

August 7, 2026

The Honorable Brian R. Nesvik
Director of U.S. Fish and Wildlife Service
Department of the Interior
1849 C Street NW
Washington, DC 20240

Public Comments Processing
Attn: Docket No. FWS-R6-ES-2026-2641
Policy and Regulations Branch
U.S. Fish and Wildlife Service
MS: PRB (JAO/3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

SUBMITTED VIA REGULATIONS.GOV

Re: National Wildlife Refuge System; Request for Information on Implementation of Drain Tile Setbacks, 91 Fed. Reg. 46795 (July 24, 2026)

Dear Director Nesvik:

The undersigned agricultural, drainage, business, local-government, and state legislative interests submit these comments in response to the Service's request for information on: (1) the efficacy of the 2024 drain-tile-setback rule; (2) whether the rule worked as intended; and (3) how the Service should calculate setbacks when requested by a landowner. Our members support a standard that protects the limited interests acquired by the United States, respects the property interests reserved by the landowner, can be understood and reproduced before a system is designed, produces timely answers, and gives a durable safe harbor.

Our recommendation is straightforward. For ordinary agricultural drainage projects in Iowa, Minnesota, North Dakota, and South Dakota, the Service should use the Natural Resources Conservation Service (NRCS) Prairie Pothole Region lateral-effect method as the presumptive setback standard. The Minnesota Board of Water and Soil Resources (BWSR) already uses the NRCS-derived approach as the standard tool for estimating lateral effect in wetland regulation, subject to published limitations and onsite evidence.¹ FWS should reserve additional analysis for defined exceptions, disclose the basis for any departure, and place the burden on the Service to justify a greater distance. A landowner who follows the published standard should receive safe-harbor protection without depending on an open-ended, case-by-case agency judgment.

I. RESPONSE TO ITEM 1: EFFICACY OF THE 2024 RULE

The safe harbor is the rule's most useful feature and should be retained. A landowner who follows the Service-provided distance, depth, and diameter will not face legal redress if the setback later

¹ Minnesota Board of Water and Soil Resources, Lateral Effect & Drainage Setback (accessed July 28, 2026), <https://bwsr.state.mn.us/lateral-effect-drainage-setback>; BWSR Guidance Concerning NRCS-Developed Drainage Setback Tables 2-5 (Oct. 2013).

proves inadequate, provided the system is not modified, enhanced, or replaced.² That protection recognizes that setback science is not exact and gives landowners a reason to coordinate before construction.

The rule has not, however, established that its calculation process is effective. It codified a request procedure, not a public technical standard. It contains no equation, input hierarchy, model version, calculation worksheet, required explanation, firm deadline, or performance measure. FWS said it aimed to provide a timeline estimate within two business weeks and expected most determinations within 60 days, but declined to make either period binding. The Service also retained an internal appeal process and did not require that the decision package disclose the data and assumptions used.³

These same organizations warned in 2023 that an unpublished, individualized process would create delay, inconsistent outcomes, and unexplained multipliers.⁴ The Service should now evaluate the rule with its own records. It should publish the number of requests received; median and 90th-percentile processing times; the distribution of setback distances; the method and version used; the number of redesigns, appeals, and modified determinations; and any monitored changes in water table, ponded area, or hydroperiod after compliant installations. Without these data, neither the Service nor the public can tell whether the rule has been timely, consistent, or hydrologically successful.

II. RESPONSE TO ITEM 2: HOW THE RULE AND THE PROCESS IT CODIFIED WORKED IN PRACTICE

The process has supplied some landowners with maps and a written safe harbor. It has also confirmed the practical problems raised during the 2023 rulemaking.

In one North Dakota matter processed under the case-by-case approach the rule later codified, the landowner supplied a proposed route, tile sizes, and depth. The process lasted nearly three months. The final maps assigned distances from about 170 feet to 2,800 feet but did not provide the underlying soils values, hydraulic inputs, wetland classifications, calculations, or a basin-by-basin explanation for the differences. The maps stated that LiDAR-derived flow paths and watershed delineations might not reflect actual site conditions.

