No. 22-2729

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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.

On Appeal from the United States District Court
for the District of South Dakota
Honorable Roberto A. Lange, District Judge

APPELLANT'S OPENING BRIEF

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SUMMARY OF CASE AND ORAL ARGUMENT REQUEST

This case concerns a small pool of water, approximately 8 inches deep, that sometimes appears in the middle of Appellant Arlen Foster's farm field. Joint Appendix (App.) 356; R. Doc. 25-1, at 6. In 2011, Appellees concluded that this water was a naturally occurring wetland under 16 U.S.C. § 3822 (Swampbuster). App. 355; R. Doc. 25-1, at 5. 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.

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). Since 2011, Mr. Foster has hired experts who have gathered new information about the hydrology of the purported wetland. App. 86; R. Doc. 24, at 4 ¶ 7. Based on this new data, he requested Appellees review the delineation. App. 126; R. Doc. 24-1, at 38. But the agency applied its regulations—regulations that have not been sent to Congress as required by the Congressional Review Act (CRA), 5 U.S.C. § 801, *et seq*.—and declined to review. *Id.* Foster filed this case challenging Appellees' refusal to review the delineation, alleging that the regulations are inconsistent with Swampbuster and not in effect under the CRA. The District Court upheld the agency's decision.

Appellant respectfully requests 15 minutes of oral argument per side to address the important statutory interpretation questions presented in this case.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction to review Appellant's claims under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704. The District Court entered its order and judgment granting Appellees' motion for summary judgment and denying Appellant's motion for summary judgment on July 1, 2022. Appellant filed his notice of appeal on August 15, 2022. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(ii) and 4(a)(4)(A)(iv). This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Natural Resources Conservation Service's (NRCS) regulation that provides for a review of a certified wetland delineation "only if a natural event alters 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), is contrary to the statutory provisions of the Erodible Land and Wetland Conservation and Reserve Program which provide "that a certification "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).

Most apposite cases: *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018); *Van Buren v. United States*, 141 S. Ct. 1648 (2021); *Branstad v. Veneman*, 212 F. Supp.

2d 976 (N.D. Iowa 2002) (*Branstad III*); *B & D Land & Livestock Co. v. Veneman*, 332 F. Supp. 2d 1200 (N.D. Iowa 2004).

Most apposite statutes and regulations: 16 U.S.C. § 3822(a); 7 C.F.R. § 12.30(c)(6).

2. Whether courts can review an agency's failure to comply with the Congressional Review Act's requirement that all rules be submitted to Congress and the Comptroller General before they are in effect.

Most apposite cases: *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984); *Kansas Nat. Res. Coal. v. United States Dep't of Interior*, 971 F.3d 1222 (10th Cir. 2020) (*KNRC*); *Tugaw Ranches, LLC v. U.S. Dep't of Interior*, 362 F. Supp. 3d 879 (D. Idaho 2019).

Most apposite statutes: 5 U.S.C. § 805.

3. Whether NRCS's regulation is in effect, and Appellees can enforce or otherwise rely on it, even though it has not been submitted to Congress and the Comptroller General as required by the Congressional Review Act.

Most apposite case: *Career College Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996).

Most apposite statutes: 5 U.S.C. § 551(4); 5 U.S.C. §§ 801, 804.

4. Whether Appellees' refusal to accept Appellant's requests to review a previous certified wetlands delineation is (1) arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law or (2) unlawful withholding of agency action.

Most apposite cases: *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Perez v. Loren Cook Co.*, 803 F.3d 935 (8th Cir. 2015) (en banc); *Nat'l Conservative Pol. Action Comm. v. Fed. Election Comm'n*, 626 F.2d 953 (D.C. Cir. 1980).

STATEMENT OF THE CASE

I. Factual Background

Arlen Foster's farm has been in the family since the early 1900s. App. 194 R. Doc. 24-1, at 27. Around 1936, Arlen's father developed a tree belt along the south edge of the farm field. *Id.* At the time the tree belt was developed, the then-recently established Soil Conservation Service, which is now Appellee Natural Resources Conservation Service (NRCS), encouraged planting tree belts as a conservation measure. App. 37; R. Doc. 13, at 5. NRCS still encourages the development of tree belts to prevent erosion, *id.*, and Foster intends to preserve the tree belt for that purpose.

Snow accumulates under the tree belt during South Dakota's stormy winters and in Spring the snow melts and drains northward across the field adjacent to where the tree belt was developed. App. 101–102; R. Doc. 24–1, at 13–14; App. 110–111; R. Doc. 24-1, at 22–23. Over the decades since the tree belt was developed, melted

snow from the tree belt ponds for periods of time in the field. *Id*. The tree belt is the primary source of the water that creates the pool at issue here. *Id*.

Because the pool receives additional snow melt from the adjacently developed tree belt, it does not dry out at the same pace as the surrounding field. App. 111; R. Doc. 24-1, at 23. In roughly half of years, the pool dries out soon enough so that its soil is also dry enough to support the use of farm equipment by the time the rest of the field is. App. 356; R. Doc. 25-1, at 6. In some years with higher snowfall, however, the water does not dry out fast enough to allow the use of farm equipment in and around it in time to plant a crop. App. 111; R. Doc. 24-1, at 23.

In these "wetter years," Foster is unable to produce an agricultural crop either in the pool or the surrounding portions of the field unless he were to drain the water to speed up its "drying out." *Id*. But because Appellees have previously certified a wetland delineation under 16 U.S.C. § 3822 ("Swampbuster") that this pool was a federally regulated wetland, Foster cannot drain it without losing access to various agricultural benefit programs. App. 5; R. Doc. 1, at 2. Without eligibility for and participation in these programs, Foster would have difficulty making a living farming his land. *Id.*

Appellee NRCS first completed a certified wetland delineation for Foster's farm in 2004, and determined that the pool of water and other areas of the field in question were wetlands whose use was restricted by Swampbuster. App. 466; R.

Doc. 25-2, at 39. In 2008, Foster requested in writing that NRCS review the 2004 delineation under 16 U.S.C. § 3822(a)(4), which provides that a certified wetland 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. *See* App. 1396; R. Doc. 43-1, at 2. Shortly thereafter, NRCS granted Foster's request and agreed to review the previous delineation. App. 355; R. Doc. 25-1, at 5.

The review process took several years, with NRCS twice rescinding its initial determination and starting its review over from the beginning. App. 1399–1401; R. Docs. 43-2, 43-3. Finally, NRCS certified a new wetland delineation in 2011, and determined that 0.8 acres of the pool is a wetland whose farming use is restricted by Swampbuster (2011 Certification). App. 355; R. Doc. 25-1, at 5. Foster took an administrative appeal from the 2011 Certification, in which Appellee United States Department of Agriculture (USDA) upheld the certification, and then sought judicial review of the 2011 Certification in court. App. 353; R. Doc. 25-1 at 3. On appeal, this Court upheld the 2011 Certification on deference grounds. *See generally Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017).

On June 6, 2017, Foster submitted another request under 16 U.S.C. § 3822(a)(4) that NRCS review the 2011 Certification (2017 Request). App. 97; R. Doc. 24-1, at 9. In response to the 2017 Request, NRCS stated that the agency would only review the 2011 Certification if Foster "suppl[ied] additional information that

has not previously been considered by NRCS." *Id.* Furthermore, the agency denied Foster any administrative appeal rights of the agency's decision not to review the 2011 Certification. *Id.*

In 2020, Foster submitted a new request under 16 U.S.C. § 3822(a)(4) that NRCS review the 2011 Certification (2020 Request). App. 126; R. Doc. 24-1, at 38. Based on NRCS's response to the 2017 Request, the 2020 Request included technical reports from Banner Associates and Wenck Associates about how the tree belt affects the hydrology of the pool. App. 110–25; R. Doc. 24-1, at 22–37. These reports were new and had never been presented to or considered by NRCS. App. 86; R. Doc. 24, at 4 ¶ 7. The reports concluded that the purported wetland is not naturally occurring and, thus, should not be regulated under Swampbuster, which does not apply to "artificial wetlands," *i.e.*, wetlands that are "temporarily or incidentally created as a result of adjacent development activity," 16 U.S.C. § 3822(b)(1)(F). App. 110–11; R. Doc. 24-1, at 22–23.

