1993

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Linda A. Malone

*William & Mary Law School, lamalo@wm.edu*

Repository Citation


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Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill

Linda A. Malone*

I. INTRODUCTION

As 1991 marked the two hundredth anniversary of the Bill of Rights and the spiritual birth of the American constitutional system, it seems fitting to reflect on the legacy of Thomas Jefferson, one of the most influential figures in articulating the political ideas embodied in the Bill of Rights. Jefferson envisioned the United States as a nation of small farmer-landowners, each economically and politically independent, and he believed that agriculture would be the heart and soul of American democracy.1

Jefferson could not have visualized the present-day realities of America’s single-crop, government subsidized, heavily regulated agricultural system. Only 124,000 people own nearly half of American farmland, and many owners do not operate their farms directly.2 The United States Department of Agriculture projects that by the year 2000, 2.7 million people will own 1.7 million farms, compared to 4.9 million owners of 5.7 million farms in

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Thomas Jefferson was an absentee farmer at his beloved estate in Monticello, but he took an active interest in the science of agriculture and in the day-to-day management of a farm. Jefferson regarded farming as a noble pursuit because of its close relationship with the land and with nature itself. In recent years, however, agriculture has come to be regarded as an enemy of nature, responsible for inflicting widespread environmental harm. Agriculture is, for example, the single largest contributor to nonpoint source water pollution, as surface water and groundwater become contaminated with fertilizer residues, insecticides, herbicides, fungicides, dissolved minerals, and animal-waste associated bacteria.

The bicentennial of the Bill of Rights marked a critical and largely unheralded turning point in national agricultural policymaking. The broad-based environmental programs contained in the 1990 Farm Bill represent a quantum leap beyond the soil erosion control initiated in the 1985 Farm Bill. The conservation programs, as established in 1985 and as refined and expanded in 1990, mark the emergence of a nascent agricultural-environmental ethic in national policy-making. At the core of these controversial new programs is nothing less than a national debate over the role of government in regulating agriculture in a nation which finds its political roots in the Jeffersonian belief of the moral superiority of farm life. It is only appropriate, then, to turn to Jefferson's philosophy for guidance on the direction these revolutionary new programs should take and on the role of agriculture in modern American society.

The analysis will start with a focus on Jefferson's political and economic philosophy for an agrarian democracy, as well as his personal life as a farmer. After a brief history of the genesis of the conservation programs of 1985, this article will analyze the current requirements of these programs and chart their departure from the course followed by many soil conservation programs of the past. The paper will then shift back and reason that the continuing influence of the Jeffersonian ideal in America is critical to determining the future role of the federal government in regulating agriculture to serve environmental objectives.

3. Id.

II. THE JEFFERSONIAN IDEAL OF AN AGRARIAN DEMOCRACY

Those who labour in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth. Corruption of morals in the mass of cultivators is a phænomenon of which no age nor nation has furnished an example.\(^5\)

Jefferson was one of “the chosen people of God,” a farmer.\(^6\) For Jefferson, agriculture was the first of the four pillars for national prosperity (along with manufacturing, commerce and navigation) and the first interest promoted by higher education. Agriculture deserved this prominence, according to Jefferson, because of its productivity and conduciveness to virtue and independence. However, with manufacturing delegated to a secondary position, how could American crops get to Europe and manufactured goods to America without undue reliance on commerce? Jefferson’s tenuous political theory on this point is that international commerce could be tolerated because allowing farmers to sell excess crops for manufactured goods from abroad would keep the corruption of industry in America to a minimum.

The virtues of independence and self-sufficiency in farming are difficult to reconcile with farmers’ desires and needs for manufactured goods, even for a great rationalizer like Jefferson. Jefferson himself certainly could not have lived the luxurious style he maintained at Monticello without the benefits of commerce. In that respect, he often turned for justification of his political theory to “the immensity of land courting the industry of the husbandman” in America.\(^7\) Americans could remain independent and untainted by commerce so long as farming was the nation’s primary occupation, and that occupation was secure so long as there were vacant lands in any part of America.\(^8\)

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5. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 164-165 (William Peden ed., 1954) [hereinafter NOTES ON VIRGINIA]. Jefferson would probably cringe at this characterization for himself, given his disinclination to allude to “God” with the notable exception of this reference to agriculture.

6. Id. at 175 (“[C]ultivators of the earth are the most virtuous and independent citizen.”). According to Jefferson, farmers are “the chosen people” because of their proximity to nature. However much Jefferson revered the farmer, he deified Nature.

7. Id. at 164.

By the late nineteenth century, farmers were not seeking independence but commerce. They organized politically to do so under the leadership of transformed Jeffersonians like William Jennings Bryan. Jefferson's political theories for the primacy of agriculture terminated at the end of the frontier in America. As Frederick Jackson Turner lamented, "the frontier has gone, and with its going has closed the first period in American history." There is no greater testament to the tenuousness of Jefferson's reconciliation of agriculture with commerce and industry than the single crop, corporate, nonorganic, and subsidized agricultural economy of today.

Was Jefferson a soil conservationist? The answer, as might be expected with the enigmatic Jefferson, yes and no. Soil conservation was being practiced in the Chesapeake Bay area during the Revolutionary War period and thereafter. Tidewater Virginia, more than the Piedmont, was in fact facing a soil crisis in Jefferson's time. Early soil conservationists recommended a shift in Virginia from soil-depleting tobacco to grain (also soil depleting) in conjunction with conservation practices. These conservation practices included deeper plowing, more crop rotation, and more fertilization (mostly with manure). Farmers utilizing these practices tended to favor the first and last methods over crop rotation. Tobacco was resistant to these conservation practices because tobacco was cultivated for a longer period of time than other crops and manure was believed to affect the taste of the plant.

Jefferson was well aware of early conservation practices. He noted that the cultivation of tobacco was declining at the commencement of the Revolutionary War with wheat taking its

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12. Although in 1793 Jefferson wrote that it was cheaper to buy a new acre of land than to fertilize an old one, by 1803 he was convinced otherwise and engaged in massive fertilization, crop rotation, and contour plowing. R. Shalhope, supra note 8, at 388. After resigning from Washington's administration in December of 1795, Jefferson's first priority upon his return to Monticello was to restore the soil too long abused by overseers and relatives in his absence. Thomas Jefferson's Farm Book 310 (Edwin M. Betts ed., 1953).
place. He applauded the decline of tobacco, referring to it as “a culture productive of infinite wretchedness.” In part, this dislike of tobacco appears predicated on the importance of slave labor for its cultivation, but more clearly Jefferson advocates its abandonment because of its soil-depleting qualities: “[tobacco] requires still more indispensably an uncommon fertility of soil: and the price which it commands at market will not enable the planter to produce this by manure.” He wrote at length on soil conservation, not only for its utility but for its pastoral beauty:

Ploughing deep, your recipe for killing weeds, is also the recipe for almost every good thing in farming. The plough is to the farmer what the wand is to the sorcerer. It’s effect is really like sorcery. In the country wherein I live we have discovered a new use for it, equal in value almost to it’s services before known. Our country is hilly and we have been in the habit of ploughing in strait rows whether up and down hill, in oblique lines, or however they lead; and our soil was all rapidly running into the rivers. We now plough horizontally following the curvatures of the hills and hollows, on the dead level, however crooked the lines may be. Every furrow thus acts as a reservoir to receive and retain the waters, all of which go to the benefit of the growing plant, instead of running off into streams. In a farm horizontally and deeply ploughed, scarcely an ounce of soil is now carried off from it. In point of beauty nothing can exceed that of the waving lines & rows winding along the face of the hills & valleys.

Jefferson was an avid farmer. From 1795 until his death, Jefferson had about 10,000 acres primarily in grains and tobacco. At Monticello in particular, Jefferson constantly experimented with new crops, new breeds of animals, new equipment and new methods. He brought to America many plants from Europe, and had high hopes for introducing olives and rice from Italy. He was elected to agricultural societies in England, France, Italy, and Germany. As a scholar, he collected over two hundred books and essays on agriculture and wrote voluminously on

13. Notes on Virginia, supra note 5, at 166.
14. Id.
15. Id.
17. Shalhope, supra note 8, at 389.
18. Miller, supra note 9, at 220-21.
farming. In 1811 he proposed the creation of a system of agricultural societies and founded the Albemarle Agricultural Society. He proclaimed that within a university, agriculture is “first in utility, and ought to be the first in respect . . . It is a science of the very first order . . . In every College and University, a professorship of agriculture, and the class of its students, might be honored as the first.”

Jefferson was fascinated by the “great workshop of nature” and sought to control its vagaries through conservation:

[H]e knew that the sun could bake, and the rain erode, overcultivated fields, so he established systems of fallow rotation, cover crops, manuring, and chemical fertilizer (gypsum) to ensure that the atmosphere was effective at its job. He became a publicist for contour plowing when he saw that on the Virginia hillsides the “horizontal furrows arrested the water at every step.” On the basis of an intuitive if inexplicit understanding of ecological relationships he proposed an organic control for the worms that attacked his tobacco plants (turkeys were brought in to eat them), and he noted an ecological succession of plants that, given enough time, might renew even the most severely eroded soils.

Jefferson was also usually in debt, a failing he blamed on “financial institutions and practices beyond his control.” Jefferson was, in short, a great agricultural innovator and an unsuccessful farmer.

So, in that sense, Jefferson was a conservationist. His practice of conservation was a natural outgrowth of his scientific interest in the processes of nature. Yet the conservation ethic of Jefferson and his contemporaries in agriculture was a limited one. Environmental and cultural historians have noted that the most common conservation practice in Jefferson’s time was to leave land fallow in order to replenish itself. In general, however, conservation practices were not widely followed.

In the broader context of conservation philosophy and ethics in this period, soil conservation was directed toward rebuilding nutrients in the land in order to increase land productivity. There was little or no appreciation of soil as a natural resource to
be preserved for its own sake, or of the off-site environmental harm caused by soil erosion.

Given the perception of unlimited expanses of land in America to which Jefferson subscribed, Jefferson's writings sharply contrast the writings of twentieth century environmentalists who are imbued with a growing awareness of the scarcity of natural resources. As much as conservationists might point to Jefferson's preservation of the Natural Bridge in Virginia, his scientific interest in land management, and his references to diminished species as evidence of a conservation ethic, Jefferson's appreciation of nature was defined by the parameters of the age of enlightenment, with its mechanistic approach to the "workshop of nature."

III. The 1985 Farm Bill: The First Step Toward Conservation

The Great Depression and the disastrous Dust Bowl droughts of the early thirties prompted the first federal legislation to control soil erosion. Concerns about the depressed economy and high unemployment, as well as the deteriorating environment, spurred the passage of this legislation. By the seventies, federal soil erosion control programs had proliferated to more than twenty-five in number, under the auspices of eight different agencies. All of these programs were voluntary—farmers were eligible for cost-sharing and/or technical assistance for soil conservation practices if they agreed to implement erosion control measures approved by a government agency, usually the Soil Conservation Service (SCS) or the Agricultural Stabilization and Conservation Service (ASCS) of the U.S. Department of Agriculture (USDA). Until the 1985 Farm Bill, no meaningful sanctions could be imposed at the federal level on a landowner guilty of contributing to excessive erosion.

