

# USDA Conservation Program Compliance: Pitfalls and Pointers

Grant Ballard, Ark Ag Law, PLLC

# USDA CONSERVATION PROGRAM COMPLIANCE:

## *PITFALLS AND POINTERS*

Presented by  
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## Overview

- Farm Businesses benefit from a variety of Federal Support Programs and Conservation Programs.
- Traditional Farm Programs are now tied to conservation compliance requirements and Agricultural Producers regularly participate in conservation programs.
- Conservation Programs have become a significant source of income to farm businesses.

## Key Considerations For Conservation Program Participants

- When you feed at the Federal Trough, you must know abide by the Government's rules.
  - *Participation in Conservation Programs requires a commitment by the Landowner and/or Producer.*
  - *Noncompliance with Federal Farm Program Requirements can be costly*

## The Important Conservation Programs

- *Conservation Reserve Program (CRP)*
- *Wetland Reserve Program (WRP)*
- *Conservation Stewardship Program (CSP)*
- *Food Security Act of 1985 (discourages the conversion of certain lands such as wetlands and highly erodible lands to cropland)*
  - Swampbuster
  - Sodbuster

## Conservation Reserve Program

- The Conservation Reserve Program (CRP)
  - *Voluntary Program for Landowners*
  - *Through CRP, **landowners** can receive annual rental payments and cost-share assistance to establish **long-term, resource conserving covers on eligible** farmland.*
  - *Producers can offer land for CRP general sign-up enrollment only during designated sign-up periods.*
  - *Environmentally desirable land devoted to certain conservation practices may be enrolled at any time under CRP continuous sign-up*

## Conservation Reserve Program

- The Commodity Credit Corporation (CCC) makes annual rental payments based on the agriculture rental value of the land, and it provides cost-share assistance for up to 50 percent of the participant's costs in establishing approved conservation practices.
- Participants enroll in CRP contracts for 10 to 15 years. (Native grasses on the plains, long leaf pine trees in the South.)

## Wetlands Reserve Program

- The Wetlands Reserve Program (WRP) is a voluntary landowner program.
- Its goal is to incentivize the protection, restoration, and enhancement of wetlands on private property.
- The USDA Natural Resources Conservation Service (NRCS) administers the program with funding from the Commodity Credit Corporation.

## Conservation Stewardship Program

- Through CSP, NRCS provides financial and technical assistance to eligible **producers** for implementing conservation practices on their land.
- Farmers must enter into 5 year contracts to receive two types of payments.
- Annual payment for installing and adopting additional activities, and improving, maintaining, and managing existing activities

## Conservation Stewardship Program

- To participate all of a farm operation's eligible land must be enrolled in the program, and the operator must have "effective control" of all eligible land for the duration of the contract through ownership or a long term lease.

## Food Security Act of 1985

- 1985 Farm Bill
- Enduring Conservation Programs were Created Including "Sodbuster" and "Swampbuster"
- The Highly Erodible Land Conservation and Wetland Conservation Compliance provisions (swampbuster) were introduced in the 1985 Farm Bill, and have been amended over time. The purpose of the provisions is to remove certain incentives to produce agricultural commodities on converted wetlands .

## Swampbuster

- Persons who plant an agricultural commodity on wetlands that were converted between December 23, 1985 and November 28, 1990 will be ineligible for program benefits in any year an agricultural commodity is planted unless an exemption applies.
- Persons who convert a wetland making production of an agricultural commodity possible after November 28, 1990, will be ineligible for program benefits until the functions of the wetland that was converted is mitigated, unless an exemption applies.

## Sodbuster

### **HEL Cropland with a Prior Cropping History**

#### **Substantial Reduction in Soil Erosion:**

- A conservation system must provide for a substantial reduction in soil erosion from the "pre-plan" level (the condition that existed before conservation measures were applied). The conservation system must include all treatments and measures needed to meet the HELC requirements, including treatment required to control sheet and rill, wind, and ephemeral and classic gully erosion.
- **A Substantial Reduction in Soil Erosion is defined as:**  
Generally, a 75% reduction of the potential erodibility (PE), not to exceed two (2) times the soil loss tolerance (T) level for the predominant highly erodible soil map unit in the highly erodible field.

## Sodbuster

- **HEL Cropland Broken out of Native Vegetation (Sodbuster) - No Substantial Increase in Soil Erosion:**
  
- A conservation system must provide for **No** substantial increase in soil erosion from the "pre-plan" level (the condition that existed before conservation measures were applied). The conservation system must include all treatments and measures needed to meet the HELC requirements, including treatment required to control sheet and rill, wind, and ephemeral and classic gully erosion.
  
- **A Substantial Increase in Soil Erosion is defined as:**  
A substantial increase in soil erosion is defined as any soil erosion level that is greater than the sustainable level (soil loss tolerance) – (T) of the predominant HEL soil mapping unit in the highly erodible field.

## Common Compliance Issues

- Notice of Transfer for Land under Contract
  
- AGI Requirements
  
- Payment Limitations
  
- Use of Land by owner (WRP/CRP)
  
- Wetland Determinations by NRCS



## Land Transfer Issues

- Balfour Land Co. , L.P. v United States, 2009 WL 1796068 (M.D. Ga.):
  - The court upheld FSA's decision to cancel a CRP contract and require the landowner to refund all annual rental payments and to pay liquidated damages because the landowner had sold the property under the CRP contract and had failed to make the new owner a successor to the contract within 60 days of the sale.
- Take Away- Notice is Required

## Payment Limitations

- Payment Limits
  - CRP \$50,000
  - CSP \$200,000.00

## Payment Limitations

- The CSP payment limitation is \$40,000 per person per year and \$200,000 per person for any 5 year period. General partnerships have two limits for a total of \$80,000 and \$400,000 regardless of the number of partners in the partnership.
  
- The rules are different for the Conservation Reserve Program regarding payment limits for a partnership.

## Land Use Restrictions

- Obviously, there are restrictions on land enrolled in a conservation program. However, your Clients will not always recognize this fact.
  - *WRP Example*
  
- Be Mindful of limitations at the time of enrollment.

## Land Use Restrictions

- Failure to Implement Conservation Plan
  - *NAD Case No.: 2016W000529*
  - *At issue was the requirement that a CRP participant conduct “mid-cover management” as scheduled in a management plan developed for the participant’s CRP contract.*
  - *Failure to Implement the Plan is a Breach of Contract*

## Wetland Determinations

- The failure to appeal Wetland Determinations by NRCS can prove costly.
  - *Bass v. Vilsack, No. 14-1017, 2014 U.S. App. LEXIS 24633 (4th Cir. Dec. 31, 2014).*
  - *Wetland Determinations are final if not timely appealed.*

## Technical Compliance Issues

- **Wyatt Estate v. Vilsack**, 2010 WL 2985981 (D. Kansas):
- FSA denied Plaintiffs permission to participate in the CRP program because Plaintiffs failed to file all the required paperwork by the deadline. The NAD Hearing Officer upheld the County and State Committee decisions.
- The court held that the Plaintiffs failed to meet their burden of proving that the final agency action was arbitrary and capricious.

## Technical Compliance Issues

- System for Award Management (SAM) registration requirement.
  - *NAD Case No. 2015W000319*
  - *A Joint Venture was held ineligible to participate in the Conservation Stewardship Program (CSP) because it did not register in the System for Award Management (SAM) as required by contract. Appellant appealed NRCS's decision to the National Appeals Division (NAD). The NAD Administrative Judge determined that NRCS did not err when it declined to award Appellants' joint venture a CSP contract. (Equitable Relief later granted).*

# Conclusion

- Thank you
- Questions?

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UNITED STATES DEPARTMENT OF AGRICULTURE  
OFFICE OF THE SECRETARY  
NATIONAL APPEALS DIVISION  
DIRECTOR REVIEW DETERMINATION

In the Matter of )  
)  
XXXXX )  
XXXXX )  
Appellants ) Case No. 2015W000319  
)  
and )  
)  
NATURAL RESOURCES )  
**CONSERVATION** SERVICE )  
Agency )

**Introduction**

This appeal involves a dispute between XXXXX and XXXXX (Appellants) and the Natural Resources **Conservation** Service (NRCS) that arose when NRCS determined that Appellants' joint venture is ineligible to participate in the **Conservation Stewardship Program** (CSP) because it did not meet the System for Award Management (SAM) registration requirement.<sup>[1]</sup> Appellant appealed NRCS's decision to the National Appeals Division (NAD). After holding a hearing, a NAD Administrative Judge determined that NRCS did not err when it declined to award Appellants' joint venture a CSP contract.<sup>[2]</sup> Appellants then filed this request for Director review, requesting that I exercise my equitable relief authority to require NRCS to accept their CSP contract application. Based on my review of the entire record, I uphold the Administrative Judge's decision, and I grant Appellants' request for equitable relief.

**Issue in This Case**

The issue on Director review is whether exercise of my equitable relief authority under 7 U.S.C. § 6998(d) is warranted in this case. To resolve this issue, I must determine whether Appellants, despite failing to comply fully with the requirements of the CSP **program**, either detrimentally relied on the advice of an authorized agency official, or made a good faith effort to comply with the requirements of the **program** under circumstances that warrant equitable relief. See 7 U.S.C. § 7996(b)(1) and (2).

**Background**

The purpose of the CSP **program** is to encourage producers to address resource concerns in a comprehensive manner by undertaking additional **conservation** activities and by improving, maintaining, and managing existing **conservation** activities. Through the CSP **program**, NRCS provides financial and technical assistance to participants for the **conservation** and improvement of the quality of soil, water, air, habitat, and other related natural resources, and for any similar **conservation** purpose as determined by NRCS. See 7 C.F.R. § 1470.1. NRCS provides annual payments under the **program** to compensate a participant for installing and adopting additional **conservation** activities, and improving, maintaining, and managing existing **conservation** activities. See 7 C.F.R. § 1470.24(a).

Appellants farm over 3,000 acres in XXXXX, XXXXX. In 2012, XXXXX applied as an individual for a CSP contract. In 2013, Appellants revised XXXXX CSP application so as to make their joint venture the applicant. In August 2014, NRCS informed Appellants that their joint venture was next in line to receive CSP funding.

NRCS informed Appellants that they had to complete at least one **conservation** enhancement project prior to September 30, 2014, for their joint venture to be eligible to participate in the CSP **program** for the 2014 fiscal year. Although completing the enhancement project would not guarantee their acceptance into the CSP **program**, NRCS advised them that not completing the project prior to the end of the fiscal year would exclude them from the **program**. Appellants heeded NRCS's advice and installed a variable frequency drive pump at a cost of \$2,700. At the end of August, NRCS directed its field office to proceed with a field verification of Appellants' land, and following its completion, NRCS determined that Appellants met the criteria for inclusion in the CSP **program**.

On September 15, 2014, NRCS informed Appellants that they had to obtain a **Dun** & Bradstreet Data Universal Numbering System (**DUNS**) number for their joint venture and complete the SAM registration before receiving funding.<sup>[3]</sup> Appellants responded immediately to NRCS's request. Meanwhile, NRCS accepted Appellants' joint venture into the CSP **program** and agreed to provide \$34,848 in annual cost share assistance for five years as part of their **conservation** plan. However, on September 30, NRCS informed Appellants that it would not approve their CSP contract because their joint venture did not maintain a current SAM registration. Nine days later, Appellants received notification that their SAM registration was complete.

Appellants appealed the NRCS decision to the FSA county committee. The county committee acknowledged the time and money that Appellants had spent as a result of their late acceptance into the **program** and the short notice they received to complete the SAM registration. Nevertheless, the county committee denied their appeal because NRCS does not obligate a contract unless the SAM registration is completed.

Appellants then appealed to the FSA state committee. The state committee found that NRCS did not notify Appellants of the SAM and **DUNS** registration requirement until two weeks after their application was selected for field verification. This two week delay, the state committee noted, could have made a difference in Appellants' ability to meet the requirement. The state committee further noted that NRCS should not have accepted their application without the SAM registration because an entity is required to be registered before submitting an application. Upon such circumstances, the state committee granted Appellants' appeal, finding that Appellants made a good faith effort to comply with the requirements of the CSP **program** and requested the NRCS State **Conservationist** to reinstate their contract.

