IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

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CTM HOLDINGS, LLC, an Iowa limited liability company,

Plaintiff,

vs.

THE UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, in his official capacity as the Secretary of the United States Department of Agriculture; THE NATURAL RESOURCES CONSERVATION SERVICE; TERRY COSBY, in his official capacity as Chief of the Natural Resources Conservation Service; and JON HUBBERT, in his official capacity as Iowa State Conservationist,

Defendants.
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No. 24-cv-02016-CJW-MAR

SUSTAINABLE AGRICULTURE GROUPS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS
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</table>

Table of Contents

I. INTRODUCTION 1
II. LEGAL STANDARD 1
III. ARGUMENT 2
A. Judgment on the pleadings is inappropriate due to outstanding factual disputes. 2
B. Issue preclusion counsels against granting judgment on the pleadings. 4
C. Plaintiff's legal arguments do not entitle them to judgment as a matter of law. 7
1. Swampbuster is a valid exercise of Congress's Spending Power. 7
2. Swampbuster does not constitute a taking of private land. 10
a. Swampbuster is not a regulatory taking. 11
b. Swampbuster does not create a conservation easement so as to effect a taking. 13
3. The challenged rules do not exceed Congress's authority. 14
a. The certification review rule is consistent with the Food Security Act. 14
b. The converted wetland rule is consistent with the Food Security Act. 18
IV. CONCLUSION 20

Table of Authorities

Cases

Armstrong v. United States, 124 U.S. 40 (1960) 11
Ashcroft v. Iqbal, 556 U.S. 662 (2009) 1
Auto-Owners Mut. Ins. Co. v. Coffin, No. 4:22-cv-00129, 2023 WL 347910 (S.D. Iowa May 1, 2023) 2
Ballanger v. Johanns, 451 F. Supp. 2d 1061 (S.D. Iowa 2006) 19, 20
Ballanger v. Johanns, 495 F.3d 866 (8th Cir. 2007) 19
Barnhart v. Walton, 525 U.S. 212 (2002) 18
Buck v. Reserve, No. CVCV052364, 2017 WL 11597038 (Iowa Dist. Dec. 19, 2017) 5, 6
California v. Texas, 593 U.S. 659, (2021) 3, 4
Ciampitti v. United States, 22 Cl. Ct. 310 (1991) 12, 13
Country Preferred Ins. Co. v. Lee, 918 F.3d 587 (8th Cir. 2019) 2
Ellis v. City of Minneapolis, 860 F.3d 1106 (8th Cir. 2017) 1
Fed. Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941) 20
Foster v. U.S. Dep't of Agric., 144 S. Ct. 2707 (2024) 6, 8, 9
Foster v. U.S. Dep't of Agric., 609 F. Supp. 3d 769 (D.S.D. 2022) .... passim
Foster v. U.S. Dep't of Agric., 68 F.4th 372, 376 (8th Cir. 2023) .... passim
Griffin v. Oceanic Contractors Inc., 458 U.S. 564 (1982) 17
Gunn v. USDA, 118 F.3d 1233 (8th Cir. 1997) 16, 19
Haney v. Portfolio Recovery Assocs., L.L.C., 837 F.3d 918 (8th Cir. 2016) 1
Horn Farms, Inc. v. Johanns, 397 F.3d 472 (7th Cir. 2005) 9, 10
Horn Farms, Inc. v. Johanns, 547 U.S. 1018 (2006) 9
Kemin Foods, L.C. v. Pigmentos Vegetales, 384 F. Supp. 2d 1334, 1351–52 (S.D. Iowa 2005)4, 7
Kiefer v. Isanti Cnty., 71 F.4th 1149 (8th Cir. 2023) 2, 7, 11
Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) 12
Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024) .... passim
Lyons v. Andersen, 123 F. Supp. 2d 485 (N.D. Iowa 2000) 5
Manion v. Nagin, 394 F.3d 1062 (8th Cir. 2005) 4
Nat'l Union Fire Ins. Co. v. Cargill, Inc., 61 F.4th 615 (8th Cir. 2023) 2
Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) 11, 12
Porous Media Corp. v. Pall Corp., 186 F.3d 1077 (8th Cir. 1999) 2, 8
Royal Ins. Co. of Am. V. Kirksville College, 304 F.3d 804 (8th Cir. 2002) 5
S. Dakota v. Dole, 483 U.S. 203 (1987) 8
Sackett v. EPA, 598 U.S. 651 (2023) 7
Scott v. City of Sherwood, 94 F.4th 778 (8th Cir. 2024) 5
United States v. Causby, 328 U.S. 256 (1946) 11
United States v. Dierckman, 201 F.3d 915 (7th Cir. 2000) 9
United States v. Huyser, 697 F. Supp. 3d 873 (S.D. Iowa 2023) 5
Voigt v. U.S. EPA, 46 F.4th 895 (8th Cir. 2022) 15

Statutes

16 U.S.C. § 3801(a)(7)(A) 18

16 U.S.C. § 3822(a)(3)(B) 17
16 U.S.C. § 3822(a)(4) 15
16 U.S.C. § 3846(a) 15
16 U.S.C. § 3865c 13
16 U.S.C. 3821(a) 12
IOWA CODE § 457A.1 13
IOWA CODE § 457A.2 13

