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WETLANDS REGULATIONS AND TAX TREATMENT OF INUNDATED AGRICULTURAL LANDS STUDY - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3018 (2025) (appendix) directs the Legislative Management to study water and wetlands regulations and the taxation of inundated lands in the state. The study must include a review of the different methods to assess and document boundaries for wetlands; an examination of the regulation of water, wetlands, and inundated lands laws of other states; an inventory of federal, state, and local laws, regulations, and policies relating to the jurisdiction of water and wetlands; an analysis of the environmental protection and public health jurisdictional framework, including an identification of potential conflicts, overlaps, and gaps in authority; and recommendations for improving the clarity, consistency, and efficiency of the jurisdictional framework in water management. The study also must explore viable legal options to fill and drain nuisance areas, examine the impacts of seasonal wet areas on agricultural productivity and soil health, and identify the value of these areas to resident wildlife.

Testimony provided in support of House Concurrent Resolution No. 3018 indicated the need to study the tax treatment of inundated agricultural land in the state and the state's authority to regulate wetlands, especially wetlands that are part of federal conservation programs. Testimony indicated the study may help bring clarity to the inconsistent tax treatment of inundated land and provide a more efficient regulatory framework for water management. No testimony in opposition to the study was received.

BACKGROUND

The taxation of inundated land and the regulation of waters and wetlands are especially relevant to North Dakota due to the state's robust agricultural sector and its geographical location within the Prairie Pothole Region. According to the federal Environmental Protection Agency[1], prairie potholes are depressional wetlands found most often in North Dakota, South Dakota, Minnesota, and Wisconsin. The potholes formed because this area of the Upper Midwest was covered by glaciers. When the glaciers melted, potholes formed, which fill with snowmelt and rain in the spring. While some potholes have permanent marshes, other potholes are temporary and recede during dry spells.

TAX TREATMENT OF INUNDATED AGRICULTURAL LAND

North Dakota Law

North Dakota Century Code Section 57-02-27.2 outlines the procedure for valuing and assessing agricultural lands. The Department of Agribusiness and Applied Economics of North Dakota State University is required to compute the average agricultural value per acre for inundated agricultural land for each county in the state. The section defines inundated agricultural land as:

> Property classified as agricultural property containing a minimum of ten contiguous acres if the value of the inundated land exceeds ten percent of the average agricultural value of noncropland for the county, which is inundated to an extent making it unsuitable for growing crops or grazing farm animals for two consecutive growing seasons or more, and which produced revenue from any source in the most recent prior year which is less than the county average revenue per acre

[1] Prairie Potholes, Environmental Protection Agency, October 2024. (https://www.epa.gov/wetlands/prairie-potholes).

for noncropland calculated by the department of agribusiness and applied economics of North Dakota state university.

An applicant seeking to classify land as an inundated agricultural land must complete a form provided by the Tax Department and submit the form to the township assessor or county director of tax equalization by March 31 of each year. The board of county commissioners must approve the inundated classification for the property for the taxable year. The agricultural value of inundated agricultural lands is 10 percent of the average agricultural value of noncropland for the county, as determined by the Department of Agribusiness and Applied Economics of North Dakota State University. The probability that the property will be suitable for agricultural production as cropland or for grazing farm animals in the future is a factor when determining the value of inundated property. A landowner aggrieved by a determination regarding inundated agricultural land may appeal the decision through the informal equalization process and formal abatement process as provided under Title 57.

Inundated land was discussed in a 1999 Attorney General's opinion (99-L-87) in which the Attorney General was asked whether an assessor has discretion when valuing land the county commission has determined meets the statutory definition for inundated agricultural land for property assessment purposes. The Attorney General opined that an assessor is granted flexibility when considering whether land will be suitable for agricultural production as cropland or for grazing farm animals in the future when valuing individual parcels of inundated agricultural land. The opinion highlighted the statutory language that states, "[v]aluation of individual parcels of inundated agricultural land may recognize the probability that the property will be suitable for agricultural production as cropland or for grazing farm animals in the future." The Attorney General offered several factors to determine whether the property will be sustainable for future production, including the length of time the land has been under water; the depth of water covering the land at the current time; the depth of water covering the land since it has been inundated; the condition of the land, its use, and productivity prior to its inundation; and the soil type and classification for the land prior to its inundation. The Attorney General indicated the factors were not an exhaustive list, but should guide assessors when valuing individual parcels of inundated agricultural land. The opinion noted, "[f]actors indicating the probability that the land will be suitable for agricultural production in future years would support an increased valuation."