A boom in agricultural exports and "fence row to fence row" planting practices during the seventies gave rise to a renewed emphasis on soil conservation, pushing it once again to the forefront of national agricultural policymaking. In 1977, the Comptroller General of the United States criticized federal soil conservation programs in a pivotal report to Congress titled "To

25. Miller, supra note 9, at 266.
Protect Tomorrow's Food Supply, Soil Conservation Needs Priority Attention." The report noted, among other criticisms, that federal financial assistance was not directed toward the most erodible land, and that cost-sharing practices seemed to be designed to enhance agricultural productivity rather than to control erosion.27

An influential study published by the American Farmland Trust (AFT) in 1984 concluded that most highly erodible land on which excessive erosion was concentrated was not being farmed under a conservation plan or the USDA conservation programs.28 The AFT recommended legislation that later became the basis for the conservation provisions in the 1985 Farm Bill. Thus, the concept of concentrating federal funding for soil conservation in problem areas, or "targeting," became the focus of soil conservation reform after forty years of federal conservation programs that had proven largely ineffective.

A combination of four key developments led to the relatively uneventful passage by Congress of the conservation components of the 1985 Farm Bill:29 the first opportunity since 1981 for a comprehensive revamping of agricultural policy; the spiraling cost of government subsidy programs aimed at the reduction of farm output; the growing recognition of the environmental destruction inflicted by past agricultural policies; and, perhaps most important, the recognition by urban and suburban interests, as well as by environmental groups, of their stake in the Farm Bill debate.30 Conservation organizations such as the AFT, the National Audubon Society, and the Sierra Club had battled fiercely to ensure the inclusion of the conservation provisions. Vigorous debates over other provisions of the Farm Bill obscured the sig-

27. Batie, supra note 4, at 94-95.
28. American Farmland Trust, supra note 4, at xvi. Earlier, in 1977, a U.S. government study revealed that almost 70 percent of the erosion exceeding 5 tons per acre per year was concentrated on 8.6 percent of the cropland. Batie, supra note 4, at 33. This indicates that soil conservation efforts should focus on the highly erodible cropland responsible for a disproportionate amount of the total erosion.

29. Twice before Congress had failed to pass similar legislation.
nificance of the conservation provisions. As a result, opponents of the bill, including the Reagan Administration, focused their resources on other areas in a futile attempt to block the legislation. Thus, the most forceful federal soil conservation measures since the Dust Bowl legislation of the thirties finally passed through Congress with relative ease.

The 1985 Farm Bill included four conservation measures designed to curb the rapidly declining quality and quantity of our nation's topsoil: the "sodbusting," "swampbusting," conservation compliance, and Conservation Reserve Programs.\textsuperscript{31} The first three components ensured cross-compliance between the USDA's conservation programs and its price and income support programs. Under these provisions, certain USDA program payments, such as price and income supports, disaster payments, and crop insurance, were withheld unless the producer met soil and wetlands conservation standards. The legislation did not, however, explicitly require soil and water conservation. Farmers could still refuse to implement conservation or wetlands preservation measures, but only at the high cost of forfeiting the USDA payments. In contrast, the Conservation Reserve Program encouraged the preservation of fragile croplands by reimbursing farmers who removed their farmland from production and devote it to less intensive uses.

The conservation title of the 1985 Farm Bill represented a landmark for the nation's soil and wetlands preservation movement; one soil conservation expert described it as "the most significant land and water conservation legislation of the past half century."\textsuperscript{32} For the first time, a farmer's decision to ignore soil conservation practices or to convert a wetland for agricultural production resulted in direct and inescapable economic consequences. For example, before the Conservation Reserve Program, government programs had paid farmers to remove acreage from production, but only as an incentive to reduce production—not to control erosion. With an astute sense of profit-maximization, farmers removed from production their least productive land rather than their most erodible land.\textsuperscript{33} By strongly encour-


\textsuperscript{33} Batte, supra note 4, at 55. Although farmers tended to remove their least productive land if permissible under the specific program, low production was sometimes
aging the removal of the most highly erodible land from production, the 1985 Conservation Reserve Program marked a shift from a supply control policy to one based on environmentally-conscious farming practices. Unfortunately, the transition in policy goals would hamper implementation of the new program due to administrative attempts to serve the conflicting objectives of supply control and conservation.34

IV. THE 1990 FARM BILL AND THE EMERGENCE OF AN AGRICULTURAL-ENVIRONMENTAL ETHIC

In 1990, Congress reauthorized the conservation programs originally created in the 1985 Farm Bill. The conservation title of the 1990 Farm Bill, known as the "Conservation Program Improvements Act," significantly amended the existing programs and created new ones as well. The Act dramatically expanded the scope of the Conservation Reserve Program while simultaneously broadening the exemptions and weakening the enforcement of the swambuster and sodbuster programs. The Farm Bill's title, the Food, Agriculture, Conservation and Trade Act of 1990, reflected the heightened importance of conservation in federal agricultural legislation.

A. The Weakening of the Sodbusting and Conservation Compliance Programs

1. The sodbuster provisions for erodible lands.

The 1990 Farm Bill's sodbusting provision is designed to ensure that no highly erodible virgin land will be used to produce an agricultural commodity35 without the full application of a conservation plan.36 In the early seventies, high grain prices lured outside investors to marginal lands. After purchasing the cheap and fragile rangeland, they plowed and planted wheat to reap both quick profits and government subsidies. When the price of

due to erosion. To a limited extent, then, conservation prior to 1985 was effectuated through production controls, although in an ineffective and year-by-year manner. Id.


35. An "agricultural commodity" is defined in the statute as (1) any commodity planted and produced by annual tilling of the soil, including tilling by one-trip planters, or (2) sugarcane. 16 U.S.C. § 380l(a)(1) (1988).

36. Id. § 3811.
wheat dropped from overproduction, the investors simply sold the abused land.\textsuperscript{37} The 1990 sodbuster provision was an effort to combat such abuses.

There are currently 345 million acres of highly erodible land in the United States. 118 million of these acres are cropland and five million are wetlands with medium-to-high potential for conversion to agricultural use.\textsuperscript{38} It is estimated that twenty-five percent of all agricultural land is highly erodible and accounts for fifty-eight percent of all cropland erosion.\textsuperscript{39} Under the sodbuster provision, a producer cannot receive USDA program payments for agricultural commodities produced on highly erodible land without the implementation of a conservation plan.\textsuperscript{40}

Highly erodible land falls within two possible classifications under the Act: either as land within classes IV, VI, VII or VIII of the SCS classification system, or as land that would have an “excessive average annual rate of erosion in relation to the soil loss tolerance level” if used to produce an agricultural commodity. The ratio of latter category is determined by the Secretary of Agriculture through the application of the universal soil loss equation and the wind erosion equation.\textsuperscript{41}

The sodbuster provision contains two important statutory exemptions. First, it does not apply to any land cultivated to produce an agricultural commodity or set aside under a USDA program during 1981 to 1985. Such land is subject, however, to the conservation compliance provision, which requires full implementation of a conservation plan approved by the local conservation district\textsuperscript{42} by January 1, 1995 at the latest.\textsuperscript{43} Under the second major exemption, a producer on land subject to the sodbuster provision can still be eligible for USDA program payments if the land is farmed under a conservation plan approved by the Secretary of Agriculture or the local conservation district in accordance with SCS technical standards.\textsuperscript{44}

\textsuperscript{39} 51 Fed. Reg. 25,497 (1986).
\textsuperscript{40} 16 U.S.C. § 3812(a) (1988).
\textsuperscript{41} Id. § 3801(a)(7)(A)(i) and (ii).
\textsuperscript{42} “Conservation districts” are defined as units of government formed under state law to develop and administer soil and water conservation programs. Id. § 3801(a)(2).
\textsuperscript{43} Id. § 3812(a)(2).
In short, the sodbuster provision requires a conservation plan for highly erodible land which was not in production or set aside during any year from 1981 to 1985. For highly erodible land that was in production or set aside during that period, conservation compliance requires active application of a conservation plan or system generally by January 1, 1990 and full implementation by January 1, 1995. Farmers with highly erodible land already in production are given more time to implement a conservation plan because of the greater economic and technological difficulties in bringing conservation measures to bear on land on which the farmer is already economically dependent. On the other hand, the cost and feasibility of adequate conservation are factors that should be considered prior to initiating agricultural production on highly erodible land. Additionally, noncommercial production of agricultural commodities on two acres or less is excluded from sodbuster compliance altogether if the Secretary determines that the production was not intended to circumvent the requirements of the program. 45

2. Sanctions and exemptions under the program.

A number of provisions, most of which were added in the 1990 amendments, restrict liability in the event of a violation. A farmer producing an agricultural commodity on land incorrectly classified by the SCS as not highly erodible can receive benefits for all commodities planted before the correct identification is determined. 46 Under the 1990 amendments, a tenant’s ineligibility for payments can 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 develop a reasonable conservation compliance plan), if the landlord refuses to comply with such plan, and if the tenant’s lack of compliance is not part of a scheme to avoid compliance. 47 Additional exemptions provide that no person will be found ineligible because of failure to actively apply a plan if: (1) the violation is technical, minor, and of minimal impact on the erosion control purposes of the conser-

45. Id. § 3812(h).
46. Id. § 3812(c)(2).
47. Id. § 3812(e). According to 1987 regulations, however, landlords are ineligible for benefits when noncompliance is required in the lease contract or when the landlord has acquiesced, approved, or assisted in the noncomplying activities of the tenant. 7 C.F.R. § 12.9(a)(2) (1992).
vation plan; (2) the failure is due to circumstances beyond the person's control; or (3) the Secretary of Agriculture has granted a temporary variance in order to handle a specific problem.48

The conservation compliance requirements as amended in 1990 authorize graduated sanctions for good faith violations. Under these provisions, failure to "actively apply" a conservation plan will not result in ineligibility for program payments if the farmer has acted in good faith without an intent to violate the Act and has not violated any highly erodible land conservation requirements within the previous five years.49 Instead, as long as the farmer actively applies the conservation plan according to schedule in subsequent crop years, the violator's program benefits for the crop year in which the violation occurred will be reduced by not less than $500 nor more than $5,000, depending on the seriousness of the violation.50 Finally, ineligibility resulting from a failure to actively apply a conservation plan can be reversed if, prior to the beginning of the next crop year, the Secretary determines that the violator is actively applying an approved conservation plan according to schedule.51

3. The final regulations.

The final regulations define highly erodible land as land determined to have an erodibility index of eight or more.52 Highly erodible land will only be considered to "predominate" a field if one-third of the field[,] or over fifty acres, is highly erodible.53 Producers of agricultural commodities on fields dominated by highly erodible land are ineligible for USDA program benefits.54 A farmer producing on highly erodible land without a conservation plan can avoid ineligibility, however, if the SCS determines that the land was not highly erodible when production began. This exemption does not apply to any agricultural commodity

50. Id. § 3812(f)(2).
51. Id. § 3812(f)(3).
52. 7 C.F.R. § 12.2(a)(15) (1992). The erodibility index numerically expresses the potential erodibility of the soil in relation to its soil loss tolerance value in the absence of conservation practices. Id. § 12.2(a)(10). The definition of highly erodible land includes land that erodes at an acceptable rate but has an inherent potential to erode eight times faster than it is rebuilding. Id.
53. Id. § 12.22(a).
54. Id. § 12.4(a)(1).
that was planted on any land after the SCS determines that such land is highly erodible and the farmer is notified.55