In another matter, FWS required the landowner or the landowner's contractor to provide a tile plan before the Service would provide the setback map. That puts the work in the wrong order: a contractor cannot design a workable system until the exclusion areas are known. After a preliminary plan was supplied, the resulting map contained overlapping setbacks of 640, 740, 890, 900, and 1,160 feet, among others. The combined exclusion areas made the project

² National Wildlife Refuge System; Drain Tile Setbacks, 89 Fed. Reg. 41,336, 41,337, 41,340, 41,346 (May 13, 2024); 50 C.F.R. § 25.24(c).

³ 89 Fed. Reg. at 41,337, 41,341-42, 41,346; 50 C.F.R. §§ 25.24, 25.45.

⁴ Comments of agricultural, landowner, drainage, business, local-government, and legislative interests, Docket No. FWS-HQ-NWRS-2022-0092, at 6-10 (June 26, 2023).

impractical on the entire property, despite the Service's limited interest in the protection of only a limited number of acres.

These examples show that the present process is not transparent or readily usable. A landowner cannot test the answer, correct an erroneous soil or elevation assumption, compare the result with NRCS, or determine whether a professional adjustment or safety factor was added. The Service itself has recognized that it purchased minimally restrictive wetland rights, not a general right to prohibit drain tile, and that tile may be installed where it does not drain protected wetlands. The RFI likewise recognizes that restrictions on surrounding land can regulate a larger property interest than the Service acquired and asks how to strike the right balance.⁵ The setback process should protect the wetland interest, not function as unreviewable regulation of the whole farm.

Because violations may carry civil or criminal consequences,⁶ this is also a fair-notice issue. A landowner or contractor should be able to determine the governing standard before investing in a design or beginning construction. A rule that exists only after an individualized agency calculation does not provide the same notice as a published, reproducible method.

III. RESPONSE TO ITEM 3: HOW FWS SHOULD CALCULATE SETBACKS

A. Use the NRCS Prairie Pothole Region method as the presumptive standard.

The NRCS method is not a generic national buffer. It was developed specifically for the Prairie Pothole Region of Iowa, Minnesota, North Dakota, and South Dakota. It uses the nonsteady van Schilfgaarde equation because sporadic rainfall is relevant in the region; official NASIS soil data and Rosetta pedotransfer functions for mineral soils; separate procedures for peat, mucky peat, and muck; hydrogeomorphic wetland classes; drain depth and diameter; hydraulic conductivity above and below the drain; drainable porosity; restrictive-layer depth; and surface storage. The tool directs the user to calculate the wetland soil, proposed tile-location soil, and intervening soils and to apply the greatest applicable distance. It also directs users to select the deepest planned tile and the next larger listed diameter when an exact choice is unavailable.⁷

Those are conservative, reproducible choices. The method can be run before final design, audited by the landowner, and applied consistently across offices. This should be the rebuttable presumption not because the Food Security Act legally controls FWS easements, but because it is the existing regional method that has been publicly documented, operationalized, and used for wetland protection.

⁵ 89 Fed. Reg. at 41,338-39; 91 Fed. Reg. at 46,796.

⁶ See 16 U.S.C. § 668dd(f).

⁷ USDA NRCS, Title 210, National Engineering Handbook, Part 650, ch. 19, Prairie Pothole Region Supplement, PPR650-19.1, .7-.14 (May 2022); USDA NRCS, Lateral Effect Distances for the Prairie Pothole Region (accessed July 28, 2026), <https://www.nrcs.usda.gov/state-offices/minnesota/lateral-effect-distances-for-the-prairie-pothole-region>.

The Food Security Act’s “minimal effect” exemption and the NRCS Prairie Pothole Region lateral-effect database should not be conflated. NRCS may separately determine that an activity will have only minimal or insignificant effects on a wetland. The PPR setback tool, by contrast, identifies distances intended to avoid hydrologic effects that may cause wetland conversion. The commenters recommend the latter as the presumptive technical calculation; they do not ask FWS to import the Food Security Act’s minimal-effect exemption or change the easement’s prohibition against draining protected wetlands.