The State **Conservationist** declined to reinstate Appellants' CSP contract on the grounds that NRCS did not have authority to enter into a contract with an entity that did not maintain a current SAM registration. The State **Conservationist** noted that the registration requirement was an applicant's responsibility and that the delay in notifying Appellants of the registration requirement did not change the underlying legal requirement. The state committee then informed Appellants of the State **Conservationist**'s decision not to reinstate their CSP contract and provided Appellants appeal rights if they believed the State **Conservationist**'s decision to be erroneous.

Appellants appealed the NRCS decision to NAD. Following a hearing, a NAD Administrative Judge upheld the NRCS's decision finding that Appellants' joint venture was ineligible to participate in the CSP **program** because it was not registered in the SAM management system at the time of contract approval. With respect to equitable relief, the Administrative Judge found:

Appellants acted promptly after learning of the [SAM] requirement. Through its accountant, the joint venture applied for the [SAM] registration on the same day that NRCS informed Appellants of the registration requirement. Through no fault of Appellants, the joint venture did not obtain the [SAM] registration until October 9, 2014. ... Moreover, given that the joint venture received its [SAM] registration nine days after the CSP deadline, it is almost a certainty that NRCS's two-week delay materially contributed to the joint venture's failure to timely obtain the [SAM] registration.

Other than obtaining the [SAM] registration, the joint venture fully complied with the CSP requirements. Moreover, the joint venture sought, and received, permission to implement a **conservation** enhancement prior to contract approval. Implementation of at least one enhancement prior to September 30, 2014 was required in order for the joint venture to remain eligible to participate

in the CSP for the 2014 fiscal year. Appellants spent approximately \$2,700 to install a variable frequency drive pump before September 30, 2014.

Appeal Determination at 6 (citations omitted).<sup>[4]</sup> Appellants then filed this request for Director review asking that I exercise my equitable relief authority and require NRCS to accept their CSP contract application. NRCS did not respond to Appellants' request for Director review.

### **Legal Authorities and Standard for Review**

I may grant equitable relief in cases involving covered **programs** administered by the Secretary of Agriculture in the same manner and to the same extent as provided to the Secretary under Section 26 of the Food and Agriculture Act of 1962. *See* 7 U.S.C. §§ 6998(d) and 7996(b). The CSP **program** is a covered **program** for equitable relief purposes. *See* 7 U.S.C. § 7996(a)(2)(A)(ii). Equitable relief may be appropriate if a participant, despite failing to comply fully with the requirements of a covered **program**, either detrimentally relied on the action or advice of an authorized agency representative, or made a good faith effort to comply fully with the requirements of the **program**. *See* 7 U.S.C. § 7996(b)(1) and (2).

### **Analysis**

On Director review, Appellants do not challenge the merits of the Administrative Judge's decision. Instead, they request that I exercise my authority to grant equitable relief. Therefore, I uphold the Administrative Judge's decision on the merits and focus solely on Appellants' request for equitable relief.

Appellants argue that NRCS failed to notify them of the **DUNS** number and SAM registration requirement in a timely and efficient manner. Appellants contend that if they had been made aware of the requirements in August, they would have met the requirements within the timeline. Request for Review at 1. Appellants claim that they worked diligently to meet the requirements and did so in a good faith effort to complete the process within the timeline provided.

Finally, Appellants suggest that they were treated disparately from other farmers.<sup>[5]</sup> Overall, Appellants request that I exercise my equitable relief authority and require NRCS to accept their CSP contract application and provide financial support for money expended on the contract and their attempt to resolve this dispute.

As stated above, when considering whether equitable relief is warranted in a particular case, I must determine whether a participant, despite failing to comply fully with the requirements of a covered **program**, either made a good faith effort to comply with the requirements of a covered **program** under circumstances that warrant equitable relief or whether the participant detrimentally relied on the action or advice of an authorized agency representative. *See* 7 U.S.C. § 7996(b).

In considering an appellant's request for equitable relief, I focus on whether the appellant made a good faith effort to comply with a **program**'s requirements. *See* 7 U.S.C. § 7996(b)(2). When assessing whether an appellant has made a good faith effort to comply with the requirements of a **program**, I focus on the specific efforts the appellant has undertaken to comply. *See* NAD Case No. 2013E000247 (Dir. Rev., May 30, 2013). Also relevant is whether the efforts expended by an appellant have advanced the objectives of the **program**. *See* NAD Case No. 2013W000586 (Dir. Rev., Oct. 29, 2014) (finding that an agency received a benefit when a participant maintained a **conservation** practice for seven years of the contract period). I further consider any factors that may have prevented an appellant from complying with a **program**'s requirements, including factors that may have been beyond an appellant's control.

In this case, Appellants fully complied with the requirements of the CSP **program** with the exception of their failure to complete their SAM registration before the close of the fiscal year. The record shows that Appellants' failure to comply with this requirement was due to factors beyond their control. NRCS delayed in notifying Appellants of the SAM and **DUNS** registration requirement, leaving them only two weeks in which to complete the registration before the end of the fiscal year on September 30, 2014.<sup>[6]</sup>



This case is similar to another recent case in which I granted equitable relief to a participant who did not maintain an active SAM registration at the time it submitted its application to renew its participation in the CSP **program**. In that case, NRCS did not advise the appellant of the registration and reporting requirements for federal financial assistance or note that such information was missing from its application at the time the application was filed. Despite the appellant's quick response to NRCS's **program** requirements, the appellant's SAM registration remained inactive as it awaited the assignment of a Commercial and Government Entity Code by the Defense Logistics Agency. Thus, for reasons that were beyond the appellant's control, it was unable to obtain the **program** payments to which it was otherwise entitled. I granted the appellant's request for equitable relief and ordered NRCS to accept the appellant's application to renew its participation in the CSP **program** as timely filed. *See* NAD Case No. 2015E000535 (Dir. Rev., March 10, 2016).

It is important to note there is no dispute that Appellants performed the tasks that they were advised to perform in order to participate in the CSP **program**. This resulted in the USDA receiving a benefit for which it has not had to pay. I have previously recognized in other NAD cases the inherent unfairness of denying a participant any payment when the agency has received the benefit from the participant's compliance with the requirements of the agency's **program**. *See, e.g.*, NAD Cases No. 2015W000165 (Dir. Rev., Dec. 10, 2015); *see also* NAD Case No. 2013W000586 (Dir. Rev., Oct. 29, 2014) (finding that an agency received a benefit when a participant maintained a **conservation** practice for seven years of the contract period).

In sum, I find that equitable relief is warranted because Appellants exercised good faith in carrying out the purposes of the **program** and failed to comply with the SAM registration requirement for reasons that were beyond their control. That the USDA received **programmatic** benefits as a result of Appellants' performance under the **program** contributes to my assessment that equitable relief is warranted in this case. Accordingly, I grant Appellants' request for equitable relief and order NRCS to accept their 2014 CSP contract application and provide **program** benefits that they are entitled to receive.

### Conclusion and Order

Based on the foregoing discussion, I uphold the Administrative Judge's determination. I also grant Appellants' request for equitable relief. NRCS shall accept Appellants' 2014 contract application to participate in the CSP **program** and provide **program** benefits that Appellants are entitled to receive.

/S/

\_\_\_\_\_  
Steven C. Silverman  
Director

05/26/2016

\_\_\_\_\_  
Date

[1] The Appeal Determination named the Farm Service Agency as the administrative agency in this appeal; however, NRCS issued the decision that was adverse to Appellants, and an NRCS representative participated in this appeal. Hearing Audio at 0:52-0:59.

[2] NAD's regulations provide that a Hearing Officer will adjudicate an appeal that a **program** participant files with NAD. *See* 7 C.F.R. § 11.8. In a memorandum dated November 25, 2014, I changed the working title of Hearing Officer to "Administrative Judge" for all adjudicative duties, including conducting hearing and issuing determinations under 7 C.F.R. Part 11. This change became effective on December 1, 2014.

[3] **Dun** & Bradstreet is a public company that provides a unique numeric identifier, referred to as a **DUNS** number, for business entities. *See* <http://www.dnb.com/>. The System for Award Management (SAM) is the official U.S. Government system that consolidates several federal procurement systems, including the Central Contractor Registration (CCR), into one system. *See* <https://www.sam.gov/>. In 2010, the Office of Management and Budget (OMB) required applicants for Federal financial assistance awards to have a **DUNS** number and maintain a current registration in the CCR. *See* 75 Fed. Reg. 55671 (September 14, 2010).

[4] NAD's enabling statute confers authority to the Director to grant equitable relief in the same manner and to the same extent as such authority is provided to the Secretary in accordance with 7 U.S.C. § 7996 and other laws. *See* 7 U.S.C. § 6998(d). The Administrative Judge develops a record from which the Director will determine whether equitable relief should be granted. *See* 7 C.F.R. § 11.8(c)(5)(ii).

[5]

I do not address Appellants' argument of disparate treatment as the record consists solely of Appellants' case and not of other CSP applicants.

[6] The NRCS State **Conservation**ist determined that completing the SAM registration was Appellants' responsibility. The record, however, shows that NRCS was in possession of Appellants' CSP application throughout the 2014 fiscal year and approved it without addressing a **DUNS** number or SAM registration requirement until two weeks prior to the close of the fiscal year. It is unreasonable to expect participants to have a better understanding of **program** requirements than the agency's own officials. *See* NAD Case No. 2014W000121 and 2014W000122 (Dir. Rev., June 12, 2014) (finding that it was unreasonable to expect a participant to have a better understanding of **program** requirements when agency misaction was a factor that led to the participant's failure to comply with those requirements).

**STEVE BASS; TERRY H. BASS,**  
**Plaintiffs - Appellants,**  
**v.**  
**TOM VILSACK, Secretary United States**  
**Department of Agriculture, Defendant -**  
**Appellee.**

**No. 14-1017**

**UNITED STATES COURT OF APPEALS**  
**FOR THE FOURTH CIRCUIT**

**Argued: October 30, 2014**  
**December 31, 2014**

**UNPUBLISHED**

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Malcolm J. Howard, Senior District Judge. (7:11-cv-00239-H)

Before SHEDD, AGEE, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

**ARGUED:** Thomas A. Lawler, LAWLER & SWANSON, Parkersburg, Iowa, for Appellants. Matthew Fesak, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Thomas G. Walker, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

The "Swampbuster" provision of the Food Security Act, 16 U.S.C. § 3821, prohibits persons who participate in programs administered by the United States Department of Agriculture ("USDA" or "the agency") from converting wetlands to

agricultural use without authorization. Appellants Steve and Terry Bass (collectively "the Basses") seek judicial review of a final decision of the USDA finding them in violation of this provision. Because we agree with the district court that the agency conformed with controlling statutes and did not commit a clear error of judgment in its decision, we affirm.

I.

This case centers around a piece of farmland in Sampson County, North Carolina, referred to as Farm 3188, Tract 8355, Field UN2 ("Field UN2"). Joe Bass, the original owner of this tract, filed an application in 1994 with the USDA seeking a wetland determination in anticipation of clearing Field UN2 for agricultural crop production. The National Resources Conservation Service ("NRCS"), the division of the USDA responsible for making wetland determinations, concluded that

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Field UN2 contained approximately 38 acres of wetlands.<sup>1</sup> Joe Bass was properly notified of this determination and informed that clearing, draining, or altering these areas to make possible the planting of a commodity crop would render him ineligible for most USDA farm programs. Joe Bass took no further administrative action regarding the NRCS determination, which thus became final.

In 2004, Joe Bass again filed an application seeking to convert Field UN2 to farmland, falsely representing that he had not "previously received a wetland determination or delineation on this tract from [NRCS.]" (J.A. 103.) Apparently unaware of the 1994 wetland determination, an NRCS wetland specialist completed an on-site inspection of Field UN2, which resulted in another NRCS wetland determination, issued March 23,



2005, concluding that the tract contained at least 28 acres of wetlands.

NRCS informed Joe Bass that this determination would become final unless he requested further review or mediation within thirty days. However, the NRCS letter did not include, as required by USDA regulations, a notice that he could also appeal to the USDA's National Appeals Division ("NAD"). This defect

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rendered the 2005 determination procedurally deficient. Nonetheless, Joe Bass did not pursue an appeal and he later died. His interest in Field UN2 passed to the Basses.

