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The Conservation Title of the 1990 Farm Bill

By Linda A. Malone

The conservation title of the 1990 Farm Bill, known as the "Conservation Program Improvements Act," significantly expands the scope of the conservation reserve programs, creating several new environmental reserve programs, while broadening the exemptions and weakening enforcement of the sodbuster and swampbuster programs.

SODBUSTER

Section 3812 of title 16 governing exemptions from sodbuster compliance provides that a tenant's ineligibility payments may be limited to the farm that was the basis for the ineligibility determination if the tenant has made a good faith effort to comply with the sodbuster requirements (including enlisting the assistance of the Secretary to get a reasonable conservation compliance plan), the landlord refuses to comply with such plan for the farm, and the tenant's lack of compliance is not part of a scheme or device to avoid compliance.¹

Moreover, failure to "actively apply" a conservation plan for sodbuster compliance will not result in ineligibility for program payments if the person has not violated the sodbuster provision within the previous five years and acted in good faith without intent to violate the act.² Instead, the violator's program benefits for that crop year alone will be reduced by not less than \$500 nor more than \$5,000, depending on the seriousness of the violation, so long as the person actively applies the conservation plan according to schedule in subsequent crop years.³ Finally, no person will be found ineligible for payments under the sodbuster program if: (1) the violation is technical, minor in nature, and has a minimal effect on the erosion control purposes of the conservation plan; (2) the failure is due to circumstances beyond the control of the person; or (3) the Secretary has granted a temporary variance from the practices in the plan for handling a specific problem.⁴

Excluded from sodbuster compliance altogether under the amendments is non-commercial production of agricultural commodities if limited to two acres or less and if the Secretary determines the pro-

duction was not intended to circumvent the requirements of the program.⁵

SWAMPBUSTER

The most extensive changes in the amendments are to the swampbuster and conservation reserve programs. In addition to the previous statutory and regulatory exemptions to the swampbuster prohibition, also exempt is production on a converted wetland if the wetland has been frequently cropped prior to conversion and the conversion is mitigated by restoration of another wetland converted before December 23, 1985. The restoration must be in accordance with a restoration plan, be in advance of or concurrent with the conversion, not be at the expense of the federal government, be on not greater than a one-for-one acreage basis unless more acreage is necessary for adequate mitigation, be on lands in the same general area of the local watershed as the converted wetland, and be subject to a recorded easement so long as the other wetland is not returned to its original state.⁶ A producer has a right to appeal the imposition of a mitigation agreement requiring more than one-to-one acreage mitigation.⁷

A good faith exemption to the sanctions of the program is provided as with the sodbuster program. A person's payment may be reduced by not less than \$750 nor more than \$10,000 for the crop year rather than terminated altogether if the person is actively restoring the converted wetland under an agreement with the Secretary or the wetland has been restored, the person has not violated the swampbuster requirements in the previous ten-year period, and the conversion was done in good faith without intent to violate the requirements of the program.⁸

Any violator of the swampbuster program can once again become eligible for program payments by fully restoring the illegally converted wetland to its prior wetland state.⁹ Cropland will not be considered a wetland in the first instance if its wetland characteristics result from the actions of an "unrelated person or public entity, outside the control of, and without the prior approval of the landowner or tenant. . . ."¹⁰

ECARP

Lands qualifying to be placed in reserve are broadly expanded pursuant to the amendments under the umbrella of the "environmental conservation acreage reserve program."¹¹ In addition to highly erodible land, wetlands and lands

with water quality problems may be placed in reserve.¹² Land placed in the environmental conservation reserve program during the 1986 through 1995 calendar years must take not less than 40,000,000 nor more than 45,000,000 acres.¹³

CRP

Eligible lands for the conservation reserve program are defined as:

"(1) highly erodible croplands that—
(A) if permitted to remain untreated could substantially reduce the production capability for future generations; or

(B) cannot be farmed in accordance with a plan under section 1212;

(2) marginal pasture lands converted to wetland or established as wildlife habitat prior to the enactment of the Food, Agriculture, Conservation, and Trade Act of 1990;

(3) marginal pasture lands to be devoted to trees in or near riparian areas or for similar water quality purposes, not to exceed 10 percent of the number of acres of land that is placed in the conservation reserve under this subchapter in each of the 1991 through 1995 calendar years;

(4) croplands that are otherwise not eligible—

(A) if the Secretary determines that (i) such lands contribute to the degradation of water quality or would pose an on-site or off-site environmental threat to water quality if permitted to remain in agricultural production, and (ii) water quality objectives with respect to such land cannot be achieved under the water quality incentives program established under chapter 2;

(B) if such croplands are newly-created, permanent grass sod waterways, or are contour grass sod strips established and maintained as part of an approved conservation plan;

(C) that will be devoted to, and made subject to an easement for the useful life of, newly established living snow fences, permanent wildlife habitat, windbreaks, shelterbelts,

(D) if the Secretary determines that such lands pose an off-farm environmental threat, or pose a threat of continued degradation of productivity due to soil salinity, if permitted to remain in production."¹⁴

Although contracts may range from ten to fifteen years, contracts for certain lands devoted hardwood trees, shelterbelts, windbreaks, or wildlife corridors are more flexible in their duration.

