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Dalana W. Johnson

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# SAVING THE WETLANDS FROM AGRICULTURE: AN EXAMINATION OF SECTION 404 OF THE CLEAN WATER ACT AND THE CONSERVATION PROVISIONS OF THE 1985 AND 1990 FARM BILLS.

DALANA W. JOHNSON\*

## I. INTRODUCTION

In the past two decades the United States government has completed a 180 degree turn from its mid-1800s policy towards America's once vast acres of wetlands. It has been estimated that the forty-eight contiguous states once had over 215 million acres of wetlands.<sup>1</sup> By 1985 that number had been reduced to less than ninety-five million acres, and the loss has continued.<sup>2</sup> More than eighty percent of the loss resulted from conversion to agricultural uses through government approved drain and fill activities.<sup>3</sup> Recognizing that this land is useful by its very nature, and responding to public concern for the environment,<sup>4</sup> Congress more recently has passed legislation designed to curtail the agricultural conversion it once subsidized.<sup>5</sup> Both the Clean Water Act (CWA)<sup>6</sup> and the Food Security Act of 1985 (FSA)<sup>7</sup> offer much needed protection for wetlands and have slowed conversion somewhat. The conservation section of the Food, Agriculture, Conservation, and Trade Act of 1990<sup>8</sup> amends the FSA and offers new

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\* B.A. 1977, Jacksonville University; J.D. 1992, Florida State University.

1. H.R. REP. No. 271, 99th Cong., 1st Sess. pt. 1, 87 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1191.

2. James T.B. Tripp & Daniel J. Dudek, *The Swampbuster Provisions of the Food Security Act of 1985: Stronger [sic] Wetland Conservation If Properly Implemented and Enforced*, 16 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,120, 10,120 (May 1986).

3. *Id.*

4. S. REP. No. 357, 101st Cong., 2d Sess. 216 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4870.

5. H.R. REP. No. 271, *supra* note 1, at 87, *reprinted in* 1985 U.S.C.C.A.N. at 1191.

6. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)). Prior to 1977 this act was known as the Federal Water Pollution Control Act.

7. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1504 (codified as amended in scattered sections of 7, 16, 19, and 42 U.S.C. (1988)) [hereinafter Pub. L. No. 99-198].

8. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 1990 U.S.C.C.A.N. (104 Stat.) 3359 (Title XIV of the Act to be codified in 16 U.S.C., amending the Food Security Act of 1985, *supra* note 7) [hereinafter Pub. L. No. 101-624].

programs and incentives for conserving these fragile but essential lands.

### A. *Historical Background on Wetland Use*

Wetlands were once considered useless in their natural state. America in its usual capitalistic and pragmatic approach set about draining and filling swamps to make them "useful," and Congress was there to support it through federal funding. During the mid-1800s Congress passed the Swamplands Acts, which transferred federally owned wetlands to the states "on condition that proceeds from their sale be used for reclamation."<sup>9</sup> The formation of drainage districts and subsequent legislation such as the Watershed Protection and Flood Prevention Act<sup>10</sup> offered monetary and technical assistance which helped make conversion possible and profitable.<sup>11</sup> Moreover, the government encouraged agricultural use of converted land through loans, price supports, and crop insurance.<sup>12</sup> Before 1986, even the nation's tax policy made conversion economically attractive through tax incentives such as investment tax credits and accelerated depreciation.<sup>13</sup> The rich soil of these wetlands helped make America's agricultural success possible.<sup>14</sup> Fortunately, Congress now has recognized that there is no need for further conversion in light of the nation's agricultural surplus.<sup>15</sup> The government's original policy, however, resulted in the loss of millions of acres of land that Congress now recognizes have inherent value.<sup>16</sup>

### B. *Wetland Values and Agricultural Detriment*

Long thought to be useless, wetlands actually serve many useful, beneficial, and essential functions. First, these areas provide essential habitat for wildlife, including threatened and endangered plant and animal species.<sup>17</sup> Wetlands also offer natural flood control because

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9. S. REP. NO. 357, *supra* note 4, at 215, *reprinted in* 1990 U.S.C.C.A.N. at 4869.

10. Watershed Protection and Flood Prevention Act, ch. 656, 68 Stat. 666 (1954) (codified as amended at 16 U.S.C. §§ 1001-09 (1988)).

11. S. REP. NO. 357, *supra* note 4, at 215-16, *reprinted in* 1990 U.S.C.C.A.N. at 4869-70.

12. Tripp & Dudek, *supra* note 2, at 10,120.

13. Linda A. Malone, *The Renewed Concern Over Soil Erosion: The Current Federal Programs and Proposals*, 10 J. AGRIC. TAX'N & L. 310, 324 (1989). Many of these tax incentives were abolished in the Tax Reform Act of 1986. *Id.* at 325.

14. Tripp & Dudek, *supra* note 2, at 10,120.

15. H.R. REP. NO. 271, *supra* note 1, at 87, *reprinted in* 1985 U.S.C.C.A.N. at 1191.

16. *Id.*

17. *Id.* at 86-87, *reprinted in* 1985 U.S.C.C.A.N. at 1190-91.

they store water and reduce water velocity and damage.<sup>18</sup> As water travels through a wetland, it is filtered and cleaned of pollutants. The result is improved water quality and groundwater recharge.<sup>19</sup> Finally, wetlands offer recreational opportunities such as hunting, canoeing, and fishing,<sup>20</sup> and splendid, aesthetically pleasing panoramas. Clearly, the agricultural conversion of wetlands has resulted in deterioration of each of these functions.

Agriculture is the greatest polluter of groundwater.<sup>21</sup> Sediments, fertilizers, and pesticides contaminate the water supply and kill animals and plants.<sup>22</sup> Agricultural sediment damage costs the country billions of dollars "as it fills up valuable reservoirs, increases the frequency and seriousness of floods, clogs navigation facilities and canals, interferes with industrial hydraulic equipment, increases the cost of treating drinking water supplies, destroys valuable aquatic wildlife, and substantially diminishes the recreational potential of downstream waters."<sup>23</sup> The agricultural industry is not only polluting much of the nation's water supply, but through wetland conversion, it is also destroying one of the surest means of ridding the waters of that pollution.

## II. THE CLEAN WATER ACT AND THE WETLANDS

The purpose of the Clean Water Act<sup>24</sup> (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>25</sup> The Administrator of the Environmental Protection Agency (EPA) is authorized to establish programs for the prevention and reduction of water pollution.<sup>26</sup> The nexus between agriculture and the CWA begins with authorization to attack the problem of agricultural pollution through a cooperative effort between the EPA Administrator and the Secretary of Agriculture.<sup>27</sup> Although this sounds

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18. S. REP. NO. 357, *supra* note 4, at 222-23, reprinted in 1990 U.S.C.C.A.N. at 4876-77; H.R. REP. NO. 271, *supra* note 1, at 87, reprinted in 1985 U.S.C.C.A.N. at 1191.

