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# COMMENT

## LAND USE RELATED RESTRICTIONS AND THE CONSERVATION PROVISIONS OF THE FOOD SECURITY ACT OF 1985: SODBUSTER AND SWAMPBUSTER

The Food Security Act of 1985 (Act)<sup>1</sup> requires persons<sup>2</sup> who wish to participate in federal farm programs to comply with established soil<sup>3</sup> and water<sup>4</sup> conservation practices. Persons who violate the highly erodible and wetland conservation provisions of the Act, referred to as "sodbuster"<sup>5</sup> and "swampbuster"<sup>6</sup> respectively, will be ineligible to receive certain benefits administered by the United States Department of Agriculture (Department benefits).<sup>7</sup> Such loss of benefits for violations of the established conservation practices discourage production of agricultural commodities (commodities)<sup>8</sup> on highly erodible land<sup>9</sup> or converted wetlands<sup>10</sup> and, thereby, achieve certain

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1. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified in scattered sections of 7 U.S.C.). The Act sets forth the direction of federal farm policy for the years 1986 through 1990.

2. A person includes an individual, partnership, association, corporation, cooperative, estate, trust, joint venture, joint operation, or other business enterprise or other legal entity, and, whenever applicable, a state, or any agency thereof. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.2(a)(21) (1988).

3. 16 U.S.C. § 3811 (1988).

4. *Id.* § 3821.

5. H.R. REP. NO. 271, 99th Cong., 1st Sess. 78, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1182.

6. *Id.*

7. Violations of the Act will result in the loss of the following Department benefits: any price support or payment for any agricultural commodity produced by such person, any farm storage loan, any disaster payment, any farm storage payment, any federal crop insurance, any Farmers Home Administration loan if the proceeds of such loan contribute in any way to a violation of the Act. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.4(a) (1988).

8. An agricultural commodity means any crop planted and produced by annual tilling of the soil. *Id.* § 12.2(a)(1). *See also id.* § 12.3(b).

9. Highly erodible land means land exceeding a set erosion standard. 7 C.F.R. § 12.2(a)(14). *See infra* note 40.

10. Converted wetlands are wetlands that have been drained, dredged, filled, leveled, or otherwise manipulated to make possible the production of a commodity. 7 C.F.R. § 12.2(a)(6).

goals: (1) reduction of soil loss due to wind and water erosion; (2) protection of the Nation's long term capability to produce food and fiber; (3) production of sedimentation and improvement of water quality; (4) preservation of the Nation's wetlands; and (5) reduction of surplus commodities production.<sup>11</sup> Since participation in federal farm programs is an essential element in the production of food and fiber in the United States,<sup>12</sup> it is important that farmers and their legal representatives understand the scope and detail of these land use related restrictions and the penalties related to violations of the Act.<sup>13</sup>

Historically, the land use policy of the Department of Agriculture has been "to help enhance and preserve prime agricultural, range, and forest lands; to promote and help influence the management of rural lands to ensure adequate sources of high quality water; and to intensify conservation work on lands returned to cultivation."<sup>14</sup> The Ninety-Ninth Congress<sup>15</sup> recognized that "[s]oil erosion on agricultural land is a major national problem."<sup>16</sup> The resulting sodbuster and swampbuster provisions represent the most sweeping conservation measures in the fifty years<sup>17</sup> of federal farm programs.<sup>18</sup>

Although the sodbuster and swampbuster provisions were enacted in 1985, their specific requirements have been phased in only in

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11. *Id.* § 12.1(b).

12. Substantial amounts of federal funds enter the farm sector through farmer participation in federal farm programs. The Farmers Home Administration approved \$4.4 billion and \$3 billion in farm program loans in FY 1986 and FY 1987 respectively. Telephone interview with Dave Meads, Management Analyst, Information Resources Management Division FmHA, Washington, D.C. (Oct. 14, 1988). Direct payments from the Agricultural Stabilization and Conservation Service, in deficiency and diversion payments alone, equaled \$13.4 billion and \$13.7 billion in FY 1986 and FY 1987 respectively. Telephone interview with Randy Webber, Director, Commodity Analysis Division, ASCS, Washington, D.C. (Oct. 13, 1988).

13. "The sodbusting and swampbusting programs are not prohibitions but instead simply deny the benefits of farm programs to those who engage in these unwise practices." H.R. REP. NO. 271, 99th Cong., 1st Sess. 78, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1182.

14. P. BOSSELMAN, *FEDERAL LAND USE REGULATION* 301 (1977).

15. The Ninety-Ninth Congress convened January 1985.

16. H.R. REP. NO. 271, 99th Cong., 1st Sess. 77, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1181. The amount of highly erodible land in the United States is substantial. "117.9 million acres of cropland and 227.3 million acres of non-cropland are identified as being highly erodible. This amounts to 24.5% of all agricultural land and accounts for 58% of all cropland erosion." *Highly Erodible Land and Wetland Conversion*, 51 Fed. Reg. 23,497 (1986).

