pond created by excavating or diking land (that is not a wetland) to collect and retain water and that is used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond.

(F) A wetland that is temporarily or incidentally created as a result of adjacent development activity.

(G) A converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of—

- (i) the lack of maintenance of drainage, dikes, levees, or similar structures;
- (ii) a lack of management of the lands containing the wetland; or
- (iii) circumstances beyond the control of the person.

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(H) A converted wetland, if—

(i) the converted wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(2) For the conversion of the following:

(A) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water and that is used primarily for livestock watering, fish

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production, irrigation, wildlife, fire control, flood control, cranberry growing, rice production, or as a settling pond.

(B) A wetland that is temporarily or incidentally created as a result of adjacent development activity.

(C) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of—

- (i) the lack of maintenance of drainage, dikes, levees, or similar structures;
- (ii) a lack of management of the lands containing the wetland; or
- (iii) circumstances beyond the control of the person.

(E) A wetland, if—

- (i) the wetland was determined by the Natural Resources Conservation Service to have been manipulated for the

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production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(c) On-site inspection requirement

No program loans, payments, or benefits shall be withheld from a person under this subchapter unless the Secretary has conducted an on-site visit of the subject land.

(d) Identification of minimal effect exemptions

For purposes of applying the minimal effect exemption under subsection (f)(1) of this section, the Secretary shall identify by regulation categorical

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minimal effect exemptions on a regional basis to assist persons in avoiding a violation of the ineligibility provisions of section 3821 of this title. The Secretary shall ensure that employees of the Department of Agriculture who administer this subchapter receive appropriate training to properly apply the minimal effect exemptions determined by the Secretary.

(e) Nonwetlands

The Secretary shall exempt from the ineligibility provisions of section 3821 of this title any action by a person upon lands in any case in which the Secretary determines that any one of the following does not apply with respect to such lands:

- (1) Such lands have a predominance of hydric soils.
- (2) Such lands are 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.
- (3) Such lands, under normal circumstances, support a prevalence of such vegetation.

(f) Minimal effect; mitigation

The Secretary shall exempt a person from the ineligibility provisions of section 3821 of this title for any action associated with the production of an agricultural commodity on a converted wetland, or the conversion of a wetland, if 1 or more of the following conditions apply, as determined by the Secretary:

- (1) The action, individually and in connection with all other similar actions authorized by the

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Secretary in the area, will have a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife.

(2) The wetland and the wetland values, acreage, and functions are mitigated by the person through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, and the restoration, enhancement, or creation is—

(A) in accordance with a wetland conservation plan;

(B) in advance of, or concurrent with, the action;

(C) not at the expense of the Federal Government;

(D) in the case of enhancement or restoration of wetlands, on not greater than a 1-for-1 acreage basis unless more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion to be mitigated;

(E) in the case of creation of wetlands, on greater than a 1-for-1 acreage basis if more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion that is mitigated;

(F) on lands in the same general area of the local watershed as the converted wetland; and

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(G) with respect to the restored, enhanced, or created wetland, made subject to an easement that—

- (i) is recorded on public land records;
- (ii) remains in force for as long as the converted wetland for which the restoration, enhancement, or creation to be mitigated remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and
- (iii) prohibits making alterations to the restored, enhanced, or created wetland that lower the wetland's functions and values.

(3) The wetland was converted after December 23, 1985, but before November 28, 1990, and the wetland values, acreage, and functions are mitigated by the producer through the requirements of subparagraphs (A), (B), (C), (D), (F), and (G) of paragraph (2).

(4) The action was authorized by a permit issued under section 1344 of Title 33 and the wetland values, acreage, and functions of the converted wetland were adequately mitigated for the purposes of this subchapter.

(g) Mitigation appeals

A person shall be afforded the right to appeal, under section 3843 of this title, the imposition of a mitigation agreement requiring greater than one-to-one acreage mitigation to which the person is subject.