19. H.R. REP. NO. 271, *supra* note 1, at 87, reprinted in 1985 U.S.C.C.A.N. at 1191.

20. *Id.*

21. David S. Cloud, *Farmers Reap a Crop of Scorn From Anti-Chemical Forces*, 48 CONG. Q. WEEKLY REP. 166, 168 (1990).

22. *Id.*

23. H.R. REP. NO. 357, *supra* note 1, at 78, reprinted in 1985 U.S.C.C.A.N. at 1182.

24. Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (1988).

25. *Id.* § 1251(a).

26. *Id.* § 1254(a).

27. *Id.* § 1254(p). See also *id.* § 1255(e) (authorizing research projects for new methods of eliminating or reducing agricultural pollution); *id.* § 1314(f)(A) (authorizing EPA Administrator to promulgate guidelines for determining pollution sources and control measures in agriculture and silviculture).

promising, the CWA also exempts certain practices from the dredge and fill permitting process<sup>28</sup> required when navigable waters are involved.<sup>29</sup> Agricultural activities are among those practices exempted.<sup>30</sup>

The CWA excludes many agricultural procedures from the permit requirement.<sup>31</sup> Among these exemptions are "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage,"<sup>32</sup> and the maintenance of drainage ditches and construction of irrigation ditches.<sup>33</sup> Each of these activities is carefully defined in the Army Corps of Engineers' regulations.<sup>34</sup> The exemption is limited in two ways, however. First, the toxic effluent standards of the CWA remain applicable.<sup>35</sup> Second, but more importantly, the so-called "recapture provision"<sup>36</sup> narrows the exemption considerably.

#### A. *Finding Wetlands in the Clean Water Act*

The Clean Water Act actually does not include wetlands within its protective scope. The Army Corps of Engineers' regulations related to section 404 of the CWA, however, give the Corps jurisdiction over wetlands in the permitting process.<sup>37</sup> This extension of the Corps' jurisdiction stems from the recapture provision of section 404, which provides the following:

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of *navigable waters* may be impaired or the reach of such waters be reduced, *shall* be required to have a permit under this section.<sup>38</sup>

Through the construction of the words "navigable waters," the CWA is made a protector of wetlands.

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28. *Id.* § 1344(f).

29. *Id.* § 1344(a).

30. *Id.* § 1344(f)(1)(A)-(F).

31. *Id.*

32. *Id.* § 1344(f)(1)(A).

33. *Id.* § 1344(f)(1)(C).

34. 33 C.F.R. § 323.4 (1990).

35. 33 U.S.C. § 1344(f)(1) (1988); *see id.* § 1317 (containing provisions on toxic effluent standards).

36. *Id.* § 1344(f)(2). *See* Kenneth E. Varns, Note, *United States v. Larkins: Conflict Between Wetland Protection and Agriculture; Exploration of the Farming Exemption to the Clean Water Act's Section 404 Permit Requirement*, 35 S.D. L. REV. 272, 296 (1990).

37. 33 C.F.R. § 323.1 (1990).

38. 33 U.S.C. § 1344(f)(2) (1988) (emphasis added).

“Navigable waters” is a term of art and is not susceptible to a layman’s conception of its meaning. The CWA defines the term as “the waters of the United States,”<sup>39</sup> which alone broadens the scope of its application.<sup>40</sup> The Corps further expands the definition to include wetlands,<sup>41</sup> a term for which it offers the following definition:

The term “wetlands” means those areas that are *inundated or saturated by surface or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include *swamps, marshes, bogs, and similar areas*.<sup>42</sup>

In *United States v. Riverside Bayview Homes, Inc.*,<sup>43</sup> a unanimous Court upheld the Corps’ exercise of jurisdiction over wetlands adjacent to waters of the United States as reasonable in light of the congressional policy stated in the CWA.<sup>44</sup> Justice White noted that areas saturated by surface or ground water supporting typical wetland vegetation brought wetlands under the Corps’ regulation<sup>45</sup> and that in section 404 “Congress expressly stated that the term ‘waters’ included adjacent wetlands.”<sup>46</sup> Here the Court refers to the CWA’s approval of state dredge and fill permit programs which reserve to the Corps superior jurisdiction over navigable waters “including wetlands adjacent thereto.”<sup>47</sup> The Court further discussed that Congress failed to narrow the definition of “waters” in the CWA despite recognition of its broadness<sup>48</sup> and that the provision funding the National Wetlands Inventory, which assists states in implementing the CWA, reflected “congressional recognition that wetlands are a concern of the Clean Water Act.”<sup>49</sup>

### B. Using Section 404 to Protect Wetlands

The scope of the section 404 exemption is considerably more narrow than one might think. First, the exemption is granted only to

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39. *Id.* § 1362(7).

40. S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 144, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822.

41. 33 C.F.R. § 328.3(a)(2), (3), (7) (1990). See Varns, *supra* note 36, at 278-83 (providing a discussion of the issue).

42. 33 C.F.R. § 328.3(b) (emphasis added).

43. 474 U.S. 121 (1985).

44. *Id.* at 134.

45. *Id.* at 129.

46. *Id.* at 138.

47. 33 U.S.C. § 1344(g)(1) (1988).

48. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

49. *Id.* at 139.

“normal” agricultural activities.<sup>50</sup> Each one of these activities is defined by the Army Corps of Engineers to ensure the effect of minimal or no discharge of dredge or fill material in regard to areas in established use.<sup>51</sup> Second, the recapture provision brings otherwise exempt dredge and fill activities back into the regulatory permitting process of section 404.<sup>52</sup> The statute specifically prohibits bringing an area of navigable waters, read to include wetlands, into a new “use to which it was not previously subject,” unless a permit is first obtained.<sup>53</sup> “Read together, the two parts of section 404(f) provide a narrow exemption for agricultural and silvicultural activities that have little or no adverse effect on the nation’s waters.”<sup>54</sup>

The recapture provision has been used effectively to save wetlands or to bring about court ordered reconversion of areas dredged and filled for agricultural purposes. In *United States v. Huebner*,<sup>55</sup> the Seventh Circuit upheld the Corps’ enforcement of the provision against landowners who had plowed a wetland area to convert it for cropping. The owners had spread discharge from ditch digging operations onto wetlands, thereby reducing their reach.<sup>56</sup> The court also affirmed the lower court’s ruling that section 404’s mandate of “best management practices” in farm road maintenance and construction required defendants to obtain a permit because bulldozing was required to widen the farm’s road.<sup>57</sup> The Huebners were allowed to leave their unpermitted cranberry beds intact because the court considered them “compatible with wetlands.”<sup>58</sup> Other restorative orders of the district court, however, were left undisturbed.<sup>59</sup>

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50. 33 U.S.C. § 1344(f)(1) (1988). Examples of normal agricultural activities include “plowing, seeding, cultivating, minor drainage, [and] harvesting.” *Id.* § 1344(f)(1)(A).