17. Becker, *The 1985 Farm Bill: A Summary*, (Congressional Research Services) 10 (1987).

18. The large federal farm programs are attributed to the congressional action as a result of the Great Depression of the 1930's. *See* K. MEYER, *AGRICULTURAL LAW* 6 (1985).

the past few years.<sup>19</sup> Consequently, no case law has developed and only a handful of administrative decisions have been rendered by the agencies at the national level.<sup>20</sup> This Comment will provide an overview of the regulatory scheme, explain how the provisions are being administered, discuss the penalties for violations of the Act, and describe a few of the legal issues related to these provisions.

### I. SODBUSTER

The Act provides that any person who, without an approved conservation plan or system, produces a commodity on a field on which highly erodible soil<sup>21</sup> is predominant<sup>22</sup> will be ineligible to receive Department benefits for that crop year.<sup>23</sup> Following this broad restrictive language, the Act provides a “grandfather” exemption<sup>24</sup> to avoid imposing restrictions on persons who made farming decisions prior to the passage of the Act.<sup>25</sup> The grandfather exemption allows farmers to produce a commodity on highly erodible land if such land was used to produce a commodity, or was enrolled in a set-aside program, during any of the 1981 through 1985 crop years,<sup>26</sup> and if the producer meets the requirements of establishing, actively applying, and eventually fully complying with an approved conservation plan or system.<sup>27</sup> The Soil Conservation Service (SCS)<sup>28</sup> and the Agricultural Stabilization and Conservation Service (ASCS)<sup>29</sup> are responsible for determining whether the exemption requirements have been satisfied

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19. Persons are allowed to continue farming land which has been in production during any of the years from 1981 through 1985. They are required to have an approved conservation plan or system adopted by January 1, 1990, or two years following a completed soil survey. Once the plan or system has been approved, it must be actively applied to the farm and be fully functional by January 1, 1995. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.5(a), (b)(1), (2) (1988).

20. Telephone interview with Carolyn Burchett, Acting Director of Appeals, ASCS, Washington, D.C. (Oct. 12, 1988). Telephone interview with Pamela Dillon, Director of National Appeals Staff, FmHA, Washington, D.C. (Oct. 13, 1988).

21. See *supra* note 9 and accompanying text.

22. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.22(a) (1988).

23. Crop year customarily refers to the year in which the commodity is produced.

24. See 16 U.S.C. §§ 3812, 3822 (1988).

25. H.R. REP. NO. 271, 99th Cong., 1st Sess. 84, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1189.

26. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.5(a)(1) (1988). The exemption will also be allowed if the highly erodible land was placed in a non-production program administered by the Secretary of Agriculture to reduce production of a commodity. *Id.* § 12.5(b).

27. 7 C.F.R. § 12.5(b)(1).

28. The SCS is the agency within the Department of Agriculture generally responsible for technical assistance on matters of soil and water conservation. *Id.* § 12.2(a)(24).

29. The ASCS is the agency within the Department of Agriculture generally responsible

or if a violation of the Act has occurred.<sup>30</sup>

The SCS makes the initial determination whether land should be classified as highly erodible.<sup>31</sup> A technical soil analysis is used to identify highly erodible land.<sup>32</sup> The Act provides that sodbuster violations occur when a commodity is produced on a field<sup>33</sup> on which highly erodible land is predominant.<sup>34</sup> Under the sodbuster regulations a field is considered to have a predominance of highly erodible land if 33.33% of the total field acreage is identified as highly erodible<sup>35</sup> or if 50 or more acres in such field are identified as highly erodible.<sup>36</sup> Requests for modifying field boundaries are subject to approval by the ASCS.<sup>37</sup>

A person does not violate sodbuster if he is actively applying production methods which satisfy the requirements of an approved conservation plan or system.<sup>38</sup> The final rule, as published in the Federal Register,<sup>39</sup> defines an approved conservation plan or system as one achieving a fixed soil loss tolerance value which is referred to as "T".<sup>40</sup> An amendment to the final rule was published in the Federal Register on February 11, 1988.<sup>41</sup> The amended rule took notice of the economic consequences to persons currently farming on highly erodible land who would be required to meet the T standard as opposed to persons who had not already broken-out fields of highly erodible

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for administering commodity adjustment programs and certain conservation programs. *Id.* § 12.2(a)(2).

30. *Id.* § 12.6(b)(3), (c)(2).

31. *Id.* § 12.20.

32. *Id.* § 12.21.

33. A field is a part of a farm separated by permanent boundaries such as fences, roads, permanent waterways, woodland, croplines, or similar features. *Id.* § 12.2(a)(13).

