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Farm Bill Conservation Programs: Swampbuster and Sodbuster

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When Congress enacted the 1985 Farm Bill, it included the Conservation Reserve Program (“CRP”), which was intended, in part, to conserve highly erodible land and wetlands. Colloquially known as the “Sodbuster” and “Swampbuster” provisions (“the conservation provisions”), they require farmers to 1) maintain a minimum level of conservation on highly erodible land, and 2) not convert wetlands for crop production, all in return for keeping certain United States Department of Agriculture (“USDA”) benefits. The goal of the conservation provisions is to encourage conservation priorities by reducing the availability of certain USDA benefits to those who make specific land-use decisions.

Participants in most of the USDA’s Farm Service Agency (“FSA”) and Natural Resource Conservation Service (“NRCS”) programs are generally required to remain in compliance with the conservation provisions. Additionally, any person who is affiliated with a USDA program participant is also bound by the conditions and requirements of the conservation provisions.

Whether someone is considered an affiliated person depends on the structure of the farming operation they work with. If the USDA program participant is an individual, the participant’s spouse or minor children who have a farming interest are considered affiliated persons. Any partnership, joint venture, other enterprise, or trust in which an individual USDA program participant has a direct ownership of, or financial interest in, will also be considered an affiliated person. If the USDA program participant is a partnership, corporation, or other type of entity, affiliated persons are any participant

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or stockholder in the entity, unless they only hold an indirect interest through another business enterprise with a 20 percent or less share in the entity.¹

FSA and NRCS are the agencies primarily responsible for determining eligibility and ensuring compliance with the conservation provisions. NRCS typically conducts status reviews to ensure that farmers are in compliance with the conditions and requirements of the conservation provisions. These reviews may be randomly selected or may occur because of recommendations from USDA or whistleblower complaint, and may be conducted either on or off-site. While there is no requirement that NRCS investigate allegedly non-compliant tracts of land in-person, it must make an in-person investigation before any benefits are withheld. Before making a violation determination, NRCS must make a reasonable effort to include the affected person in an on-site investigation. Additionally, if a participant disagrees with an off-site determination, NRCS must make an on-site determination. If the on-site determination differs from the original determination, the affected person may appeal the finding to the National Appeals Division (NAD) or to the FSA county committee.²

Sodbuster

The purpose of the Sodbuster program is to discourage the conversion of highly erodible grassland into cropland. For land to be considered highly erodible, it must be:

- Land that has, or if put into agricultural production would have, an excessive average annual rate of erosion in relation to the soil loss tolerance level; or
- Cropland that is classified as class IV, VI, VII, or VIII land under the land capability classification system³ in effect on December 23, 1985.⁴

Simply put, highly erodible land is land that erodes at an excessive rate, which is determined by its classification on the erodibility index. Soil maps and the erodibility index are the tools used by NRCS to identify highly erodible land. The erodibility index for a soil is determined by dividing the potential average annual rate of erosion for each soil by its predetermined soil loss tolerance value, also known as the T value. This requires the consideration of several factors including the amount of rainfall and runoff, the degree that soil resists water erosion, and the slope length and steepness of the ground.

Farmers and landowners who have highly erodible land on their property must work with NRCS to create conservation plans that ensure compliance with Sodbuster and help better manage resources. These plans may be revised based on markets, weather, or developments in technology.⁵

If participants in certain USDA programs convert highly erodible land or areas comprised primarily of highly erodible land into cropland, the participants become ineligible for program benefits. However,

¹ 7 C.F.R. § 12.8(a)-(c).

² 7 C.F.R. § 614.1.

³ The land capability classification system classifies soils based on similar hazards and limitations. There are eight different classes, and soil damage and limitations on use increase with the classification number.

⁴ 16 U.S.C. § 3801(a)(11)(A).

⁵ *What is a Conservation Plan?*, Natural Resources Conservation Service, accessible at <https://bit.ly/33BmUpA>.



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there are several exemptions that could maintain a non-compliant participant's eligibility. For example, a person who acted in good faith to comply with Sodbuster and their conservation plan, but failed to satisfy them may be granted up to one year to return to compliance before losing USDA benefits. Similarly, NRCS will typically not consider a participant to have come out of compliance with Sodbuster if the conservation plan fails, so long as the failure is technical and minor or was caused by circumstances beyond the control of the participant.