Despite the agency's statement in the 2017 letter stating that it would review the 2011 Certification if Foster provided information that had not previously been considered by NRCS, the agency once again declined to review the 2011 Certification. App. 126; R. Doc. 24-1, at 38. The State Conversationist for NRCS simply stated, without further explanation, that "[t]he 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 [for review] mentioned above for a redetermination apply." *Id.* As with the 2017 response, the 2020 response did not include any administrative appeal rights. *Id.*

II. Legal Background

A. The Swampbuster Act

In 1985, Congress established the Erodible Land and Wetland Conservation and Reserve Program, 16 U.S.C. § 3801, *et seq.*, provisions of which are known as "Swampbuster." 16 U.S.C. §§ 3821–3822; *see generally*, *Clark v. U.S. Department of Agriculture*, 537 F.3d 934, 935–36 (8th Cir. 2008). The purpose of Swampbuster 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) (quotations omitted). 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).

To achieve its objectives, Swampbuster disqualifies any person from eligibility for a wide variety of federally authorized agricultural benefit programs, 16 U.S.C. § 3821(a), and premium subsidies for federally authorized crop insurance programs, *id*. § 3821(c), if that person drains a wetland and produces an agricultural commodity on it, *id*. § 3821(d)(1). This disqualification does not apply, however, to

wetlands that are "temporarily or incidentally created as a result of adjacent development activity." *Id*. § 3822(b)(1)(F); § 3822(b)(2)(B).

In order to determine what areas are regulated by Swampbuster, the Secretary of Agriculture—through NRCS—is required to certify "all wetlands located on subject land on a farm[.]" 16 U.S.C. § 3822(a)(1)–(3). In 1996, Congress amended Swampbuster to provide that these 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 the USDA. *Id*. § 3822(a)(4). The statutory language places no limits or conditions on the affected person's right to request review of a final certification. *Id.* Additionally, Swampbuster ensures that only farmers can initiate a review of a wetlands certification by providing that a final certification "shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by" a person affected by the certification. *Id.* § 3822(a)(6).

B. Swampbuster regulations

On September 6, 1996, Appellees USDA and NRCS promulgated a final interim rule with request for comments, interpreting various provisions of Swampbuster. 61 Fed. Reg. 47,019 (Sept. 6, 1996). These regulations are codified at 7 C.F.R. §§ 12.1–12.13 and 12.30–12.34 ("Swampbuster Regulations").

Despite Swampbuster placing no limit on when a farmer can request a review of a final wetlands certification, a provision of the Swampbuster Regulations imposes limitations on the right to request review. 7 C.F.R. § 12.30(c)(6) (the Review Regulation). The Review Regulation provides:

> 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).

C. The Congressional Review Act

To restore democratic accountability to the federal bureaucracy, Congress enacted the Congressional Review Act (CRA), 5 U.S.C. § 801, *et seq.*, on March 29, 1996, requiring federal agencies to submit every new rule they adopt to Congress before the rule goes into effect. If Congress disagrees with an agency's rule, the CRA provides streamlined procedures for passing a resolution disapproving the rule. 5 U.S.C. § 802.

The CRA provides:

> *Before a rule can take effect*, the Federal agency promulgating such rule *shall submit* to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.

5 U.S.C. § 801(a)(1)(A) (emphasis added).

Once a rule is submitted—and only then—Congress can review the rule and, if it disapproves of it, pass a joint resolution voiding the rule using streamlined procedures. 5 U.S.C. §§ 801(a)(1)(A); 802(a). According to the statute, the disapproval resolution may only be introduced during "the period beginning on the date on which the report ... is received by Congress and ending 60 days thereafter." 5 U.S.C. § 802(a). Thus, if an agency refuses to comply with the CRA's submission requirement, it denies Congress its opportunity to consider the rule.

If both Houses of Congress pass such a resolution, the joint resolution is sent to the President. If the President signs a joint resolution disallowing a rule, the CRA provides that the rule "shall not take effect[.]" 5 U.S.C. § 801(b). The agency is also barred from reissuing the rule "in substantially the same form" or issuing a new rule "that is substantially the same" as the disapproved rule. *Id*.

The CRA defines "rule" broadly 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. § 551(4); 5 U.S.C. § 804(3)(C). It has only a few narrow exceptions for rules "of particular applicability," "relating to agency management or personnel," and "of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." 5 U.S.C. § 804(3)(A)–(C).

III. Proceedings Below

On May 5, 2021, Arlen Foster and his late wife Cindy Foster[1] filed this case alleging that Appellees unlawfully denied the request to review the 2011 Certification. Specifically, they alleged that (1) the Review Regulation is inconsistent with Swampbuster; (2) the Review Regulation is not in effect because Appellees never submitted the regulation to Congress and the Comptroller General as required by the Congressional Review Act; and (3) the denial of the request for review was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. App. 22–30; R. Doc. 1, at 19–27.[2]

On August 6, 2021, Appellees filed an answer to the Complaint. R. Doc. 13. On September 23, 2021, the District Court entered a briefing schedule and ordered Appellees to file the administrative record with their dispositive motion. R. Doc. 17.

On November 15, Appellees filed a motion to dismiss or alternatively for summary judgment, alleging that the court lacked subject matter jurisdiction and that Foster failed to state a claim upon which relief may be granted. R. Doc. 21. Relevant to the issues on appeal, Appellees argued that the District Court lacked subject matter

[1] On January 3, 2022, Mrs. Foster passed away. R. doc. 33. She was subsequently dismissed from the case under Federal Rule of Civil Procedure 25(a)(2). R. Docs. 40, 44.

[2] The Complaint also alleged that Swampbuster violated the Commerce Clause and that the Review Regulation violates the Due Process Clause of the Constitution. Mr. Foster does not appeal these claims.

jurisdiction over all but one of Foster's claims because the agency's denial of Foster's request for review was not final agency action. R. Doc. 22, at 13–18. In the alternative, Appellees argued that they were entitled to judgment as a matter of law on those claims. *Id.* at 25–27. Regarding Foster's claim that the Review Regulation is inconsistent with Swampbuster, Appellees did not challenge the court's jurisdiction to hear the claim, and only argued that they were entitled to judgment as a matter of law. *Id.* In response to the District Court's order regarding the administrative record, Appellees argued that there was no certified administrative record and instead submitted what they alleged were the documentary materials that underlie the consideration of the request for review. R. Doc. 22, at 18 n. 4; R. Docs. 24–32.

On January 10, 2022, Foster filed an opposition to the motion to dismiss and a motion for summary judgment on his claims. R. Doc. 36. After Appellees denied allegations in Foster's statement of material facts, he filed a motion to complete or supplement the administrative record to further support those facts. R. Doc. 41. Appellees opposed the motion. R. Doc. 45.

On July 1, 2022, the District Court entered an order and judgment granting Appellees' motion for summary judgment and denying Foster's motion for summary judgment. App. 57–81; R. Doc. 47. Relevant to the issues on appeal, the District Court held the Review Regulation did not conflict with Swampbuster. App. 71–75;

R. Doc. 47, at 15–19. It also held that Appellees' denial of Foster's requests for review were final agency action and, on the merits, that the denials were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. App. 75–79; R. Doc. 47, at 19–23. On the CRA claim, the District Court held that the CRA precluded judicial review of a challenge to an agency's failure to comply with the Act. App. 69–71; R. Doc. 47, at 13–15. Finally, the order granted Foster's motion to complete or supplement the record "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." App. 80–81; R. Doc. 47, at 24–25.