34. 16 U.S.C. § 3811 (1988).

35. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.22(a)(1) (1988).

36. *Id.* § 12.22(a)(2).

37. *Id.* § 12.22(2)(b). See *infra* note 48 and accompanying text.

38. Although a person has until January 1, 1995, to fully comply with the conservation plan or system, the person must be actively applying the plan by January 1, 1990 or 2 years following a soil survey. 7 C.F.R. § 12.5(b)(1). See also 7 C.F.R. § 12.5(b)(1) (1988). Active application includes maintaining a plan schedule, conducting practices properly, rotation of crops when required, and annual certification of application. SOIL CONSERVATION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, NATIONAL FOOD SECURITY ACT MANUAL tit. 180, § 511.46 (2d ed. 1988).

39. Highly Erodible Land and Wetland Conversion, 52 Fed. Reg. 35,196 (now codified at 7 C.F.R. § 12.23).

40. T value represents the maximum rate of erosion for each soil type which would not impair the soil's long term productivity. 7 C.F.R. § 12.21(a) (1988).

41. Highly Erodible Land and Wetland Conversion, 53 Fed. Reg. 3,999 (1988) (now codified at 7 C.F.R. § 12.23).

land.<sup>42</sup> As a result of the amended final rule, the SCS will assist persons to develop conservation plans or systems for highly erodible land that was in production prior to December 23, 1985,<sup>43</sup> by employing alternative conservation systems which take into account current technology and the costs of attaining added increments of erosion control.<sup>44</sup> A farm that has highly erodible land must be in full compliance of an approved conservation plan or system by January 1, 1995.<sup>45</sup> The SCS has developed a set of guidelines to determine what factors to consider in designing a conservation plan or system.<sup>46</sup>

Once the SCS determines that land is highly erodible, the ASCS decides whether a violation of the Act has occurred.<sup>47</sup> The determination by ASCS will be based on the manner in which the person has used the land in question.<sup>48</sup>

One administrative adjudication, at the national level, addressed

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42. The amendment noted that farmers who had not broken-out highly erodible land were not realizing commodity production and related Department benefits, whereas persons already producing commodities on the land would realize an economic loss if they could not achieve T. 53 Fed. Reg. 3,999 (1988).

43. December 23, 1985, is the date of enactment of the Food Security Act of 1985.

44. 53 Fed. Reg. 3,998 (1988).

45. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.5(b)(1) (1988).

46. Guidelines for an approved conservation plan or system include the following items: (1) highly erodible fields must be identified; (2) methods, such as crop rotation, of erosion reduction treatment for all forms of erosion encountered must be developed; (3) the plan or system must contain a schedule for the application of the erosion reduction practices in an orderly manner to ensure the plan or system is fully functional by January 1, 1995; (4) a statement of understanding must be inserted as to how the plan or system is to be applied; (5) the plan or system must be signed by the landowner or the person having control of the land; (6) the plan or system agreement must be signed by a representative of the SCS; (7) the plan or system agreement must be signed by a representative of the local conservation district or, if there is no conservation district, the SCS must finally approve the plan. SOIL CONSERVATION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, NATIONAL FOOD SECURITY ACT MANUAL tit. 180, § 511.44(b) (2d ed. 1988). The approval method used under sodbuster is interesting in that the standard approved by the SCS might be less restrictive than one imposed by state law, which is the authority of local conservation districts. See, e.g., ARK. CODE ANN. §§ 14-125-101 to -907 (1987). However, since an adverse determination by the Soil Conservation District can be appealed back to the SCS, see 7 C.F.R. § 12.12 (1988), the plan or system could be approved for purposes of sodbuster but still not comply with state law. This could lead to the loss of certain state benefits. See, e.g., WIS. STAT. ANN. § 92.105 (West 1987) (loss of certain tax credits).

47. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.6(b)(3) (1988).

48. Factors considered by the ASCS include: (1) whether a person produced a commodity on highly erodible land; (2) whether field boundaries have been established; (3) whether land was planted to a commodity during any of the years 1981 through 1985; (4) whether to allow an exchange of crop acreage bases for purposes of crop rotation as required by an approved conservation plan or system; (5) whether land not in production during any of the years 1981 through 1985 was enrolled in a set-aside program administered by the Secretary of Agriculture to reduce commodity surpluses; (6) whether a commodity was planted on highly erodible land before December 23, 1985; and (7) whether planting of a commodity on highly

the question of whether a commodity had been planted on highly erodible land prior to December 23, 1985.<sup>49</sup> In that case a Missouri producer claimed to have produced a commodity on highly erodible land in 1981 and 1982. To support his claim, he submitted seed receipts as evidence that a crop was planted. The ASCS denied the appeal on the grounds that aerial photographs of the farm taken in those years did not indicate a crop planted on the highly erodible land and that the receipts indicated only that the commodity may have been planted on the farm, but not necessarily on the fields in question.<sup>50</sup>

