No. _____

In The
Supreme Court of the United States

ARLEN FOSTER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Acting Chief of the Natural Resources Conservation Service; TONY SUNSERI, in his official capacity as Acting South Dakota State Conservationist,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2011, Respondent Natural Resources Conservation Service concluded that an 8-inch-deep pool of water in the middle of Petitioner Arlen Foster's farm is a naturally occurring wetland under 16 U.S.C. § 3822 (Swampbuster). As a result of this certified wetland delineation, in the years the water appears, Foster is unable to drain it to farm that area of his land. Since 2011, Foster has hired experts who have gathered new information about the hydrology of this purported wetland. Based on this new data, Foster requested that Respondent review his previous delineation.

Swampbuster provides that a certified delineation "remain[s] valid and in effect . . . until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). Despite this statutory language, Respondent applied its regulations to deny Foster's request to review the previous delineation and kept the previous delineation in place. The Eighth Circuit deferred to the agency's interpretation of Swampbuster under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and upheld the agency's denial.

The questions presented are:

1. Whether a statute that provides that a wetlands certification "remain[s] valid and in effect . . . until such time as the person affected by the certification requests review of the certification" requires an agency to treat a certification as invalid and not in effect when a person affected by that certification requests review.

2. Whether the Court should overrule *Chevron*.

LIST OF ALL PARTIES

Petitioner (plaintiff-appellant below) is Arlen Foster. The Respondents (defendants-appellees below) are the United States Department of Agriculture and its Secretary Tom Vilsack, The Natural Resources Conservation Service and its Chief, Terry Cosby, and Tony Sunseri, South Dakota State Conservationist.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Foster v. USDA, et al., No. 4:21-CV-04081-RAL, 609 F. Supp. 3d 769 (D.S.D. July 1, 2022).

Foster v. USDA, et al., No. 22-2729, 68 F.4th 372 (8th Cir. May 12, 2023).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arlen Foster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel opinion of the Eighth Circuit is reported at 68 F.4th 372, and is reproduced in the Appendix beginning at 1a. The opinion of the United States District Court for the District of South Dakota – Southern Division is reported at 609 F. Supp. 3d 769, and is reproduced in the Appendix beginning at 15a.

JURISDICTION

The date of the decision sought to be reviewed is May 12, 2023. Jurisdiction is conferred under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

- 16 U.S.C. § 3822(a)(4): "A final certification made under paragraph (3) shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary."
- 16 U.S.C. § 3822(a)(6): "No person shall be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary. The delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person under paragraph (4)."

- 7 C.F.R. § 12.30(c)(6): "A person may request review of a certification only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination."

STATEMENT OF THE CASE

A. Legal Framework

In 1985, Congress passed several statutory provisions—known today as "Swampbuster"—as part of the Erodible Land and Wetland Conservation and Reserve Program, 16 U.S.C. § 3801, *et seq*. Through these provisions, Congress sought to preserve wetlands by restricting how recipients of USDA agricultural benefits may use land containing wetlands. 16 U.S.C. §§ 3821–3822; *see also B & D Land and Livestock Co. v. Schafer*, 584 F. Supp. 2d 1182, 1190 (N.D. Iowa 2008). Swampbuster defines "wetlands" as land that combines wetland hydrology, hydric soils, and the ordinary production of plants that grow well in wet conditions. 16 U.S.C. § 3801(a)(27), *id.* § 3801(a)(12), (13). Farmers who drain wetlands and produce an agricultural crop on a wetland are ineligible to receive various federally authorized agricultural benefit programs and premium subsidies for federally authorized crop insurance programs. *Id.* § 3821(a); § 3821(d)(1).

Swampbuster's ineligibility provisions, however, do not apply to "artificial wetlands," or wetlands that are "temporarily or incidentally created as a result of adjacent development activity." 16 U.S.C.

§ 3822(b)(1)(F). Therefore, farmers may produce an agricultural commodity on artificial wetlands without risking the loss of their federal agricultural benefits.

The Secretary of Agriculture must notify farmers of where they can farm without risk of losing benefits by "delineating" wetlands on a certified map. 16 U.S.C. § 3822(a). So long as a farmer follows a certified delineation, he or she remains eligible for those benefits and subsidies covered by Swampbuster. 16 U.S.C. § 3822(a)(6). The Secretary of USDA has delegated this certification responsibility to the National Resources Conservation Service (NRCS), which is an agency of USDA. 7 C.F.R. § 12.30(a)(3).

In 1996, Congress amended Swampbuster to clarify how the NRCS was to certify wetlands. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322, 110 Stat. 888 (Apr. 4, 1996). The statute, as amended, provides that wetland certifications "remain valid and in effect . . . until such time as the person affected by the certification requests review of the certification by the Secretary" of USDA. 16 U.S.C. § 3822(a)(4). The statute places no limits or conditions on an affected person's right to request review, creating a system where an affected person may request review of a wetland certification at any time. *See id.*

On September 6, 1996, USDA and NRCS promulgated a final interim rule purporting to interpret, among other things, the Review Provision of Swampbuster. *See* 61 Fed. Reg 47,019 (Sept. 6, 1996), *codified at* 7 C.F.R. §§ 12.1–12.13 and §§ 12.30–12.34 ("Swampbuster Regulations"). The agencies "interpreted" the right to Review Provision by limiting review to only two circumstances. *See* 7 C.F.R.

§ 12.30(c)(6) ("Review Regulation"). According to the agencies' interpretation,

> [a] person may request review of a certification *only if* a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, *or if NRCS concurs* with an affected person that an error exists in the current wetland determination.

Id. (emphasis added).

B. Factual Background

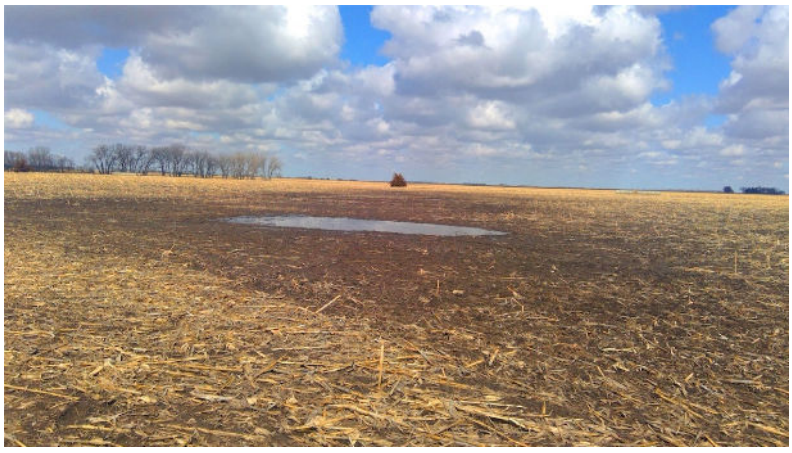
Arlen Foster is a third-generation farmer in Miner County, South Dakota. Court of Appeals' Joint Appendix Vol. 1 at 7–8, ¶ 13, ¶ 19, Eighth Circuit Case no. 22-2729, docket no. 1 (filed May 5, 2021). He produces a variety of agricultural crops on his land, including corn. *Id.* at 11, ¶ 39. Farming is a family business, and the property has been in Foster's family since his grandfather purchased it in 1900. *Id.* at 8, ¶ 19.

In the 1930s, Foster's father developed a tree belt along the south edge of the farm field. App. 18a. The tree belt acts as a barrier preventing wind-driven soil erosion on Foster's field as well as surrounding farms. *Id.* The tree belt is now approximately half a mile long (running West to East along the edge of the field) and consists of 1,200–2,000 trees. Court of Appeals' Joint Appendix Vol. 1 at 8–9, ¶ 20. It is roughly 25 yards deep. *Id.*

At the time the tree belt was planted, the Soil Conservation Service (a predecessor to NRCS) encouraged planting tree belts as a conservation

measure. Court of Appeals' Joint Appendix Vol. 1 at 37, ¶ 22, docket no. 13 (filed Aug. 6, 2021). NRCS still encourages the development of these tree belts to prevent erosion, *id.* ¶ 23, and Foster intends to preserve the tree belt for that purpose.

The tree belt also affects Foster's farmland in other ways. During the winter, snow accumulates under the tree belt on Foster's field. That snow melts in the spring and drains northward adjacent to where the tree belt was developed, occasionally creating the pool shown below. App. 18a. This occasional pool is isolated from any other water body because the tree belt, not another body of water, feeds into it. Court of Appeals' Joint Appendix Vol. 1 at 9–10, ¶¶ 27–29. When it is present, it is roughly 0.8 acres and approximately 8 inches deep. *Id.* ¶ 27.



Picture of the small pool in Foster's field. *See* Court of Appeals' Joint Appendix Vol. 1 at 5, docket no. 1.

Because the small pool receives additional snow melt from the adjacent tree belt, it often takes longer to dry out than the surrounding field. In the years with higher snowfall, the pool does not dry out fast

enough to allow the use of farm equipment in and around it in time to plant a crop. App. 62a–63a. In these wetter years, Foster would need to drain the pool to speed up its "drying out" to produce an agricultural crop in the pool and the surrounding portions of the field. *Id.*

But Foster is unable to drain the pool in these wetter years. NRCS certified a wetland delineation for a portion of Foster's farm in 2004. Court of Appeals' Joint Appendix Vol. 3 at 466. Four years later, Foster requested that NRCS review that certification under 16 U.S.C. § 3822(a)(4). App. 46a–47a. That request was granted and NRCS began reviewing the 2004 delineation. Court of Appeals' Joint Appendix Vol. 3 at 355. That process took several years, as NRCS twice rescinded its initial determination and restarted the review process from scratch. Court of Appeals' Joint Appendix Vol. 8 at 1399, 1401.

In 2011, NRCS finally certified a new wetland delineation. It ultimately determined that 0.8 acres of the field is a naturally occurring wetland under Swampbuster (2011 Certification). Court of Appeals' Joint Appendix Vol. 3 at 355. Foster administratively appealed the agency's determination, but the USDA upheld the certification. *Id.* at 353. Foster then sought judicial review of the 2011 Certification, but the Eighth Circuit deferred to the agency. This Court denied Foster's petition for certiorari. *See Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017).

In 2017, Foster submitted a new request for review (2017 Request) of the 2011 certification under 16 U.S.C. § 3822(a)(4). *See* App. 57a–59a. NRCS declined to review the 2011 certification and stated it would

only do so if Foster "suppl[ied] additional information that has not previously been considered by NRCS." *Id.* at 58a. The purported requirement for additional information is found not in the text of Swampbuster, but in the agency's understanding of the regulations that purport to interpret the statute. *Id.*, App. 65a–66a (2020 letter from NRCS declining review).

In 2020, Foster submitted a new request under 16 U.S.C. § 3822(a)(4) that the agency review the 2011 certification. App. 65a–66a. Foster complied with the NRCS's extra-statutory demand that he provide new, additional information the agency had not considered. *See id.*; Court of Appeals' Joint Appendix Vol. 2 at 110–25. Specifically, the 2020 request included a technical report detailing how the tree belt affects the hydrology of the pool, *id.*, a report the agency admits it had never seen before the 2020 request. *See* App. 20a (district court quoting the affidavit of Deke Hobbick, assistant state conservationist at NRCS, who stated, "I also observed that the information submitted with the 2020 request included *newly created data* in the engineer's report and conclusions based on that data[.]" (emphasis added)). The report concluded that the wetland is not covered under Swampbuster because it is an "artificial wetland" created by the adjacent tree belt. App. 62a–64a; *see also* 16 U.S.C. § 3822(b)(1)(F) (excluding from Swampbuster coverage wetlands that are "temporarily or incidentally created as a result of adjacent development activity").

Despite providing this new information, the agency again declined to review the 2011 Certification, stating that Foster did not meet the conditions for reconsideration. App. 65a–66a. Indeed,

the agency refused to admit that Foster was entitled to administratively appeal the agency's decision to not review the certification, *id.*, and at the District Court attempted to argue that it had not even made a final decision about Foster's right to a review of the 2011 certification. *See* Memorandum in Support of Federal Defendants' Motion to Dismiss or Alternatively for Summary Judgment at 15–18, District Court case no. 4:21-cv-04081-RAL, docket no. 22 (filed Nov. 15, 2021).

As a result, for almost two decades Foster has been unable to drain the small pool of water in the years when it appears. He cannot farm his entire property without losing access to federal agricultural benefits—benefits he needs to make a living farming his land. Court of Appeals' Joint Appendix Vol. 1 at 5, ¶ 2.

C. Proceedings Below

After being denied his right to a review, Foster and his late wife Cindy[1] filed this suit in 2021. *See* Court of Appeals' Joint Appendix Vol. 1 at 4. Under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, they sought a declaration that the 2011 Certification is no longer valid or in effect because the Review Regulation is contrary to the plain text of

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[1] On January 3, 2022, Mrs. Foster passed away. *See* Suggestion of Death Upon the Record Under Rule 25(a), District Court case no. 4:21-cv-04081-RAL, docket no. 33 (filed Jan. 10, 2022). She was subsequently dismissed from the case under Federal Rule of Civil Procedure 25(a)(2). *See* Plaintiff's Unopposed Motion to Dismiss Plaintiff Cindy Foster, District Court case no. 4:21-cv-04081-RAL, docket no. 40 (filed Apr. 4, 2022); Order Granting Unopposed Motion to Dismiss Plaintiff, District Court case no. 4:21-cv-04081-RAL, docket no. 44 (filed Apr. 5, 2022).

Swampbuster. Court of Appeals' Joint Appendix Vol. 1 at 31, ¶ 147.

In November 2021, Respondents moved to dismiss or in the alternative for summary judgment, arguing that they were entitled to judgment as a matter of law on Foster's claim that the Review Regulation conflicts with the text of Swampbuster. *See* Memorandum in Support of Federal Defendants' Motion to Dismiss or Alternatively for Summary Judgment at 25–27, District Court case no. 4:21-cv-04081-RAL, docket no. 22 (filed Nov. 15, 2021). Specifically, Respondents argued that they were merely filling in statutory "silence" in Swampbuster's text regarding "how a party may request review of a final wetland certification," and therefore the conditions in the Review Regulation "are reasonable, in accord with the statute, and entitled to *Chevron* deference." *Id.* at 26. Foster responded that the Review Regulation contradicts Swampbuster because under the plain language of the statute, when a person affected by the certification requests review, the previous certification is invalidated. *See* Plaintiffs' Combined Memorandum in Support of Motion for Summary Judgment and Response to Motion to Dismiss at 19–20, District Court case no. 4:21-cv-04081-RAL, docket no. 36 (filed Jan. 10, 2022).

On July 1, 2022, the District Court granted the agencies' motion for summary judgment and denied Foster's motion for summary judgment. App. 15a–45a. Relying on this Court's articulation of *Chevron* deference from *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013), it concluded that the Review Regulation did not conflict with Swampbuster because it "merely restricts the circumstances in which an agency must

review a final certification[.]" App. 36a. Therefore, *Chevron* deference was appropriate.