Foster appealed the judgment on August 15, 2022. R. Doc. 51.

SUMMARY OF THE ARGUMENT

Appellees' refusal to review the 2011 Certification was arbitrary, capricious, and abuse of discretion or otherwise not in accordance with the law.

Appellees denied Foster's request to review the 2011 Certification based on their Review Regulation. App. 126; R. Doc. 24-1, at 38. But that regulation is contrary to the statutory provisions it purports to interpret. The statutory language places no limits or conditions on the affected person's right to request review of a final certification. 16 U.S.C. § 3822(a)(4). The plain meaning of the statute is confirmed by the context and statutory history of the provision. In 1996, Congress removed Appellees' discretion to determine when review is appropriate, and instead

gave farmers the right to trigger review. *Compare* 16 U.S.C. § 3822(a)(4) (Nov. 28, 1990), *with* 16 U.S.C. § 3822(a)(4). The Review Regulation effectively rewrites the statute by removing the right of farmers to trigger review and instead leaves review in the sole discretion of the agency. Because the plain meaning of the statute can be discerned by applying the traditional tools of statutory construction, Appellees' interpretation is not entitled to deference and the Review Regulation should be held unlawful and set aside.

Furthermore, Appellees could not rely on the Review Regulation to deny Foster's request for review because the regulation has not been submitted to Congress and the Comptroller General as required by the Congressional Review Act. 5 U.S.C. § 801(a)(1)(A). Below, the District Court held that CRA Section 805 precludes judicial review of an agency's failure to comply with the CRA. App. 70–71; R. Doc. 47, at 14–15. That is incorrect. Because judicial review of agency action is the norm in our legal system, an agency seeking to rebut the presumption bears a "heavy burden" in attempting to show that Congress prohibited judicial review of the agency's compliance with a legislative mandate. *Mach Mining*, 575 U.S. at 486, 490. In determining whether Congress precluded judicial review, a court must look beyond the text of a provision and consider the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action

involved. *Block*, 467 U.S. at 345. That analysis proves that Congress did not intend Section 805 to preclude judicial review of agency noncompliance with the CRA.

Finally, even if the Review Regulation is lawful and in effect, Appellees still acted arbitrarily in denying Foster's request for review. In 2017, Appellees stated that they would not review the 2011 Certification unless Foster provided new information. App. 97; R. Doc. 24-1, at 9. In 2020, Foster provided new information in the form of expert reports that had never been presented to or considered by NRCS. App. 86; R. Doc. 24, at 4 ¶ 7. But the agency still refused to review the previous delineation. App. 126; R. Doc. 24-1, at 38. Appellees' failures to apply their own stated standards renders its refusal to accept Foster's review request arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Nat'l Conservative Pol. Action Comm.*, 626 F.2d at 959.

This Court should reverse the judgment of the District Court. It should further direct the District Court to hold unlawful and set aside the Review Regulation and direct Appellees to accept Foster's request to review the 2011 Certification.

STANDARD OF REVIEW

"This court reviews de novo the district court's grant of summary judgment …." *Green v. Dormire*, 691 F.3d 917, 921 (8th Cir. 2012). "Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(a)).

Under the Administrative Procedure Act (APA), courts "shall" "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1); § 706(2)(A).

The APA requires courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. A court owes an "agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction," the court is "unable to discern Congress's meaning." *SAS Inst.*, 138 S. Ct. at 1358 (quotations omitted). Courts do not defer to an agency interpretation that is "inconsistent with the plain language of the statute or constitutes an unreasonable interpretation of an ambiguous statute." *Afolayan v. INS*, 219 F.3d 784, 787 (8th Cir. 2000). And "an overreaching and erroneous interpretation of the statute cannot be in accordance with law." *Barthel v. U.S. Dep't of Agric.*, 181 F.3d 934, 937 (8th Cir. 1999) (quotations omitted).

When deciding whether an agency decision is arbitrary, capricious, or an abuse of discretion courts apply a standard that, while "narrow," still "entails a 'searching and careful' de novo review of the administrative record presented to determine 'whether the decision was based on a consideration of the relevant factors

and whether there has been a clear error of judgment.'" *Downer v. U.S. By & Through U.S. Dep't of Agric. & Soil Conservation Serv.*, 97 F.3d 999, 1002 (8th Cir. 1996) (quoting *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989)).

ARGUMENT

I. NRCS's Review Regulation Conflicts with Swampbuster's Review Provision.

A. The traditional tools of statutory construction demonstrate the meaning of the review provision.

NRCS's refusal to accept the 2017 and 2020 Requests to review the 2011 Certification violated Swampbuster. *See* 16 U.S.C. § 3822(a)(4). The statute provides 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." 16 U.S.C. § 3822(a)(4). The language contains no limits on when a person can request review and, once he or she requests a review, the previous certification is invalidated. The agency's Review Regulation conflicts with the plain language of the statute because it allows a 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) (the Review Regulation). The agency's Review Regulation does not interpret the statute, it rewrites it.

The statute's structure confirms Swampbuster's plain meaning that a farmer can request a review at any time. An adjacent subsection to Section 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). Thus, the statute puts farmers, not the agency, in charge of when a wetland delineation is reviewed. *Id. Cf. SAS Inst.*, 138 S. Ct. at 1355 ("This language doesn't authorize the Director to start proceedings on his own initiative.... From 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."). Congress deliberately structured Swampbuster to put farmers in charge of the review process. "And '[j]ust as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'" *SAS Inst.*, 138 S. Ct. at 1355 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). If Congress intended for NRCS to control when a farmer could review a previous certification, it would have structured the process in a manner that puts the agency in control of initiating the review process.

The statutory history of Swampbuster further demonstrates that NRCS is required to accept Foster's requests for review. Prior to 1996, the statute 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). Unlike the amended statute, the plain language of the previous statute authorized the agency to define when a farmer was entitled to review, and structured the statute in a way that put the agency in control of the start of the review process.

In 1996, however, Congress removed Appellees' discretion to determine when a review is appropriate, and instead gave farmers the right to trigger review. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 322, 110 Stat. 888 (Apr. 4, 1996). The 1996 statutory language no longer authorized the agency to deem when a review was "appropriate" and instead required NRCS to review a wetland delineation when "the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4); *see also id.* § 3822(a)(6).

"'When 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 Review Regulation, however, puts farmers in the position they were in prior to the 1996 amendments. Under NRCS's interpretation, it is NRCS, and not the farmer, who decides when it is appropriate for the agency to review a certified delineation. 7 C.F.R. § 12.30(c)(6). But if Congress intended for the agency to "provide by regulation a process for the

periodic review and update of such wetland delineations," it would have retained that language in 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 wetlands delineation. *Cf. Van Buren*, 141 S. Ct. at 1660–61 ("Congress' choice to *remove* the statute's reference to purpose thus cuts *against* [the government's reading of the statute]. (citation omitted)).

Finally, the Review Regulation frustrates the purpose of the 1996 amendments. With those statutory amendments, Congress intended to insulate farmers from continuous recertification by the agency by putting the farmer in charge of initiating review. 16 U.S.C. §§ 3822(a)(4); 3822(a)(6). Swampbuster provides that "No person shall 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). Congress wanted to provide certainty that, if a farmer farms land certified as a nonwetland, he or she will not be in violation of Swampbuster. The Review provision is a safe harbor for farmers, not 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, stating that

"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 "One way of accomplishing this goal was to allow prior delineations of wetlands to be changed only upon request of the farmer.").

"Certainly there is no worse statute than one misunderstood by those who interpret it." *Barthel*, 181 F.3d at 937 (interpreting Swampbuster). Here, the Review Regulation not only misunderstands the statute, it rewrites the statute. In 1996, Congress amended Swampbuster to allow farmers to request review of a certified wetland delineation at any time. But NRCS's regulations only allow review at the agency's discretion. This Court should reverse the judgment of the District Court and hold that the Review Regulation is unlawful and inconsistent with Swampbuster.