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¹⁵Upon application by the appropriate state agency, the Secretary can also designate watershed areas of the Chesapeake Bay region, the Great Lakes region, the Long Island Sound region and other areas of special environmental sensitivity for inclusion in the reserve. *Id.*¹⁶

Not less than one-eighth of the land placed in the reserve from 1991 to 1995 must be devoted to trees or noncrop vegetation or water that may provide a permanent habitat for wildlife.¹⁷ The Secretary is also authorized under certain conditions to permit "alley cropping," which is the "practice of planting rows of trees bordered on each side by a narrow strip of groundcover, alternated with wider strips of row crops or grain."¹⁸

WRP

A new wetlands reserve program is also created for approximately one million acres from 1991 to 1995.¹⁹ Eligible wetlands are farmed wetlands or converted wetlands (along with adjacent lands functionally dependent on such wetlands) if "the likelihood of the successful restoration of such land and the resultant wetland values merit inclusion . . . in the program taking into consideration the cost of such restoration."²⁰ Some other wetlands may be eligible under certain conditions.²¹

The owner of qualifying wetlands must agree to grant an easement on the land to the Secretary with an appropriately recorded deed restriction and to implement a wetland conservation plan to preserve the wetlands values.²² The easement must be for thirty years, be permanent, or have the maximum duration allowed under applicable state laws.²³

Compensation is provided for the easement in cash in an amount not to exceed the difference in the fair market value of the land unencumbered and as encumbered with the easement.²⁴ Cost sharing for conservation and technical assistance are also provided by the Secretary.²⁵

VOLUNTARY INCENTIVE PROGRAM

The amendments also create a voluntary incentive program to encourage development of water quality protection plans.²⁶ From 1991 to 1995 the Secretary can enter into agreements of three to five years on 10 million acres with owners and operators of farms to implement such plans in return for which the Secretary will provide cost sharing assistance for the implementation of wetland preservation or wildlife habitat improvement.²⁷

and an "annual incentive payment."²⁸ Payments to a participant may not exceed \$3,500 per person per year in incentive payments and not more than an additional \$1,500 per person per contract in cost-sharing assistance.²⁹ Eligible lands include:

"(1) areas that are not more than 1,000 feet from a public well unless a larger wellhead area is deemed desirable for inclusion by the Secretary in consultation with the Environmental Protection Agency and the State agency responsible for the State's operations under the Safe Drinking Water Act (42 U.S.C. 300h-7);

(2) areas that are in shallow Karst topography areas where sinkholes convey runoff water directly into ground water;

(3) areas that are considered to be critical cropland areas within hydrologic units identified in a plan submitted by the State under section 319 of the Federal Water Pollution Control Act (33 U.S.C. 1329) as having priority problems that result from agricultural nonpoint sources of pollution;

(4) areas where agricultural nonpoint sources have been determined to pose a significant threat to habitat utilized by threatened and endangered species;

(5) areas recommended by State lead agencies for environmental protection as designated by a Governor of a State;

(6) in consultation with the Secretary, other areas recommended by the Administrator of the Environmental Protection Agency or the Secretary of the Interior;

(7) lands that are not located within the designated or approved areas but that are located such that if permitted to continue to operate under existing management practices would defeat the purpose of the program as determined by the Secretary; or

(8) areas contributing to identified water quality problems in areas designated by the Secretary."³⁰

Priority in accepting agreements is given to lands on which agricultural production contributes to or creates potential failure to meet water quality standards or the goals and requirements of federal or state water quality laws.³¹ A separate environmental easement program is created for the Secretary to acquire easements on land placed in the conservation reserve, land under the Water Bank Act (16 U.S.C. § 1301), and other cropland that contains riparian corridors, is a critical habitat or that contains other environmentally sensitive areas.³² In return for the easement and

implementation of a natural resource conservation management plan, the Secretary will provide cost-sharing, technical assistance, and annual easement payments for a period not to exceed ten years in an amount not to exceed the lesser of \$250,000 or the difference in the land's value with and without the easement.³³

Reauthorization highlighted the disagreement between environmentalists on the one hand and producers and the administering agencies on the other over the need to strengthen and expand the 1985 provisions. The object of most of this controversy was wetlands preservation.

