IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK GROENENDYK, Plaintiff, vs. MIKE JOHANNS, Secretary, UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	No. 4:06-cv-00214 JAJ **ORDER**

I. INTRODUCTION

On June 21, 2005, Plaintiff Mark Groenendyk submitted a request for a certified wetland determination to the Natural Resources Conservation Service (NRCS) of the United States Department of Agriculture (USDA). Of concern to Plaintiff was a 0.7-acre portion of land located on Tract 2296 of his farm in Mahaska County, Iowa. Tract 2296 contains a total of 249 acres. (A.R. 312). The site in question had previously been classified by the NRCS as not-inventoried (NI), meaning that no wetlands had been inventoried on the site in question.[1] (A.R. 4, 173). On July 18, 2005, the NRCS completed a wetland determination on the site in question. (A.R. 4). On July 28, 2005, the NRCS issued a preliminary determination that the land in question was a wetland. (A.R. 4). On September 6, 2005, the NRCS issued a final determination to that same effect (A.R. 4).

Plaintiff appealed NRCS's final determination to the Farm Service Agency (FSA) County Committee. On September 29, 2005, the Committee affirmed the NRCS's determination in a letter decision (A.R. 4-6). On October 7, 2005, Plaintiff appealed the FSA County Committee decision to the National Appeals Division (NAD) of the USDA.

[1] The NRCS instructed Appellant in a letter dated March 15, 1996, that he should first request a wetland determination before performing any manipulation to an area designated "NI." (A.R.173).

(A.R. 8-9). After a hearing, the Hearing Officer reversed the FSA's affirmation of the NRCS's determination, finding that the NRCS did not follow applicable regulations and failed to establish the requisite wetland identification criteria in regards to the site in question. (A.R. 36-40). The agency appealed the Hearing Officer's decision to the NAD Director for review. (A.R. 284). On March 14, 2006, the NAD Deputy-Director issued a decision that reversed the hearing officer's decision and reinstated the NRCS classification of the site in question. (A.R. 280-88).

On May 12, 2006, Plaintiff filed an action in the United States District Court for the Southern District of Iowa against the USDA for judicial review of the NAD's decision. (Docket No. 1) . On October 24, 2006, after the resolution of several motions, the agency filed an answer. (Docket No. 17). Both Plaintiff and the agency timely filed briefs with this Court regarding judicial review of the decision.

II. FACTUAL AND PROCEDURAL BACKGROUND

In this action for judicial review, the underlying facts are not disputed by the parties. In his decision, the Deputy-Director adopted the Hearing Officer's Findings of Facts. The Deputy Director's summary of the Hearing Officer's Findings of Fact are set out below.

> Between 1920 and 1936, the channel of the South Skunk River bordering Tract 2296 was straightened. (FOF 1; and CR, Tab16, File 2, Appellant Exh. B, Page 1.) During or prior to 1969, a drainage ditch (Cooper Ditch) was constructed across Tract 2296 in a Southwest to Northeast direction. (FOF 2; and CR, Tab 16, File 2, Appellant Exh. A, Page 2; and Appellant Exh. B, Page 2.)
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> In April 1989, Appellant purchased Tract 2296. (FOF 3; and CR, Tab 16, File 2, Appellant Exh. B, Page 2.) The North border of Tract 2296 abuts the South Skunk River. (FOF 4; and CR, Tab 16, File 2, Appellant Exh. B, Page 2.) Tract 2296 contains 249.0 acres. (CR, Tab 15, File 2, Page 14).
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> On September 21, 1990, the COE visited Appellant's farm and documented: "There is no reason to think that ground water,

independent of surface water, is a factor in maintaining a wetland at the property." The report documents that "drainage ditches are in place, and apparently have been for considerable years. The area does not show wetland hydrology during low-river-flow periods." The report further documents that "[t]he property appears to qualify as a disturbed area in that since 1968 it has been excavated, subject to removal of vegetation, converted to agricultural land, and hydrologically most importantly, had a drainage system constructed." (CR, Tab 16, File 2, Appellant Exh. B, Page 5.)

Subsequently, on January 14, 1991, NRCS determined that Tract 2296 contained 179.9 acres of wetland, 44.8 acres of converted wetland, and 6.0 acres of prior converted wetland. (FOF 5; and CR, Tab 16, File 2, Appellant Exh. B, Pages 2-6.)