B. Because the meaning of the review provision can be discerned by applying the traditional tools of statutory construction, this Court should not defer to the agency's interpretation of the statute.

The District Court below deferred to the agency's interpretation of the statute and upheld the review regulation as consistent with Swampbuster. App. 73; R. Doc. 47, at 17. But courts do not defer to an agency interpretation that is "inconsistent with the plain language of the statute or constitutes an unreasonable interpretation of an ambiguous statute." *Afolayan*, 219 F.3d at 787. "Under the *Chevron*

framework, we ask first whether the intent of Congress is clear as to the precise question at issue. If, by employing traditional tools of statutory construction, we determine that Congress' intent is clear, that is the end of the matter." *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937, 940 (8th Cir. 2014) (quotations omitted). As demonstrated above, the traditional tools of statutory construction demonstrate Congress's intent to the question at issue and the Review Regulation is entitled to no deference.

In deferring to the agency, however, the District Court held that the Review Regulation was a reasonable interpretation of the statute because the regulation "does not contradict any provision of the Swampbuster Act and is rationally related to promoting efficiency in the certification review process." App. 73; R. Doc. 47, at 17. But the regulation does contradict the statute. *See* Argument Section I-A, *supra*. And an interest in promoting efficiency cannot supplant what Congress wrote. *See SAS Inst.*, 138 S. Ct. at 1358 ("[P]olicy considerations cannot create an ambiguity when the words on the page are clear.").

Thus, in analyzing the statute, the District Court skipped over the first step of *Chevron*. "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.*, 138 S. Ct. at 1358–59 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843

n.9 (1984)); *see also*, *Hawkins*, 761 F.3d at 940. To determine whether a regulation contradicts any provision of a statute, a court must first apply all the tools of statutory construction to determine that provision's meaning.

The plain language of the review provision demonstrates that a farmer can request a review at any time. 16 U.S.C. § 3822(a)(4). But even if the plain language were not clear, that Congress amended the statute to remove NRCS's discretion to determine when it must accept review demonstrates the meaning of the statute. *Compare* 16 U.S.C. § 3822(a)(4) (Nov. 28, 1990), *with* 16 U.S.C. § 3822(a)(4). The Review Regulation does not give effect to the 1996 Amendments, but instead returns the pre-1996 statutory language that Congress explicitly removed.

The District Court suggested that following the plain language of the statute would conflict with the overall purpose of the statute, App. 73–74, R. Doc. 47, at 17–18, but allowing farmers to request review does not upset any of Swampbuster's purposes. Specifically**,** the District Court stated that the purpose of *Swampbuster* is "'to combat the disappearance of wetlands through their conversion into crop lands.'" App. 58; R. Doc. 47, at 2 (quoting *B & D Land & Livestock Co.*, 584 F. Supp. 2d at 1190). But allowing farmers to request review does not endanger wetlands.

Swampbuster's ineligibility provisions apply regardless of whether there is a certified wetland determination. 16 U.S.C. § 3821. If a farmer converts a wetland,

he or she will face ineligibility as a consequence. *Id.* § 3821(a). NRCS can bring an enforcement proceeding even if it has not certified the area. *See Ballanger v. Johanns*, 451 F. Supp. 2d 1061, 1064 (S.D. Iowa 2006), *aff'd*, 495 F.3d 866 (8th Cir. 2007). Having a certification merely guarantees that if a farmer produces a crop in an area certified as non-wetland, he or she is safe from enforcement. 16 U.S.C. § 3822(a)(6).

Despite the plain language of the statute, and its consistency with protecting wetlands, Appellees argued that following the plain language of the statute "would be expensive for NRCS, allow for endless litigation of the same issues, and undermine the wetland determination process" by allowing producers to stymie enforcement through serial requests for review. NAD Director Decision, Case No. 2014E000753, at 5 (June 22, 2016).[3] No matter its preferences, the agency is required to follow the statute. The government "may (today) think [its] approach makes for better policy, but policy considerations 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)). The words on the page are clear, the review provision requires NRCS to review every request. 16 U.S.C. § 3822(a)(4); *cf. SAS Inst.*, 138 S. Ct. at 1358 (The statute "requires the Board's final written decision to address

[3] *Available at* https://usda-nad-local1.entellitrak.com/etk-usda-nad-prod-temp/page.request.do?page=page.highlightedFile&id=93025&query_text=&query_text2=&citation=.

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.").

Moreover, the government's concerns about following Swampbuster's plain language are overstated. First, a lack of a certified wetland determination does not stymie enforcement. If anything, it is certification—not a lack of certification—that stymies enforcement because only a certified delineation provides a safe harbor from enforcement. 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 Ballanger*, 451 F. Supp. 2d at 1064. And, certified or not certified, the agency has the burden of proving ineligibility of benefits. *See Downer*, 97 F.3d at 1009 (Beam, J., concurring and dissenting) (stating that it is the burden of the agency to prove ineligibility for benefits); *Barthel*, 181 F.3d at 938 (favorably citing Judge Beam's concurrence in part). Thus, having a certified delineation does not make enforcement easier for the agency, who must still independently prove that a violation occurred. *See B & D Land & Livestock Co*., 332 F. Supp. 2d at 1216. On the other hand, the government cannot bring an enforcement action against work done on an area that has been certified as not a wetland, preventing enforcement on those areas. 16 U.S.C. § 3822(a)(6).

Second, following the plain language of the statute would not result in endless litigation. Although Swampbuster places no limits on a farmer's right to review, in practice farmers will not endlessly file lawsuits challenging the agency's wetland certifications. Litigation is not just expensive for NRCS, it is expensive—likely more expensive—for farmers as well. Farmers, and their lawyers, are not going to file endless lawsuits that have little to no chance of success.

The language, context, statutory history, and legislative purpose demonstrate that Congress intended for farmers to request a review of a certified wetlands delineation at any time. Thus, the agency's interpretation of the statute is entitled to no deference. The Review Regulation conflicts with the statute and should be held unlawful and set aside. This Court should reverse the judgment of the District Court.

C. Another district court in this Circuit has correctly interpreted the review provision and refused to defer to the agency's regulations interpreting the provision.

In two separate 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 & Livestock Co.*, 332 F. Supp. 2d at 1213. But here, the agency decided that Foster will only get a review of the 2011 Certification if and when the agency decides it wants to review it. The court's reasoning in *Branstad III* and *B & D Land & Livestock* is persuasive,

and further demonstrates that the agency's actions here violate Swampbuster's requirements.

In *Branstad III*, the plaintiffs, like Foster here, argued that "a certification of wetlands can be challenged at *any time* by a person affected by the certification." 212 F. Supp. 2d at 994. The court accepted that argument, noting that "the *statute* as amended in 1996 expressly states that 'a final certification' is only '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.* at 996 (quoting 16 U.S.C. § 3822(a)(4)). Thus, the court concluded that "a person affected by an existing, certified wetland determination may request that the Secretary review an existing certified determination, which ends the 'validity' of the existing certified determination." *Id.* at 997.

B & D Land & Livestock is also persuasive because the court there rejected the same argument Appellees made below. In *B & D Land & Livestock*, the USDA argued that the plaintiff was not entitled to a review of a previous certified wetland delineation because it had previously initiated an administrative appeal of the determination. 332 F. Supp. 2d at 1210. The plaintiff responded that the Act entitles "a person affected by the certification of a wetland to review of that wetland determination" and that "there is no statutory basis for holding that certified wetland

determinations become 'unreviewable,' even if the initial wetland determination becomes final …." *Id.*

The court agreed with the plaintiff, holding that the statute expressly provides a farmer a "second bite at the apple to challenge the correctness of a wetland determination, *after that determination is 'final' and 'certified,'* when the producer is affected by that wetland determination, for example, by being charged with a wetland 'conversion' violation." 332 F. Supp. 2d at 1215. Although the plaintiff brought the challenge after being charged with a conversion violation, that was one "example" of when a farmer could have a "second bite at the apple …." *Id.*

Importantly, the court explained how the certification process works under Swampbuster. First, "the statute expressly provides for an administrative appeal process *prior to* final certification of a wetland." *B & D Land & Livestock*, 332 F. Supp. 2d at 1213. Then, "subsection (a)(4) expressly provides for *a second administrative challenge* to a wetland determination, *after* the final certification of the wetland has become final, when a person affected by the certification requests review of the certification by the Secretary." *Id*. Here, Foster exhausted the first administrative appeal process for the 2011 determination, which included an APA review of the decision in court. *Foster*, 820 F.3d 330. After Foster exhausted that first appeal process, and the certification became final, he then requested a second administrative challenge to the determination.