NRCS was required and did notify the U.S. Army Corps of Engineers ("USACE") of its 2005 wetlands determination, which prompted the USACE to issue a letter to the Basses advising that it might also have jurisdiction over Field UN2 under the Clean Water Act. The USACE letter recommended having the property inspected. The Basses then hired a private consultant, the Land Management Group, Inc. ("LMG"), to provide wetland mapping for the tract. LMG prepared a report finding no wetlands on Field UN2, but its evaluation did not meet any of NRCS's requirements for determining the presence of wetlands under the Food Security Act.

In response to the LMG report, the USACE conducted a site visit and found waters of the United States over which it had jurisdiction along the southern boundary of Field UN2. The USACE then notified the Basses that this determination only "applies to Section 404 of the Clean Water Act," and that it "may or may not be valid for identifying wetlands or waters subject to the rules of the Food Security Act." (J.A. 434.)

Without contacting or seeking any information from NRCS, the Basses

drastically altered Field UN2 by removing the natural forest and woody vegetation through logging, stump removal,

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drainage, and disking to prepare the tract for agricultural use. The Basses sought a cropland acreage determination from the USDA, which triggered an investigation by NRCS to determine if the Food Security Act was violated by the alteration of the tract.

NRCS conducted an on-site inspection and determined that Field UN2 contained wetland hydrology prior to its alteration. As part of its investigation, NRCS also examined whether the Basses could qualify for a minimal effects exemption under 16 U.S.C. § 3822(f), which permits alteration of a wetland if the changes have only a "minimal effect on the functional hydrological and biological value of the wetlands in the area[.]" *Id.* The exemption did not apply because NRCS determined that the effects of the wetland conversion were greater than minimal.

NRCS then worked with the Basses to determine the feasibility of mitigating the converted wetlands on Field UN2, but those efforts proved unsuccessful. Consequently, NRCS issued a final technical determination in June 2010 finding that Field UN2 contained at least 13.5 acres of converted wetlands. The Basses were then declared ineligible for programs or benefits administered by the USDA.

The Basses timely filed an administrative appeal with the NAD, which held a lengthy evidentiary hearing. In a written

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decision, the NAD affirmed NRCS's final determination that Field UN2 contained converted wetlands in violation of 16 U.S.C. § 3821. The hearing officer found that NRCS had met its burden of proving that wetlands

were present on Field UN2 prior to its alteration, and it now contained at least 13.5 acres of converted wetlands. In addition, the hearing officer found NRCS's evidence and testimony more credible, specifically observing that the Basses' private consultant did not complete its wetland survey in compliance with the applicable guidelines.

Pertinent here, the Basses attempted to argue that no wetlands existed on Field UN2 prior to their conversion activities. The hearing officer found this issue barred under 7 C.F.R. § 12.30(c)(4), which provides that once a final wetland determination has been made any appeal regarding a potential conversion is "limited to the determination that the wetland was converted[.]" *Id.* Noting the absence of any evidence that NRCS had rescinded its 1994 determination or that the property's prior owner had appealed that determination, the hearing officer precluded the Basses from presenting evidence that the property did not contain wetlands.

The Basses then filed this lawsuit seeking judicial review of the USDA's final action. Their complaint raised several claims, but only two are now at issue on appeal: (1) did the NAD hearing officer err by limiting their appeal in the manner noted

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above; and (2) did NRCS incorrectly perform a minimal effects determination in compliance with 16 U.S.C. § 3822(f)?

The district court granted the USDA's motion for summary judgment, finding no error in the hearing officer's decision to preclude the Basses from re-litigating the question of whether wetlands ever existed on Field UN2. Specifically, the court held:

[T]here was at least one valid prior certified wetland determination in existence at the time of the plaintiffs'

conversion of Field UN2. In such circumstances, the review of the agency's 2010 determination that conversion occurred is properly limited to that question of conversion on appeal before the agency, and thus to this court as well. . . .

. . . .

. . . The agency reasonably interpreted its own regulations by limiting the scope of review to whether a conversion took place, thus the court must defer to the agency.

(J.A. 62-64.) The district court also held that it lacked jurisdiction over the minimal effects claim because the Basses never pursued this argument during the administrative process and thus "failed to exhaust their administrative remedies[.]" (J.A. 64.)

The Basses timely appealed, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

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II.

We review the district court's ruling on summary judgment de novo. *See Holly Hill Farm Corp. v. United States*, 447 F.3d 258, 262 (4th Cir. 2006). However, this Court, like the district court, reviews the underlying decision from the USDA pursuant to the Administrative Procedures Act ("APA"), under which the agency's decision must be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A); *see also Holly Hill Farm Corp.*, 447 F.3d at 262-63

(applying APA judicial review to a final determination of the NAD). Following this narrow standard, we are "not empowered to substitute [our] judgment for that of the agency." Md. Dep't of Human Res. v. U.S. Dep't of Agric., 976 F.2d 1462, 1475 (4th Cir. 1992) (citation and internal quotation marks omitted). Rather, our task is "to determine whether the agency conformed with controlling statutes," and "whether the agency has committed a clear error of judgment." Id. (citations and internal quotation marks omitted).

A.

The NAD hearing officer limited the Basses' appeal pursuant to 7 C.F.R. § 12.30(c)(4), which provides that if a prior wetlands determination exists for purportedly converted

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property, any administrative appeal is limited to the issue of whether wetlands were converted. After remarking that the 2005 wetland determination was deficient, the hearing officer found that the 1994 determination was a final, certified decision for purposes of this regulation.

The Basses argue that the NAD hearing officer contravened 16 U.S.C. § 3822(a)(4) in reaching that conclusion, citing the statutory language that provides "[a] final [wetland] certification . . . shall remain valid and in effect . . . until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). Relying on this provision, the Basses contend that the 1994 wetland determination was made void when Joe Bass requested a new wetland determination in 2004. They conclude that, because the 1994 determination was invalid at the time of their appeal, "7 C.F.R. § 12.30(c)(4)'s limitation [could] not apply [and] [t]he hearing officer's

ruling to the contrary is an error of law." (Opening Br. 21.)

We find this argument to lack merit. By its plain terms, § 3822(a)(4) ends the validity of an existing wetland determination only when an aggrieved landowner "requests review" of that decision. We agree with the USDA's position (regardless of the deference applied) that Joe Bass's actions in 2004 were

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not a request for review, making this provision inapplicable.<sup>2</sup> Accordingly, the NAD hearing officer did not act contrary to law in concluding that the 1994 determination was a valid wetland decision that limited the Basses' appeal.

Furthermore, even assuming the hearing officer erred in the manner alleged, the result in this case would be unaffected because the evidence was overwhelming that Field UN2 contained wetlands prior to its conversion. Any error on the part of the USDA was therefore harmless, and the Basses' argument fails. See Ngarurih v. Ashcroft, 371 F.3d 182, 190 n.8 (4th Cir. 2004) (noting that the harmless-error doctrine is available in judicial review of administrative actions).

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B.

The Basses next claim that NRCS did not correctly perform a minimal effects determination under 16 U.S.C. § 3822(f). The district court determined it lacked jurisdiction to adjudicate this claim because the Basses never raised it during their administrative appeal. While we agree that the Basses are foreclosed from pursuing this claim on appeal, we reach that result on a different basis than the district court.

The Supreme Court has long held that it is inappropriate for courts to consider

arguments not developed before an administrative agency because doing so usurps the agency's function. See Woodford v. Ngo, 548 U.S. 81, 88-91 (2006); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 36-37 (1952); see also Pleasant Valley Hosp., Inc. v. Shalala, 32 F.3d 67, 70 (4th Cir. 1994) ("As a general matter, it is inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved."). As explained by the Supreme Court,

orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . [C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

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L.A. Tucker Truck Lines, Inc., 344 U.S. at 37.

In Sims v. Apfel, 530 U.S. 103 (2000), the Supreme Court further explained that the need for issue exhaustion is, first and foremost, a question of statutory construction and that agencies generally have the power to adopt regulations requiring issue exhaustion. Id. at 107-08. Where the relevant statutes and regulations do not clearly require exhaustion, however, a court-imposed issue exhaustion requirement may be appropriate. Id. at 108. "[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." Id. at 109. Where the parties are expected to fully develop the dispute during the course of an adversarial

proceeding, the rationale for requiring issue exhaustion is at its strongest. Id. at 110. Conversely, where an administrative proceeding is not adversarial, the reasons for requiring issue exhaustion are much weaker. Id.

There is no statute or regulation that mandates issue exhaustion in this case. See Mahon v. U.S. Dep't of Agric., 485 F.3d 1247, 1256 (11th Cir. 2007) ("[T]here is no express issue exhaustion requirement in the NAD regulations[.]"). However, the regulations that describe the review process before the USDA reflect that this process is adversarial and that issue exhaustion should be required. Id. ("The NAD's procedures

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provide an adversarial system in which parties are given a full and fair opportunity to make their arguments and present evidence, and, as a corollary, to attempt to challenge the arguments and evidence presented by the agency."); see also Downer v. U.S. Dep't of Agric., 97 F.3d 999, 1005 (8th Cir. 1996) (noting that a general exhaustion of remedies is insufficient in the context of a wetlands determination, and specific issue exhaustion is required). Indeed, every court to address this question has found that issue exhaustion applies to similar proceedings before the USDA. See, e.g., Ballanger v. Johanns, 495 F.3d 866, 868-71 (8th Cir. 2007); Care Net Pregnancy Ctr. of Windham Cnty. v. U.S. Dep't of Agric., 896 F. Supp. 2d 98, 110 (D.D.C. 2012). Finding these cases persuasive, we agree that an issue exhaustion requirement applies.

The Basses had ample opportunity to raise the minimal effects claim at each phase of the administrative proceeding and before the NAD, yet they failed to do so. Instead, the Basses focused their administrative appeal on arguing that Field UN2 did not contain wetlands prior to its conversion. This course of action denied the USDA an opportunity to

exercise its discretion and expertise in considering any minimal effects claim. On these facts, preclusion is appropriate. See Mahon, 485 F.3d at 1256-57 (precluding claims raised for the first time

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in federal court and never presented to the NAD during the plaintiffs' administrative appeal).

Although the district court incorrectly viewed the foregoing as a jurisdictional bar, see Pleasant Valley Hosp., Inc., 32 F.3d at 70 ("[T]his general rule is not a strict jurisdictional bar, it is a prudential one[.]"), it was ultimately correct in its decision to forego review of this claim. Accordingly, we find the district court's decision without reversible error.<sup>3</sup>

III.

For the foregoing reasons, the judgment of the district court is

**AFFIRMED.**

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Footnotes:

<sup>1</sup> NRCS was then known as the Soil Conservation Service. For ease of reference, we refer to this division and its predecessors as NRCS.

<sup>2</sup> Citing to SEC v. Chenery, 332 U.S. 194 (1947), the Basses contend that this argument is unavailable because it was not relied upon by the NAD hearing officer in the administrative decision below. While generally a reviewing court may only judge the propriety of an agency decision on the grounds invoked by the agency, see id. at 196-97, the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute. See N.C. Comm'n of Indian

Affairs v. U.S. Dep't of Labor, 725 F.2d 238, 240 (4th Cir. 1984) ("We do not . . . perceive there to be a Chenery problem in the instant case because the question of interpretation of a federal statute is not 'a determination or judgment which an administrative agency alone is authorized to make.'" (citation omitted)).

<sup>3</sup> Apparently forecasting this hurdle, the Basses argue that plain error would result if we decline to consider this claim. Under this doctrine, as applied in our civil jurisprudence, we will correct an error not raised previously if it is "plain" and our refusal to consider it would result in a miscarriage of justice." Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 318 (4th Cir. 1988) (citation omitted). Plain error analysis, in the noncriminal context, is very rarely available, and then only to correct particularly egregious errors. See In re Under Seal, 749 F.3d 276, 285-86 (4th Cir. 2014). It is not at all evident that NASD erred in its minimal effects determination in the manner alleged. Moreover, this type of error does not constitute a "miscarriage of justice" as defined in our case law. See Holly Hill Farm Corp., 447 F.3d at 268; see also In re Celotex Corp., 124 F.3d 619, 631 (4th Cir. 1997). We therefore find this doctrine inapplicable.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION

No. 7:11-CV-239-H

TERRY H. BASS & STEVE BASS, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
 )  
TOM VILSACK, Secretary, )  
United States Department of )  
Agriculture, )  
 )  
Defendant. )

**ORDER**

This matter is before the court on defendant's motion for summary judgment. Plaintiffs have responded, and the parties have also provided the court with supplemental briefing as ordered. The time for further filing has expired, and this matter is ripe for adjudication.