Section 57-02-10 requires the board of county commissioners to remove from the tax rolls and exempts from taxation all inundated lands upon which the landowner has granted or grants in the future a permanent easement to the United States or its agencies, for the purpose of constructing, maintaining, and operating water or wildlife conservation projects, and all lands upon which the landowner has granted or grants in the future an easement for a highway or road right of way to the United States or its agencies, or to the state or a political subdivision of the state. Land removed from the tax rolls must remain exempt until the time the water or wildlife conservation projects or highway has been abandoned. Additionally, the land may not be removed from the tax rolls and declared exempt from taxation until the construction of the water or wildlife conservation projects, or the highway on the land, is completed.

Easements were discussed in a 2001 Attorney General's opinion (2001-L-41) in which the Attorney General was asked whether land subject to an easement granted to the United States Department of Agriculture is exempt from taxation under Section 57-02-10. The Attorney General opined that for land to qualify for exemption under Section 57-02-10, the assessing officials must determine whether the land is inundated, a permanent easement has been granted under the federal program, the easement is for a water or wildlife conservation project, and the construction of the water or wildlife conservation project is completed.

Understanding the nuances of land ownership adjacent to navigable waters is a critical component when determining the tax treatment of inundated agricultural lands. In a 2004 Attorney General's opinion (2004-L-33), the Attorney General addressed ownership issues related to the fluctuating levels of Devils Lake by analyzing North Dakota case law. The Attorney General stated, "as Devils Lake rises or recedes, the adjacent landowner will take title down to the ordinary high water mark, the State will take title to lands up to the ordinary low water mark, and the adjacent landowner and the State will have correlative

rights to the area in between the two marks known as the shorezone." The opinion relied on *North Shore, Inc. v. Wakefield*, 530 N.W.2d 297 (N.D. 1995) to define riparian land, which is "belonging or relating to the bank of a river or stream; of or on the bank." Thus, riparian land is land not submerged by water. In reaching his conclusion, the Attorney General analyzed *Perry v. Erling*, 132 N.W.2d 889 (N.D. 1965). The Attorney General stated:

> In *Perry*, land which was originally surveyed as riparian was submerged by the encroaching Missouri River; the encroachment caused land, originally surveyed as nonriparian, to become riparian. The *Perry* Court concluded that when the river shifted back, causing the land originally surveyed as riparian to reemerge, title to the reemerging land rested with the owner of the original riparian land and not with the owner of the original nonriparian land.

The *Perry* court analyzed the Missouri River, not Devils Lake. However, the Attorney General indicated that, if ever faced with the question, the North Dakota Supreme Court could apply the *Perry* precedent, and allow title to formerly inundated riparian land to revert to the person who owned it before inundation.

Approaches by Adjacent States

South Dakota

The South Dakota Legislature has enacted several statutes relating to inundated lands. Section 43-17-31 of the South Dakota Codified Laws authorizes a landowner to restrict access to private taxable property, including inundated property if the property has been inundated for at least 3 years, borders the water's edge, and lies above the ordinary high water mark of a navigable lake of 5,000 acres or more of privately owned inundated land. A landowner who denies access must request the Department of Game, Fish, and Parks to delineate the boundaries of the restricted property. Section 43-17-32 allows a landowner to restrict access to inundated property in the same manner as under Section 43-17-31. However, the inundated land may be open for public access if the landowner grants permission for public access and use, and all applicable property taxes paid by the landowner during the public access period are reimbursed by the state agency managing the public use. Neither Section 43-17-31 nor 43-17-32 applies to public highways used by motor vehicles.

Section 10-6-126 provides a mechanism for a landowner to request a special assessment rate for inundated farmland if agricultural land is inundated by flooding and the land could not be farmed during the previous three growing seasons. Before November 1 of each year, the landowner must complete an application provided by the South Dakota Department of Revenue to claim inundation. The landowner must describe the location of the inundated land that was not farmable in the previous three growing seasons. Under Section 10-6-125, if a landowner applies for a special valuation rate, the director of the county equalization department must consider and adjust the assessed value of the land described in the application. To determine whether the land is farmable, the director is required to use the marshland soil rating classification under South Dakota law.