Both the Environmental Protection Agency and the Soil and Water Conservation Society had determined that wetland conversion had significantly decreased after implementation of the swampbuster program.³⁴ Many environmental organizations claimed the program had had little impact, often pointing to the fact that at least 77,000 acres of nonexempt wetlands had been converted since 1985.³⁵ When the ASCS reported in April of 1989 that 427 producers had lost their benefits due to the swampbuster prohibition,³⁶ the National Wildlife Federation asserted, based on a Freedom of Information Act request, that only twenty-six producers had actually lost benefits between December 23, 1985 and April 15, 1989.³⁷

Although the battle lines were clearly drawn in the 1990 debates, there were no clear victors. The Conservation Program Improvements Act generally strengthened the conservation programs. While expanding their reach, however, the Act also added several new exemptions and did nothing to restrict the more controversial exemptions already provided (the "commencement" and "hardship" exemptions to swampbuster, for example), which environmental groups claimed were subject to abuse. Moreover, the basic enforcement mechanisms for violations remain unchanged.

The Act exemplifies the current schizophrenia in environmental regulation of soil erosion. Agriculture, like most sectors of the economy, cannot remain immune from the ever expanding sweep of environmental regulation. Yet meaningful enforcement of such regulation threatens the most fundamental premise in the agricultural economy—constantly expanding production. The difficult choice between emphasis on production or environmental preservation was skirted alto-

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gether in the Act in a compromise meant to be palatable to producers and environmentalists. The scope of the conservation restrictions was expanded but there are limited possibilities for enforcement of the restrictions against those who fail to comply.

¹ House and Senate Final Approved Bill Text Report, 1990 Conservation Program Improvements Act, § 3812.

² *Id.* § 1412(c)(f)(1)(A), (B), amending 16 U.S.C. 3812.

³ *Id.* § 1412(c)(f)(2), amending 16 U.S.C. 3812.

⁴ *Id.* § 1412(c)(f)(4), amending 16 U.S.C. 3812.

⁵ *Id.* § 1412(f)(h), amending 16 U.S.C. 3812.

⁶ *Id.* § 1422, amending 16 U.S.C. 3822 § 1222(f)(2).

⁷ *Id.* § 1422, amending 16 U.S.C. 3822 § 1222(g).

⁸ *Id.* § 1422, amending 16 U.S.C. 3822 § 1222(h)(1).

⁹ *Id.* § 1422, amending 16 U.S.C. 3822 § 1222(i).

¹⁰ *Id.* § 1424, amending Subtitle C of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1224.

¹¹ *Id.* § 1431, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1230(a).

¹² *Id.*
¹³ 1990 Conservation Program Improvements Act, § 1431, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1230(b).

¹⁴ *Id.* § 1432, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1231(c).

¹⁵ *Id.* § 1432, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1231(e)(2). The Secretary can extend the contract period for such lands up to five years with the agreement of the owners. *Id.*

¹⁶ *Id.* § 1432, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1231(f)(1).

¹⁷ *Id.* § 1433, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1232(c).

¹⁸ *Id.* § 1433, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1232(d)(4).

¹⁹ *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237(b).

²⁰ *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237(c).

²¹ *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237(d).

²² *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237A(a).

²³ *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237A(e)(2).

²⁴ *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237A(f).

²⁵ *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237C(b).

²⁶ *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238B(a). Agreements for incentive payments authorized under this section require implementation of an approved water quality protection plan by the owner or

operator concerned as well as compliance with any other conditions included by the Secretary in the agreement to facilitate implementation of the plan or administration of the program. *Id.*

²⁷ *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238B(a)(4)(A).

²⁸ *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238B(a)(5)(C).

²⁹ *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238B(a)(6)(C)(i).

³⁰ *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238C(a).

³¹ *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1239(b)(1).

³² *Id.* § 1440, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1239(b)(1).

³³ *Id.* § 1440, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1239B, and § 1239C(a), (b), (c).

³⁴ Environmental Protection Agency, Aerial Photographic Analyses of Wetland Conversion Related to the Food Security Act 11-17 (1990); Soil and Water Conservation Society, Implementing the Conservation Provisions of the Food Security Act 8-9 (1989).

³⁵ Soil Conservation Service, Food Security Act Progress Report - October 1989 (1989).

³⁶ Agricultural Stabilization and Conservation Service, Sodbuster/Swampbuster Cumulative Data Report for March and April (1989). More than half won back their benefits on appeal. Department of Agriculture, 11 Farmlines 5 (Feb. 1990).

³⁷ Presentation by Anthony N. Turrini, National Wildlife Federation to the Annual Meeting of the American Agricultural Law Association, November 3, 1990.