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(h) Good faith exemption

(1) Exemption described

The Secretary may waive a person's ineligibility under section 3821 of this title for program loans, payments, and benefits as the result of the conversion of a wetland subsequent to November 28, 1990, or the production of an agricultural commodity on a converted wetland, if the Secretary determines that the person has acted in good faith and without intent to violate this subchapter.

(2) Eligible reviewers

A determination of the Secretary, or a designee of the Secretary, under paragraph (1) shall be reviewed by the applicable—

(A) State Executive Director, with the technical concurrence of the State Conservationist; or

(B) district director, with the technical concurrence of the area conservationist.

(3) Period for compliance

The Secretary shall provide a person who the Secretary determines has acted in good faith and without intent to violate this subchapter with a reasonable period, but not to exceed 1 year, during which to implement the measures and practices necessary to be considered to be actively restoring the subject wetland.

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(i) Restoration

Any person who is determined to be ineligible for program benefits under section 3821 of this title for any crop year shall not be ineligible for such program benefits under such section for any subsequent crop year if, prior to the beginning of such subsequent crop year, the person has fully restored the characteristics of the converted wetland to its prior wetland state or has otherwise mitigated for the loss of wetland values, as determined by the Secretary, through the restoration, enhancement, or creation of wetland values in the same general area of the local watershed as the converted wetland.

(j) Determinations; restoration and mitigation plans; monitoring activities

Technical determinations, the development of restoration and mitigation plans, and monitoring activities under this section shall be made by the National Resources Conservation Service.

(k) Mitigation banking

(1) Mitigation banking program

(A) In general

Using authorities available to the Secretary, the Secretary shall operate a program or work with third parties to establish mitigation banks to assist persons in complying with the provisions of this section while mitigating any loss of wetland values and functions.

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(B) Funding

Of the funds of the Commodity Credit Corporation, the Secretary shall use \$10,000,000, to remain available until expended, to carry out this paragraph.

(2) Applicability

Subsection (f)(2)(C) shall not apply to this subsection.

(3) Policy and criteria

The Secretary shall develop the appropriate policy and criteria that will allow willing persons to access existing mitigation banks, under this section or any other authority, that will serve the purposes of this section without requiring the Secretary to hold an easement, in whole or in part, in a mitigation bank.

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7 C.F.R. § 12.2

(a) General. The following definitions shall be applicable for the purposes of this part:

* * * * *

Wetland, except when such term is a part of the term “converted 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 does support a prevalence of such vegetation, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

Wetland determination means a decision regarding whether or not an area is a wetland, including identification of wetland type and size. A wetland determination may include identification of an area as one of the following types of wetland—

- (1) Artificial wetland is an area that was formerly non-wetland, but now meets wetland criteria due to human activities, such as:
 - (i) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water that is used primarily for livestock, fish production, irrigation, wildlife, fire control, flood control,

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cranberry growing, or rice production, or as a settling pond; or

(ii) A wetland that is temporarily or incidentally created as a result of adjacent development activity;

(2) Commenced-conversion wetland is a wetland, farmed wetland, farmed-wetland pasture, or a converted wetland on which conversion began, but was not completed, prior to December 23, 1985.

(3) Converted wetland is a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if:

(i) Such production would not have been possible but for such action, and

(ii) Before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland;

(4) Farmed wetland is a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and met the following hydrologic criteria:

(i) Is inundated for 15 consecutive days or more during the growing season or 10 percent

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of the growing season, whichever is less, in most years (50 percent chance or more), or

(ii) If a pothole, playa, or pocosion, is ponded for 7 or more consecutive days during the growing season in most years (50 percent chance or more) or is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

(5) Farmed-wetland pasture is wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the following hydrologic criteria:

(i) Inundated or ponded for 7 or more consecutive days during the growing season in most years (50 percent chance or more), or

(ii) Saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

(6) Not-inventoried land, is an area for which no evaluation of soils, vegetation, or hydrology has been conducted to determine if wetland criteria are met;

(7) Non-wetland is;

(i) Land that under natural conditions does not meet wetland criteria, or

(ii) Is converted wetland the conversion of which occurred prior to December 23, 1985, and on that date, the land did not meet wetland criteria but an agricultural commodity was not produced and the area was not managed for pasture or hay;

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(8) Prior-converted cropland is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

(i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and

(ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more); or

(9) Wetland, as defined above in this section.