## II. SWAMPBUSTER

Any person who produces a commodity on converted wetlands<sup>51</sup> after December 23, 1985, will be in violation of the Act and, therefore, ineligible to receive Department benefits for that crop year.<sup>52</sup> Statutory exemptions are provided<sup>53</sup> and responsibilities, similar to those under sodbuster, are assigned to the SCS and the ASCS.<sup>54</sup>

The SCS will identify wetlands<sup>55</sup> through the use of soil maps or on-site evaluations.<sup>56</sup> Land that has a predominance<sup>57</sup> of hydric soils<sup>58</sup> and under normal conditions<sup>59</sup> does support a prevalence<sup>60</sup> of hydrophytic vegetation<sup>61</sup> is considered wetland.<sup>62</sup> If hydrophytic vegetation has been removed or altered, the SCS will make a wetlands determination through an examination of vegetation on similar soils in the local area.<sup>63</sup> The SCS will determine that lands are converted

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erodible land was required by the terms of an agreement between a landlord and a tenant or sharecropper. *Id.* § 12.6(b)(3).

49. Letter from Jim Davis, Acting Deputy Administrator, State and County Operations, ASCS, to Dallas L. Fletcher (Feb. 25, 1988).

50. *Id.*

51. *See supra* note 10.

52. 16 U.S.C. § 3821 (1988).

53. *Id.* § 3822.

54. *See generally* Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.6 (1988).

55. *Id.* § 12.6(c)(2)(i).

56. *Id.* § 12.31.

57. *Id.* § 12.31(a)(2).

58. Hydric soils are those that "in an undrained condition, are saturated, flooded, or ponded long enough during a growing season" to support the growth of hydrophytic vegetation. *Id.* § 12.2(a)(15).

59. *Id.* § 12.31(b)(2)(i).

60. *Id.* § 12.31(b)(3).

61. Hydrophytic vegetation shall consist of plants listed in the National List of Plant Species that Occur in Wetlands. *Id.* § 12.31(b)(1).

62. *Id.* § 12.2(a)(28).

63. *Id.* § 12.31(b)(2)(ii).

wetlands where hydric soils have been altered or woody vegetation has been removed so as to produce a commodity.<sup>64</sup> If drainage or other altering activity is not clearly discernable, the SCS will compare the site with similar sites to determine if commodities could be grown under natural conditions, in which case, the land is not considered to be converted wetlands.<sup>65</sup> Wetlands in which woody hydrophytic vegetation has been removed and wetland conditions have not returned as a result of abandonment<sup>66</sup> will be considered converted wetlands.<sup>67</sup>

Wetlands will not be considered converted wetlands if they are artificially created,<sup>68</sup> or if production of a commodity is possible due to natural conditions, such as drought, and will not destroy the wetland characteristics.<sup>69</sup> Wetlands will be considered converted wetlands if production of a commodity does require the removal of woody vegetation.<sup>70</sup> Production of wetlands on which conversion was commenced<sup>71</sup> prior to December 23, 1985, is allowed as long as such improvements or alterations will not bring additional wetlands into production.<sup>72</sup> Production may continue on wetlands which were converted prior to December 23, 1985, but which are seasonally flooded for extended periods of time;<sup>73</sup> however, no action can be taken to further improve or alter such land unless the SCS, in consultation with the United States Fish and Wildlife Service,<sup>74</sup> determines that the effect on remaining wetland values will be minimal.<sup>75</sup>

A person may produce a commodity on converted wetlands if the conversion activity, individually and in connection with similar activities,<sup>76</sup> has only a minimal impact on the hydrological and biological aspects of the wetlands.<sup>77</sup> The minimal effect exemption will be allowed in very limited cases and is not to serve as a method to weaken

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64. *Id.* § 12.2(a)(6).

65. *Id.* § 12.32(a)(1).

66. *Id.* § 12.33(b).

67. *Id.* § 12.32(a)(2).

68. *Id.* § 12.5(d)(1)(ii), (iii).

69. *Id.* § 12.5(d)(1)(iv).

70. *Id.* § 12.32(b)(2).

71. *Id.* § 12.6(b)(3)(viii).

72. *Id.* § 12.33(b).

73. An extended period of time is 15 consecutive days or 10% of the growing season, whichever is less. SOIL CONSERVATION SERVICE, U.S. DEPARTMENT OF AGRICULTURE, NATIONAL FOOD SECURITY ACT MANUAL tit. 180, § 512.15(b)(3) (2d ed. 1988).

74. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.33(a) (1988).

75. *Id.* § 12.31(d).

