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Swampbuster Basics


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Overview


- What is Swampbuster?
- Recent Cases
- New Regulations
- Final Takeaways



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Wetland Conservation Provisions

- Commonly known as “Swampbuster”
- Introduced in the 1985 Farm Bill along with the Highly Erodible Lands Conservation provisions
- Encourages conservation of wetlands by removing certain incentives to produce agricultural commodities on converted wetlands
 - Most USDA programs require ag producers to agree to comply with the conservation provisions
 - Violation of the provisions can result in USDA program benefits ineligibility
- Implemented by Natural Resources Conservation Service (NRCS)



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How Does Swampbuster Work?

- By prohibiting USDA program participants from converting wetlands on their agricultural operations so that the converted wetland could produce an agricultural commodity
 - Including pasture or hay land
- Converting a wetland will result in the loss of eligibility for certain USDA program benefits
 - However, there are many exemptions



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What Is a Wetland?

- Swampbuster defines a wetland as an area that:
 1. Has predominance of hydric soils;
 2. Is inundated with water at a frequency sufficient to support hydrophytic vegetation (aka wetland hydrology);
 3. Supports hydrophytic vegetation under normal circumstances



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How Do You Know if An Area Is a Wetland?

- NRCS determines if an area is a wetland through a process known as a wetland determination
- First step requires NRCS to identify wetlands, non-wetlands, and drainage features using remote data sources called "sampling units"
 - Sampling units are assessed for the three wetland factors
 - NRCS determines whether an assessment can be made off-site or if an on-site visit is required
 - Producers will be notified ahead of a site visit
- NRCS next determines the wetland type and size – there are several wetland types under Swampbuster
 - Includes non-wetland areas, converted wetlands, and many of the Swampbuster exemptions



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Wetland Determination

- The wetland determination process results in a map that marks out or delineates the size and location of the wetland, and documents its label
 - NRCS issues the wetland map as part of the preliminary technical determination
 - A producer has 30 days to appeal the preliminary determination after which the determination becomes a certified wetland determination
- Same process is used to determine if Swampbuster has been violated



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Swampbuster Exemptions

- Many exemptions prevent ineligibility from USDA benefits
- Exemptions include:
 - Production on prior-converted wetlands. 7 C.F.R. 12.5(b)(1)(i)
 - Conversion occurred prior to December 23, 1985, produced at least one agricultural commodity prior to that date, and did not support woody vegetation on that date
 - Conversion has a minimal effect on wetland functions and wetlands in the area. 7 C.F.R. 12.5(b)(1)(v)
 - NRCS has developed a list of categorical minimal effects exemptions
 - Landowner or producer mitigates the effects of converting a wetland. 7 C.F.R. 12.5(b)(1)(vi)
 - Mitigation can mean restoration of a converted wetland, enhancement of an existing wetland, or creation of equivalent wetland functions on a new site
 - Mitigation must be done according to a plan approved by NRCS



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Swampbuster Exemptions Cont.

- Other exemptions:
 - Conversion that does not make production of an ag commodity possible. 7 C.F.R. 12.5(b)(1)(iv)
 - Example: conversion for fish production, trees, cranberries, livestock ponds
 - The wetland is an artificial wetland. 7 C.F.R. 12.5(b)(1)(vii)
 - An area that was formerly non-wetland, but now meets wetland criteria due to human activity
- This is a nonexclusive list of possible exemptions
- Exempted areas can be identified through the wetland determination process
 - Example: wetland determination process determines that an area is an artificial wetland



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Certified Wetlands

- A certified wetland determination indicates which areas are subject to Swampbuster requirements
 - Areas are marked on maps, and the map is certified if it "is sufficient for the purpose of making a determination of ineligibility for program benefits." 16 U.S.C. § 3822(a)(3)(a)
- A wetland certification remains in effect so long as the area remains in agricultural use, or until the producer requests a review. 16 U.S.C. § 3822(a)(4)
- No person shall be "adversely affected" for taking action in reliance on a certified wetland determination. 16 U.S.C. § 3822(a)(6)



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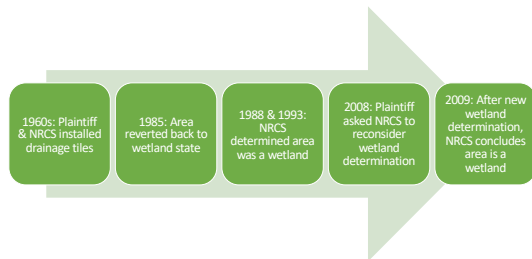
Overview