51. 33 C.F.R. § 323.4 (1990). *See, e.g., id.* § 323.4(a)(1)(iii)(C)(2) (limiting “minor drainage” to areas in established use and disallowing drainage to convert wetland); *id.* § 323.4(a)(6)(ii) (providing that temporary or permanent roads for farming activities must be located sufficiently away from water bodies to minimize discharge).

52. Sara Schreiner Kendall, *The Silvicultural Exemption After Bayou Marcus*, 5 NAT. RESOURCES & ENV’T, Winter 1991, at 13.

53. 33 U.S.C. § 1344(f)(2) (1988).

54. *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983). Additionally, this case declares that bulldozing, which involves redepositing of material as well as removal of vegetation, equals discharge of a pollutant under CWA, *id.* at 923, and that the bulldozer is a point source of pollution, *id.* at 922. *See* 33 U.S.C. § 1362(6), (12), (14), (19) (1988) (defining discharge, pollutant, and point sources).

55. 752 F.2d 1235 (7th Cir.), *cert. denied*, 474 U.S. 817 (1985) (decided before *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)).

56. 752 F.2d at 1242.

57. *Id.* at 1243. *See* 33 U.S.C. § 1344(f)(1)(E) (1988).

58. 752 F.2d at 1245.

59. *Id.*

In *United States v. Cumberland Farms, Inc.*,<sup>60</sup> a federal district court ordered the restoration of 674 acres of land to their 1977 wetland status.<sup>61</sup> The First Circuit upheld the restoration plan despite the defendant's claim that this action would inundate valuable farm fields.<sup>62</sup> The court noted that "[h]ad Cumberland complied with the Clean Water Act when the Act first became applicable to its activities in 1977, no such burdensome order reversing the many years of illegal activity would have been necessary."<sup>63</sup>

A more recent test of the CWA's agricultural exemption and recapture provision came in *United States v. Larkins*.<sup>64</sup> The defendants had drained and discharged fill material on 110 acres of wetland.<sup>65</sup> Larkins claimed the land clearing fell within the silviculture exemption, but the court noted that the exemption was only for "normal" tree harvesting.<sup>66</sup> Because the owners were not replanting trees, but rather intended to plant crops,<sup>67</sup> they were forced to restore the land to its previous state.<sup>68</sup>

Concurring in *Larkins*, Judge Merritt discussed *United States v. Riverside Bayview Homes, Inc.*,<sup>69</sup> and stated that the Army Corps of Engineers' definition of "navigable waters" had been expanded so that "[a] statute [CWA] that does not mention 'wetlands' has apparently been read to include simply 'moist land adjacent to a creek.'"<sup>70</sup> This expansive construction may allow the Corps to exercise jurisdiction over wetlands, but it does not provide total relief. Section 404 provides only that a permit be obtained for those activities exceeding the first part of the exemption and recaptured by the second provision. A discussion of the permitting process is beyond the scope of this article. It should be apparent, however, that federal legislation other than the CWA is needed to provide a more comprehensive plan for saving America's wetlands. Fortunately, there is much potential

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60. 647 F. Supp. 1166 (D. Mass. 1986), *aff'd*, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

61. *Id.* at 1171, 1183.

62. *United States v. Cumberland Farms, Inc.*, 826 F.2d 1151, 1165 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

63. *Id.* at 1165.

64. 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1061 (1989).

65. *Id.* at 190-91.

66. *Id.* at 192-93.

67. *Id.* at 192.

68. *Id.* at 194 (Merritt, J. concurring). See 33 C.F.R. § 323.4(c) (1990) (requiring permit for conversion of a wetland from silvicultural to agricultural use where there is discharge in conjunction with structures).

69. 474 U.S. 121 (1985).

70. 852 F.2d 189, 194 (6th Cir. 1988) (Merritt, J., concurring), *cert. denied*, 489 U.S. 1016 (1989).

for their salvation in the Food, Agriculture, Conservation, and Trade Act of 1990.<sup>71</sup>

### III. SWAMPBUSTING

“The Congress finds that it is in the public interest to preserve, restore, and improve the wetlands of the Nation . . . to reduce acres of new land coming into production and to retire lands now in agricultural production . . . .”<sup>72</sup> Surprisingly, this recognition of the need to preserve America’s wetlands comes from an act passed over twenty years ago.<sup>73</sup> The Water Bank Program for Wetlands Preservation<sup>74</sup> and the Rural Environmental Conservation Program<sup>75</sup> represent early attempts by the Department of Agriculture to stem the loss of wetlands. These programs involved a contracting system between the federal government and the farmer.<sup>76</sup> Under the contract, the farmer developed and implemented a conservation plan, and the government paid for both the use of the conserved land and a percentage of the costs of the conservation practices employed.<sup>77</sup>

Paying farmers to leave wetlands in their natural state marked a complete turnabout from the previous century’s legislation that encouraged their destruction.<sup>78</sup> The newer legislation had little impact on the problem, however. Unfortunately, other federal policies that supported agriculture through subsidies, loans, and price support programs made wetland conversion to cropland all too attractive.<sup>79</sup>

71. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 1990 U.S.C.C.A.N. (104 Stat.) 3359, 3568 (Title XIV of the Act to be codified in Title 16 U.S.C., amending the Food Security Act of 1985, *supra* note 7).

72. Water Bank Act, 16 U.S.C. § 1301 (1988) (originally at Pub. L. No. 91-559, § 2, 84 Stat. 1468). The text reads as follows:

The Congress finds that it is in the public interest to preserve, restore, and improve the wetlands of the Nation, and thereby to conserve the surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources, to reduce runoff, soil and wind erosion, and to contribute to flood control, to contribute to improved water quality and reduce stream sedimentation, to contribute to improved subsurface moisture, to reduce acres of new land coming into production and to retire lands now in agricultural production, to enhance the natural beauty of the landscape, and to promote comprehensive and total water management planning. The Secretary of Agriculture . . . is authorized and directed to formulate and carry out a continuous program to prevent the serious loss of wetlands, and to preserve, restore, and improve such lands, which program shall begin on July 1, 1971.

73. *Id.* §§ 1301-11.

74. *Id.*

75. 16 U.S.C. §§ 1501-10 (1988).

76. 16 U.S.C. §§ 1301-03 (1988); *id.* §§ 1501-03.