Minnesota

Section 272.02 of the Minnesota Statutes outlines the types of property exempt from property taxes, which include wetlands. Exempt wetlands include, "land which is mostly under water, produces little if any income, and has no use except for wildlife or water conservation purposes, provided it is preserved in its natural condition and drainage of it would be legal, feasible, and economically practical for the production of livestock, dairy animals, poultry, fruit, vegetables, forage and grains, except wild rice." This statute defines wetlands of this type as including adjacent land that is not suitable for agricultural purposes due to the presence of the wetlands. However, exempt wetlands do not include woody swamps containing shrubs or trees, wet meadows, meandered water, streams, rivers, floodplains, or river bottoms.

WETLANDS REGULATIONS

Background

Federal, state, local, and private actors exercise authority over wetlands in the state. Authority over wetlands is derived primarily from state and federal laws, which continue to be tested through state action

and litigation. A significant point of contention between landowners and the federal government relates to United States Fish and Wildlife Service (FWS) easements.

Congress established the original precursor to FWS in 1871, and FWS was established in 1956. The FWS primarily is responsible for the conservation and management of fish, wildlife, and plants, and their habitats through the implementation of federal environmental laws relating to migratory birds and endangered species. An easement exercised by FWS is a right created by an express voluntary legal agreement to allow a person to make lawful and beneficial use of the land of another without possessing the land and can include conservation easements and wetland easements. Conservation easements are agreements that protect wetlands, floodplains, riparian corridors, and habitats of endangered species. Wetland easements enable FWS to acquire the right to maintain wetlands on described tracts of land and restrict the landowner from draining, burning, filling, or leveling the wetlands. Easements are recorded on an abstract of title to keep a record of the history of the property. An easement is specific to the acreage purchased. As held by the United States District Court of North Dakota in *United States v. Albrecht*, 364 F.Supp. 1349 (1973), an agreement granting FWS an "… easement or right of way for the maintenance of the land … as a waterfowl production area in perpetuity …" is a "permanent interest" that continues with the land even if there is a change in ownership.

North Dakota Law

Several elected officials and state agencies, including the Agriculture Commissioner, the Tax Commissioner, the Game and Fish Department, and the Department of Water Resources exercise statutory authority over wetlands in the state. The provisions in Chapter 47-05 address wetland easements, including federally owned wetland easements, and provide for duration limits on various easements.

Agriculture Commissioner

Under Section 4.1-01-15, the Agriculture Commissioner oversees an electronic database of wetland credits that an agricultural landowner may purchase under a wetland mitigation banking program. According to the National Resources Conservation Service, mitigation banking is the restoration, creation, or enhancement of wetlands for the purpose of compensating for unavoidable impacts to wetlands at another location. Wetland mitigation banking commonly is used to compensate for wetland impacts resulting from development, but also is used to compensate for impacts from agriculture. Chapter 61-31 authorizes the Agriculture Commissioner to execute agreements with landowners for wetland conservation. Section 61-31-04 outlines landowner duties under a conservation agreement with the Agriculture Commissioner, which include the duty not to destroy the wetland area or farm the wetland area subject to the agreement. Section 61-31-05 outlines the duties of the Agriculture Commissioner under a conservation agreement with a landowner, which include making payments to the landowner subject to the agreement, providing conservation and development practices on the wetlands, and authorizing the landowner to conduct haying or grazing in the wetland area if a drought emergency exists.

Game and Fish Department

Chapter 20.1-02 provides the statutory provisions for the North Dakota Game and Fish Department. Section 20.1-02-17 was enacted in 1973 to provide state assent to the federal Wildlife Restoration Act, subject to the conditions of Section 20.1-02-17.1. Section 20.1-02-17.1 provides the procedures and conditions for land acquisitions for wildlife and fish restoration under the Wildlife Restoration Act [16 U.S.C. 669]. The North Dakota Game and Fish Department receives federal funds for wildlife purposes under the Wildlife Restoration Act [16 U.S.C. 669], which provides the "Secretary of the Interior is authorized to cooperate with the states, through their respective state fish and game departments, in wildlife-restoration projects...; but no money apportioned under this chapter to any state shall be expended therein until its legislature… shall have assented to the provision of this chapter and shall have passed laws for the conservation of wildlife."

Section 20.1-02-18 gives the state's conditional consent to the United States' acquisition of land or interests in land for migratory bird reservations, subject to gubernatorial consent. Section 20.1-02-18.1 requires the submission of proposed federal wildlife area acquisitions to the board of county

commissioners of the county or counties where the land is located, requires an opportunity for public comment, and requires an impact analysis before the acquisition may be approved.