Other Authorities

142 Cong. Rec. S4420 16
142 Cong. Rec. S4420 (daily ed. Apr. 30, 1996) (statement of Sen. Charles Grassley) 16
Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649, tit. 2, §§ 2201-2713 18
Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, tit. 2, §§ 2101-2822 18
Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134, tit. 2, §§ 2001-2702 18
Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1422, 104 Stat. 3359 16
Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, tit. 2, §§ 2001-2003 18

Regulations

7 C.F.R § 12.30(c)(6) 15
7 C.F.R. 12.2(a) 19

I. INTRODUCTION

Plaintiff filed a motion for judgment on the pleadings (MJOP), ECF No. 29, but its brief does not contain a single reference to a single pleading. Plaintiff fails to even cite to its own Complaint, let alone acknowledge the numerous and meaningful denials contained in Defendants' Answer. Instead, the MJOP consists solely of legal arguments based on legal conclusions, untethered to well-pled facts. Rule 12(c) does not grant eager parties a license to gloss over facts, and simply ignoring factual disputes does not make them disappear or become immaterial. Motions for judgment on the pleadings are only appropriate where there are no disputed issues of material fact. Here, disputed fact issues abound. Moreover, even if they had been factually supported, Plaintiff's legal arguments would still be wrong. On nearly every issue, the MJOP fails to acknowledge, let alone grapple with, controlling precedent that dictates the opposite outcome from the one Plaintiff seeks. Plaintiff also fails to alert the Court to a similar case currently pending before the Eighth Circuit—brought by Plaintiff's counsel—that overlaps substantially with the legal claims in this case.[1] The MJOP should be denied.

II. LEGAL STANDARD

Rule 12(c) motions for judgment on the pleadings are governed by the same standard used to assess motions to dismiss under Rule 12(b)(6). *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1109–10 (8th Cir. 2017) (citing *Haney v. Portfolio Recovery Assocs., L.L.C.*, 837 F.3d 918, 924 (8th Cir. 2016)). Such motions may only be granted if the complaint pleads factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In deciding a 12(c) motion, courts

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[1] *See Foster v. U.S. Dep't of Agric.*, 609 F. Supp. 3d 769, 781 (D.S.D. 2022), *aff'd*, 68 F.4th 372 (8th Cir. 2023), *cert. granted, judgment vacated sub nom. Foster v. U.S. Dep't of Agric*., 144 S. Ct. 2707 (2024).

cannot rely on factual materials outside the pleadings, including case law that is provided to prove a factual allegation. *Kiefer v. Isanti Cnty.*, 71 F.4th 1149, 1154 (8th Cir. 2023) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)). Additionally, "judgment on the pleadings is appropriate only when there is no dispute as to any material facts and the moving party is entitled to judgment as a matter of law." *Nat'l Union Fire Ins. Co. v. Cargill, Inc.*, 61 F.4th 615, 619 (8th Cir. 2023); *Country Preferred Ins. Co. v. Lee*, 918 F.3d 587, 588 (8th Cir. 2019); *Auto-Owners Mut. Ins. Co. v. Coffin*, No. 4:22-cv-00129, 2023 WL 347910 (S.D. Iowa May 1, 2023). Importantly, material issues of fact may arise from a defendant plausibly asserting an affirmative defense or filing a responsive pleading that denies the complaint's factual allegations. *Auto-Owners Mut. Ins. Co.*, 2023 WL 347910 , at *5–7.

III. ARGUMENT

A. Judgment on the pleadings is inappropriate due to outstanding factual disputes.

Plaintiff is not entitled to judgment on the pleadings because, as indicated by the many denials in Defendants' answer,[2] numerous issues of material fact must first be resolved. These outstanding issues include, but are not limited to:

- Whether Plaintiff will lose all access to USDA benefits for its farmland in Delaware County, Iowa if it uses its nine-acre wetland for anything aside from conservation, Answer, Dkt. 17, ¶ 2;
- Whether Swampbuster "imposes compulsory conservation" on farmers, *id.* ¶ 16;
- Whether Sodbuster pays farmers market rent to conserve highly erodible land, *id.* ¶ 17;
- Whether the forested land on Plaintiff's property is permanently or seasonally saturated with water or connected to any water body, *id.* ¶ 39;
- Whether the nine acres of wetland on Plaintiff's property are distinguishable from the property's nonwetlands, contain standing water, or are visibly wet, *id.* ¶ 46;

[2] Defendants have also asserted eight affirmative defenses, including collateral estoppel, discussed further below, which raise additional issues of material fact.

- Whether draining, dredging, developing, or farming Plaintiff's wetlands would cause Plaintiff to lose its remaining Conservation Reserve Program payments and allow the USDA to demand a refund of the past eight years' worth of payments, *id.* ¶ 48;
- Whether draining, dredging, developing, or farming Plaintiff's wetlands would cause the Plaintiff's tenant to lose its crop insurance subsidy, *id.* ¶ 49; and
- Whether USDA's administrative rules preclude Plaintiff from removing trees from its wetland, *id.* ¶ 52.