On January 18, 1991, for reasons undetermined, a COE geologist issued a wetland investigative report of Tract 2296,[2] wherein he determined the tract appeared to qualify as a disturbed area. He obtained a topographic map of "the property" that showed swamp symbols in considerable parts of the "area" of concern. He opined that the property appeared to be underlain in large part by poorly draining soils and that it seemed likely that, prior to 1969, the area met the hydrologic criteria for wetland more that it then did, and concluded that "the property may or may not now meet the wetland hydrology criterion." (FOF 6; and CR, Tab 16, File 2, Appellant Exh. A, Pages 2-6 [the Hearing Officer mistakenly identified the exhibit as "B"].)

On June 3, 1993, the NRCS Iowa State Conservationist (SC) revised its previous wetland determination to 34.9 acres of converted wetland and 7.1 acres of farmed wetland. (There is no explanation in the record of the classification of the

[2] Colin C. McAneny is the name of the geologist that prepared this report. Throughout the remainder of this opinion, the report will be referred to as the "McAneny report."

remaining 188.7 acres.) (FOF 7; and CR, Tab 16, File 2, Appellant Exh. B, Pages 1-6). On April 10, 1995, the NRCS National Office upheld the SC's determination of 34.9 acres of converted wetland, but revised the determination to indicate that 7.1 acres was prior converted wetland. (FOF 8; and CR, Tab 16, File 2, Appellant Exh. B, Pages 2-6.)

On November 29, 1995, on appeal, NAD issued a determination that reversed NRCS's National Office decision. The NAD decision determined that NRCS had not complied with its regulations because manipulation of Appellant's property occurred prior to December 23, 1985, thus NCRS was required to consider the property exempt from the wetland regulations consistent with the provisions of 7 C.F.R. § 12.33(b). (FOF 9; and CR, Tab 16, File 2, Appellant Exh. B, Pages 2-6.)

On June 21, 2005, Appellant requested a wetland determination on 0.7 acres of Tract 2296. Appellant attached to the request a previous HEL and Wetland Determination Map, dated May 30, 2001, that shows the 0.7 acres is located within 11.3 acres of Tract 2296 that was previously identified as "not-inventoried (NI)." (FOF 10; and CR, Tab 15, File 2, Pages 14-15.)

On July 28, 2005, NRCS made a Preliminary Technical Determination that Appellant's 0.7 acres was "wetland (W)," because the area met the criteria of hydric soils, wetland plants, and soil surface wetness. NRCS determined that the 0.7 acres was identified on a soil map as being located on #133 Colo silt clay loam on a zero to two percent slope. Colo silty clay loam is found on bottom lands and runoff is slow with mostly poor drainage. Most areas if this soil are well-suited to corn and soybeans where wetness is controlled. Colo silt clay loam is a hydric soil and is predominant in Appellant's county. (FOF 11; and CR, Tab 15, File 2, Page 3, 9-13, 29-30, 32, 34, 39-44, 48.) NRCS also determined that the 0.7 acres contained hydrophytic vegetation (reed canary grass, smartweed, stinging nettle, American elm, pin oak, silver

maple, and honey-locust). (FOF 12; and CR, Tab 15, File 2, Pages 48-64.) NCRS determined that there was no recorded hydrology data available, but found secondary wetland hydrology indicators based on a local soil survey and FAC-neutral test. Numerous aerial maps since 1985 show the 0.7 acre area to be treed or partially treed, with no evidence of crop production thereon. (FOF 13; and CR, Tab 15, File 2, Pages 12-13, 48, 52-53, 54, and 65-67.) NRCS made its determination final on September 6, 2005. (CR, Tab 15, Page 7.)

Appellant appealed the NRCS decision to the FSA. On September 23, 2005, Appellant met with the FSA County Committee (COC) to present his case. On September 29, 2005, the COC determined there was no merit to Appellant's appeal. (FOF 16; and CR, Tab 15, File 2, Pages 20-22).

On October 7, 2005, Appellant appealed to NAD. Appellant retained the services of a hydrology and hydraulics firm, whose employee opined that Appellant's 0.7 acre area did not exhibit wetland hydrology, nor had wetland hydrology been present for many years. The basis for the opinion is that "the site" had been significantly disturbed since 1921 by channelization of the South Skunk River, installation of field ditches on Appellant's and adjacent farms, and construction of Cooper Ditch. The expert also cited the previous COE findings supporting a determination that "the property" appears to qualify as a disturbed area in that, since 1968 it has been excavated, subjected to removal of vegetation, converted to agricultural land, and hydrologically, most importantly, had a drainage system constructed. Appellant's expert opined that a 5.9 foot elevation difference from the 0.7 acre site to Cooper Ditch provided surface water drainage from the area. (FOF 14; and CR, Tab 16, File 2, Appellant Exh. C.)