Farmers are allowed to exchange certain crop acreage bases for crops with a high residue base if (1) the SCS issues a recommendation that the high residue crop is essential to the conservation plan and (2) the recommendation is approved by the ASCS.56 Additionally, persons who wish to participate in the USDA programs are responsible for contacting the appropriate USDA agency well in advance of the intended participation date to ensure that the necessary determinations are scheduled in a timely manner.57

4. The Conservation Compliance Program.

The conservation compliance provision may well be the most controversial conservation provision of the 1985 Farm Bill. Under this provision, farmers on highly erodible land have until January 1, 1990 (or two years after the SCS soil survey is completed), to actively apply a conservation plan that must take full effect by January 1, 1995.58 The National Association of Conservation Districts (NACD) has estimated that in order to meet this requirement, the SCS will need to add 3,000 additional technicians at a cost of at least $95 million, and one million farms will have to develop conservation plans.59 Conservation plans apply not only to the highly erodible land on which a farmer produces a commodity, but also to highly erodible land set aside or designated as conservation use acreage under separate USDA programs established to reduce production.60

A conservation plan establishes a set of management prescriptions for a given piece of cropland. The plan includes decisions concerning location, land use, tillage systems and conservation treatment measures, all with the purpose of controlling erosion on highly erodible cropland.61 A conservation sys-

55. Id. § 12.5(a)(3).
56. See id. § 12.6(b)(3)(iv).
57. Id. § 12.4(f).
58. Id. § 12.5(a)(2)(i). A person is "actively applying" a plan if the plan is applied "according to schedule specified in the plan and the applied practices are properly operated and maintained." Id. § 12.23(f). The soil survey must be completed only for the cropland portion of the tract or farm. See id. § 12.5(a)(2).
60. 7 C.F.R. § 12.5(a)(2)(i).
61. Id. § 12.2(a)(4). A section dealing exclusively with conservation plans and systems encourages persons who require SCS assistance in developing a plan or system to
Systems is defined as the part of a cropland resource management system that provides for cost effectiveness and practical erosion reduction based upon standards contained in the SCS Field Office Technical Guide. However, none of the statutory provisions address the important question of what level of conservation is required by the plans and systems. For highly erodible croplands in production prior to December 23, 1985, Congress designed the systems to achieve substantial reductions in soil erosion, while taking into consideration economic and technical feasibility factors. For highly erodible croplands converted from native vegetation after December 23, 1985, the conservation systems are aimed at controlling soil losses to a level approximating the soil loss tolerance level. The comments to the final rule illuminate this significant difference in treatment:

Alternative conservation systems available for highly erodible cropland presently in crop production or that has a cropping history generally will not be applicable to those situations where native vegetation, i.e., range land and woodland, are “broken out” for agricultural commodity production. For the most part, these lands are very fragile and very sensitive to increases in erosion. Additionally, as noted in the comments, persons who break out these lands are in a different position with regard to the economic consequences of implementing the conservation requirements than are those who have been using their land for commodity production, since crop bases or commodity price support eligibility are not yet established for the broken-out fields. Requiring the conservation systems on these lands to be more stringent than those applicable to existing cropland fields does not unfairly or unreasonably impose an economic hardship on producers who want to bring new land into production.

The regulations do not require absolute environmental protection of land already in production but only a balancing of environmental protection with “economic and technical feasibility and other resource related factors.” From an environmental

request assistance well in advance of deadline dates for compliance. Id. § 12.23(d). If the conservation district fails to act without due cause within forty-five days of the request for approval, the SCS will approve or disapprove the plan or system. Id. § 12.23(e).

62. Id. § 12.2(a)(5).
63. Id. § 12.23(a).
64. Id.
66. 7 C.F.R. § 12.23(a) (1992).
perspective, this rule allows SCS representatives to succumb to pressure from farmers to weaken conservation requirements. From a purely practical perspective, however, an unrealistic requirement of conservation without regard to economic and technical feasibility might induce farmers to forego federal payments rather than meet conservation requirements, particularly when commodity prices rise.

Since conservation plans do not have to be fully implemented until 1995, it is still too early to fully evaluate the effectiveness of the program; however, some early figures are available. In 1991, the USDA announced that conservation compliance plans were about forty percent implemented. Plans had been applied to about 135 million acres and were fully implemented on 54 million of those acres. To ensure that farmers continue to make progress, the USDA plans to conduct random status reviews on five percent of the farmers each year. A limited study released in April of 1991 by the Soil and Water Conservation Society was less optimistic. According to the study, many farmers have failed to follow their plans, and others receive payments despite practices, such as breaking out land in native vegetation for crop production, that should have made them ineligible.

B. The Conservation Reserve Program

1. Originally enacted in the 1985 farm bill.

In June of 1985, the Reagan Administration, in an apparent reversal of prior policy, decided to support the establishment of a twenty million-acre conservation reserve. Secretary of Agriculture John Block announced the Administration's support of such a reserve, despite earlier opposing the program for being too costly. This support, although limited, paved the way for the broader conservation provisions ultimately incorporated into the 1985 Farm Bill.

The conservation reserve as enacted in the 1985 Farm Bill was designed to take highly erodible land out of agricultural pro-

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68. Id.
69. Id.
duction and into a reserve to directly control the erosion. The program’s stated objectives were to reduce water and wind erosion; protect the nation’s long-term capability to produce food and fiber; reduce sedimentation; improve water quality; create better fish and wildlife habitats; curb production of surplus agricultural commodities; and provide needed income support for farmers. Toward these ends, Congress authorized the Secretary to place forty-five million acres into the reserve during the 1986 to 1990 calendar years. By 1990, approximately thirty-four million acres of highly erodible land had been enrolled. The conservation title of the 1990 Farm Bill, the Conservation Program Improvements Act, reauthorized the Conservation Reserve Program for the 1991 through 1995 calendar years. Under the 1990 Act, the Conservation Reserve Program has been significantly expanded. The program no longer limits enrollment to highly erodible land but now extends it to many additional types of environmentally sensitive land as well.

2. The Environmental Conservation Acreage Reserve Program.

The 1990 Farm Bill created an umbrella program, the Environmental Conservation Acreage Reserve Program (ECARP), consisting of the Conservation Reserve Program and a newly created wetlands reserve program. As stated in the Bill, the goal of ECARP is to assist owners and operators of (1) highly erodible lands, (2) other fragile lands, including land with associated ground or surface water that may be vulnerable to contamination, and (3) wetlands in conserving and improving the soil and water resources of their farms or ranches. During the 1986 to 1995 calendar years, the Secretary must place at least forty million yet not more than forty-five million acres into the ECARP. This acreage threshold includes the thirty-four million acres al-


73. 7 C.F.R. § 704.1(b) (1992).


78. Id. § 3830(e).

79. Id. § 3830(b).
ready enrolled in the Conservation Reserve Program.80

Land eligible to be placed into the ECARP. Lands eligible for placement in the Conservation Reserve Program under the Act include:

(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 [conservation compliance plan];
(2) marginal pasture lands converted to wetland or established as wildlife habitat prior to November 28, 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 . . . 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 . . . ;81
   (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, or filterstrips devoted to trees or shrubs; or
   (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.82

Additionally, not less than one-eighth of the land placed in the reserve from 1991 to 1995 must be devoted to trees, noncrop vegetation or water that may provide a permanent habitat for wildlife.83

80. Id. § 3830(c).
81. See infra text accompanying notes 224-230.
82. 16 U.S.C.A. § 3831(b) (West Supp. 1991). Upon applying to 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 into the reserve. Id. § 3831(f).
83. Id. § 3832(c).
To put eligible land into the conservation reserve, the owner must contractually agree to: (1) apply an approved conservation plan removing the land from commodity production for a less intensive use;\(^84\) (2) place the land in the reserve;\(^85\) (3) not use the land for agricultural purposes, except as permitted by the Secretary;\(^86\) (4) establish approved vegetative cover or watercover on the land;\(^87\) (5) forfeit the right to receive rental and cost sharing payments, refund all payments received plus interest for a violation of the contract warranting termination, and refund or accept adjustments to the rental and cost sharing payments for any violations not warranting termination of the contract;\(^88\) (6) forfeit the right to receive rental and cost sharing payments, refund such payments as the Secretary considers appropriate upon transfer of the land, subject to the contract, unless the transferee agrees to assume the contract or the Secretary and the transferee agree to modifications of the contract;\(^89\) (7) not conduct harvesting, grazing or commercial use of forage except as permitted by the Secretary;\(^90\) (8) not make commercial use of trees, unless expressly permitted in the contract;\(^91\) (9) not adopt any practice specified by the Secretary in the contract as a practice which would tend to defeat the purposes of the program;\(^92\) (10) comply with any additional requirements the Secretary might include in the contract;\(^93\) and (11) under a 1990 amendment, not produce

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\(^84\) Id. \$ 3832(a)(1). A conservation plan under this program shall set forth the conservation measures and practices to be carried out by the owner or operator, the commercial use, if any, to be permitted on the land during the contract term, and may provide for the permanent retirement of any existing cropland base and allotment history for the land. Id. \$ 3832(b). Under certain conditions, the Secretary may 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." Id. \$ 3832(d).

\(^85\) Id. \$ 3832(a)(2).

\(^86\) Id. \$ 3832(a)(3).

\(^87\) Id. \$ 3832(a)(4).

\(^88\) Id. \$ 3832(a)(5).

\(^89\) Id. \$ 3832(a)(6).

\(^90\) Id. \$ 3832(a)(7). The Secretary may permit harvesting or grazing in response to drought or other similar emergency. The Secretary may also permit limited fall and winter grazing where such grazing is incidental to the gleaning of crop residues on the fields in which such land is located for an applicable reduction in rental payment. Id.

\(^91\) Id. \$ 3832(a)(8). Christmas trees alone do not constitute eligible cover and may not be harvested until after expiration of the contract. Bidding Land Into the Conservation Acreage Reserve, LANDOWNER (Professional Farmers of America, Cedar Falls, Iowa), Feb. 10, 1986, at 6.