Section 20.1-02-18.2, enacted in 1977, allowed landowners to negotiate the terms of leases, easements, and servitudes for wildlife production purposes. Under the section, as originally enacted, easements terminated upon the death of the landowner or the transfer of ownership. However, the section was amended in 1985 to remove the requirement that an easement terminate upon the death of a landowner or upon change of ownership. The section also was amended in 1985 to require the duration of an easement for a waterfowl production area acquired by the federal government, and consented to by the Governor or appropriate state agency after July 1, 1985, to be limited to 50 years. Section 20.1-02-18.3, enacted in 1981, prohibited the United States from acquiring land or interests in the state for migratory bird reservations, and prohibited the Governor from approving acquisitions with money from the migratory bird conservation fund until December 31, 1985, or until the date a management plan, jointly prepared by the Secretary of the Interior and the Governor, for the land was approved by the Legislative Assembly and the Governor.

Real Property Statutes

Chapter 47-05 provides statutory provisions relating to easements in the title of property. Section 47-05-02.1, enacted in 1977, aimed to limit the duration of wetland easements by establishing conditions governing easements, servitudes, and other restrictions on the use of real property, and restricted easements to a duration of 99 years. The section was amended in 1985 to limit easement durations for waterfowl production areas acquired by the federal government, and consented to by the Governor after July 1, 1985, to 50 years. The section was amended again in 1991 to limit the duration of wetland reserve program easements acquired by the federal government under the Food, Agriculture, Conservation, and Trade Act of 1990, after July 1, 1991, to 30 years. However, in *North Dakota v. United States*, 460 U.S. 300 (1983), the United States Supreme Court found the provisions of Section 47-05-02.1, which purport to limit wetland easements to a term of 99 years, may not be applied to wetland easements acquired by the United States under gubernatorial consents previously given. Since FWS still was acquiring wetland easements under the consents given in 1983, the state was not allowed to limit the duration of the pre-1976 easements. After the finding in *North Dakota v. United States*, it appears the duration of wetland easements under consents given before 1976 are perpetual, the duration of easements for waterfowl production areas consented to by the Governor or an appropriate state agency after July 1, 1985, is 50 years, and the duration of wetlands reserve program easements acquired pursuant to the Food, Agriculture, Conservation, and Trade Act of 1990 after July 1, 1991, is 30 years.

Section 47-05-02.1 was amended by House Bill No. 1399 (2013) to provide waterfowl production area easements exceeding 50 years or which purport to be perpetual may be extended by negotiation between the owner of the easement and the owner of the servient tenement. The amendment also provided waterfowl production easements exceeding 50 years or purporting to be perpetual, which are not extended by negotiation, are void. The legislative history of the bill indicates the bill was intended to provide a method of pushing back against the federal government's policy of perpetual waterfowl easements.

Tax Department

Section 57-02-08.4 provides for a conditional property tax exemption for qualifying wetlands. To qualify for the exemption, the wetland owner is required to file by June 30 of the exemption year an application on a form prescribed by the state tax commissioner with the county director of tax equalization. The form must include a legal description of the wetlands sought to be exempted and a statement from the owner agreeing not to "drain, fill, pump, or concentrate water in a smaller and deeper excavation in the wetland basin or alter the physical nature of the wetland in any manner that reduces the wetland's ability to function as a natural system during the year for which the exemption is claimed." If wetlands are drained or altered to the extent that the land is disqualified from receiving the exemption, the land is subject to the taxes that would have been assessed if the property had not qualified for the exemption. Under this section, wetlands subject to the exemption are "all types 3, 4, and 5 wetlands, as determined by the agriculture commissioner and the director of the game and fish department, in accordance with United

States Fish and Wildlife Service circular no. 39 (1971 edition), drainage of which would be feasible and practical."

Department of Water Resources

Section 61-32-03 grants the Department of Water Resources (DWR) the authority to receive permit applications from any person draining a pond, slough, lake, or sheetwater with a watershed area comprising 80 acres or more. Once received, DWR is required to forward the permit application to the governing body of all water resource districts in the watershed area. However, if the proposed drainage project is "of statewide or interdistrict significance", DWR has the authority to issue the final approval.