On January 4, 2006, a NAD Hearing Officer reversed FSA's decision. The Hearing Officer determined that NRCS did not properly consider hydrological manipulations that occurred prior to December 23, 1985 and that the previous NAD appeal determination was applicable to Tract 2296. The Hearing

> Officer concluded that Appellant's acreage met the definition of non-wetland because its conversion occurred prior to December 23, 1985. (CR, Tab 7 and 8, File 1.)

(A.R. 282-85).

On March 14, 2006, the Deputy-Director reversed the Hearing Officer's decision. (A.R. 280-88). The Deputy Director concluded "[t]hat there were previous manipulations on and around Tract 2296 does not preclude a determination that this particular site is a wetland . . ." (A.R. 287). Next, the Deputy Director examined the factual record to determine if the site in question met the requirements to be classified as a wetland under the 7 C.F.R. § 12.2(a). (A.R. 287-88). The Deputy Director found that the site in question met the definition of a wetland because it contains hydric soil, hydrophytic vegetation, and contains at least two secondary indicators of wetland hydrology. (A.R. 287-88). The Appellant seeks judicial review of the Deputy-Director's decision.

III. CONCLUSIONS OF LAW

A. Standard of Review for Agency Actions

"A final determination of the [National Appeals] Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with chapter 7 of Title 5." 7 U.S.C. § 6999. Chapter 706 of Title 5 states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
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> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706. In his request for judicial review, Plaintiff urges this court to hold unlawful or set aside the Deputy-Director' decision because 1) the Deputy-Director acted arbitrarily, capriciously, abused its discretion, or otherwise did not act in accordance with the law; 2) the Deputy-Director acted in excess of his jurisdiction; and 3) the Deputy-Director's wetland determination was not supported by substantial evidence.

1. Arbitrary, Capricious, Abuse of Discretion, or Error of Law

A court accords substantial deference to the agency's interpretation of the statutes and regulation that the agency administers. Siebrasse v. United States Department of Agriculture, 418 F.3d 847, 851 (8th Cir. 2005) (citing Vue v. INS, 92 F.3d 696, 699 (8th Cir. 1996) (citations and quotations omitted)). A court "will defer to the agency's interpretation 'so long as it is not arbitrary, capricious, and abuse of discretion, or otherwise not supported by law.'" Siebrasse, 418 F.3d at 851 (quoting Minnesota v. Apfel, 151 F.3d 742, 745 (8th Cir. 1998) (internal quotations omitted)). An agency action is arbitrary and capricious when "'the agency has … offered an explanation for its decision

that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Siebrasse, 418 F.3d at 851 (quoting Mausolf v. Babbitt 125 F.3d 661, 669 (8th Cir. 1997) (internal quotations omitted).

When conducting judicial review of an agency decision for arbitrariness, capriciousness, an abuse of discretion, or error of law, this Court must conduct a "'searching and careful' de novo review of the administrative record presented to determine 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Downer v. United States By and Through the United States Department of Agriculture and Soil Conservation Service, 97 F.3d 999, 1002 (8th Cir. 1996) (quoting Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)).

> To perform this review the court looks to whether the agency considered those factors Congress intended it to consider; whether the agency considered factors Congress did not intend it to consider; whether the agency failed entirely to consider an important aspect of the problem; whether the agency decision runs counter to the evidence before it; or whether there is such a lack of rational connection between the facts found and the decision made that the disputed decision cannot 'be ascribed to a difference in view or the product of agency expertise.'

Downer, 97 F.3d 999 at 1002 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

"[T]he reviewing court may not substitute its judgment for that of the agency and must give substantial deference to agency determinations." Downer, 97 F.3d at 1002 (citing Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43). "This deference is particularly appropriate when the agency determination in issue concerns a subject within the agency's own area of expertise." Downer, 97 F.3d at 1002 (citing Marsh, 490 U.S. at 377-78). "An agency making fact-based determinations in its own field of expertise, particularly where those determinations are wrapped up in scientific judgments, must be permitted to 'rely on the reasonable opinions of its own qualified experts even if, as an original matter,

a court might find contrary views more persuasive." Downer, 97 F.3d at 1002 (quoting Marsh, 490 U.S. at 377-78).