The Eighth Circuit affirmed. App. 1a–14a. In a short but published opinion, the panel cited *Chevron* and deferred to the agency's interpretation of Swampbuster. App. 5a–9a. It therefore held that the Review Regulation was a valid exercise of the agencies' power. App. 9a. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted Because the Decision Below Conflicts with This Court's Statutory Interpretation and *Chevron* Deference Precedents

"Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984)); *see also Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). A court must make a robust effort to determine the meaning of a statute before deferring to an agency's interpretation. *See Epic Systems*, 138 S. Ct. at 1630, *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2423–24 (2019) (explaining that before deferring, "the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning"); *id.* at 2430 (Gorsuch, J., concurring) (explaining that judges have and should use their "interpretative toolkit, full of canons and tiebreaking rules, to reach a decision about the best

and fairest reading of the law"). And if "the canons [of statutory interpretation] supply an answer" to an "interpretive puzzle," "*Chevron* leaves the stage." *Epic Systems*, 138 S. Ct. at 1630 (quotations omitted).

The Eighth Circuit ignored this mandate. It did not attempt to apply the traditional tools of statutory interpretation to solve Swampbuster's interpretive puzzle. Instead, the Court of Appeals found ambiguity where none exists, effectively allowing the agency to rewrite the statute.

A. Contrary to This Court's Precedents, the Eighth Circuit Failed to Apply Traditional Tools of Interpretation to Discern Swampbuster's Meaning

This Court has repeatedly admonished that statutory interpretation always begins with the statutory text. *See Bartenwerfer v. Buckley*, 143 S. Ct. 665, 671 (2023) ("[W]e start where we always do: with the text of the statute.") (quoting *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021)). And "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. In ascertaining the meaning of the text, this Court has instructed courts to "employ[] traditional tools of statutory construction," *id.* at 843 n.9, including an analysis of "the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Here, if the Eighth Circuit had followed this Court's direction on statutory interpretation, it would

have reached a different conclusion. An analysis of Swampbuster's language, design, and statutory history demonstrates that the statute requires an agency to treat a certification as invalid and not in effect when a person affected by that certification requests review.

First, the text of Swampbuster does not limit the right to request review of a certification. The operative text is in a subsection titled "Duration of certification." 16 U.S.C. § 3822(a)(4). The text then lays out the "[d]uration," stating that "[a] final certification . . . shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary." *Id.* The text makes no mention of conditions that must be met before review is granted, and instead provides that once review is requested, the previous certification is invalidated.

The NRCS's Review Regulation, however, adds barriers to review, allowing review of a previous certification "only if a natural event alters the topography or hydrology of the subject land," or "if NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6); *see also* App. 36a (opinion and order of the District Court stating that the Review Regulation "restricts the circumstances in which an agency must review a final certification[.]"). The agency's regulation, far from "giv[ing] effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, instead rewrites the statute to add conditions not present in the statute.

Despite the regulation adding restrictions on review where Congress imposed none, the courts below held that the Review Regulation is consistent with Swampbuster. App. 9a, 36a. In doing so, both courts eschewed a textual analysis for concern about "agency efficiency." *See* App. 9a, 36a. Whatever the merits of such concern as a matter of policy—which, under the Constitution's separation of powers, is for Congress, and not the agency or the courts to determine—it cannot override the plain text of the statute. *See, e.g.*, *SAS Institute*, 138 S. Ct. at 1355 ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant these commands with others it may prefer."); *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 325 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

Second, Swampbuster's structure confirms that affected persons may request review at any time and that such a request invalidates previous certifications. Indeed, the adjacent subsection to 16 U.S.C. § 3822(a)(4) provides that an existing "delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person under paragraph (4)." 16 U.S.C. § 3822(a)(6). This provision reinforces Congress's deliberative choice to place affected persons in charge of the review process. In both 16 U.S.C. § 3822(a)(4) and 16 U.S.C. § 3822(a)(6) the farmer drives the review process. Neither provision allows the agency "to start proceedings on his own initiative," and "[f]rom the outset, we see that Congress chose to structure a process in which it's the

petitioner, not the Director, who gets to define the contours of the proceeding." *SAS Inst., Inc.*, 138 S. Ct. at 1355 (interpreting provisions of patent statute). "And '[j]ust as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'" *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)).

Despite the importance of analyzing statutory structure when discerning the meaning of a statutory text, neither the District Court nor the Eighth Circuit even cited this adjacent provision. *See* App. 15a–45a (District Court Opinion and Order); 1a–14a (Eighth Circuit Opinion). This is contrary to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Third, the courts below failed to analyze Swampbuster's statutory history. This Court has often instructed that "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Van Buren*, 141 S. Ct. at 1660–61 (quoting *Ross v. Blake*, 578 U.S. 632, 641–42 (2016)). The 1996 amendment to Swampbuster is no exception. Before Congress amended Swampbuster, it provided that "[t]he Secretary shall provide by regulation a process for the periodic review and update of such wetland delineations as the Secretary deems appropriate." Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1422, 104 Stat. 3359

(Nov. 28, 1990); 16 U.S.C. § 3822(a)(4) (Nov. 28, 1990). This framing put the agency, rather than the farmer, in charge of the review process. Indeed, the original text explicitly directed the Secretary to create a system for the review of wetland delineations.

But that all changed in 1996, when Congress amended the statute and removed the Secretary's discretion to determine when review is warranted. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322, 110 Stat. 888 (Apr. 4, 1996). The statute now reads: "A final certification made under paragraph (3) shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). This amendment affected an important change in the statute. It stripped the agency of the discretion to decide via regulation when review is warranted. The 1996 statutory language no longer authorizes the agency to deem when a review is "appropriate" and instead requires NRCS to review a wetland delineation when "the person affected by the certification requests review of the certification by the Secretary." *Id.*; *see also id.* § 3822(a)(6). With this change, Congress explicitly allowed review at any time it is requested by an affected person.

The Review Regulation effectively reverses the purpose of the 1996 amendments by placing farmers back in the position they were in before Congress overhauled the review process. Contrary to Swampbuster's plain text, under the Review Regulation, the Secretary still decides when it is appropriate to review a certified delineation. 7 C.F.R.

§ 12.30(c)(6). If Congress intended the agency to have such discretion, it could have retained the original language of the statute. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127 § 322, 110 Stat. 888 (Apr. 4, 1996). Instead, Congress removed that language and entered new language—which stripped NRCS of the authority it now asserts via regulation—demonstrating that Congress wanted farmers to determine when the agency would review a previous certified wetland delineation. *Cf. Van Buren*, 141 S. Ct. at 1661 ("Congress' choice to *remove* the statute's reference to purpose thus cuts *against* [the government's reading of the statute].") (citation omitted).

The purpose of the 1996 amendments further confirms that Congress intended to put farmers in control of when review is granted. With the amendments, Congress insulated farmers from recertification by the Secretary by placing the farmers in charge of review. 16 U.S.C. § 3822(a)(4), (a)(6). The statute therefore is a safe harbor for farmers, rather than an enforcement mechanism for the agency. *See* 142 Cong. Rec. S3037-06, S3038 (daily ed. Mar. 28, 1996) (statement of Senator Lugar, manager of the bill's conference committee: "The agreement stipulates that current wetlands delineations remain valid until a producer requests a review."); 142 Cong. Rec. S4420-01, S4420 (daily ed. Apr. 30, 1996) (colloquy between Senator Grassley and Senator Lugar discussing that "the Conference Committee intended to give farmers certainty in dealing with wetlands," and "[o]ne way of accomplishing this goal was to allow prior delineations of wetlands to be changed only upon request of the farmer").

But the courts below did not look to Swampbuster's statutory history, or the purpose of the 1996 amendments to determine the meaning of the text. *See* App. 15a–45a (District Court Opinion and Order); 1a–14a (Eighth Circuit Opinion). Instead, they skipped to the second step of *Chevron* without completing the first. *See* App. 6a–9a.

B. The Eighth Circuit Inverted *Chevron's* Framework by Using Statutory Silence to Skip to Step 2

Instead of using all the interpretive tools in its toolkit, the Eighth Circuit used purported statutory silence as a crutch. *See* App. 6a–9a. Rather than engaging in a thorough analysis of Swampbuster's text, structure, and statutory history, the Eighth Circuit allowed what the text did not say to create ambiguity in the statute where there is none. App. 9a. That is an inversion of *Chevron*'s framework. *See, e.g.*, *Bartenwerfer*, 143 S. Ct. at 671 ("[W]e start where we always do: with the text of the statute.") (quoting *Van Buren*, 141 S. Ct. at 1654). *Chevron* does not allow an agency to create procedures not mentioned in the statute merely because the statute does not explicitly forbid them. *Cf. SAS Inst.*, 138 S. Ct. at 1358 (The statute "requires the Board's final written decision to address every claim the petitioner presents for review. There is no room in this scheme for a wholly unmentioned 'partial institution' power that lets the Director select only some challenged claims for decision.").

The plain text of the Review Provision contains no conditions. 16 U.S.C. § 3822(a)(4). It does not authorize the agency to add procedural hurdles to review. *Id.* Instead, the statute lays out the "Duration

of certification" and states what events will cause the certification to no longer "remain valid and in effect." *Id.* But rather than employing traditional tools of statutory construction to discern the meaning of those terms, the Eighth Circuit focused on what the statute does not say. *See supra*, Section I-A.

Although the Eighth Circuit recognized that "by suggesting a certification is effective 'until' a farmer requests review, the statute may reflect a Congressional intent to provide that a farmer's review request in and of itself voids a prior certification without the need to follow any procedural requirements like those enumerated in the Review Regulation," App. 6a, it allowed the statute's lack of "direction as to what constitutes a proper review request," App. 7a, to guide it.

Giving such weight to a supposed "lack of direction" on its own would drastically expand the field of deference, contrary to this Court's warning that "statutory silence, when viewed in context, is best interpreted as limiting agency discretion." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009). That is precisely the case with Swampbuster, as demonstrated by the statutory history. As discussed above, in 1996 Congress removed the Secretary's authority to determine when a certification is entitled to review. *See supra*, Section I-A; *see also* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322, 110 Stat. 888 (Apr. 4, 1996). The Review Regulation—and the decision of the Eighth Circuit—make that amendment a nullity. *But see Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have

real and substantial effect.") (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258–59 (2004)). Not only does the decision of the Eighth Circuit not give effect to Congress's amendment, but rather it actively does "what Congress had not," *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2486 (2021) (per curiam), and what Congress rejected by giving the Secretary the power to determine when review is warranted. *See also* Petition for a Writ of Certiorari, *Loper Bright Enterprises v. Raimondo* (No. 22-451) at 21, *cert. granted in part* May 1, 2023 (noting the same issue with respect to a regulation of the National Marine Fisheries Service).

The Eighth Circuit also failed to follow this Court's precedents on applying *Chevron* by elevating policy considerations over statutory text. The Eighth Circuit stated that "from an economic perspective, the Review Regulation preserves agency resources[.]" App. 9a. But concern about agency resources "cannot create an ambiguity when the words on the page are clear." *SAS Inst.*, 138 S. Ct. at 1358 (citing *SEC v. Sloan*, 436 U.S. 103, 116–17 (1978)). Here, the words on the page are clear, and the Review Provision requires NRCS to review every request. 16 U.S.C. § 3822(a)(4).

Finally, the Eighth Circuit failed to follow this Court's instructions on statutory interpretation by only mentioning one canon of statutory construction: the "absurd results construction canon." App. 8a. In mentioning this canon, the court did not cite any authority applying it, but merely assumed that following the plain language of the statute would be absurd because "[t]his ability to request review would be without limit and would grant farmers the

unfettered ability to render any attempted certification by the NRCS uncertain." *Id.*

The absurdity cannon is not a get-out-of-consequences-free card. Courts apply the absurdity canon only "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring in judgment); *Nixon v. Missouri Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in judgment) ("avoidance of unhappy consequences" is inadequate basis for interpreting a text); *cf. Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819) (Before disregarding the plain meaning of a constitutional provision, the case "must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."). If its use were expanded to cover policy results that an appellate panel finds merely improbable or simply bad, agencies could freely make an end run around statutory text.

Here, following the plain text of Swampbuster would not be, in a genuine sense, absurd because even if farmers attempted to "render any attempted certification by the NRCS uncertain," that uncertainty would only negatively affect the farmers themselves. As the plain text of Swampbuster lays out, a certification is to a farmer's benefit because a certification means that a farmer will not "be adversely affected because of having taken an action

based on a previous certified wetland delineation by the Secretary." 16 U.S.C. § 3822(a)(6). In other words, if a farmer has a certification, and follows that certification, he or she cannot lose access to USDA benefits.

If a farmer does not have a certification, however, then the farmer does not have the protection of 16 U.S.C. § 3822(a)(6). The government can bring enforcement proceedings against a farmer receiving USDA benefits even before there is a certified wetlands delineation. *See* 16 U.S.C. § 3821; *Ballanger v. Johanns*, 451 F. Supp. 2d 1061, 1064 (S.D. Iowa 2006). And, certified or not certified, the agency has the burden of proving that a farmer improperly converted a wetland and is ineligible for benefits. *See Downer v. U.S. By and Through U.S. Dep't of Agric. & Soil Conservation Serv.*, 97 F.3d 999, 1009 (8th Cir. 1996) (Beam, J., concurring and dissenting) (stating that it is the burden of the agency to prove ineligibility for benefits); *Barthel v. USDA*, 181 F.3d 934, 938 (8th Cir. 1999) (favorably citing Judge Beam's concurrence in part). Thus, from the agency's standpoint, its enforcement is the same whether or not a farmer has a certification. But from the farmer's standpoint, having a certification allows the farmer to defend against the allegations by arguing that he or she followed the certification.

The Eighth Circuit's invoking of the absurdity canon further demonstrates the inadequacy of the court's statutory analysis. When the statute is read as a whole, invalidating a certification upon the request of a farmer is not absurd because the statute imposes costs on a farmer who requests a review. When a farmer requests review, and the previous certification

is invalidated, the farmer loses the protections of 16 U.S.C. § 3822(a)(6). Thus, farmers will only initiate review if they believe they have a good argument that the current certification is inaccurate and they can get a new, better certification after review. In short, "the finality of wetlands determinations is for the benefit of producers, not the USDA," *B & D Land and Livestock Co. v. Veneman*, 332 F. Supp. 2d 1200, 1209 (N.D. Iowa 2004) (stating plaintiff's argument and later accepting that argument).[2]

Rather than applying all of the various canons of statutory construction to interpret Swampbuster's Review Provision, the Eighth Circuit found ambiguity in the statute where none exists. As a result, the Eighth Circuit failed to apply this Court's precedents on how to properly apply the *Chevron* framework, and inappropriately deferred to the agency's interpretation of the statute. The Court should grant the petition to ensure that this method of statutory interpretation does not overwhelm this Court's commitment to the separation of powers.