Recent opposition to an NRCS-aligned standard has relied in part on an incorrect description of the method’s 12-inch parameter. Its 12-inch input is a modeled water-table drawdown over 14 days, not permission to remove 12 inches of standing water from a protected basin. The NRCS supplement defines initial and final water-table depths below grade and treats surface storage as a separate variable. BWSR likewise explains that the van Schilfgaarde equation estimates water-table drawdown in saturated soil, is not intended to model significant surface-water ponding, and that water-table drawdown is not necessarily synonymous with elimination of wetland hydrology. A lower surrounding water table can affect ponding or hydroperiod, but the response is not a one-for-one loss of ponded-water depth.⁸ Accordingly, describing the NRCS method as permitting 12 inches of water to be drained from a protected wetland basin over 14 days is technically incorrect.

The legal endpoint is not supplied by an equation. BWSR candidly states that all drains have some effect and that the practical question is what constitutes an acceptable negligible hydrologic effect.⁹ FWS should define what measurable change constitutes a protected wetland being “drained.” It should not use an undefined literal “no effect” standard, because hydrologic influence attenuates with distance rather than ending at a precise line. If FWS chooses an endpoint or safety factor different from NRCS, it should publish that choice and the evidence supporting it.

The available Prairie Pothole literature supports a disciplined baseline with defined exceptions. In a three-year study of four seasonal wetland catchments in high-relief North Dakota terrain, Tangen and Finocchiaro modeled average reductions in ponded surface area of 24 percent without setbacks and 7 percent with USDA-style setbacks. They concluded that setbacks reduced, but did not eliminate, modeled effects and cautioned against extending the result beyond the limited terrain, soils, and weather studied.¹⁰ Werner and colleagues found in South Dakota model experiments that wetland hydroperiod was more sensitive to tile depth relative to the basin

⁸ NRCS Prairie Pothole Region Supplement, PPR650-19.12-.13, .30-.32; BWSR Guidance at 3, 6.

⁹ BWSR Guidance at 3.

¹⁰ Tangen, B., and Finocchiaro, R., 2017, A case study examining the efficacy of drainage setbacks for limiting effects to wetlands in the Prairie Pothole Region, USA: *Journal of Fish and Wildlife Management*, v. 8, no. 2, p. 513-529, <https://doi.org/10.3996/022017-JFWM-012>.

bottom than to horizontal distance alone.¹¹ Tangen and Wiltermuth likewise identified drain depth and catchment slope length as relevant variables.¹² These studies do not validate a universal distance. They do support using the NRCS method as a baseline and reserving added review for defined, vertical, soil or flow-path conditions.

No source identified by the proponents of historical FWS drain tile setbacks establishes that FWS should multiply every NRCS distance by three or more. The van Schilfgaarde relationship is nonlinear. Multiplying the final horizontal distance does not establish a corresponding water-table drawdown, ponded-water response, or ecological outcome. Any proposed multiplier should identify the protection endpoint, the Prairie Pothole data used, the tile depths and wetland classes tested, and the measured or modeled benefit over the NRCS result.

B. Adopt a two-tier process that gives the answer before final design.

Tier 1 should cover ordinary perforated agricultural tile. The landowner would submit the agreed or official wetland map; mapped soils; the side of the wetland where drainage is contemplated; and the deepest anticipated perforated-tile depth and largest anticipated diameter. The landowner or contractor would run the NRCS tool and submit the output. FWS would confirm the exclusion zone within 15 business days. A final tile plan should not be required to obtain the basic setback. The system should be designed around a known exclusion zone, not the other way around.

The 2020 Director's memorandum should remain part of the framework. It used the van Schilfgaarde calculation, capped the upgradient distance at the catchment boundary when the calculation extended beyond it, applied the calculated distance downgradient, and provided safe-harbor treatment.¹³ FWS should retain that direction-sensitive structure, subject to a defined exception where the Service documents that tile would intercept a material groundwater, perched-water, or runoff source before it reaches the wetland.

Tier 2 should apply only when FWS identifies a published trigger, such as perforated tile below the protected basin bottom; a system that substantially encircles the basin; riverine or lacustrine-fringe conditions; a documented aquitard, sand lens, perched-flow path, or unusual organic soil not represented by the database; or a design outside the tool's depth and diameter range. FWS

¹¹ Werner, Brett, John Tracy, W. Carter Johnson, Richard A. Voldseth, Glenn R. Guntenspergen, and Bruce Millett, 2016. *Modeling the Effects of Tile Drain Placement on the Hydrologic Function of Farmed Prairie Wetlands*. *Journal of the American Water Resources Association* (JAWRA) 52(6): 1482-1492. DOI: [10.1111/1752-1688.12471](https://doi.org/10.1111/1752-1688.12471).