2. Substantial Evidence

Appellant bringing action for review of NAD decision overruling a hearing officer's decision bears the burden of proof that the NAD decision was not based on substantial evidence. Payton v. United States Dep't of Agric., 337 F.3d 1163, 1169 (10th Cir. 2003). "Substantial evidence is 'less than a preponderance but is enough that a reasonable mind would find it adequate to support' the decision." Fredrickson v. Barnhart, 359 F.3d 972, 976 (8th Cir. 2004)(quoting Krogmeier v. Barnhart, 294 F.3d 1019, 1022 (8th Cir. 2002)). The substantial evidence standard:

> has always involved a large amount of deference to the relevant fact-finder. For example, it is a more deferential standard that the "clearly erroneous" standard that we use for reviewing factual determinations by lower court judges. Under that standard, we can overturn factual findings that we conclude are clearly wrong even though they are not unreasonable. In contrast, under the substantial evidence standard we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is clearly wrong. Rather, before we can reverse we must find that it would not be possible for any reasonable fact-finder to come to the conclusion reached by an administrator.

Mendendez-Donis v. Ashcroft, 360 F.3d 915, 918 (8th Cir. 2004) (internal citations omitted). "Substantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence.'" Baldwin v. Barnhart, 349 F.3d 549, 555 (8th Cir. 2003) (internal citations omitted).

B. Applicable Regulations

The controlling regulations are 7 C.F. R. 11, 7 C.F.R. 12, and the United States Corp of Engineers (COE) Wetland Delineation Manual (WDM). Section 11 of Title 7 contains regulations regarding the National Appeals Division. Section 11.9(d)(3)states:

> In any case or category of cases, the Director may delegate his or her authority to conduct a review under this section to any

> Deputy or Assistant Directors of the Division. In any case in which such review is conducted by a Deputy or Assistant Director under authority delegated by the Director, the Deputy or Assistant Director's determination shall be considered to be the determination of the Director under this part and shall be final and not appealable.

7 C.F.R. 11.9(d)(3). Section 11.10(a) states, "In making a determination, the Hearing Officers and the Director are not bound by previous findings of facts on which the agency's adverse decision was based." 7 C.F.R. 11.10(a). Section 11.10(b) states:

> In making a determination on the appeal, Hearing Officers and the Director shall ensure that the decision is consistent with the laws and regulations of the agency, and with the generally applicable interpretations of such laws and regulations.

7 C.F.R. 11.10(b).

Section 12 of Title 7 contains regulations regarding Highly Erodible Land and Wetland Conversion. Under Section 12.2(a), the term *wetland*, except when such a term is a part of the term "converted wetland", means land that:

> (1) Has a predominance of hydric soils;
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> (2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
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> (3) Under normal circumstances, does support a prevalence of such vegetation, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

7 C.F.R. 12.2(a). See also 16 U.S.C. §3801(a)(18). Under Section 12.2(a), a *converted wetland* is a wetland

> that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity

> without further application of the manipulations described herein if:
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> (I) Such productions would not have been possible but for such action; and
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> (ii) Before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland;

7 C.F.R. 12.2(a). See also 16 U.S.C. § 3801(a)(6)(A). Under Section 12.2(a), a *non-wetland* is:

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

7 C.F.R. 12.2(a). Under Section 12.2(a),a *prior-converted cropland* is

> a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:
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> (I) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and
>
> (ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more); [or];

7 C.F.R. 12.2(a).

C. Analysis

1. The Deputy-Director's Decision Is Lawful

The Appellant argues that the Deputy-Director's decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, because the Deputy-Director found the non-wetland exemption under 7 C.F.R. 12.2(a) to be inapplicable, relied on impermissible criteria in his wetland determination, and ignored agency rules regarding the authoritativeness of the WDM. The agency argues that the Deputy-Director's decision is lawful because the Deputy-Director properly applied the regulations and provisions contained in 7 C.F.R. 12 and the WDM. This Court finds that the Deputy-Director's decision was not arbitrary, capricious, an abuse of discretion, and that it was in accordance with the law.

Non-Wetland Exemption Under 7 C.F.R. 12.2(a) is Inapplicable. The Appellant argues, and the Hearing Officer found, that the site in question is a non-wetland because it met the criteria for a converted wetland prior to December 23, 1985, the site in question did not meet wetland criteria on that date, and the site in question was not being used to produce an agricultural commodity nor being managed for pasture or hay. See 7 C.F.R. 12(a) *Non-wetland*.[3] (A.R. 38-39). The Appellant and the Hearing Officer point to evidence detailing hydrological manipulations to Tract 2296 that occurred prior to December 23, 1985, as proof that the site in question meets the criteria for a non-wetland, and is therefore exempt from a wetland determination. (A.R. 38-39).