77. *Id.* §§ 1304, 1503.

78. The so-called “Swamp Acts” subsidized drain and fill campaigns for agricultural conversion. Tripp & Dudek, *supra* note 2, at 10,120.

79. *Id.*

Wetlands continued to be drained at an average rate of 280,000 acres per year between 1975 and 1985.<sup>80</sup> It was not until 1985 that Congress addressed this incongruity of policies in what was called "the most significant conservation legislation passed by Congress since the 1930's."<sup>81</sup> The Food Security Act of 1985 (FSA)<sup>82</sup> and its successor, the Food, Agriculture, Conservation, and Trade Act of 1990,<sup>83</sup> which significantly amends the FSA, contain provisions specifically drawn to address the problem of wetland loss. These two pieces of legislation, known as the farm bills, attempt to reduce further loss of wetlands by holding out to the farmer both the carrot of federally funded conservation easements and incentive payments<sup>84</sup> and the stick of cessation of federal funding to those who convert wetlands.<sup>85</sup>

#### A. *Issues and Compromise: Amending Swampbuster*

Environmental groups launched a concerted effort to assure passage of new conservation measures in the Food Security Act of 1985 (FSA).<sup>86</sup> Groups such as the National Audubon Society and the Sierra Club mounted an organized campaign, which, along with Congress' growing recognition of the destructiveness of agricultural policy, helped assure passage of the revolutionary provisions.<sup>87</sup> Their success is evidenced by numerous provisions in the FSA aimed at soil and wetland protection.<sup>88</sup> In particular, Congress sought to discourage the conversion of wetlands for agricultural purposes.<sup>89</sup> Through these "swampbuster" provisions, Congress proffered a simple approach to the problem it had created. If one insisted on engaging in the now "unwise" practice<sup>90</sup> of converting wetlands, the government would cut

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80. S. REP. NO. 357, *supra* note 4, at 215, reprinted in 1990 U.S.C.C.A.N. at 4869.

81. James H. Canterberry, *Protecting Wetlands with Swampbuster*, SYMP. ON COASTAL WATER RESOURCES 785, 785 (1988).

82. Pub. L. No. 99-198, *supra* note 7.

83. Pub. L. No. 101-624, *supra* note 8.

84. 16 U.S.C. §§ 3831-36 (1988); Pub. L. No. 101-624, *supra* note 8, secs. 1431-39.

85. 16 U.S.C. § 3821; Pub. L. No. 101-624, *supra* note 8, at sec. 1421. The Tax Reform Act of 1986 took away many of the tax incentives farmers enjoyed which encouraged conversion of fragile lands. "Specifically, income from sale of highly erodible land or wetland converted to production after March 1, 1986 is ineligible for capital gains treatment" and the deduction for land-clearing expenses is repealed. Malone, *supra* note 13, at 324-25. Sale of converted wetland as defined by the FSA must be treated as ordinary income, not as a capital gain. 26 U.S.C. § 1257 (1988).

86. Malone, *supra* note 13, at 330.

87. Linda A. Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve*, 34 KAN. L. REV. 577, 578 (1986).

88. Pub. L. No. 99-198, *supra* note 7, at Title XII.

89. H.R. REP. NO. 271, *supra* note 1, at 78, reprinted in 1985 U.S.C.C.A.N. at 1182.

90. *Id.*

off federal money.<sup>91</sup> The culprit would no longer enjoy the largess of federal price supports, crop insurance, or income assistance.<sup>92</sup> The swampbuster statutes conformed federal conservation policy with the new federal agricultural policy.<sup>93</sup> Congress summarized this new policy with the following statement:

This program will not halt the conversion of the nation's wetlands. Nor will it restore those wetlands now altered. However, this program will help better focus Federal resources, restrain the decline of our wetland heritage and ensure that taxpayer funds devoted to a strong and prosperous agriculture are not inadvertently subsidizing improper wetland conversion.<sup>94</sup>

Not surprisingly, farm organizations vigorously opposed this landmark swampbuster program when it came up for review in 1990.<sup>95</sup> Having allowed other issues to obscure the import of these provisions in 1985,<sup>96</sup> the farm lobby fought to weaken the prohibitions.<sup>97</sup> Farm groups claimed the swampbuster was too restrictive and needed to be made more "workable."<sup>98</sup> Environmentalists, on the other hand, sought to preserve and tighten the program.<sup>99</sup> The environmental lobby proved formidable enough to force compromise in both the Senate and the House of Representatives, despite strong sympathy for the farmers in both houses.<sup>100</sup>

The Food, Agriculture, Conservation, and Trade Act of 1990<sup>101</sup> reflects the compromise between farm groups and environmentalists. For example, although the farm lobby succeeded in expanding the exemption from swampbuster, environmental interests gained through the redefinition of the point of statutory violation.<sup>102</sup> The basic program remained intact, however. The Senate Agriculture Committee

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91. Tripp & Dudek, *supra* note 2, at 10, 121.

92. *Id.*

93. Malone, *supra* note 13, at 331.

94. H.R. REP. No. 271, *supra* note 1, at 89, reprinted in 1985 U.S.C.C.A.N. at 1193.

95. David S. Cloud, *Environmentalists, Farmers Square Off on Farm Bill*, 48 CONG. Q. WEEKLY REP. 830, 832 (1990).

96. Malone, *supra* note 13, at 330.

97. Cloud, *supra* note 95, at 830.

98. *Id.*

99. *Draining 'Swampbuster'*, 48 CONG. Q. WEEKLY REP. 1470 (1990).

100. David S. Cloud, *Farm Groups, Environmentalists Compromise on 'Swampbuster'*, 48 CONG. Q. WEEKLY REP. 1344 (1990) [hereinafter Cloud, *Farm Groups*]; David S. Cloud, *House Panel Stays Course with 1990 Farm Bill*, 48 CONG. Q. WEEKLY REP. 1868 (1990).

