

Nebraska Law Review

Volume 73 | Issue 1

Article 9

1994

Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer

Justin Lamunyon
Faulkner Law Firm

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Justin Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer*, 73 Neb. L. Rev. (1994)
Available at: <https://digitalcommons.unl.edu/nlr/vol73/iss1/9>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.



Justin Lamunyon*

Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer

TABLE OF CONTENTS

I. Introduction	164
II. What is a Wetland?	164
A. Predominance of Hydric Soil	165
B. Wetland Hydrology	165
C. Hydrophytic Vegetation	166
III. SCS Delineation Procedure	167
IV. Swampbuster Violations	168
V. Criticism of the Current System	169
VI. New Developments Concerning Delineation Procedures .	170
VII. Alternatives to the Farmer Who has a Wetland	175
A. Is this a Wetland?	175
B. Is the Wetland Subject to Swampbuster?	176
1. Commenced Determinations	176
C. Questions for SCS	177
1. Artificial Wetlands	177
2. Farmed Wetlands	177
3. Natural Conditions	177
4. Highly Erodible Land Compliance	177
D. What can be Done with Jurisdictional Wetlands? ...	178
1. Convert the Wetland	178
2. Minimal Effect	179
E. Options When a Wetland has been Converted	181

Copyright held by the NEBRASKA LAW REVIEW.

* The author is a 1993 graduate of the University of Oklahoma School of Law, Norman, Oklahoma and an attorney in the Faulkner Law Firm, Enid, Oklahoma. This is his winning essay of the 1993 American Agricultural Law Association Writing Competition.

1. Reliance on Erroneous SCS Information	181
F. Questions for ASCS	181
1. Third Party Exemption	181
2. Good Faith/Graduated Sanctions	181
G. Challenge Jurisdiction	183
VIII. Conclusion.....	185

I. INTRODUCTION

At a time when the agricultural industry is becoming subject to more and more regulations, the successful farmer in this country must not only be aware of these regulations, but must also learn what it takes to comply with and adapt to them. The Swampbuster provisions of the 1985 Food Security Act (FSA) and the 1990 Food, Agriculture, Conservation and Trade Act (FACTA)¹ present the American farmer with confusing and controversial issues.

First, this Essay will concentrate on small, isolated wetlands, typically located in fields and pastures, and the options available to the farmer with such a wetland. Next, the Essay will discuss the technical delineation procedures used by the Soil Conservation Service (SCS) and compare the 1989 delineation manual with the much debated proposed 1991 delineation manual as well as the proposals from the Clinton administration.

Finally, the Essay will examine the role of the Agricultural Stabilization and Conservation Service (ASCS) and the Soil Conservation Service (SCS) in determining whether a violation of the Swampbuster provisions has occurred, the possible sanctions to be levied, and the alternatives available to the producer suspected of violating these provisions.

II. WHAT IS A WETLAND?

The definition of a wetland varies slightly among the different agencies involved. SCS is responsible for identifying and delineating wetlands that are subject to the Swampbuster provisions. For SCS and Swampbuster purposes, wetlands are defined as:

areas that have a predominance of hydric soils and that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions, except lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.²

1. 16 U.S.C. §§ 3821-3824 (Supp. IV 1992).

2. U.S. ARMY CORPS OF ENG'RS, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS 3 (1989)[hereinafter 1989 MANUAL].

This definition, as well as the definitions used by the Environmental Protection Agency (EPA), Army Corps of Engineers, and the Fish and Wildlife Service, includes three main components—soils, hydrology, and vegetation.³ Each of the three components must be present for an area to be identified as a wetland.⁴ The 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands⁵ provides the techniques and criteria for identifying all of the mandatory requirements.

A. Predominance of Hydric Soil

There is nothing magic about a soil that makes it hydric. In fact, any soil can be a hydric soil so long as the soil is wet enough to develop anaerobic conditions during the growing season.⁶ The growing season is defined as the time when soil temperatures are above forty-one degrees Fahrenheit.⁷ The nation was divided into zones according to the dates of when the soil temperature was above this temperature. In Oklahoma, for example, the majority of the state is in the thermic zone with a growing season of February 1 to October 30, as defined in the 1989 Manual.

If, according to a soil survey, a soil map unit is named a hydric soil, or in the alternative meets hydric soil criteria, the soil is considered predominately hydric.⁸ Also, if the soil has inclusions of hydric soils, which are small areas of hydric soils mixed in nonhydric soils, the area with the inclusions is considered predominately hydric as well.⁹

In summary, any soil that has met hydric soil criteria or has hydric soil inclusions and is wet enough during the growing season to create anaerobic conditions is considered to have a predominance of hydric soil.

B. Wetland Hydrology

The second component of a wetland is its hydrology, which is the moisture characteristics of an area. The hydrology requirement for a wetland is, of course, that the area be characteristically wet on regular cycles. The hydrology component can be met by water on the surface, referred to as inundation, or from groundwater rising to or near the surface, referred to as saturation. The wetland definition requires “inundat[ion] or saturat[ion] . . . at a frequency and duration sufficient to

3. *Id.*

4. *Id.* at 5.

5. *Id.*

6. Interview with Dr. Brian Carter, Professor of Agronomy, Oklahoma State University, Stillwater, Okla. (Oct. 30, 1992).

7. 1989 MANUAL, *supra* note 2, at 5.

8. 7 C.F.R. § 12.31 (1993).

9. *Id.*

support . . . hydrophytic (water-loving) vegetation.”¹⁰ Hydrology can be met by inundation when surface water covers the area at least once during the growing season for at least seven consecutive days during an average rainfall year.¹¹

The hydrology requirement can also be met by groundwater saturation for the same amount of time. Saturation must occur to the surface. However, the manual allows SCS to assume that saturation to the surface will occur if the soil is saturated for at least seven consecutive days within a certain distance from the soil surface.¹²

In summary, the hydrology component is a function of frequency and duration during an average rainfall year. The frequency must be at least once during the growing season and duration must be for at least seven consecutive days. The wetness characteristics are required to occur often enough to be recognized as a recurring event, which requires occurrence in more years than not—six of every ten years, for example.