**BACKGROUND**

This is an action for judicial review of a final administrative decision of the United States Department of Agriculture ("USDA"). Plaintiffs are owners of real property located in Sampson County, North Carolina, which the USDA refers to as Sampson Co. Farm 3188, Tract 8355, Field UN2 ("Field UN2"). Between 1994 and 2010, the USDA's Natural Resources Conservation Service ("NRCS") and its predecessor agency issued

a number of preliminary and final determinations regarding the existence of wetlands on Field UN2. Most recently, on June 21, 2010, NRCS made a Certified Wetland Determination and Final Technical Determination that Field UN2 contains 13.5 acres of converted wetlands. Plaintiffs appealed NRCS's Final Technical Determination to the USDA's National Appeals Division.

Following a hearing held over a period of four days, Glenna J. Sheveland, National Appeals Division Hearing Officer, upheld NRCS' 2010 wetland determination, concluding that plaintiffs had failed to meet their burden of proving that the NRCS' Final Technical Determination was erroneous. In reaching this conclusion, Hearing Officer Sheveland determined that a final certified wetland determination existed prior to NRCS' 2010 determination - that in 1994 the agency found the existence of 28 acres of wetlands on Field UN2. Citing the absence of any evidence that NRCS had rescinded its 1994 determination or that the property's prior owner had appealed the determination, Hearing Officer Sheveland further determined that plaintiffs were precluded from presenting any evidence to support their position that the property did not contain wetlands. R. 161 (containing the Agency Decision and citing 7 C.F.R. § 12.30(c)(4)).

Plaintiffs filed complaint in this court on November 18, 2011, seeking review of the final administrative decision.

Defendant answered the complaint [DE # 13] and filed a transcript of the administrative record in this case, which is lodged under docket number 7:12-MC-2-H. Additionally, plaintiffs filed a brief in support of petition for judicial review [DE # 29], to which defendant incorporated its response in defendant's memorandum in support of the instant motion for summary judgment [DE # 33]. Plaintiffs responded to the motion for summary judgment [DE # 34] and filed a reply to defendant's response regarding the petition for judicial review [DE # 35]. Upon review of the case, on May 3, 2013, the court ordered supplemental briefing on the validity of NRCS's 1994 determination. In response to the order, plaintiffs submitted a supplemental brief [DE # 38] and defendant responded [DE # 40].

#### **STATEMENT OF THE FACTS**

Field UN2 was originally owned by Mr. Joe Bass. Upon his death, it was inherited by plaintiffs. In or around 1994,<sup>1</sup> Joe Bass filed a Form AD-1026 to determine if there were wetlands present on Field UN2, which was forwarded to NRCS. R. 152. NRCS made a determination on February 7, 1994, that Field UN2 contained 38 acres of wetland. R. 152, 1375-80. That determination stated: "Before clearing, draining or altering these areas for any use . . . complete a new Form AD-1026.

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<sup>1</sup> The record is unclear as to precisely when Joe Bass first filed this form, presumably because it was referred to NRCS by a local agency. See R. 152, 1362, 1376.

Failure to do so could result in loss of eligibility for USDA benefits for all the land you farm." R. 1376. Joe Bass was also notified in the 1994 determination of his right to appeal. R. 1376.

On December 15, 2004, Joe Bass filed another Form AD-1026 along with a Form NRCS-CPA-38, again seeking to convert Field UN2 to farmland. R. 1381-85. Form NRCS-CPA-38 asked if Joe Bass "previously received a wetland determination or delineation on this tract from [NRCS]," and the "NO" box was marked. R. 1383. These request forms were referred to NRCS, which sent a resource wetland specialist to complete an on-site inspection of Field UN2 on February 2, 2005.

The on-site inspection resulted in a preliminary technical determination, which NRCS issued on March 23, 2005, concluding that Field UN2 contained at least 28 acres of wetlands. R. 1386-1400. Joe Bass was provided with documentation as to the basis for the agency's determination, including the type of soil and vegetation which indicated wetlands, and several maps, which corresponded to markers on the property, delineating where wetlands and non-wetlands were located.

As to his appeal rights, Joe Bass was informed that "this preliminary technical determination will become final within 30 days unless you request . . . either [a field visit] or [mediation]." Joe Bass was further informed that once the

determination became final, it "may be appealed to the Farm Service Agency Sampson County committee." R. 1388. However, Joe Bass was not informed, as required by the agency's own regulations, that he could also appeal the final technical determination to the USDA's National Appeals Division. Joe Bass took no further action as to the 2005 determination. The United States Army Corps of Engineers ("COE") was also notified of this determination, as it makes wetland determinations pursuant to the Clean Water Act. NRCS has exclusive responsibility for wetland determinations under the Food Security Act, which is at issue in this case.<sup>2</sup>

In 2005 Joe Bass died and his estate passed to plaintiffs. On September 11, 2006, plaintiff Steve Bass hired a private consultant to provide "[p]reliminary wetland mapping" of the property at issue. R. 3135. By November 2007, the private consultant had prepared a report finding no wetlands on the property, which it sent to COE. R. 3136-58. The consultant dug one data point<sup>3</sup> from which he recorded information and formed the conclusion that no wetlands existed on the property. The private consultant's review did not meet any of NRCS's requirements (laid out in the National Food Security Act Manual)

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<sup>2</sup> Plaintiffs were aware of this division of responsibility between NRCS and COE. See R. 155.

<sup>3</sup> At some point plaintiffs contended to NRCS that the consultant used more than one data point, but there is no evidence in the record to support that assertion, and it appears to be abandoned at this stage. See R. 155.

for determining the presence of and delineating the boundaries of wetlands. R. 155

At some point between August 2007 and January 2008, without contacting or seeking any information from NRCS, plaintiffs drastically altered Field UN2. It had been covered by natural forest and woody vegetation, in no condition to support agricultural production. R. 1376-80, 1410-17. Plaintiffs then logged, removed stumps, root raked, improved drainage and channels, and disked Field UN2 in order to prepare the area for agricultural use. R. 1467, 1874. In fact, plaintiffs planted corn on the property during crop year 2008. R. 158.

In response to the consultant's report, COE visited the property in January 2008 and found waters of the United States, which it had jurisdiction to regulate pursuant to the Clean Water Act, along the southern boundary of the tract. R. 3159-66. COE's inspection did not follow the guidelines for making a wetland determination in the National Food Security Act Manual. R. 155. COE followed its determination with a letter to plaintiff Steve Bass, notifying him that this determination "applies to Section 404 of the Clean Water Act," and advising him that it "may or may not be valid for identifying wetlands or waters subject to the rules of the Food Security Act." R. 1856. Plaintiff Steve Bass was further advised in that letter to "contact [NRCS] for their determination regarding your

eligibility for the USDA program benefits for agricultural lands." R. 1856.

In January 2008, plaintiff Steve Bass requested a cropland acreage determination for Field UN2 from the Sampson County Farm Services Agency, which triggered an investigation by NRCS. NRCS conducted an on-site field investigation on January 31, and February 1, 2008, to determine if noncompliance with the Food Security Act had occurred.<sup>4</sup> R. 731. NRCS made initial determinations in February 2008, but then rescinded those determinations and decided to perform another review of the property. R. 1484-87. In April 2008, NRCS conducted another on-site field review to determine the extent of the converted wetland, in accordance with the National Food Security Act Manual.

NRCS worked with plaintiffs to determine the feasibility of mitigating the converted wetland at Field UN2, but found plaintiffs did not meet any exemptions, pursuant to the regulations, that would allow plaintiffs to continue to receive benefits from USDA. R. 158.

NRCS issued preliminary technical determinations finding converted wetland at Field UN2 in 2008 and 2009. Finally, on June 21, 2010, NRCS made its final technical determination that

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<sup>4</sup> NRCS informed plaintiff Steve Bass that the 2005 determination was still in place.

Field UN2 contained at least 13.5 acres of converted wetland, which plaintiffs appealed to the National Appeals Division. NRCS's determination was upheld on agency appeal, and is now before the court.

### COURT'S DISCUSSION

#### **I. Standard of Review**

Summary judgment is appropriate pursuant to Rule 56 of the Federal Rules of Civil Procedure when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Summary judgment is not a vehicle for the court to resolve disputed factual issues. Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court



reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. Anderson, 477 U.S. at 249.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. Anderson, 477 U.S. at 247-48. The evidence must also be such that a reasonable jury could return a verdict for the non-moving party. Id. at 248. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in ruling on this motion. Faircloth, 837 F. Supp. at 125.

Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, a person "adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. "The reviewing court shall . . . hold unlawful and set aside any agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In determining whether agency action violates § 706(2)(A), we perform only the limited, albeit important, task of reviewing

agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment.” Holly Hill Farm Corp. v. United States, 447 F.3d 258, 263 (4th Cir. 2006) (internal quotation marks omitted). “Although this inquiry into the facts is to be searching and careful, the ultimate 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).

## **II. Analysis**

The “Swampbuster” provision of the Food Security Act of 1985 prohibits farmers who participate in USDA programs from converting wetlands and then producing an agricultural commodity on those converted wetlands. 16 U.S.C. § 3821(a). In 1990, Congress concluded that this law did not sufficiently discourage inappropriate agricultural uses of valuable wetlands. Accordingly, ineligibility for USDA benefits was extended to “any person who in any crop year . . . converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland.” 16 U.S.C. § 3821(c). Ineligibility for USDA benefits continues for all land the farmer controls until the wetland is restored

or the loss mitigated. 16 U.S.C. §§ 3821(c), 3822(i).

NRCS is responsible for determining whether any portions of a farmer's land are subject to Swampbuster restrictions. This responsibility involves determining whether any agricultural lands involved in an application are wetlands and delineating the specific boundaries of any wetlands that are present. See 7 C.F.R. § 12.2(a). Wetland is defined by statute as 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.

16 U.S.C. § 3801(a)(27).

Review of a wetlands determination may only be requested if "a natural event alters the topography or hydrology of the subject land . . . or if NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6). Once a wetlands determination has been made, and the wetlands have been converted for agricultural use, NRCS must still make another on-site determination that such a conversion has been made before USDA can withhold benefits. On appeal, that decision to withhold benefits "shall be limited to the determination that the wetland was converted," instead of re-assessing whether any wetlands ever existed on the property.

7 C.F.R. § 12.30(c)(4).

In opposition to summary judgment, plaintiffs argue that: (1) NRCS's final decision is not in accordance with law because 16 U.S.C. § 3822(a)(4) requires treating the 1994 determination as invalidated by the 2005 determination; (2) NRCS's substantive position is contrary to law because the requirements for wetlands are unmet; and (3) NRCS's refusal to consider a minimal effects determination is contrary to 16 U.S.C. § 3822(f)(1). In sum, plaintiffs are seeking a new determination, from the agency or this court, that wetlands were never located on their property in order to receive benefits from the USDA.

"A final certification . . . shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). Plaintiffs argue that when Joe Bass began the application process that resulted in the 2005 determination, he was actually requesting review of the 1994 determination. Defendant responds that even if the 1994 determination was invalid, reliance on it instead of solely the 2005 determination would be immaterial to the outcome of this case.

The 1994 determination found wetlands and was not appealed, the 2005 determination found wetlands and was not appealed, and finally the 2010 determination at issue here found conversion of

wetlands, which was affirmed on appeal by the agency. NRDC's review on appeal of that 2010 determination was limited to whether a conversion occurred because wetlands had already been found on the property, and it is difficult to ascertain whether wetlands existed on a property after it has been changed to accommodate crops.