Participants who find themselves unable to comply because of weather, pests, or similar issues may apply to NRCS for a temporary variance that would allow them to be noncompliant for a specific amount of time without losing eligibility for USDA benefits. When determining whether to grant a variance for natural disasters such as weather, pest, or disease problems, NRCS will consider a variety of factors, including: the percent of the area damaged or destroyed by the event; the percent of expected crop production compared to normal production for that crop; the documented invasion of non-native insects, weeds, or diseases for which no recognized treatment exists; or whether an event is severe or unusual based on historical weather records.⁶ This is not a complete list of the possible exemptions from the sodbuster provisions; there are many other exemptions provided in section 12.5 of title 7 of the Code of Federal Regulations.⁷

Swampbuster

The Swampbuster program is similar to Sodbuster, but it applies to wetlands instead of highly erodible land. It is important to note that actual crop production on a wetland is not necessary for a participant to be in violation of Swampbuster. Instead, non-compliance occurs when action is taken to make crop production on a wetland possible. These actions generally include draining, dredging, filling, or leveling a wetland.

NRCS considers three characteristics to determine whether a certain tract of land is a wetland:

- 1) Predominance of hydric soils (wet soils);
- 2) Inundation or saturation by surface or groundwater sufficient to support a prevalence of water tolerant vegetation (wetland hydrology) and;
- 3) Whether the area supports a prevalence of water tolerant vegetation under normal circumstances.⁸

When all three of these characteristics are present in an area, that area will generally be considered a wetland. In an effort to better inform farmers and landowners about the requirements of Swampbuster, USDA recently finalized a rule clarifying the process used by NRCS for delineating, determining, and certifying wetlands. The new rule outlines clear procedures for identifying wetland hydrology, including clarified definitions for "wetland hydrology,"⁹ "wetland determination," "best

⁶ 7 C.F.R. §12.5(a)(6)(ii).

⁷ <https://bit.ly/3nnHykZ>.

⁸ 16 U.S.C. § 3801(a)(27); 7 C.F.R. § 12.31(a)-(c).

⁹ Wetland hydrology means inundation or saturation by surface or ground water during a growing season at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation. When a wetland is affected by drainage



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drained condition,” and “normal climatic conditions.” The rule also establishes that normal climatic conditions for determining wetland hydrology will rely on the precipitation dataset from 1971-2000.¹⁰

When a farmer takes action to make crop production possible on a wetland, they are typically considered non-compliant with Swampbuster. However, there are many exemptions to Swampbuster that may prevent a farmer who converted wetland from becoming non-compliant with the program. Those exemptions include:

- A wetland converted to cropland before the provisions were enacted on December 23, 1985, that was being used for agricultural production on that date;
- Artificially created lakes, ponds, or wetlands;
- Wetlands created by irrigation delivery systems;
- Wetlands on which agricultural production is naturally possible;
- Wetlands that are temporarily or incidentally created as a result of adjacent development activities;
- Wetlands converted to cropland before December 23, 1985, that have reverted back to a wetland as the result of a lack of drainage, lack of management, or circumstances beyond the control of the landowner;
- Converted wetlands if the effect of the conversion is minimal; and
- Authorized wetlands converted through a permit issued under Section 404 of the Federal Water Pollution Control Act (Clean Water Act, 33 U.S.C. 1344), for which wetland values, acreage, and functions of the converted wetland were adequately mitigated.¹¹

While there are several exemptions available under the Swampbuster provisions, two of the most commonly used are the minimal effects exemption and the prior-converted cropland exemption.

Under the minimal effects exemption, a farmer may remain compliant with the Swampbuster provisions despite converting a wetland if the conversion will have a “minimal effect” on the wetland’s functions and values, and the functions and values of nearby wetlands. The NRCS will determine whether or not a participant is eligible for this exemption through an on-site assessment of the functions and values of the wetland and surrounding wetlands.¹² While an off-site analysis is an option for determining the impact on nearby wetlands, an on-site visit is required to determine the effect of a minimal effect exemption on the particular wetland in question, which is decided on a case-by-case basis. The NRCS has identified categorical minimal effect exemptions for activities that are routinely determined to have a minimal effect on wetland functions. Land that is subject to those activities that are included as categorical minimal exemptions are “fast-tracked” for approval because they do not

manipulations that occurred prior to December 23, 1985, wetland hydrology will be identified by the best drained condition resulting from such drainage manipulations. 7 C.F.R. § 12.31(c).