C. Hydrophytic Vegetation

The third requirement of a wetland is hydrophytic, or “water-loving” vegetation. Some plants require a larger amount of water to grow. By locating areas where these plants are growing, one locates an area with an abundance of water. A definitional wetland must support a prevalence of hydrophytic vegetation in normal circumstances.¹³ Plants are classed as obligate wetland plants, which occur greater than ninety-nine percent of the time in wetlands conditions; facultative wetland plants, which usually occur in wetlands (sixty-seven to ninety-nine percent of the time); facultative plants which are likely to occur equally in wetland or nonwetland conditions (thirty-four to sixty-six percent of the time); facultative upland plants, which usually occur in nonwetlands; and obligate upland plants, which nearly always occur in nonwetland conditions.¹⁴

A prevalence of hydrophytic plants occurs when more than fifty percent of the dominant species from all strata (tree, shrub, herb) are obligate wetland, facultative wetland, or facultative plants.¹⁵ Prevalence can be determined by calculations that yield a ‘prevalence index’ of less than 3.0.¹⁶ Values are assigned from one to five with obligate wetland plants given a one and obligate upland plants given a five.¹⁷

10. 16 U.S.C. § 3801(a)(16)(B) (Supp. IV 1992).

11. 1989 MANUAL, *supra* note 2, at 7.

12. This would range from .5 to 1.5 feet depending on the permeability of the soil. *Id.*

13. 16 U.S.C. § 3801(a)(16)(C) (Supp. IV 1992).

14. 1989 MANUAL, *supra* note 2, at 5.

15. 1989 MANUAL, *supra* note 2, at 5.

16. 1989 MANUAL, *supra* note 2, at 5.

17. 1989 MANUAL, *supra* note 2, at 5.

Additionally, if the value is three or more (indicating no prevalence of hydrophytic plants) but hydric soils and hydrology are present, prevalence of hydrophytic plants is assumed.¹⁸

Although “normal circumstances” is not defined in the manual, a hint of the definition is found in the Federal Register. The phrase is meant to exclude nonaquatic areas that have an “abnormal presence of aquatic vegetation.”¹⁹

To summarize the vegetation requirement, if more than fifty percent of the dominant species from all strata are of the type that occur in wetlands at least thirty-three percent of the time, the area is considered to have a prevalence of hydrophytic vegetation.

III. SCS DELINEATION PROCEDURE

The procedure used by the SCS follows the 1989 Manual. The Manual contains procedures for “in-office” and “in-the-field” delineations. Most of the delineations in Oklahoma were done in the office using various information.

According to the Oklahoma State SCS office,²⁰ SCS used published soil surveys to find the location of the hydric soils. SCS then viewed aerial slides provided by the ASCS to identify areas that have indications of saturation or inundation. The indications included areas of standing water, dead crops, evidence of different planting dates, and color differences of plants and soil. Slides from the five previous years were viewed if available. However, in some counties, five years of slides were not available.

Areas that had visual wetland indicators of saturation or inundation in at least three of five years, or in a majority of years if less than five years of slides were available, were cross-referenced to the hydric soil maps. Those areas with both hydric soils and visual evidence of wetness were then checked on lists that contain information on the types of vegetation present in the area. If wetland plants were present in ample populations, the area was considered a wetland.

Climatological data was used to determine whether the precipitation for the area was normal for the two or three months immediately before the photos were taken. This was done to alert the determination team to the possibility of above or below average precipitation. This information was considered in determining whether the slide was reflective of the area during normal circumstances.

Although the definition requires all three parameters to be present, the Manual allows assumptions of one of the criteria if the other

18. 1989 MANUAL, *supra* note 2, at 5. See *infra* text accompanying notes 20-22.

19. 42 Fed. Reg. 37,128 (1977).

20. Interview with Steve Tully, Oklahoma State USDA Soil Conservation Service, Stillwater, Okla. (Oct. 30, 1992).

two are confirmed.²¹ The assumptions were needed because of the lack of manpower to visit each site and because some of the wetland characteristics had been destroyed by cultivation or manipulation.²²

Because it was unlikely that the wetland areas would have the same boundaries as the hydric soil map unit, the areas that contain all three components had to be determined. The boundaries were determined by tracing the borders of the suspected wetland from each aerial photo onto a transparency. Then all of the transparencies were stacked. The border was drawn from the areas in common to the majority of photos. These areas were delineated and recorded onto aerial photography in the SCS office.

When the operator of the farm on which the wetland was located applied for program benefits which are subject to the Swampbuster provisions, that person was notified by mail of the determination. The notice included a letter explaining the wetland determination, a fact sheet on wetlands, information on the size of the wetland area, and an aerial photo indicating the location of the wetland. Because SCS did not know who the landowners of all the land in the county were, wetland determinations were mailed only to those who requested benefits.

IV. SWAMPBUSTER VIOLATIONS

There are two different triggering events for a Swampbuster violation. Under FSA, a violation occurs when an agricultural commodity, any crop planted and produced by annual tilling of the soil, is produced on a wetland that has been manipulated by damming, diking, or draining since December 23, 1985.²³ A violator is then ineligible for designated program benefits during the year of the violation.²⁴ Because an "agricultural commodity" as defined by the Act is a crop that requires annual tillage of the soil, crops such as alfalfa, asparagus, and grapes could be planted on a manipulated wetland and not be in violation of the Swampbuster provisions.

Under FACTA, a violation occurs when a wetland is manipulated so as to make it possible to produce an agricultural commodity.²⁵ A violator is ineligible for specific program benefits²⁶ until the converted

21. 1989 MANUAL, *supra* note 2, at 24. For example, if no evidence of hydrophytic vegetation exists but hydric soil and the required hydrology is verified, the area is considered a wetland. If there is no information on whether the area is a hydric soil but hydrophytic vegetation and required hydrology is verified, the area is considered a wetland.

22. Interview with Steve Tully, *supra* note 20.

23. 16 U.S.C. § 3821(a) (Supp. IV 1992).

24. *Id.* § 3821(a)(1).

25. *Id.* § 3821(b).