\(^93\) Id. \$ 3832(a)(10).
an agricultural commodity on any other highly erodible land purchased after November 28, 1990 that has not been used to produce an agricultural commodity other than forage crops.\textsuperscript{94} Under the conservation program, farmers are still free to charge access fees for hunting, fishing, and camping. Twenty states currently have programs to compensate landowners for access to private land for recreation and wildlife management, an option that does not violate the terms of the reserve contract.\textsuperscript{95}

\textit{Contractual obligations under the ECARP.} In return for adhering to the contract terms, the owner or farmer receives technical assistance,\textsuperscript{96} cost sharing for the conservation measures required,\textsuperscript{97} annual rental payments as compensation for the retirement of the land during the period of the contract, and any permanent retirement of the cropland base and allotment history.\textsuperscript{98} Payments may not exceed $50,000 per year,\textsuperscript{99} and the owner or farmer can pay with either cash or in-kind commodities.\textsuperscript{100} Annual rental payments are not subject to the $250,000 cap on some USDA payments,\textsuperscript{101} nor may they be affected by a Presidential sequestration order.\textsuperscript{102}

The annual rental payment can be set by either the submission of bids by the owners or operators, or by any other means set by the Secretary.\textsuperscript{103} In determining the acceptability of contract offers, the Secretary may consider the extent to which the

\begin{itemize}
\item \textsuperscript{94} Id. § 3832(a)(11).
\item \textsuperscript{95} LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 5.05(3)(b) n. 67 (1992) (citing BPI, Land Use Planning Report 366 (Nov. 23, 1987)). These states are California, Colorado, Connecticut, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oregon, South Dakota, Texas, Wisconsin, and Wyoming. Id.
\item \textsuperscript{96} 16 U.S.C.A. § 3833(3) (West Supp. 1991).
\item \textsuperscript{97} Id. § 3833(1). Cost sharing payments are to be made "as soon as possible" after the obligation is incurred. Id. § 3834(a)(1). In general, the Secretary shall pay fifty percent of the cost of establishing water quality and conservation measures and practices required by the contract. Id. § 3834(b)(1). Cost sharing payments shall not push the total amount of such payments received from all sources past 100% of the total establishment costs. Id. § 3834(b)(2).
\item \textsuperscript{98} Id. § 3833(2). Rental payments are to be made "as soon as practicable" after October 1 of each calendar year or, at the discretion of the Secretary, at any time prior to such date during the year that the obligation is incurred. Id. § 3834(a)(2).
\item \textsuperscript{99} Id. § 3834(d)(1). "In-kind commodities" are commodities normally produced on the land enrolled in the conservation reserve. Id. § 3801(a)(10).
\item \textsuperscript{100} Id. § 3834(d)(3).
\item \textsuperscript{101} Id. § 3834(g).
\item \textsuperscript{102} Id. § 3834(c)(2).
\end{itemize}
enrollment of the land would improve soil resources, water quality, wildlife habitat, or provide other environmental benefits. Different criteria may be established in various states and regions of the United States, based upon the extent to which water quality or wildlife habitat may be improved or erosion abated. The Secretary will not enter into a contract if the land has changed hands in the previous three years, unless the new ownership was acquired by will or succession, the land was acquired before January 1, 1985, or the Secretary decides that the land was not acquired for the purpose of being placed in the reserve.

Conservation reserve program contracts may range in duration from not less than ten years to no more than fifteen years. If land under a contract is transferred, the new owner may assume all of the contractual obligations, enter into a new or modified contract with the Secretary, or elect not to participate in the program.

Land devoted to long-term conserving uses such as hardwood trees, shelterbelts, windbreaks, or wildlife corridors receives preferential treatment under the reserve program. Within the statutory limits, the owner of such lands may specify the duration of the contract. To further encourage such long-term conserving uses of land, the Act provides incentives in the form of cost share assistance to farmers who wish to convert highly erodible land already enrolled in the CRP to hardwood trees, windbreaks, shelterbelts, or wildlife corridors. In return, the owner of such land must provide a conservation easement for the useful life of the plantings and agree to participate in the Forest Stewardship Program Improvements Act, Pub. L. No. 101-624, § 1437(c), amending subtitle D of Title XII of the Food Security Act of 1985, Pub. L. No. 99-198 (codified at 16 U.S.C.A. § 3837(a) (West Supp. 1991)).

104. Id. § 3834(c)(3)(A).
105. Id. § 3834(c)(3)(B).
106. Id. § 3835(a).
107. Id. § 3831(e)(1). During the 1996 through 2000 calendar years, the Secretary may extend for up to ten years conservation reserve contracts entered prior to November 28, 1990 or place such land in the environmental easement program at the option of the owner or operator. 1990 Conservation Program Improvements Act, Pub. L. No. 101-624, § 1437(c), amending subtitle D of Title XII of the Food Security Act of 1985, Pub. L. No. 99-198 (codified at 16 U.S.C.A. § 3837(a) (West Supp. 1991)).
109. Id. § 3831(e)(2). In the case of lands devoted to hardwood trees enrolled in the program prior to October 1, 1990, the Secretary may, with the agreement of the owner, extend the contract period for up to five years. Id. The Secretary may consider contract bids for land to be devoted to hardwood trees on a continuous basis; the owner or operator need not wait for one of the general sign-up periods. Id. § 3834(c)(4).
110. Id. § 3835a(a)(1) and (a)(2)(C).
Land under contract may also be converted to wetlands if the farmer agrees to provide the Secretary with a long-term or permanent easement under the wetlands reserve program.\(^{112}\)

3. Revisions to the Conservation Reserve Program.

The Conservation Program Improvement Act of 1990 effected extensive changes in the Conservation Reserve Program. While the regulations at 7 C.F.R. § 704 will continue to apply to contracts entered prior to April 19, 1991, contracts entered after April 19, 1991 will be controlled by a new set of regulations at 7 C.F.R. § 1410 which reflect the changes in the program.\(^{113}\)

Requirements for eligibility under the new regulations. Under the new regulations, a person eligible to place land in the Conservation Reserve Program must be an owner,\(^{114}\) operator,\(^{115}\) or tenant of eligible cropland.\(^{116}\) Since the Conservation Reserve Program aims to protect highly erodible and other environmentally sensitive farmland, the regulations require that land proposed to be enrolled in the program satisfy the following criteria: (1) been annually planted or considered to have been planted to an agricultural commodity in at least two of the five crop years from 1986 through 1990; (2) be physically capable of being planted in a normal manner, at the time of enrollment, to an agricultural commodity; (3) be a predominantly highly erodible field; and (4) if in a redefined field, be in a manageable unit which meets the minimum acreage requirements.\(^{117}\) Highly erodible

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111. Id. § 5835a(a)(2)(B) and (d).
112. Id. § 3835a(b).
114. An owner of eligible cropland must have owned the cropland for at least three years prior to the close of the reserve program's applicable sign up period. Three exceptions to the aforementioned requirements exist where (1) the cropland was acquired by will or succession as a result of the death of the previous owner, (2) the only ownership change during the three year period occurred due to foreclosure on the land, and the owner exercised a timely right of redemption from the mortgage holder in accordance with state law, or (3) where the circumstances present adequate assurances that the new owner did not acquire the land for the purpose of placing it in the reserve. 7 C.F.R. § 1410.102(b) (1992).
115. An operator of eligible cropland must have operated the cropland for at least three years prior to the close of the applicable sign-up period, and must provide satisfactory evidence that he or she will be in control of the cropland for the contract period. Id. § 1410.102(a).
116. For the purposes of the Act, a tenant is defined as a participant with an eligible owner or operator. Id. § 1410.102(c).
117. Id. § 1410.103(a).
land for the purposes of the CRP is land which is classified by the SCS as:

(i) Being predominantly Land Capability Classes II, III, IV, and V with:
   (A) An annual average erosion rate of at least 2T; or
   (B) A serious gully erosion problem as determined by the Deputy Administrator; or
(ii) Being predominantly Land Capability Classes VI, VII, or VIII; or
(iii) If trees are to be planted under the conservation plan, eroding at the rate of at least 2T; or
(iv) Having:
   (A) An erodibility index equal to or greater than 8 for either wind or water erosion; and
   (B) An erosion rate greater than T.\textsuperscript{118}

In some circumstances, land may be eligible even if it does not meet the requirement of being a predominantly highly erodible field. A field or portion of a field determined as suitable for a filter strip may be eligible even if not predominantly highly erodible, provided the participant agrees to grow permanent grass, forbs, shrubs, or trees on the field.\textsuperscript{119} A field with evidence of scour erosion caused by out-of-bank flows of water may also be eligible despite not being predominantly highly erodible, if it can be expected to flood a minimum of once every ten years.\textsuperscript{120} Only the cropland areas of such a field may be enrolled unless the field is nine acres or less, or more than one-third of the cropland in the field lies between the water source and the inland limit of the

\textsuperscript{118} Id. § 1410.8(b). In a predominantly highly erodible field, at least two thirds of the land is highly erodible. However, if the Deputy Administrator of SCS finds that planting trees is necessary to fulfill the objectives of the program, and if at least one-third of the land is highly erodible, the land will be classified as a predominantly highly erodible field. Id.

\textsuperscript{119} Id. § 1410.103(b). A field or portion of a field may be considered to be suitable for use as a filter strip only if it:

(1) [Other than being predominantly highly erodible, meets the requirements of section 1410.103(a)];
(2) Is located adjacent to a stream having perennial flow, a waterbody of a permanent nature (such as a lake, pond, wetlands, or sinkhole), or seasonal stream, or wetlands excluding such areas as gullies or sod waterways;
(3) Is capable, when permanent grass, forbs, shrubs, or trees are grown, of substantially reducing sediment that otherwise would be delivered to the adjacent stream or waterbody; and
(4) Is 1.0 to 1.5 chain lengths (66 to 99 feet) in width. Such width may be exceeded, to the extent necessary to meet SCS Field Office Technical Guide criteria, to accomplish the desired environmental effect.

\textsuperscript{120} Id. § 1410.103(c)(1)-(2).
scour erosion.\textsuperscript{121} If the entire field is not eligible, only the cropland between the water body and the inland limit of the scour erosion will be eligible, together with the additional areas which would otherwise be unmanageable and would be isolated by the eligible areas, as determined by the Deputy Administrator of SCS.\textsuperscript{122} Cropland approved for enrollment due to scour erosion must be planted with an appropriate tree species determined by the SCS. If the SCS determines that tree planting is inappropriate, the eligible cropland shall be devoted to another acceptable permanent vegetative cover approved by the Deputy Administrator.\textsuperscript{123}

Expanding the scope of eligible lands. The most significant change in the Conservation Reserve Program in the 1990 amendments was the expansion of the category of eligible lands to include those serving broad environmental objectives. The regulations describe the newly eligible lands as:

1. Land contributing to the degradation of water quality or posing an on-site or off-site environmental threat to water quality if such land remains in production, so long as water quality objectives, with respect to such land, cannot be obtained under the Agricultural Water Quality Incentives Program (AWQIP).
2. Land subject to a useful life easement which is devoted to living snowfences, windbreaks, wildlife habitat, shelterbelts, or filterstrips with trees or shrubs.
3. Land subject to a useful life easement that is devoted to newly-created permanent grass waterways, or contour grass sod strips created after November 28, 1990, which are established and maintained according to an approved conservation plan.
4. Non-irrigated or irrigated cropland which produce, as determined by the Deputy Administrator, saline seeps, or which are functionally-related to such saline seeps, or where a rising water table contributes to increased levels of salinity at or near the ground surface. Any land which qualifies for the CRP under this subparagraph may be made subject to a useful life easement established to salt tolerant vegetation . . . \textsuperscript{124}

This list of additional lands eligible for enrollment corresponds to the expanded list of lands which may be eligible in the 1990 statute, except that marginal pasture lands are not included in the regulations. Comments to the regulations suggest that other programs, such as the Agricultural Conservation Program,

\textsuperscript{121} \textit{id.} § 1410.103(c)(3).
\textsuperscript{122} \textit{id.} § 1410.103(c)(4).
\textsuperscript{123} \textit{id.} § 1410.103(c)(5).
\textsuperscript{124} \textit{id.} § 1410.103(d).
can better protect marginal pasture land despite Congress' directive.125

The regulations also provide that certain types of land are ineligible for enrollment in the conservation reserve. Federal land, lands acquired by an agency of the federal government, or lands acquired by a quasi-federal entity all fall into this category.126 Also, land subject to a deed restriction prohibiting the production of agricultural commodities (unless otherwise approved by the Deputy Administrator) or a "farmed wetland" which may be eligible for the Wetlands Reserve Program may not be enrolled in the reserve.127

4. Enrolling in the conservation reserve.

Evaluating bid offers. To enroll land into the conservation reserve, the applicant must submit a bid to the local ASCS office during an announced sign-up period.128 The offer is irrevocable for a pre-determined period of time.129 The bids will be evaluated on a competitive basis to achieve the most environmental benefit for each federal dollar expended.130

In evaluating contract offers, different factors may be weighted more heavily to ensure certain lands are accepted in the program. Such factors may include, but are not limited to: (1) surface water quality; (2) ground water quality; (3) soil productivity; (4) conservation compliance considerations; (5) tree planting; (6) an area's designation under section 319 of the Clean Water

126. 7 C.F.R. § 1410.103(e) (1992).
127. Id. § 1410.103(f). However, comments to the regulations indicate that "prior converted wetlands" still qualify for enrollment. 56 Fed. Reg. 15,983 (1991).
128. 7 C.F.R. § 1410.113. Offers for contracts shall be submitted only during public sign-up periods as announced periodically by the CCC, except that the CCC may hold a continuous sign-up for land to be devoted to particular uses, as the CCC deems desirable. Id. § 1410.113. However, the comments to the regulations indicate that it is not anticipated that there will be a continuous sign-up because of the difficulty of encouraging competing bids without a definite bid period. 56 Fed. Reg. 15,982 (1991).
129. Id. § 1410.115(c)(1) (1992).
130. Id. § 1410.115(c)(2) (1992). The applicant shall be liable to the CCC for liquidated damages if the applicant revokes an offer during the period in which the offer is irrevocable; however, the CCC may waive payment of these damages if it determines that the assessment of such damages is not in its best interest in a particular case. Id. § 1410.115(c)(3).
Act; and (7) conservation priority area designation. To determine total environmental benefits, the CCC expects to use a system that would evaluate the seven criteria in such a manner as to preclude any one criteria from unduly affecting bid acceptance.