101. Pub. L. No. 99-198, *supra* note 7.

102. *Agriculture and Conservation*, 48 CONG. Q. WEEKLY REP. 831 (1990) (chart comparing competing proposals by commodity and environmental groups).

noted its belief that "if anything, society's desire to protect wetlands has grown since 1985, and swampbuster is still good, sound policy."<sup>103</sup>

The basic sanction in the FSA provides that after 1985 "any person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible"<sup>104</sup> for specified federal monies such as price supports, crop insurance, and disaster payments.<sup>105</sup> The loss applies to all the farmer's land, not just the converted wetland.<sup>106</sup> The violator also is disallowed loans from the Farmers Home Administration if the proceeds are used to contribute to wetland conversion for agricultural purposes.<sup>107</sup> If loan funds free the farmer to use nonloan funds for effecting this prohibited activity, the farmer is declared in default on the loan.<sup>108</sup>

Standing alone, this swampbuster provision appears to be a formidable defense against further wetland drain and fill. A flaw, however, lies in the determination of violation. A farmer must produce an agricultural commodity on the converted wetland in order to violate the statute.<sup>109</sup> In a year in which prices are good, a farmer could give up the federal support with impunity because of the profits garnered from using the additional land.<sup>110</sup> In a lean year, the farmer could forego planting the area and regain eligibility.<sup>111</sup>

Environmental groups pushed Congress to redefine the point of violation to close the loophole and strengthen the FSA.<sup>112</sup> In the Food, Agriculture, Conservation, and Trade Act of 1990, Congress amended this provision, adding language that ineligibility also results when the person "*converts* a wetland by draining, dredging, filling, leveling, or any other means *for the purpose, or to have the effect, of making* the production of an agricultural commodity possible."<sup>113</sup> The time of conversion is now the point of violation, marking an important change. In addition, Congress further provides that the ineligibility resulting from violation is imposed "for that crop year and *all subsequent* crop years."<sup>114</sup> To regain eligibility under the amended act, the

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103. S. REP. NO. 357, *supra* note 4, at 231, *reprinted in* 1990 U.S.C.C.A.N. at 4885.

104. 16 U.S.C. § 3821 (1988).

105. *Id.*

106. *See* Tripp & Dudek, *supra* note 2, at 10,121.

107. 16 U.S.C. § 3821(1)(E) (1988).

108. 7 C.F.R. § 1940 (Exhibit M(3)) (1990).

109. 16 U.S.C. § 3821 (1988).

110. Tripp & Dudek, *supra* note 2, at 10,121.

111. S. REP. NO. 357, *supra* note 4, at 236, *reprinted in* 1990 U.S.C.C.A.N. at 4890.

112. *See Agriculture and Conservation, supra* note 102, at 831.

113. Pub. L. No. 101-624, *supra* note 8, at sec. 1421(b)(6) (amending 16 U.S.C. § 3821) (emphasis added).

114. *Id.* (emphasis added).

violator must restore the wetland.<sup>115</sup> This effectively ends market gamesmanship by farmers. Still, if the farmer converts the wetland for some other purpose, such as road construction, the swampbuster provision has no effect.<sup>116</sup> The Clean Water Act's agricultural exemption, however, which covers construction of farm roads, requires that "best management practices" be employed "to assure that flow . . . and biological characteristics of the navigable waters are not impaired" nor their reach reduced.<sup>117</sup> Thus, the farmer is required to undergo the CWA's permitting process.<sup>118</sup>

Environmentalists had been disappointed with results of the 1985 definition of the point of violation.<sup>119</sup> Despite continued conversion of wetlands, fewer than 200 people suffered a loss in federal benefits.<sup>120</sup> Estimates of the number of acres converted to agriculture since 1985 are incomplete. By January of 1990, the Soil Conservation Service (SCS) had completed wetland determinations under swampbuster for only one-third of the nation.<sup>121</sup> Concern over the ability of the SCS to enforce swampbuster was expressed soon after passage of the FSA because the provision was antithetical to the previous policy of the United States Department of Agriculture (USDA).<sup>122</sup> Environmentalists lobbied to place authority for swampbuster enforcement with the Fish and Wildlife Service (FWS) during Congress' consideration of the 1990 amendments.<sup>123</sup> They won a partial victory. Originally, the Secretary of Agriculture had to consult with the Secretary of the Inte-

115. *Id.* at sec. 1422 (amending 16 U.S.C. § 3822).

116. S. REP. No. 357, *supra* note 4, at 237, reprinted in 1990 U.S.C.C.A.N. at 4891.

117. Clean Water Act, 33 U.S.C. § 1344(f)(1)(E) (1988).

118. *See, e.g.*, United States v. Huebner, 752 F.2d 1235 (7th Cir.), cert. denied, 474 U.S. 817 (1985) (before widening farm road, defendant needed permit).

119. David S. Cloud, *Are 'Swampbusters' Failing?*, 48 CONG. Q. WEEKLY REP. 167 (1990); *contra* Canterbury, *supra* note 81.

120. Cloud, *Farm Groups*, *supra* note 100, at 1345. Another source reports that only 26 actually have been denied benefits. Cloud, *supra* note 119, at 167.

121. S. REP. No. 357, *supra* note 4, at 215, 232, reprinted in 1990 U.S.C.C.A.N. at 4869, 4886. The report states the following:

This estimate of the number of wetlands converted is necessarily incomplete. SCS [Soil Conservation Service] has conducted these determinations only for roughly one-third of the country. For the areas of the country that have been covered, the estimates include only those wetlands converted by persons receiving Federal farm program benefits. The SCS numbers also do not include wetlands converted under a swampbuster "commenced" determination. Since December 1985, SCS reports that approximately 82,000 wetland acres have been converted.

*Id.* at 215, reprinted in 1990 U.S.C.C.A.N. at 4869.

122. Tripp & Dudek, *supra* note 2, at 10,122.

123. *Agriculture and Conservation*, *supra* note 102, at 831; *see* Cloud, *Farm Groups*, *supra* note 100, at 1346.

rior in promulgating regulations for the swampbuster provision.<sup>124</sup> Now the two agencies also must consult in the establishment of rules on mitigation and restoration of wetlands.<sup>125</sup> More importantly, the FWS must agree with the “[t]echnical determinations [of wetlands] and the development of restoration and mitigation plans”<sup>126</sup> made pursuant to the provisions of the exemptions section of swampbuster.<sup>127</sup> The SCS has the final say, however, in the event of disagreement.<sup>128</sup>

An additional pressure on the USDA to give careful consideration to its wetlands determinations and exemption decisions could stem from the threat of citizens’ suits under the FSA. In *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*<sup>129</sup> (ASCS), the Eighth Circuit upheld an environmental group’s standing to sue the ASCS. The organization challenged the ASCS’s decision to exempt 6,500 acres of North Dakota wetlands from the FSA.<sup>130</sup> The exemption was based on a finding that the conversion had begun before swampbuster’s effective date.<sup>131</sup> The court stated that swampbuster’s provisions were designed “to help preserve, for the Nation and its citizens, the beneficial attributes of wetlands.”<sup>132</sup> The appellants asserted that they would suffer from the exemption decision through the derogation of water quality and quantity and the loss of aesthetic pleasure.<sup>133</sup> The court, therefore, found they had met the tests for standing and were “arguably” within FSA’s zone of interest.<sup>134</sup>

### B. Swampbuster Exemptions

With the 1990 amendments, the original list of exemptions from FSA’s swampbuster has been expanded. The original exemptions remain intact and include the following: converted wetland if the conversion was begun before December 23, 1985; artificial wetland if created on nonwetland to retain water for a purpose, such as rice production or flood control; wetland created by irrigation; wetland where nondetrimental agricultural production is possible; and wetland where agricultural production has a minimal effect.<sup>135</sup> Commodity groups

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124. 16 U.S.C. § 3823 (1988).