Procedurally, defendant admits NRDC failed to notify Joe Bass of both avenues of appeal of available to him in regards to the 2005 determination. The 1994 determination contained no such notification error. Thus, when applying the regulations, the National Appeals Division of USDA relied on the 1994 determination, which plaintiffs now argue was invalidated by the 2005 determination.<sup>5</sup>

However, there was at least one valid prior certified wetland determination in existence at the time of the plaintiffs' conversion of Field UN2. In such circumstances, the review of the agency's 2010 determination that conversion occurred is properly limited to that question of conversion on appeal before the agency, and thus to this court as well. See 7 C.F.R. § 12.30(c)(4) ("If the prior determination was a certified wetland determination, an appeal of the NRCS on-site determination shall be limited to the determination that the

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<sup>5</sup> This matter was further clarified in the supplemental briefing, which revealed NRDC's determinations were not likely ever subject to a five year limitation for purposes of administering Swampbuster provisions.

wetland was converted in violation of this part."). Plaintiffs cannot, as they seek to do now, reopen the question of whether wetlands ever existed on the property in the first place.

This court finds no clear error of judgment in the agency's reliance on the 1994 certification, considering that both the 1994 and 2005 certifications found wetlands to be present and plaintiffs proceeded with the conversion in complete disregard for both determinations.

As to plaintiffs' second argument, the court does not have jurisdiction to determine whether wetlands were in place before the conversion because that is outside of its review of the 2010 determination.<sup>6</sup> The agency reasonably interpreted its own regulations by limiting the scope of review to whether a

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<sup>6</sup> Even assuming, arguendo, that the scope of review before the agency on appeal should have included re-examining whether wetlands ever existed on the property, defendant has provided substantial evidence in the record to support the determination that Field UN2 contained wetlands because of the hydric soils and hydrophytic vegetation located there. See, e.g., R. 162-63 (concluding that Field UN2 contained a "predominance of hydric soils" and a "prevalence of hydrophytic vegetation"); R. 1774, 1806-809, 1850 (containing soil maps of the area that identify hydric soil); R. 153, 156-57, 1394, 1793 (showing the information collected during the 2005 and 2008 field inspections as to soil profiles); R. 1780-85 (showing that the property was densely forested between 1986 and 2006); R. 153, 156, 1393, 1447 (containing information about hydrophytic vegetation observed during the 2005 and 2008 on-site inspections); R. 154, 3145-46 (noting that plaintiff's consultant found an eighty percent prevalence of hydrophytic vegetation on the property). Furthermore, there is ample evidence that the hydrology of Field UN2 was consistent with a wetlands determination. See, e.g., R. 157, 163 (finding hydrology criterion were met); R. 1393 (indicating the presence of oxidized root channels in the upper twelve inches of soil during the 2005 field investigation); R. 157, 1528-29, 1803 (depicting remotely sensed data identifying portions of Field UN2 as palustrine forested, broad-leaved deciduous, with temporarily flooded and/or a seasonally flooded wetland); R. 157, 1772, 1798-1800 (indicating Field UN2 does not possess sufficient slope to preclude soil saturation); R. 158, 1793 (evaluating hydrology indicators of a comparison site).

conversion took place, thus the court must defer to the agency. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984). Ultimately, plaintiffs are asking this court to substitute its judgment for that of the agency, which is outside the scope of review. See Citizens to Preserve Overton Park, 401 U.S. at 416.

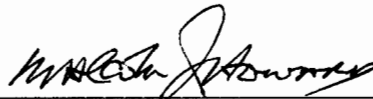
Finally, the minimal effect exemption allows a farmer to continue receiving benefits from the USDA after crop production on a converted wetland, if "[t]he action, individually and in connection with all other similar actions authorized by the Secretary in the area, will have a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife." 16 U.S.C. § 3822(f)(1); see also 7 C.F.R. 12.5(b)(1)(v) (providing that to meet the minimal effect exemption NRCS has to make that determination as to the actions in question and authorize such actions).

Plaintiffs never requested for NRCS to make a minimal effect determination, or pursued this argument before the agency during the administrative hearing. See R. 3108-10. Therefore, plaintiffs failed to exhaust their administrative remedies with respect to this argument and the court cannot consider it for lack of subject matter jurisdiction. See Pleasant Valley Hosp., Inc. v. Shalala, 32 F.3d 67, 70 (4th Cir. 1994).

**CONCLUSION**

In summary, this court finds the agency acted reasonably when it found plaintiffs ineligible for USDA benefits because they converted wetlands, and as a result affirms the USDA's final administrative decision. For the foregoing reasons, defendant's motion for summary judgment is GRANTED [DE # 32]. The clerk is directed to close this case.

This 7<sup>th</sup> day of November 2013.



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MALCOLM J. HOWARD  
Senior United States District Judge

At Greenville, NC  
#33



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

In the Matter of )  
 )  
XXXXXX )  
XXXXXX )  
 )  
and ) Case No. 2016W000529  
 )  
FARM SERVICE AGENCY )

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**APPEAL DETERMINATION**

XXXXXX, a retired schoolteacher, and XXXXXX, a risk management and contract specialist, (Appellants) own 615 acres of inherited farmland. Beginning in 1997, Appellants have received annual payments to implement a **conservation** plan on their farmland through two consecutive ten-year **Conservation Reserve Program** (CRP) contracts. On May 31, 2016, Farm Service Agency (Agency or FSA) notified Appellants, that they must repay the Agency the \$131,573.70 in annual payments that Appellants received from their 2007 CRP Contract (Contract). The letter also notified Appellants that the Agency had disapproved their request to reinstate the Contract. The Agency terminated the Contract because Appellants had not implemented two scheduled **conservation** plan treatments, described as mid-management activities (mid-cover management).<sup>[1]</sup>

Appellants appealed the Agency’s May 31, 2016 adverse decision. In support of their appeal they first argue that they did not violate the Contract and that the Agency erred by not providing proper advance notice of the required mid-cover management. Next, they argue that the County Committee had the ability to reinstate their contract and that the Agency erred when it revoked the County Committee’s reinstatement decision. Lastly, Appellants argue that the Agency’s Deputy Administrator for Farm **Programs** (DAFP) abused his discretion when he declined to reinstate Appellants’ Contract. In addition to these challenges, Appellants request equitable relief from the National Appeals Division (NAD).

At Appellants’ request, I held an in-person hearing on September 29, 2016, in XXXXXX. I left the record open at the conclusion of the hearing to allow the parties to submit additional evidence and closed the record on January 3, 2017. I subsequently reopened the record on January 9, 2017, to allow for the Appellants’ additional consideration of an Agency submission. I closed the record again on January 13, 2017.

After evaluating the evidence and the applicable regulations, I conclude that the Agency’s adverse decision was erroneous. I have also developed the record so the NAD Director may consider equitable relief should Appellants request a Director Review.

**PROGRAM BACKGROUND**

The objectives of CRP include reducing water and wind erosion, protecting the Nation’s long-term capability to produce food and fiber, reducing sedimentation, improving water quality, and creating and enhancing wildlife habitat. To meet those objectives, CRP authorizes the Agency to sign contracts with eligible participants to convert land to a conserving use. Participants receive financial and technical assistance during the contract period in return for converting their land. *See Title Seven of the Code of Federal Regulations (7 C.F.R.) Sections (§§) 1410.1 and 1410.3.*

The regulations require each CRP participant to conduct “mid-cover management” as scheduled in a management plan

developed for the participant's CRP contract. 7 C.F.R. § 1410.22(f). The Agency interprets that provision to require that participants employ at least one management activity during the life of the contract. Under the provisions of the Agency's handbook, the management plan must schedule such mid-cover management activities before the end of the 6th year for 10-year contracts. A participant may not perform mid-cover management activities during the final three years of a contract. See *FSA Handbook 2-CRP (CRP Handbook), Paragraph (§) 428A*.

## STATEMENT OF THE ISSUES

The dispute in this case is whether the Agency's May 31, 2016 adverse decision is consistent with applicable laws and regulations. The decision informed Appellants that DAFP had declined to reinstate Appellants' Contract, and that Appellants must refund payments and pay interest and damages. The core issues for my consideration are:<sup>[2]</sup>

1. Did Appellants violate their Contract by failing to perform mid-cover management?
2. Was the Agency required to notify Appellants of Appellants' failure to complete the required mid-cover management?
3. Did the Agency err when it determined the County Committee had no authority to reinstate a participant's CRP contract?
4. Did the County Committee have authority to reconsider its decision to terminate Appellants' Contract?
5. If only DAFP had authority to reverse the County Committee's action, did he abuse his discretion when he denied Appellants' request to reinstate the Contract?
6. What arguments do Appellants present for equitable relief?

## FINDINGS OF FACT (FOF)

1. Appellants are third generation owners of 615.5 acres of XXXXX farmland, known as farm number 2826 (Farm). Appellant XXXXX (Appellant) is a retired schoolteacher who received her Master of Arts degrees in English and Educational Leadership. Appellant XXXXX (Brother) is employed as a risk management contract specialist and received his Master of Business Administration degree. Brother gave Appellant a power of attorney to manage his 50% of the Farm's Contract. Appellants inherited the Farm from their mother, who had also entered the Farm into CRP contracts beginning around 1985. Prior to entering the Farm into its first CRP contract, the Farm's crop production was very poor and the Farm had very poor erosion control. During the later years of her mother's life, Appellant managed the Farm's CRP contract for her mother. *Testimony of Appellant, HA, 1:11:00-1:11:16; 1:41:45-1:43:01; 1:43:02-1:43:07; 2:55:01-2:55:55; 2:56:00-2:58:00; 4:13:11-4:13:18.*
2. Since entering the Farm into CRP contracts, Appellants have always fully complied with the terms of their CRP contracts and promptly completed the Agency's verbal requests or instructions. However, Appellants' compliance

was entirely based upon their reliance upon the Agency's verbal explanations and notifications of the contracts' terms. While Appellants read their contracts, they relied solely upon the Agency to identify, explain, and notify them of the contracts' necessary or important terms. *Testimony of Appellants, HA, 1:02:30-1:03:05; 4:32:17-4:37:11.*

3. Starting in 2004, the Agency began including in its contracts the requirement that all CRP participants perform mid-cover management activities. Mid-cover management included activities such as light discing and burning. *Agency Record (AR), page 19; Agency's Post Hearing Exhibit 1, pages 1-2; Testimony of the Agency Representative, HA, 4:51:00-4:51:45.*
4. Appellants signed their Contract on July 28, 2008. Its effective dates were October 1, 2007 to September 30, 2017. The Contract outlined Appellants' agreement to implement its **Conservation** Plan. It also incorporated by reference an Appendix to CRP-1 (appendix). Appellants did not read, were not provided, and did not receive a copy of the appendix.<sup>[3]</sup> Attached to the Contract was a **Conservation** Plan, a **Conservation** Plan Schedule of Operations (Plan Schedule), and a Revision of Plan or Schedule of Operations or Modification of a Contract (Amended Schedule). Two of the Amended Schedule's planned **conservation** treatments were mid-cover management activities and were scheduled to occur on half of the Farm's entire acreage, once in 2012 and again 2013.<sup>[4]</sup> The schedules were prepared by the Natural Resources **Conservation** Service (NRCS) and signed by the Appellants prior to their executing the Contract. *AR, pages 97, 106, and 109-110; Agency's Post Hearing Exhibit A, pages 1-7.*
5. Appellants did not perform mid-cover management on half of the Farm's acres in 2012 or 2013. However, between 2007 and 2012 the following activities were approved by the Agency and conducted on the property: (1) in September of 2007, half of the Farm was hayed; (2) in 2007, seismic tests were performed and an oil well was installed; (3) in July of 2008, an overhead powerline was installed to connect power to the oil well; and (4) in late 2011, a fiber optic line and an oil pipeline were laid across part of the Farm. In each activity listed above, if the Farm's vegetation was uprooted during the activity, the disturbed area was seeded and re-seeded. The cost of performing mid-cover management on the Farm's total acreage between 2012 and 2013 would have been \$14.50 an acre or \$8,925. *Testimony of Appellant, HA, 53:20-1:01:00, 1:21:00-1:23:03, 2:24:01-2:24:49; AR, pages 81-82.*
6. In 2011 Appellant was diagnosed with rheumatoid arthritis and secondary hyperparathyroidism and had surgical procedures performed as part of her treatment for these conditions. In June of 2012, Appellant had her first hip replaced and in December of 2015, she had her second hip replaced. As a result of her treatments, from 2011 through 2014, Appellant experienced a significant amount of pain. Between 2011 and 2013, the pain from her recovery left her at less than a 60% capacity to function normally. *Testimony of Appellant, HA, 2:27:01-2:33:24; AR, pages 83-84.*
7. During the term of Appellants' Contract and during their prior CRP contract Appellant visited the Agency's County office twice each year. These visits were in addition to the times she contacted the Agency to request permission for the utility and oil activities on the property. Each time Appellant went into the Agency's County office or contacted them by telephone, she asked the Agency whether there was anything that she needed to do to complete the Contract, and whether she was "good to go." Excluding the times the Agency requested she do something, she was always told everything was okay and that she was good to go. *Testimony of Appellant, HA, 44:27-45:00; 46:30-49:40; 51:18-51:29.*
8. During the Contract's effective term and prior to the end of the mid-cover management deadline, the Agency arbitrarily sent notices to some similarly situated CRP participants. The notices warned and reminded the other participants of the mid-cover management requirement. The Agency did not send Appellants one of these notices. The reason the Agency did not send notices to all similarly situated CRP participants was likely due to its understaffed county office. Subsequent to the termination of Appellants' Contract, the Agency's state office amended the Agency's state handbook to require that it provide advance notice to all CRP producers of possible mid-cover management violations. *Testimony of Appellant, HA, 1:34:44-1:36:06; Testimony of Agency*