Wetland delineation means outlining the boundaries of a wetland determination on aerial photography, digital imagery, other graphic representation of the area, or on the land.

* * * * *

Appendix I-1

7 C.F.R. § 12.30 NRCS responsibilities regarding wetlands.

(a) Technical and coordination responsibilities. In carrying out the provisions of this part, NRCS shall:

- (1) Oversee the development and application of criteria to identify hydric soils in consultation with the National Technical Committee for Hydric Soils and make available to the public an approved county list of hydric soil map units, which is based upon the National List of Hydric Soils;
- (2) Coordinate with the U.S. Fish and Wildlife Service and others in updating the National List of Plant Species that Occur in Wetlands;
- (3) Make or approve wetland determinations, delineations and certifications, functional assessments, mitigation plans, categorical minimal effects, and other technical determinations relative to the implementation of the wetland conservation provisions of this part;
- (4) Develop and utilize off-site and on-site wetland identification procedures;
- (5) Assure quality of service and determinations through procedures developed by NRCS in consultation with other Federal agencies that have wetland responsibilities;
- (6) Investigate complaints and make technical determinations regarding potential violations;
- (7) Develop a process at the state level, in coordination with the U.S. Fish and Wildlife Service, to ensure that these provisions are

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carried out in a technically defensible and timely manner, seek assistance as appropriate, and annually review the progress being made on implementation; and

* * * * *

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7 C.F.R. § 12.31 On-site wetland identification criteria.

* * * * *

(b) Hydrophytic vegetation. Hydrophytic vegetation consists of plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(1) A plant shall be considered to be a plant species that occurs in wetland if such plant is listed in the National Wetland Plant List, or (as determined by NRCS) successor publication. The publication may be accessed at: <http://rsgisias.crrel.usace.army.mil/NWPL/>.

(2) For the purposes of the definition of “wetland” in § 12.2 of this part, land shall be determined to have a prevalence of hydrophytic vegetation if:

(i) NRCS determines through the criteria specified in paragraph (b)(3) of this section that under normal circumstances such land supports a prevalence of hydrophytic vegetation. The term “normal circumstances” refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed; or

(ii) In the event the vegetation on such land has been altered or removed, NRCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions.

(3) The determination of prevalence of hydrophytic vegetation will be made in accordance

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with the current Federal wetland delineation methodology in use by NRCS at the time of the determination.

* * * * *

Appendix K-1

United States Department of Agriculture

NRCS
Natural Resources Conservation Service
P.O. Box 2890
Washington, D.C. 20013

December 1, 2010

NATIONAL FOOD SECURITY
ACT MANUAL (NFSAM)
180-CPA
Circular No. 6, Part 527, Appendix

SUBJECT: CPA-Food Security Act Wetland
Identification Procedures

* * * * *

(5-28) **FSA Variances.** - NRCS will use the date of December 23, 1985, when making a decision on the disturbance-based consideration portion of NC as it relates to the soils and hydrology diagnostic factors.

o (5-29) The terms “unauthorized activities” and “unauthorized discharges” in paragraph 71(a) are replaced with the term “Recent (post-12/23/1985) activities or actions.”

o (5-30) For vegetation, when using the Corps manual *adjacent vegetation* data source (Corps manual paragraph 73, STEP 3(d)), NRCS will collect vegetative data from a comparison site “in the local area on the same hydric soil map unit,” in accordance with 7 CFR section 12.31(b)(2)(ii). The comparison site should support hydrologic conditions that are similar to what

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existed on the altered site prior to the drainage. Long-term hydrologic monitoring, as referenced in the Corps methods, is not required. **Note:** The *adjacent vegetation* data source is only one of several options provided for making a decision on the hydrophytic vegetation factor in section F.

* * * * *