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Final Rules on Swampbuster and Sodbuster Program

Linda A. Malone

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

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Final rules on swambuster and sodbuster program


In the final rule, many of the definitions in the interim rule have been revised. The definition of "highly erodible land" for purposes of the swambuster provision has been amended to provide that "highly erodible land" is land that has an "erodibility index" of eight or more. 52 Fed. Reg. at 35201. "Erodibility index" is a "numerical value that expresses the potential erodibility of a soil in relation to its soil loss tolerance value without consideration of applied conservation practices or management." Id. (emphasis added). Also the definition of "conservation plan" has been revised to be more specific about the contents of a plan, and the wetland definition has been revised to exclude lands in Alaska which have a predominance of permafrost soils. Id. at 35202.

Insofar as "wetland" is defined as land which supports "under normal circumstances" a prevalence of hydrophytic (aquatic) vegetation, "under normal circumstances" is defined to refer to "soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed. Id. at 35207.

The Ultimate Wisdom: The only alternative to perseverance is failure.
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Conservation compliance for highly erodible cropland in production or in USDA programs for any year from 1981-1985 is not required until the later of January 1, 1990 or the date two years after the SCS soil survey is completed. Revisions in the final regulation indicate that the soil survey that must be completed is that which applies only to the cropland portion of the tract or farm, not the plan for the entire farm. Id. at 35202.

In response to a statutory amendment on April 24, 1987 (Pub. L. No. 100-28), persons who had alfalfa in a crop rotation during each of the 1981 through 1985 crop years based on a conservation plan have an extension until June 1, 1988 to fully apply a conservation system to retain eligibility. Id. at 35202.

There is a statutory exemption for conversion of wetlands if conversion was “commenced” before December 23, 1985. 16 U.S.C. § 3822 (West Supp. 1987). A person seeking a determination of conversion commencing before December 23, 1985 must request the determination within one year following publication of the final rule, must demonstrate that the conversion has been actively pursued, and must complete the conversion by January 1, 1995. 52 Fed. Reg. 35203-04. The final rule revises the interim rule to clarify in great detail when conversion was “commenced.”

Another revision clarifies that converted wetlands are presumed to have been converted by the person applying for benefits unless the person can show the conversion was by an unrelated third party and there has been no involvement in a scheme or device to avoid compliance. 52 Fed. Reg. at 35203. If there was acquiescence in, approval of, or assistance to acts of the third party, the person applying for benefits is subject to the scheme or device restrictions and may lose eligibility. If, however, the conversion was in fact done by an unrelated third party, the person applying for benefits may continue to produce agricultural commodities on the converted wetland and retain eligibility so long as there are no further improvements to the drainage, or the SCS determines further improvement will have a minimal effect on wetland areas. Id. at 35202. Potholes, playas, and other wetlands flooded or ponded for periods of time will not be considered converted based on activities occurring prior to December 23, 1985, and further conversions may result in loss of eligibility unless determined to have a minimal effect on wetland values. Id. at 35208.

Further revisions include changes in the criteria for identifying highly erodible lands, new rules for exchange of certain crop acreage bases for crops that have a high residue base, clarifications on what constitutes an “artificial wetland,” limitations on further alteration of converted wetlands which have been the subject of a minimal effects determination, and revisions in criteria for identifying converted wetlands. A full analysis of these revisions will appear in the “In Depth” section of a future issue of the Agricultural Law Update.

– Linda Malone