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[2] The Eighth Circuit's brief statutory analysis is in sharp contrast to two earlier district court decisions within the Eighth Circuit that properly applied the *Chevron* framework to interpret Swampbuster's Review Provision. *See Branstad v. Veneman*, 212 F. Supp. 2d 976 (N.D. Iowa 2002) (*Branstad III*); *B & D Land and Livestock Co.*, 332 F. Supp. 2d 1200. In both cases, the District Court for the Northern District of Iowa followed Swampbuster's plain language to hold that a farmer can request a review of a certified wetlands delineation at any time and that a request invalidates the previous certification. *Branstad III*, 212 F. Supp. 2d at 997; *B & D Land and Livestock Co.*, 332 F. Supp. 2d at 1213.

II. Certiorari Should Be Granted Because the Eighth Circuit's Decision Illustrates Why *Chevron* Should Be Overruled

A. *Chevron* Is Unworkable in Practice

The opinions below in this case demonstrate the need for this Court to overrule *Chevron*. Although this Court's precedents lay out a framework for how lower courts should determine if an agency regulation is consistent with the statute, lower courts rarely conduct the robust statutory analysis this Court's precedents require. Instead, lower courts "reflexive[ely] defer[]" to agencies' interpretations of statutes. S*ee, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring). *Chevron* is irrevocably broken. The time has come for this Court to overrule it.

Here, the Eighth Circuit found ambiguity in the statutory text where there was none, and elevated an agency's policy concerns over the policies adopted by Congress. App. 9a. Because of *Chevron*, the Eighth Circuit did not follow through on its judicial responsibility to interpret the statute Congress enacted. *See* App. 6a–9a; *see also* Brief of Eight Nat'l Bus. Orgs. as Amici Curiae in Support of Petitioners at 23–24, *Loper Bright Enters., Inc. v. Raimondo*, 143 S. Ct. 2429 (2023) (No. 22-451) (noting that in *Foster*, the Eighth Circuit deferred to the agencies' reading of the statute "despite the fact that the court possesses the ability to resolve statutory ambiguity as part of its traditional interpretative toolkit"). Instead, the panel below allowed an agency to rewrite the statute Congress enacted. *But see Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023) (Agencies are not permitted to "rewrite [] statute[s] from the ground up.").

Unfortunately, this case is not an isolated incident of a court using *Chevron* to sidestep a rigorous statutory analysis. S*ee, e.g.*, *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (describing the "reflexive deference" of some lower courts when applying *Chevron* as "troubling"); *Baldwin v. United States*, 921 F.3d 836, 842 (9th Cir. 2019) (dispensing with *Chevron* Step One in a single paragraph that lacks meaningful statutory analysis, and instead focusing on the statute's "silence" as a reason to immediately proceed to Step Two); *Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) ("The Framers anticipated that legal texts would sometimes be ambiguous, and they understood the judicial power to include the power to resolve these ambiguities over time in judicial proceedings. The Court's decision in *Chevron*, however, precludes judges from exercising that judgment.") (internal quotations and citations omitted); *Buffington v. McDonough*, 143 S. Ct. 14, 14 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (admonishing the lower court for "bypass[ing] any independent review of the relevant statutes," before resorting to *Chevron* deference); *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 525 (6th Cir. 2019) (Kethledge, J., dissenting) (stating "the federal courts have become habituated to defer to the interpretive views of executive agencies, not as a matter of last resort but first," and criticizing the majority for not "analyz[ing] the interpretive issue," and "merely fram[ing] it"); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 281 (3d Cir. 2017) (Jordan, J., concurring) ("[F]ederal courts are now routinely told, in the name of *Chevron*, to bow down and obey the executive branch."); *Oregon Restaurant & Lodging*

Ass'n v. Perez, 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of rehearing en banc) (criticizing the panel majority for "equat[ing] a statutes 'silence' with an agency's invitation to regulate").

Indeed, this Court has recently granted a Petition that requests this Court to overrule *Chevron*. *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (granting petition in part). There, the Petitioners laid out the issues with the National Marine Fisheries Service's (NMFS) interpretation of the 1976 Magnuson-Stevens Act (MSA), and the D.C. Circuit's reflexive deference to that interpretation. *See* Petition for a Writ of Certiorari, *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451). The myriad of issues with *Chevron* deference raised by Petitioners in *Loper Bright Enterprises* are likewise reflected here.

In both *Loper Bright Enterprises* and this Petition, the lower courts deferred to the agency even though the regulation was contrary to, and in direct conflict with, statutory text, context, and history. *See* Petition for a Writ of Certiorari at 16–23, *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451); *see also supra* Part I. Similarly, in both *Loper Bright Enterprises* and here, the lower courts impermissibly relied on statutory silence to justify deference. *See* Petition for a Writ of Certiorari at 26–29, *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451); *see also supra* Part I. But as the Petitioner in *Loper Bright Enterprises* aptly explained, "silence does not create ambiguity," Petition for a Writ of Certiorari at 29, *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451), and a deference doctrine that allows the court to find

otherwise raises serious separation of powers concerns, as "[i]t is far easier to gin up ambiguity in a statute than it is to run the gauntlet of bicameralism and presentment." *Id.* at 31.

B. *Chevron* Undermines the Constitution's Separation of Powers

It is axiomatic that Congress—and Congress alone—has the power to make or change the law. *See* U.S. Const. art. I. And administrative agencies, as creatures of the Executive Branch, have "'no power to act'—including under its regulations—unless and until Congress authorizes it to do so by statute." *FEC v. Cruz*, 142 S. Ct. 1638, 1649 (2022) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). To that end, this Court has recognized that it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regul. Grp.*, 573 U.S. at 328. But the decision of the Eighth Circuit flouts this first principle by setting precedent that administrative agencies may rewrite statutes. *See* App. 6a–9a. The Eighth Circuit's theory conflicts with both the plain text, structure, and history of Swampbuster as well as this Court's longstanding recognition that "[i]n a democracy, the power to make the law rests with those chosen by the people," *King v. Burwell*, 576 U.S. 473, 498 (2015), and not with unelected officials at administrative agencies.

The people vested Congress—and Congress alone—with the power to make law. *See* U.S. Const. art. I. By contrast, the people vested the President with the executive power to enforce those laws. *See* U.S. Const. art. II. And the people vested the

Judiciary with the power to interpret the laws Congress makes. *See* U.S. Const. art. III. The Constitution divided the government's powers this way not merely to resolve inter-branch conflicts or to ensure efficient government. Rather, the "doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

Chevron flouts these principles in two crucial ways. First, it is contrary to the power of the judicial branch to interpret the law. At its core, *Chevron* deference incentivizes the judiciary to abdicate its solemn duty of the "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Unlike courts, agencies are not experts at statutory interpretation. *See, e.g.*, *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 618 (2013) (Scalia, J., concurring in part and dissenting in part) ("Making regulatory programs effective is the purpose of *rulemaking*, in which the agency uses its 'special expertise' to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule—to 'say what the law is[.]'") (quoting *Marbury*, 5 U.S. at 177). Yet "[u]nder a broad reading of *Chevron*," like the one applied by the Eighth Circuit here, the court "outsource[d] [its] interpretive responsibilities." *Buffington*, 143 S. Ct. at 18–19 (Gorsuch, J., dissenting from denial of cert). Instead of independently engaging in a robust and independent statutory review, the Eighth Circuit's deference to the agency's interpretation of the statute "represent[ed] a transfer of judicial power to the Executive Branch" and "amount[ed] to an erosion of the judicial obligation to serve as a 'check' on the

political branches." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring). This is especially problematic because in doing so, the Eighth Circuit "place[d] a finger on the scales of justice in favor of the most powerful of litigants, the federal government," effectively "turning *Marbury* on its head." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of cert). The very existence of *Chevron* deference encourages and permits these errors.

Second, *Chevron* is contrary to the power of the legislative branch to make the law. *See, e.g.*, U.S. Const. art. I. The Framers "believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty." *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting). To that end, "the framers went to great lengths to make lawmaking difficult." *Id.* But that intentional design is undermined when courts invoke deference to regulations that are contrary to the statutory text. That is precisely the scenario here. Through its creative reading of Swampbuster, the agency has claimed the authority to place extra-textual limitations on when a farmer may request review, deciding for itself whether review is warranted. *Compare* 16 U.S.C. § 3822(a)(4), *with* 7 C.F.R. § 12.30(c)(6). And by reflexively applying deference without undertaking a thorough statutory analysis, the Eighth Circuit upheld a statute that not only conflicts with Congress' statutory text, but rewrites it. *But see La. Pub. Serv. Comm'n*, 476 U.S. at 376 ("As we so often admonish, only Congress can rewrite this statute.").

The serious problems *Chevron* causes have not been lost on the members of this Court. *See, e.g.*, *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from denial of cert) ("*Chevron* is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions."); *Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., joined by Justice Thomas & Kavanaugh, concurring in the judgment) (asserting that "there are serious questions" about whether *Chevron* "comports with the APA and the Constitution."); *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., joined by Justice Thomas, dissenting) (noting "the mounting criticism of *Chevron* deference"); *Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (expressing "concern" over how *Chevron* "has come to be understood and applied"); *id.* at 2129 (Alito, J., dissenting) (noting that "in recent years, several Members of this Court have questioned *Chevron*'s foundations").[3]

Finally, *Chevron* is a grave threat to individual liberty. As discussed above, it fundamentally alters the Constitution's structural protections. The separation of powers "enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from

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[3] These criticisms have also been echoed by legal scholars and academics. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017); Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 Ala. L. Rev. 1 (2017); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016); Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 Admin. L. Rev. 1 (2013); Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779 (2010).

whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). But if agencies are permitted to guide how statutes should be interpreted, an important check on Executive power is lost. *See, e.g.*, Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1212 (2016) ("[W]hen judges defer to the executive's view of the law, they display systematic bias toward one of the parties."). This is antithetical to our unique and liberty-maximizing system of government. *See, e.g.*, *Buffington*, 143 S. Ct. at 16 (Gorsuch, J., dissenting from denial of cert.) ("From the beginning of the Republic, the American people have rightly expected our courts to resolve disputes about their rights and duties under law without fear or favor to any party—the Executive Branch included.").

The Eighth Circuit's decision shows that *Chevron* cannot be saved, and that "[a]t this late hour, the whole project deserves a tombstone no one can miss." *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of cert.). This Court should grant the Petition to overrule *Chevron*.

III. The Petition Should Be Held Pending Resolution of *Loper Bright*

This term, in *Loper Bright Enterprises*, 143 S. Ct. 2429 (No. 22-451), this Court will likely answer the second question presented in this Petition. In light of *Loper Bright*, this Court may wish to hold the Petition until that case is resolved and, if appropriate, Grant Vacate and Remand (GVR) in light of the decision there. "[T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of

developments, including our own decisions," *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam). Further, this Court "regularly hold[s] cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) (emphasis omitted).

This Petition, like the Petition in *Loper Bright Enterprises*, asks the Court to overrule *Chevron*. *See supra* Part II; Petition for a Writ of Certiorari, *Loper Bright Enterprises* (No. 22-451) at i, *cert. granted in part* May 1, 2023. If this Court decides to overrule *Chevron*, or even if it clarifies the proper application of *Chevron* deference without overruling the doctrine, this Court's decision in *Loper Bright Enterprises* will affect the Eighth Circuit's interpretation of Swampbuster and the outcome of this case. In its decision, the Eighth Circuit stated that it "appl[ied] the two-step framework from *Chevron*" to reach its holding. App. 5a–6a. If the court can no longer apply that framework, then it must apply a different analytic framework to reach its holding.

Indeed, the opinion below did not offer a non-*Chevron* justification for its holding, despite Respondents' suggestion to the court that it should do so. After this Court granted the Petition in *Loper Bright*, Respondents filed a notice of supplemental authority informing the Eighth Circuit of the grant. *See* Appellees' Notice of Supplemental Authority, Eighth Circuit Case No. 22-2729, Entry ID 5273203 (filed May 4, 2023). Appellees argued that while they "stand by [the] argument" that "the Secretary of

Agriculture's regulation at issue here should be upheld as a permissible and rational interpretation" of Swampbuster "under *Chevron*'s second step," that their "primary argument, however, remains that the regulation is the better interpretation in light of the statutory text, purpose, and history, and that these sources do not support Plaintiff's reading of the Act." *Id.* Respondents stated that their "primary argument does not implicate the question presented in *Loper*," *id.*, but the Eighth Circuit did not adopt the agencies' "primary argument." App. 9a. Instead, the court resolved the case under *Chevron*'s second step, *id.*, and adopted the argument that implicates the question presented in *Loper Bright* Enterprises.

This petition should be held pending resolution of *Loper Bright Enterprises* and then disposed of accordingly.

CONCLUSION

The petition for a writ of certiorari should be granted or held in abeyance pending the disposition of *Loper Bright Enterprises*.

DATED: August 2023.

Respectfully submitted,

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Appendix

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United States Court of Appeals
For the Eighth Circuit

No. 22-2729

Arlen Foster

Plaintiff - Appellant

v.

United States Department of Agriculture;
Tom Vilsack, in his official capacity as Secretary of the United States Department of Agriculture;
The Natural Resources Conservation Service;
Terry Cosby, in his official capacity as Acting Chief of the Natural Resources Conservation Service;
Tony Suseri, in his official capacity as Acting South Dakota State Conservationist

Defendants - Appellees

Appeal from United States District Court
for the District of South Dakota - Southern

Submitted: March 21, 2023
Filed: May 12, 2023

Before BENTON, ERICKSON, and KOBES, Circuit Judges.

ERICKSON, Circuit Judge.

In this action, Arlen Foster maintains several administrative law claims against appellees. The

district court[1] granted summary judgment in favor of appellees. We affirm.

I. BACKGROUND

A. Statutory and Regulatory Framework

The Secretary of Agriculture ("Secretary") is responsible for "delineat[ing], determin[ing], and certify[ing] all wetlands" and has authority to promulgate rules necessary to implement the provisions contained in 16 U.S.C. § 3821 et seq. ("Swampbuster Act"). 16 U.S.C. §§ 3801(a)(21), 3822(a)(1), 3846(a). The National Resources Conservation Service ("NRCS") is a federal agency that acts at the direction of the Secretary to certify wetlands and otherwise administer the Swampbuster Act. *Id.* § 3822(j); *see* 7 C.F.R. §§ 12.6(c), 12.30(a)(3). To preserve wetlands, the Swampbuster Act precludes farmers who convert wetlands or produce crops on converted wetlands from receiving certain farm-related benefits. *See* 16 U.S.C. § 3821(a)–(c); *Clark v. USDA*, 537 F.3d 934, 935 (8th Cir. 2008) (citation omitted). The Swampbuster Act generally does not prohibit farmers from converting or farming on artificial wetlands. *See* 16 U.S.C. § 3822(b)(1)(E), (b)(2)(A).