125. Pub. L. No. 101-624, *supra* note 8, at sec. 1423 (amending 16 U.S.C. § 3823).

126. *Id.* at sec. 1422(j)(1) (amending 16 U.S.C. § 3822).

127. *Id.*

128. S. REP. No. 357, *supra* note 4, at 233, *reprinted in* 1990 U.S.C.C.A.N. at 4887.

129. 901 F.2d 673 (8th Cir. 1990).

130. *Id.* at 674.

131. *Id.*

132. *Id.* at 678.

133. *Id.* at 675.

134. *Id.* at 678-79.

135. 16 U.S.C. § 3822(a), (c) (1988).

won important changes with an expansion of the minimal effect exemption and the addition of a good faith exemption.<sup>136</sup>

The farm lobby had found the original swampbuster sanction draconian in nature.<sup>137</sup> It noted that the FSA prohibited the draining of insignificant "prairie potholes" that technically qualified as wetlands but offered none of their ecological benefits.<sup>138</sup> The argument can be made, however, that these wetland areas at least offer some functional values, though limited, and do provide important wildlife habitat. Once drained and filled, both of these uses are lost.<sup>139</sup>

The commodity groups also lobbied for exemption eligibility for a farmer who plants a wetland area that has been frequently cropped in previous years in exchange for mitigation.<sup>140</sup> The farmer would be required to restore a previously converted wetland within the general area.<sup>141</sup> The National Resources Defense Council and the National Wildlife Federation warned, however, that these proposed provisions "would almost certainly exempt tens of millions of acres of wetland from swampbuster" and would "likely result in wholesale drainage."<sup>142</sup>

### 1. *Minimal Effect Exemption*

The new minimal effect exemption provides two important exceptions, one of which is linked to mitigation.<sup>143</sup> First, small areas such as the prairie pothole may be drained if "such action, individually and in connection with all other similar actions authorized by the Secretary [of Agriculture] in the area, will have a *minimal* effect on the functional hydrological and biological value of the wetland."<sup>144</sup> The Senate committee noted that this provision is "intended to allow drainage or manipulation of wet areas with little or no functional values."<sup>145</sup>

This exemption actually ties in with the subsection preceding it.<sup>146</sup> The statute requires the Secretary to exempt from ineligibility a

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136. Pub. L. No. 101-624, *supra* note 8, at sec. 1422 (amending 16 U.S.C. § 3822).

137. Cloud, *Farm Groups*, *supra* note 100, at 1344.

138. *Id.*

139. Stewart L. Hofer, Comment, *Federal Regulation of Agricultural Drainage Activity in Prairie Potholes: The Effect of Section 404 of the Clean Water Act and the Swampbuster Provisions of the 1985 Farm Bill*, 33 S.D. L. REV. 511, 525-27 (1988).

140. Cloud, *Farm Groups*, *supra* note 100, at 1344; Cloud, *supra* note 95, at 830-32.

141. Cloud, *supra* note 95, at 832.

142. *Id.*

143. Pub. L. No. 101-624, *supra* note 8, at sec. 1422 (amending 16 U.S.C. § 3822).

144. *Id.*

145. S. REP. NO. 357, *supra* note 4, at 233. *reprinted in* 1990 U.S.C.C.A.N. at 4887.

146. Pub. L. No. 101-624, *supra* note 8, § 1222(e) (amending 16 U.S.C. § 3822).

farmer's action on land that is determined to be nonwetland,<sup>147</sup> which seems axiomatic. The purpose of this language, however, is to assure that farmers may convert "nuisance areas with minimal wetland functional values" because they are not classified as wetlands.<sup>148</sup> Those areas that pass the wetlands test might then fall within the minimal effect exception.<sup>149</sup>

The second minimal effect exemption is the farmers' conversion-for-mitigation proposal.<sup>150</sup> The exemption is limited in that the area to be converted must have been cropped frequently in the past and that the mitigation must be the restoration of a previously converted wetland.<sup>151</sup> In addition, the mitigation itself must meet several criteria. For example, the restoration must be completed before, or concurrent with, the permitted conversion, and the federal government will not pay any restoration expenses.<sup>152</sup> Most notable, however, is that the restored wetland is subject to an easement prohibiting alterations that reduce wetland values.<sup>153</sup> The easement remains as long as the converted wetland is used for agricultural purposes or is not reconverted to a functional wetland.<sup>154</sup>

## 2. *Graduated Sanctions and the Good Faith Exception*

The final expansion of the FSA's exemption section is the addition of a good faith exception to the severity of the swampbuster sanction. The exemption provides for the possible lessening of ineligibility for the farmer who has planted a converted wetland since 1985 or who converts a wetland after this amendment was enacted.<sup>155</sup> The farmer, however, must fully restore the area or be in the process of restoration

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147. *Id.*

148. S. REP. NO. 357, *supra* note 4, at 233, *reprinted in* 1990 U.S.C.C.A.N. at 4887.

149. The following is the nonwetlands test: If the Secretary determines any one of the following does not apply to the land in question, then the farmer is not ineligible.

(1) Such lands have a predominance of hydric soils.

(2) Such lands are 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 soil conditions.

(3) Such lands, under normal circumstances, support a prevalence of such vegetation.

Pub. L. No. 101-624, *supra* note 8, § 1222(e); *See also id.* at sec. 1421(a) (amending 16 U.S.C. § 3801(a)(16), the wetland definition of FSA, to match this language).

150. Pub. L. No. 101-624, *supra* note 8, at sec. 1422 (amending 16 U.S.C. § 3822).

151. *Id.*; S. REP. NO. 357, *supra* note 4, at 233, *reprinted in* 1990 U.S.C.C.A.N. at 4887.