The Appellant also argues that the Deputy-Director acted arbitrarily, capriciously, abused his discretion, or otherwise failed to act in accordance with the law by not accepting the 2005 hearing testimony of experts John Chenowith, a private hydrology

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[3] In his brief, Appellant argues that the 0.7 acre at issue qualifies for an exemption under "7 C.F.R. 12.3(a)." (Appellant's Brief, p. 13). However, 7 C.F.R. 12.3(a) does not address exemptions from wetland determinations, but rather, it addresses the geographic scope to which the provisions of 7 C.F.R. 12 are applicable. See 7 C.F.R. 12.3(a). Based on Appellant's brief, it appears that Appellant is arguing that the 0.7 acre should not be subject to a wetland determination because it is a "non-wetland" under 7 C.F.R. 12.2(a), and that the citation to 7 C.F.R. 12.3(a) is a typographical error. The same typographical error is found in the Hearing Officer's decision. (A.R. 38).

consultant and former NRCS senior hydrologist, and Don Etler, an agricultural engineer, regarding the site in question. Both Chenowith and Etler testified that the site in question sustained hydrological manipulations prior to December 23, 1985, that qualified it for an exemption as a non-wetland. Chenowith, who visited the site in question and relied on the 1991 McAneny report, testified that the site in question sits at a higher elevation than the non-wetland surrounding it. Chenowith testified that draining water would have to run uphill into the site in question in order for the site in question to maintain wetland hydrology. In contrast, the agency argues that no evidence in the record shows that the site in question meets the requirements to be exempt from a wetland determination as a non-wetland under 7 C.F.R. 12.2(a).

This Court finds that the Deputy-Director properly considered whether the site in question was exempt, as a non-wetland, under 7 C.F.R. 12.2(a). In his analysis of whether the non-wetland exemption applied, the Deputy-Director specifically addressed the two pieces of documentary evidence relied upon by the Appellant and the Hearing Officer regarding past hydrological manipulations to Tract 2296, the1991 McAneny report and the1995 NAD decision. (A.R. 286-87). The Deputy-Director explained that these two pieces of evidence did not supply information that qualified the site in question for a non-wetland exemption because the information they contained did not pertain specifically to the site in question. (A.R. 286-87). The Deputy-Director found that the McAneny report showed only that "an area including Appellant's farm tract and areas well beyond the tract has been extensively manipulated, and those manipulations had or would have resulted in changes affecting the entire area over an undetermined amount of time." (A.R. 286). Thus, the Deputy-Director explained that while the McAneny report provided information regarding hydrological manipulations that occurred on Tract 2296 wholly, it did not contain information about the site in question specifically. (A.R. 286). Additionally, the Deputy-Director found that the information in the McAneny report did not prove or disprove whether the site in question meets the requirements for classification of a wetland in the past or currently. (A.R. 286). The Deputy Director noted that the McAneny report concluded that "the property may or may not now meet the wetland hydrology criterion."

(A.R. 286 (citing the McAneny report at A.R. 86)). Thus, the Deputy-Director found that the information contained in the McAneny report was insufficient to show that the site in question met the criteria for a non-wetland under 7 C.F.R. 12.2(a). (A.R. 286).

The Deputy-Director found that the 1995 NAD decision had no bearing the Deputy-Director's instant decision. (A.R. 286-87). In the 1995 decision, the NAD reversed the NRCS's determination regarding the wetland classifications of sections of Tract 2296 on the grounds that the NCRS was required to consider whether sections of Tract 2296 met the criteria for non-wetland, as "prior converted cropland," under 7 C.F.R. 12.33(b). (A.R. 169, 286-87). The Deputy-Director explained that the 1995 NAD decision addressed hydrological manipulations that took place on Tract 2296 wholly, but that the decision made no specific determinations regarding the site now in question. (A.R. 286-87). The site in question was classified as "not-inventoried" prior to the Appellant's request for a wetland delineation in 2005. (A.R. 284). Additionally, in his decision, the Deputy-Director applied the definition of "prior converted cropland" to the site in question, determining that the site in question would not have qualified as such now or in the past. (A.R. 287). Thus, the Deputy-Director found that the 1995 NAD decision was not applicable to the wetland determination for the site in question.

