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Swampbuster, sodbuster, and conservation compliance programs — first

by Linda A. Malone

On September 17, 1987, final regulations were published in the *Federal Register* for the swampbuster, sodbuster, and conservation compliance programs of the 1985 Farm Bill. Pub. L. No. 99-198, provisions, codified at 16 U.S.C. §§ 3801-3823 (West Supp. 1987). The new rules, published in 52 Fed. Reg. 35194-35208 (September 17, 1987), will be published in the *Code of Federal Regulations* as 7 C.F.R. Part 12. The changes made in the final rule from the interim rule are significant and extensive.

The 1985 Farm Bill contained several conservation provisions that were new to agricultural programs, among which were the so-called sodbuster, swampbuster, conservation compliance, and conservation reserve programs. The basic purpose of the sodbuster, swampbuster, and conservation compliance provisions is to ensure cross-compliance between conservation programs of the USDA and financial support programs of the USDA.

Under these provisions, a person receives no USDA program payments, that is, price and income supports, disaster payments, crop insurance, CCC storage payments, farm storage facility loans, Farmer's Home Administration loans (if the proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or conversion of wetland), and all other USDA production payments, unless the person is in compliance with the conservation provisions. Until these provisions in the 1985 Farm Bill, soil conservation had been based primarily on voluntary initiatives.

Swampbusting

Under the swampbuster provision, any person who converts wetlands after December 23, 1985, the effective date of the 1985 Farm Bill, will be ineligible for price and income supports and other USDA program payments for any agricultural commodities produced by that person during that crop year. 16 U.S.C. § 3821. The application of a conservation plan to the converted wetlands, in contrast to the sodbuster provision, is irrelevant to eligibility.

Under the final rule, a wetland is defined as land that has a predominance of "hydric soils" and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that "under normal circumstances" does support, a prevalence

of "hydrophytic vegetation" typically adapted for life in the saturated soil conditions. 52 Fed. Reg. at 35202. An exception from the definition of "wetland" is made for lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils. *Id.* at 35202. "Under normal circumstances" is explained in the final rule as referring to "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." *Id.* at 35207.

A person is ineligible for program payments under the swampbuster provision if all or a portion of the field is converted wetland, and the ASCS has determined that the person was entitled to share in the crops available for the land or the proceeds thereof, and the ASCS has determined that the land is or was planted to an agricultural commodity during the year for which the person is requesting benefits. *Id.* at 35202. Converted wetland means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated to make possible the production of an agricultural commodity without further application of the manipulations described, if such production would not have been possible but for the action and before such action the land was wetland and was neither highly erodible land nor highly erodible cropland. *Id.* at 35201.

In determining if wetland has been converted, the following factors are to be considered: (1) where the altering activity is not clearly discernible, comparison of other sites containing the same hydric soils in a natural condition to determine if the wetland has been converted; and (2) where woody hydrophytic vegetation has been removed, and wetland conditions have not returned as a result of abandonment, the area is to be considered converted wetland. *Id.* at 35207. Also, potholes, playas, and other wetlands flooded or ponded for extended periods will not be considered converted based upon activities occurring prior to December 23, 1985, and further conversions may result in loss of eligibility unless determined to have a minimal effect on wetland values. *Id.*

There are several exemptions that may relieve a person from the requirements of the act. If conversion of the wetland was commenced or completed before December 23, 1985, the person pro-

ducing an agricultural commodity on the land continues to be eligible for program payments. 16 U.S.C. § 3822.

The final rule has been revised at length to clarify when conversion is considered to have been "commenced" before December 23, 1985. Conversion was "commenced" before that date if: (1) draining, dredging, filling, leveling or other manipulation (including any activity that results in impairing or reducing the flow, circulation, or reach of water) was actually started on the wetland; or (2) the person applying for benefits has expended or legally committed substantial funds either by entering into a contract for the installation of any of the above activities or by purchasing construction supplies or materials for the primary and direct purpose of converting the wetland. 52 Fed. Reg. at 35203.

Even if the criteria for "commencement" conversion before December 23, 1985 are not satisfied, the person may request a commencement determination from the ASCS upon showing that undue economic hardship will result because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland. *Id.*

Under the final rule, activities of a water resource district, drainage district, or similar entity are attributable to all persons within the jurisdiction of the entity who are assessed for its activities. *Id.* A separate rule applies to determine when conversion by such an entity was "commenced" before December 23, 1985. *Id.*

A person seeking a determination of conversion commencing before December 23, 1985, must request the determination before September 19, 1988, must demonstrate that the conversion has been actively pursued, and must complete the conversion by January 1, 1995. *Id.* at 35203.

Conversion of a wetland is considered to have been completed before December 23, 1985, if any of the above described conversion activities were applied to the wetland and made the production of an agricultural commodity possible without further manipulation where the production would not otherwise have been possible.

Another revision clarifies that converted wetlands are presumed to have been converted by the person applying for benefits unless the person can show

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that the conversion was by an unrelated third party and that there has been no involvement in a scheme or device to avoid compliance. *Id.* If there was acquiescence in, approval of, or assistance to acts of the third party, the person applying for benefits is subject to the scheme or device restrictions and may lose eligibility. If, however, the conversion was in fact done by an unrelated third party, the person applying for benefits may continue to produce agricultural commodities on the converted wetland and retain eligibility if there are no further improvements to the drainage, or if the SCS determines further improvement will have a minimal effect on wetlands values. *Id.* However, any further drainage improvement on such land by the party is not permitted without loss of eligibility for USDA program payments, unless the SCS determines that further drainage activities applied to such lands would have minimal effect on any remaining wetland values. *Id.*

An artificial lake, pond, or wetland created by excavating or diking non-wetland to collect and retain water for purposes such as water for livestock, fish production, irrigation, a settling basin, cooling, rice production, or flood control is not subjected to the provisions of the act. *Id.* An area is considered an artificial wetland if such area was formerly non-wetland or wetland on which conversion was started or completed before December 23, 1985, but meets the wetland criteria "due to the actions of man." *Id.* at 35207. A wet area created by a water delivery system, irrigation or irrigation system is also not covered as wetland under the act. *Id.* at 35203.