Appellees never allowed Foster his second administrative challenge. Instead, as the District Court here stated, the agency's "refusals, after administrative appeals and judicial appeals had been exhausted, barred any further review of the 2011 wetland certification …" App. 78; R. Doc. 27, at 22. But a "wetland determination that has become 'final' and 'certified' pursuant to § 3822(a)(3) is not 'unreviewable,' because § 3822(a)(4) expressly provides for a further administrative challenge to that wetland determination." *B & D Land & Livestock Co.*, 332 F. Supp. 2d at 1213. By refusing any *further* review of the 2011 wetland certification, NRCS violated Swampbuster's Review Provision. *Id.* And not only was Foster denied his statutorily-entitled second challenge to the 2011 Certification, the agency prevented him from administratively appealing the denial itself. App. 98; R. Doc. 24-1, at 10; App. 126; R. Doc. 24-1, at 38. That decision is inconsistent with the requirements of the statute.

Below, the District Court quoted *B & D Land & Livestock* about "purpose of the Swampbuster Act …." App. 58; R. Doc. 47, at 2 (quoting *B & D Land & Livestock*, 584 F. Supp. 2d at 1190). But the District Court did not analyze any other aspects of that case in reaching its decision. The entirety of *B & D Land & Livestock* demonstrates that following the plain language of the statute does not conflict with Swampbuster's purpose because the court there both stated the purpose of the statute

and held that it allows farmers to request another review of a certification after it has been finalized. *B & D Land & Livestock Co.*, 332 F. Supp. 2d at 1213.

The two opinions from the Northern District of Iowa provide a comprehensive analysis of Swampbuster's Review Provision, and this Court should adopt its reasoning. "[I]n light of the plain language of the statute, the statute must be read to mean that *any* person *subsequently affected* by an *existing* wetland determination may invalidate the existing certification by requesting review of the certification by the Secretary." *Branstad III*, 212 F. Supp. 2d at 997. Foster, affected by the existing 2011 wetland determination, requested a review of that certification. Under the statute, he is entitled to a review of the existing wetland determination and an order invalidating the existing determination. This Court should reverse the judgment of the District Court. Further, this Court should instruct the District Court to hold unlawful and set aside NRCS's Review Regulation and order NRCS to accept Foster's request for review of the 2011 Certification.

II. NRCS Cannot Enforce or Otherwise Rely on the Review Regulation Because It Never Sent It to Congress as Required by the Congressional Review Act.

Under the CRA, an agency must submit every rule to Congress and the Comptroller General before a rule can take effect. 5 U.S.C. § 801(a)(1)(A). It is undisputed that Defendants never submitted the Review Regulation to Congress pursuant to the CRA. *See* R Doc. 38, at 10. Despite the agency's failure to comply

with the CRA, the District Court did not reach the merits of that claim because it ruled that an agency's failure to comply with the CRA is not judicially reviewable. App. 70; R. Doc. 47, at 14 (citing 5 U.S.C. § 805). The District Court is incorrect that Section 805 precludes judicial review of an agency's failure to send a rule to Congress. This Court should reverse the judgment of the District Court and hold that the Review Regulation is not in effect and was not in effect when Appellees refused to accept Foster's request for review.

A. An agency's failure to comply with the Congressional Review Act is judicially reviewable

1. Any ambiguity in the CRA is construed in favor of judicial review.

"There is a strong presumption that administrative action is subject to judicial review." *Clark v. United States*, 482 F.2d 586, 590 (8th Cir. 1973). This presumption reflects the courts' recognition that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 575 U.S. at 486. This is so because "legal lapses and violations occur," *id.* at 489, and the presumption is necessary to ensure that "compliance with the law," does not "rest in the [agency's] hands alone." *Id.* at 488. This presumption is so "well-settled" that Congress expects the courts to apply it when interpreting statutes. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). And exceptions are limited because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," *Mach*

Mining, 575 U.S. at 486, and because Congress rarely leaves "agenc[ies] to police [their] own conduct." *Id.*

The presumption favoring judicial review "may be rebutted only if the relevant statute precludes review, 5 U.S.C. § 701(a)(1), or if the action is 'committed to agency discretion by law,' § 701(a)(2)." *Weyerhaeuser v. USFWS*, 139 S. Ct. 361, 370 (2018). Because "[j]udicial review of administrative agency action is the norm in our legal system," *Mach Mining*, 575 U.S. at 495, an agency seeking to rebut the presumption bears a "'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of the agency's compliance with a legislative mandate." *Id.* at 486 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). To meet this "heavy burden," the agency must show that there is no "substantial doubt" that Congress intended to preclude judicial review. *See Block*, 467 U.S. at 351. "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Id.*

Courts do not only consider a statute's "express language" when deciding whether a statute preludes judicial review. *Sackett v. EPA*, 566 U.S. 120, 128 (2012). Rather, a court must also consider "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345; *see also Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (presumption of judicial review fails only "when a statute's language or

structure" shows that Congress meant to preclude judicial review) (quoting *Mach Mining*, 575 U.S. at 486); *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 261, 273 (2016) (presumption of judicial review "may be overcome by 'clear and convincing' indications, drawn from 'specific language,' 'specific legislative history,' and 'inferences of intent drawn from the statutory scheme as a whole,' that Congress intended to bar review." (quoting *Block*, 467 U.S. at 349–50) (internal quotation marks omitted). Because it is rare for Congress to prohibit judicial review, it is only after considering all these factors that a court may conclude that the statute is one of those exceptional instances where Congress intended to preclude judicial review.

The District Court erred in holding that Section 805 precludes judicial review of Foster's CRA claim. Although the District Court acknowledged the presumption favoring judicial review, the District Court did not impose on Appellees the "heavy burden" of overcoming that presumption. Instead, the District Court's analysis was limited to citing the holdings of other courts preluding judicial review under the CRA. App. 70; R. Doc. 47, at 14. But it did not address multiple opinions that have reviewed CRA claims. *See, e.g.*, *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 201–02 (2d Cir. 2004); *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1373–76 (Fed. Cir. 2002); *Tugaw Ranches*, 362 F. Supp. 3d at 889; *Center for Biological Diversity v. Zinke*, 313 F. Supp. 3d 976, 991 n.89 (D. Alaska 2018);

United States v. Reece, 956 F. Supp. 2d 736, 743–44 (W.D. La. 2013); *United States v. S. Indiana Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 WL 31427523, at **4–6 (S.D. Ind. Oct. 24, 2002) (unpublished).[4] Indeed, one of the cases that the District Court primarily relied on was a split decision, with Judge Lucero concluding in an extensive and thorough dissent that Section 805 does not preclude judicial review of a CRA claim. App. 70; R. Doc. 47, at 14 (citing *KNRC*, 971 F.3d at 1235); *see* 971 F.3d at 1245–57 (Lucero, J., dissenting). But the District Court's opinion here only discusses the majority opinion. The views about whether Section 805 precludes judicial review are not as straightforward as the District Court's opinion suggests.