The Deputy-Director acknowledged Chenowith's theory that the difference in elevation between the site in question and the surrounding area would allow adequate draining of the site in question. (A.R. 287). The Deputy-Director stated that the Appellant failed to provide actual soil profile data or other information to show that the site in question actually drains. (A.R. 287). The Deputy-Director stated that the Appellant failed to provide evidence to contradict previous determinations that the area encompassing the site contains soils that drain poorly. (A.R. 287). In the absence of such evidence, the Deputy-Director did not accept the expert testimony of Chenowith. (A.R. 287).

This Court finds that the Deputy-Director's decision that the site in question was not exempt is not capricious, an abuse of discretion, or otherwise unlawful. In his decision, the Deputy-Director considered the factors that Congress intended the agency to consider in a wetland determination. There is no evidence to suggest that the Deputy-Director

considered factors that Congress did not intend for him to consider. The Deputy-Director considered the important aspects of the problem, including the non-specificity of past reports regarding hydrological manipulations to Tract 2296. The Deputy-Director's decision is in line with the evidence before the agency. There is not "such a lack of rational connection between the facts found and the decision made that the disputed decision cannot 'be ascribed to a difference in view or the product of agency expertise." Downer, 97 F.3d 999 at 1002 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Additionally, the determination of whether the site in question is a wetland is one of the "classic examples of factual disputes implicating substantial agency expertise." Downer, 97 F.3d 999 at 1002. This Court accords "substantial deference" to "a subject within the agency's own area of expertise." Downer, 97 F.3d at 1002 (internal citations omitted). Thus, this Court will not disturb the Deputy-Director's decision that the site is question is not exempt from a wetland delineation as a non-wetland.

Primary and Secondary Indicators of Wetland Hydrology Used in Wetland Determination. Under 7 C.F.R. 12.2(a), a site properly classified as a wetland must contain 1) hydric soils, 2) wetland hydrology, and 3) hydrophytic vegetation. In his decision, the Deputy-Director noted that the parties' conflict centered on the wetland hydrology requirement, and that the parties did not dispute that the site in question met the requirements for hydric soils and hydrophytic vegetation. (A.R. 287). Thus, the Deputy-Director properly addressed only the wetland hydrology requirement in his decision. (A.R. 287).

The Deputy-Director stated that no primary indicators of wetland hydrology existed.[4] (A.R. 287). He concluded that the issue before him was whether the site in

[4] The WDM provides lists of primary and secondary indicators of wetland hydrology. According to the WDM, "[I]n the absence of a primary indicator, any two secondary indicators must be present in order to conclude a wetland hydrology is present." WDM, ¶ 49 User Note. Primary indicators of wetland hydrology are "drainage patterns, drift lines, sediment depositions, watermarks, stream gauge data and flood predictions, historic records, visual observation of saturated soils, and visual observation of inundation." WDM, ¶ 49.

(continued…)

question contained two secondary indicators of wetland hydrology. (A.R. 287). The Deputy-Director then found that two secondary indicators, soil survey data and the FAC-neutral test, existed for the site in question. (A.R. 287). The Deputy-Director found that the presence of these two secondary indicators demonstrated that the site contained wetland hydrology. (A.R. 287). The Deputy-Director's finding regarding the presence of two secondary indicators was based on the reports of agency personnel who conducted field visits to the site in question. Because the site in question met all three requirements established for wetlands in 7 C.F.R. 12.2(a), the Deputy-Director reversed the decision of the Hearing Officer, and reinstated the NRCS decision. (A.R. 288).

The Appellant argues that the Deputy-Director's finding that primary indicators of hydrology did not exist is erroneous. Appellant argues that Chenowith and Etler testified at the 2005 hearing that recorded data pertinent to the determination of whether the site in question contained wetland hydrology existed. According to the Appellant, primary indicators of wetland hydrology were present in the record before the Deputy-Director, and the Deputy-Director erred when he bypassed them and used secondary indicators instead to find that the site contains wetland hydrology. The agency argues that the Deputy-Director properly determined that no primary indicators of wetland hydrology existed by relying on the scientific conclusions reached by agency personnel. Therefore, the agency argues, the Deputy-Director did not err by using secondary indicators to determine if the site contained wetland hydrology.