The Swampbuster Act and United States Department of Agriculture ("USDA") regulations work together to provide farmers with the right to request reviews of wetland certifications. The Swampbuster Act's review provision ("Swampbuster Review Provision") provides that a prior wetland certification "shall remain valid and in effect . . . until

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[1] The Honorable Roberto A. Lange, Chief Judge, United States District Court for the District of South Dakota.

such time as the person affected by the certification requests review of the certification by the Secretary." *Id.* § 3822(a)(4). In turn, a regulation ("Review Regulation") provides procedural requirements a farmer must follow to make an effective review request. Specifically, a farmer "may request review of a certification only if a natural event alters the topography or hydrology of the subject land . . . or if NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6). Other regulations provide administrative appeal rights to persons subject to adverse certifications. *See generally id.* §§ 11.1, 11.9, 614.1. After exhausting administrative remedies, a farmer may seek judicial review of the NRCS's wetland determination in federal district court. *See id.* § 11.13(a); *see also* 7 U.S.C. §§ 6912(e), 6999.

B. Factual Background and Procedural History

Foster owns a tract of land in South Dakota that contains a tree belt. In the winter, snow accumulates around the tree belt. When the snow melts in the spring, some ponding in the nature of a shallow puddle can occur on a portion of the property ("Site"). In 2004, the NRCS certified the Site as a wetland. Following a 2008 request by Foster to review the certification, the NRCS reviewed the certification and in 2011 recertified the Site as a wetland. In the 2011 recertification, the NRCS specifically found that the Site is not an artificial wetland. Foster exhausted his administrative remedies and sought judicial review in the district court. The district court upheld the agency's determination as not arbitrary and capricious, this Court affirmed, and the Supreme

Court declined to grant certiorari. *See generally Foster v. Vilsack*, No. CIV. 13-4060-KES, 2014 WL 5512905 (D.S.D. Oct. 31, 2014), *aff'd* 820 F.3d 330 (8th Cir. 2016), *cert. denied* 137 S. Ct. 620 (2017).

In 2017, Foster requested review of the 2011 recertification. The NRCS did not conduct the review, finding that Foster had failed to comply with the Review Regulation because he failed to provide new information that the NRCS had not previously considered. In 2020, Foster submitted a third review request, but this time, he also submitted an engineering report that opined that the Site's ponding is the result of the tree belt and is properly considered an artificial wetland outside the scope of the Swampbuster Act. The NRCS noted the opinion and asked Foster's engineering firm to identify any evidence that would show that the NRCS had not fully considered the tree belt at the time of the 2011 recertification decision. Neither Foster nor the engineering firm ever responded to the request. Thereafter, the NRCS reviewed the engineering report, "compared [it] to the agency record," and declined to consider Foster's 2020 review request on the ground that the request did not comply with the Review Regulation.

In May 2021, Foster filed this action in the district court alleging that: (1) the Review Regulation contravenes the Swampbuster Review Provision; (2) the Review Regulation was never submitted to Congress or the Comptroller General as required by the Congressional Review Act ("CRA"); and (3) the NRCS's decisions to refuse to consider Foster's 2017 and 2020 review requests violated the Administrative Procedure Act ("APA"). The district court granted

summary judgment in favor of appellees, holding: (1) the Review Regulation does not conflict with the Swampbuster Review Provision; (2) the CRA's judicial review provision precludes judicial review of Foster's CRA claim; and (3) the NRCS's decisions to decline to consider Foster's 2017 and 2020 review requests did not violate the APA. Foster appeals.

II. DISCUSSION

"We review the district court's grant of summary judgment *de novo*, viewing the evidence and drawing all reasonable inferences in the light most favorable to . . . the nonmoving party." *Kallail v. Alliant Energy Corp. Servs., Inc.*, 691 F.3d 925, 929 (8th Cir. 2012) (citation omitted).

Foster reasserts the claims raised below, urging this Court to find the district court erred in each of its three holdings. Specifically, Foster argues that the Review Regulation is in conflict with the Swampbuster Review Provision, the CRA does not preclude judicial review of his CRA claim, and the NRCS's decisions to decline to consider his 2017 and 2020 review requests violated the APA. We discuss each assertion in turn.

A. The Swampbuster Review Provision and the Review Regulation

Foster contends the Review Regulation unlawfully conflicts with the Swampbuster Review Provision. He argues that the Review Regulation limits a farmer's right to request review of a wetland certification while the Swampbuster Act permits broad review upon request by a farmer. When asked to review whether a regulation is consistent with a statute, we apply the two-step framework from

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). *See Voigt v. EPA*, 46 F.4th 895, 900 (8th Cir. 2022) (citation omitted). We first consider whether the statute is ambiguous "us[ing] traditional tools of statutory construction," including the statute's "text, structure, history, and purpose." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); *Voigt*, 46 F.4th at 900–01 (alteration in original) (citation omitted). If the statute is unambiguous, we must simply apply it. *Voigt*, 46 F.4th at 901 (citation omitted). If the statute is ambiguous, we defer to and apply the agency's interpretation of the statute so long as it is reasonable. *Id.* (citation omitted); *see Ameren Corp. v. FCC*, 865 F.3d 1009, 1012 (8th Cir. 2017) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 566 U.S. 208, 218 (2009)).

After closely reviewing the Review Regulation and the Swampbuster Act, we conclude the Review Regulation does not contravene the Swampbuster Review Provision. The Swampbuster Review Provision appears to us to suffer from some ambiguity related to whether it disallows regulations establishing procedural requirements for making effective review requests. We first consider the text of the statute, which provides that a wetland certification "shall remain valid and in effect . . . until such time as the person affected by the certification requests review." *See* 16 U.S.C. § 3822(a)(4). On one hand, by suggesting a certification is effective "until" a farmer requests review, the statute may reflect a Congressional intent to provide that a farmer's review request in and of itself voids a prior certification without the need to follow any procedural requirements like those enumerated in the Review Regulation. *See also* 142 Cong. Rec. S3038 (daily ed.

Mar. 28, 1996) (statement of Sen. Richard Lugar) ("The agreement stipulates that current wetlands delineations remain valid until a producer requests a review."). On the other hand, the Swampbuster Review Provision provides no direction as to what constitutes a proper review request and as a result may not preclude the existence of procedural requirements for making an effective review request.

The legislative history offers no clarification. In 1990, Congress amended the Swampbuster Act and adopted a version of the Swampbuster Review Provision that permitted the Secretary to update "wetland delineations as the Secretary deem[ed] appropriate." 16 U.S.C. § 3822(a)(4) (1990) (amended 1996). These amendments also made the Secretary responsible for creating a process to review wetland certifications to "provide farmers with certainty as to which of their lands are . . . wetlands." H.R. Rep. No. 101-916 (1990), *as reprinted in* 1990 U.S.C.A.A.N. 5286, 5436.

By 1996, members of Congress recognized the amendments had operated in a manner that increased uncertainty. Senator Grassley noted that after the amendments, the NRCS began conducting aerial photography to delineate new wetlands, which "caused a lot of anxiety and uncertainty for" farmers who could not operate with constantly-changing delineations. *See* 142 Cong. Rec. S4420 (daily ed. Apr. 30, 1996) (statement of Sen. Charles Grassley); *see also* 141 Cong. Rec. S1702–03 (daily ed. Jan. 27, 1995) (statement of Sen. Charles Grassley) (requesting a moratorium on new wetland delineations pending new legislation). As a result, Congress proposed new amendments in 1996, and

senators expressed their understanding that these new amendments would "give farmers certainty . . . [by] allow[ing] prior delineations of wetlands to be changed only upon request of the farmer." 142 Cong. Rec. S4420. The 1996 amendments contained the current Swampbuster Review Provision. *See* 16 U.S.C. § 3822(a)(4) (1996) (amended 2008).

Foster suggests that when Congress amended the Swampbuster Act to permit only farmers to initiate reviews, it necessarily granted individual farmers the right to freely make review requests that automatically void prior wetland certifications. This is a broader reading of the statute than is supported by the legislative record. The legislative history suggests that the sole purpose of the 1996 amendments was to promote certainty by preventing the NRCS from constantly changing wetland delineations. Nothing in the legislative history can be fairly read to evince a Congressional purpose to prevent the USDA from implementing a reasonable process to facilitate a farmer's ability to seek a new wetland determination.

Under Foster's interpretation, farmers could unilaterally nullify wetland certifications as the NRCS makes them by filing vague and facially-meritless review requests. This ability to request review would be without limit and would grant farmers the unfettered ability to render any attempted certification by the NRCS uncertain. The absurd results construction canon supports the validity of the Review Regulation. Because the relevant tools of construction demonstrate the Swampbuster Review Provision is ambiguous, we defer to the USDA's interpretation (as reflected by the Review Regulation) so long as it is reasonable.

The Review Regulation imposes reasonable procedural requirements a farmer must follow to make an effective review request and thereby delimit a prior wetland certification. Because the Swampbuster Review Provision is silent as to the nature of an effective review request, the Review Regulation does not conflict with the Swampbuster Review Provision. Moreover, from an economic perspective, the Review Regulation preserves agency resources by allowing the NRCS to refuse to consider facially-meritless review requests, and it promotes certainty among farmers by preventing farmers from nullifying certifications at will. We note our decision is consistent with an agency adjudication that addressed the same issue. *See generally In re XXXXX*, Case No. 2014E000753 (USDA June 22, 2016) (URL omitted). Because the USDA's interpretation is reasonable, we will defer to it and find the Review Regulation does not contravene the Swampbuster Review Provision.

B. CRA Claim

Foster next asserts the district court erred in finding the CRA's judicial review provision precludes review of his CRA claim. Under the CRA, "[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit [the rule] to each House of the Congress and to the Comptroller General." 5 U.S.C. § 801(a)(1)(A)(i). Congress may then pass a joint resolution disapproving the rule to nullify it and prevent the agency from reissuing another rule "in substantially the same form." *Id.* § 801(b). If Congress takes no action, the rule automatically takes effect. *See id.* § 801(a)(3). Finally, the CRA contains a judicial review provision, 5 U.S.C. § 805, which provides that

"[n]o determination, finding, action, or omission under [the CRA] shall be subject to judicial review."

Because "legal lapses and violations occur" without consequences, "[t]here is a strong presumption that administrative action is subject to judicial review," and "[o]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015); *Clark v. United States*, 482 F.2d 586, 590 (8th Cir. 1973) (citations omitted). Nevertheless, an agency may overcome the presumption of judicial review by showing there is no "substantial doubt" that Congress intended to bar judicial review. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984). This Congressional intent may be "fairly discernible in" a judicial review provision's "express language, . . . structure[,] . . . its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 345, 351 (citations omitted); *see also Clark*, 482 F.2d at 590 (noting judicial review is unavailable "where a statute specifically precludes judicial review").

Here, the CRA's judicial review provision precludes review of Foster's CRA claim. Section 805 states that "[n]o determination, finding, action, or omission under [the CRA] shall be subject to judicial review." 5 U.S.C. § 805. This language is broad and unambiguous. It precludes judicial review of all omissions under the CRA, including those of agencies such as the USDA. Because Foster's CRA claim is based on the USDA's alleged omission in failing to submit the Review Regulation to Congress and the

Comptroller General, we lack the authority to review his claim.

Foster contends § 805 does not apply because it only precludes review of alleged omissions of Congress as only Congress can engage in all four of the enumerated activities in § 805 (i.e., determinations, findings, actions, and omissions). But § 805's broad language covers all omissions under the CRA, including agency omissions, so whether an agency can make "determinations" and "findings" or take other "actions" under the CRA is irrelevant. Foster raises several other arguments against our interpretation, but we find the decisions of our sister circuits that have reached the same conclusion we have persuasive. *See Kan. Nat. Res. Coal. v. U.S. Dep't of the Interior*, 971 F.3d 1222, 1235–38 (10th Cir. 2020) (considering § 805's plain language, other canons of construction, and legislative history); *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) (Kavanaugh, J.) (relying on § 805's plain language alone); *see also Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 562–64 (9th Cir. 2019) (citations omitted) (adopting the Tenth's and D.C. Circuit's approaches when finding § 805 precluded review of a claim based on an action of Congress).[2]

[2] Foster suggests the Second and Federal Circuits have adopted his construction of § 805. However, the cited decisions do not address § 805. *See Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 201–02 (2d Cir. 2004); *Liesegang v. Sec'y of Veterans Affs.*, 312 F.3d 1368, 1372–76 (Fed. Cir. 2002).

C. APA Claim

1. Exhaustion

Before reaching the merits of Foster's APA claim, appellees suggest Foster failed to exhaust his APA claim by failing to administratively appeal the NRCS's decisions to refuse to consider his 2017 and 2020 review requests. "[A] person shall exhaust all administrative appeal procedures . . . before the person may bring an action . . . against" the Secretary, the USDA, or "an agency, office, officer, or employee of the" USDA. 7 U.S.C. §§ 6902(1), 6912(e). Assuming without deciding that one of the exceptions applies, Foster's APA claim fails on the merits. *See Ace Prop. & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 999 (8th Cir. 2006) (determining §6912(e) sets forth an administrative exhaustion requirement and is non-jurisdictional and may be waived or excused).

2. APA Claim

Foster argues the district court erred by finding the NRCS's decisions to deny his 2017 and 2020 review requests did not violate the APA. Agency actions, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" are to be set aside. 5 U.S.C. § 706(2)(A). "This is a highly deferential standard" providing a "narrow" standard of review. *Org. for Competitive Mkts. v. USDA*, 912 F.3d 455, 459 (8th Cir. 2018) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)). While we must ensure an agency has considered "relevant data and articulate[d] a satisfactory explanation for its action," we are to uphold that action if it is "supportable on any rational basis." *Id.* (citation omitted). We will not

interfere with agency action based on the agency's failure to fully explain its decision so long as "the agency's path may reasonably be discerned." *Voigt*, 46 F.4th at 900 (quoting *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 497 (2004)).

The NRCS's decisions to refuse to consider Foster's 2017 and 2020 review requests were not arbitrary and capricious because Foster failed to comply with the Review Regulation as he never provided evidence that a natural event altered the Site or that an error exists in the NRCS's current wetland certification. *See* 7 C.F.R. § 12.30(c)(6). Regarding Foster's 2017 review request, Foster does not assert that he complied with the Review Regulation. We find the NRCS's refusal to consider his 2017 review request was not arbitrary and capricious.