Notably, the pleadings raise a serious factual dispute as to whether Plaintiff even has standing. A plaintiff has standing only if he can "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 593 U.S. 659, 668–69 (2021). "The Declaratory Judgment Act [] alone does not provide a court with jurisdiction." *Id.* at 672. Instead, "declaratory-judgment actions must satisfy Article III's case-or-controversy requirement." *Id.* The entire basis of Plaintiff's alleged injury is that Swampbuster will "force Plaintiff to choose between keeping 9 acres of land out of crop production in order to keep USDA benefits," Compl. ¶ 47, and that if Plaintiff does fill its wetlands, it will be harmed by the loss of those benefits. *See generally id.* ¶¶ 47–54 (section titled "Injury to Plaintiffs").[3] Throughout its answer, however, Defendants consistently deny Plaintiff's factual assertions about how the Swampbuster program works and that Plaintiff will lose its benefits if it takes the actions it claims it wants to take.

For example, Defendants deny that if Plaintiff chose to develop its wetlands, it would lose USDA benefits. *See* Answer ¶¶ 48, 49. Defendants also deny: (1) that unless this Court quickly enjoins Swampbuster, Plaintiff will "be unable to plant its crop on the [wetland]," *id.* ¶ 51; (2) that "Plaintiff cannot remove the trees from the wetland because of the administrative rule prohibiting removal of woody vegetation," *id.* ¶ 52; and (3) that Plaintiff cannot appeal NRCS's wetland determination because of USDA's determination rules, *id.* ¶ 53. Defendants' denials on these

[3] This section of the complaint uses the plural form of Plaintiff, even though the complaint only identifies one Plaintiff: CTM Holdings, LLC. *See* Compl. ¶ 2.

points seriously undermine Plaintiff's ability to establish standing. And of course, Plaintiff's allegation that its "tenants" might lose their benefits if Plaintiff chooses to fill its wetlands, *id.* at ¶¶ 48, 50, 54, does not—even on its face—support standing or injury on behalf of the Plaintiff.

It may not be surprising that Plaintiff and Defendants disagree on these basic facts, as Plaintiff appears to fundamentally misunderstand how Swampbuster and other USDA conservation programs operate. However, the lack of accord is meaningful at this stage. "Judgment on the pleadings is only appropriate when the moving party has clearly established no material issue of fact remains." *Kemin Foods, L.C. v. Pigmentos Vegetales*, 384 F. Supp. 2d 1334, 1351–52 (S.D. Iowa 2005). There are few issues more material than whether a plaintiff has standing. If Plaintiff does not have standing, this Court does not have jurisdiction, and any ruling—including an order granting judgment on the pleadings—"would amount to an advisory opinion without the possibility of an Article III remedy." *California*, 593 U.S. at 661.

Because the pleadings reveal numerous material issues of disputed fact, including whether Plaintiff stands to suffer any legally cognizable injuries, Plaintiff's MJOP must be denied. *Id.*[4]

B. Issue preclusion counsels against granting judgment on the pleadings.

Courts in the Eighth Circuit "look to state law in determining whether to apply issue preclusion." *Manion v. Nagin*, 394 F.3d 1062, 1066 (8th Cir. 2005) (citation omitted). In Iowa, "[i]ssue preclusion prohibits relitigation when (1) the issue sought to be precluded in the second suit is the same as that from the first suit; (2) the issue was litigated in the first suit; (3) the issue was determined by a valid and final judgment in the first suit; and (4) the determination of that issue was essential to the judgment in the first suit." *Scott v. City of Sherwood*, 94 F.4th 778, 780

[4] Even if all Plaintiff's standing-related facts were undisputed (and they are not), there is still serious doubt as to whether these facts are sufficient to establish standing. Plaintiff purchased the land with knowledge of the pre-existing wetland designation and the potential limitations of use from complying with Swampbuster. The purchase price would likely have reflected the possibility of the exact circumstances Plaintiff now claims is an injury.

(8th Cir. 2024). While issue preclusion's bar on litigation was traditionally reserved for use against parties who participated in the original lawsuit, *United States v. Huyser*, 697 F. Supp. 3d 873, 879 (S.D. Iowa 2023), courts now permit use of issue preclusion, also known as collateral estoppel, for defensive purposes against a party who is "so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and properly be bound by its resolution." *Lyons v. Andersen*, 123 F. Supp. 2d 485, 491–98 (N.D. Iowa 2000). This standard has been interpreted to effect preclusion where "the nonmutual party against whom the doctrine is invoked has a 'community of interest with, and adequate representation by, the losing party in the first action.'" *Buck v. Reserve*, No. CVCV052364, 2017 WL 11597038, at *6–7 (Iowa Dist. Dec. 19, 2017); *see also Royal Ins. Co. of Am. V. Kirksville College*, 304 F.3d 804, 808 (8th Cir. 2002) (citation omitted). Notably, "shar[ing] the same attorney" is a relevant factor in determining whether two parties' interests are "so connected" that issue preclusion may be invoked against one based on earlier litigation in which the other participated. *Buck*, 2017 WL 11597038, at *6–8.