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Maple Drive Farms: Timeline



Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1001 (6th Cir., 2012)




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Facts

- FSA denied plaintiff USDA benefits based on NRCS converted wetlands determination
- Plaintiff attempted to mediate the dispute with NRCS, but the mediation failed
- Plaintiff pursued the dispute until it reached the Sixth Circuit in 2015

Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)




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Plaintiff's Claims

- At the 6th Circuit, the plaintiff argued:
 1. Exempted from swampbuster under the prior-converted-wetland exemption
 2. Exempted from swampbuster under the minimal-effect exemption which NRCS failed to consider
 3. FSA acted arbitrarily when it failed to grant the plaintiff's penalty reduction request

Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)




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First Claim

1. Plaintiff qualified for prior-converted-wetland exemption

- Rule:
 - A producer will not be ineligible for USDA benefits under Swampbuster if they produce a commodity on a "wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date" as a result of failure to maintain drainage. 16 U.S.C. § 3822(b)(2)(D).
- Plaintiff Argues:
 - The exemption applies to farmland that was converted at one point in time and subsequently reverted to wetland status, regardless of whether the land was a wetland on December 23, 1985.
- NRCS Argues:
 - The exemption only applies when the conversion occurred prior to December 23, 1985 and on that date the converted wetland did not have wetland characteristics.

Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)



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First Claim – Conclusion

- Court concluded that both plaintiff interpretation and NRCS interpretation of the exemption was reasonable
- Because NRCS interpretation was reasonable, court found in the agency's favor
- Plaintiff's 2.24 acres were not considered prior-converted-wetlands

Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)



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Second Claim

2. Plaintiff was exempted from swampbuster under the minimal-effect exemption which NRCS failed to consider

- Rule:
 - Farmers are exempt from Swampbuster's ineligibility provisions for the conversion of a wetland that has "a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife." 16 U.S.C. § 3822(f)(1).
 - "NRCS shall determine whether the effect of any action of a person associated with the conversion of a wetland ... has a minimal effect ..." 7 C.F.R. § 12.(e)(1)
- Plaintiff Argues:
 - NRCS violated the law by failing to make an onsite minimal effects determination
 - NRCS ignored the minimal effects evidence that plaintiff presented
- NRCS Argues:
 - It considered the minimal effects evidence presented by plaintiff, but it was not enough to prove minimal effects
 - In Michigan, the minimal effects exemption applies in only two circumstances that are decided by the state NRCS office

Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)



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Second Claim – Conclusion

- Court concluded that nothing in the evidence showed that NRCS had considered plaintiff's minimal effects evidence
- The law does not support state NRCS offices limiting the minimal effect exemption to only two circumstances
- NRCS violated the law by failing to consider plaintiff's minimal effects evidence
- Court remanded case back to NRCS to make a minimal effect determination

Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)



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Third Claim

3. FSA acted arbitrarily when it failed to grant the plaintiff's penalty reduction request unless plaintiff restored or mitigated the wetland conversion

- Rule:
 - A person who converts a wetland "shall be ineligible for all *or a portion* of the USDA program benefits ..." ineligibility **"may be reduced"** based on a variety of factors, including (1) information available prior to the violation, (2) previous land use patterns, (3) previous wetland violations, (4) wetland values affected, (5) recovery time for full mitigation, (6) impact reduction in payments would have on the person's ability to repay a USDA farm loan. 7 C.F.R. § 12.4(c)
- Plaintiff argues:
 - FSA could not require plaintiff to mitigate before providing penalty reduction
- USDA argues:
 - Plaintiff may not receive any benefits without agreeing to mitigate



Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)

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Third Claim – Conclusion

- Court found in favor of plaintiff and remanded issue back to FSA
- Instead of relying on 7 C.F.R. § 12.4(c) to make its decision, FSA improperly relied on its interpretation of 7 C.F.R. § 12.5(b)(5)
 - 12.5(b)(5) provides an exemption for farmers who act in good faith
 - Distinct from the factors applied to reduce benefit eligibility
- Court remanded for application of correct regulations



Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)

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Take Aways

- Prior-converted wetland has to have been a converted wetland on December 23, 1985 to qualify for the prior-converted wetland exemption
- NRCS must review evidence presented to it for a minimal effects determination
- State NRCS offices may not place restrictions on the minimal effects exemption that are contrary to the law
- "Good faith" exemption is distinct from factors used to determine whether penalty reduction is appropriate