The District Court should have applied the presumption in favor of judicial review, placed a heavy burden on the government to prove that Congress precluded judicial review, and construed any ambiguity in favor of allowing Foster's CRA claims to go forward. *Cf. KNRC*, 971 F.3d at 1248 (Lucero, J., dissenting) ("Not

[4] This is a question of first impression for this Circuit. Besides the District Court here, two other district courts in this circuit have held that 5 U.S.C. § 805 precludes judicial review. *See In re Operation of the Missouri River System Litig.*, 363 F. Supp. 2d 1145, 1173 (D. Minn. 2004); *United States v. Ameren Missouri*, No. 4:11CV77RWS, 2012 WL 2821928, at *4 (E.D. Mo. July 10, 2012) (not reported); *United States v. Carlson*, No. 12-305(DSD/LIB), 2013 WL 5125434, at *15 (D. Minn. Sept. 12, 2013) (not reported). Those decisions contained little to no analysis of the presumption in favor of judicial review and this Court did not address the issue on appeal. *See In re Operation of Missouri River System Litig.*, 421 F.3d 618 (8th Cir. 2005); *United States v. Carlson*, 810 F.3d 544 (8th Cir. 2016). Notably, the District Court here did not cite any of these cases in its opinion.

once does [the majority opinion] acknowledge the government's 'heavy burden' to show that Congress intended to 'prevent courts from enforcing its directive[ ]' that agencies submit proposed rules for approval." (quoting *Mach Mining*, 575 U.S. at 486)). An analysis of the CRA's structure, purpose, and history demonstrates that Congress did not preclude courts from reviewing an agency's failure to comply with the CRA.

2. The CRA's statutory scheme demonstrates that judicial review of an agency's failure to submit rules is judicially reviewable.

Section 805 states that "No determination, finding, action, or omissions under this chapter shall be subject to judicial review." 5 U.S.C. § 805. But critically the statutory text is silent about whose determinations, findings, actions, or omissions are precluded from judicial review. *Id.* This silence creates ambiguity because the CRA covers four groups—Congress, the Comptroller General, and federal agencies—all of whom have different responsibilities under the Act. *See Tugaw Ranches*, 362 F. Supp. 3d at 883 ("§ 805 is not clear and unambiguous."). Thus, the court must consider "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345. That review demonstrates that Congress intended agency action to be subject to judicial review.

The District Court's holding that Section 805 bars judicial review fails to give effect to all the words in the provision. Section 805 speaks of "determination[s],

finding[s], action[s], or omission[s]," but of the four groups and individuals covered by the CRA only Congress can engage in all four listed activities. For example, Congress can make a "determination" and "finding" under the CRA that the rule should not take effect, s*ee* 5 U.S.C. §§ 801, 802, and Congress can "act" by passing a joint resolution disproving of the rule. *Id.* Congress can also make an "omission" under the CRA by deciding not to pass a joint resolution disapproving of the rule. *Id.* By contrast, Agencies do not make "findings" or "determinations" under the CRA. Under the "principle of *noscitur a sociis*—a word is known by the company it keeps" courts "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Yates v. United States*, 574 U.S. 528, 543 (2015) (quotations omitted). Applying Section 805 to agency action subverts that principle by giving the words in the provision a broader meaning than Congress intended. *See KNRC*, 971 F.3d at 1249 (Lucero, J., dissenting). Here, only some of the activities in Section 805 apply to agencies, while all the words apply to Congress. Thus, the best reading of the provision is that the preclusion of judicial review applies to Congress, and not to administrative agencies.

Additionally, the District Court's holding also renders key provisions of the CRA meaningless. If the District Court is correct that Section 805 bars judicial review, then nothing prevents an agency from reissuing a rule that was disapproved by Congress and the President, or from refusing to submit a rule in the first place.

But the CRA explicitly precludes an agency from this type of action. 5 U.S.C. § 801(b). Because Congress cannot enforce this provision itself, only courts can hold agencies accountable for failing to comply with the CRA. *See, e.g.*, *Tugaw Ranches*, 362 F. Supp. 3d at 883; *KNRC*, 971 F.3d at 1250–51 (Lucero, J., dissenting); *see also* Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under* Chevron, 70 Admin. L. Rev. 53, 68 (2018). In holding that Foster's CRA claims are unreviewable, the District Court failed to apply the "well-established principle[] of statutory interpretation that require[s] statutes to be construed in a manner that gives effect to all of their provisions." *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009).

The District Court's holding also effectively wrote the severability clause out of the statute. That provision, which immediately follows the provision on judicial review, states:

> If any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

5 U.S.C. § 806(b).

If Section 805 precludes judicial review, then the severability clause is meaningless. But "[a] statute should not be interpreted so as to render the legislature's language mere surplusage." *In re Bellanca Aircraft Corp.*, 850 F.2d

1275, 1280 (8th Cir. 1988). Thus, Congress must have intended for judicial review to be available for at least some claims. The CRA's statutory scheme shows that, at a minimum, those claims include allegations that an agency ignored the CRA's rule submission mandate.

3. The context of the CRA's passage, and its objectives and legislative history, further demonstrate that Congress intended agency action to be subject to judicial review.

The CRA was passed to address separation-of-powers concerns resulting from agency overreach. As the CRA's sponsors noted, agency rules "can be surprisingly different from the expectations of Congress or the public." 142 Cong. Rec. S3683-01, S3684 (daily ed. Apr. 18, 1996). To address that issue, and to restore the "delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws," *id.* at S3683, Congress in the CRA created a rule-submission requirement. 5 U.S.C. § 801(a)(1)(A). That provision achieves Congress's objective because it "gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule." 142 Cong. Rec. at S3684.

That objective is undermined if courts exempt agencies from judicial review under the Act. Indeed, without the possibility of judicial review, "an agency would frankly have no reason to comply with the CRA," *Tugaw Ranches*, 362 F. Supp. 3d

at 883, which would "render[] the CRA ineffectual," *KNRC*, 971 F.3d at 1250 (Lucero, J., dissenting). While Congress could "arguably have some modicum of enforcement through pressure, politics, rules, funding, or some other function . . . ultimately, it is the Court that must determine if there has been statutory compliance." *Tugaw Ranches*, 362 F. Supp. 3d at 883 n.2.

Moreover, judicial review is the only way for private parties to ensure that agencies comply with the CRA and do not enforce rules that have not properly been submitted to Congress. *See, e.g.*, Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 Harv. J.L. & Pub. Pol'y 187, 230 (2018) (explaining that private parties "need the courts to protect them"). Enforcing compliance with the law "is precisely why the judicial branch exists." *Tugaw Ranches*, 362 F. Supp. 3d at 883 n.2. "Interpreting § 805 to preclude review of an agency's failure to submit a rule for approval thus raises separation-of-powers concerns because it 'place[s] in executive hands authority to remove cases from the Judiciary's domain.'" *KNRC*, 971 F.3d at 1251 (Lucero, J., dissenting) (quoting *Kucana v. Holder*, 558 U.S. 233, 237 (2010)). That interpretation also raises due process concerns because a lack of judicial review allows an agency to enforce a regulation that is not in effect and enforceable under the law. *See* Larkin, *supra*, 41 Harv. J.L. & Pub. Pol'y at 223–27.

If Congress wanted to preclude judicial review of agency action under the CRA, it could have easily done so. For example, in the 1980 enactment of the

Regulatory Flexibility Act ("RFA"), which was passed to check agency overreach, Congress excluded from review "any determination by *any agency* concerning the applicability of any of the provisions of this chapter to *any action of the agency*," as well as "compliance or noncompliance of *the agency* with the provisions of this chapter[.]" Pub. L. No. 96-354, § 3(a), 94 Stat. 1164, 1165–70 (Sept. 19, 1980) (emphasis added). Unlike the CRA's Section 805—which contains no mention of agencies or agency actions—Congress in the 1980 RFA intentionally and clearly excluded agencies from judicial review. If Congress truly intended the CRA to exclude agency actions from judicial review, it would have clearly stated as much. *See, e.g.*, *S. Indiana Gas & Elec. Co.*, 2002 WL 31427523, at **4–6 (using the RFA's history to interpret the CRA).