Wetland on which production of an agricultural commodity is possible as the result of a natural condition and without action by the person that destroys a natural wetland characteristic is not wetland that is covered by the act. *Id.*

Converted wetland may also be exempt if the SCS has determined that the actions of the person with respect to the production of the agricultural commodity, individually and in connection with all other similar actions authorized by SCS in the area, would have only a minimal impact on the hydrological and biological aspect of wetlands. *Id.* Although this exception might seem to be a broad one, the legislative history makes it clear that this is intended to be a very limited exemption. A request for

such a determination must be made prior to the beginning of activities that would convert the wetland. *Id.* at 35208.

Sodbusting

Under the sodbuster provision, a producer is ineligible for USDA program payments for agricultural commodities if there is production without an approved conservation plan or system on a field in which highly erodible land is predominant. *Id.* at 35201.

In the final rule, many of the definitions in the interim rule have been revised. The definition of "highly erodible land" encompasses land that has an "erodibility index" of eight or more. *Id.* at 35201. "Erodibility index" is a numerical value that expresses the potential erodibility of a soil in relation to its soil loss tolerance value *without consideration of applied conservation practices or management.* *Id.* (emphasis added). Therefore, land that may actually be eroding at an acceptable rate, but with an unacceptable potential rate of erosion in relation to the acceptable soil loss tolerance, will be considered highly erodible land. Also, the definitions of "conservation plan" and "conservation system" have been revised to be more specific about their contents. *Id.*

Highly erodible land is predominant in a field if one-third of the field is highly erodible or fifty or more acres of the field are highly erodible. *Id.* at 35206. Highly erodible land that was planted to an agricultural commodity in any year from 1981 through 1985, or that was set aside, diverted, or otherwise not cultivated in any such crop year under a program administered by the Secretary to reduce production of an agricultural commodity, is exempt from the sodbuster requirement. *Id.* at 35202.

In response to a statutory amendment on April 24, 1987 (Puh. L. No. 100-28), persons who had alfalfa in a crop rotation during each of the 1981 through 1985 crop years based on a conservation plan have an extension until June 1, 1988 to fully apply a conservation system to retain eligibility. *Id.* at 35202. If the person has not fully implemented an approved conservation plan by that date, the person shall be deemed to be ineligible for the 1988 crop year and for every following year that an agricultural commodity is produced without an approved conservation plan or system. *Id.* A person is not ineligible for program pay-

ments as a result of production on highly erodible land without a conservation plan if it was done in reliance on a determination by SCS that the land was not highly erodible land when the production was made. The exemption does not apply to any agricultural commodity that was planted on highly erodible land after the SCS determines that such land is highly erodible land and the person is so notified. *Id.* at 35203.

For the first time, under the final rule persons are allowed to exchange certain crop acreage bases for crops that have a high residue base if the high residue crop is recommended by SCS as being essential for the conservation plan and the SCS's recommendation is approved by the ASCS. *Id.* at 35204.

Conservation compliance

The requirement of conservation compliance is applicable to highly erodible land as defined in the sodbuster provision. By the later of January 1, 1990 or the date two years after the SCS soil survey is completed, a person must be "actively applying" an approved conservation system or plan for highly erodible cropland that was in production or set aside in USDA programs for any year from 1981 to 1985. *Id.* at 35202. A person is "actively applying" a plan if the plan "is being applied according to the schedule specified in the plan and the applied practices are properly operated and maintained." *Id.* at 35206. By 1995, the person must have fully complied with the plan. *Id.* at 35202. Revisions in the final regulation indicate that the soil survey that must be completed is that which applies only to the cropland portion of the tract or farm, not the plan for the entire farm. *Id.*

A conservation plan for purposes of the sodbuster and conservation compliance provisions is defined as a document containing the decisions of a person with respect to the location, land use, tillage systems and conservation treatment measures as scheduled which, if approved, must be or have been established on highly erodible cropland in order to control erosion on the land. *Id.* at 35201. A conservation system means the part of cropland resource management system applied to a field or group of fields that provides for cost effectiveness and practical erosion reduction based upon the standards contained in the SCS Field Office Technical Guide. *Id.*

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A new section dealing exclusively with the conservation plans and systems encourages persons who require SCS assistance in developing a plan or installing a system to request assistance well in advance of deadline dates for compliance. *Id.* at 35206. Conservation districts approve or disapprove conservation plans and systems as in conformance with the SCS Field Office Technical Guide. If the conservation district fails to act without due cause within 45

days of the request for approval, the SCS will approve or disapprove the plan or system. *Id.*

Sections 12.9 and 12.10 are revised in the final rule to expand the ineligibility of landlords for tenants' actions. Under the final rule, landlords are ineligible for benefits not only when noncompliance is required in the contract with a tenant, but also if the landlord has acquiesced, approved, or assisted in the noncomplying activities of the tenant. *Id.* at 35205.

Persons who wish to participate in the USDA programs are responsible for contacting the appropriate agency in the USDA well in advance of the intended participation date to assure that determinations regarding highly erodible land, wetland, and conservation plans or systems are scheduled in a timely manner. *Id.* at 35202. The final rule applies to crops planted after September 17, 1987, and to all determinations made after or pending on that date. *Id.* at 35193.