26. *Id.*

wetland is restored.²⁷ The affiliates of a violator are also ineligible for program benefits.²⁸ Because the manipulation of the wetland and not the planting of the crop triggers the violation, the alfalfa situation described above is considered a violation under these rules.

All wetland delineations may be appealed. If appealed, an on-site inspection is required.²⁹ Also, an on-site inspection is required before any benefits can be denied, regardless of whether the delineation was appealed.³⁰

V. CRITICISM OF THE CURRENT SYSTEM

The current delineation system has been frequently criticized. Much of the criticism is related to the delineation procedures. The definition of a wetland states that all three components—hydric soil, hydrophytic vegetation, and hydrology—are mandatory. However, as stated previously, the 1989 Manual allows for the assumption of one of the components if the other two are verified. When off-site procedures are used, largely due to the lack of manpower to visit each site, the margin of error is increased.

Also, it is important to remember that both frequency *and* duration of wetness are needed. By using aerial photos from several different years, frequency can be fairly accurately determined. However, these photos do not indicate the duration of inundation or saturation. Moreover, because the ASCS photos are used for acreage determinations by ASCS, the photos are often taken in the early spring to achieve maximum visibility, usually in March before the trees have leaves. Because the average temperatures are relatively low and the growing season for many plants has not yet begun at this early date, the transpiration and evaporation rates are low. This results in an extended drying period after the seasonal rains.

Because the photos are taken from an airplane, the photos must be calibrated by the viewer to ensure that they are correctly scaled. A small error in scaling will result in an erroneous acreage determination. Because there is no minimum size limit for wetlands and because they often occur in cultivated fields with no reference points, the boundaries are often difficult to pinpoint and the acreage is difficult to accurately determine.

The regulations require that the owner *or* operator, but not both, be notified of the wetland determination.³¹ SCS typically notifies only the operator of the determination.³² Because ASCS regulations allow

27. *Id.* § 3822(i).

28. 7 C.F.R. § 12.8 (1993).

29. 16 U.S.C. § 3822(a)(2) (Supp. IV 1992).

30. *Id.* § 3822(c).

31. *Id.* § 3822(a)(2).

32. Interview with Steve Tully, *supra* note 20.

for the operator to get a power of attorney for the owner³³ (which is often done), the actual owner of the land with wetland acres may never have actual notice that a wetland exists on his or her land until the wetland has been manipulated.

Furthermore, the soil surveys used to locate hydric soils are limited in scale. The soil map units are mapped to areas with a minimum size of about eight acres.³⁴ Smaller hydric soil areas are listed as inclusions or complexes within larger areas of nonhydric soils. Without a field visit, the location of the inclusions is difficult to determine. This may result in small areas of hydric soils being overlooked or wetland areas being erroneously delineated on nonhydric soils.

Most of the problems can be eliminated by a field visit to verify the existence of the required parameters. However, the duration of inundation or saturation cannot be verified unless successive visits to the site are made. SCS was aware of this problem and performed some trial runs before authorizing the procedure. The trial runs consisted of performing the in-office procedure on several areas and then visiting the sites to evaluate the accuracy of the determination. SCS, well satisfied with the accuracy of the off-site procedure, authorized the use for the delineation teams that performed the statewide determinations.³⁵

VI. NEW DEVELOPMENTS CONCERNING DELINEATION PROCEDURES

Proposed changes to the Delineation Manual generated much debate. One rejected change was House Bill 1330, the Comprehensive Wetlands Conservation and Management Act.³⁶ It was introduced on March 7, 1991 and would have amended the Federal Water Pollution Control Act³⁷ [hereinafter CWA] by changing section 404 of the Act.

33. AGRIC. STABILIZATION AND CONSERVATION SERV., USDA, ASCS HANDBOOK, HIGHLY ERODIBLE CONSERVATION AND WETLAND CONSERVATION PROVISIONS amend. 2, para. 317B (Revision 1 1991) and amend. 23, para. 94C (Revision 1 1994)[hereinafter ASCS HANDBOOK].

34. Interview with Dr. Brian Carter, *supra* note 6.

35. Interview with Steve Tully, *supra* note 20.

36. H.R. 1330, 102d Cong., 1st Sess. (1991).

37. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988). It is important to note that activities that do not result in a Swampbuster violation may result in a violation of § 1344 of this Act. Section 1344 requires a permit from the Secretary before dredging or filling a wetland. The Act exempts activities associated with ongoing agricultural activities from the permit requirement. Section 1344 does not address Swampbuster violations per se. An example of an activity that does not violate Swampbuster but does violate the Act is where a farmer fills a wetland area and then builds a shed on the site. Because a shed now exists on the site, the activity has not made it possible to plant an agricultural commodity on it and, thus, no Swampbuster violation has occurred. However, because this activity does not fall under the rubric of an 'ongoing agricultural activity' (this is

This would have classified wetlands as Class A, B, or C based on the functions of the wetland, size, location, proximity to other wetlands, and public interest in the use of the wetland for purposes other than conservation.³⁸ This Act called for the greater protection of Class A wetlands, those that perform critical functions and are ten acres or larger, and provided for compensation to the landowner under a takings analysis.³⁹ Additionally, House Bill 1330 would have codified different levels of permit flexibility and exemptions depending on the class of wetland.⁴⁰ It also would have codified a mitigation banking concept.⁴¹

The portion of this proposal that attracted the most controversy was the change of the delineation procedures. Under House Bill 1330, the assumptions allowed in the 1989 manual when two of the three components were verified⁴² would have been virtually eliminated. All three of the requirements would have to have been found, unless specifically exempted, before the area could be classified as a wetland.⁴³ Those areas that were specifically exempted included vernal pools, playa lakes, and prairie potholes. Because these areas often dry up, they lack the required hydrology. However, because these areas perform important wetland functions during the times when they are not dry, they would have been considered wetlands under House Bill 1330.

