

Wetlands/Swampbuster Act: Federal Court Addresses Constitutional/Certification Challenges



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The United States District Court for the Southern District of South Dakota (“Court”) addressed in a July 2022 Opinion issues arising out of the application of the Swampbuster Act. See *Foster v. USDA*, No. 4:21-CV-0408-RAL (S.D. Da. July 1, 2022).

The Swampbuster Act encompasses the wetland conservation provisions of the Food Security Act of 1985.

The questions considered by the Court included the constitutionality of the Swampbuster Act and whether a property was properly certified as a wetland.

The purpose of the Swampbuster Act is to “combat the disappearance of wetlands through their conversion into crop lands.” This is accomplished by preventing the distribution of federal farm benefits to anyone converting certified wetlands to croplands. Persons converting certified wetlands to crop lands are disqualified from federal farm benefits.

The certification of a wetland is valid and enforceable until either:

1. A natural event alters the topography or hydrology of the subject land; or
2. An affected person certification requests a review of the certification by the Natural Resource Conservation Service (“NRCS”) and it concurs that there is an error in the wetland determination

Foster owns .8 acres of property covered by approximately 8.5 inches of water at times of the year.

The NRCS and the United States Department of Agriculture (“USDA”) reviewed Foster’s land and certified it a “wetland” under the Swampbuster Act. In some years the water dries out. In other years the land cannot be farmed without draining the site. Foster cannot drain the certified wetland to farm it or surrounding land without forfeiting federal farm benefits.

Foster sought multiple reviews and appealed recertifications of the property. However, he failed to provide new information regarding the alteration of the topography or hydrology of the site.

Another request was submitted in April 2020 which included an engineering report and opinion that argued the site was an artificial wetland. NRCS rejected the request as the information presented was previously considered in the 2011 wetland certification.

Foster filed a complaint alleging the Swampbuster Act violates the Commerce Clause, Tenth Amendment, and Due Process clause of the United States Constitution. Further, Foster questioned the Swampbuster Act's "wetland" certification process.

The Court concluded the Swampbuster Act is within Congress's Article I § 8 spending power as it does not exercise direct regulatory power. Instead it indirectly regulates by conditioning the receipt of USDA farm benefits on the preservation of wetlands.

The Court further found the Act does not violate the Tenth Amendment because it has been:

. . . consistently construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adopted to the permitted end.

Foster was also held to have failed to provide a law or independent source of authority that would give him a right to a review of a liberty interest. These are both requirements for a due process violation.

Finally, USDA and NCRS were deemed to have provided a clear and legal explanation of when a certification is subject to review.

Due to the finding that the Swampbuster Act was constitutional and the lack of a "natural event" or NCRS concurrence to Foster's reasoning, the USDA motion for summary judgment was granted for the defendants on all counts.

A copy of the Opinion can be downloaded [here](#).