In 2021, counsel for Plaintiff CTM Holdings—the Pacific Legal Foundation—filed a lawsuit on behalf of a separate plaintiff in a case referred to as *Foster v. U.S. Dep't of Agric.*, 609 F. Supp. 3d 769, 779–782 (D.S.D. 2022); *see* ECF Case No. 21-cv-04081-RAL (District of South Dakota); *see also* ECF Case No. 22-2729 (Eighth Circuit). That case similarly sought to invalidate Swampbuster and raised many of the same claims at issue here, including the claims that Swampbuster violates the Commerce Clause, and that 7 C.F.R. § 12.30(c)(6) exceeds USDA's statutory authority. *Id.* The district court in that case ruled that the plaintiff's constitutional claims were barred, but even on their merits, would not have succeeded. *Id.* That ruling was affirmed by the Eighth Circuit in *Foster v. U.S. Dep't of Agric.*, 68 F.4th 372, 376 (8th Cir. 2023), and counsel

for Plaintiff CTM Holdings sought *certiorari* at the U.S. Supreme Court for review of some, but not all, of the claims that were decided by the lower courts. The Court granted *certiorari* and remanded the case to the Eighth Circuit to decide a single issue: whether the recent Supreme Court opinion in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) impacts the lower court's conclusion as to whether 7 C.F.R. § 12.30(c)(6) exceeds USDA's statutory authority. *Foster v. U.S. Dep't of Agric.*, 144 S. Ct. 2707 (2024). In other words, the Eighth Circuit's holdings in *Foster v. USDA*, 68 F.4th 372, 376 (8th Cir. 2023) remain intact with the sole exception of whether 7 C.F.R. § 12.30(c)(6) exceeds USDA's statutory authority (that issue is discussed below at section III.C.3.). The remand on that single issue was pending at the time of this filing.

The doctrine of collateral estoppel counsels against granting Plaintiff's motion because many of the underlying issues have already been decided against a party who is so connected through counsel as to share an overlapping community of interest with CTM Holdings. Indeed, the series of holdings in the *Foster* litigation—which have already either passed the deadline for appeal or been reviewed by the highest court in the land—demonstrate that Swampbuster does not violate the Commerce Clause. *See Buck*, 2017 WL 11597038 at *6 (lack of final judgment does not bar issue preclusion where the earlier court's ruling "was final and conclusive" as to the underlying issue). Thus, at least one of the issues raised by Plaintiff is precluded. Further, even if issue preclusion does not apply, the fact that the Eighth Circuit is actively considering a case that deals with many of the same legal issues as are raised here counsels against granting judgment on the merits at this early stage of the case.

C. Plaintiff's legal arguments do not entitle them to judgment as a matter of law.

Each of Plaintiff's specific legal arguments fails because they are nothing more than "unsupported conclusions or interpretations of law." *Kemin Foods*, 384 F. Supp. 2d at 1351–52. Specifically, each of Plaintiff's claims is unsupported by the pleadings, unsupported by uncontroverted fact, and unsupported by controlling legal precedent. As such, Plaintiff's claims pertaining to the Commerce Clause, Takings Clause, and the scope of USDA's authority under the Swampbuster statute are meritless.

1. Swampbuster is a valid exercise of Congress's Spending Power.

Plaintiff's argument that Swampbuster exceeds Congress's power under the Commerce Clause suffers two problems: (1) the pleadings contradict the predicate factual bases on which Plaintiff's arguments rely, and (2) Plaintiff's arguments misstate the law.

With respect to the first issue, to support its Commerce Clause argument, Plaintiff makes three factual assertions: (1) "Swampbuster applies to all farmland for which the owner has applied or is receiving USDA benefits"; (2) "unlike 'wetlands' under the Clean Water Act, 'wetlands' under Swampbuster are not required to be adjacent or connected to navigable waters"; and (3) "[r]ather, Swampbuster reaches features that are purely intrastate." MJOP at 4. Accordingly, in Plaintiff's view, these combined facts mean that "Swampbuster exceeds Congress's power under the Commerce Clause." None of these factual assertions—which are little more than "interpretations of law," *Kemin Foods*, 384 F. Supp. 2d at 1351–52—are supported by the pleadings. Plaintiff does not provide any support for its first assertion at all, and Plaintiff supports the remaining assertions by citation to a Supreme Court decision, *Sackett v. EPA*, 598 U.S. 651, 679 (2023). But when deciding a 12(c) motion, courts cannot rely on factual materials outside the pleadings, including case law that is provided to prove a factual allegation. *Kiefer*, 71 F.4th at

1154 (citing *Porous Media Corp.*, 186 F.3d at 1079). As a result, the Court cannot accept these factual assertions as true. More to the point, all three of these assertions are directly contradicted by the Defendants' Answer. *See* Answer ¶ 60 (denying that "[i]ntrastate wetlands are not instrumentalities or goods in interstate commerce and they have no substantial effect on interstate commerce"); *id.* at ¶ 61 (denying that "[t]he purported wetlands on CTM's property are not connected to any navigable waterways and are purely intrastate," and that "[t]he purported wetlands are not instrumentalities or goods in interstate commerce and they have no substantial effect on interstate commerce"); *id.* at ¶ 62 (denying that "Swampbuster, both on its face and as applied to Defendants' regulation of CTM's property, exceeds Congress's power under the Commerce Clause."). Judgment on the pleadings should be denied on this basis alone.