The hydrology criterion also would have been significantly changed under House Bill 1330. Saturation or inundation would have to last for twenty-one consecutive days⁴⁴ and the saturation to the surface would be evidenced by squeezing or shaking water from the soil.⁴⁵

In addition to House Bill 1330, a new delineation manual was proposed during the Bush administration.⁴⁶ This manual proposed some procedures that differed from the 1989 Manual and House Bill 1330. The proposed manual would have also eliminated the assumptions (if two components are verified, then the third could be assumed) but would not have specifically exempted any areas. These areas would be treated as "difficult to identify" areas.⁴⁷ Difficult to identify areas

a one-time occurrence) a permit is required before dredging or filling. Since the farmer did not obtain a permit, the farmer has violated § 1344.

38. H.R. 1330, 102d Cong., 1st Sess. § 3(c)(3)(A)-(C) (1991).

39. H.R. 1330, 102d Cong., 1st Sess. § 3(d) (1991).

40. H.R. 1330, 102d Cong., 1st Sess. § 3(e) (1991).

41. H.R. 1330, 102d Cong., 1st Sess. § 3(e)(3)(F) (1991).

42. *See supra* text accompanying notes 21-22.

43. H.R. 1330, 102d Cong., 1st Sess. § 3(g)(2)(A) (1991).

44. H.R. 1330, 102d Cong., 1st Sess. § 3(g)(2)(A)(iv) (1991).

45. 56 Fed. Reg. 40,446, 40,452 (1991).

46. 56 Fed. Reg. 40,446 (1991).

47. 56 Fed. Reg. 40,451 (1991).

need not have absolute evidence of all three components but are subject to more intensive verification procedures.

The proposed manual had different hydrology requirements as well. The proposal would have required inundation for at least fifteen consecutive days and saturation for at least twenty-one consecutive days, both evidenced by shaking or squeezing.⁴⁸

Some changes were common to both the proposed bill and the proposed delineation manual. Among these was a proposed change in the vegetation requirement. Both would have required that obligate wetland plants—those that grow in wetlands greater than ninety-nine percent of the time—be growing on the area unless the vegetation had been removed in an effort to evade jurisdiction of the wetland provisions.⁴⁹

Also, both proposals would have changed the growing season to three weeks before the average last killing frost until three weeks after the average first killing frost.⁵⁰ In Oklahoma, for example, this proposal would change the growing season from February 1 through October 30, to March 20 through December 1, resulting in an inundation requirement at least until the first week of April and saturation until the second week of April. This change would have moved the growing season enough to avoid that portion of the wet season when the temperatures are too low for many plants to grow.

The dispute over the 1989 Manual and the proposed changes has resulted in a return to the 1987 Corps of Engineers Delineation Manual.⁵¹ The major difference between the 1987 and 1989 manual appears to be in the determination of the hydrology component. While the 1989 Manual has the same duration requirement regardless of the length of the growing season, the 1987 Manual ties the duration requirement to the length of the growing season.⁵² It does this by determining the duration of inundation or saturation as a percentage of the total number of days in the growing season. It specifically states that if the area is not inundated or saturated during more than five percent of the growing season, the area is not a wetland.⁵³ This difference between the 1987 and 1989 manuals has drastic results in Oklahoma. The average growing season in Oklahoma is about 270 days. Under the 1987 Manual, an area must be inundated or saturated for at least 13.5 consecutive days to be considered a wetland. The duration re-

48. 56 Fed. Reg. 40,452 (1991).

49. H.R. 1330, 102d Cong., 1st Sess. § 3(g)(2)(A)(iii) (1991).

50. H.R. 1330, 102d Cong., 1st Sess. § 4(26) (1991); 56 Fed. Reg. 40,446, 40,452 (1991).

51. 58 Fed. Reg. 4995 (1993).

52. Environmental Laboratory, "Corps of Engineers Wetlands Delineation Manual," Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, Miss., 36 Table 5 (1987).

53. *Id.*

quirement is seven consecutive days under the 1989 Manual. Thus, the 1987 Manual and the proposed manual would eliminate many of the same areas from the wetland inventory under the 1989 Manual.

The obvious result of the different manuals is that the total number of acres of wetlands in the United States varies depending on which manual is used to identify and delineate wetlands. All three manuals contain the same three basic criteria—hydric soils, hydrology, and hydrophytic plants, but differ in how one determines if the three criteria are met. The duration of inundation or saturation required to meet the hydrology component varies greatly between the three manuals. Small isolated wetlands vary greatly in the duration of inundation or saturation. As a result, the total acres of wetlands attributed to small isolated wetlands is drastically changed from manual to manual.

The Clinton Administration has issued its proposal concerning the protection of wetlands as well. This Administration expressly rejects the 1991 proposed manual⁵⁴ as well as the classification theory expressed in House Bill 1330.⁵⁵ However, its proposal does call for increased flexibility in assessing the functional value of a particular wetland and the environmental impact of proposed actions. Small projects with minor impacts are subject to less rigorous review than projects with more substantial impacts.⁵⁶ This approach seems to create a priority system for the protection of the most functional wetlands, similar to the classification scheme of House Bill 1330, without the limiting restrictions of pigeon-holing wetlands into a certain class. It also seems to support a procedure similar to the minimal effects/mitigation approach used in Swampbuster situations.⁵⁷

This proposal calls for a return to the 1987 Corps Manual⁵⁸ as well as encouraging the development of state wetland programs.⁵⁹ Another goal of the proposal is the elimination of the duplication and inconsistency of the federal wetlands programs by appointing SCS as the lead agency on agricultural lands,⁶⁰ mandating that all agencies use the same delineation manual,⁶¹ proposing a nationwide general permit for minimal effects/mitigation exemptions that are approved

54. *Clinton Administration Proposal on Protection of U.S. Wetlands*, 24 ENV'T REP. (BNA) 793, 794, (Aug. 24, 1993)[hereinafter *Clinton Proposal*].

55. *Id.* at 797.

56. *Id.* at 798.

57. *See infra* subsection VII.D.2.

58. *Clinton Proposal*, *supra* note 54, at 798.

59. *Clinton Proposal*, *supra* note 54, at 796.

60. *Clinton Proposal*, *supra* note 54, at 797.