The NRCS also did not arbitrarily and capriciously decline to review Foster's 2020 review request because that request also failed to comply with the Review Regulation. While Foster asserts the NRCS unreasonably refused to consider the "new information" he provided in his engineering report, before the NRCS made any decision regarding the 2020 review request, the NRCS requested Foster's engineering firm to identify evidence showing the NRCS had failed to consider the tree belt on the Site when it made its prior certification. The record shows no indication that Foster or his engineering firm responded to this request. After affording Foster an opportunity to provide the additional information, the NRCS denied the 2020 review request, noting Foster failed "to supply the specific information and data sufficient to justify a review." It "may reasonably be discerned" from the NRCS's decision and the record

that the NRCS declined to consider the 2020 review request because Foster failed to show the NRCS's prior certification was erroneous in that it did not account for the tree belt. *See Voigt*, 46 F.4th at 900 (citation omitted). Because Foster failed to make this showing and did not otherwise claim there had been any natural change in the Site, he necessarily failed to comply with the Review Regulation.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Filed July 1, 2022

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

ARLEN FOSTER, Plaintiff, vs. THE UNITED STATES DEPARTMENT OF AGRICULTURE, TOM VILSACK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; THE NATURAL RESOURCES CONSERVATION SERVICE, TERRY COSBY, IN HIS OFFICIAL CAPACITY AS ACTING CHIEF OF THE NATURAL RESOURCES CONSERVATION SERVICE; AND TONY SUSERI, IN HIS OFFICIAL CAPACITY AS ACTING SOUTH DAKOTA STATE CONSERVATIONIST; Defendants.	4:21-CV-04081-RAL OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Arlen Foster ("Foster") owns a piece of farmland that was certified as a "wetland" in 2011 pursuant to the Swampbuster Act, 16 U.S.C. §§ 3801, 3821–3824. Foster brought this complaint against the United States Department of Agriculture ("USDA"), the Natural Resources Conservation Service ("NRCS"), and their named representatives (collectively "Defendants") seeking to set aside the 2011 wetland certification based on various legal theories including an Administrative Procedure Act ("APA") claim that Defendants' refusal to review the 2011 wetland certification was arbitrary and capricious. The parties filed cross-motions for summary judgment. For the reasons discussed, Defendants' motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied.

I. Facts and Procedural History

A. The Swampbuster Act

The Swampbuster Act, 16 U.S.C. §§ 3801, 3821–3824, refers to the wetland conservation provisions of the Food Security Act of 1985. *See Barthel v. U.S. Dep't of Agric.*, 181 F.3d 934, 936 (8th Cir. 1999). The purpose of the Swampbuster Act is "to combat the disappearance of wetlands through their conversion into crop lands." *B & D Land & Livestock Co. v. Schafer*, 584 F. Supp. 2d 1182, 1190 (N.D. Iowa 2008) (citation omitted); *see also Barthel*, 181 F.3d at 937 ("The [Swampbuster] Act's proclaimed purpose is to preserve wetlands, or, if wetlands are altered, to preserve the conditions as altered."). As an enforcement mechanism, the Swampbuster Act sets forth that persons who convert certified wetlands to crop lands are disqualified from receiving federal farm

benefits. 16 U.S.C. § 3821; *Schafer*, 584 F. Supp. 2d at 1190.

16 U.S.C. § 3822(a)(4) concerns the "Duration of Certification" and states that once an area is certified as a "wetland" under the Swampbuster Act, that certification remains valid and enforceable "as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). In 1996, the Code of Federal Regulations imposed criteria on when a party could request review of a wetland certification, stating that a "wetland" certification "will remain valid and in effect until such time as the person affected by the certification requests review of the certification by NRCS. *A person may request review of a certification only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination*." 7 C.F.R. § 12.30(c)(6) (emphasis added). Therefore, pursuant to 7 C.F.R. § 12.30(c)(6), a wetland certification is binding and enforceable if and until a person affected by the certification requests review of that certification and natural changes to the wetland make the certification unreliable, or until such a person requests review and NRCS agrees that the wetland certification is erroneous.

B. 2011 Wetland Certification of Foster's Land

This case concerns .8 acres of land ("the site") in Miner County, South Dakota, which is covered by

approximately 8.5 inches of water at points during the year. Doc. 1 at 4, 7; Doc. 35 at 2–3; Doc. 38 at 5–6. Foster's grandfather purchased land containing the site in 1900. Doc. 1 at 5; Doc. 35 at 2. Around 1936, Foster's father planted a tree belt on the south side of the site to prevent soil erosion. Doc. 1 at 5–6; Doc. 35 at 2; Doc. 38 at 4. Snow accumulated around the tree belt in the winter and melted in the spring, creating an 8.5 inch puddle or shallow pond on the site. Doc. 1 at 7; Doc. 35 at 2; Doc. 36 at 3; Doc. 38 at 4. Foster now owns the site and surrounding land, which he farms. Doc. 1 at 3, 7–9; Doc. 35 at 2–3; Doc. 38 at 6. In approximately half of the crop years, the water on the site will dry out in time to farm the site and the surrounding area. Doc. 1 at 8; Doc. 35 at 3; Doc. 36 at 3. In the other years, the site does not dry out, and the land surrounding it cannot be farmed without draining the site. Doc. 1 at 8; Doc. 35 at 3; Doc. 36 at 3.

In 2004, the Natural Resources Conservation Service (NRCS) and the United States Department of Agriculture (USDA) reviewed the site and certified it as a "wetland" under 16 U.S.C. § 3822 of the Swampbuster Act. Doc. 1 at 2; Doc. 35 at 4. Due to the certification, Foster cannot drain the site to farm it and the surrounding land without losing the federal farm benefits on which he relies for his farming operation. Doc. 35 at 3.

In 2008, Foster requested an administrative review of the wetland certification. Doc. 1 at 15; Doc. 35 at 4; Doc. 38 at 6. After several years of review, in June 2011, NRCS recertified the site as a wetland. Doc. 1 at 16; Doc. 35 at 4; Doc, 38 at 6. Foster administratively appealed that certification to the USDA, but the USDA upheld the certification. Doc. 1

at 16; Doc. 35 at 4. Foster then brought an action in federal district court under the Administrative Procedure Act (APA) arguing that the certification was arbitrary and capricious. Doc. 1 at 16; Doc. 22 at 2. Doc. 36 at 4; Doc. 38 at 7. The district court affirmed NRCS's decision to certify the site as a wetland. *Foster v. Vilsack*, No. CIV. 13-4060-KES, 2014 WL 5512905 (D.S.D. Oct. 31, 2014); Doc. 1 at 16; Doc. 22 at 2; Doc. 36 at 4; Doc. 38 at 7. Foster appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the district court in 2016. *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016); Doc. 1 at 16; Doc. 22 at 2. Doc. 36 at 4; Doc. 38 at 7.

In June 2017, Foster submitted another request to NRCS to review the 2011 wetland certification. Doc. 1 at 16; Doc. 36 at 4; Doc. 38 at 8. Consistent with 7 C.F.R. § 12.30(c)(6), NRCS responded that Foster needed to submit new information showing that the topography or hydrology of the site had changed so that the 2011 certification was no longer reliable, otherwise it would not review the certification. Doc. 1 at 16; Doc. 22 at 9; Doc. 24-1 at 9; Doc. 36 at 4–5.

In April 2020, Foster submitted another request to review the 2011 certification. Doc. 1 at 16; Doc. 38 at 8. In that request, Foster did not claim there had been a change to the topography or hydrology of the site as required by 7 C.F.R. § 12.30(c)(6). Doc. 24 at 5. However, he submitted an engineering report analyzing the volume of snow accumulation under the tree belt and providing an opinion that the site was an artificial wetland. Doc. 1 at 16-1; Doc. 24-1 at 22–35; Doc. 35 at 5; Doc. 38 at 8–9.

Deke Hobbick, an assistant state conservationist at NRCS, considered Foster's 2020 review request and

the engineering report. Doc. 24 at 3–5. He concluded that the information presented in the report, concerning whether the site was an "artificial wetland," was previously considered and rejected by NRCS when reaching the 2011 wetland certification. Doc. 22 at 9; Doc. 24 at 4; Doc. 35 at 6. Hobbick also concluded Foster had not alleged or shown that there was any change in the topography or hydrology of the site, as required by 7 C.F.R. § 12.30(c)(6), which would qualify the 2011 wetland certification for review. Doc. 24 at 5. Hobbick submitted an affidavit explaining that:

> In reviewing the Fosters' 2020 request for review of the agency's final certified wetland determination, I reviewed the original information submitted by the Fosters in 2019 and the supplemental information received in 2020. Their request asserted that the area in question should be considered an artificial wetland, as defined in 7 C.F.R. § 12.2 . . . . *I reviewed the information and data that underlies the 2011 final wetland certification and observed that NRCS previously considered, on multiple occasions, whether or not a nearby shelter belt was causing an artificial wetland*. I also observed that the information submitted with the 2020 request included newly created data in the engineer's report and conclusions based on that data; however, the data and conclusions appeared to be based upon the same artificial wetland argument that the agency had considered and rejected in connection with the 2011 determination and subsequent administrative and judicial review. *The 2020*

> *request also did not assert that there had been a natural change in the topography or hydrology of the area in question*. As a result of my review of the 2020 request and NRCS records, I recommended that the State Conservationist respond to the request by stating that NRCS was unable to determine whether any of the conditions identified in 7 C.F.R. § 12.30(c)(6) governing requests for review of a final certified wetland determination applied. . . . *[Foster has] not provided any further information that would permit review under the conditions sets forth in 7 C.F.R. § 12.30(c)(6).*

Doc. 24 at 4–5 (emphasis added). Consistent with Hobbick's conclusions, NRCS rejected Foster's request to review the 2011 wetland certification. Doc. 1 at 17; Doc. 35 at 6; Doc. 38 at 9.

In May 2021, Foster filed this complaint[1] raising five counts:

1) Constitutionality of the Swampbuster Act;

2) Whether 7 C.F.R. § 12.30(c)(6) contravenes the Congressional Review Act ("CRA"), 5 U.S.C. § 801;

3) Whether 7 C.F.R. § 12.30(c)(6) violates the Swampbuster Act and the due process clause;

4) Whether Defendants' denials of Foster's 2017 and 2020 requests for review were arbitrary and capricious under the APA;

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[1] The initial plaintiffs in this case were Arlen Foster and his wife Cindy Foster. Doc. 1. Cindy Foster has since passed away and was dismissed from this action. Doc. 33; Doc. 40; Doc. 44.

5) Claim that the 2011 wetland certification is no longer in effect.

Doc. 1 at 19–27. Defendants filed a motion to dismiss for lack of jurisdiction, failure to state a claim, judgment on the pleading, or alternatively for summary judgment, Doc. 21, and Foster responded with a cross-motion for summary judgment, Doc. 34. Foster also filed a motion to supplement the administrative record with three letters pertaining to the review process leading up to the 2011 wetland certification. Doc. 41; Doc. 42 at 1.

II. Legal Standards

Defendants bring their motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Doc. 22 at 10–11. On a motion to dismiss under Rule 12(b)(1), the standard of review depends on whether the defendant is making a facial attack or factual attack on subject matter jurisdiction. *Stalley v. Cath. Health Initiatives*, 509 F.3d 517, 520–21 (8th Cir. 2007). When a defendant makes a facial attack to challenge whether the facts alleged in the complaint establish subject matter jurisdiction under Rule 12(b)(1), the plaintiff is afforded similar safeguards as in a Rule 12(b)(6) motion. *See Osbom v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Namely, the Court must "accept as true all factual allegations in the complaint, giving no effect to conclusory allegations of law," and determine whether the plaintiff's alleged facts "affirmatively and plausibly suggest" that jurisdiction exists. *Stalley*, 509 F.3d at 521. A court's review then is limited to the face of the pleadings. *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015).

On the other hand, when a defendant attacks the factual basis for subject matter jurisdiction, a court can consider matters outside the pleadings, "and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Osborn*, 918 F.2d at 729 n.6. "A factual attack occurs when the defendant challenges the veracity of the facts underpinning subject matter jurisdiction." *Davis v. Anthony, Inc.*, 886 F.3d 674, 679 (8th Cir. 2018) (cleaned up and citation omitted). In that case, "no presumptive truthfulness attaches to the plaintiff's allegations," and a "court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Osborn*, 918 F.2d at 730 (citation omitted). Defendants consider their motion to dismiss for lack of jurisdiction to be a factual attack under which this Court may consider matters outside of the pleadings. Doc. 22 at 10–11.

A judgment on the pleadings is reviewed under "the same standard used to address a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6)." *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009) (cleaned up and citation omitted). Under this standard, "well-pleaded facts, not legal theories or conclusions, determine the adequacy of the complaint. . . . The facts alleged in the complaint must be enough to raise a right to relief above the speculative level." *Id.* (cleaned up and citations omitted).

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A party opposing a properly supported motion for summary judgment "may not rest upon mere allegations or denials" in his pleadings but "must set forth specific facts showing that there is a genuine issue for trial." *Gacek v. Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1145 (8th Cir. 2012). To establish that a material fact is genuinely disputed, the party opposing summary judgment must "cit[e] to particular parts of materials in the record" that establish a genuine dispute or "show[] that the materials cited do not establish the absence . . . of a genuine dispute . . . ." Fed. R. Civ. P. 56(c)(1)(A), (B). In ruling on a motion for summary judgment, the facts and inferences fairly drawn from those facts are "viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986) (cleaned up and citation omitted).

"There is authority for the proposition that a summary judgment motion should be denied whenever its proponent does not meet his initial burden" under Fed. R. Civ. P. 56(a). *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997). But the United States Court of Appeals for the Eighth Circuit has made clear that there is "no reason to prevent a district court from granting summary judgment if the unchallenged facts cannot, as it turns out, sustain a viable cause of action. In these situations, we agree with our counterparts on the Fifth Circuit that the submission should be evaluated similarly to a 12(b)(6) motion to dismiss. . . . Where a motion for summary judgment is based solely on the pleadings and makes no meaningful reference to affidavits, depositions, or interrogatories, it makes no difference whether the motion is evaluated under Rule 56 or Rule 12(b)(6)

because both standards reduce to the same question." *Id.* (cleaned up and citations omitted); *see also Ashe v. Corley*, 992 F.2d 540, 544 (5th Cir. 1993). "Therefore, a court should grant [a] motion [for summary judgment[] and dismiss [an] action 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Handeen*, 112 F.3d at 1347 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

III. Discussion

A. Constitutionality of the Swampbuster Act

Foster's first claim is that the Swampbuster Act violates the Commerce Clause and the Tenth Amendment. Doc. 1 at 19–22; Doc. 39 at 16–19. He argues that wetlands are neither an instrument of commerce nor have a substantial effect on interstate commerce, so the Swampbuster Act is outside of Congress's plenary power. Doc. 1 at 20; Doc. 36 at 35–41. Foster also claims that the Swampbuster Act violates the Tenth Amendment by usurping a state's police power over local land use. Doc. 1 at 21. Alternatively, he claims that the Swampbuster Act is outside of Congress's Article I § 8 spending power. Doc. 36 at 41–43. Defendants argue that Foster's constitutional claims are barred by the six-year statute of limitations set forth in 28 U.S.C. § 2401(a). Doc. 22 at 13–14; Doc. 37 at 3–6.

"Section 2401(a) of 28 U.S.C. is a general statute of limitations for suits against the government, which provides that 'every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first

accrues.'" *Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 759 (8th Cir. 2009) (quoting 28 U.S.C. § 2401(a)). "A claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Id.* (cleaned up and citation omitted).