Maple Drive Farms Ltd. Partnership v. Vilsack, No. 13-1091 (6th Cir., 2015)

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Foster v. Vilsack: Facts

- Concerns a 0.8-acre area of land on plaintiffs’ farm in the Prairie Pothole Region of South Dakota
- Plaintiffs requested a wetlands determination from NRCS in 2002
- In 2011, NRCS officially certified the 0.8-acre area as a wetland – specifically a prairie pothole
 - Prior to when NRCS visited the area in 2010, plaintiffs tilled the pothole
 - NRCS used a comparison site to make the determination
- Plaintiffs appealed the determination and eventually ended up before the 8th Circuit



Foster v. Vilsack, 820 F.3d 330 (8th Cir., 2016)

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Plaintiffs’ Claims

1. NRCS erred in concluding that the disputed area had the necessary hydrology to qualify as a wetland by using incorrect methodology
2. NRCS incorrectly concluded that the disputed area would support hydrophytic vegetation under normal circumstances by using a comparison site that was too far away



Foster v. Vilsack, 820 F.3d 330 (8th Cir., 2016)

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First Claim

1. NRCS used incorrect methodology to wrongly conclude that the disputed area had wetland hydrology

- Methodology:
 - NRCS used aerial photographs to make the determination using a set of recognized wetland signatures: (1) hydrophytic vegetation, (2) surface water, (3) saturated conditions, (4) stressed crops due to wetness, (5) differences in vegetation due to differing planting dates, (6) inclusion of set-aside or idled wet areas, (7) irregular areas of unharvested crops in a harvested field, (8) isolated unfarmed areas, (9) areas of greener vegetation
 - Wetland hydrology is established when any of these signatures appear in over half of the normal rainfall year photos
- Plaintiffs Argue:
 - NRCS wrongly relied on “color tone” instead of any of the accepted signatures
- NRCS Argues:
 - Agricultural engineer identified many of the signatures in photos of the disputed area for 7 out of 10 years



Foster v. Vilsack, 820 F.3d 330 (8th Cir., 2016)

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First Claim – Conclusion

- Court found in favor of NRCS
- Reviewed testimony of agricultural engineer and determined that the identification of the area as a wetland was based on more than “color tone”
- Evidence was sufficient to support NRCS’s final decision



Foster v. Vilsack, 820 F.3d 330 (8th Cir., 2016)

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Second Claim

2. NRCS wrongly concluded disputed area supported hydrophytic vegetation under normal circumstances after using comparison site that was too far away

- Rule:
 - “Hydrophytic vegetation consists of plants growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content...In the event the vegetation on such land has been altered or removed, NRCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions.” 7 CFR § 12.31(b)(2)(ii).
- Plaintiffs Argue:
 - NRCS improperly chose a site 40 miles away instead of a “local site” proposed by the plaintiffs
- NRCS Argues:
 - Comparison site was appropriate because it was located in the same hydric soil map as the disputed site and was an undisturbed prairie pothole



Foster v. Vilsack, 820 F.3d 330 (8th Cir., 2016)

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Second Claim – Conclusion

- Court found in favor of NRCS
- NRCS comparison site met the regulatory requirements for a comparison site
- Plaintiffs failed to show that the sites they selected met the same requirements



Foster v. Vilsack, 820 F.3d 330 (8th Cir., 2016)

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Takeaways

- While “areas of greener vegetation” is a wetland signature that NRCS will look for, that is different than simply looking for “color tone”
- Comparison sites do not have to be close by in order to satisfy regulatory requirements



Foster v. Vilsack, 820 F.3d 330 (8th Cir., 2016)

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Boucher v. USDA: Background & Facts

- Bouchers removed 9 trees from their property in late 1990s
- In 2002, NRCS performed a wetland determination by using a comparison site to determine the disputed area was a wetland
 - Bouchers appealed this determination in 2003, believed that resolved the issue
- In 2013, NRCS realized determined the Bouchers had converted a wetland
- Bouchers began the appeals process and ended up before 7th Circuit



Boucher v. USDA, 934 F.3d 530 (7th Cir. 2019)

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Boucher v. USDA: Before the Court

- NRCS used comparison site to argue the disputed area was a wetland that had been drained with drainage tile
 - Comparison site was indisputably a wetland
 - Maintained that tree removal was wetland conversion
- Bouchers presented evidence that no drainage tiles had been installed in the area, that the area had no wetland hydrology, and the removed trees were unlikely to occur in a wetland



Boucher v. USDA, 934 F.3d 530 (7th Cir. 2019)