61. *Clinton Proposal*, *supra* note 54.

under the Swampbuster provisions,⁶² and continuing funding for the Wetland Reserve Program.⁶³

The Clinton Administration advocates an interim goal of no net loss of wetlands and a long term goal of a net gain in wetland acreage.⁶⁴ This plan calls for the expressed inclusion of certain isolated waters within the definition of wetlands such as prairie potholes, vernal pools, and playa lakes,⁶⁵ thus eliminating the need for special rules or exemptions to be able to classify these areas as wetlands.

Other highlights of the Clinton Administration's proposal include the development, training, and utilization of private-sector wetland delineators to alleviate some of the burden on the federal agencies with respect to delineations,⁶⁶ and approval of a mitigation bank system.⁶⁷ The Administration supports the recent EPA decision to remove areas classified as "prior converted wetlands" from inclusion in the "waters of the United States,"⁶⁸ but does not support legislation concerning compensation to landowners under a "takings" analysis.⁶⁹ Current proposed legislation contains much of President Clinton's proposals with minor deviations.⁷⁰

The exact number of total wetland acres under each manual differs depending on who is estimating the figure. Under the 1987 Manual, estimates include numbers from 105 million acres to 111 million acres.⁷¹ Estimates under the 1989 Manual vary from 170 million to 180 million.⁷² The proposed 1991 Manual has generated estimates from 90 million to 130 million.⁷³ It is generally accepted that the 1991 Manual would result in the fewest acres, followed by the 1987 Manual, while the 1989 Manual would result in the most acres of wetlands. Because small wetlands are likely to be the most affected

62. *Clinton Proposal*, *supra* note 54.

63. *Clinton Proposal*, *supra* note 54.

64. *Clinton Proposal*, *supra* note 54, at 794.

65. *Clinton Proposal*, *supra* note 54, at 799.

66. *Clinton Proposal*, *supra* note 54, at 795.

67. *Clinton Proposal*, *supra* note 54, at 799.

68. *Clinton Proposal*, *supra* note 54, at 797; 58 Fed. Reg. 45,008 (1993).

69. *Clinton Proposal*, *supra* note 54, at 802.

70. *See, e.g.*, S. 1304, 103d Cong., 1st Sess. (1993); H.R. 3465, 103d Cong., 1st Sess. (1993).

71. *Washington, FARM J.*, June/July 1992, at 8, 8 (citing SCS) (105 million); *Water Pollution*, 22 Env't Rep. (BNA) 2194 (Jan. 24, 1992) (111 million).

72. *Washington, FARM J.*, June/July 1992, at 8, 8 (citing SCS) (170 million); *Water Pollution*, 22 Env't Rep. (BNA) 2194 (Jan. 24, 1992) (180 million).

73. *Washington, FARM J.*, June/July 1992, at 8, 8 (citing SCS) (90 million to 180 million depending on how prairie potholes and playa lakes are treated under 1991 Manual); *Environmental, Economic Harm Predicted in 1991 Revisions to Wetlands Manual Adopted*, 22 Env't Rep. (BNA) 2176, 2177 (Jan. 24, 1992) (130 million) (stating 1991 Manual would remove 50 million acres from 1989 total and using 180 million for 1989 total).

category of wetlands,⁷⁴ the farmers with these areas tend to be most affected by differences between the manuals.

This dispute is far from over. The 1991 Manual is being reviewed⁷⁵ and a study by the National Academy of Sciences has been funded to study the three manuals and come up with a definition of a wetland.⁷⁶ This study is expected to be completed in the fall of 1994.⁷⁷

VII. ALTERNATIVES TO THE FARMER WHO HAS A WETLAND

Many alternatives exist for a farmer who has been notified that a wetland exists on his or her farm. Some of the options require SCS and some require ASCS action.

A. Is this a Wetland?

Regardless of which delineation manual is used, many farmers will have small isolated wetlands on their farms. What can a farmer do to try to minimize the impact of a determination that a wetland exists on his or her land? The first move would be to appeal the wetland determination to SCS. The initial appeal must be filed with the district conservationist for the local SCS district. A written appeal must be received within forty-five days of the date of the notification letter. A field visit must be conducted before rendering a final decision.⁷⁸ If the farmer is not satisfied with the result of the initial appeal, further appeals to higher levels in SCS must be filed within fifteen days. For further appeals, the farmer must appeal to the area conservationist, then the state conservationist, and finally, the Deputy Chief for Programs.⁷⁹

Each notice mailed to the farmer should contain notification of the appeal rights and the appeal process. The procedure should be followed closely or the producer's appeal rights may be lost. However, in practice, SCS has allowed some appeals despite failures in following the procedures to the letter.

Once a farmer has exhausted the appeal rights, he or she may turn to the judicial system for review of the delineation. The review is governed by the Administrative Procedures Act.⁸⁰

74. See *supra* Part VI.

75. Jack Odle, ed, *Washington: What's new*, PROGRESSIVE FARMER, Dec., 1992, at 8.

76. Paul D. Andre, ed. *News Closeout*, BEEF, Nov. 1992, at 54.

77. *Clinton Proposal*, *supra* note 54, at 798.

78. 16 U.S.C. § 3822(a)(2) (Supp. IV 1992).

79. 7 C.F.R. § 614.5 (1993).

80. 5 U.S.C. §§ 551-559 (1988).

B. Is the Wetland Subject to Swampbuster?

1. *Commenced Determinations*

For those delineations that have been determined to be correct, what alternatives are available to the farmer? The wetland may fit into one of the statutory exemptions. One exemption is a "commenced determination." There is no violation of the Swampbuster provisions if an agricultural commodity is planted on a converted wetland, as long as the conversion was commenced on or before December 23, 1985.⁸¹ The commencement determination is made by ASCS.⁸² Conversion is commenced once actual work has been done or substantial funds have been expended or legally committed by the purchase of construction supplies or material or contracting for the work.⁸³

The farmer must request this exemption from ASCS and show that the manipulation was commenced before the deadline and the farmer has been actively pursuing the project. The project must be completed before January 1, 1995.⁸⁴ If the farmer cannot meet all of the requirements, equitable relief can be requested from the Deputy Administrator of ASCS.⁸⁵ Equitable relief may be granted if the farmer can show undue economic hardship as a result of substantial financial obligations incurred before December 23, 1985 in an effort to convert the wetland.⁸⁶

Appeals of ASCS commenced determinations, good faith/graduated sanctions, and third party exemptions⁸⁷ must be filed with fifteen days of written notification of an adverse decision with the county committee that made the decision. Further appeals to higher levels must also be filed within fifteen days of written notification of an adverse decision, first to the state committee and then to the newly created National Appeals Division in Washington D.C., or the Deputy Administrator of State and County Operations if the determination was made before November 28, 1990 and not resolved before November 25, 1991.⁸⁸

81. 16 U.S.C. § 3822(b)(1)(A) (Supp. IV 1992).