76. *Id.*

77. *Id.* § 12.5(d)(1)(v).



the requirements under the Act.<sup>78</sup> Determinations of minimal effect are based on the use of United States Fish and Wildlife Service wetland inventory maps, ASCS slides, photos, and when requested, field visits.<sup>79</sup> Consideration will also be given to the effects on the wetlands value for wildlife maintenance.<sup>80</sup>

An understanding of the SCS requirements may be assisted by reviewing a few of the administrative adjudications at the national level. Efforts by a South Dakota producer to qualify under the minimal effect exemption by creating a permanent body of ponded water while draining a wetland area were not considered as resulting in a minimal effect because the intent of the Act was found to maintain wetlands in their natural state, not to replace them with artificial ones.<sup>81</sup> An Illinois producer was granted reconsideration of a minimal effect request where the wetlands involved amounted to one-half acre and the conversion resulted from the installation of a conservation system to control erosion.<sup>82</sup> The Minnesota SCS State Conservationist was instructed to conduct an environmental evaluation and process a minimal effect determination on a 0.4 acre tract of land that did not have standing water and was not close to any kind of wildlife area even though the producer did not expressly request a minimal effect determination but, instead, based an appeal on the fact that he was unaware of the wetland conversion provisions of the Act.<sup>83</sup> It is important to note that although many of these cases involved relatively small tracts of land, the size was not necessarily the controlling factor in the wetland conversion determination. In each case there were other facts upon which the agency was able to consider a minimal effect standard.

The ASCS will make determinations affecting wetland conversions similar to those made by the agency in reference to the production of a commodity on highly erodible land.<sup>84</sup> In addition, ASCS

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78. Congress determined that the minimal effect exemption is to be used with great caution in recognition of the great value attached to the country's remaining wetlands. H.R. REP. NO. 271, pt. 2, 99th Cong., 1st Sess. 17, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1660, 1672.

79. Letter from Wilson Scaling, Chief, SCS to Thomas L. Kluck (Sept. 12, 1988) (discussing minimal effect appeal of May 31, 1988).

80. Letter from Galen Bridge, Acting Chief, SCS to Marvin Randell (June 8, 1988) (discussing effect of wetland values on wildlife maintenance).

81. Letter from Roy M. Gray, Acting Chief, SCS to Lloyd Kuchta (Mar. 10, 1988).

82. Letter from Wilson Scaling, Chief, SCS to Edward Woodson (Aug. 13, 1987).

83. Letter from Joseph Haas, Acting Chief, SCS to Dale and Donald Peterson (Sept. 25, 1987).

84. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.6(b)(3) (1988).

will determine whether a wetland conversion was commenced prior to December 23, 1985.<sup>85</sup> A determination of commencement of a conversion of wetlands will be reached if the conversion activity actually started before December 23, 1985,<sup>86</sup> or the person applying for Department benefits has expended or legally committed substantial funds by entering into contracts or by purchasing construction supplies for the primary and direct purpose of converting the wetland.<sup>87</sup>

The purpose of allowing commenced wetland conversion activity to continue is to avoid unnecessary economic hardship for persons who began conversion activities prior to the effective date of the Act.<sup>88</sup> Any person wishing the ASCS to make a determination that conversion of wetlands commenced prior to December 23, 1985, was required to request such a determination from the ASCS before September 19, 1988.<sup>89</sup>

A North Carolina producer purchased land on January 16, 1986. Prior to December 23, 1985, he discussed with the SCS the feasibility of clearing and converting wetlands for purposes of producing commodities. The producer committed to purchase and clear the land prior to December 23, 1985. The producer's appeal of an adverse commenced wetland conversion determination was denied on the grounds that he had not begun and was not legally and financially obligated to begin earth moving or similar activities for the purpose of draining the wetland prior to December 23, 1985.<sup>90</sup>

A North Dakota producer obtained a legal permit to drain wetlands. He spent considerable time and money in connection with planning the drainage project. On appeal to the ASCS, the producer argued that this activity constituted a commenced action. The appeal was denied since the permit and funds applied only to plans for conversion and not for actual drainage activities such as earthmoving.<sup>91</sup>

A determination that a wetland conversion was commenced also requires that the conversion activity was actively pursued on a regular basis except for delays beyond the person's control.<sup>92</sup> A Georgia pro-

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85. *Id.* § 12.6(b)(3)(viii).

86. *Id.* § 12.5(d)(3)(i).

87. *Id.* § 12.5(d)(3)(ii).

88. *Id.* § 12.5(d)(5).

89. *Id.* § 12.5(d)(5)(i).

90. Letter from Jim Davis, Acting Deputy Administrator, State and County Operations, ASCS to Leroy Autry (Dec. 7, 1987).

91. Letter from Tom Von Garlem, Acting Deputy Administrator, State and County Operations, ASCS to Mr. Elmer Hillesland (June 8, 1988) (discussing denial of appeal of commenced conversion determination).

92. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.5(d)(5)(ii) (1988).

ducer appealed an adverse commenced conversion determination on the basis that he began conversion prior to December 23, 1985, but proceeded only as time off from his main job and his health permitted. The ASCS denied the appeal finding that the provisions for an exemption for converted wetlands are very restrictive and that the producer's commenced activity was not pursued on a regular basis.<sup>93</sup>

Persons who cannot show that conversion activities have actually begun or that contracts or material purchases related to wetland conversion were made prior to December 23, 1985, may request a commencement of conversion determination by the Deputy Administrator, State and County Operations of the ASCS. The person must show that undue financial hardship will result because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland.<sup>94</sup> Any conversion activity that is considered commenced prior to December 23, 1985, will lose its exempt status if the activity is not completed on or before January 1, 1995.<sup>95</sup>

Persons will not be considered ineligible for Department benefits for conversion of wetlands if such person can show that the conversion was caused by a third party with whom the person was not associated through a scheme or device.<sup>96</sup> Landlords will remain eligible for Department benefits for commodities produced on lands other than those in which a tenant or sharecropper has an interest despite the failure of their tenants or sharecroppers to comply with the Act.<sup>97</sup> The landlord will lose the eligibility if the activity causing the violation was required under the terms of the lease agreement or if the landlord acquiesced in the violation by the tenant or sharecropper.<sup>98</sup>

A person associated with a water resource district, drainage district, or similar entity, and who is also assessed for the activities of such district or entity, will be considered to have converted wetlands on his property if the conversion activity is due to the actions of the

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93. Letter from Jim Davis, Acting Deputy Administrator, State and County Operations, ASCS to Bobby Newman (June 16, 1988).

94. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.5(d)(5)(iv) (1988).

95. *Id.* § 12.5(d)(5)(iii).

96. *Id.* § 12.5(d)(1)(vi). Scheme or device includes, but is not limited to, acts of falsifying or concealing information having a bearing on a wetland conversion determination from the Department. Such acts also include acquiescence in, approval of, or assistance to acts which have the effect of circumventing wetland conversion regulations. *Id.* § 12.10. See 7 C.F.R. § 12.8 (1988); see also *infra* text accompanying note 138.

97. *Id.* § 12.9(a).

98. *Id.* § 12.9(b).

district or entity.<sup>99</sup> A person can retain eligibility for Department benefits upon a showing that the wetland conversion was part of a project drainage plan adopted by the district or entity prior to December 23, 1985,<sup>100</sup> and that the district or entity was legally and financially obligated, prior to that date, to complete the project activity.<sup>101</sup>

### III. RELATED ISSUES

#### A. Effect on Farm Credit

The ability of persons to participate in federal programs has a dramatic effect on the ability to obtain farm credit.<sup>102</sup> Provisions of the Act restrict the use of certain loan proceeds.<sup>103</sup> A person applying for a Farmers Home Administration (FmHA)<sup>104</sup> insured<sup>105</sup> or guaranteed<sup>106</sup> loan must certify that proceeds of the loan will not be used for a purpose that will contribute to excessive erosion on highly erodible land or the conversion of wetlands to produce a commodity.<sup>107</sup> If a violation of the Act occurs after a FmHA loan has been approved and if any proceeds from the loan contribute to the violation, the loan will at that time be in default.<sup>108</sup> FmHA regulations specify a number of prohibited uses of FmHA loan proceeds.<sup>109</sup>

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99. *Id.* § 12.5(d)(1)(vi).

100. *Id.* § 12.5(d)(4)(i). *See supra* note 89 and accompanying text.

101. 7 C.F.R. § 12.5(d)(4)(ii).

102. Loans administered by the Farmers Home Administration account for a substantial amount of available farm credit and direct payments by other agencies of the Department provide repayment ability needed to establish credit from other sources. *See supra* note 12.

103. 16 U.S.C. §§ 3811(1)(E), 3821(1)(E) (1988).

104. The Farmers Home Administration provides farm loans to eligible borrowers at special rates acting as a lender of last resort. *See* 7 U.S.C.S. §§ 1921-2006 (1985 & Supp. 1988).

105. Insured loans are those made directly from the agency to the borrower. *See* 7 U.S.C. §§ 1929, 1947 (1988).

106. Guaranteed loans are loans offered by commercial lenders with a guarantee against loss covered by the Farmers Home Administration. *See* 7 U.S.C.S. § 1929(h) (1988).

107. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.7(a)(3) (1988).

108. *Id.* pt. 1940, subpt. G, exh. M § 3.