With respect to Plaintiff's legal arguments, courts have made clear that the Spending Clause—not the Commerce Clause—governs the constitutionality of Swampbuster and similar voluntary benefits programs. *Foster*, 609 F. Supp. 3d at 781, *aff'd*, 68 F.4th 372 (8th Cir. 2023), *cert. granted, judgment vacated sub nom. Foster v. USDA*, 144 S. Ct. 2707 (2024). The U.S. Supreme Court has long recognized that pursuant to its Spending Powers, Congress may "condition[] receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987). Moreover, Congress's Spending Powers are not "not limited by the direct grants of legislative power found in the Constitution." *Id.* In other words, even if Congress might lack the authority under the Commerce Clause to directly regulate an intrastate wetland, the voluntary incentives provided through Swampbuster are still valid exercises of Congress's Spending Powers. *Id.* at 209.

The Eighth Circuit has already recognized that Swampbuster validly "conditions the receipt of farm benefits on the preservation of wetlands," and that the Commerce Clause is not controlling.

Foster, 609 F. Supp. 3d at 781, *aff'd*, 68 F.4th 372 (8th Cir. 2023), *cert. granted, judgment vacated sub nom. Foster v. USDA*, 144 S. Ct. 2707 (2024) (granting certiorari and ordering remand on issues unrelated to the constitutionality of Swampbuster) (citing *United States v. Dierckman*, 201 F.3d 915, 922–23 (7th Cir. 2000)). In *Foster*, the Eighth Circuit explicitly ruled that "the Swampbuster Act is within Congress's Article I § 8 spending power," and is "not an exercise of direct regulatory power." *Id.* As a result, Swampbuster does not violate the constitution. *Id.* The MJOP does not attempt to distinguish—or even mention—the Eighth Circuit's holding in the *Foster* case. The *Foster* case disposes of Plaintiff's Commerce Clause arguments, and the Court should reject the MJOP on that basis.

The Seventh Circuit has also upheld Swampbuster as a valid exercise of the spending power. In *United States v. Dierckman*, the Seventh Circuit found the Swampbuster provision to be constitutional under Congress's Spending Clause authority, noting that the claimant's "argument falters because it assumes that the [Food Security Act] is "a creature of the Commerce Clause." *Dierckman*, 201 F.3d at 922–23.

Five years later, the Seventh Circuit in *Horn Farms, Inc. v. Johanns* once again upheld Swampbuster. 397 F.3d 472, 476–78 (7th Cir. 2005), *cert. denied*, *Horn Farms, Inc. v. Johanns*, 547 U.S. 1018 (2006). The court disagreed that the program was an "unduly coercive" exercise of Congress's Spending Power, noting that "[e]ven the scholars most skeptical of Congress' use of conditional spending to achieve substantive goals would not think this legislation problematic." *Id.* at 477. Farmers are free to choose whether to comply with Swampbuster in exchange for taxpayer subsidies, or to forego federal monies and farm their land as they wish. And, in fact, many farmers choose not to participate. USDA estimates for 2020 show that 5,996 corn farmers in Iowa

(roughly 28%) did not participate in the subsidy programs, while 21,429 did (roughly 72%).[5] The court further noted that because Swampbuster is valid under the Spending Clause, it was "unnecessary to determine whether the legislation could be supported at any event by the national commerce power." *Horn Farms,* 397 F.3d at 477. The Seventh Circuit also issued a warning to litigants seeking to invalidate Swampbuster: "The sort of argument Horn Farms presses would demolish, not the Swampbuster legislation, but the whole system of agricultural subsidies, and indeed all federal legislation (including tax credits and deductions) linking financial rewards to the satisfaction of conditions. Horn Farms could not gain from such a decision." *Id*.

Swampbuster is a valid exercise of Congress's spending power, and the MJOP fails to grapple with—or even mention—the Seventh and Eighth Circuits' rejection of Plaintiff's arguments on that basis. The Court should deny Plaintiff's motion.

2. Swampbuster does not constitute a taking of private land.

Plaintiff next argues that Swampbuster somehow effects a taking of private land without just compensation in violation of the Fifth Amendment's Takings Clause. Once again, this argument is unsupported by fact or law. As an initial matter, the key facts on which Plaintiff's arguments rely are disputed. Both of Plaintiff's Takings arguments turn on Plaintiff's assertion that "Swampbuster, in effect, requires farmers to transfer a conservation easement to the government that limits farmers' use of wetlands." MJOP at 9; *see also* MJOP at 11 ("Swampbuster requires a farmer to transfer a conservation easement to NRCS as a condition of receiving benefits.") These factual assertions that Swampbuster is a conservation easement, and therefore a taking, are not facts that are entitled to the presumption of truth. Rather, they are "nothing more

[5] USDA, *Tailored Report - report: Government Payments, Sub report: Farm Payment Status, Subject: All Farms, Filter 1. Production Specialty > Corn, Region: Iowa,* Tailored Reports (Dec. 14, 2023), https://my.data.ers.usda.gov/arms/tailored-reports.

than threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Kiefer*, 71 F.4th at 1153, *cert. denied*, 144 S. Ct. 353, 217 L. Ed. 2d 189 (2023) (cleaned up). Regardless, Defendants have denied Plaintiff's assertions that Swampbuster is akin to an easement. *See* Answer ¶ 1 (denying that "[i]f the government designates any part of a farmer's land as a wetland, it effectively obtains a conservation easement over that portion of the property" and that "the USDA conditions federal benefits on the relinquishment of farmland for conservation easements—without providing just compensation for the taking"); *see also id.* ¶¶ 2, 3, 79.