A decade and a half later—in the same bill that enacted the CRA—Congress removed the RFA's preclusion of judicial review of agency action. *See* Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 242, 110 Stat. 847 (Mar. 29, 1996); 5 U.S.C. § 611. Congress was concerned that agencies had not been complying with the RFA and that "without judicial review, the Federal regulators will continue to ignore the RFA." 142 Cong. Rec. H2986, H3016 (daily ed. Mar. 28, 1996) (statement of Rep. Ewing). Considering this context, it strains credulity to argue that Congress provided for judicial review of agency action in the RFA because a lack of judicial review had led to agencies ignoring the RFA, but Congress

precluded judicial review in the same bill of the new CRA requirement when Congress was keenly aware that agency noncompliance was a significant problem. *See KNRC*, 971 F.3d at 1251 (Lucero, J., dissenting). Given that Section 805 does not mention agencies explicitly, and given that it was passed to check agency action, the best reading of the provision is that agency action is subject to judicial review.

The CRA's legislative history further proves that Section 805 does not preclude judicial review of agency actions. The CRA's sponsors published a joint statement directly addressing that issue, explaining that "[t]he limitation on judicial review in no way prohibits a court from determining whether a rule is in effect," but rather that the limitation on judicial review extends only to "the major rule determinations" made by the Office of Management and Budget and "whether Congress complied with the congressional review procedures[.]" 142 Cong. Rec. at S3686. This understanding was confirmed on the CRA's tenth anniversary, when the House Judicial Committee acknowledged that the joint statement of the sponsors was "the most authoritative contemporary understanding of the provisions of the law." *See* H. Comm. on the Judiciary, Subcomm. on Commercial & Admin. Law, 109th Cong., Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century 86 n.253 (Comm. Print 2006).[5]

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[5] *Available at https://www.google.com/books/edition/Interim_Report_on_the_Administrative_Law/-gl0Lf3Kl9kC?hl=en&gbpv=0.*

Courts that have reviewed CRA claims have found the legislative history instructive. For example, in *S. Indiana Gas & Elec. Co.*, the court observed that "[t]he legislative history of the CRA confirms the limited reach of the preclusion of judicial review." *S. Indiana Gas & Elec. Co.*, 2002 WL 31427523, at *5. And the court in *Tugaw Ranches*, after a lengthy review of the CRA's text, context, and legislative history, noted that the legislative history showed that "those who promulgated it understood that actions taken by certain actors would not be reviewable, but that this non-reviewability did not extend to all CRA actors and that specifically agency action would be reviewable." *Tugaw Ranches*, 362 F. Supp. 3d at 888. That the legislative history for the CRA is in the form of a post-enactment statement is of little consequence. *KNRC*, 971 F.3d at 1253 (Lucero, J., dissenting).

The Supreme Court has recognized that this form of legislative history merits consideration "to the extent it is persuasive." *United States v. Woods*, 571 U.S. 31, 48 (2013). Courts "do not apply a categorical rule precluding consideration of post-enactment legislative history." *KNRC*, 971 F.3d at 1253 (Lucero, J., dissenting). And the primary reason courts are skeptical of post-enactment legislative history is not present here. *See id*. "[P]ost-enactment legislative history 'does not bear strong indicia of reliability ... because as time passes memories fade and a person's perception of his earlier intention may change.'" *Id.* (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980)). But "[t]his concern

is substantially mitigated in this case" because the "joint statement was recorded a mere twenty days after the CRA was enacted, during the same session." *Id.*

Furthermore, a post-enactment joint statement was the only possible form for the CRA's legislative history to take because the CRA was adopted as an amendment to an existing bill. *See, e.g.*, *Tugaw Ranches*, 362 F. Supp. 3d at 887 (noting that the form of the CRA's passage "would preclude 'a conference report or managers' statement prior to passage'") (quoting 142 Cong. Rec. at H3005). And the sponsors of the CRA—prior to the CRA's enactment—informed Congress of their intention to issue a joint statement "that we can insert in the Congressional Record at a later time to serve as the equivalent of a floor managers' statement."142 Cong. Rec. at H3005.

In holding that agency action is not subject to judicial review under the CRA, the District Court failed to apply the strong presumption favoring judicial review. That presumption is controlling in this case. The CRA's statutory scheme, context, purpose, and legislative history definitively proves that Congress intended agency action to be subject to judicial review. This Court should reverse the judgment of the District Court.

B. Because NRCS never sent the Review Regulation to Congress, it is not in effect and the agency could not rely on it to refuse to accept Foster's review request.

Under the CRA, Appellees were required to submit the Review Regulation before it went into effect. 5 U.S.C. § 801. The review regulation is a "rule" subject to the CRA. 5 U.S.C. § 551(4); 5 U.S.C. § 804 (defining "rule" in reference to 5 U.S.C. § 551(4)). The Swampbuster Regulations are a statement of general applicability and future effect, by the Appellees USDA and NRCS, designed to implement Swampbuster. 7 C.F.R. §§ 12.1–12.13 and 12.30–12.34. Interim final rules are rules within the meaning of the CRA. Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions* at 8 (Nov. 12, 2021);[6] *cf. Career College*, 74 F.3d at 1268 ("The key word in the title 'Interim Final Rule,' unless the title is to be read as an oxymoron, is not interim, but *final*.").

Appellees, however, have not submitted the Review Regulation to Congress or the Comptroller General, as required by the CRA. Appellees admit that the Review Regulation has not been submitted. R. Doc. 38, at 10. The Review Regulation does not appear in the GAO's database of rules submitted. U.S. Government Accountability Office, *Congressional Review Act*.[7] The Review

[6] *Available at* https://sgp.fas.org/crs/misc/R43992.pdf.

[7] https://www.gao.gov/legal/other-legal-work/congressional-review-act

Regulation also does not appear in the list of executive communications to the two houses of Congress. *See, e.g.*, U.S. Senate, *How to find Executive Communications*.[8]

Appellees have submitted later amendments to the Review Regulation, but that does not affect the failure to submit the original version of the Review Regulation.[9] Under the CRA, Congress reviews only the rule that was submitted to them, not earlier, related rules. 5 U.S.C. § 802(a). If Congress were to pass a resolution of disapproval, it would apply only to the amendments, not to the underlying regulations. *See id.*

Because Appellees have not submitted the Review Regulation under the CRA, it is not in effect now and was not in effect when Foster submitted his request for review. 5 U.S.C. § 801(a)(1)(A). Because NRCS's denial was based solely on the not-in-effect Review Regulation, the agency unlawfully denied the Fosters' request for review. This Court should instruct the District Court to direct the agency to accept Foster's request for review of the 2011 Certification, and vacate the 2011 Certification.

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[8] *Available at* https://www.senate.gov/reference/common/faq/how_to_executivecommunications.htm (last viewed Sept. 22, 2022).

[9] Unlike the 1996 rule, these later rules appear in the GAO's database. *See* https://www.gao.gov/fedrules/199916; https://www.gao.gov/fedrules/189170; https://www.gao.gov/fedrules/169685.

III. Even if Review Regulation Is Lawful and in Effect, NRCS's Refusal to Accept Foster's Review Request Was Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance With the Law

A. NRCS failed to follow its own stated standards on how Foster could obtain review of the 2011 Certification.

Even accepting that Appellees could enforce the Review Regulation, their refusal to accept Foster's requests for review was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law. In response to the 2017 Request, NRCS directed Foster to "supply additional information that has not previously been considered by NRCS." App. 97; R. Doc. 24-1, at 9. As demonstrated above, the plain language of the statute does not require a farmer to provide new information to get a review of an existing wetland determination. 16 U.S.C. § 3822(a)(4). But even if Appellees' requirement for new information were a permissible interpretation of the statute, Foster complied with that requirement. Appellees' failures to apply their own stated standards renders its refusal to accept Foster's review request arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Nat'l Conservative Pol. Action Comm.*, 626 F.2d at 959.