**Contract obligations once participants are enrolled.** The regulations for the CRP require participants: (1) to carry out the terms and conditions of the contract; (2) to implement a conservation plan contained in the contract according to schedule; (3) to establish temporary vegetative cover when required by the plan or if, as determined by the CCC, permanent vegetative cover cannot be timely established; (4) to reduce the crop base acreage, allotments, and quotas by the amount of land enrolled in the reserve; (5) not to produce an agricultural commodity on highly erodible land acquired on or after November 28, 1990 in a county which has not met the section 1410.4 acreage limitation, unless such land, as determined by the CCC, has a history of producing an agricultural commodity other than forage crops in the most recent five year period; (6) to comply with all conservation compliance requirements; (7) not to allow grazing, harvesting, or other commercial use of the property except as permitted by the CCC in response to drought or other similar emergency; (8) to establish and maintain the required vegetative or water cover and to take other actions that may be required by the CCC to achieve the desired environmental benefits; (9) to

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132. 7 C.F.R. § 1410.114(b) (1992).


134. Crop acreage bases reduced during the contract period shall be returned at the end of the contract period in the same amounts as would apply had the land not been enrolled in the reserve. 7 C.F.R. § 1410.109(d) (1992). In the final year of the contract or renewable period, participants may, subject to approval by the CCC, request to preserve base and allotment history for five additional years without payment. Approval will only be given if participants agree to abide by the terms and conditions of the contract for the term in which payments were to be made. Id. § 1410.117(a). During this extension period, no cost share, annual rental, or bonus payment shall be made that would not have been made under the original contract for its original term. Id. § 1410.117(b).

135. 7 C.F.R. § 1410.4 provides that, except for areas devoted to windbreaks or shelterbelts after November 28, 1990, the maximum acreage which may be placed in the ECARP may not exceed twenty-five percent of the total cropland in a county of which not more than ten percent of the cropland in the county may be subject to an easement, unless CCC determines that such action would not adversely affect the local economy of the county. Id.
comply with local or state noxious weed laws on the land; (10) to control weeds, insects, and pests on the land as necessary, taking into consideration the needs of water quality and wildlife as determined by the CCC; and (11) to be jointly and severally responsible for compliance with the contract and the regulations, as well as for any refunds or payment adjustments which may be required for their violation.\textsuperscript{136}

In return, the CCC is obligated to make annual rental payments, share the cost of establishing conservation practices specified in the plan, provide technical assistance, and permit limited fall and winter grazing of grass waterways on program land where the grazing is incidental to the gleaning of crop residues on fields where contracted land is located.\textsuperscript{137} Annual rental payments may not exceed $50,000 per year.\textsuperscript{138} Cost share assistance is limited to not more than fifty percent of the actual or average cost of the practices.\textsuperscript{139}

Several of the above contract obligations were added or modified due to the 1990 amendments. The 1990 amendments authorize water cover for the enhancement of wildlife as an approved cover on contracted land, in addition to vegetative cover. Water cover does not include ponds for watering livestock, irrigation, or raising fish for commercial purposes.\textsuperscript{140} Alley cropping on CRP lands may now be permitted by the CCC if (1) the land is planted to, or converted to, hardwood trees; (2) agricultural commodities are planted in close proximity to such trees in accordance with an approved conservation plan; and (3) the owner and operator of the land agrees to implement appropriate conservation measures.\textsuperscript{141} The CCC may solicit bids for permission to alley crop on conservation reserve land; annual rental payments for the term of the contract must be reduced by at least fifty percent of the original amount of the total rental

\textsuperscript{136} Id. \S 1410.109.
\textsuperscript{137} Id. \S 1410.110. The limited grazing may only be conducted with prior approval of the CCC, which will be given in exchange for an appropriate reduction in the annual rental payment to be determined by the Deputy Administrator. Id. \S 1410.110(d).
\textsuperscript{138} Id. \S 1410.120(c).
\textsuperscript{139} Id. \S 1410.119(a). In addition, the cost-share payment made to a participant may not exceed the participant's actual contribution to the cost of establishing the practice and the amount of the cost-share may not be an amount which, when added to assistance from other sources, exceeds the cost of the practices. Id. \S 1410.118(e).
\textsuperscript{140} 16 U.S.C.A. \S 3832(a)(4) (West Supp. 1992); 7 C.F.R. \S 1410.112(b) (1992).
\textsuperscript{141} 7 C.F.R. \S 1410.106(a) (1992).
payment in the original contract.\(^\text{142}\)

*Conversion of CRP Land.* The 1990 amendments and regulations authorize the use of CRP land for conversion to trees and wetlands restoration.\(^\text{143}\) A program participant who entered a contract prior to November 28, 1990 may elect to convert highly erodible cropland which is devoted to permanent cover, hard-wood trees, windbreaks, shelterbelts, or wildlife corridors.\(^\text{144}\) Participants who thus modify their contracts may elect to extend the contract for up to fifteen years.\(^\text{145}\) Participants who plant windbreaks must provide an easement on the land to the CCC for the useful life of the plantings.\(^\text{146}\) The CCC may provide cost share assistance for up to fifty percent of costs, except that the total cost share paid, including that paid for the original cover, may not exceed the amount which the CCC would have paid had the land originally been devoted to the new conservation measures.\(^\text{147}\)

A program participant who entered a contract prior to November 28, 1990 on land that is suitable for restoration to wetlands or that was restored to wetlands while under contract may, if given approval by the CCC, transfer eligible acres into the Wetlands Reserve Program.\(^\text{148}\) If the transfer was made prior to Oct. 1, 1992, payments received under the CRP contract need not be returned, otherwise they must be returned with interest.\(^\text{149}\) Contracts may only be converted if: (1) the areas are deemed suitable for the wetlands reserve program; (2) the owner or operator provides a WRP easement on the areas; (3) the CCC determines that there is a high probability of successful restoration; and (4) the restoration otherwise meets the requirements of the wetlands re-

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\(^{142}\) *Id.* § 1410.106(b).


\(^{145}\) *Id.* § 1410.107(a) (1992).

\(^{146}\) *Id.* § 1410.107(b). The duration of a useful life easement is either fifteen or thirty years depending on the practice for which the easement is being given. *Id.* § 1410.3.

\(^{147}\) *Id.* § 1410.107(c).

\(^{148}\) *Id.* § 1410.108.

\(^{149}\) *Id.* If the transfer is made during the first two sign-ups for the WRP, no CRP payments need to be returned. However, subsequent transfer of CRP lands in the WRP will result in the deduction of any CRP payments made after the second WRP sign-up from the WRP payment. 57 Fed. Reg. 23,912 (1992). This modification of the statute by the regulation was made necessary by the delay in promulgating final regulations for the wetlands reserve program.
serve. Even if not eligible for transfer into the wetlands reserve, the land may, if approved by CCC, still be restored to wetlands (without cost-share assistance) since water is an approved cover.

The duration of a Conservation Reserve Program contract is ten years, except in cases of land devoted to hardwood trees, shelterbelts, windbreaks, or wildlife corridors, when the participant may specify the duration of the contract for between ten and fifteen years. If a participant fails to carry out the terms and conditions of his or her contract, the CCC may terminate the contract. If the CCC terminates the contract, the participant must forfeit all rights to future payments, refund all payments received with interest, and pay liquidated damages as provided in the contract. If the CCC determines that the violation does not warrant contract termination, the CCC may grant relief from sanctions as it deems appropriate. Once the conservation reserve contracts expire, farmers may return the land to production. However, land enrolled in the CRP is subject to the conservation compliance provision upon termination of the contract. The owner or operator will have two years after expiration of the contract to fully comply with practices that require structural construction.

5. Slow success for reserve sign-ups.

The first sign-up period for the reserve was in March of 1986 and resulted in only 838,000 acres being enrolled in the reserve. Farmers had offered 4.8 million acres, but many bids were too high. This slow start has been attributed to a lack of information and competing farm programs. After the second sign-up in May of 1986, however, a total of 3.8 million acres were enrolled in the reserve, costing the USDA $44 per acre per year.

150. 7 c.f.r. § 1410.108(a) (1992).
151. Id. § 1410.108(b).
152. Id. § 1410.104(b).
153. Id. § 1410.124(a)(1).
154. Id. § 1410.124(a)(2)(i)(ii). The CCC may reduce a demand for a refund under § 1410.124 to the extent it determines that such relief would be appropriate and would not deter the accomplishment of the goals of the program. Id. § 1410.124(d).
155. Id. § 1410.124(b).
156. 16 u.s.c.a. § 3812(a)(3) (West Supp. 1992).
158. Id.
and involving 22,800 farmers. In large part, farmers were still cautious about the new program. Many farmers had already decided upon a cropping plan and the program was competing against crop deficiency payments. In the first two sign-ups, the strongest response to the program was in farm states in the Midwest, the South, and parts of the West, with Colorado having the most land enrolled (620,611 acres).

In the August 1986 sign-up, more than 45,000 bids were submitted for almost 6.5 million acres, with an average accepted bid of almost $47 per acre. After the addition of more than five million acres to the reserve, the total land enrolled was brought to nine million acres. A poll done by the American Farmland Trust concluded that most farmers who did not apply in erosion-prone areas thought their land was not eligible, and over two-thirds said they would be more likely to apply if haying and grazing were permitted.