*Representative, HA, 5:44:37-5:47:00.*

9. On April 20, 2015, the Agency sent Appellant a letter notifying her that it did not have any documentation to show that Appellants' had completed the Contract's mid-cover management requirement. The letter requested that Appellant respond by submitting any evidence of the completion of the mid-cover management or that she list the reasons for not completing it. *AR, page 95.*
10. Upon receiving the letter Appellant called the Agency's county office. She asked the Agency to explain its letter and suggest how she should respond. The Agency told Appellant to write a brief letter explaining how she had acted in good faith. Appellant followed the instructions of the Agency. She responded to the Agency's request by asserting that she had acted in good faith and that during the term of the Contract she had hayed various fields and ensured that disturbed areas had been seeded and re-seeded. *AR, page 94; Testimony of Appellant, HA, 2:33:00-2:33:25.*
11. On June 8, 2015, the County Committee reviewed Appellant's letter and its records and decided that Appellants had not performed the required mid-cover management activities. It determined that the 2007 haying was performed prior to the Contract's effective date and did not discuss Appellants' seeding and reseeded activity. Because there was no evidence to support a finding of Appellants' good faith, it decided to terminate Appellants' Contract. It provided Appellants notice of its decision on July 17, 2015. When the County Committee made its decision, it understood that it had the authority to reconsider and reinstate Appellants' Contract. Had the County Committee realized it could not reinstate the Contract, it would not have terminated Appellants' Contract. *AR, pages 63, 86, 92-93, 98, and 134; Testimony of Agency Representative, HA, 6:06:50-6:07:13.*
12. Appellants requested that the County Committee reconsider its June 8, 2015 termination decision, on August 21, 2015. The County Committee reconsidered its decision on September 15, 2015. After reconsideration it concluded that, while Appellants had not complied with the Contract's mid-cover management requirement, they had acted in good faith to comply. To support its finding of good faith the County Committee noted that, although Appellants were not informed of the mid-cover management requirements, they had been diligent in asking if anything in the Contract was pending, and they had been repeatedly told by the Agency that nothing needed to be completed. In light of these findings the County Committee imposed a fine upon the Appellants and allowed them to repay it through the offset of the Contract's future payments, thereby reversing its prior termination. Appellants paid the fine and did not appeal the County Committee's second decision. *AR, pages 67-68 and-72-70; Testimony of Appellant, HA, 1:44:42-1:46:30.*
13. Paragraph 573 of the Agency's handbook notes that the County Committee does not have the authority to reinstate a terminated CRP contract. It specifies that terminated CRP contracts may only be reinstated by DAFP. This note was added on April 29, 2012. It is based upon the Agency's interpretation of 7 C.F.R. § 1410.52. *AR, page 40.*
14. On November 24, 2015, the State Committee notified the County Committee that it did not have the authority to reinstate Appellants' Contract and that a decision to reinstate the Contract could only be made by DAFP. After being notified, the County Committee recommended Appellants' reinstatement to the State Committee who in turn recommended reinstatement to DAFP. The State Committee's recommendation outlined the relevant facts and the timeline of events. It also included the minute notes of the State and County Committee meetings. *AR, pages 53-54, 56-57, and 59-60; Testimony of Agency Representative, HA, 4:54:11-4:55:54.*
15. On April 25, 2016, DAFP, after finding that Appellants had demonstrated a good faith effort to comply, denied the State and County Committee's recommendation. In support of his decision DAFP found that a good faith effort was not a basis upon which he could authorize relief. He further found that allowing reinstatement would establish a bad precedent that could result in inequitable treatment of future participants. *AR, page 52.*
16. When making a decision whether to terminate a CRP contract, the County Committee is required to consider whether a participant made a good faith effort to comply. In this appeal, after the County Committee decided the Appellants acted in good faith it could not, pursuant to its handbook, terminate the Contract. *AR, page 31-33; Testimony of the Agency Representative, HA, 6:01:30-6:06:00.*

17. The County Committee informed Appellants of DAFP's decision by letter on May 31, 2016. Its letter notified Appellants that they were required to repay the Agency, \$131,573.75. To obtain sufficient funds to make this payment, Appellants would have to sell their property, downsize their homes and / or liquidate their retirement savings. Appellant has a fixed monthly income of \$1,800 and no cash **reserves**. Appellants request that their contract be reinstated and that they be allowed to be considered for re-enrollment in the CRP in 2017. *AR, page 45-48; Testimony of Appellants, HA, 2:19:00-2:20:00; 3:21:00-3:30:00; 3:54:50-3:56:41; 4:00:48-4:02:26; 4:07:12-4:08:01.*
18. Subsequent to their receipt of the Agency's May 31, 2016 decision, the Appellants hayed the entire Farm and received \$4,425 from that haying. *Testimony of Appellants, HA, 4:08:43-4:10:29.*
19. Over the course of its enrollment in the CRP Appellants' Farm has developed into an area where wildlife thrive and erosion is controlled. The Agency does not dispute that, excluding the potential benefits of mid-cover management, it received the full **conservation** benefit from Appellants' Contract. *Testimony of Agency Representative, HA 5:50:33-5:59:00.*

## DISCUSSION

The regulations found at 7 C.F.R. Parts 11, 780 and 1410 govern the appeal and the issues on appeal. I also considered the CRP Handbook. The handbook provisions outline the Agency's interpretation of its regulations and provide guidance for implementing Agency **programs**.

It is Appellants' burden to prove by a preponderance of the evidence that the Agency's May 31, 2016 adverse decision was erroneous. 7 C.F.R. § 11.8(e). The U.S. Federal Circuit Court of Appeals explained that a preponderance of the evidence is, "evidence which is ... more convincing than the evidence ... offered in opposition to it ...." *Greenwich Collieries v. Director, 990 F.2d 730, 736 (3d Cir. 1993)*. An agency's adverse decision is erroneous when it is inconsistent with the laws and regulations of the agency or the generally applicable interpretations of those laws and regulations. 7 C.F.R. § 11.10(b).

### 1. Appellants violated their Contract by failing to perform mid-cover management.

In order to enroll land in the CRP a participant must enter into a contract with the Agency. 7 CFR §1410.32(a). By regulation a CRP contract must contain: (1) the terms and conditions for participation; (2) a **conservation** plan; and (3) any other materials or terms deemed necessary by DAFP. 7 CFR §1410.32(b). It must be: (1) within the dates established by DAFP; and (2) signed by the producers and or owners. 7 C.F.R. § 1410.32(d). It may be terminated if the participant is not in compliance with the terms and conditions of the contract. 7 C.F.R. § 1410(f)(3).

In this case the Amended Schedule for Appellants' Contract contained two specific mid-cover management activities. *FOF 4*. The inclusion of a mid-cover management activity was mandated by regulation. 7 C.F.R. § 1410.22(f). In Appellants' Contract the activities listed the number of acres to be treated and the year each treatment must occur. <sup>[5]</sup> *FOF 4*. Appellants did not apply the specified treatments on the listed acres within the two-year time limit. *FOF 5*. Given these facts I am not persuaded the Agency erred in deciding Appellants violated the Contract. 7 C.F.R. § 1410(f)(3).

### 2. The Agency was not required to provide advance notice of Appellants' failure to complete the required mid-cover management.

In my review of the rules and regulations, I am unable to find any that require that the Agency check, remind or warn a participant of possible contract compliance problems. 7 C.F.R. § 1410 et. al. To the contrary, the regulations

generally impose responsibility for contract compliance on CRP participants. *See, e.g. 7 C.F.R. § 14.20 (Participants must implement their **conservation** plans).*

Noting their lack of regulatory responsibility the Agency concedes that during the relevant time period it treated similarly situated CRP participants unequally. *FOF 8*. It provided advance notice to some and none to others. *FOF 8*. While some of Appellants' colleagues received notice Appellants did not. *FOF 8*. Appellants do not dispute that the Agency's failure to provide them notice was un-intentional and most likely the result of a well intentioned but understaffed Agency county office.

It was clear at the hearing that these facts left both the Agency representative and the Appellants unsettled. It is further noteworthy that the Agency's state office has amended its handbook to require that its county offices provide advance notice to future CRP participants. *FOF 8*. The Deputy Director of the National Appeals Division has explained that if an agency, through its handbook, directs that specific notice be provided, that the agency must follow its handbook even when the regulations are silent. *See NAD Case No. 2013W000151 (Dir. Rev., July 9, 2013)*. However, those facts are not present in this appeal. The effective date of the state amendment was July 1, 2015, and not applicable to the events in this appeal.

Here advance notice of Appellants' CRP violation was not required by handbook or regulation. Accordingly, the Agency did not err when it did not provide advance notice to Appellants. Moreover, contrary to Appellants' assertion of reliance on Agency instruction, NAD precedent establishes that producers have an obligation to exercise due diligence to understand the terms and conditions of any **program** contracts they sign. *FOF 2; See NAD Case No. 2015S000328 (Dir. Rev., Mar. 17, 2016)*.

### **3. The Agency erred when it determined the County Committee had no authority to reinstate a participant's CRP contract.**

The Agency's handbook instructs that terminated CRP contracts may only be reinstated by DAFP. *FOF 13*. This instruction is derived from its interpretation of 7 C.F.R. § 1410.52(b). Appellants argue that this interpretation is unreasonable and internally inconsistent. *Appellants' Post Hearing Exhibit A, pages 5-6*.

NAD will defer to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the regulation. *NAD Case. No. 2015S000134 (Dir. Rev. May 11, 2016)*. Under this standard the question I will analyze is whether the Agency's interpretation of 7 C.F.R. § 1410.52 is inconsistent with the requirements of that regulation.

Both DAFP and the County Committee derive their CRP authority from 7 C.F.R. §1410.1. This section grants DAFP, together with certain other persons and entities, general supervisory authority over the implementation of the CRP regulations. *7 C.F.R. § 1410.1(a) and (d)*. Saliently, the same section vests the authority to implement its regulations in its state and county committees.<sup>[6]</sup> Absent a specific regulatory exclusion, these grants of supervisory or implementation authority apply to each regulation within Part 1410 and task a county committee with the implementation of each. Subsequent to these original grants, the exceptions, if any, are specifically identified. *7 C.F.R. § 1410 et. al.* Both reason and the common canons of statutory construction support this approach.<sup>[7]</sup>

The Agency's interpretation that Section 1410.52(b) grants DAFP the sole authority to reinstate terminated contracts is inconsistent with a county committee's Section 1410(a) grant of implementation authority. In pertinent part, Section 1410.52(b) provides,

(a)(1) If a participant fails to carry out the terms and conditions of a CRP contract, CCC<sup>[8]</sup> may terminate the CRP contract.

••••

(b) If the Deputy Administrator determines such failure does not warrant termination of such contract, the Deputy Administrator may authorize relief as the Deputy Administrator deems appropriate.