Foster complied with NRCS's request for new information by submitting new expert reports about the hydrology of the purported wetland. App. 110–11; R. Doc. 24-1, at 22–23. The latest review request includes expert, technical information from Banner Associates and Wenck Associates about how the tree belt affects the

hydrology of the purported wetland. *Id.* Previously, NRCS inferred that the area was not an artificial wetland based on its analysis of the hydric soils. *See Foster v. Vilsack*, No. CIV. 13-4060-KES, 2014 WL 5512905, at *15 (D.S.D. Oct. 31, 2014), *aff'd*, 820 F.3d 330 (8th Cir. 2016). But hydric soils are only one factor in determining whether an area is a wetland. 16 U.S.C. § 3801(a)(27), *id.* § 3801(a)(12), (13). The new technological information demonstrates that the hydrology of the area is a result of the tree belt, calling into question NRCS's previous conclusion that the area is a naturally occurring wetland. App. 110–11; R. Doc. 24-1, at 22–23. During the appeal process for the 2011 Certification, NRCS argued that Foster "presented no expert testimony or evidence with respect to the agency's wetland determination procedures." *Foster*, 2014 WL 5512905, at *15. Foster's 2020 request fixed that alleged deficiency. App. 110–11; R. Doc. 24-1, at 22–23. Foster thus complied with NRCS's request to supply information not previously considered.

At the District Court below, Appellees confirmed that Foster provided new information in his 2020 request. Assistant State Conservationist Deke Hobbick admitted in a declaration that "the information submitted with the 2020 request included *newly created data* in the engineer's report and conclusions based on that data …." App. 86; R. Doc. 24, at 4 ¶ 7 (emphasis added). Under NRCS's own stated policies, the agency should have accepted Foster's 2020 review because he supplied new information, as requested. *See Nat'l Conservative Pol. Action Comm.*, 626 F.2d

at 959 ("Agencies are under an obligation to follow their own regulations, *procedures, and precedents*, or provide a rational explanation for their departures." (emphasis added)). The agency's failure to accept the review request is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See id.*

In an attempt to justify their refusal to accept the review request, Appellees below changed course from their previous statements about Foster needing to provide new information and instead argued that Foster did not comply with the agency's request because the newly created data relates to the hydrology of the pool. R. Doc. 37, at 14. It argued that Foster was not entitled to a review of the 2011 certification because he had previously argued about the hydrology of the pool, and, therefore, any new information or data related to hydrology was not actually the new information the agency asked for in 2017. *See id*. In short, after the suit was filed, the agency began to argue that Foster had to provide a new argument about how the pool is not a wetland, and could not obtain a review by providing new information about an argument he had previously made.

The District Court erred in accepting the agency's "new argument" interpretation to uphold the agency's decision not to accept Foster's review request. "[A] court should decline to defer to a merely 'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack.'" *Kisor*, 139 S. Ct. at 2417 (quoting *Christopher v. SmithKline Beecham Corp*, 567

U.S. 142, 155 (2012)). Not only was the "new argument" rationalization inconsistent with the position stated by the agency itself in 2017, the rationalization wasn't even advanced by the agency below until its reply brief. In their original motion, Defendants argued that Foster's request did not "point to any new *data or information* that NRCS had not previously considered in the 2011 final certified wetland determination." R. Doc. 22, at 9 (emphasis added). Only in their final brief—after Foster had pointed out that Appellees' own Conservationist admitted that he provided new information—did Appellees argue that Foster "must present some *new information and argument* that would show that the 2011 wetland certification was erroneous." R. Doc. 37, at 14 (emphasis added). This post hoc rationalization demonstrates that the agency's refusal to accept Foster's request to review the 2011 Certification is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.

Further demonstrating the unreasonableness of NRCS's "new argument" standard is that it is inconsistent with its past practice about when it will accept a review request. In 2008, Foster requested a review of the wetland certification. App. 1396; R. Doc. 43-1, at 2. In response, NRCS explained how it interpreted the applicable statutory and regulatory provisions. *Id.* Specifically, Resource Conservationist Karen Cameron-Howell quoted the relevant statutory provision, attached the relevant portion of the agency's Food Security Act Manual, and stated

that "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." App. 1396–97; R. Doc. 43-1, at 2–3.

Now, NRCS has stated that additional hydrology information is not sufficient to get another look. NRCS has changed its standards for accepting review of a wetland certification, despite no change in the relevant portions of the statute or the relevant regulations. The agency's change of positions cautions against deferring to the agency's interpretation of the review regulation. "[P]rior notice is required where a private party justifiably relies upon an agency's past practice and is substantially affected by a change in that practice." *Nat'l Conservative Pol. Action Comm.*, 626 F.2d at 959. And as a result, "a court may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties." *Kisor*, 139 S. Ct. at 2417–18 (quoting *Long Island Care at Home*, *Ltd. v. Coke*, 551 U.S. 158, 170 (2007)). A "disruption of expectations may occur when an agency substitutes one view of a rule for another" and, therefore, courts "rarely give[] *Auer* deference to an agency construction 'conflict[ing] with a prior' one." *Id.* (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

In short, "[t]here are 'strong reasons' for withholding deference from an agency's interpretation of an ambiguous regulation when an agency acquiesces in an interpretation for an extended period of time and then changes its interpretation to

sanction [past] conduct ….” *Perez*, 803 F.3d at 943 (en banc); *see also id.* at 943–44 (Melloy, J., dissenting) (“The majority correctly notes that the Secretary’s deviation from a longstanding interpretation of a regulation can be a factor in assessing the reasonableness of a new interpretation.”). But the District Court below incorrectly deferred to the agency’s interpretation of its review regulation, even though that interpretation was advanced for the first time in litigation. App. 78–79; R. Doc. 47, at 22–23.

Finally, Appellees’ “new argument” standard is not only a convenient litigation position inconsistent with past practice, but also unworkable in practice. Under the “new argument” standard, a farmer would never be able to get a review of a certification, even with advancements in technology or better understanding of wetlands science. In fact, Appellees’ argument goes against NRCS’s own practice. Based on advancements in scientific understanding, the agency continually updates its standards for determining wetland hydrology. *See* 86 Fed. Reg. 52,632-02 (Sept. 22, 2021). But according to Appellees, farmers who previously made an argument related to wetland hydrology cannot argue hydrology in the future, even if new data emerges or new standards apply.

In 2017, Appellees stated that they would not review the 2011 Certification unless Foster provided new information. In 2020, Foster provided new information, but the agency still refused to review the previous delineation. Then, after this suit

was filed, the agency argued that what the agency said in 2017 is not what it meant. The agency's refusal to even accept the review request to assess the new information is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

B. Alternatively, if NRCS's denial is not final agency action, then NRCS is unlawfully withholding agency action.

Below, the District Court correctly held that NRCS's denial of Foster's requests for review was final agency action. App. 76; R. Doc. 47, at 20. If this Court disagrees with the District Court on that issue, it should still reverse the District Court's judgment because the APA authorizes courts to "compel agency action unlawfully withheld …." 5 U.S.C. § 706(1). As demonstrated above, Swampbuster imposes an unambiguous statutory requirement that NRCS accept a farmer's request to review an existing wetland certification. *See* Argument Section I, *supra*. In this case, Foster is merely requesting that the Court compel NRCS to review the existing certification, not determine what the agency should conclude after it completes the review. That falls within the scope of § 706(1), which empowers a court "to compel an agency … to take action upon a matter, without directing *how* it shall act." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (quotations omitted).

CONCLUSION

This Court should reverse the judgment of the District Court. It should further direct the District Court to hold unlawful and set aside the Review Regulation and direct Appellees to accept Foster's request to review the 2011 Certification.

DATED: September 28, 2022.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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DATED: September 28, 2022.

s/ Jeffrey W. McCoy
JEFFREY W. McCOY

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