By 1987, surprised farmers began to feel the effects of the sodbuster and swampbuster provisions. Farmers who innocently squared off pastures for production found themselves denied USDA program payments on all their land. In February, 10.6 million more acres were accepted into the Reserve at an average bid of $51.17 an acre. The fifth sign-up period in July brought in 5.28 million more acres, bringing the total acreage in the first two years of the program to 22.9 million acres. Accepted bids

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159. SCS, Soil and Water Conservation News (Sept. 1986) at 2. The USDA fell short of its goal to enroll five million acres in the reserve. Id.
160. Id.
161. Id. at 8.
162. SCS, Soil and Water Conservation News (Nov. 1986) at 3.
163. Id.
165. Sharp teeth of sodbuster and swampbuster law begin to snap on surprised landowners and tenants, LANDOWNER (Professional Farmers of America, Cedar Falls, Iowa), Feb. 9, 1987, at 8. However, in 1988 one of the original proponents of the swampbuster bill asserted before the Senate Agriculture Appropriations subcommittee that the provision was being "circumvented and in many cases wholly ignored in the north central U.S." MALONE, supra note 95, § 5.05(3)(d) n.145 (BPI, Land Use Planning Report 47 (Feb. 8, 1988) (remarks of Sen. Robert Kasten, Jr.)).
166. SCS, Soil and Water Conservation News (June 1987) at 11. After the February 1987 sign-up, farmers from forty-four states and Puerto Rico were participating in the reserve. SCS, Soil and Water Conservation News (July 1987) at 10.
167. MALONE, supra note 95, § 5.05(3)(d) (citing BPI, Land Use Planning Report 279 (Aug. 31, 1987)). Under the provisions of the Act, the Secretary is required to establish an appeals procedure for any person adversely affected by any of the conservation re-
averaged $47.90. By the start of 1990, after nine sign-up periods, nearly 34 million acres had been enrolled at an average rental rate of $49.

The tenth sign-up period in March 1991 was the first under the expanded eligibility provisions in the 1990 Farm Bill. In the first nine sign-ups, the Plains and Mountain states provided sixty-two percent of the acreage enrolled. In the tenth sign-up, those states accounted for only thirty percent of the acreage enrolled, with the majority of the acreage coming from the Corn Belt, Delta, and Lake states. The average accepted bid from the Corn Belt states was $73.84, considerably higher than the $54.00 national average.

D. Swampbusting

1. Program requirements.

Under the Act's swampbuster provision, federal farm subsidies cannot be used to fund the destruction of wetlands. A wetland is defined in the Act as land that:

(A) has a predominance of hydric soils;
(B) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated

serve, conservation compliance, sodbuster or swampbuster provisions. 16 U.S.C.A. § 3843(a) (West Supp. 1992). The ineligibility of a tenant or sharecropper will not cause the landlord to be ineligible for commodities on lands not operated by the tenant or sharecropper. Id. § 3843(b). The Secretary must provide adequate protection for tenants and sharecroppers, including a provision for sharing of payments received under the conservation reserve program. Id. § 3843(c). For further guidance on the appeals procedure, see CHRISTOPHER KELLEY & JOHN HARRISON, NAT'L CENTER FOR AGRIC. LAW, A LAWYER'S GUIDE TO ASCS ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW OF ASCS DECISIONS (1990); J.W. LOONEY ET AL., AGRICULTURAL LAW: A LAWYER'S GUIDE TO REPRESENTING FARM CLIENTS 292-56 (1990).

168. MALONE, supra note 95, § 5.05(3)(d) (citing BPI, Land Use Planning Report 279 (Aug. 31, 1987)).

169. Id.

170. Id.

171. Id.

172. MALONE, supra note 95, § 5.05(4) (citing American Land Resource Association, Land Report 1 (Nov./Dec. 1987)).


174. "Hydrophytic vegetation" is a plant growing in water or "a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content." 16 U.S.C. § 3801(a)(9)(B) (1988).
soil conditions; and
(C) under normal circumstances\textsuperscript{175} does support a prevalence of such vegetation.\textsuperscript{176}

Drainage and planting of wetlands destroys critical wildlife habitats, impairs groundwater recharge and diminishes stream quality.\textsuperscript{177} Wetlands reduce flooding and stabilize shorelines against erosion and storm damage.\textsuperscript{178} Approximately 43 million acres of the remaining 99 million acres of wetlands in the nation could be farmed if drained, and over five million of those acres have a high or medium potential for conversion.\textsuperscript{179}

Under the swampbuster provision, anyone who produces an agricultural commodity\textsuperscript{180} on wetlands converted after December 23, 1985 or who, after December 23, 1990, converts a wetland by any means \emph{so as to make possible} the production of an agricultural commodity on such converted wetland, will be ineligible for price and income supports and other USDA payments.\textsuperscript{181} The 1990 amendments changed the “trigger” for wetlands eligibility. Under the 1985 Farm Bill, a farmer became ineligible upon \emph{production} of an agricultural commodity on a converted wetland.\textsuperscript{182} After November 28, 1990, however, a farmer is ineligible whenever a wetland is converted \emph{so as to make possible the production of an agricultural commodity}, if that was the purpose or the effect of conversion.\textsuperscript{183} Availability and application of a conservation plan to the converted wetlands under the swampbuster provision, unlike the sodbuster and conservation compliance provisions, is irrelevant to the prohibition of financial support.\textsuperscript{184}

Converted wetland is “wetland that has been drained,

\textsuperscript{175} “Under normal circumstances” refers to “the soil and hydrological conditions that are normally present, without regard to whether the vegetation has been removed.” 7 C.F.R. § 12.31(b)(2)(i) (1992).


\textsuperscript{177} MALONE, supra note 95, § 5.05(4) (citing American Land Resource Association, Land Report 1 (Nov./Dec. 1987)).

\textsuperscript{178} Mark Brohan, Wetlands to Farmlands: Curbing the Conversion, FARMLINE (Oct. 1986) at 4 (published by the U.S. Dept. of Agric.).

\textsuperscript{179} Id. at 5.

\textsuperscript{180} An “agricultural commodity” is (1) any commodity planted and produced by annual tilling of the soil, including tilling by one-trip planters, and (2) sugarcane. 16 U.S.C. § 3801(a) (West Supp. 1992).

\textsuperscript{181} Id. § 3822.


\textsuperscript{184} See id. § 3822.
dredged, filled, leveled, or otherwise manipulated . . . for the purpose or to have the effect of making the production of an agricultural commodity possible if . . . (1) such production would not have been possible but for the action” and, (2) before such action, the land was wetland and was neither highly erodible land nor highly erodible cropland. Where the altering activity is not clearly discernible, SCS will undertake a comparison of the site with other sites containing the same hydric soils in a natural condition to determine if the wetland has been converted. Areas where the woody hydrophytic vegetation has been removed and wetland conditions have not returned as a result of abandonment are also considered converted wetland. Potholes, playas, and other wetlands flooded or ponded for extended periods prior to December 23, 1985, however, will not be considered converted. Other wetland alterations may result in loss of eligibility unless determined to have a minimal effect on wetland values.

A farmer is considered to have produced an agricultural commodity on converted wetlands if: (1) highly erodible land is predominant in the field; (2) at least a portion of field is converted wetland; (3) the ASCS has determined that the person was entitled to share in the crops available for the land or in the proceeds therefrom; and (4) the ASCS has determined that the land is or was planted with an agricultural commodity during the year for which the person is requesting benefits. A farmer will continue to be eligible for USDA benefits if the wetlands on which the agricultural commodity is produced were converted by unrelated third parties, provided that the conversion was intended to avoid compliance.

In such a case, however, the farmer may not conduct any further drainage improvements without losing eligibility for USDA program payments unless the SCS determines that these activities would have a minimal effect on any remaining wetland values. Converted wetlands are presumed to have been converted by the farmer applying for benefits unless he or she can show that the conversion was caused by an unrelated third party. If the farmer applying for benefits acquiesced in, ap-

187. Id. § 12.4(e).
188. Id. § 12.5(b)(1)(iv)(D).
189. Id.
190. Id.
proved of, or assisted a third party in the conversion, he or she may lose program eligibility.\(^{191}\)

2. Exemptions to the swampbuster program.

Most common exemptions. There are several exemptions from the requirements of the Act. A farmer will not be deemed ineligible for program benefits under the swampbuster program if the production or conversion was undertaken in reliance on an incorrect determination by the SCS as to the wetland status of such land.\(^{192}\) If conversion of the wetland was commenced or completed before December 23, 1985, no program ineligibility will result due to the production of an agricultural commodity on the land.\(^{193}\) Production on or conversion of an artificial lake, pond, or wetland created by excavating or diking nonwetland to collect and retain water for livestock, fish production, irrigation, a settling basin, cooling, rice production, or flood control will not result in program ineligibility.\(^{194}\)

Nor will ineligibility result due to production on or conversion of a wet area created by a water delivery system, irrigation,

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\(^{191}\) Id. § 12.10. In cases in which conversion results from the activities of a water resource district, drainage district, or similar entity, the person assessed for the activities will be held accountable. If the conversion was beyond the control of the individual and the converted wetlands are not used by the person for the production of an agricultural commodity, he or she will not be held responsible and will remain eligible for program benefits. Id. § 12.5(b)(1)(iv)(D).


\(^{193}\) 16 U.S.C. § 3822(a)(1) (1988). The regulations clarify when conversion is considered to have been commenced before December 23, 1985. Conversion is deemed to have "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 [the] 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 . . . for the primary and direct purpose of converting the wetland." 7 C.F.R. § 12.5(b)(3) (1992). Such a 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. § 12.5(b)(5). Conversion of a wetland is considered to have been completed before December 23, 1985 if any of the above described 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. Id. § 12.5(b)(2).

\(^{194}\) 16 U.S.C. § 3822(a)(1) (1988). An area is considered an artificial wetland if it was formerly nonwetland or wetland on which conversion was commenced or completed before December 23, 1985, but meets the wetland criteria "due to the action of man." 7 C.F.R. § 12.31(c)(1) (1992).
or irrigation system. Production of an agricultural commodity on a wetland using normal farming or ranching techniques will not result in ineligibility where such production is possible "as a result of a natural condition, such as drought, and without action by the producer that destroys a natural wetland characteristic." Finally, cropland will not be considered a wetland for purposes of the Act 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."

Discretion of the Secretary. Even if land is found to be subject to the swampbuster prohibitions, the Secretary retains the discretion to grant certain exemptions. First, the Secretary may exempt a farmer from program ineligibility that results from production of an agricultural commodity on a converted wetland or the conversion of a wetland if it is determined that "such action, individually and in connection with all other similar actions authorized by the Secretary in the area, will have a minimal effect on the functional hydrological and biological value of the wetland." The legislative history of the bill indicates that this exemption was very limited as phrased originally in the 1985 Farm Bill.