When read as a whole, a plain reading of this regulation does not relieve a county committee of its authority to implement this regulation. It merely expands the supervisory authority of DAFP to include additional implementation authority, its mention made necessary by its general absence in section 1410.1(a).

Furthermore when applied to Part 1410 as a whole, the Agency's interpretation is both unreasonable and unworkable. As noted above, many sections of Part 1410 contain additional grants of implementation authority to the supervisory authority of the CCC and DAFP. If the Agency's interpretation were applied equally to the entire part, the implementation authority of the county committee would effectively be nullified.<sup>[9]</sup> Accordingly, I find that the Agency's handbook instruction is inconsistent with its regulations.

#### **4. The County Committee had authority to reconsider its decision to terminate Appellants' Contract.**

Alternatively, in addition to discussing the regulatory inconsistency of the Agency's interpretation of 7 C.F.R. § 1410.52(b), it is necessary to discuss the County Committee's ability to reconsider a termination decision that was not final. Appellants argue in the alternative, that even if DAFP had the sole authority to reinstate a terminated contract, the Agency erred when it de-authorized the County Committee's decision to reverse its termination of the Contract. *Appellants' Post Hearing Exhibit A, pages 6-8*. In support of this decision they argue that the County Committee's first termination decision was not final. *Appellants' Post Hearing Exhibit A, pages 6-8*. The Agency did not specifically respond to Appellants' argument.

Part 780 of 7 C.F.R. outlines the Agency's informal appeal regulations. It first provides **program** participants with the right to request reconsideration from the decision maker or to appeal to the next level reviewing authority. 7 C.F.R. §§ 780.4(b), 780.7, and 780.10. Second it defines when a decision is final. 7 C.F.R. § 780.2.

As set forth by the regulations, a final decision is one rendered by a decision maker upon the written request of a participant that remains final because it is not appealed to a state committee or NAD. 7 C.F.R. §§ 780.2 and 780.7. Accordingly, a county committee decision is not final unless it is made upon the written request of the participant and is not under reconsideration or appeal. 7 C.F.R. § 780.2.

In this appeal, after receipt of the County Committee's June 8, 2015 decision to terminate the Contract, Appellants exercised their appeal rights by requesting reconsideration through a written request. *FOF 12*; 7 C.F.R. §§ 780.2, 780.4(b), and 780.7.<sup>[10]</sup> The County Committee received Appellants' request, and re-considered and reversed its initial decision. *FOF 13*. Appellants did not appeal the County Committee's reversal and second decision, and they paid the amount assessed by the County Committee. *FOF 12*. Appellants' written request for reconsideration, decision to pay the fine, and their decision not to exercise their appeal rights, made the County Committee's second decision the final decision for purposes of the regulation.<sup>[11]</sup>

Appellants timely exercised their rights to request reconsideration of the County Committee's June 8, 2015 action. *FOF 12*. Under the above provisions, the June 8, 2015 action of the County Committee was not final while Appellants exercised their review rights, the Contract had not been terminated. The County Committee had authority to reverse its June 8, 2015 action and treat the Contract as still active. The provisions of 7 C.F.R. § 1410.52(b) giving DAFP sole authority to reinstate terminated CRP contract were never invoked.<sup>[12]</sup> Accordingly, the Agency erred when it required that the matter be forwarded to DAFP and the adverse decision was not in compliance with the Agency's regulations.

#### **5. DAFP abused his discretion when he denied Appellants' request to reinstate their Contract.**

In July of 2016, the Director of the National Appeals Division, citing the United States Supreme Court, explained that an abuse of discretion review analyzes, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *NAD Case No. 2015S000287 (Dir. Rev. July 7, 2016) citing,*

*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). When conducting such a review it is critical that the reviewing official does not substitute his or her own judgment for that of the agency.

Here, as explained by the Agency and as set forth by its own rules, once the Agency's decision maker<sup>[13]</sup> determines that a participant made a good faith effort to comply, the Agency is not allowed to terminate that participant's CRP contract. *FOF 16; AR, page 31-33*. In his April 25, 2016 letter, DAFP violated these rules when he found good faith but failed to reinstate the contract. *FOF 15*. His violation of the Agency's rules in the absence of any recognized exception constitutes clear error. *NAD Case No. 2015S000287 (Dir. Rev. July 7, 2016)*.

## **6. What facts and arguments do Appellants present for equitable relief?**

Equitable relief may be appropriate if a participant, despite failing to comply fully with the requirements of a covered **program**, either detrimentally relied on the action or advice of an authorized agency representative, or made a good faith effort to comply fully with the requirements of the **program**. See 7 U.S.C. § 7996(b)(1) and (2). The CRP **program** is a covered **program** for equitable relief purposes. See 7 U.S.C. § 7996(a)(2)(A)(ii).

Appellants request that they be relieved from having to repay the \$131,573.70 mandated by the Agency's May 31, 2016 letter and that their Contract be reinstated. *FOF 17*. In support of their requests they refer to the facts set forth below. Additionally they cite to what they argue is the disproportionate cost of mid-cover management as compared to the termination penalty. They also emphasize the unequal **conservation** benefit received by the Agency. *FOF 5 and 17*.

During the hearing, several issues were identified as possibly relevant to a decision analyzing equitable relief. I will identify each in turn and outline the facts I believe may be helpful to an equitable relief determination should Appellants request equitable relief from the NAD Director.

### **Did the Agency advise Appellants that they were in compliance with all of the terms of their Contract? If so, did Appellants rely upon this statement to their detriment?**

Appellant visited the Agency's county office at least twice each year. She also occasionally spoke with the Agency's county office employees by telephone. During each of these visits or telephone conversations, she specifically asked whether there were tasks in the contract that she needed to accomplish that she had not yet accomplished. Each time she asked this question she was assured that there were no outstanding tasks to be performed. *FOF 7*.

These assurances were given to Appellant in the same year that the Agency's county office was sending other similarly situated CRP participants advance notice of possible mid-cover management violations. Appellants were not given advance notice. *FOF 7 and 8*.

After receiving the County Committee's April 20, 2015, notice of possible mid-cover management violation, Appellant telephoned the Agency's county office and received instruction from an Agency employee regarding how to respond. Appellant followed the advice she was given and provided the County Committee a short explanation. The brevity of Appellant's initial explanation was one of the reasons the County Committee decided to terminate the Contract. *FOF 10 and 11*.

### **What purposes, if any, of the CRP contract were fulfilled?**

Outside of any potential benefits that the mid-cover management may have provided to the Farm,<sup>[14]</sup> and the income derived from subsequently haying the farm, the parties do not dispute that the Agency received full benefit from the Contract. *FOF 18 and 19*. The Farm is an area where wildlife thrive and erosion is controlled. *FOF 19*.

### **Did Appellants make a good faith effort to comply with the terms of the Contract?**



Facts which might support a finding of good faith include: Appellants' history of compliance with prior a CRP contract and Appellant's efforts to continue to reach out to the Agency and inquire about their level of compliance while recovering from painful medical treatments. *FOF 1 and 6.*

Some facts which might rebut a finding of good faith include: Appellants' uncommunicated complete reliance upon the verbal instructions of the Agency and their failure to inform the Agency of Appellant's incapacity and request relief, despite their education and effort to read the Contract. *FOF 2.*

### **What additional arguments and evidence do the parties present concerning equitable relief?**

The required mid-cover management activities were scheduled to be performed during the years when Appellant was experiencing the highest amounts of incapacity while recovering from her medical treatments. *FOF 6.*

As a NAD Administrative Judge, I have no authority to make a determination on equitable relief. In accordance with 7 C.F.R. § 11.9(e), the NAD Director has the authority to grant equitable relief to the same extent as such authority is provided the Agency. The Administrative Judge will not determine the matter, but is responsible for developing a record to enable the Director to make a determination as to whether he should grant equitable relief. Although I have found in Appellants' favor if they wish to request equitable relief, they should do so in a request for a Director Review.

### **DETERMINATION**

Seven C.F.R. § 11.8(e) provides that an appellant bears the burden of proving an agency's adverse decision is erroneous by a preponderance of the evidence. In this case, Appellants met this burden. The Agency's adverse decision was erroneous.

This is a final determination of the Department of Agriculture unless a party files a timely request for review.

Dated and mailed this 10th-day of February 2017.

/s/

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SAMUEL S. BAILEY  
Administrative Judge  
National Appeals Division

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[1] At the hearing and throughout the record the parties referred to the activity in question as "mid-contract management" or "mid-contract maintenance." However, in this determination I will use the regulatory term "mid-cover management" as a substitute to avoid confusion. *See Title Seven of the Code of Federal Regulations, Section 1410.22(f).*

[2] I have shortened and re-worded the issues presented at the hearing to better conform to the evidence and to increase readability.

[3] In their closing argument Appellants renewed their objection to the admission and consideration of the appendix. Given NAD's practice to consider all relevant evidence, that objection is over-ruled. *7 C.F.R. 11.8(b)(5).*

[4] The Amended Schedule required that mid-cover management be applied to no more than 50% of the Contract acreage and performed before the end of the 6th year of the Contract. Both the Plan Schedule and the Amended Schedule incorrectly referenced the Appellants' prior CRP contract. The insertion of the incorrect number was an inadvertent typographical mistake. It was the understanding of each of the parties that the Amended Schedule applied to the Contract and they treated it accordingly. *AR pages 97, 105, and 109-110.*

[5] Appellants argue that because the mid-cover management's general descriptive language provided that the treatment was to apply to no more

than 50% of the Contract acreage, that the treatment could be satisfied even if it was not applied, 0% being less than 50%. *FOF 4; Appellants' Post Hearing Exhibit A, page 3*. Appellants supported their argument by citing to Appellants' experiences as a teacher and risk management specialist and to their graduate degrees. I am not persuaded by Appellants' argument. Here, the Amended Schedule lists the specific amount of acres to be treated as well as the treatment years. *FOF 4*. This specificity is sufficient to overcome any ambiguity contained in the general description.

I am also not persuaded by the Appellants' argument that the Amended Schedule did not apply to the Contract because it referenced Appellants' prior CRP contract. The Agency's error was typographical. It is insufficient to invalidate Appellants' obligation to perform the delineated mid-cover management. Given the applicable facts of when and how it was prepared and executed, it is clear the inclusion of an incorrect contract number was inadvertent and each party understood the Amended Schedule's applicability to the Contract. *7 C.F.R. § 1410.32(b) and (d); FOF 4*.

Lastly Appellants argue that the haying and or other activities performed on the Farm satisfied their mid-cover management obligation. *FOF 5; Appellants' Post Hearing Exhibit A, page 4*. The County Committee determined that because the haying occurred prior to the effective date of the Contract it could not be used to satisfy the Contract's mid-cover management requirement. The other efforts were also performed on an undetermined but small percentage of the Farm. Given the specificity of the Amended Schedule I am not persuaded the Agency erred by not applying the haying or other activities.

[6] I note here that Subsection 1410.1(b) additionally instructs that a county committee does not have the authority to waive any of the provisions of Part 1410 unless specifically authorized. As explained further below I do not find that this section restricts a county committee's ability to implement the regulation's provisions, absent their specific exclusion.

[7] The common canons of statutory construction promote a plain language and holistic reading of the entire act or part, where exceptions are interpreted narrowly. *William N. Eskridge, Jr., Philip P. Frickey, Foreword: Law As Equilibrium, 108 Harv. L. Rev. 26, 98-99 (1994)*. The U.S. Supreme Court explained that specific sections must first be read by reference to the whole act. Citing the canons of statutory construction the Court often warns against the following inconsistencies:

1. Interpreting a provision in a way inconsistent with the policy of another provision;
  2. Interpreting a provision in a way that is inconsistent with a necessary assumption of another provision;
  3. Interpreting a provision in a way that is inconsistent with the structure of the statute; and
  4. Broad readings of statutory provisions when Congress has specifically provided for the broader policy in more specific language elsewhere.
- William N. Eskridge, Jr., Philip P. Frickey, Foreword: Law As Equilibrium, 108 Harv. L. Rev. 26, 98-99 (1994)*.

[8] CCC as used in Part 1410 of the CFR is an abbreviation for Commodity Credit Corporation.