¹⁰ Highly Erodible Land and Wetland Conservation, 85 FR 53137, 53138.

¹¹ 7 C.F.R. § 12.5(b)(1)–(2).

¹² 7 C.F.R. 12.31(e)(1).



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require a case-by-case determination.¹³

Under the prior-converted cropland exemption, a farmer will not come out of compliance with Swampbuster after converting a wetland if the conversion occurred before December 23, 1985 so that the area had not wetland characteristics on that date, and the converted area produced an agricultural commodity at least once before that date.¹⁴ For land to qualify as prior converted cropland, it must:

- Have been cropped prior to December 23, 1985 with an agricultural commodity (an annually tilled crop such as corn);
- Have been cleared, drained or otherwise manipulated to make it possible to plant a crop;
- Continue to be used for agricultural purposes (cropping, haying or grazing)
- Not flood or pond for more than 14 days during the growing season.¹⁵

The NRCS must certify the land as a prior-converted cropland before the exemption applies. To determine if an area qualifies as prior-converted cropland, the NRCS uses a variety of methods, including crop history records, aerial photography, maps, and on-site evaluations. Once an area is determined to be a prior-converted cropland, it will not be considered to have reverted back to wetland status if the reversion is a result of lack of management to the drainage system, lack of management of the lands containing the wetland, or circumstances beyond a person's control. If an area that the NRCS certified as a prior-converted cropland reverts to a wetland state as a result of any of those activities, the reversion will not result in a Swampbuster violation.¹⁶

Like the prior-converted cropland exemption, the farmed-wetland exemption provides that certain wetlands that have already been used to produce agricultural commodities before December 23, 1985 are not subject to Swampbuster restrictions or penalties, provided that there is a continued absence of wetland vegetation. The NRCS must also certify that the land in question meets the required criteria before any exemption applies. Additional information on these and other exemptions not discussed may be found on the NRCS website¹⁷ and in section 12.5 of title 7 of the Code of Federal Regulations¹⁸.

Swampbuster participants who are out of compliance can mitigate the violation by restoring the converted wetland, enhancing an existing wetland, or the creating a new wetland. However, participants who are non-compliant and do not qualify for one of the exemptions, mitigation opportunities, or temporary variances may be ineligible for further USDA benefits, and may even be required to pay back benefits from previous years.

The NRCS provides a variety of helpful materials on Sodbuster and Swampbuster, including the

¹³ 7 C.F.R. 12.31(f).

¹⁴ 7 C.F.R. 12.2(a)(8).

¹⁵ *Wetland Factsheet—Prior Converted Cropland*, Natural Resources Conservation Service, accessible at <https://bit.ly/2GCDX1N>.

¹⁶ 7 C.F.R. § 12.5(b)(1)(ii).

¹⁷ <https://bit.ly/2FcYfhG>

¹⁸ <https://bit.ly/3nnHykZ>



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handbooks that NRCS agents refer to when carrying out the programs. Although these handbooks are not the law like a statute or regulation would be, they provide insight on how the NRCS implements the program and interprets the applicable law. All the NRCS handbooks can be found [here](#), and the NRCS handbooks on conservation programs can be found [here](#).

References and Resources:

7 C.F.R. §§ 12.1–12.33

7 C.F.R. § 614.1

16 U.S.C. §§ 3811–3814 (2018)

16 U.S.C. §§ 3821–3824 (2018)

Highly Erodible Land and Wetland Conservation, 85 Fed. Reg. 53137 (Aug. 28, 2020)

Highly Erodible Land Conservation & Wetland Conservation Compliance For Crop Insurance Participants, U.S. Dep’t of Agri. (Sept. 2014), <https://bit.ly/3d7qlqW>.

Megan Stubbs, *Conservation Compliance and U.S. Farm Policy*, Congressional Research Service, accessible at <https://bit.ly/34C3Arg>.

Walter G. Wright & Jordan Wimpy, *Highly Erodible Land and Wetland Conservation Compliance Provision: U.S. Department of Agriculture Issues Final Rule*, Arkansas Environmental, Energy, and Water Law Blog (Aug. 31, 2020), <https://bit.ly/3iJXj3>.

Wetland Factsheet—Prior Converted Cropland, Natural Resources Conservation Service, accessible at <https://bit.ly/2GCDX1N>.

What is a Conservation Plan?, Natural Resources Conservation Service, accessible at <https://bit.ly/33BmUpA>



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