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Findings & Takeaway

- Court concluded the comparison site used by NRCS was inappropriate
 - Comparison site was an unfarmed wetland while disputed area was clearly not a wetland
 - NRCS should have stopped when presented with evidence that no drainage tile had been used
- Court rejected NRCS argument that removal of woody hydrophytic vegetation from hydric soils was enough to prove wetland conversion
 - This is a direct conflict with Swampbuster focus on wetland hydrology
- Comparison sites must be appropriately similar to disputed areas
- Presence of wetland hydrology necessary to identify a wetland

Boucher v. USDA, 934 F.3d 530 (7th Cir. 2019)



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Other Important Cases

- Other recent Swampbuster cases of note not in federal court system:
 - **Hoffe Case**
 - Concerning 22.4 acres of land purchased by Hoffe in 2010 that had been continuously farmed with drainage tiles for over 100 years
 - Hoffe began improving tile system after purchase, causing NRCS to make first wetland determination
 - NRCS made repeated wetland determinations of the 22.4 acres based on one aerial photo
 - NAD found in favor of Hoffe, stating that NRCS violated its own regulations by making "unsupported assumptions" and ignoring evidence
 - **Hood Case**
 - In 2006, NRCS determined that Hood converted 18.74 acres of wetland into cropland – neither party did anything at the time
 - In 2016, NRCS made the same determination – Hood appealed, challenging 2006 determination
 - Claimed NRCS did not follow soil map, incorrectly identified soil in the disputed area, and that NRCS had previously told him the area did not support wetland hydrology or hydrophytic vegetation
 - NAD found in Hood's favor, determining that evidence showed natural water event altered hydrology of the land, and NRCS maps did not identify hydric soil in the area



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Background

- Final regulations published in Federal Register August 28, 2020
- Codified an interim final rule published in December, 2018
- Goal of new regs is to clarify process by which highly erodible lands and wetlands are identified, and help farmers better understand what actions result in ineligibility

7 CFR part 12.2, 12.30, 12.31



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Changes to Swampbuster

- Added definitions for: “best drained condition,” “normal climatic conditions,” “playa,” “pocosin,” “pothole,” & “wetland hydrology”
- Revised definition of “wetland determination” with respect to farmed wetland, farmed wetland pasture, and prior-converted cropland
- Clarified that wetland determinations are done on a field or sub-field basis
- Confirmed that wetland determinations made between Nov. 28, 1990 and July 3, 1996 are certified wetland determinations
- Requires a particular level of legibility for maps used for wetland determinations that result in ineligibility for benefits

7 CFR part 12.2, 12.30, 12.31



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Changes to Swampbuster, Cont.

- Clarified:
 - Wetland determination process involves three steps
 - Wetland hydrology consists of saturation by water during growing season sufficient to support hydrophytic vegetation
 - Wetland hydrology will be determined according to best drained condition when the wetland is affected by drainage manipulations that occurred prior to December 23, 1985
 - Wetland hydrology determinations will be made according to the current methodology used by NRCS at the time of the determination

7 CFR part 12.2, 12.30, 12.31




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Intended Outcomes

- Clarify when a wetland is present in an area
- Provide certainty with regard to determinations made between 1990 – 1996
- Explain what the process for determining a wetland already is without making significant changes

7 CFR part 12.2, 12.30, 12.31




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Biden Administration

- On Jan. 20, 2021, the Biden Administration issued executive order “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis”
- Order requires all federal agencies to review regulations passed between Jan. 20, 2017 and Jan. 20, 2021 to see if they present an obstacle to policies identified in the order
 - Policies include protecting the environment, utilizing “the best science,” and “bolster[ing] resilience to the impacts of climate change”
- Biden administration also released a non-exclusive list of regulations that it will be specifically reviewing – Swampbuster regulations are **not** on that list
- Unclear whether the Swampbuster regulations will be revised under the Biden administration

7 CFR part 12.2, 12.30, 12.31



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7 CFR part 12.2, 12.30, 12.31



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Final Takeaways

- Goal of Swampbuster is to conserve wetlands in agricultural areas by removing incentives to convert wetlands for agricultural production
 - Many exemptions to Swampbuster ineligibility provisions
- Swampbuster enforcement depends on wetland determinations
- Wetland determinations can lead to legal disputes
 - Common issues include prior-converted wetlands, minimal-effects determinations, and comparison sites
- New regulations aimed at clearing up common confusion
 - Clarifying prior-converted wetlands definition, and process by which wetlands are identified



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