152. Pub. L. No. 101-624, *supra* note 8, at sec. 1422 (amending 16 U.S.C. § 3822).

153. *Id.*

154. *Id.* An additional minimal effect exemption extends to wetlands converted after 1985 but before this amendment, but the violator must meet mitigation plan requirements. *Id.*

155. Pub. L. No. 101-624, *supra* note 8, at sec. 1422 (amending 16 U.S.C. § 3822).

under an agreement with the Secretary.<sup>156</sup> In addition, the farmer must not have violated the FSA within the previous ten years and must have acted without an intent to violate the act.<sup>157</sup> The provision, for example, covers the farmer who inadvertently alters the depth of a drainage ditch, technically violating the FSA.<sup>158</sup> In this case the Secretary may determine that the farmer only must forfeit from \$750 to \$10,000 of the federal money for which the farmer is eligible.<sup>159</sup>

### C. *Effect of Amendments on Swampbuster*

Undoubtedly, the swampbuster sanction is strengthened by the redefinition of the point of violation as the time a wetland is converted.<sup>160</sup> The sanction also applies the ineligibility for federal money to all subsequent years.<sup>161</sup> The expansion of the exemption section, however, presents the potential for severely weakening swampbuster's efficacy. Congress has tied allowable conversion to equal mitigation,<sup>162</sup> and the requirements of that mitigation are strict. The problem, however, lies in the monitoring of the restoration and mitigation plans. The purpose of these plans is to ensure that there is no loss of wetland values through successful restoration of converted wetlands.<sup>163</sup> The Secretary of Agriculture is charged with "conduct[ing] such monitoring activities as are necessary to ensure the success and effectiveness of the wetland restorations undertaken [as required by the exemption amendments]."<sup>164</sup> If the restoration is to be successful, the Secretary must implement more than a cursory process. The restorations must be monitored closely through field agents to assure that promised reconversion of wetlands is completed. Use of aerial photography also would be beneficial in monitoring the restorations. Otherwise, farmers who are not making good faith efforts toward compliance will continue to collect federal money while controverting federal environmental policy.

## IV. CONSERVATION EASEMENT AND WETLAND PRESERVATION PROGRAMS

In addition to the changes to the swampbuster provisions of the Food Security Act of 1985, the Food, Agricultural, Conservation, and

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156. *Id.*

157. *Id.*

158. S. REP. No. 357, *supra* note 4, at 235-36, *reprinted in* 1990 U.S.C.C.A.N. at 4889-90.

159. Pub. L. No. 101-624, *supra* note 8, at sec. 1422 (amending 16 U.S.C. § 3822).

160. *Id.* at sec. 1421 (amending 16 U.S.C. § 3821).

161. *Id.*

162. *Id.* at sec. 1422 (amending 16 U.S.C. § 3822).

163. S. REP. No. 357, *supra* note 4, at 235, *reprinted in* 1990 U.S.C.C.A.N. at 4889.

164. Pub. L. No. 101-624, *supra* note 8, at sec. 1422 (amending 16 U.S.C. § 3822).

Trade Act of 1990 provides new programs intended to encourage wetland protection. The largess of federal money is offered in exchange for conservation easements or compliance with federal programs.<sup>165</sup> Although it is recognized that wetlands provide important long-term public benefit, the problem lies in attaching some economic value to that use or benefit. Federal incentive payments can provide the requisite value to encourage farmers to leave the land as it is or to adopt practices more congruous with wetland functions.

### A. Conservation Reserve Program

The FSA contains a provision for a conservation program designed to reduce soil erosion. Through the conservation reserve, farmers contract to take land out of agricultural production and place it in the reserve, where it is planted in vegetative cover.<sup>166</sup> In exchange, the federal government offers rental payments, cost share payments, and technical assistance for the duration of the contract.<sup>167</sup> The program does not include wetlands specifically, but it is possible that some wetlands can be enrolled in the program.<sup>168</sup>

The 1990 amendments to the FSA, however, address coverage for wetlands directly with "the sort of conservation program many farmers like: It is voluntary, and the government payments allow them to recoup profit lost by taking land out of production."<sup>169</sup> The 1990 farm bill creates the Environmental Conservation Acreage Reserve Program which encompasses the extant conservation reserve and the new wetland reserve program.<sup>170</sup> The overall program requires contracting for easements "to assist owners and operators of highly erodible lands, other fragile lands . . . and *wetlands* in conserving and improving the soil and water resources of [their] farms or ranches."<sup>171</sup> Specifically, the wetland reserve focuses on restoring wetland previously converted to agricultural use because other federal and state statutes already provide substantial protection for existing wetlands.<sup>172</sup>

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165. See S. REP. No. 357, *supra* note 4, at 216, *reprinted in* 1990 U.S.C.C.A.N. at 4870.

166. 16 U.S.C. §§ 3831-44 (1988); *see also*, Malone, *supra* note 13, at 339-49 (providing an overview of conservation reserve program).

167. 16 U.S.C. §§ 3831-44 (1988).

168. Tripp & Dudek, *supra* note 2, at 10,123.

169. Cloud, *supra* note 95, at 832.

170. Pub. L. No. 101-624, *supra* note 8, at secs. 1431-39 (amending 16 U.S.C. §§ 1231, 3831-32, 3834-35).

171. *Id.* at sec. 1431 (emphasis added). Section 1431 contains the general provisions of the environmental easements program.

172. S. REP. No. 357, *supra* note 4, at 216-17, *reprinted in* 1990 U.S.C.C.A.N. at 4870-71.

The goal of the plan is to enroll one million acres of land into the wetlands reserve by 1995.<sup>173</sup> Land enrollment is limited to farmed wetland or converted wetland<sup>174</sup> if success of restoration and the gain of wetland values compares favorably to the restoration cost.<sup>175</sup> Land converted subsequent to the enactment of the FSA is not eligible for the program as a matter of policy.<sup>176</sup>

Under the plan, the federal government receives a long-term conservation easement<sup>177</sup> on the restored wetland that is recorded on the deed, as well as the agreement that the farmer will implement a restoration plan and conservation of the wetland.<sup>178</sup> The easement plan requires development of a restoration plan to be approved by both the Soil Conservation Service and the Fish and Wildlife Service.<sup>179</sup> The approval of the FWS is required because of its expertise in the area,<sup>180</sup> another small triumph for environmental groups who wanted more control in their hands.<sup>181</sup> Although certain prohibitions on the land are imposed, the land may be used for compatible practices such as haying, grazing, or fishing.<sup>182</sup> The compensation to the farmer includes cost share assistance for the restoration and an easement payment "not to exceed the fair market value of the land less the fair market value of such land encumbered by the easement."<sup>183</sup>

### B. Wetland Protection Through Flood Prevention Program

Another new easement program accomplishes the dual purposes of flood control and wetland protection. Under the Watershed Protection and Flood Prevention Act,<sup>184</sup> the federal government offers cost

173. Pub. L. No. 101-624, *supra* note 8, at sec. 1438 (amending 16 U.S.C. § 3831).

174. Converted wetlands and farmed wetlands are defined as follows:

Converted wetlands are those that have been manipulated for the purpose of or having the effect of making the production of an agricultural commodity possible, and as a result have had some or all of the natural wetland characteristics destroyed. Farmed wetlands are those that have received some manipulation and are cropped intensively enough that the wetland values are impaired.