¹² Tangen, Brian A., and Mark T. Wiltermuth. "Prairie Pothole Region Wetlands and Subsurface Drainage Systems: Key Factors for Determining Drainage Setback Distances." *Journal of Fish and Wildlife Management* 9, no. 1 (2018): 274–84. <http://dx.doi.org/10.3996/092017-jfwm-076>.

¹³ Memorandum from Aurelia Skipwith, Director, U.S. Fish & Wildlife Service, to Regional Directors, Regions 3, 4, & 5, Drain Tile Setbacks and Legal Action on U.S. Fish and Wildlife Service Wetland Easements 1-2 (Feb. 26, 2020).

should then provide the complete calculation, elevations, soil sources, model version, assumptions, and reason the Tier 1 result is inadequate. The landowner should be allowed to submit DRAINMOD, a Skaggs-type analysis, field data, survey information, or another accepted method.¹⁴ A Tier 2 decision should issue within 30 days absent a written extension agreed to by the landowner, and any technical reconsideration should be conducted by someone who did not make the initial calculation.

C. Make the safe harbor automatic, durable, and workable.

Compliance with the published Tier 1 standard, or an approved Tier 2 determination, should create the safe harbor. It should protect the landowner, successors in title, contractors acting within approved parameters, routine maintenance, replacement in kind, reasonable construction tolerances, and minor route changes that do not move perforated tile closer to the wetland or increase drainage effect. Sealed, nonperforated mains within a setback area should be distinguished from perforated laterals and evaluated according to their actual capacity to intercept soil water. Prior written determinations issued under the 2020 guidance or the 2024 rule should remain protected if the policy changes.

D. Use the Minnesota model for transparency and practical administration.

BWSR states that NRCS setback tables have become the standard for estimating lateral effect in Minnesota. Its guidance explains the assumptions, directs users to consider onsite hydrology and flow direction, and uses the common method to promote consistency and avoid requiring every wetland manager to generate a new estimate. The current BWSR website confirms that the guidance remains applicable to wetland-regulatory work under the Wetland Conservation Act.¹⁵ FWS should follow the same model: publish the default tool, publish the limitations, define exceptions, and permit better field evidence to correct default inputs.

The 2022 National Resources Inventory provides useful context for building confidence in the NRCS setback tables. The report shows that the combined statewide point estimate for palustrine and estuarine wetlands on water areas and non-Federal land increased slightly from approximately 18.662 million acres in 1992 to 18.714 million acres in 2022 across the five states containing the U.S. Prairie Pothole Region. Point estimates increased in Minnesota, from 10.630 to 10.676 million acres; Iowa, from 887,500 to 917,900 acres; and South Dakota, from 2.247 to 2.259 million acres. They declined modestly in North Dakota, from 3.541 to 3.509 million acres,

¹⁴ NRCS Prairie Pothole Region Supplement, PPR650-19.7-.14; BWSR Guidance at 6-9; R.W. Skaggs, GM. Chescheir & B.D. Phillips, Methods to Determine Lateral Effect of a Drainage Ditch on Wetland Hydrology, 48 Transactions of the ASAE 577 (2005); N.C. Department of Transportation, Skaggs Method for Determining Lateral Effects of a Borrow Pit on Adjacent Wetlands (Dec. 11, 2008).

¹⁵ See F.N. 1.

and Montana, from 1.357 to 1.352 million acres.¹⁶ Because these changes are small relative to the published margins of error, the conclusion is broad regional stability, not statistically proven gains or losses. That stability occurred in a highly agricultural region where NRCS conservation-compliance requirements have long applied to producers participating in USDA programs and, in Minnesota, where BWSR and local government units administer the Wetland Conservation Act using NRCS-derived drainage-setback guidance. The NRI weighs against assuming that the NRCS and BWSR framework has produced uniform or sustained wetland depletion and supports requiring direct evidence before replacing that framework with a more restrictive standard.