109. The restrictions of FmHA loan proceeds apply to: (1) the purchase of the affected land; (2) necessary planning, feasibility, or design studies; (3) obtaining any necessary permit; (4) the purchase, contract, lease, or renting of equipment or materials necessary to carry out land modifications to include all associated costs such as fuel and maintenance costs; (5) any labor costs; (6) the planting, cultivating, harvesting, or marketing of any commodity to include all associated costs such as fuel, seed, fertilizer, and pesticide costs; (7) the planting, cultivating, harvesting, or marketing of any commodity during the 10 years following a wetland conversion; (8) any costs associated with using for on-farm purposes a commodity, grown on affected land, during the year of the wetland conversion or for 10 years thereafter; and (9) any use, during the life of the loan, to pay other costs so that non-loan funds can be used for an activity prohibited under the Act. *Id.* § 3(d).

## B. Regulatory Taking

The restrictive nature of the Act might suggest an unlawful taking of private property without just compensation.<sup>110</sup> Such an argument would be based on the effect of the regulation to interfere with the landowner's use of his property. However, an argument against the Act constituting a taking rests in the nature of federal farm programs. "The Agricultural Act is a public law, not a private law; therefore no vested rights may be obtained under it."<sup>111</sup> Federal farm programs are based on voluntary participation and the restrictions of sodbuster and swampbuster are not mandatory prohibitions, but conditions for eligibility in voluntary programs.<sup>112</sup>

Notwithstanding the voluntary nature of federal farm programs, farmers would have difficulty in showing that the restrictions of sodbuster or swampbuster affect a taking by restricting the use of property. This argument was advanced in *Deltona Corp. v. United States*.<sup>113</sup> In *Deltona* federal regulations prohibited a land developer from dredging and filling certain areas of a planned subdivision in Florida.<sup>114</sup> The Court of Claims stated that the application of a land use restriction to particular property does effect a taking if it "does not substantially advance legitimate state interests . . . or denies a[n] owner economically viable use of his land . . ." <sup>115</sup> The court rejected the claim that a taking had occurred although *Deltona* had "been denied the ability to exploit its property by constructing a project that it theretofore had believed 'was available for development.'" <sup>116</sup>

During the 1987 term, the United States Supreme Court reviewed the issue of a taking in *Keystone Bituminous Coal Association v. DeBenedictis*.<sup>117</sup> In *Keystone*, a Pennsylvania statute required that 50% of the coal beneath certain structures be kept in place to provide surface support.<sup>118</sup> Petitioners, an association of coal mine operators and others involved in the coal mining industry, complained that the statute restricted their right to mine coal and amounted to a taking of their private property without compensation in violation of the fifth

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110. U.S. CONST. amend. V.

111. *Allen v. David*, 334 F.2d 592, 599 (5th Cir. 1964).

112. *See supra* note 13.

113. 657 F.2d 1184 (Ct. Cl. 1981).

114. *Id.* at 1184.

115. *Id.* at 1191 (quoting *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

116. *Id.* at 1193.

117. 107 S. Ct. 1232 (1987).

118. *Id.* at 1238.

and fourteenth amendments.<sup>119</sup> The Court refused to find a taking when, from the restraint on private use, society "benefit[s] greatly from the restrictions that are placed on others."<sup>120</sup>

During the same term in which the Supreme Court decided *Keystone*, the Court held that a taking had occurred in *Nollan v. California Coastal Commission*.<sup>121</sup> In *Nollan* a landowner was offered a construction permit conditioned on the establishment of a public easement across the landowner's property.<sup>122</sup> The Court determined that the constitutional propriety of government regulation depends on a nexus between the advancement of a legitimate state interest and the justification for the specific prohibition.<sup>123</sup> In this case the prohibition against barring the public access to the landowner's property was not closely related to the state interest in regulating building permits.<sup>124</sup>

The regulatory scheme present under the Food Security Act of 1985 appears to satisfy the constitutional requirements enunciated by the Court. Here, the regulation advances the legitimate state interest of protecting valuable natural resources and does not deny the landowner an economically viable use of his property. In fact, it could be argued, the conservation measures enforced under the Act will result in improved land conditions and increased economic value. In addition, the regulation of land use under the Act does present a nexus between the state interest in conservation of resources and the specific prohibitions against sodbusting and swampbusting.

### C. Notice

In spite of language that no vested rights may be obtained under federal farm programs,<sup>125</sup> a different approach was used in *Curry v. Block*.<sup>126</sup> In *Curry* the court held that the farmer loan programs administered by FmHA are "a form of social welfare legislation,"<sup>127</sup> and that methods similar to procedural due process were required to give FmHA borrowers proper notice of loan servicing options.<sup>128</sup>

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119. *Id.* at 1239.

120. *Id.* at 1245.

121. 107 S. Ct. 3141 (1987).

122. *Id.* at 3143.

123. *Id.* at 3148.

124. *Id.*

125. *Allen v. David*, 334 F.2d 592, 599 (5th Cir. 1964).

126. 541 F. Supp. 506 (S.D. Ga. 1982).