82. 7 C.F.R. § 12.6(b)(3)(vii) (1993).

83. *Id.* § 12.5(b)(3).

84. *Id.* § 12.5(b)(5)(ii)-(iii).

85. *Id.* § 12.5(b)(5)(iv).

86. *Id.*

87. Commenced determinations exempt conversions of wetlands from Swampbuster provisions if the conversion was started before Dec. 23, 1985 (date of enactment of the 1985 farm bill.) Wetlands converted by certain persons other than the person applying for program benefits are exempted from Swampbuster provisions. Conversions done in good faith may be eligible for payment reductions and not cause the converter to be totally ineligible for program benefits. All three are ASCS determinations and are discussed in this paper.

88. 7 C.F.R. §§ 780.7-.8 (1993).

C. Questions for SCS

1. *Artificial Wetlands*

Drainage or manipulation of an artificially created wetland is permitted. Artificial wetlands may be created by ponding, terracing, or irrigation system discharge. These wetlands are exempted from the Swampbuster provisions and SCS must make the determination of whether a wetland qualifies for this exemption.⁸⁹

2. *Farmed Wetlands*

Some wetlands may have been partially converted before December 23, 1985 but still exhibit wetland characteristics. This may happen when a farmer tries to convert a wetland but is not completely successful. If these areas are inundated or saturated for fifteen days or more (twice as long as required for regular wetlands), they are considered farmed wetlands.⁹⁰ Wetland pastures and hayland are treated the same as farmed wetlands. These areas may be farmed with no Swampbuster violation and the drainage systems on these wetlands may be maintained, but the drainage system cannot be changed to increase drainage.⁹¹

3. *Natural Conditions*

Some wetlands can be farmed without violating the provisions if farming is possible as a result of a natural condition such as a drought.⁹² These areas meet the definition of a wetland, but dry up every summer. The farmer cultivates and plants these areas whenever possible because it is more convenient. However, these areas often present the greatest problems for the farmer when he or she decides to dig a small ditch to drain the 'mudhole' to avoid the inconvenience of working around these areas or to keep the areas from drowning out. The farmer cannot manipulate the wetland and must rely solely on natural conditions to facilitate farming of these areas.

4. *Highly Erodible Land Compliance*

Actions to control erosion on highly erodible land will not be considered a Swampbuster violation. Examples of this are terraces above a wetland that reduce the runoff and water supply to the wetland and thus eliminate the required hydrology, incidentally resulting in a con-

89. 16 U.S.C. § 3822(b)(1)(B)-(2)(A) (Supp. IV 1992).

90. Interview with Steve Tully, *supra* note 20.

91. 7 C.F.R. § 12.33(a) (1993).

92. 16 U.S.C. § 3822(b)(1)(D) (Supp. IV 1992).

version of a wetland. Practices to control soil erosion of highly erodible land take precedence over the wetland provisions.⁹³

Essentially all naturally occurring wetlands upon which no conversion activities had commenced by December 23, 1985, or those in which conversion activities were commenced but abandoned, are subject to the Swampbuster provisions. The small isolated wetlands within cultivated fields are subject to the provisions in addition to those wetlands that were partially converted before the deadline but still meet the wetland requirement.

D. What can be Done with Jurisdictional Wetlands?

1. Convert the Wetland

Jurisdictional wetlands are those areas that have been delineated and verified as a wetland and are not eligible for an exemption⁹⁴ and are thus subject to the Swampbuster provisions. There are several options available to the farmer with a jurisdictional wetland. The most obvious option is to forego program benefits and convert the wetland; however, this is probably not the best alternative to most farmers. These benefits include ASCS price and income support payments, ASCS and FmHA loans, disaster payments, FCIC crop insurance, CRP payments, and conservation cost-share payments.⁹⁵ These benefits are essential to the success of many farming operations in existence today.

In addition, the converting farmer may be subject to civil and criminal penalties under the CWA. Also, the converted wetland determination runs with the land. Any buyer of the land with the converted wetland will be ineligible for program benefits until the wetland is restored or mitigated.⁹⁶ This will likely reduce the market value of the land.

Another consideration for the converting farmer is the impact on his or her affiliates. Not only will the converting farmer be ineligible, but so will any people affiliated with the farmer.⁹⁷ Affiliated people include spouses and minor children, corporations of which the converter holds more than twenty percent interest, and any trust, partnership, joint venture, or other enterprise in which the violator has an

93. SOIL CONSERVATION SERV., USDA, NATIONAL FOOD SECURITY ACT MANUAL Amend. 7, § 512.14(b)(3)-(4) (2d ed. December 1991) [hereinafter NATIONAL FOOD SECURITY ACT MANUAL].

94. Such as commenced determinations, farmed wetlands, wetland farmed under natural conditions, artificial wetlands, and wetlands converted as a result of compliance with HEL provisions.

95. 7 C.F.R. § 12.4(c) (1993).

96. *Id.* § 12.4(b).

97. *Id.* § 12.8.

interest.⁹⁸ The impact of this rule often results in unforeseen circumstances. The agriculture student who shows sheep or raises bees for honey cannot receive any wool incentive payments or honey loan payments if his or her parent has violated the Swampbuster provisions. The spouse who has an interest in an estate or trust that could receive program benefits cannot receive program benefits related to the trust or estate, nor can any other member of the estate or trust receive program benefits from that trust or estate. A violating tenant or landlord may cause his or her landlord or tenant to become ineligible. This rippling effect⁹⁹ of a violation of the Swampbuster provisions makes this option a very risky choice.