Defendants argue that Foster's claim accrued no later than 2012, when the USDA upheld the 2011 wetland certification on administrative appeal. Doc. 37 at 2–4. Foster responds with two arguments. First, he claims that a statute of limitations defense is nonjurisdictional, and therefore Defendants waived this defense by failing to raise it in their answer. Doc. 39 at 17; *see Day v. McDonough*, 547 U.S. 198, 199 (2006) (stating that "[a] statute of limitations defense is not jurisdictional"). Second, Foster argues that his cause of action accrued in 2020 when Defendants denied his petition to review the 2011 wetland certification, and therefore 28 U.S.C. § 2401(a) does not bar his claim. Doc. 36 at 37; Doc. 39 at 19–20.

"Generally, a motion to dismiss may be granted when a claim is barred under a statute of limitations. . . . In order for a party to avail itself of this defense, the party must specifically plead the defense in its answer. However, while this failure would normally result in the waiver of a limitations defense, . . . we recognize that when it appears from the face of the complaint itself that the limitation period has run, a limitations defense may properly be asserted through a Rule 12(b)(6) motion to dismiss." *Vamer v. Peterson Farms*, 371 F.3d 1011, 1016 (8th Cir. 2004) (cleaned up and citations omitted); *see also Wycoff v. Menke*, 773 F.2d 983, 984–85 (8th Cir. 1985). Here, the site

was first certified as a wetland under the Swampbuster Act almost two decades ago in 2004. Doc. 1 at 2; Doc. 35 at 4. Therefore, it is clear from the face of the complaint that the statute of limitations period has run, and this Court may properly consider Defendants' statute of limitations defense as pled in their motion to dismiss.

Further, Foster's claim that his cause of action challenging the constitutionality of the Swampbuster Act accrued in 2020 ignores the lengthy factual and procedural history of this most recent case. Foster would have become aware, or with due diligence should have become aware, of any alleged unconstitutionality of the Swampbuster Act no later than when the site was initially certified as a wetland under the Swampbuster Act in 2004, and certainly no later than 2013 when he brought an action in federal district court challenging the 2011 certification based on the Swampbuster Act. *Foster*, No. CIV. 13-4060-KES, 2014 WL 5512905, at *1. Foster did not bring his claim that the Swampbuster Act is unconstitutional until over six years later in May 2021. Therefore, Foster's constitutional claims appear barred by 28 U.S.C. § 2401(a). *See Burt Lake Band of Ottawa & Chippewa Indians v. Zinke*, 304 F. Supp. 3d 70, 74–75 (D.D.C. 2018) (holding that § 2401(a) applies to constitutional claims and, as "a jurisdictional condition attached to the government's waiver of sovereign immunity . . . must be strictly construed").

Even if Foster's constitutional claims were not barred, courts have affirmed that the Swampbuster Act is within Congress's Article I § 8 spending power. "The Constitution empowers Congress 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." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (citation omitted). "Incident to this power, Congress may attach conditions on the receipt of federal funds, and 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." *Id.* (cleaned up and citation omitted). Congress's spending power is limited in that "the exercise of the spending power must be in pursuit of the general welfare. . . . In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Id.* (cleaned up and citations omitted). In *United States v. Dierckman*, the United States Court of Appeals for the Seventh Circuit explained that the Food Security Act—and the provisions of the Swampbuster Act in particular—were enacted under the spending power and rejected an argument that the Food Security Act violated the Commerce Clause, stating: "the argument falters because it assumes that the [Food Security Act] is a creature of the Commerce Clause. The [Food Security Act] is not an exercise of direct regulatory power; instead, the [Food Security Act] conditions the receipt of USDA farm benefits on the preservation of wetlands. *This is indirect regulation invoking the spending power and is not limited by the enumeration of Congressional powers in Article I, section 8 of the Constitution*." 201 F.3d 915, 922 (7th Cir. 2000) (emphasis added) (citing *Dole*, 483 U.S. at 207).

Additionally, the Swampbuster Act does not violate the Tenth Amendment, which states: "[t]he

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Under the Tenth Amendment, "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation." *New York v. United States*, 505 U.S. 144, 178 (1992). "The Tenth Amendment . . . has been consistently construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 766 (1982) (cleaned up and citation omitted); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286 (1981) ("Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result that has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that the means chosen by Congress must be reasonably adapted to the end permitted by the Constitution." (cleaned up and citation omitted)). Here, the Swampbuster Act is within Congress's Article I § 8 spending power and does not infringe upon state sovereignty by requiring states to implement a federal program, statute, or regulation. *See F.E.R.C.*, 456 U.S. at 765–66 (rejecting a Tenth Amendment challenge to a federal statute when the statute did not "directly compel[]" a state to enact a legislative program and thereby impair the state's ability to function independently). Defendants

are entitled to summary judgment on Foster's count seeking declaratory relief that the Swampbuster Act is unconstitutional.

B. Whether 7 C.F.R. § 12.30(c)(6) Contravenes the Congressional Review Act

Foster's second claim seeks declaratory relief that 7 C.F.R. § 12.30(c)(6) does not comply with the Congressional Review Aet (CRA), 5 U.S.C. § 801, and is therefore unlawful. Doc. 1 at 22–23; Doc. 36 at 26–33. In March 1996, Congress enacted the CRA, which requires federal agencies to submit administrative rules to Congress before enacting those rules. 5 U.S.C. § 801. Congress may then submit a joint resolution disapproving of the rule if certain provisions of the CRA are satisfied. 5 U.S.C. § 802. The CRA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 804; 5 U.S.C. § 551. 5 U.S.C. § 805 of the CRA states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805.

Foster argues that 7 C.F.R. § 12.30(c)(6), which restricts the circumstances in which a party may request review of a wetland certification, was not submitted to Congress pursuant to the CRA and is therefore invalid. Doc. 1 at 22–23; Doc. 35 at 6–7; Doc. 36 at 26–35; Doc. 38 at 10; Doc. 39 at 13–15. Foster asserts that if 7 C.F.R. § 12.30(c)(6) is unenforceable, then Defendants were required to accept his 2017 and 2020 requests to review the 2011 certification under

16 U.S.C. § 3822(a)(4). Doc. 1 at 23. Defendants respond that this claim is barred because the CRA does not waive sovereign immunity to challenge 7 C.F.R. § 12.30(c)(6) on these grounds. Doc. 22 at 14–15; Doc. 37 at 7–8.

"Congress is generally free to limit the jurisdiction of federal courts." *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 563 (9th Cir. 2019) (citing *United States v. Hudson*, 7 Cranch 32, 33 (1812)). "But in order to do so, Congress must enact a statute that provides 'clear and convincing evidence that Congress intended to deny' access to judicial review." *Id.* (quoting *Bd. Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991)). "A statute provides such clear and convincing evidence, 'and the presumption favoring judicial review [is] overcome, whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.'" *Id.* (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

Most courts examining 5 U.S.C. § 805 have determined that it is a "Jurisdiction-Stripping Provision" that "bars judicial review." *Id.* (collecting cases); *Kansas Nat. Res. Coal. v. U.S. Dep't of the Interior*, 382 F. Supp. 3d 1179, 1183–85 (D. Kan. 2019) (explaining that most courts have found 5 U.S.C. § 805 precludes judicial review while "[o]nly two district court cases specifically have found that § 805 does not preclude relief when an agency fails to submit a rule to Congress under the CRA"). For instance, the Tenth Circuit has held that "the plain language of § 805" denies a court subject matter jurisdiction over a claim that an agency failed to submit an administrative rule to Congress prior to its enactment as required by

§ 801(a)(1)(A) of the CRA. *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222, 1235 (10th Cir. 2020). Likewise, the Ninth Circuit has held § 805 "deprived [it] of jurisdiction to review any claim challenging a 'determination, finding, action, or omission' under the CRA," including a failure to comply with 5 U.S.C. § 801. *Bernhardt*, 946 F.3d at 562–63 (quoting 5 U.S.C. § 805).

An agency's alleged failure to submit an administrative rule to Congress, such as 7 C.F.R. § 12.30(c)(6), is an omission under 5 U.S.C. § 801 of the CRA. Therefore, the plain language of 5 U.S.C. § 805—that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review"—bars this Court from exercising jurisdiction over Foster's claim that 7 C.F.R. § 12.30(c)(6) was enacted in violation of the CRA. 5 U.S.C. § 805; *see Kansas Nat. Res. Coal.*, 382 F. Supp. 3d at 1183–85 (holding 5 U.S.C. § 805 precluded judicial review of a claim that a Fish and Wildlife agency rule was invalid because the rule was not submitted to Congress as required by 5 U.S.C. § 801); *Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) (holding 5 U.S.C. § 805 precluded judicial review of a forest management plan that the plaintiffs alleged was not submitted to Congress in compliance with 5 U.S.C. § 801(a)(1)(A)). Defendants are entitled to summary judgment on Foster's second count seeking declaratory relief that 7 C.F.R. § 12.30(c)(6) is invalid and unenforceable.

C. Whether 7 C.F.R. § 12.30(c)(6) violates the Swampbuster Act and the Due Process Clause

Next, Foster alleges that 7 C.F.R. § 12.30(c)(6) violates 16 U.S.C. § 3822(a)(4) by limiting a review of a wetland certification to "only [when] a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or [when] NRCS concurs with an affected person that an error exists in the current wetland determination." Doc. 1 at 23–25; 7 C.F.R. § 12.30(c)(6). As discussed, 16 U.S.C. § 3822(a)(4) concerns the "Duration of Certification" and states that once an area is certified as a "wetland" under the Swampbuster Act, that certification remains valid and enforceable "as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). Foster claims that because 16 U.S.C. § 3822(a)(4) does not discuss any restrictions on requesting a final certification review, the statute implicitly imposes a mandatory duty on agencies to conduct a review and issue a new certification every time an aggrieved party requests such a review. Doc. 1 at 23–25. Foster also argues that 7 C.F.R. § 12.30(c)(6) violates the due process clause by restricting review of wetland certifications.[2] Doc. 1 at 24–25; Doc. 36 at 24–26.

"[W]hen a court reviews an agency's construction of the statute which it administers, it is confronted

[2] In the complaint, Foster does not specify whether he is alleging a substantive due process violation or a procedural due process violation. Doc. 1 at 24–25. In Foster's motion for summary

with two questions. . . . First, applying the ordinary tools of statutory construction, the court must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *City of Arlington v. F.C.C.*, 569 U.S. 290, 296 (2013); *see also Mayo Clinic v. United States*, 997 F.3d 789, 792 (8th Cir. 2021). "Generally speaking, the language in the [the Swampbuster Act], just as in any statute, is to be given its ordinary meaning." *Mayo Clinic*, 997 F.3d at 793 (citation omitted). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 794 (citation omitted).

Here, the question is whether Congress imposed any restrictions on how often or under what circumstances a party may request a review of a final certification, or if Congress required an agency to repeat the certification process whenever an unsatisfied party requests a review. Section 3822(a)(4) does not address any restrictions on when a party can request a review, much less impose a nondiscretionary duty on an agency to repeat the certification process whenever requested to do so by an unsatisfied party. 16 U.S.C. § 3822(a)(4). The other

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judgment, he alleges that 7 C.F.R. § 12.30(c)(6) violates his procedural due process rights. Doc. 36 at 24–26.

provisions of the Swampbuster Act also do not address or set forth any requirements for requesting review of a wetland certification. 16 U.S.C. §§ 3801, 3821–3824. Because the Swampbuster Act is silent on the requirements for requesting review of a wetland certification, the question becomes whether 7 C.F.R. § 12.30(c)(6) is a permissible interpretation of 16 U.S.C. § 3822(a)(4). *See City of Arlington*, 569 U.S. at 296.

"In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979); *see also Mayo Clinic*, 997 F.3d at 794. "When an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations. . . . We have interpreted this deference as amounting to controlling weight unless the regulation is arbitrary, capricious, or manifestly contrary to the statute." *Clark v. U.S. Dep't of Agric.*, 537 F.3d 934, 939 (8th Cir. 2008) (cleaned up and citation omitted). When possible, courts should also seek to harmonize statutes and agency regulations. *See, e.g.*, *Carmichael v. The Payment Ctr., Inc.*, 336 F.3d 636, 640 (7th Cir. 2003) (stating "[a] statute and its implementing regulations should be read as a whole and, where possible, afforded a harmonious interpretation"); *Powell v. Heckler*, 789 F.2d 176, 179 (3d Cir. 1986) (stating that "statutes and regulations should be read and construed as a whole and, wherever possible, given a harmonious, comprehensive meaning"); *McCuin v. Sec'y of Health & Human Servs.*, 817 F.2d 161, 168 (1st Cir. 1987)

(stating that, "[i]n interpreting statutes and regulations, courts must try to give them a harmonious, comprehensive meaning, giving effect, when possible, to all provisions").

Here, 7 C.F.R. § 12.30(c)(6) is easily reconciled with 16 U.S.C. § 3822(a)(4) and the other provisions of the Swampbuster Act. 7 C.F.R. § 12.30(c)(6) merely restricts the circumstances in which an agency must review a final certification to when it receives information that (1) the final certification was no longer reliable due to changes in natural conditions, or (2) the NRCS agrees with the party requesting review that the final certification is no longer accurate. 7 C.F.R. § 12.30(c)(6). 7 C.F.R. § 12.30(c)(6) does not contradict any provision of the Swampbuster Act and is rationally related to promoting efficiency in the certification review process. *West v. Bergland*, 611 F.2d 710, 725 (8th Cir. 1979) (upholding a regulation that was "unchallenged" for decades, "reasonably designed to preserve the integrity and reliability of a government agricultural program, and was "not inconsistent either with an express statutory provision or with the agriculture laws taken as a whole").

Additionally, 7 C.F.R. § 12.30(c)(6) does not violate the due process clause. "To have a property interest in a benefit," protected by the due process clause, "a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Such entitlements are, of course, not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an

independent source such as state law." *Keating v. Nebraska Pub. Power Dist.*, 660 F.3d 1014, 1017 (8th Cir. 2011) (citations omitted). "The requirements of procedural due process apply only to governmental decisions which deprive individals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *United States v. Long*, 977 F.2d 1264, 1276 (8th Cir. 1992) (cleaned up and citation omitted); *see also Demming v. Hous. & Redevelopment Auth. of Duluth*, 66 F.3d 950, 953 (8th Cir. 1995). "The relevant consideration for [a procedural due process] analysis is a two-part inquiry. We must determine (1) whether the [Foster was] deprived of a protected interest, and if so, (2) what process was due." *Schneider v. United States*, 27 F.3d 1327, 1333 (8th Cir. 1994).