In light of the evidence on either side of the issue, the Deputy-Director's finding that no primary indicators of wetland hydrology existed is not "'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Siebrasse, 418 F.3d at 851 (8th Cir. 2005) (quoting Mausolf v. Babbit, 125 F.3d 661, 669 (8th Cir. 1997) (internal quotations omitted)). The Deputy-Director had before him three previous

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[4](…continued)
Secondary indicators of wetland hydrology are "presence of rhizospheres associated with living plant roots in the upper 12 inches of the soil, presence of water-stained leaves, local soil survey hydrology data for identified soils, and FAC-neutral test of the vegetation." WDM, ¶ 49 User Note.

agency decisions that stated no primary indicators existed, including the July 28, 2005, NRCS wetland determination, the September 6, 2005, NRCS final wetland determination, and the September 29, 2005, FSA affirmation of those determinations. To the contrary, the Deputy-Director had before him the decision of the Hearing Officer, who found that the 1991 McAneny report constituted pertinent hydrology data. (A.R. 39). The Hearing Officer found that elevation readings and a channel survey of the South Skunk River provided by the Appellant constituted "hydrology data" available to the agency. (A.R. 39). The Deputy-Director also had before him Etler's testimony regarding the presence of wetland hydrology data for the site in question in the record.

In making the determination that no primary indicators existed, this Court finds that the Deputy-Director considered the factors that Congress intended the agency to consider in a wetland determination. The Deputy-Director thoroughly explained in his decision that the McAneny report was not relevant to the wetland hydrology of the site in question because the report did not contain findings regarding the site in question. Additionally, the report did not reach any conclusive determinations regarding the wetland hydrology contained on Tract 2296. There is no evidence to suggest that the Deputy-Director considered factors that Congress did not intend for him to consider. The Deputy-Director considered the important aspects of the problem, including the non-specificity of past reports regarding hydrological manipulations to Tract 2296. The Deputy-Director stated that the Appellant failed to produce hydrology data to show that the site in question actually drains as purported by expert witnesses in their testimony before the agency at a 2005 hearing. (A.R. 287). The Deputy-Director's decision is in line with the evidence before the agency. "An agency making fact-based determinations in its own field of expertise particularly where those determinations are wrapped up in scientific judgments, must be permitted to 'rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Downer, 97 F.3d at 1002 (quoting Marsh, 490 U.S. at 377-78). Thus, this Court finds that the Deputy-Director did not act arbitrarily, capriciously, abuse his discretion, or otherwise error as

a matter of law when he found that the no primary indicators of wetland hydrology existed on the site.

Use of Soil Survey as Secondary Indicator in Wetland Determination. Pursuant to the User Note that appears following Paragraph 49 in the WDM, "local soil survey hydrology data for identified soils" is a permissible secondary indicator of wetland hydrology. At Part IV, Section B, Paragraph 54(c), the WDM lists "soil surveys" as a data source that a WDM user should obtain as a source of information when making a wetland determination. At Paragraph 55(c), Step 8(h), of the same part and section, the WDM instructs WDM users to use soil surveys when summarizing the hydrology of a site. Immediately following Step 8(h), the WDM contains the following statement regarding soil surveys:

> *CAUTION: Data provided only represent average conditions for a particular soil series in its natural undrained state, and cannot be used as a positive hydrologic indicator in areas that have significantly altered hydrology.*

The Appellant argues that the above-quoted section prevents the Deputy-Director from permissibly using soil survey data to determine if the site in question is a wetland. According to the Appellant, evidence in the record, such as the McAneny report and the 1995 NAD decision, demonstrate that Tract 2296 contains "significantly altered hydrology." Because the site in question is encompassed by land that contains "significantly altered hydrology," the agency argues that the Deputy-Director could not lawfully use soil survey data to determine if the site in question was a wetland. The agency argues that none of the evidence in the record regarding hydrological manipulations pertains specifically to the site in question. Thus, the agency contends that the Deputy-Director permissibly used soil survey data as a secondary indicator to determine if the site in question contained wetland hydrology.

This Court finds that the Deputy-Director did not act arbitrarily, capriciously, abuse his discretion, nor fail to act in accordance with the law when he used the soil survey as a secondary indicator. The Deputy-Director properly considered whether the site in question contains "significantly altered hydrology," as is required by the WDM, before

he used the soil survey as a secondary indicator of wetland hydrology. Although evidence existed in the record that showed that hydrological manipulations took place on Tract 2296 in the past, the Deputy-Director thoroughly explained in his decision that such evidence, like the McAneny report and the 1995 NAD decision, was not relevant to the wetland hydrology of the site in question because they did not contain findings regarding the site in question.