2. *Minimal Effect*

Another option is the minimal effect determination and mitigation. A farmer may get an exemption if SCS determines that the proposed action will have a minimal effect on the functional hydrological and biological value of the wetland.¹⁰⁰ This alternative may seem to be the saving grace for the farmer with the small isolated wetland, as it seems that these wetlands would easily fit into a minimal effect exemption. However, this is not necessarily the case. The wetland must have been frequently cropped and the values, functions, and acreage may have to be mitigated by the restoration of a wetland that was converted prior to December 23, 1985.¹⁰¹ The restoration must occur before or during the conversion, it must be in the same general area of the watershed, and the farmer must grant an easement on the restored wetland.¹⁰² This easement must remain in effect until the converted wetland is returned to its original wetland status or as long as the acres are used for agricultural purposes.¹⁰³ The minimal effect determination is made by SCS and FWS. Hydrological values such as erosion, sediment, and flood control, as well as impacts on ground water and water quality are considered.¹⁰⁴ Also, biological values of migratory birds, endangered species, fish, and other wildlife habitat are considered.¹⁰⁵ If there will be a significant adverse impact, a minimal effect exemption is denied if there has been any other wetland converted on the same tract of land for any reason.¹⁰⁶ If there is no significant impact, a minimal effect determination may be granted.

98. *Id.* § 12.8(a).

99. *Id.* § 12.8(a)(4).

100. *Id.* § 12.5(b)(1)(iii).

101. 16 U.S.C. § 3822(f)(2) (Supp. IV 1992).

102. *Id.* § 3822(f)(2)(B),(E),(F).

103. *Id.* § 3822(f)(2)(F).

104. NATIONAL FOOD SECURITY ACT MANUAL, *supra* note 93, § 516.13.

105. NATIONAL FOOD SECURITY ACT MANUAL, *supra* note 93, § 516.13.

106. NATIONAL FOOD SECURITY ACT MANUAL, *supra* note 93, § 516.13.

If there have been no other conversions, but a significant adverse impact, an exemption may be granted. However, size now becomes a factor. If the conversion will convert a minute fraction (one percent of a wetland of less than 100 acres, or less than one acre of a larger wetland) of the wetland with no other effect on the remaining wetland acres, an exemption may be granted without mitigation being required.¹⁰⁷

If there is a significant adverse impact, with no other conversions on the tract, and the proposed conversion will destroy more than one percent of the wetland, or it will destroy less than one percent but have a corresponding “measurable effect” on the rest of the wetland, minimal effect is granted only if the wetland value is fully mitigated *and* the objective for the requested exemption/conversion is for reasons other than increased production.¹⁰⁸ Note that only here is mitigation required, and if the objective is only to increase production, such as growing a crop where it usually drowns out, the exemption will be denied.

The mitigation/restoration opportunity may also be available, despite a contradiction in the regulations, for those producers who have converted a wetland after December 23, 1985 but before November 28, 1990.¹⁰⁹ The contradictory language states that mitigation is available in the above-circumstances if the requirements for a current or proposed conversion and mitigation/restoration plan are met. One of these requirements is that the mitigation occur before or concurrently with the conversion. This would not have been likely before November 28, 1990, when this option was codified.

An interesting aspect of the mitigation option is that FACTA does not require the restored wetland to be located on the converting farmer’s land. This has led to the idea of ‘mitigation banks’ being used to avoid the ineligibility provisions. A mitigation bank is an area of wetlands converted prior to December 23, 1985 that can be bought by those farmers wanting to convert wetland areas, but who do not have a prior converted wetland to mitigate according to a mitigation/restoration plan.

These banks may result in larger, more functional wetlands. However, this may result in widely scattered wetland areas. This may also result in rewarding those farmers who converted wetlands in the past by creating a high-priced market for the converted wetland. There may be problems with the required easements in that the ‘bank owner’ may not ensure that the restored wetlands maintain their wetland status or may not honor the easements.

107. NATIONAL FOOD SECURITY ACT MANUAL, *supra* note 93, § 516.13.

108. NATIONAL FOOD SECURITY ACT MANUAL, *supra* note 93, § 516.13.

109. 16 U.S.C. § 3822(f)(3) (Supp. IV 1992).

E. Options When a Wetland has been Converted

The farmer is not automatically denied all program benefits when it has been determined that a jurisdictional wetland has been converted in violation of the wetland conservation provisions. The farmer still has some options to avoid total ineligibility.

1. Reliance on Erroneous SCS Information

There may be some cases where the farmer has relied on erroneous SCS delineation information in taking actions that result in conversion of a wetland. This exemption is essentially a good faith reliance exemption. The farmer in this situation may not be ineligible for benefits.¹¹⁰ However, this exemption applies only to actions taken before SCS informs the farmer of the error.¹¹¹ Any actions taken after the notification of the error, or any actions taken when the farmer knew or should have known that the determination was in error, are not exempted.¹¹²

F. Questions for ASCS

1. Third Party Exemption

If a farmer does not qualify for an exemption from the Swampbuster provision, he or she may still not be totally ineligible for program payments. One option for the individual in such a situation is a third party exemption.¹¹³ This exemption applies if someone other than the farmer requesting benefits or any of his or her predecessors in interest converted the wetland in question. The one requesting benefits will be presumed to have converted the wetland.¹¹⁴ The farmer must prove that the conversion was caused by a third party and that the farmer was not associated with the converter.¹¹⁵ This determination is done by ASCS. The conversion must have been for reasons other than to increase production or the result of a scheme or device.¹¹⁶

2. Good Faith/Graduated Sanctions

Another option is a good faith determination with graduated sanctions.¹¹⁷ If the farmer has not violated the wetland provisions in the previous ten years on any land owned, operated, or leased by the

110. 7 C.F.R. § 12.5(b)(8) (1993).

111. *Id.*

112. *Id.*

113. 16 U.S.C. § 3824 (Supp. IV 1992).

114. 7 C.F.R. § 12.5(b)(iv)(D) (1993).