CONCLUSION

FWS can protect easement wetlands and give landowners a workable rule. It should retain the safe harbor; adopt the NRCS Prairie Pothole Region method as the presumptive standard; use the direction-sensitive features of the 2020 memorandum; provide the setback before requiring a final design; limit additional review to published exceptions; reject unsupported multipliers; disclose every material input and adjustment; and provide firm deadlines and independent technical reconsideration. This approach would better protect the wetland interests the Service acquired while avoiding unnecessary restrictions on private property and agricultural use that landowners retained.

Using NRCS's technical method would not rewrite the easement, import Swampbuster's legal exemptions, or reduce the protection the United States purchased; it would provide a transparent and reproducible method for determining where tile can be installed without draining the protected wetland.

Respectfully submitted,

SIGNATORIES TO COMMENTS OF AGRICULTURAL, LANDOWNER, DRAINAGE, LOCAL- GOVERNMENT, AND LEGISLATIVE INTERESTS

AGRICULTURAL AND PRODUCER ORGANIZATIONS

Land Association of North Dakota

Kevin Regan, President

Minnesota Association of Wheat Growers

Brian Sorenson, Executive Director

Midwest Council on Agriculture

Allison Stock, Executive Director

Minnesota Corn Growers Association

Wesley Beck, President

¹⁶ USDA, *Summary Report: 2022 National Resources Inventory*, ch. 6, tbl. 19 (Sept. 2025) (statewide palustrine and estuarine wetland estimates, in thousands of acres, 1992 and 2022 respectively: Iowa, 887.5 $\pm$ 105.7 and 917.9 $\pm$ 105.4; Minnesota, 10,629.5 $\pm$ 481.3 and 10,676.0 $\pm$ 453.6; Montana, 1,356.7 $\pm$ 310.9 and 1,352.1 $\pm$ 331.2; North Dakota, 3,541.1 $\pm$ 187.7 and 3,508.9 $\pm$ 175.5; and South Dakota, 2,246.8 $\pm$ 134.7 and 2,259.4 $\pm$ 135.3).

Minnesota Farm Bureau Federation

Dan Glessing, President

North Dakota Corn Growers Association¹⁷

Brian Leier, President

North Dakota Farmers Union¹⁹

Matt Perdue, President

North Dakota Soybean Growers Association²⁰

Chris McDonald, President

Northland Potato Growers Association²¹

Gary Shields, Executive Director

Minnesota Soybean Growers Association

Ryan Mackenthun, President

North Dakota Farm Bureau¹⁸

Calvin Benson, Director of Public Policy

North Dakota Grain Growers Association

Nick Sinner, Executive Director

Northarvest Bean Growers Association

Mitch Coulter, Executive Director

South Dakota Corn Growers Association

Trent Kubik, President

LOCAL GOVERNMENTS AND WATER MANAGEMENT ORGANIZATIONS**Cavalier County Water Resource District**

Brian Hardy, Chairman

Middle-Snake-Tamarac Rivers Watershed District

Mori Maher, Administrator

North Dakota Water Resource Districts Association

Harold Gaugler, President

Dani Quissel, Executive Secretary

Red River Watershed Management Board

Robert L. Sip, Executive Director

Devils Lake Basin Joint Water Resource Board

Jeff W. Frith, Manager

Nelson County Water Resource District

Dave Satern, Chairman

North Dakota Water Users Association

Mary Massad, President

Dani Quissel, Executive Vice President

Rubin Township, Nelson County, ND

Nathan Stefan, Clerk

¹⁷ The North Dakota Corn Growers Association is a farmer-led membership organization focusing on advancing public policy at the state and federal levels of government, that impacts North Dakota corn producers. The NDCGA board of directors consists of fourteen growers from seven districts, along with one at-large and three industry directors.

¹⁸ North Dakota Farm Bureau represents over 28,000 North Dakota farmers, members, and families.

¹⁹ North Dakota Farmers Union represents more than 70,000 farm, ranch and member families.

²⁰ NDSGA is a statewide, not-for-profit, member-driven organization and the leading advocate for our more than 500 soybean producing members. NDSGA is one of 26 soybean-producing states affiliated with the American Soybean Association (ASA). NDSGA exists to conduct legislative activities in Bismarck, ND and Washington, D.C. to improve the sustainable prosperity of our members and the US soybean industry.

²¹ Northland Potato Growers Association represents 140 potato growers in the Northern Plains.

AGRICULTURAL DRAINAGE, BUSINESS, AND INDUSTRY ORGANIZATIONS

Agassiz Drain Tile

Derek Peterson, Vice President

Apex Companies

Anthony Dahl, President

Landmark Companies

Blake Sunde, COO

Minnesota Land Improvement Contractors Association

Jesse James, President

Prinsco, Inc.

James Duininck, CEO

Karl Guetter, Agriculture Segment Lead

Agricultural Drainage Management Coalition

Keegan Kult, Executive Director

Deep Roots Drainage

Levi Otis, President

Midwest Agricultural Water Management Association

Dan Wogsland, Executive Director

North Dakota Association of Rural Electric Cooperatives

Josh Kramer, General Manager & Executive Vice President

EDUCATIONAL AND TECHNICAL ORGANIZATIONS

Minnesota Agricultural Water Resource Center

Tim Velde, Chairman

ELECTED OFFICIALS

North Dakota State Senate

Senator Jeff Barta, District 43

Senator Cole Conley, District 12

Senator Mark Enget, District 2

Senator Greg Kessel, District 39

Senator Randy Lemm, District 20

Senator Scott Meyer, District 18

Senator Dale Patten, District 26

Senator Kristin Roers, District 27

Senator Paul Thomas, District 6

Senator Mark Weber, District 22

Senator Keith Boehm, District 33

Senator Kyle Davison, District 41

Senator Bob Erbele, District 28

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Senator Larry Luick, District 25

Senator Janne Myrdal, District 19

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Senator Michael Wobbema, District 24

North Dakota House of Representatives

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Rep. Mike Berg, District 8

Rep. Jim Grueneich, District 28

Rep. Craig Headland, District 29

Rep. Donald W. Longmuir, District 2

Rep. Eric Murphy, District 43

Rep. Bernie Satrom, District 12

Rep. Greg Stemen, District 27

Rep. Steve Vetter, District 18

Rep. Daniel R. Vollmer, District 6

Rep. Robin Weisz, District 14

Rep. Mike Beltz, District 20

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Rep. Dori Hauck, District 36

Rep. Dwight Kiefert, District 24

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Rep. Brandy Pyle, District 22

Rep. Austen Schauer, District 13

Rep. Bill Tveit, District 33

Rep. Don Vigesaa, District 29

Rep. Jonathan Warrey, District 22

INDIVIDUAL LANDOWNERS AND PRODUCERS

Dale Mason, Fessenden, North Dakota

Tracy Wanzek, Jamestown, North Dakota

Josh Graves, Jamestown, North Dakota

Shawntil Knecht, Jamestown, North Dakota

Ryan Wanzek, Jamestown, North Dakota

Eric Knodel, Jamestown, North Dakota

Casey Knecht, Jamestown, North Dakota

Caleb Wanzek, Jamestown, North Dakota

cc: The Honorable Brooke Rollins, U.S. Secretary of Agriculture
 The Honorable Doug Burgum, U.S. Secretary of the Interior
 The Honorable Kevin Cramer, U.S. Senator
 The Honorable John Hoeven, U.S. Senator
 The Honorable Julie Fedorchak, U.S. Representative
 The Honorable Tina Smith, U.S. Senator
 The Honorable Amy Klobuchar, U.S. Senator
 The Honorable Brad Finstad, U.S. Representative
 The Honorable Angie Craig, U.S. Representative
 The Honorable Kelly Morrison, U.S. Representative
 The Honorable Betty McCollum, U.S. Representative
 The Honorable Ilhan Omar, U.S. Representative
 The Honorable Tom Emmer, U.S. Representative
 The Honorable Michelle Fischbach, U.S. Representative
 The Honorable Pete Stauber, U.S. Representative
 The Honorable Charles Grassley, U.S. Senator
 The Honorable Joni Ernst, U.S. Senator

The Honorable Mariannette Miller-Meeks, U.S. Representative
The Honorable Ashley Hinson, U.S. Representative
The Honorable Zachary Nunn, U.S. Representative
The Honorable Randy Feenstra, U.S. Representative
The Honorable John Thune, U.S. Senator
The Honorable Mike Rounds, U.S. Senator
The Honorable Dusty Johnson, U.S. Representative