These denials raise a dispute about a material fact and judgment on the pleadings should be denied on this basis alone. In any case, Plaintiff's legal arguments are also off the mark.

a. Swampbuster is not a regulatory taking.

The takings doctrine necessarily requires that the government actually take the property by appropriating it, *United States v. Causby*, 328 U.S. 256 (1946), or by regulating it in a way that goes too far, generally such that modification is either required or prohibited. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124–27 (1978). The Fifth Amendment's guarantee is designed to bar government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 124 U.S. 40, 49 (1960).

Swampbuster is not a regulation. The Eighth Circuit has already ruled that Swampbuster "is not an exercise of direct regulatory power." *Foster*, 609 F. Supp. 3d at 781. Instead, it is a voluntary exchange which "conditions the receipt of USDA farm benefits on the preservation of wetlands." *Id.* Plaintiff correctly concedes that *Nollan* and *Dolan* do not apply to this case, MJOP at 13, but proceeds to apply the test articulated in those cases. In those cases, land use permits imposed conditions on developers and "the issue was whether the exactions substantially advanced

the *same* interests that land-use authorities asserted would allow them to deny the permit altogether." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547, 125 S. Ct. 2074, 2087, 161 L. Ed. 2d 876 (2005) (emphasis in original). The "proportionality" test of *Nollan* and *Dolan* does not apply in this case because Swampbuster does not involve any permits. Rather, Swampbuster is a voluntary program under which farmers may choose to access taxpayer subsidies in exchange for not destroying wetlands.

Even if Swampbuster were viewed as a regulation, it does not exact a taking. Takings jurisprudence "focuses [] both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Penn Cent.*, 438 U.S. at 130–31. In order to be a taking, the regulation must "cause a denial of all economically viable use of the property." *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991) (citing *Penn Central*). Swampbuster does not deny benefits recipients "all economically viable use," *id.*, of their property. The plain language of the Food Security Act demonstrates that farmers may fill, dredge, or modify their wetlands however they like as long as they do not "produce[] an agricultural commodity" on that converted wetland. 16 U.S.C. 3821(a). In other words, Plaintiff is free to drain its nine-acre wetland and use the land as a site for a hotel, a residence, a wedding venue, or any number of other economically beneficial purposes. So long as an agricultural commodity is not being produced on it, Plaintiff can still derive income from the wetland acreage and keep USDA benefits. *Id.*

Additionally, when considering a tract of land with wetlands and adjacent uplands, a court may not focus on simply the wetland and "ignore whatever rights might remain in the uplands." *Ciampitti*, 22 Cl. Ct. at 318–19. In fact, if the government "required a buffer . . . around a housing development, a court would not entertain a separate claim for the land dedicated to buffer" but instead would consider the extent to which the whole parcel, including the buffer, can be used. *Id.*

The "parcel as a whole" at issue here is the 71.85 acre "Property" Plaintiff refers to in the complaint, not the nine-acre wetland. Even if Plaintiff chooses to maintain the wetland, Plaintiff is still free to use the remainder of the Property for agriculture in whatever manner it wishes. As a result, Swampbuster does not "ha[ve] the effect of taking all economically viable use of the property." *Id.* at 318.

For all these reasons, the takings cases on which the MJOP relies are inapplicable and do not support judgment in Plaintiff's favor.

b. Swampbuster does not create a conservation easement so as to effect a taking.

Contrary to Plaintiff's assertions, Swampbuster does not create a conservation easement. Indeed, under federal law, conservation easements are addressed by an entirely different provision of the Food Security Act, 16 U.S.C. § 3865c. Under the wetland conservation easement program, USDA "shall pay as compensation for a permanent wetland reserve easement acquired under the program an amount necessary to encourage enrollment in the program . . . ." 16 U.S.C. § 3865c. In other words, federal wetland easements, like Swampbuster, are entirely voluntary, and participating farmers receive financial benefits in exchange for their decision to enroll in the wetlands easement program. The MJOP ignores these provisions altogether and instead relies on Iowa easement law under which a conservation easement is "an easement in, servitude upon, restriction upon the use of, or other interest in land owned by another, created for any of a list of purposes, including wetland preservation." IOWA CODE § 457A.2. But the fact that Iowa law allows for conservation easements does not support Plaintiff's tortured argument that Swampbuster effects a taking. Indeed, Plaintiff ignores the portion of Iowa law which makes clear that Iowa easements are also entirely voluntary. *See* IOWA CODE § 457A.1 (certain state entities "may acquire

by purchase, gift, contract, or other voluntary means, but not by eminent domain, conservation easements in land . . . .”).