Foster has not established that he suffered any due process violation because there is no law or independent source of authority giving Foster a right to certification review upon request. As discussed, 7 C.F.R. § 12.30(c)(6) is a permissible interpretation of 16 U.S.C. § 3822(a)(4) and restricts the circumstances in which a final certification merits review. Thus, 16 U.S.C. § 3822(a)(4) does not create a protected liberty or property interest requiring certification review upon request. *See also United States v. Dierckman*, 41 F. Supp. 2d 870, 878 (S.D. Ind. 1998) (holding "the Food Security Act and its implementing regulations easily clear the substantive due process hurdle," and "[t]he Swampbuster provisions undoubtedly relate to Congress' goal of curtailing wetland conversion and do so within Constitutional limits"). Defendants are entitled to summary judgment on Foster's count seeking declaratory relief that 7 C.F.R. § 12.30(c)(6)

violates 16 U.S.C. § 3822(a)(4) and the due process clause.

D. Whether Defendants' Denials of Foster's 2017 and 2020 Requests for Review were Arbitrary and Capricious under the APA

Next Foster argues Defendants' refusal to accept his 2017 and 2020 requests to review the 2011 wetland certification were arbitrary and capricious, and therefore should be set aside under the Administrative Procedure Act (APA). Doc. 1 at 25–27. Foster's claim rests on the premise that 16 U.S.C. § 3822(a)(4) requires an agency to repeat the certification process whenever an aggrieved party requests review of a final certification. Doc. 1 at 25–27. Alternatively, Foster argues his 2020 review request should have been accepted pursuant to 7 C.F.R. § 12.30(c)(6) because it was accompanied by an engineering report stating the site was an artificial wetland. Doc. 1 at 25–27.

"The APA waives the United States' sovereign immunity in either one of two ways[:]" 5 U.S.C. § 702 and 5 U.S.C. § 704. *Wright v. Langdeau*, 158 F. Supp. 3d 825, 833–34 (D.S.D. 2016); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (discussing avenues for relief under 5 U.S.C. § 702 and 5 U.S.C. § 704). If a party has established either 5 U.S.C. § 702 or 5 U.S.C. § 704 waives sovereign immunity for its claim, the reviewing court shall review the agency action and "shall set aside agency action found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Preferred Risk Mut. Ins. Co. v. United States*, 86 F.3d 789, 792 (8th Cir. 1996) (cleaned up) (quoting 5 U.S.C.

§ 706(2)(A)); 5 U.S.C. § 706. Foster brings this claim under both 5 U.S.C. § 702 and 5 U.S.C. § 704, and this Court will address each statute in turn. Doc. 1 at 3, 17.

First, 5 U.S.C. § 702 waives sovereign immunity for a person seeking injunctive relief who "suffer[ed] legal wrong because of agency action, or [was] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Section 702's waiver of sovereign immunity "contains two separate requirements: 1) the person claiming a right to review must identify some agency action, and 2) the party seeking review must show that he has suffered a legal wrong or been adversely affected by that action within the meaning of a relevant statute." *Preferred Risk Mut. Ins. Co.*, 86 F.3d at 792. An "agency action" is defined "as the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Lujan*, 497 U.S. at 882 (cleaned up and citation omitted). "A legal wrong is any invasion of a legally protected right." *Smith v. U.S. Dep't of Agric.*, 888 F. Supp. 2d 945, 954 (S.D. Iowa 2012) (citing *Preferred Risk Mut. Ins. Co.*, 86 F.3d at 793 n.5). "[T]o be adversely affected or aggrieved within the meaning of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan*, 497 U.S. at 883 (cleaned up and citation omitted).

Here, Defendants' denials of Foster's 2017 request and 2020 request to review the 2011 wetland

certification are agency actions under 5 U.S.C. § 702. However, the second requirement of 5 U.S.C. § 702—requiring the party seeking review to establish that he or she "suffer[ed] legal wrong because of agency action, or [was] adversely affected or aggrieved by agency action within the meaning of a relevant statute"—is not satisfied. 5 U.S.C. § 702. As discussed, Foster's claim that 16 U.S.C. § 3822(a)(4) required Defendants to review the 2011 certification is not supported by the statutory text. 16 U.S.C. § 3822(a)(4) sets forth the duration of a wetland certification stating that the certification of a wetland endures "as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). As explained above, 7 C.F.R. § 12.30(c)(6) is a permissible interpretation of 16 U.S.C. § 3822(a)(4) that limits certification review to when "a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or [when] NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6). Therefore, Foster cannot show he suffered a "legal wrong or been adversely affected . . . within the meaning of a relevant statute." *Preferred Risk Mut. Ins. Co.*, 86 F.3d at 792.

A party may also seek relief under 5 U.S.C. § 704 of the APA. Section 704 states that a "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. In these cases, where the "review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions

of the APA [5 U.S.C. § 704], the 'agency action' in question must be 'final agency action.'" *Lujan*, 497 U.S. at 882. "Two conditions must be satisfied for an agency action to be "final": First, the action must mark the consummation of the agency's decisionmaking process. . . . The agency's action cannot be tentative or interlocutory in nature. . . . Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Sisseton-Wahpeton Ovate of Lake Traverse Reservation v. United States Corps of Engineers*, 888 F.3d 906, 915 (8th Cir. 2018) (cleaned up and citation omitted). "To constitute a final agency action, the agency's action must have inflicted an actual, concrete injury upon the party seeking judicial review." *Id.* (cleaned up and citation omitted).

Here, Defendants' denial of Foster's requests for review in 2017 and 2020 were final agency actions. The refusals, after administrative appeals and judicial appeals had been exhausted, barred any further review of the 2011 wetland certification and ensured that the enforcement provisions of the Swampbuster Act remain in place for the .8 acre site at issue. *See Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808, 813 (8th Cir. 2006) (stating that if an "agency has issued a definitive statement of its position, determining the rights and obligations of the parties, that action is fmal for purposes of judicial review despite the possibility of further proceedings in the agency to resolve subsidiary issues" (cleaned up and citation omitted)). Therefore, Section 704 waives sovereign immunity for Foster's claim, and this Court now reviews whether Defendants' 2017 and 2020 denials of Foster's requests for review of the 2011

wetland certification were "arbitrary and capricious." *See Preferred Risk Mut. Ins. Co.*, 86 F.3d at 792.

7 C.F.R. § 12.30(c)(6) requires that "a natural event alter[] the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions, or [that] NRCS concur[] with an affected person that an error exists in the current wetland determination" to merit a review of a final certification. 7 C.F.R. § 12.30(c)(6). Foster does not allege or point to any evidence in the record suggesting that NRCS believed the 2011 wetland certification was erroneous when he brought his requests for review in 2017 and 2020. *See* Doc. 1 at 25–27; Doc. 36.

In 2017, Foster did not submit any new information suggesting that the natural conditions of the site had changed pursuant to 7 C.F.R. § 12.30(c)(6). *See* Doc. 1 at 25–27. Therefore, Defendants' denial of Foster's 2017 review request was not arbitrary or capricious. Foster's 2020 request for review is a somewhat closer question. Foster submitted a report stating that the wetland was an artificial wetland. However, NRCS determined that the report did not allege or show the topography of the site had changed such that the 2011 wetland certification was no longer reliable as required by 7 C.F.R. § 12.30(c)(6). Doc. 1 at 17, 25–27; Doc. 24 at 5; Doc. 35 at 6. Neither does Foster allege or show that the report presented information that the topography of the site had changed. Doc. 1 at 16, 25–27; Doc. 24-1 at 22–35; Doc. 35 at 5–6. Rather, the engineering report addressed how the longstanding tree belt affected the topography of the site. Doc. 1 at 16, 25–27; Doc. 24-1 at 22–35; Doc. 35 at 5. Therefore, by all

accounts, Defendants' denial of Foster's 2020 request for review complied with 7 C.F.R. § 12.30(c)(6) and was not arbitrary and capricious. Summary judgment for Defendants thus enters on Foster's fourth count seeking to set aside Defendants' denials of his 2017 and 2020 requests for review.

E. Claim that the 2011 Wetland Certification is No Longer in Effect

Next, Foster seeks declaratory relief that the 2011 wetland certification is no longer valid due to Foster's 2017 and 2020 requests for review. Doc. 1 at 27. In support, Foster relies on his claim that 16 U.S.C. § 3822(a)(4) sets forth that a final certification is no longer valid whenever an aggrieved party requests review of that certification. As discussed, 16 U.S.C. § 3822(a)(4) governs the duration of a certification and cannot be read to nullify a wetland certification whenever an aggrieved party requests review. *See* 16 U.S.C. § 3822(a)(4). Instead, because 7 C.F.R. § 12.30(c)(6) is a permissible interpretation of 16 U.S.C. § 3822(a)(4), a wetland certification is subject to review when a qualifying party requests review of the certification and "a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions," or a qualifying party requests review and the "NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6). Defendants are entitled to summary judgment on Foster's fifth count requesting a declaration that the 2011 wetland certification is no longer in effect.

F. Foster's Motion to Supplement the Administrative Record

After the parties filed cross-motions for summary judgment, Foster filed a motion to supplement the administrative record. Doc. 41. He seeks to add three documents to the administrative record: a letter dated February 19, 2008 from resource conservationist Karen Cameron-Howell; a letter dated April 6, 2009 from NRCS rescinding a 2009 wetland certification of the site; and a letter dated January 15, 2010 from NRCS rescinding a subsequent wetland determination of the site. Doc. 41; Doc. 42 at 1. Foster argues these letters are necessary to resolve disputed issues of fact in the record concerning the review process leading up to the 2011 wetland certification, and these documents are necessary to complete the administrative record. Doc. 42 at 1–2, 6–7; Doc. 46.

Defendants oppose the motion and argue that these letters were properly excluded fi:om the administrative record. Doc. 45 at 2–4. These letters are now part of the record of this Court, so to that extent Foster's motion is granted. However, while these three documents may have significance to the 2011 wetland certification, they do not alter the analysis in this opinion and order.

IV. Conclusion and Order

For the reasons discussed, it is hereby

ORDERED that Defendants' Motion for Summary Judgment, or in the alternative Defendants' Motion to Dismiss for Lack of Jurisdiction, Motion to Dismiss for Failure to State a Claim, or Motion for Judgment on the Pleading, Doc. 21, is granted. It is further

ORDERED that Plaintiff's Motion for Summary Judgment, Doc. 34, is denied. It is finally

ORDERED that Plaintiff's Motion to Complete or Supplement the Record, Doc. 41, is granted to the extent that the three documents are now part of this Court's CM/ECF record for any appeal that Plaintiff may wish to file.

DATED this 1st day of July, 2022.

BY THE COURT:

/s/ Roberto A. Lange
ROBERTO A. LANGE
CHIEF JUDGE

United States Department of Agriculture

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Natural Resources Conservation Service
520 Third Ave PO Box 626 Phone: (605) 692-2344
Brookings, SD 57006-0626 Fax: (605) 597-6723

Arlen Foster 2/19/08
24314 421st Ave
Fulton, SD 57340

Dear Arlen:

I received your CD this morning and reviewed the three photos. In your original note (2/7/08) you asked if there is any procedure for a reconsideration of your certified wetland determination.

The appeal rights from your certified determination have expired. I completed the certified wetland determination in November 2004.

However, the most recent 4th Edition of the National Food Security Act (Amendment 4, January 2008) part 514C states that "all certified wetland determinations, conditions, and exemptions remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification." So, I think this is telling us that we can take another look at it since you are offering additional hydrology information in the form of the CD.

I think the best way to proceed is to visit the FSA office in Miner County (or whichever county your farm is administered in) and sign a 1026 indicating your request for a wetland determination **on this site**. The district conservationist, Kirk Lingren, will then refer

the request to the Brookings Field Support Office to complete.

If you have any questions, please call this office or Kirk Lingren at the Miner County office.

Sincerely,

/s/ Karen Cameron-Howell
Karen Cameron-Howell
Resource Conservationist

Cc (w/ enc.) Kirk Lingren, DC, Howard
Gary Coplan, ASTC(FO), Brookings

(1) Certified wetland determinations must be completed by a qualified NRCS employee, as determined by the State Conservationist. Qualified employees must meet all of the following criteria:

(i) Have completed all the required training, including update courses.

(ii) Have the appropriate job approval authority and classification.

(iii) Have demonstrated proficiency in making certified wetland determinations.

(2) State Conservationists will be responsible for maintaining a roster of qualified employees, by training and experience, who have demonstrated knowledge and skills to conduct wetland determinations/delineations, scope and effect evaluations, functional assessments, minimal effects evaluations, mitigation planning, and mitigation easements.

(3) In accordance with Part 518, State Conservationists will carry out appropriate quality control reviews of certified wetland determinations.

C. Effective Period of Certifications

All certified wetland determinations, conditions, and exemptions remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification. [16 U.S.C. Sec. 3822(a)(4)] Agricultural use refers

to land used for the production of food, fiber, or horticultural crops; used for haying or grazing; left idle in accordance with USDA program requirements; or diverted from crop production to an approved cultural practice that prevents erosion or other natural resource degradation.

D. Appeals of Certified Wetland Determinations

(1) Before finalizing a certified wetland determination, NRCS will notify the person affected by the certification and provide an opportunity to appeal it. NRCS will certify the wetland determination as final 30 days after providing the person notice of certification or, if an appeal is filed with USDA, after the administrative appeal procedures are exhausted or discontinued by the affected person. (See the 440-Conservation Programs Manual, Part 510 for NRCS policy and procedure regarding appeals.) NRCS appeal procedures are contained in 7 CFR 614.

(2) In the case of an appeal, NRCS must review and certify the accuracy of the determination for all lands subject to the appeal to ensure that it is accurate. Before a decision is rendered on the appeal, NRCS will conduct an onsite investigation of the subject land.

E. Preparing the Certified Wetland Determination

(1) NRCS will delineate all wetlands subject to the WC provisions by outlining the boundaries of the wetland on aerial photography, digital imagery, or other graphic representation. If possible, NRCS will use GPS to digitally map

the wetland boundary in the field and to import that data onto digital orthophotoquadrangle maps (DOQs) or other GIS digital photographic imagery. Refer to Part 514, Subparts B–E, to determine the appropriate labels to apply to the delineated wetlands.

(2) The complete boundaries and acreage of all fields that were delineated and identified must be shown on the map, including areas identified as non-wetland (NW). This must be clearly depicted on the wetland determination map. The label and acreage information from the map will be used to prepare the CPA-026e. A copy of the CPA-026e, along with the delineation map, will be provided to the USDA program participant and Farm Service Agency (FSA). A copy should be retained in the participant's file located in the NRCS office.

(180-V-NFSAM, Fourth Edition, Amend. 4, January 2008)

United States Department of Agriculture

NRCS
Natural Resources Conservation Service
200 Fourth Street SW Phone: (605) 352-1200
Huron, South Dakota 57530 Fax: (605) 352-1270

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

June 23, 2011

Arlen and Cindy Foster
24314 421st Ave
Fulton, SD 57340

Dear Mr. and Mrs. Foster:

As a result of your request for a certified wetland determination on July 23, 2008 via form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification, from the Miner County Farm Service Agency Office, based on a site visit of November 23, 2010, the NRCS has made a preliminary certified wetland determination on the outlined portion of Tract # 400, located in SE1/4, Section 28, T105N R58W, in Miner County, South Dakota (SD).