Potential abuse of the exemption is somewhat tempered by the requirement that the Fish and Wildlife Service concur in the exemption. In the comments to the regulations, the USDA indicates that it plans to continue considering mitigation of conversion, including restoration, in making a minimal effects determination:

USDA plans to use the following guidelines when determining whether a minimal effects finding with mitigation or restoration of wetland value is appropriate: (1) Minimal effect for replace-

196. Id. § 3822(a)(4).
198. Id. § 3822(f)(1).
199. See 52 Fed. Reg. 35,200 (1987). The original exemption applied only "if the effect of such action[s] ... on the hydrological and biological aspect of wetland [sic] is minimal." Food Security Act of 1985, Pub. L. No. 99-198, § 1222(c) (codified as amended in scattered sections of 16 U.S.C. § 3822(c) (1988)). The exemption was so narrowly applied that it was broadened to apply when the effect on the "functional hydrological and biological value" is minimal. 16 U.S.C.A. § 3822(f)(1) (West Supp. 1992) (emphasis added).
ment of wetlands not frequently-cropped will be used only where the purpose of the conversion is not solely the increase
of production of an agricultural commodity on the converted
wetland, such as cases where the removal of woody vegetation
will allow center pivot systems to function, or the squaring-off
of corners of fields; (2) Replacement will require replacement
for the functional values lost; (3) Minimal-effect with mitigation
or restoration must be granted in advance of the conversion,
and never after the conversion if the wetland to be converted
was not frequently cropped; (4) Replacement must take place
on prior converted cropland; (5) The producer will be advised
that all necessary Federal, State, and local permits should be
secured prior to approval of the plan to replace lost values; (6)
The plan to replace lost values must be concurred with by SCS
and agreed to by FWS at the local level with consultation at the
State level; (7) The plan shall include language to the effect that
the plan does not exempt the producer from any other wetland
protection rules and regulations outside the purview of [the
regulations governing the swampbuster program]; (8) USDA
shall require an easement for the mitigated land; (9) A copy of
the signed restoration agreement will be forwarded to the na­
tional office of SCS and USFWS for their review.201

In addition to the above mentioned exemptions, under the
1990 Amendments, if the Secretary determines that the wetland
has been frequently cropped in the past or that it was converted
between December 23, 1985 and November 28, 1990, program
ineligibility will not result if the wetland values, acreage and func­
tions are mitigated by the restoration of another wetland which
was converted before December 23, 1985. This restoration must
be in accordance with a restoration plan, be in advance of or con­
current with the production or conversion being mitigated, not
be at the expense of the federal government, be on not greater
than a one-for-one acreage basis unless more acreage is neces­
sary for adequate mitigation, be on lands in the same general
area of the local watershed as the converted wetland, and be sub­
ject to a recorded easement as long as the other wetland is not
returned to its original state.202 A producer has a right to appeal
the imposition of a mitigation agreement requiring more than
one-to-one acreage mitigation.203

202. 16 U.S.C.A. § 3822 (f)(2) (West Supp. 1992). It should be noted that the
provisions requiring mitigation with production on frequently cropped or prior con­
verted wetland are a distinct requirement from mitigation or restoration required for the
Graded sanctions. Impermissible conversion of a wetland does not always result in total ineligibility. The bill contains a provision for graduated sanctions in the case of a good faith violation. A farmer's payments may be reduced by $750 to $10,000 for the crop year rather than terminated altogether as the result of the conversion of a wetland, if (1) the farmer is actively restoring the converted wetland under an agreement with the Secretary or the wetland has been restored; (2) the farmer has not violated the swampbuster requirements in the previous ten-year period; and (3) the conversion was done in good faith without intent to violate the requirements of the program. 204 These graduated sanctions for good faith violations may be applied retroactively to permit the restoration of portions of benefits withheld for violations which occurred between December 23, 1985 and November 27, 1990. 205 Due to the potential abuse of this exemption, the regulations mandate internal USDA review to ensure that "good faith" relief will be "rarely granted." 206 Program benefits may not be withheld without an on-site inspection. 207 Ineligibility is not permanent; 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. 208

The provisions permitting graduated sanctions for good faith violators were enacted as part of the 1990 amendments to the swampbuster program. Prior to their enactment, ASCS had been granting blanket exemptions for good faith violators under the general statutory and regulatory authority granted under 7 U.S.C. § 1339(a) and 7 C.F.R. § 790.2(a). 209 These blanket exemptions, unlike the good faith provisions added in the 1990 amendments, did not require fines or restoration of the illegally converted wetland. In National Wildlife Fed'n v. ASCS, 210 the Eighth Circuit Court of Appeals, while declining to decide whether ASCS actually had the statutory or regulatory authority

204. Id. § 3822(h).
208. Id. § 3822(i).
209. Both 7 U.S.C. § 1339(a) (1988) and 7 C.F.R. § 790.2(a) (1992) provide that, "Notwithstanding any other provision of law," good faith performance in reliance on the advice of an ASCS representative may be accepted as meeting the requirements of the applicable program.
to grant such exemptions prior to the 1990 amendments, held that the new graduated sanctions provisions are retroactive and must be applied in cases of good faith violations of the swampbuster prohibitions. This holding, in effect, deprives the ASCS of discretion it had to grant good faith relief without imposing a fine and to require restoration of the illegally converted wetland.

3. Appeals.

The USDA specifically decided not to permit third parties to appeal any determination under the regulations. 211 In the National Wildlife Federation case, however, the Eighth Circuit Court of Appeals held that an environmental organization has standing to challenge an exemption granted by a local ASCS office under the swampbuster program. 212 The Court later clarified that the Supreme Court's ruling in Lujan v. National Wildlife Federation 213 did not affect the case. 214 The impact of this difference in third party rights for administrative appeals and for judicial proceedings is to limit the recourse of third parties such as environmental organizations to bringing a lawsuit after the conclusion of an often lengthy administrative process.

E. Additional Conservation Programs under the Conservation Program Improvements Act of 1990

The Conservation Program Improvements Act created a number of important new programs. These programs include the Wetlands Reserve Program which, along with the conservation reserve, comprise the Environmental Conservation Acreage Reserve Program, the Agricultural Water Quality Incentives Program, and the Environmental Easement Program, as well as numerous, more limited programs.

1. Wetlands Reserve Program.

The Wetlands Reserve Program is intended to "assist owners

211. 56 Fed Reg. 18,635 (1991) (comments to 7 C.F.R. § 12.30 (1990)).
213. Lujan v. National Wildlife Fed'n, 110 S.Ct. 3177 (1990). The Supreme Court held that, in order for an environmental protection group to establish standing sufficient to withstand summary judgement, the affidavits filed by members of the group must demonstrate both agency action and that the affiants were actually "adversely affected or aggrieved." Id. at 3186.
of eligible lands in restoring and protecting wetlands.”

During the 1991 through 1995 calendar years, approximately one million acres are to be enrolled in this reserve. 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.” Some other wetlands may be eligible under certain conditions.

To participate in the program, the owner of qualifying wetlands must agree to grant an easement to the Secretary with an appropriately recorded deed restriction and implement a wetland conservation plan to preserve the wetland values. The easement must be for at least thirty years or the maximum duration allowed under state law. In return for this easement, the Secretary will compensate the owner for an amount not to exceed the difference in the fair market value of the land with and without the easement. Cost sharing for conservation measures and technical assistance will also be provided by the Secretary.

Land subject to a Wetlands Reserve Program easement may be utilized for compatible economic uses if specified in the conservation plan; such uses include hunting, fishing, managed timber harvesting, and periodic grazing.


217. Id. § 3837(c).

218. Id. § 3837(d). These lands are farmed wetland and adjoining lands already enrolled in the conservation reserve with high wetland functions and values which are likely to return to production, other wetland of an owner which would not otherwise be eligible but which would add to the functional value of the easement, and riparian areas that link protected wetlands.

219. Id. § 3837a(a).

220. Id. § 3837a(e).

221. Id. § 3837a(f).

222. Id. § 3837c(a). The Secretary shall provide cost share assistance for at least fifty but not more than seventy-five percent of the eligible costs with respect to an easement which is not permanent, and not less than seventy-five but not more than one hundred percent of eligible costs with respect to a permanent easement.

2. Agricultural Water Quality Incentive Program.

The Act also authorizes the Agricultural Water Quality Incentive (AWQI) Program which encourages development of on-farm water quality protection practices. During the 1991 through 1995 calendar years, the Secretary is authorized to enroll a total of 10 million acres in this program. Farmers enrolling in the Program will sign three-to-five year contracts agreeing to: (1) implement an approved water quality protection plan; (2) refrain from practices that would defeat the purposes of the program; (3) comply with additional provisions contained in the agreement; (4) refund incentive or cost share payments with interest and forfeit future payments in the event of a violation; (5) refund cost share and incentive payments if the land is transferred, unless the transferee agrees to assume all of the contract obligations; (6) report nutrient, pesticide, and animal waste materials usage on the land for the previous three years; and (7) supply other information that the Secretary determines necessary.

In return, the Secretary will provide a program participant with: (1) an eligibility assessment; (2) technical assistance in developing the plan; (3) information, education, and training to aid in its implementation; (4) guidance in obtaining cost share assistance under other programs; and (5) an annual incentive pay-

the regulations essentially echo the language of the Act. There are, however, several notable exceptions. During 1992, enrollment in the WRP will be limited to nine states. 7 C.F.R. § 703.1(a). The ASCS has indicated that it intends to accept only permanent easements in this pilot program. 57 Fed. Reg. 23,908, 23,912 (1992). Finally, the amount of "adjacent lands" which may be enrolled is limited to buffer areas which may not average more than 100 feet in width nor be more than twice the area of the restored wetlands. 7 C.F.R. § 703.7(d)(2).

It should be noted that, as yet, the House spending bill for agriculture for fiscal year 1993 contains no appropriations for the WRP. The House Appropriations Committee reported that it was deferring additional funding until the results of the pilot program are analyzed. House Panel Approves Funding For Some USDA Programs But Cuts Others, Daily Report for Executives (BNA) No. 124, at D31 (June 26, 1992). The Senate had approved 55 million dollars for the WRP in its bill. On August 6, House and Senate Conferences agreed to eliminate funding for the WRP and insist on a report from USDA on the status of the program. Conferences Close to Agreement on Spending Bill for Agriculture, Daily Report for Executives (BNA) No. 153, at D29 (Aug. 7, 1992).

224. 16 U.S.C.A. § 3838b(a) (West Supp. 1992). An "agricultural water quality protection practice" is defined as "a farm-level practice or system of practices designed to protect water quality by mitigating or reducing the release of agricultural pollutants, including nutrients, pesticides, animal waste, sediment, salts, biological contaminants, and other materials, into the environment." Id. § 3838a(1).

225. Id. § 3838b(a)(11).

226. Id. § 3838b(a)(2)-(3).
In addition, participants may choose to enroll in the wetland preservation or wildlife habitat options, which provide cost share assistance to landholders who implement agricultural production practices that preserve or enhance existing wetland or improve on-farm wildlife habitat.\footnote{In determining the amount of incentive payment, the Secretary shall consider the amount necessary to encourage participation, additional costs incurred by producers, and production value lost in implementing the plans. \textit{Id.} § 3838b(a)(5)(A)(B)(C)(E)(F). Incentive payments shall not exceed $3,500 per person per year. \textit{Id.} § 3838b(a)(6)(B)(I). Incentive payments shall not exceed $3,500 per person per year. \textit{Id.} § 3838b(a)(6)(B)(I).}

Lands eligible for enrollment in the AWQI program 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 [EPA and the appropriate state agency];
2. 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 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 not otherwise eligible, which,] 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.\footnote{Cost share payments under either of these options may not exceed $1,500 per person per contract. \textit{Id.} § 3838b(a)(6)(C)(I).}

Lands on which agricultural production threatens the achievement of water quality standards or the goals and requirements of federal or state water quality laws have priority for agreements.\footnote{It should be noted that lands creating water quality problems, while not eligible for enrollment in the AWQI program, are included in the priority list to be assessed for nonpoint source pollution. \textit{Id.} § 3838c(b).}
problems may also qualify for enrollment in the CRP as expanded in the 1990 amendments.