The condition imposed by Swampbuster is not a conservation easement, but even if it were, it would not constitute a taking because all three programs—Swampbuster, federal wetland easements, and Iowa state conservation easements—provide compensation to the farmers who choose to enroll in them. Once again, contrary to Plaintiff's conclusory statement (MJOP at 9), there is no “restriction upon the use of” Plaintiff's land mandated by Swampbuster. If a farmer wishes to receive federal subsidies, it must, in exchange, comply with Swampbuster. It's that simple. Plaintiff's argument that this voluntary program, which provides farmers access to billions of dollars of federal taxpayer subsidies, somehow constitutes a taking is borderline frivolous.

The Plaintiff has not shown that Swampbuster meets the definition of a conservation easement, let alone a taking in violation of constitutional rights.

3. The challenged rules do not exceed Congress's authority.

As discussed above, Plaintiff's challenge to the certification review rule is the same as the pending challenge before the Eighth Circuit in *Foster v. USDA*, section III.B. The U.S. Supreme Court granted certiorari and remanded the case to the Eighth Circuit to decide whether *Loper* impacts the lower court's conclusion that 7 C.F.R. § 12.30(c)(6) is consistent with USDA's statutory authority. The remand on that issue is pending and will create binding precedent for this court. While this court could wait until the Eighth Circuit rules in *Foster*, the analysis under *Loper* supports holding that the certification rule is consistent with the Swampbuster Act.

a. The certification review rule is consistent with the Food Security Act.

The Supreme Court has held that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . .” *Loper*, 144 S. Ct. at 2273.

The first step in this analysis is a determination of whether the statute is ambiguous. Courts must simply apply unambiguous statutes. *Voigt v. U.S. EPA*, 46 F.4th 895, 901 (8th Cir. 2022). In cases of ambiguity, "courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity." *Loper*, 144 S. Ct. at 2266. Even in overturning *Chevron* deference, the Supreme Court recognized that an agency's interpretation of the statute is one such tool that "may be especially informative" and persuasive due to the agency's expertise. *Id.* at 2267.

The Swampbuster statute provides that a wetland 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). This section of statute is silent as to what constitutes a valid request for review.

USDA recognized that an unlimited opportunity for certification review would be unworkable and irrational and exercised its statutory authority to issue a rule to implement Swampbuster certification review. 16 U.S.C. § 3846(a) ("The Secretary shall promulgate such regulations as are necessary to implement programs under this chapter . . . ."). The USDA rule specifies that "[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).

USDA's interpretation of the statute is the best reading of the statute. It is consistent with the legislative intent of the Swampbuster amendments, the purpose and text of the statute, and the agency's longstanding interpretation that Congress has implicitly approved.

Legislative history. The Eighth Circuit has previously reviewed the Swampbuster certification statute in *Foster v. USDA*, 68 F.4th 372 (8th Cir. 2023). The Plaintiff in *Foster* sought

the same broad interpretation of the statue to allow farmers the ability to make unlimited review requests as CTM Holdings does here. *Id.* at 337; MJOP at 18. Prior to the 1996 Swampbuster Act amendments, the law required the Secretary to periodically review wetland determinations as the Secretary deemed appropriate. *See* Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1422, 104 Stat. 3359, 3573 (formerly codified at 16 U.S.C. § 3822(a)(4) (1995) ("The Secretary shall provide by regulation a process for the periodic review and update of such wetland delineations as the Secretary deems appropriate.")). The Eighth Circuit reviewed the legislative history of the 1996 Swampbuster amendments in *Foster* and recounted how the NRCS application of aerial photography to delineate new wetlands created Congressional concern about uncertainty. *Foster*, 68 F.4th at 377 (citing 142 Cong. Rec. S4420 (daily ed. Apr. 30, 1996) (statement of Sen. Charles Grassley)). The amendment to the certification provision was solely to provide farmers certainty from changing wetlands delineations "'[by] allow[ing] prior delineations of wetlands to be changed only upon request of the farmer.'" *Id.* (citing 142 Cong. Rec. S4420). A unanimous Eighth Circuit panel concluded that "[n]othing 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." *Foster*, 68 F.4th at 377. While *Foster* was vacated and remanded for the Eighth Circuit to apply the *Loper* standard, the legislative history summarized by the *Foster* court does not change. The legislative history supports the certification review rule as consistent with USDA's statutory authority.

Statutory Context. The Swampbuster statute and the text of the certification review provisions support USDA's statutory interpretation and undercut Plaintiff's. The general purpose of the Swampbuster statute is "to preserve those wetland characteristics still in existence in 1985." *Gunn v. USDA*, 118 F.3d 1233, 1238 (8th Cir. 1997). Plaintiff's interpretation of the statute is

inconsistent with the general purpose of the statute and leads to absurd results. *See Griffin v. Oceanic Contractors Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.") Plaintiff's position is that a farmer has the ability to file a review at any time without any limiting principle. CTM's interpretation would allow a farmer to file a request for review on the exact same facts immediately after an NRCS determination has been upheld on appeal. This would allow a farmer who simply disagrees with Congress' decision to implement Swampbuster to nullify its application to the individual farmer with countless review requests. Such a result is absurd and inconsistent with the general purpose of the statute.