127. *Id.* at 511.

128. The court did not undertake an extensive due process analysis since the statute required notice, "due process aside." *Id.* at 522 n.15.

The decision in *Curry* was expanded in *Coleman v. Block*<sup>129</sup> in which FmHA was enjoined from foreclosure action until more specific standards were adopted for loan servicing programs.<sup>130</sup> *Coleman* was later extended to cover a national class of FmHA borrowers.<sup>131</sup> Since penalties for violations of the Food Security Act of 1985 include withdrawal of Department benefits, including FmHA loans,<sup>132</sup> proper notice and procedure of sodbuster and swampbuster requirements may be very important.

Persons who produce any commodity and wish to participate in federal farm programs are responsible for contacting the appropriate agency to ensure that proper sodbuster and swampbuster determinations are made.<sup>133</sup> A person requesting a highly erodible land or wetland determination is entitled to a written reply within a specified time period.<sup>134</sup> In addition, any person applying for Department benefits must certify in advance that they will be operating in compliance with the Act.<sup>135</sup> Any adverse determination may be appealed through the agencies' appeals process.<sup>136</sup>

Notwithstanding the provisions affecting third party conversions,<sup>137</sup> certain classes of affiliated persons will be subject to penalties for violations of the Act by other persons.<sup>138</sup> Under the affiliation rule, a person is responsible for the acts of:

- (1) The spouse and minor child of such person and/or guardian of such child;
- (2) [a]ny corporation in which the person is a stockholder, shareholder, or owner of more than 20 percent interest in such corporation;
- (3) [a]ny partnership, joint venture, or other enterprise in which the person has an ownership . . . or financial interest; and
- (4) [a]ny trust in which the person or any [affiliated person] is a beneficiary or has a financial interest.<sup>139</sup>

No person will be denied participation in federal farm programs if action resulting in a violation of the Act was based on advice or action of the Department.<sup>140</sup>

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129. 562 F. Supp. 1353 (D.N.D. 1983).

130. *Id.* at 1367.

131. KEITH MEYER, AGRICULTURAL LAW 79 (1985).

132. *See supra* note 12 and accompanying text.

133. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.4(c) (1988).

134. *Id.* § 12.6(c)(4).

135. *Id.* § 12.7.

136. *Id.* § 12.12.

137. *See supra* note 96.

138. Highly Erodible Land and Wetland Conversion, 7 C.F.R. § 12.8 (1988).

139. *Id.* § 12.8(a).

140. *Id.* § 12.11.

## IV. CONCLUSION

Although penalties for violations of sodbuster and swampbuster are severe, the requirements of the Act represent a very important and proper response to national concerns of environmental damage. The preservation of the productivity of United States farmland is necessary to provide adequate supplies of food and fiber for future demand. Farmland preservation is also critical to the protection of wildlife habitat and water quality.

While there is reason for concern within the agricultural community that proper and timely determinations be rendered to provide farmers the ability to manage their operations in a prudent and economically viable manner, it is unlikely that the sodbuster and swampbuster rules will be repealed. Congressional attention has focused on concerns that provisions of the Act are not being strictly enforced<sup>141</sup> and that the rules ought to be tightened rather than loosened.<sup>142</sup>

One unfortunate aspect of the Act is the per se nature of violations. A person who accidentally or inadvertently plants a commodity on prohibited land is in violation of the Act even though there was no knowledge or intent that a violation was about to occur. The resulting penalties can swiftly and decidedly destroy a farmer's capital investment and life's work by the sudden and unexpected loss of Department benefits and the possibility that a FmHA loan, scheduled for 20 or 30 years, is suddenly in default.

The onerous nature of penalties could also have a chilling effect on the availability of commercial farm credit. Bankers often approve loans on the cash flow provided by Department benefits or by the guarantees of FmHA. The realization that those direct payments or guarantees may be suddenly, and without warning, withdrawn will likely require a close monitoring of farm operations so that the bank's interests will be protected.

Most procedures of the SCS and the ASCS provide a network of notice to the farmers which should help provide protection against an accidental violation of the Act. The requirements of FmHA, on the other hand, pose some serious problems for unintended violations over a 10 year period that could have a substantial adverse impact. Given the attitude of the court in the *Curry* and *Coleman* line of

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141. *Implementation of the Swampbuster Provision of the 1985 Farm Act: Hearing Before the Subcomm. on Agriculture, Rural Development, and Related Agencies of the Senate Comm. on Appropriations*, 100th Cong., 2d Sess. 30 (1988) (statement by Senator Bob Kasten).

142. *Id.* at 35 (statement by Senator Dale Bumpers).



cases, FmHA may need to provide adequate safeguards against potential default judgments against their borrowers based on violations which may encroach on the due process principle of fundamental fairness.

*Galen Fountain*