[9] Some examples of this include the DAFP's authority to terminate found in 7 C.F.R. §1410.33(d) and a county committee's similar ability to terminate explained in paragraph 571 of CRP Handbook 2 CRP (Rev. 5) Amend. 22. *See CRP Handbook ¶571*. Another example is DAFP's authority to reduce a demand for refund in 7 C.F.R. § 1410.52(c) and a county committee and state committee's similar authority in CRP Handbook ¶¶ 576-578.

[10] Review options under Part 780 include a participant's right to request that a county committee reconsider its actions. *7 C.F.R. §§ 780.4(b) and 780.7*. For purposes of a complete discussion, I note that 7 C.F.R. § 780.7(c) provides that a **program** participant has a right to reconsideration unless the "decision-maker" is DAFP or some other Agency official outside of the Agency's informal appeals process. It might be argued here that DAFP, with his regulatory reinstatement authority, is the decision-maker and, hence, a participant has no right to request reconsideration.

When viewing the regulations as a whole I find this interpretation to be unreasonable and impractical. The plain meaning of that section is that if DAFP makes the initial adverse decision, a county committee has no authority to reconsider it. For example, under circumstances similar to this appeal, if DAFP had been the one who initially decided to terminate Appellants' Contract, the County Committee would not have had authority to reconsider DAFP's action. DAFP was not, however, the decision-maker here. The County Committee was the decision-maker, and it could reconsider its own actions when they were not yet final.

[11] An additional section of Part 780 makes the question of finality clear. Seven C.F.R. § 780.15(e) states that decisions appealable under Part 780 "are final *unless review options under [Part 780] are timely exercised.*" *7 C.F.R. § 780.15(e)(emphasis added)*. CRP decisions are appealable under Part 780. *7 C.F.R. § 1410.59(a)*.

[12] The above is a harmonious interpretation of Sections 1410.52(b), 1410.59(a), 780.2, and 780.15(e) because it gives full effect to all of the provisions. Reading various parts of a statute (or regulation) as a whole and interpreting the provisions so as to give effect to each of the parts has long been a cardinal rule of statutory construction. *See United States v. Boisdorè's Heirs, 49 U.S. 113, 122 (1850); United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371(1988)*.

[13] The Agency's handbook through inference identifies the county committee as its primary fact finder and decision maker. However here, based upon the information provided by the County Committee, the State Committee and DAFP also made findings and conclusions of Appellants' good faith efforts. These findings were based upon information gathered and reported by the County Committee as the primary fact finder.

[14] No evidence was presented of the specific benefits performing mid-cover management affords CRP contract lands.



1. On May 22, 2012, Appellant, as the sole participant, entered into CSP contract number 815E34121MV with the Agency. The contract extended through December 31, 2016, and provided for Appellant to receive an annual CSP payment of \$3,847.00 for years 2012 through 2016. In exchange for the annual CSP payments, Appellant agreed to implement and maintain specific **conservation** practices on Farm number 6062, Tract number 3984 and Farm number 6926, Tract numbers 308 and 331 (enrolled land), as set forth in the **Conservation** Plan or Schedule of Operations. Appellant's contract required **conservation** practices WQL04, WQL10, and WQL25<sup>[1]</sup>, which are performed early in the season or prior to planting. *[Agency Record, Pages 10-43; Hearing Audio, Track 1, 27:54-28:23, 51:37-52:09, 53:08-54:26]*
2. The appendix incorporated into Appellant's CSP contract specified that the participant must be the operator of record in the FSA farm records management system for the agricultural operation enrolled in the CSP **program** and have effective control of the land for the contract period. The appendix required Appellant to notify the Agency within 60 days of the **transfer** of interest to an eligible **transferee** who accepted the contract's terms and conditions or the Agency would terminate the contract. The appendix provided that a participant may be required to refund all or a portion of any assistance earned if the participant sold or lost control of the land under the contract and the new owner or **transferee** was either not eligible for the **program** or refused to assume responsibility under the contract. The appendix further stated that the Agency may require a participant to refund payments and pay liquidated damages if the participant violated the terms of the contract. *[Agency Record, Pages 10-43; Hearing Audio, Track 1, 26:54-27:53]*
3. Appellant received the 2012, 2013, 2014, and 2015 annual payments under the CSP contract. *[Hearing Audio, Track 1, 54:45-55:20]*
4. Appellant and his son farm together on the enrolled land. In 2016, their crops included soybeans. *[Hearing Audio, Track 1, 17:20-17:28]*
5. In March 2016, Appellant's son decided he wanted to get crop insurance for the soybean crop. Appellant's son obtained crop insurance for the soybean crop in the name of the LLC. Appellant's son created the LLC in approximately 2014, and is the sole member of the LLC. *[Hearing Audio, Track 1, 17:28-17:39]*
6. After purchasing crop insurance, Appellant's son found out from the crop insurance agent that grains must be sold under the name in which the crop insurance policy is written. On March 23, 2016, Appellant met with FSA staff about the crop insurance requirements and decided to change the operator of the land from himself to his son's LLC in the FSA farm records management system. *[Hearing Audio, Track 1, 17:39-19:20]*
7. On March 23, 2016, Appellant met with the Agency District **Conservationist** and filled out an application to renew the CSP contract for an additional 5-year period. Appellant did not notify the Agency that he changed the operator of the enrolled land from himself to the LLC in the FSA farm records. *[Agency Exhibit 1; Hearing Audio, Track 1, 18:13-19:20, 32:51-33:45]*
8. On June 2, 2016, during the scoring process for CSP renewal, the Agency discovered that the FSA farm records management system listed the LLC as the operator for the enrolled land. On August 31, 2016, the Agency verified with FSA that Appellant **transferred** the enrolled land to the LLC on March 23, 2016. *[Agency Record, Pages 37-43; Hearing Audio, Track 1, 30:15-32:46]*
9. The Agency terminated Appellant's CSP contract because Appellant no longer retained control of the enrolled land according to the FSA farm records and failed to notify the Agency of the **transfer**. In a letter dated December 8, 2016, the Agency notified Appellant of the contract termination, that he would not receive the final annual payment under the contract, and that the Agency waived liquidated damages. *[Agency Record, Pages 1, 5-16]*
10. On December 27, 2016, Appellant requested informal review of the Agency's decision to terminate the CSP contract. On January 26, 2017, following reconsideration, the Agency upheld its decision to terminate Appellant's contract and not pay the 2016 **program** payment. The Agency waived liquidated damages and did not seek repayment of the 2012-2015 **program** payments. *[Agency Record, Pages 1-4; Agency Exhibit 1]*

## DISCUSSION

Part 11 of Title 7 of the Code of Federal Regulations (7 C.F.R.) governs the appeal. Seven C.F.R. Part 1470, the **Conservation Program** Contract Form NRCS-CPA-1202 (Contract), and Appendix to Form NRCS-CPA-1202 **Conservation Program** Contract for CSP (Appendix) govern the issues on appeal.

### Contract Termination

Appellant violated the CSP contract when he changed the operator of record in the FSA farm records for the land subject to his CSP contract without notice to the Agency; thus, the Agency properly terminated Appellant's CSP contract. A participant in the CSP must be identified as the operator of the agricultural operation in the FSA farm records management system. *See* 7 C.F.R. § 1470.6(a)(1). The Agency may grant exceptions to the operator of record requirement under certain circumstances. *See* 7 C.F.R. § 1470.6(a)(1). Operator means an individual, entity, or joint operation who is determined by the FSA county committee to be in control of the farming operations on the farm. *See* 7 C.F.R. § 718.2 (definitions). At least one CSP participant must be the operator of record in the FSA farm records management system for the agricultural operation being offered for enrollment in the **program** and have effective control of the land for the contract period. *See* Appendix Section 1D. The participant is responsible for notifying the Agency prior to any voluntary or involuntary **transfer** of land under contract.

See 7 C.F.R. § 1470.25(d)(1). If all or part of the land is **transferred**, the contract terminates with respect to the **transferred** land unless the **transferee** of the land provides written notice within 60 days to the Agency that all duties and rights under the contract have been **transferred** to, and assumed by, the **transferee**, and the **transferee** meets the eligibility requirements of the **program**. See 7 C.F.R. § 1470.25(d)(2)(i)-(ii), and Appendix, Section 3(7).

Appellant argues that he changed the name of the farm operator in the FSA records from himself to the LLC strictly for crop insurance purposes and that operation of the farm did not change. In 2012, Appellant signed as the sole participant on the CSP contract for the enrolled land. (FOF 1) The contract required that the participant be the operator of record for the enrolled land in the FSA farm records. (FOF 2) In March 2016, Appellant changed the name of the farm operator for the enrolled land in the FSA farm records from himself to the LLC. (FOF 1, 7) Appellant is not a member of the LLC. (FOF 5) Appellant did not notify the Agency of the farm operator change. (FOF 7) The Agency only learned of the operator change when it checked the FSA farm records to process Appellant's contract renewal application. (FOF 8) Had Appellant notified the Agency prior to the change in operator or within 60 days of the change, the Agency could have considered whether exceptions to the operator of record requirement were applicable to Appellant's situation or whether the LLC was eligible to assume the contract for **program** year 2016. As it happened; however, Appellant did not notify the Agency of the change and the Agency became aware of the change after the period of performance for the 2016 **conservation** practices. (FOF 1, 8) Since Appellant did not comply with the operator of record requirement and failed to notify the Agency of the change in operator as required, I conclude that the Agency did not err when it terminated Appellant's CSP contract and determined Appellant ineligible for the final **program** payment.

#### Equitable Relief

I have interpreted some of Appellant's arguments as a request for equitable relief consideration from the NAD Director. The Director has the authority to grant equitable relief to the same extent such authority is provided an agency. See 7 C.F.R. § 11.9(e). The Director of NAD may grant equitable relief in cases involving covered **programs** administered by the Secretary of Agriculture. See 7 U.S.C. §§ 6998(d) and 7996(a)(2). CSP is a covered **program**. See 7 U.S.C § 7996(a)(2)(A)(ii). When a participant has been determined to not be in compliance with the requirements of a covered **program**, the participant may seek equitable relief if, acting in good faith, he or she detrimentally relied on the action or advice of an agency representative. See 7 U.S.C. § 7996(b)(1). Equitable relief may also be granted where a **program** participant fails to fully comply with the terms and conditions of a covered **program** but made a good faith effort to abide by all of the terms and conditions of the **program**. See 7 C.F.R. § 635.4(b).

Appellant presents the following arguments and evidence in support of his request for equitable relief. Appellant asserts that he completed the **conservation** practices required by the contract for **program** year 2016 and should be paid. The Agency did not doubt Appellant's assertion that he completed the 2016 practices; however, the Agency noted that because it terminated the contract the Agency did not certify Appellant's completion of the 2016 **conservation** practices. Appellant argues that he changed the operator from himself to his son's LLC strictly for crop insurance purposes and that operation of the enrolled land did not change as a result of the operator change. Appellant maintains that he did not understand the implications of his decision to change the farm operator with FSA and did not realize the FSA farm records were connected to CSP eligibility. Appellant argues that the Agency should not penalize him for insuring his crop. Appellant further contends that the Agency should not expect him in 2016, the final year of the contract, to remember everything in the contract and appendix that he signed in 2012. Appellant faults FSA and the Agency for not telling him what he needed to do to comply with the CSP contract requirements. I, as an Administrative Judge, have no authority to grant or deny equitable relief. In accordance with 7 C.F.R. § 11.9(e), the Director has the authority to grant equitable relief to the same extent such authority is provided an agency. I will not determine the matter, but am responsible for developing a record to enable the Director to make a determination as to whether equitable relief should be granted. If Appellant wishes to request equitable relief, the request should be made in the request for Director review.

#### **DETERMINATION**

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

This is a final determination of the Department of Agriculture unless a timely request for review is filed.

Dated and mailed this 10th day of May 2017.

/s/

Elizabeth A. Brown  
Administrative Judge

Attachments:

Notice of Right to Request Director Review and/or Copy of Audio Recording  
Request for Director Review

\_\_\_ WQL04 is plant tissue tests and analysis to improve nitrogen management, WQL10 is plant a cover crop that will scavenge residual nitrogen, and WQL25 is split applications of nitrogen based on a pre-sidedress soil nitrate test (PSNT). See <https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/program/financial/csp>.