Further, the Swampbuster certification review provision provides a process for a farmer that disagrees with an agency wetland determination to file an appeal before it becomes final. *See* 16 U.S.C. § 3822(a)(3)(B) ("[T]he Secretary shall . . . provide an opportunity to appeal the [wetland] certification prior to the certification becoming final.") Plaintiff's interpretation of the statute effectively reads the appeal process out of the statute and replaces it with an unlimited ability for a farmer to request a new review based on the certification review provision. There would be no need to have a separate appeal provision in the statute if a farmer could simply apply for a new determination on the same facts at any time. Courts read a statute to give meaning to all portions of the statute, and the certification review provision should not be read in a manner that renders the appeal provision meaningless. The agency's certification review rule gives meaning to the entire statute.

Agency Interpretation. While the court does not defer to the agency interpretation, the agency's long-standing and consistent interpretation can assist the court in its statutory interpretation. *Loper*, 144 S. Ct. at 2267. The agency's interpretation of the rule gives effect to

Swampbuster's statutory purpose as well as effect to the amendment's purpose. The agency issued its rule months after the 1996 amendments and a contemporaneous interpretation has additional value. *Loper*, 144 S. Ct. at 2262. The agency rule is necessary to responsibly allocate limited agency resources and allows NRCS to refuse to consider meritless (or previously decided) review requests. This prevents inconsistency and undue political influence in the process.

Further, as the 1996 amendments illustrate, when Congress has concerns with agency implementation of Swampbuster, it can and has amended the statute to address those concerns. Since the agency issued the certification review rule, Congress has repeatedly amended the Swampbuster Act but has not altered the certification review provision of the statute. *See* Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4530- 4603, tit. 2, §§ 2101-2822; Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649, 713-772, tit. 2, §§ 2201-2713; Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, 1025-1028, tit. 2, §§ 2001-2003; Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134, 223-280, tit. 2, §§ 2001-2702. That Congress has not felt compelled to address USDA's rule supports the rule as consistent with the statute. *See Barnhart v. Walton*, 525 U.S. 212, 220 (2002) ("These circumstances provide further evidence—if more is needed—that Congress intended the Agency's interpretation, or at least understood the interpretation as statutorily permissible.").

b. The converted wetland rule is consistent with the Food Security Act.

The Swampbuster statute defines converted wetland as one "that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) . . . ." 16 U.S.C. § 3801(a)(7)(A). "Otherwise manipulated" is a broad term that includes a variety of actions that could manipulate a wetland.

The agency rule addressed this by providing additional illustration of what manipulation of wetland includes and defined a converted wetland as "a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein." 7 C.F.R. 12.2(a).

Plaintiff argues that USDA enlarged the definition of converted wetland in its rule by adding language in the rule that was not in statute. The Southern District of Iowa and the Eighth Circuit have already addressed this exact issue: whether the inclusion of "removal of woody vegetation" in the definition of converted wetland rule expanded the statute. *Ballanger v. Johanns*, 451 F. Supp. 2d 1061, 1071 (S.D. Iowa 2006) *aff'd by* 495 F.3d 866, 871 (8th Cir. 2007) The *Ballanger* court concluded the rule was consistent with the statute. Plaintiff does not attempt to explain why *Ballanger* is not controlling; the MJOP does not reference the case at all. That alone forecloses judgment in Plaintiff's favor.

Even under the standard recently articulated in *Loper*, the *Ballanger* court's conclusion does not change. As discussed above, under *Loper*, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . ." *Loper*, 144. S. Ct. at 2273. Plaintiff's argument that USDA cannot provide a common example to elucidate the term "or otherwise manipulated" is contrary to the plain text of the statute, not to mention basic principles of statutory interpretation. The general purpose of the Swampbuster statute is to preserve wetlands and prevent their manipulation. *Gunn*, 118 F.3d at 1238 (emphasizing the role of "otherwise manipulated" in the statute). The plain meaning of "otherwise manipulated" encompasses removing something (e.g. vegetation) from an existing wetland. The parenthetical

language in the definition of converted wetland is illustrative language and does not limit the definition of converted wetland. *Ballanger*, 451 F. Supp. 2d at, 1071 (citing *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."). The agency rule adding "removal of woody vegetation" is another illustrative example and is plainly within the meaning of "otherwise manipulated."

Further, as noted above, Congress has not hesitated to amend the Swampbuster provisions when agency implementation has raised concerns. The wetland conversion definition and rule have been in place since the 1985 Act. The *Ballanger* decision came out in 2006. Congress has not amended the Swampbuster provisions in response.

IV. CONCLUSION

The pleadings reveal numerous and significant factual disputes, rendering judgment on the pleadings inappropriate. Plaintiff does not attempt to explain how these fact issues might be immaterial; Plaintiff's MJOP simply ignores them. Plaintiff's substantive legal arguments are also wrong because, among other reasons, Plaintiff also ignores controlling precedent that doesn't go Plaintiff's way. Boiled down, Plaintiff is arguing that it should be entitled to free taxpayer money with no strings attached. That is not the law. The MJOP should be denied.

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Respectfully Submitted,

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