Federal Provisions

United States Fish and Wildlife Services Easements

The wetland easement program is authorized by the Migratory Bird Conservation Act of 1929 [Pub. L. 70-770; 45 Stat. 1222; 16 U.S.C. 715 et seq.] and the Migratory Bird Hunting Stamp Act of 1934 [48 Stat. 452; 16 U.S.C. 718 et seq.]. Under the Migratory Bird Conservation Act, "[t]he Secretary of the Interior is authorized to purchase or rent such areas as have been approved for purchase or rental by the commission … and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for such purposes…." [16 U.S.C. 715d]. The Act also provides, "[n]o deed or instrument of conveyance shall be accepted by the Secretary of the Interior under ... (the Act) ... unless the state in which the area lies shall have consented by law to the acquisition by the United States of lands in that state." [16 U.S.C. 715f]. Nor shall land "be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the governor of the state or appropriate state agency." [16 U.S.C. 715k-5]. The North Dakota Legislative Assembly consented "to the United States acquiring, by purchase, gift, devise, or lease, land or water in this state as the United States may deem necessary to establish migratory bird reservations" in accordance with the required consent provision of the federal Act. The consent is codified in Section 20.1-02-18.

Under the Migratory Bird Hunting Stamp Act, the Secretary of the Interior is authorized to sell stamps and use the migratory bird conservation fund "to acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange of, small wetland and pothole areas, interests therein, and right-of-way to provide access thereto." [16 U.S.C. 718d (c)]. All money received for the stamps are paid into a special fund known as the migratory bird conservation fund. [16 U.S.C. 718d]. The fund "shall be available for the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under the provisions of the migratory bird conservation Act...." [16 U.S.C. 718d (b)]. A 1958 amendment, known as the Small Wetlands Acquisition Program, gave the Secretary of the Interior flexibility to acquire lands or interests in land (easements) for waterfowl production areas.

Following the enactment and consent to the federal Acts by the state, issues arose concerning the duration of easements and the areas covered by FWS easements, which led to the enactment of several statutory provisions in 1977 and subsequent litigation. The terms of pre-1976 easements prohibited the draining, filling, leveling, or burning of all wetlands located on the easement acres. The FWS estimated pre-1976 easements protected 758,645 wetland acres. However, wetland acres in pre-1976 easements were not delineated, and the actual number of wetland acres protected by the pre-1976 easements is unclear as the tracts of land considered by the easements totaled approximately 4.8 million acres. The easements described the entire parcel of land as subject to an easement instead of the wetland area itself. Pre-1976 easements did not include an agreed upon easement map showing areas protected by the easement, but the easement summaries described the wetland acres restricted under the easement conveyance which led to disagreements over the location and boundaries of the covered easement areas. In 1977, the Legislative Assembly attempted to limit the duration of wetland easements with the enactment of Section 47-05-02.1.

United States Fish and Wildlife Service Litigation

In 1979, the United States brought an action against the state seeking declaratory judgment that the state's statutes restricting the acquisition of land for migratory bird refuges and waterfowl production areas enacted in 1977 were unconstitutional. In *North Dakota v. United States*, the United States

Supreme Court ruled the consent of the Governor required for land acquisition previously given cannot be revoked at will by an incumbent governor. The Court further held the state may not revoke its consent based on noncompliance with the conditions set forth in the 1977 legislation. The Court held to the extent the 1977 legislation authorized landowners to drain wetlands that had increased in size after the granting of the easement contrary to the terms of the easement agreement, it was hostile to federal law and interests and could not be applied to easements under previously given gubernatorial consents. For the same reason the statutes limiting perpetual easements to 99 years were found to be unconstitutional as applied to wetlands to which acquisitions by the United States had been approved previously under prior gubernatorial consent. The Court held North Dakota may not restrict the acquisition of easements under previously given gubernatorial consents.

In *United States v. Johansen*, 93 F.3d 459, 463 (8th Cir. 1996), two brothers were charged with violating the terms of an easement agreement entered in the 1960s by draining wetlands on their property after being denied permission by FWS. The brothers argued only the original number of acres contracted for in the easement summaries were covered by the agreement, not the wetland areas that expanded after a rainy season. The United States argued the easement summaries were not a part of the official recorded easement and the recorded easements described and covered larger tracts of land, and the easements encompassed all wetlands on an encumbered parcel. The Eighth Circuit Court of Appeals held federal wetland easements are limited to the wetland acreage provided in the easement summaries because the easement is limited to wetland acres only. The court of appeals largely based its opinion on the United States Supreme Court decision of *North Dakota v. United States* (U.S., 1983 103 S.Ct. 1095) and the district court decision of *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987). The court of appeals held FWS acquired an easement and paid the landowner based upon the wetland easement acreage summary sheet. Further, the defendant must have had knowledge the parcel was encumbered by a wetland easement, and the drained wetlands must be part of the easement summary. The court of appeals, interpreting the *Vesterso* decision, also noted the United States must prove beyond a reasonable doubt that identifiable, covered wetlands, as existing at the time of the easement's conveyance and described in the easement summary, were damaged and the defendant knew the parcel was subject to a federal easement.