Deputy-Director's Treatment of the WDM and Definition of Terms "Site" and "Area." The Appellant argues that by placing Footnote 2 in his decision, the Deputy-Director committed a legal error and acted in excess of jurisdiction because the footnote effectively declared that he would not consider binding any portion of the WDM except those entered into evidence or testified about by witnesses. Footnote 2 states:

> Neither party offered the entire WDM into evidence. FSA provided part of Paragraph 49 of the WDM in its request for review. Appellant provided witness testimony about certain paragraphs of the WDM that will be appropriately considered; however, those paragraphs are not cited herein as legal authority in absence of the actual document.

(A.R. 282). This Court disagrees with the Appellant's characterization of Footnote 2. The Deputy-Director did not disregard all portions of the WDM that were not entered into evidence in Footnote 2. The Deputy-Director's intent regarding the authoritativeness of the WDM is made clear by his acknowledgment of the controlling nature of the WDM in the "Legal Standards" section of his decision. (A.R. 280). Thus, the Deputy-Director's inclusion of Footnote 2 in his decision did not constitute a legal error or an action in excess jurisdiction.

The Appellant also argues that in Footnote 1 of his decision, the Deputy-Director committed a legal error and acted in excess of his jurisdiction because he redefined terminology, specifically the words "site " and "area," used by the NRCS, the COE, and the USDA. Footnote 1 states:

> The 0.7 acres on Tract 2296 has been referred to differently as a "site" or "area" in documentary and testimonial evidence. For clarity in this review, I will consider that the "site" refers only to the specific

> 0.7 acres in question, and that the "area" may refer to Appellant's farm or Tract 2296, both of which encompass the site, but may also include larger areas outside the geographical boundaries of Appellant's farm, for example, adjacent to the landowner's properties, the County, the Skunk River, etc.

(A.R. 280). This Court disagrees with the Appellant's characterization of Footnote 2. A review of the decision demonstrates that the Deputy-Director included Footnote 1 to explain the definitions that the words "site" and "area" would carry in his decision. Thus, the Deputy-Director's inclusion of Footnote 1 in his decision did not constitute a legal error or an action in excess jurisdiction.

2. The Deputy-Director's Decision is Supported By Substantial Evidence in the Record

A review of the agency record demonstrates that substantial evidence exists to support the Deputy-Director's decision to reverse the Hearing Officer's decision. As stated above, in order for a site to be properly classified as a wetland, it must contain 1) hydric soils, 2) wetland hydrology, and 3) hydrophytic vegetation. The parties agreed that the site in question satisfies the first and third elements of the classification. The Deputy-Director determined, and substantial evidence supports, that the site in question contained the second element, wetland hydrology.

The substantial evidence standard "has always involved a large amount of deference to the relevant fact-finder." Mendendez-Donis v. Ashcroft, 360 F.3d 915, 918 (8th Cir. 2004) (internal citations omitted). "Substantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence.'" Baldwin v. Barnhart, 359 F.3d 549, 555 (8th Cir. 2003) (internal citations omitted). "[U]nder the substantial evidence standard we cannot substitute our determination for that of the administrative fact-finder just because we believe that the fact-finder is clearly wrong. Rather, before we can reverse we must find that it would not be possible for any reasonable fact-finder to come to the conclusion reached by an

administrator." Mendendez-Donis v. Ashcroft, 360 F.3d 915, 918 (8th Cir. 2004) (internal citations omitted).

The Deputy-Director relied on the findings of agency personnel that conducted field visits when he reversed the decision of the Hearing Officer. After Appellant requested a wetland determination for the site in question on June 21, 2005, the NRCS conducted two field visits at the site in question on July 18, 2005, and August 17, 2005. (A.R. 300). District Conservationist Kevin Funni, Soil Scientist Mark La Van, and Area Resource Conservationist Shawn Dettman from NRCS met with the Appellant at the site in question for the first visit (A.R. 4, 300). Funni and the Appellant were present at the second field visit to the site in question (A.R. 4). After both field visits, the NRCS reached the determination that the site in question was a wetland because it contained two secondary indicators of wetland hydrology. (A.R. 4). This Court finds that the determinations of agency personal that two secondary indicators of wetland hydrology were present in the site in question meets the threshold of substantial evidence to support the Deputy-Director's decision. Because the Deputy-Director's decision is supported by substantial evidence in the record, this Court will not disturb the decision.

Upon the foregoing,

IT IS ORDERED

That the decision of the Deputy-Director is hereby affirmed. This matter is dismissed. The Clerk of Court shall enter judgment accordingly.

DATED this 12th day of February, 2008.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA