UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

ELECTRONIC EMAIL
CONFIRMATION OF EMAIL RECEIPT REQUESTED

AgReserves, Inc. d/b/a Deseret Cattle & Timber
Deseret Ranches of North Florida, LLC
c/o Samuel Brown
Todd Mikolop
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037
slbrown@huntonak.com
tmikolop@huntonak.com

Re: Notice of Clean Water Act Violations by and Opportunity to Show Cause
AgReserves, Inc. d/b/a Deseret Cattle and Timber and Deseret Ranches of North Florida, LLC in Bay, Calhoun, Franklin, and Gulf Counties, Florida
Pursuant to Section 309(a) of the CWA

Dear Mr. Brown and Mr. Mikolop:

The U.S. Environmental Protection Agency, Region 4 has reviewed information provided by your clients AgReserves, Inc. d/b/a Deseret Cattle and Timber and Deseret Ranches of North Florida, LLC (Respondents) in response to Information Request Letters Nos. 308-2020-001, 309-2021-02, and 308-2021-06. These requests sought information regarding mechanical land clearing of forested wetlands and conversion of these wetlands to cattle pastures and ponds conducted on parcels owned and/or operated by Respondents in Bay, Calhoun, Franklin, and Gulf Counties and/or listed on Attachment A (the Site). These requests also sought information regarding Respondents' compliance during these activities with Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. The EPA also considered information collected during the two site visits that it conducted in November 2019 and April 2021 on a 9,500-acre portion of the approximately 285,000-acre Site. Further, the EPA participated in virtual meetings with Respondents to discuss Respondents' methodology for selecting areas of the Site to be converted to cattle pastures. Based on this information, the EPA believes that Respondents have discharged dredged and/or fill material into jurisdictional waters of the United States while conducting mechanized land clearing and conversion activities on the Site without CWA Section 404 permits. As described in more detail below, such unpermitted discharges violate Section 301(a) of the CWA. 33 U.S.C. § 1311(a). This letter provides Respondents with notice that the activities on the Site are violations of the CWA and that Respondents should schedule a show cause meeting to discuss this matter.

Based on the EPA's review of the information noted above, Respondents' mechanized land clearing and conversion activities to convert large portions of the Site from forested wetlands to cattle pastures and ponds have resulted in discharges of dredged and/or fill material into jurisdictional waters of the United

States. The activities in jurisdictional waters of the United States include, but are not limited to, extensive mechanical land-clearing, stump removal, blading, discing, raking, piling, and burning. These activities also include construction of ponds and associated side-casting of excavated material. Based on the information currently available to the agency and provided by the Respondents, Respondents' unauthorized activities have resulted in impacts and discharges to thousands of acres of jurisdictional wetlands that are directly adjacent to and/or have a significant nexus to perennial tributaries and tidal waters, including but not limited to the areas shown on the enclosed Impact Analysis. *See* Attachment B: Exhibits 1 – 7, 8A, and 8B. Some of the tributaries and all the tidal waters are Rivers and Harbors Act section 10 traditional navigable waters of the United States including but not limited to Sandy Creek, Eagle Nest Bayou, California Bayou, Smith Bayou, Burkett Bayou, Richard Bayou, and Murray Bayou. 33 U.S.C. § 403. The discharge of dredged and/or fill material into these waters, their adjacent wetlands, and/or other jurisdictional waters of the United States required prior authorization under a CWA Section 404 permit. Respondents did not receive such authorization before discharging dredged and/or fill material into jurisdictional waters at the Site.

These activities and the resulting discharges are not exempt or excepted from the permitting requirements. Section 404 authorization is required for any mechanized land clearing and other excavation activity in a water of the United States that results in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or the EPA as appropriate, <u>prior to commencing the activity involving the discharge</u>, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(4) and (d)(5) of this [regulation]." 33 C.F.R. § 323.2(d)(3)(i) (emphasis added). Section 404(f) of the CWA exempts "normal farming, silviculture, and ranching activities" in forested wetlands. *See id.* at § 323.4(a)(1). However, this exemption does <u>not</u> apply to mechanized land clearing and conversion activities that bring forested wetlands (including but not limited to wet flats and hydric flatwoods where pines are planted) into cattle ranching use because such activities: (1) are not part of an established (i.e., ongoing) cattle ranching operation, *id*. at § 323.4(a)(1)(ii), and (2) involve redistribution of surface materials by blading, grading, or other means (e.g., mechanical stump removal, filling in of stump holes, raking and piling of material for burning, etc al.) to fill in forested wetlands and/or change them to non-wetlands (e.g., Bahiagrass pastures) which are not normal farming or silviculture activities. *Id*. at § 323.4(a)(1). Further, even if Respondents' activities were normal farming, silviculture, and ranching activities, under the "recapture provision" of the regulations a permit was required because the discharges of dredged and/or fill material were part of activities whose purpose was to convert forested wetlands into a use to which it was not previously subject (cattle pastures), where the reach of such forested wetlands were reduced by converting them to non-wetlands such as Bahiagrass pastures. *Id*. at § 323.4(c).

Such violations are potentially subject to enforcement actions pursuant to Section 309 of the CWA, 33 U.S.C. § 1311, including the issuance of compliance orders, the assessment of administrative penalties, the initiation of civil or criminal judicial actions, and/or injunctive relief including restoration of forested wetlands. In February 2021, Respondents represented to the EPA that they have paused conversion activities on the Site. As the EPA has previously indicated to Respondents, Respondents may continue to convert pine stands to cattle pastures where the pine stands are in uplands. However, continued mechanical site preparation in forested wetlands (including but not limited to wet flats and hydric flatwoods with pine stands)—where these areas are either converted to non-wetlands (such as Bahiagrass pastures) or there are no efforts to regenerate and reestablish the forest to continue normal silviculture—is done at the risk of adding to the scope of the violations.

The Respondent should contact the EPA within 10 business days of receipt of this letter to arrange a virtual meeting or telephone conference to show cause why the EPA should not take formal enforcement

action against Respondents for these violations and any other potential violations, including the assessment of appropriate civil penalties and injunctive relief. Respondents have the right to be represented by legal counsel. Respondents are encouraged to provide any additional relevant information and supporting documentation regarding this matter. However, all information submitted in response to or during the show cause meeting must be accompanied by the following certification that is signed by a duly authorized official of Respondents:

> "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Please be aware that the EPA may use information provided during the meeting or telephone conference in any potential enforcement proceeding related to this matter. Notwithstanding the scheduling of a show cause meeting, the EPA retains the right to bring further enforcement action under Section 309 of the CWA, 33 U.S.C. § 1319 for the violations cited herein or for any other violation of the CWA. Please contact Mr. Tyler Sniff, Associate Regional Counsel, at (404) 562-9499 or at sniff.tyler@epa.gov to arrange a show cause meeting. The EPA appreciates Respondents' cooperation in its investigation of the Site thus far and looks forward to a timely resolution of the violations cited herein.

Sincerely,

CAROL KEMKER

Digitally signed by CAROL KEMKER
Date: 2021.08.31 15:19:41 -04'00'

Carol L. Kemker
Director
Enforcement and Compliance Assurance Division

Enclosures

cc: Mr. Robert Halbert
U.S. Army Corps of Engineers, Jacksonville District

Mr. John Truitt
Florida Department of Environmental Protection