United States Fish and Wildlife Service pre-1976 waterfowl production area easements describe the entire parcel of land as subject to an easement; however, courts have held FWS only purchased the right to prohibit the draining, filling, and burning of wetlands on the property when the easement was conveyed. Nonwetland areas on the property are not covered by the easements. However, following the decision in *United States v. Johansen*, disputes remain regarding the acreage covered by FWS easements, including *Peterson v. United States,* Case 3:25-cv-00078-ARS (D.N.D. 2025).

In *Peterson*, the plaintiff is a North Dakota landowner whose property is subject to an FWS easement, which was acquired in the 1960s. The plaintiff alleges in the complaint that FWS has misinterpreted the location and scope of the easement, as outlined in a 2020 guidance memorandum and a 2024 federal regulation promulgated by FWS. The plaintiff brought a challenge under the federal Quiet Title Act and the federal Administrative Procedure Act against FWS to ensure that FWS does not unlawfully and unreasonably restrict the plaintiff's use of his farmland. The case is currently pending in the United States District Court in the District of North Dakota. On August 6, 2025, Magistrate Judge Alice R. Senechal issued an order granting the defendant's motion for extension of time to file an answer to the plaintiff's complaint. The defendant's response is due by December 8, 2025.

Congressional Acts

On April 9, 2025, Wyoming Congresswoman Harriet Hageman and North Dakota Congresswoman Julie Fedorchak introduced the Landowner Easement Rights Act in the United States House of Representatives.[2] This bill would prohibit the Secretary of the Interior from entering certain conservation easements with terms exceeding 30 years. This bill also provides landowners subject to an eligible

[2] *H.R.2773 - Landowner Easement Rights Act*, United States Congress, August 2025. (https://www.congress.gov/bill/119th-congress/house-bill/2773/text).

conservation easement a mechanism to renegotiate the terms of the easement with the Secretary of the Interior. The bill also requires the Secretary of the Interior to provide a detailed map of the easement area and the fair market value of the easement within 6 months of receiving such a request. The bill has been assigned to the House Committee on Natural Resources and is awaiting the first hearing.

Federal Provisions Relating to Waters of the United States

In 1972, Congress enacted the Federal Water Pollution Control Act [Pub. L. 92-500; 86 Stat. 816; 33 U.S.C. 1251 et seq.], also known as the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The Act protects "navigable waters," which includes waters of the United States and territorial seas. 33 U.S.C.A. § 1362. However, the Act does not create a definition for Waters of the United States (WOTUS), so previous presidential administrations have defined WOTUS differently from their predecessors or successors. On January 18, 2023, the Army Corps of Engineers and the Environmental Protection Agency published a new federal regulation for the definition of WOTUS.[3] The rule aimed to advance the goals of the Clean Water Act by affording protections for the vital water resources contributing to public health, environmental protection, agricultural activity, and economic growth across the United States. Shortly after the effective date of the rule, several states challenged the rule.[4] However, before the challenges to the new rule could be litigated, the United States Supreme Court issued its ruling in *Sackett v. EPA*, 598 U.S. 651 (2023). In *Sackett*, the Court found that the meaning of "waters" under the Clean Water Act is "only those relatively permanent, standing, or continuously flowing bodies of water." *Id.* The Court reasoned that the mere presence of water is too broad, and a definition of this nature would include puddles and isolated ponds, which are not navigable waters. *Id.* Thus, wetlands are not per se "waters of the United States"; rather, only those with a continuous surface connection to traditional navigable waters fall within that category. *Id.* This ruling is consistent with the plurality opinion handed down in *Rapanos v. United States*, 547 U.S. 715 (2006). The Supreme Court's decision in *Sackett* did not directly affect the status of the 2023 WOTUS Rule.[5] Following the Court's decision, the Army Corps of Engineers and the Environmental Protection Agency issued a rule to align the definition of WOTUS to *Sackett* and stated that they "will interpret the phrase waters of the United States' consistent with the Supreme Court's decision."[6] According to the Congressional Research Service, due to pending legal challenges across the country, the 2023 WOTUS Rule, as amended by the 2023 Conforming Rule following the ruling in *Sackett*, is currently in effect in 24 states, the District of Columbia, and all United States territories. In the remaining states, the federal government is interpreting WOTUS pursuant to the pre-2015 regulatory scheme, as established in *Sackett*. North Dakota is one of the states subject to the pre-2015 regulatory regime consistent with *Sackett.*

Food Security Act

Another prominent act relating to the regulation of wetlands is the federal Food Security Act of 1985 [Pub. L. 99-198; 99 Stat. 1354]. Under this Act, Congress enacted a provision aimed at conserving wetlands on agricultural land by restricting production on highly erodible land. 16 U.S.C. § 3821. This program is commonly referred to as the "Swampbuster" program. According to the National Agricultural Law Center[7], the purpose of Swampbuster is to preserve wetlands nationwide by reducing the incentive

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[3] Corps and EPA, "Revised Definition of 'Waters of the United States,'" 88 Federal Register 3004, January 18, 2023. (https://www.govinfo.gov/app/details/FR-2023-01-18/2022-28595).

[4] Challenges include: *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.); *West Virginia v. EPA, No*. 3:23-cv-00032 (D.N.D.); *Kentucky v. EPA, No*. 3:23-cv-00007 (E.D. Ky.).

[5] *Waters of the United States (WOTUS): Frequently Asked Questions about the Scope of the Clean Water Act*, Congressional Research Service, June 2025. (https://www.congress.gov/crs_external_products/R/PDF/R47408/R47408.8.pdf).

[6] *Revised Definition of "Waters of the United States"; Conforming*, 88 Federal Register 61964, September 2023. (https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming#:~:text=The%202023%20Rule%20incorporated%20the,flowing%20tributaries%20connected%20to%20traditional).

[7] *Federal Court Finds Swampbuster Constitutional*, National Agricultural Law Center, June 2025. (https://nationalaglawcenter.org/federal-court-finds-swampbuster-constitutional/).

to transition wetlands into areas for farming or ranching. Under this program, a producer who converts a designated wetland into an agriculture production area is not eligible for certain benefits offered by the United States Department of Agriculture. 16 U.S.C. § 3821. While this provision has been in place for over 40 years, it has been subject to several constitutional challenges. The most recent constitutional challenge was resolved in *CTM Holdings, LLC v. U.S. Dep't of Agriculture*, No. 6:24-cv-2026 (N.D. Iowa, May 29, 2025). In this case, the plaintiffs argued that the Swampbuster provision violates the Commerce Clause and Takings Clause of the United States Constitution. The court ruled that the plaintiff lacked standing to bring the case, but also decided to rule on the merits of the constitutional challenge. The court found the program did not violate the Commerce Clause because the program is an exercise of Congress' spending power. The court reasoned:

> The Food Security Act, of which Swampbuster is a part, is an exercise of Congress's spending power. Under Article I, Section 8, clause 1 of the Constitution, Congress "shall have Power To lay and collect Taxes, Duties, Imposts and Excises, *to pay the Debts and provide for the* common Defence and *general Welfare of the United States*[.]" (emphasis added). The Supreme Court has held that "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds," and the Court has noted that Congress "has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." … Swampbuster fits squarely into this category.[8]

The court also addressed whether the program constituted a "taking" under the United States Constitution. The court denied this argument because the arrangement between a landowner and the United States Department of Agriculture is purely voluntary. The court further stated, the "plaintiff can use its land any way it wants at any time. The only consequence is a potential loss of certain [United States Department of Agriculture] benefits."

Previous Legislative Management Studies Relating to Wetlands

The 1975-76 interim Agriculture Committee studied FWS programs and policies about land purchase and easement acquisition for waterfowl production areas and wildlife refuges. The committee found FWS had approximately 4.6 million acres of land in the state under easement for wildlife production areas, but only 730,000 acres were actual wetlands. The committee found landowners were required to cooperate in the maintenance of the waterfowl production areas and the surrounding acres, and were restricted from draining, filling, or burning in the easement area of surface waters existing or recurring due to natural causes. The committee believed much of the land surrounding the wetlands could be used for agricultural purposes, and the broad FWS easements prevented the effective use of the lands. The committee believed FWS should delineate the exact wetland acreage covered by the easements, and provide only the delineated acres are covered by the easement. The committee also believed the easements should be limited in time and not be perpetual. The committee recommended a number of bills related to the study, which ultimately resulted in the enactment of Sections 20.1-02-18.1, 20.1-02-18.2, and 47-05-02.1. Some changes recommended by the committee and enacted by the Legislative Assembly in 1977 to limit federal authority to acquire North Dakota wetland easements were declared unconstitutional in *North Dakota v. United States*, 460 U.S. 300 (1983).

The 1983-84 interim Natural Resources Committee studied the impact of federal waterfowl production areas and refuges, focusing on necessary changes to state procedure to acquiesce to federal acquisition of wetland easements, easement acreage delineation, and payments in lieu of taxes on federal lands. The committee recommended House Bill No. 1079 (1985), which included various amendments to Section 20.1-02-18 regarding state consent to wildlife area land acquisitions, Section 20.1-02-18.1 to eliminate language requiring affirmative recommendations from the board of county commissioners of a county where waterfowl production area acquisition is sought before the Governor may approve the acquisition because the language conflicted with the finding in *North Dakota v. United States*, and Section 20.1-02-18.2 to eliminate language requiring the Department of the Interior to comply with the negotiation

[8] *CTM Holdings, LLC v. U.S. Dep't of Agriculture*, No. 6:24-cv-2026 (N.D. Iowa, May 29, 2025), *citing South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

of provisions of waterfowl production area easement agreements, and the removal of language that a failure to comply would result in the state's consent to the acquisition of migratory bird conservation easements by the federal government being nullified because the language conflicted with the finding in *North Dakota v. United States*.

The 1985-86 interim Agriculture Committee studied issues related to the state's wetlands, including the economic and other impacts to the state's drainage permit laws. The committee recommended a bill to establish a wetlands mediation advisory board in Sections 20.1-02-18.4, 20.1-02-18.5, and 20.1-02-18.6, to provide an alternative dispute resolution mechanism to resolve conflicts between landowners and FWS related to wetlands. The wetlands mediation advisory board sections were repealed in 1997 after it was determined the advisory board had not met since the board's creation.

The 2017-18 interim Agriculture Committee studied the desirability and feasibility of creating a state wetlands bank to restore, create, or enhance wetlands for the purpose of compensating for unavoidable impacts to wetlands caused by development or agriculture at another location. The committee made no recommendations concerning the study.

The 2021-22 interim Agriculture and Natural Resources committee studied the fiscal and safety impacts of FWS easements on the Department of Transportation, Department of Agriculture, and counties. The study was proposed because FWS owns perpetual easements in the state, including easements adjacent to roadways; FWS may impose regulatory requirements on state agencies and political subdivisions constructing or improving roads or engaging in other projects when FWS deems the projects would impact its interests; the imposition of federal requirements may delay or otherwise negatively affect the construction and improvement of roads or other projects in the state; and delays and other impacts from federal requirements may impede road improvements and repairs necessary for public safety and increase the cost of construction to the state and political subdivisions. The committee expressed opposition to how FWS easements operate in the state. However, because FWS easements are governed by federal law, the committee acknowledged that the state's options for reform are limited. Several committee members expressed support for the federal Landowner Rights Easement Act and believed the Act would address several of the issues raised during committee deliberations. A resolution to Congress urging the passage of the Act was discussed; however, the committee took no action to draft a resolution. Ultimately, the committee made no recommendation regarding its study of the fiscal and safety impacts of FWS easements in the state on the Department of Transportation, Department of Agriculture, and counties.

RELEVANT BILLS AND RESOLUTIONS FROM THE 2025 LEGISLATIVE SESSION

During the 2025 legislative session, the Legislative Assembly approved Senate Concurrent Resolution No. 4002 and failed to enact Senate Bill No. 2325.

Senate Concurrent Resolution No. 4002 urged Congress to enact legislation allowing a landowner to terminate a perpetual easement owned by FWS within the state. The resolution directed the Secretary of State to forward copies of the resolution to the President of the United States, the Secretary of the Interior, each member of the North Dakota Congressional Delegation, and the Governors of Iowa, Minnesota, Missouri, Montana, North Dakota, and South Dakota.

Senate Bill No. 2325 would have required a real property owner granting an easement within a nonfederal wetland to request the Department of Water Resources or the appropriate federal agency to determine the ordinary high water mark of the area subject to the easement. This requirement would have applied retroactively. The bill passed in the Senate but failed to pass in the House of Representatives.

SUGGESTED STUDY APPROACH

In conducting the study of wetlands regulations and the taxation procedure for inundated agricultural lands, the committee may wish to receive testimony from representatives from the Department of Agriculture, the Game and Fish Department, the Department of Water Resources, the Tax Department,

North Dakota State University, the various commodity groups in the state, the United States Department of Agriculture, the Natural Resources Conservation Service, the Department of Interior, FWS, local governments, local government advocacy groups, and nongovernmental organizations dedicated to habitat conservation operating in the state.

ATTACH:1