Please refer to the attached certified wetland map(s) provided as a part of this preliminary technical determination to help you understand the explanations contained in this letter. All areas identified on the attached certified wetland determination maps are considered part of the preliminary technical determination. The remaining areas of the tract not covered by this preliminary

technical determination retain their original wetland determination. Please also refer to Section 2 of the NRCS-CPA-026E, Highly Erodible Land and Wetland Conservation Determination, for a listing of the wetlands identified. Additional information may be found in the accompanying report.

The results of this preliminary technical determination confirm that Site 1 is a wetland farmed under natural conditions and meets the definition of a wetland as set forth at 7 CFR Part 12.2(a) because the site has predominance of hydric soils; 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 under normal circumstances does support a prevalence of such vegetation.

Further, Site 1 is *not* an Artificial Wetland (AW) as defined in 7 CFR Part 12.2(a) because the site was not formerly a non-wetland; non-hydric soils were found in other locations within the mapped soil unit (Clarno-Stickney-Tetonka complex) potentially affected by snow accumulation in the shelterbelt; the Tetonka soil is listed as a hydric soil unit on the Miner County Hydric Soil Interpretation; the Tetonka soil is pothole landform; and the approved Tetonka Reference site (which did not contain a shelterbelt) meets the definition of a wetland because the reference site has a predominance of hydric soils; 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 under

normal circumstances does support a prevalence of such vegetation.

The Wetland Conservation (WC) Provisions of the Food Security Act (FSA) of 1985 prohibit United States Department of Agriculture (USDA) program participants from converting wetlands to agricultural use. Persons who convert wetlands (CW) after November 28, 1990, are ineligible for USDA program benefits, until the CW's are restored or mitigated.

This preliminary technical determination has been conducted for the purpose of implementing the WC Provisions of the FSA of 1985. This determination may not be valid for identifying the extent of the COE Clean Water Act jurisdiction for this site. If you intend to conduct any activity that constitutes a discharge of dredged or fill material into wetlands or Other Waters, you should request a jurisdictional determination by contacting the COE, **(605) 224-8531**, Pierre, SD, before starting the work.

There may be opportunities to utilize mitigation if you have an interest in converting the labeled wetlands (W's), farmed wetlands (FW's), and farmed wetland pasture (FWP), found in this determination. Mitigation is the compensation of lost wetlands through wetland restoration, enhancement, or the creation of new wetlands. Mitigation can not occur at the expense of the federal government. Mitigated wetlands must be in the same local watershed as the wetlands you wish to convert. The landowner must grant an easement that remains in effect as long as the original W(s) remains converted and the easement will be recorded on public land records for the mitigated wetlands. All of the above activities, as well

as, a mitigation plan, must be completed before any wetland conversions could occur.

You may appeal this preliminary technical determination in accordance with the laws and federal regulations set forth at 7 CFR 614, the NRCS Appeals Procedures, 7 CFR 780, the Food Security Act Appeals Procedures, and 7 CFR 11, the National Appeals Division (NAD) Rules of Procedure, as follows:

(1) Reconsideration with a field visit will be made by the NRCS to review with you the basis for our preliminary technical determination, answer any questions you have concerning the determination, and to gather additional information from you concerning the preliminary determination.

Within 15 days of the field visit, the NRCS will reconsider the preliminary technical determination:

A. If the reconsidered determination is no longer adverse to the participant, a final technical determination will be issued.

B. If the reconsidered determination remains adverse the preliminary technical determination and agency record will be forwarded to the assistant state conservationist for field operations for a final technical determination; a final technical determination will be issued as soon as practicable. The technical determination issued becomes a final technical determination upon receipt by the participant.

OR

(2) Mediation may be used in an attempt to settle your concerns with the preliminary technical determination:

Contact: Gerald E. Jasmer
State Resource Conservationist
Natural Resources Conservation Service
200 Fourth Street SW
Huron, South Dakota 57350-2475
Phone: (605) 352-1234
Fax: (605) 352-1261

If none of the previously discussed options have been selected, **this determination becomes final 30 days after the date this letter is received**. If the final technical determination is a result of the expiration of the 30-day period following receipt of this preliminary technical determination, it may be appealed to either of the following, within 30 days of the determination becoming final:

- Appeal to the Miner County Farm Service Agency County Committee

OR

- Appeal to the NAD at the following address:

National Appeals Division, Western Regional Office
755 Parfet Street, Suite 494
Lakewood, Colorado 80215-5506
Phone: (800) 541-0483 or (303) 236-2862
TTY: (800) 497-0253
Fax: (303) 236-2820

If you are the owner of this tract of land and have a tenant, I urge you to discuss this letter and accompanying NRCS-CPA-026E with your tenant.

Likewise, if you are the tenant of this tract of land, I urge you to discuss this letter with your landlord.

Sincerely,

/s/ Kirk Lindgren
Kirk Lindgren
District Conservationist

Attachments

Cc:
Curtis Elke, ASTC(FO), NRCS, BFSO (without attachments)
Gerald Jasmer, SRC, NRCS, Huron SO (without attachments)
Leah Turgeon, CED, FSA, Howard SC (without attachments)

USDA
United States Department of Agriculture

August 1, 2017

Mr. Arlen and Cindy Foster
24314 421st Avenue
Fulton, South Dakota 57340

Dear Mr. and Mrs. Foster:

Thank you for your letter of June, 6, 2017, requesting review of the Certified Wetland Determination (CWD) for Sampling Unit (SU) 1 in Tract 400, located in the S1/2 of Section 28-T105N-R58W, in Miner County. It appears you originally sent this request in March, but your June 6, 2017 request, which included a copy of a request dated March 6, 2017, is the first communication the Natural Resources Conservation Service (NRCS) received. I apologize for the delayed response.

According to the regulations found at Title 7 of the Code of Federal Regulations (CFR), Part 12, and 16 U.S.C. § 3822, the CWD completed by the NRCS is still valid and remains in effect. This CWD was recently upheld by the U.S. Court of Appeals for the Eight Circuit, in a decision that the U.S. Supreme Court declined to review. (See 820 F.3d 330 (8th Cir. 2016), cert denied, 137 S. Ct. 620 (2017)).

As you correctly note in your request, 16 U.S.C. § 3822(a)(4) allows for a review of a CWD by the Secretary; however, Section 3822(a)(4) must be read in conjunction with 7 C.F.R. § 12.30(c)(6), which sets forth what constitutes a valid request for review under the statute. Specifically, a person may request

a review of a wetland certification only if a natural event alters the topography or hydrology of the subject land to the extent that the original determination is no longer a reliable indication of site conditions, or if NRCS concurs with an affected person that an error exists in the current wetland determination.

Per statute, absent a valid request under Section 3822(a)(4), NRCS is prohibited from completing any additional CWDs for land covered under an existing certified determination.

In order to request a CWD review, you are required to provide specific information and data sufficient to justify the review. NRCS is unable to justify a review based on the information you enclosed with your June 6 letter. If you would like to submit a new request for review under Section 3822(a)(4) based on an error in the wetland determination, you must supply additional information that has not previously been considered by NRCS.

If you have any further questions, or would like to review your request in person, please contact Jeff Zimprich, South Dakota State Conservationist, at 605-350-1200.

Thank you once again for your letter and for your on-going commitment to the conservation of natural resources.

Sincerely,

/s/ Leonard Jordan
Leonard Jordan
Acting Chief

cc: (w/copy of incoming correspondence)
Kevin Wickey, Regional Conservationist, Central, NRCS, Washington, D.C.
Jeff Zimprich, State Conservationist, NRCS, Huron, South Dakota

WENCK

April 20, 2020

Deke Hobbick
NRCS
Huron, South Dakota
Via email

Re: NRCS Wetland Determination for the Foster Property, Fulton, SD.

Dear Mr. Hobbick:

I have been retained by the Fosters to look further into the Natural Resources Conservation Service's (NRCS) Certified Wetland Delineation (CWD) completed for their property (see Attachment 1). You may recall our brief telephone conversation this past winter. This letter provides our findings to date and requests that NRCS review the CWD based on this additional information.

I have looked over the large amount of information related to this determination and disagreement between the parties. The NRCS has followed their standard protocol for a delineation of a *typical* wetland. The depression area of concern however is certainly *not typical* in that its hydrology is significantly affected by the adjacent tree line wind break. This is counter to what I understand the NRCS has stated, that the tree line has no effect on the hydrology of the area. A purpose of this letter is to provide evidence that the area's hydrology is significantly affected by the adjacent wind break, enough so that it may support a wetland.

Figure 1 shows the depression area watershed based on LiDAR data. A relatively basic hydrologic model of the depression area was created using a spreadsheet. The approach is to show the effect of the trees with a basic model and avoid complications and controversy that additional detail may cause. The model accounts for the following factors:

- Runoff from the depression watershed using NRCS curve number hydrology for rain events.
- Snow melt input based on information from the 2019 Banner report (See Attachment 2). The last page of the Banner report provides pictures of the drifted snow along the shelter belt. The water content of the snow drift is shown to be 2.4-inches over the watershed of the depression. My analysis shows that the depression will fill to a depth of approximately 12-inches and overflow with less than 1.5-inches of runoff over the watershed. Based on the expected drifting on an average winter, the depression will be filled with water after snow melt in spring.
- Evaporation from ponding based on the aerodynamic method considering wind speed, temperature, and relative humidity. The wind input accounts for the shelter belt tree line effect when the wind has a southerly component. Two on site weather stations, one near the tree line and one approximately 700-feet north at the edge of the field, show that wind speed near the depression area is typically 30% of the unobstructed wind speed.

- Infiltration from ponding based on soil characteristics and observations.

Wetland hydrology considers conditions during the growing season. It is assumed for this analysis that the growing season starts by May 1st. Weather data for the model uses historical data for an average precipitation period. 2013 data most closely matches these conditions and is relatively current data. Data from Mitchell, SD are used given that it is the closest station with continuous record of all the input data used in the model. The hydrologic effect of the tree line shelter belt will be most noted during the early growing season due to the added soil moisture from the tree line snow drift. Data from April, May, and June are used for modeling.

Table 1 shows primary input data and the model results for two conditions, existing conditions with the tree line shelter belt and without the tree line shelter belt. The input data are shown in Columns 2 to 6, right of the date. The estimated runoff is shown in Column 7. The estimated evaporation from the ponded water and the depth of water in the depression for existing conditions are shown in Columns 8 and 9. The effect of the trees includes runoff from the melted snow drift and reduction of evaporation due to sheltering of the wind by the tree line.

The second condition shown in Columns 10 and 11 removes the tree line shelter belt. Without trees there will be no drifting of the snow and the winds will not be diminished. Modeling assumptions and a basis for the assumptions are provided in Table 2.

For existing conditions, the snow drift melts and fills the depression area as stated above. This water

starts to infiltrate when the frost leaves the ground typically by April 1. Based on average conditions the ponding extends to the middle of April. The soil is expected to be saturated to within 1-foot of the surface until approximately the start of May or the start of the growing season. Significant rains in May cause runoff to the depression as can be seen in the modeling results. Given that the soil has had limited time to dry, the sustained saturation caused by the rainfall runoff leads to crop stress. It is this crop stress that causes identifiable signatures in aerial photographs.

If there were no trees, there would be no snow accumulation within the depression or within the depression watershed. The ground would start relatively dry in early April and be even drier at the start of the growing season. The added evaporation potential is shown by the shaded cells in Table 1. Soil dries significantly faster without trees to block the wind. The drier soil has greater capacity to absorb runoff and maintain good growing conditions. Wetland hydrology may not exist in the basin as with other depressions in the area without adjacent shelter belt trees. The watershed area to wetland area is very limited, less than 5 to 1, and not conducive to wetland hydrology.

The basic modeling in this analysis shows a significant hydrologic effect of the tree line shelter belt adjacent to the depression area. Even a relatively small effect should be considered given the borderline results of the aerial photography review. Without the trees the area would not likely sustain wetland hydrology. It is requested that NRCS review the CWD with this new information.

Please contact me at 612-296-7732 if you have any questions or need additional information.

Sincerely,

/s/ Joel Toso
Joel Toso, PhD, PH, PE
Senior Water Resources Engineer

USDA
United States Department of Agriculture

May 14, 2020

Mr. Arlen Foster
24314 421st Avenue
Fulton, South Dakota 57340

Dear Mr. Foster:

The Natural Resources Conservation Service (NRCS) has received your request that the existing Certified Wetland Determination (CWD) dated June 23, 2011, for the 0.8 acre wetland delineated in Field 5, Tract 400, located in the S 1/3 of the SE 1/4 of Section 28, T105N, R58W, in Miner County, be reviewed.

According to the regulations found at Title 7 of the Code of Federal Regulations (CFR), Part 12, the CWD completed by the NRCS on June 23, 2011, is still valid; therefore, the NRCS is not obligated to complete a new CWD.

The NRCS is prohibited from completing any additional CWDs for land covered under an existing certified determination. According to the regulations, you may request a review of a wetland certification only if a natural event alters the topography or hydrology of the subject land to the extent that the original determination is no longer reliable or if the NRCS concurs that an error exists in the current wetland determination.

The responsibility is on you to supply the specific information and data sufficient to justify a review. You submitted work that was completed by Banner

Engineering in January 2019, and a work completed by Wenck Engineering in April 2020. The work was reviewed in depth and compared to the agency record. Based upon the evidence you provided, I am unable to determine that any of the conditions mentioned above for a redetermination apply.

If you have any further questions, please contact Deke Hobbick, Assistant State Conservationist for Compliance, at (605) 352-1287.

Sincerely,

/s/ Jeffrey J. Zimprich
JEFFREY J. ZIMPRICH
State Conservationist

Enc.

cc:
Deke Hobbick, ASTC(Compliance), NRCS, Huron SO
Ryan Ransom, CS, NRCS, Huron SO
Kirk Lindgren, DC, NRCS, Howard FO
Lynsee Planting, RUC, NRCS, Madison FO

No. _____

In the
Supreme Court of the United States

ARLEN FOSTER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Acting Chief of the Natural Resources Conservation Service; TONY SUNSERI, in his official capacity as Acting South Dakota State Conservationist,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 8,398 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 10, 2023.

JEFFREY W. McCOY
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No. _____

ARLEN FOSTER,
Petitioner,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Acting Chief of the Natural Resources Conservation Service; TONY SUNSERI, in his official capacity as Acting South Dakota State Conservationist,
Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 10th day of August, 2023, send out from Omaha, NE 7 package(s) containing 3 copies of the PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Counsel for Petitioner

Subscribed and sworn to before me this 10th day of August, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

Renee J. Goss
Notary Public

Andrew H. Cockle
Affiant

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Foster v. United States Department of Agriculture

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