3. **Environmental Easement Program.**

The 1990 Act also creates an Environmental Easement Program with the goal of ensuring the continued long-term protection of environmentally sensitive lands.\(^{231}\) Under this program, the Secretary may acquire easements on land that is in the conservation reserve or under the Water Bank Act, or on other cropland that contains riparian corridors, critical habitats, or is otherwise environmentally sensitive.\(^{232}\) In determining the acceptability of easement offers, the Secretary may take into consideration the extent to which the goals of the easement program would be achieved on the land, the productivity of the land, and the on-farm and off-farm environmental threats if the land is used for the production of agricultural commodities.\(^{233}\)

Easements acquired under this program must be permanent or for the maximum duration permitted under applicable state law.\(^{234}\) In return for participation in the Environmental Easement Program,\(^{235}\) the Secretary will make annual payments for ten years or less totalling the lesser of $250,000 or the difference in the land’s value with and without the easement.\(^{236}\) In addition, the Secretary will provide financial assistance for establishing the conservation measures and practices called for in the plan,\(^{237}\) provide technical assistance,\(^{238}\) and permit the land to be used for wildlife activities, including hunting and fishing.\(^{239}\)

4. **Smaller programs Created in the Conservation Program Improvements Act.**

In addition to the major programs already discussed, the

\(^{231}\) Id. § 3839(a).
\(^{232}\) Id. § 3839(b)(1).
\(^{233}\) Id. § 3839c(c)(2).
\(^{234}\) Id. § 3839(a).
\(^{235}\) Id. § 3839(a). A "natural resources conservation management plan" shall set forth the conservation measures and practices to be carried out by the owner, and the commercial use, if any, to be prohibited on the land during the term of the easement, and shall provide for the permanent retirement of any existing cropland base and allotment history. Id. § 3839a(b).
\(^{236}\) Id. § 3839b(2). Easement payments to any one person shall not exceed $50,000 per year. Id. § 3839c(f)(1).
\(^{237}\) Id. § 3839b(1) and § 3839c(b).
\(^{238}\) Id. § 3839b(3).
\(^{239}\) Id. § 3839b(4).
Conservation Program Improvements Act creates a host of lesser programs addressing various agricultural conservation concerns. The most significant of these programs is the Integrated Farm Program Management Option. The goal of this program is to encourage farmers to incorporate resource conserving crops into their management system by removing economic disincentives which might otherwise deter their cultivation. During the 1991 through 1995 calendar years, the Secretary is directed to enroll not less than 3 million nor more than 5 million acres into this program. Enrollment is to be carried out by means of three to five year renewable contracts.

To participate in this program, a farmer must: (1) prepare and submit an integrated farm management plan; (2) actively apply the plan; (3) devote not less than twenty percent of enrolled crop acreage bases to a resource conserving crop; (4) comply with any annual acreage limitation program in effect for the crop acreage bases enrolled in the program; and (5) keep such records as the Secretary may require. In return, the Secretary will not reduce acreage bases or farm program yield for the program crops.

F. The Jeffersonian Legacy in the 1990 Farm Bill

The ambitious environmentalism of the expanded programs in the 1990 Farm Bill is deceptive. At first, the multitude of new programs and expansiveness of the Environmental Conservation Act of 1990 may appear to be a significant step forward. However, as the implementation of these programs unfolds, it becomes apparent that the goals of environmental conservation may not be achieved.

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241. Id. § 5822(d).
242. Id. § 5822(e).
243. An “integrated farm program management plan” specifies the acreage and acreage bases to be enrolled, describes the resource-conserving crop rotation to be implemented on the acreage, contains a schedule for the implementation of the plan, and describes how the practices implemented may be expected to result in maintenance or increases in overall productivity and profitability, prevention of soil degradation, improvement of soil conditions, and protection of water quality. Id. §§ 5822(b)(1)(D), 5822(f).
244. “Resource-conserving crops means legumes, legume-grass mixtures, legume small grain mixtures, legume-grass-small grain mixtures, and alternative crops,” that is, “experimental and industrial crops grown in arid and semiarid regions that conserve soil and water.” Id. §§ 5822(b)(1)(A), 5822(b)(2)(D).
245. Id. § 5822(c).
246. Id. § 5822(b)(1). However, no producers enrolled in this program may receive payments under farm programs for wheat, feed grains, or rice on acreage equal to the average number of traditionally underplanted acres for the three years prior to enrollment. Id. § 5822(b)(7).
Acreage Reserve Program would appear to be a victory for those who urged Congress to make the conservation title a focused, full fledged environmental directive, separate and distinct from the long legacy of supply control programs. At the same time, however, Congress weakened many of the enforcement mechanisms of the Act and created new exemptions from liability. This ambivalence in creating an aggressive environmental program for agriculture has continued in the implementation of the Act. Final regulations for many of the programs have been very slow in coming, and budgeting for fiscal year 1993 ranges from minimal to non-existent.

This congressional schizophrenia of creating ambitious environmental programs and then failing to support them is consistent with the roots of the Jeffersonian ideal. The cultural reverence for American agriculture in general and the American farmer in particular as predicated on the Jeffersonian ideal of the independent farmer as custodian of the land. Modern economic realities, however, have undermined the independence of the farmer and farms have ceased to be self-sustaining entities. To maximize profits, the soil often has been abused while the promise of “quick fixes” in the form of chemical inputs have been effusive.

The virtual extinction of the Jeffersonian farmer, however, did not extinguish the Jeffersonian ideal. Congress’ reluctance to dictate environmental norms for agriculture is rooted in a reverence for an independence which no longer exists. Agriculture is heavily regulated and heavily subsidized. Nevertheless, the Jeffersonian ideal of an agrarian democracy impeded environmental reform, and wrongly so. The Jeffersonian ideal is well served by an environmental ethic in agriculture, and it is agriculture which stands most to benefit from recognition and acceptance of an environmental ethic.

V. CONCLUSION

What, then, would Jefferson think of today’s soil conservation programs? Jefferson would likely endorse the traditional cost-sharing and technical assistance voluntary conservation program, which arose out of the Great Depression. Despite his abhorrence
of meddlesome government, Jefferson advocated many special benefits for agriculture, from tax breaks to exemptions from constitutional requirements of uniformity in federal bankruptcy laws. \(^{248}\) Jefferson would view the voluntary soil conservation programs prior to 1985 as an acceptable benefit to agriculture with minimal governmental interference. Similarly, the conservation easement programs in the 1985 and 1990 Farm Bills, although more intrusive in their contractual requirements, would pass at least this first step of the Jeffersonian litmus test for agricultural programs. These most recent programs are, in a sense, a subsidy to agriculture which the farmer is free to accept or reject.

The conservation easement programs, however, differ from the pre-1985 soil conservation programs in one critical respect. The pre-1985 programs subsidize implementation of government recommended conservation measures in agricultural production. The conservation easement programs, in contrast, pay a farmer not to produce to accomplish environmental objectives. Could Jefferson endorse any program which discouraged American farmers, directly or indirectly, from planting?

The 1985 Farm Bill sodbusting, swamplisting, and conservation compliance programs are mandatory programs in the traditional guise of voluntary programs. Farmers are free to convert wetlands and plant highly erodible land without a conservation plan; it is just that the federal government will not subsidize their doing so. Some farmers could not survive without government subsidies. This economic consequence complicates the analysis considerably.

Jefferson's acceptance or rejection of the government subsidy system is critical not only to projecting his position on the easement programs of the 1985 and 1990 Farm Bills, but also on the more "mandatory" sodbusting, conservation compliance, and swamplisting programs. Jefferson was a man who could bend his political and economic theories to overcome his intellectual scruples when necessary to achieve his most fundamental goals. His sponsorship of the Lewis and Clark expedition is the most compelling of many examples. In his message to Congress on January 18, 1803, Jefferson—the self-proclaimed agrarian—touted "the extension of public commerce" and the need to bring western Indian tribes into the factory or trade system

\(^{248}\) MILLER, supra note 9, at 211.
through which the government engaged in commercial transactions with the eastern tribes.\textsuperscript{249}

Assuming that subsidies are not necessary for the economic survival of farming, limitations upon their availability would be consistent with Jefferson's notion of limited government and economic independence of the American farmer. If subsidies are necessary to the survival of agriculture, Jefferson would likely put aside his distaste of a subsidy system in order to preserve the first pillar of his political and economic ideals. Support by analogy for this leap of faith is the fact that the government support programs of the New Deal were overseen by Henry A. Wallace, described by one Jeffersonian scholar as "a man whose life and family background were models—scientific, cultural, and political—of Jeffersonian farming."\textsuperscript{250} Therefore, it is unlikely that he would approve of the conditions placed on government payments \textit{due to disapproval of the subsidy system itself}.

There is no question that the conservation provisions intrude upon the land use decisions which, in Jefferson's time, were left to the individual property owner. As demonstrated earlier, it would be disingenuous to conclude that Jefferson would tolerate this interference by glibly characterizing him as a conservationist. Jefferson zealously experimented with any method or equipment designed to enhance the productivity and profitability of agriculture. Jefferson's interest in soil conservation was an outgrowth of his interests in agriculture and science. There was little need for Jefferson the philosopher to formulate a conservation ethic or public policy for preservation of natural resources with his vision of unlimited resources in America. Jefferson may have grasped and adopted the limited premises in which the 1985 program was partially clothed: crop reduction and conservation to control productivity in the short run and enhance profitability in the long run, with an almost incidental environmental benefit.

The undeniably broad environmental objectives of the 1990 programs, however, would challenge his ideals. Jefferson, influenced by the humancentric age of enlightenment with its mechanistic and utilitarian emphasis on nature, might be perplexed by

\textsuperscript{249} Donald Jackson, \textit{The West}, in \textit{Thomas Jefferson: A Reference Biography}, supra note 8, at 369, 374.

\textsuperscript{250} Miller, supra note 9, at 269. Wallace even wrote a review essay of Jefferson's \textit{Farm Book} when it was published with accompanying documentation. 28 Agric. Hist. 133-38 (1954).
the land ethic of Aldo Leopold with its emphasis on the obligations of human beings to other species and resources. There is a symbolic irony to the replacement on the American nickel during the Franklin D. Roosevelt administration of the Indian head and buffalo of George Catlin, the painter of native Americans and one of the earliest conservationists, with Jefferson and Monticello.\(^{251}\)

Even if it can be assumed that Jefferson would endorse government programs which, directly or indirectly, limit production to the extent necessary to serve agriculture's economic interests, it is unlikely that Jefferson would endorse programs which affect production to serve environmental objectives. At this crucial point, further analysis necessarily must leave the domain of environmental and cultural historians for speculation as to Jefferson's position on issues he never contemplated, much less addressed.

This country may never return to Jefferson's ideal of small, economically independent farmers, but his respect for farming and nature strikes a fundamental and immutable chord in the American spirit. Jefferson said that when he entered public life, he "came to a resolution never . . . to wear any other character than that of a farmer."\(^{252}\) The character to which Jefferson aspired was a character of independence, economic self-sufficiency, and appreciation of nature. These are values at the heart of the Jeffersonian vision, the heart of our democracy, and still within the heart of many Americans today.

There is still a place in American culture to revere and honor the American farmer. Yet whatever favored position remains for the farmer in our society, it is rooted in the Jeffersonian ideal of agriculture as the friend, not foe, of nature. As agriculture has distanced itself from the land—with corporate, absentee, non-organic farm management—the reverence for agriculture in American society has diminished. It is not the American public which has forgotten Jefferson's vision, but agriculture itself. Agriculture must be at the forefront in formulating environmentally responsible, agricultural policy-making to salvage what remains of Jefferson's vision and of agriculture's special place in American society.

\(^{251}\) Miller, supra note 9, at 269.

\(^{252}\) Shalhope, supra note 8, at 385 (emphasis added).