S. REP. NO. 357, *supra* note 4, at 217, *reprinted in* 1990 U.S.C.C.A.N. at 4871.

175. Pub. L. No. 101-624, *supra* note 8, at sec. 1438 (amending 16 U.S.C. § 3831). This section also allows inclusion of land that alone would be ineligible but which adds functional values, land functionally dependent on the eligible wetland, and riparian areas linking eligible wetlands. *Id.*

176. *Id.*

177. *Id.* (providing easements "shall be for 30 years, permanent, or the maximum duration allowed under applicable State laws").

178. *Id.*

179. *Id.*

180. S. REP. NO. 357, *supra* note 4, at 218, *reprinted in* 1990 U.S.C.C.A.N. at 4872.

181. See *Agriculture and Conservation*, *supra* note 102, at 831.

182. Pub. L. No. 101-624, *supra* note 8, at sec. 1438 (amending 16 U.S.C. § 3831).

183. *Id.*

184. 16 U.S.C. §§ 1001-09 (1988).

share assistance to local governments for acquiring land for water retention structures. The federal government pays all construction costs, thus aiding in preventing flood damage, but inadvertently encourages agricultural wetland drainage into the structures.<sup>185</sup> The 1990 farm bill amends the Watershed Protection and Flood Prevention Act with a plan for natural flood control that again offers money to owners who will leave wetlands in their natural state.<sup>186</sup> Under the new program the federal government pays cost share assistance to enable local authorities to acquire "perpetual wetland or floodplain conservation easements to perpetuate, restore and enhance the natural capability of wetlands . . . retain excessive floodwaters, improve water quality and quantity, and provide habitat for fish and wildlife."<sup>187</sup>

### C. Incentive Payments for Wetland Protection

The 1990 farm bill adds another conservation program to the FSA that should benefit wetlands. Although commodity groups take the position that the link between water quality and agricultural practices has not been conclusively established,<sup>188</sup> a USDA report attributes sixty-four percent of the water quality loss in rivers to agricultural nonpoint sources.<sup>189</sup> The Water Quality Incentives Program provides farmers with an economic incentive to adopt sound conservation practices that will reduce water contamination by agriculture.<sup>190</sup>

In this program, farmers enter into short-term contracts with the government, agreeing to implement an approved water quality protection plan and to report on management practices, including pesticide use.<sup>191</sup> The owner also must supply evidence supporting the report.<sup>192</sup> In determining incentive pay, the government considers the "amount necessary" to encourage participation, the costs incurred in implementing the plan, and any production values waived because of implementation.<sup>193</sup> The water quality program specifically provides a wetland preservation option that directs the Secretary of Agriculture

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185. S. REP. NO. 357, *supra* note 4, at 222-23, *reprinted in* 1990 U.S.C.C.A.N. at 4876-77.

186. Pub. L. No. 101-624, *supra* note 8, at sec. 1462 (amending 16 U.S.C. § 1003).

187. *Id.*

188. Cloud, *supra* note 95, at 832.

189. S. REP. NO. 357, *supra* note 4, at 206, *reprinted in* 1990 U.S.C.C.A.N. at 4860. The 1990 farm bill does require that certified applicators of restricted use pesticides keep records containing the product name, amount, approximate date used, and the location of use for two years after each use. Pub. L. No. 101-624, *supra* note 8, at sec. 1491.

190. Pub. L. No. 101-624, *supra* note 8, at sec. 1439 (amending 16 U.S.C. § 3831).

191. *Id.*

192. *Id.*

193. *Id.*

to encourage farmers to implement plans protecting wetland and wildlife habitat.<sup>194</sup> This program encourages farmers to change management practices because modifications “that prove to be effective both in preventing pollution and in reducing production costs are more likely to be maintained by producers in the long run, without the need for continued investment of government funds.”<sup>195</sup>

## V. CONCLUSION

Looking out over a Florida “wetland,” an elevation from the now pejorative “swamp,” one might find an aesthetically pleasing sight. Others may even see an area important for wildlife habitat, and some even may know of the importance of wetlands to the nation’s water quality. Although most people asked probably would agree that all of these qualities are important, the problem remains of how to value them.

The farmers operating in the profit and loss economy looking at these wetlands may see the opportunity to make money by draining, filling, and planting that land—their land. The task facing America is to find a way to place a value on that land and stem the inexorable loss of the wetlands to agriculture. As applied, the Clean Water Act<sup>196</sup> permitting process presents a hoop through which farmers must jump before converting wetlands. It does not provide an incentive not to convert the land at all. The Food Security Act of 1985 offered economic disincentives for conversion through its swampbuster provisions.<sup>197</sup> The threat of losing federal subsidies effectively could prohibit much conversion. Because of loopholes in that provision, however, the farmers could play a yearly market game and easily could regain eligibility.<sup>198</sup> Like the permitting process of the Clean Water Act, the swampbuster imposed inconvenience or financial difficulties on farmers, but provided no positive incentive not to convert the wetlands.

The Food, Agriculture, Conservation, and Trade Act of 1990<sup>199</sup> presents farmers with the proverbial carrot and stick. Amending swampbuster, it changes the point of violation that results in loss of federal funds to the time of conversion and eliminates the yearly eligibility game by imposing ineligibility that remains until restoration is

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194. *Id.*

195. S. REP. No. 357, *supra* note 4, at 207, *reprinted in* 1990 U.S.C.C.A.N. at 4861.

196. 33 U.S.C. §§ 1251-1387 (1988).

197. 16 U.S.C. §§ 3801-44 (containing swampbuster and conservation measures).

198. S. REP. No. 357, *supra* note 4, at 236, *reprinted in* 1990 U.S.C.C.A.N. at 4861.

199. Pub. L. No. 101-624, *supra* note 8.

effected.<sup>200</sup> Some of the prohibitions' severity is removed through new exemptions and limited availability of graduated sanctions.<sup>201</sup> By connecting most exemptions to strict mitigation plans,<sup>202</sup> however, Congress may have discouraged application for conversion, a positive effect. Positive, that is, if the Department of Agriculture undertakes strict enforcement of the swampbuster federal ineligibility requirements and the mitigation plans.

Most appealing to farmers who must survive economically, however, should be the programs of conservation easement and incentive payments that the 1990 legislation offers.<sup>203</sup> These programs provide rewards for the protection and restoration of wetlands, finally placing inherent value on the land to ensure a public benefit for the nation.

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200. *Id.* at secs. 1421-22 (amending 16 U.S.C. §§ 3821, 3822).

201. *Id.* at sec. 1422 (amending 16 U.S.C. § 3822).

202. *Id.*

203. *Id.* at secs. 1431, 1438-40, 1461-63 (amending 16 U.S.C. §§ 1231, 3831, 1001-09).