115. *Id.*

116. *Id.*

117. 16 U.S.C. § 3822(h) (Supp. IV 1992).

farmer and ASCS finds that the violation was in good faith and without the intent to violate the wetland provisions, ASCS can reduce the amount of benefits received by the farmer by at least \$750 but not more than \$10,000.¹¹⁸ The producer must be actively restoring or have already restored the wetland in accordance with a restoration plan with SCS and FWS.¹¹⁹

The amount of the payment reduction is determined by ASCS taking into consideration such factors as the number of acres affected, previous land use, information available to the farmer at the time of the conversion, and amount of time required for total restoration.¹²⁰ The payment reduction only affects the payments made during the crop year of the violation and any amounts not withheld are not carried over to the next crop year.¹²¹ Thus, if a payment reduction of \$7,000 is assessed on a producer who is otherwise eligible to receive \$5,000 during the crop year, that farmer will receive no payments during the crop year and the other \$2,000 will be written off and not deducted from payments in the following year. This provision may apply retroactively to allow the farmer to receive a portion of payments withheld in previous years for a violation after December 23, 1985.¹²²

Although the ASCS regulations provide information on how to determine the amount of the payment reduction which is based on the seriousness of the violation, there is very little guidance on determining what constitutes good faith.¹²³ This may be an area of future litigation. It would seem that good faith cannot be found if the producer has been notified of the wetland area and of the wetland provisions, and it would be a rare situation when a farmer is not aware of the wetland provisions. Also, because an exemption exists for the producer relying on erroneous SCS determinations, this situation would not be one in which a good faith determination would be proper.

One can conclude that a good faith determination can only be properly made if the producer had not been informed that a wetland existed or if the producer could not have foreseen that the activities undertaken would destroy the wetland. This may be possible in cases where SCS notified only the operator, and the operator and owner used a power of attorney that allowed the operator to sign the wetland certification on behalf of the owner. The owner in this case may not have been notified of the existence of a wetland. It may also occur in the case of a farmer who is requesting benefits for the first time since

118. *Id.* § 3822(h)(1)(2).

119. *Id.* § 3822(h)(1)(A).

120. *ASCS Handbook*, 6-CP (Rev. 1) amend. 2, para. 474 (1993).

121. *Id.* at para. 472.

122. 16 U.S.C. § 3822(h)(3) (Supp. IV 1992).

123. *ASCS Handbook*, 6-CP (Rev. 1) amend. 2, para. 472 (1993).

the wetland certification requirements were made applicable to the program benefits for which the producer is applying.

G. Challenge Jurisdiction

Another option is to challenge the jurisdiction of the EPA and the USDA to regulate these small isolated wetlands under the CWA. Although this has been much-litigated and most cases have resulted in decisions that allow the regulation of these wetlands under the auspices of the Commerce Clause of the Constitution, not all courts have decided in favor of the EPA. Regulation of these areas under the Commerce Clause is based on the idea that migratory birds may use these areas, and migratory birds are an article of interstate commerce. This justification has become known as the “reasonable bird” theory.

In *Tabb Lakes, Ltd. v. United States*,¹²⁴ the court held that the “reasonable bird” theory was a formal rule passed without the notice and comment requirements of the Administrative Procedure Act.¹²⁵ The court also stated that, because the Corps assertion of jurisdiction was based on the “reasonable bird” theory, and that theory was not properly incorporated, the Corps lacked jurisdiction over the property in this issue.¹²⁶ In dicta, the court went further to express doubt that the “reasonable bird” theory would be a sufficient nexus to interstate commerce to warrant assertion of jurisdiction by the Corps if it had been adopted as per proper procedures.¹²⁷

After this decision, the EPA and the Corps of Engineers indicated they would initiate the formal rulemaking procedures to incorporate this theory into their policy but had taken no such action eighteen months later.¹²⁸ Without the “reasonable bird” theory, the EPA would likely not be able to exert jurisdiction over the small isolated wetlands discussed in this Essay. And, in fact, the EPA has abandoned this theory in the Fourth Circuit.¹²⁹ The Corps and EPA have issued a memorandum indicating their disagreement with the court in *Tabb Lakes* and stating that this ruling would not be followed in any other circuit.¹³⁰ It seems as if the EPA has thrown down the gauntlet and will welcome challenges of this nature in confidence that other courts will not follow the Fourth Circuit.

124. 715 F. Supp. 726, (E.D. Va. 1988), *aff'd* No. 89-2905 (4th Cir. Sept. 19, 1989).

125. *Id.* at 728, (citing 5 U.S.C. § 553).

126. *Id.*

127. *Id.* at 729.

128. Virginia Albrecht & David Isaacs, *Wetland Jurisdiction and Judicial Review*, NATIONAL RESOURCES AND ENVIRONMENT No. 1, Summer, 1992.

129. *Id.*

130. WILLIAM L. WANT, LAW OF WETLANDS REGULATION, § 2.02(1) (1991).

The Ninth Circuit has recently decided not to follow the *Tabb Lakes* court in *Leslie Salt Co. v. United States*.¹³¹ In *Leslie Salt*, the court held that the Commerce Clause power, and thus the CWA, is broad enough to extend the Corp's jurisdiction to local isolated water which *may* provide habitat to migratory bird and endangered species.¹³² The court stated that the *possibility* of use by migratory birds or endangered species is a sufficient connection to interstate commerce.¹³³

However, the dissenting opinion attempted to draw an important distinction that is worth considering. Judge Rymer disagreed with the conclusion of the majority that, because the Commerce Clause is broad enough to grant *Congress* the power to regulate migratory birds and endangered species, Congress intended to extend the Corp's jurisdiction under the CWA to the full extent of the Commerce Clause.¹³⁴

Since *Leslie Salt*, at least one court has held that the EPA's exercise of jurisdiction over small isolated wetlands based on the "reasonable bird" theory is beyond the bounds of the Commerce Clause in certain circumstance. In *Hoffman Homes, Inc. v. EPA*,¹³⁵ a land owner challenged the jurisdiction of the EPA over small (0.8 acre) intrastate, nonadjacent or "isolated" wetlands. The court held, in a very convincing opinion, that the EPA's exercise of jurisdiction over small wetland areas that are not adjacent to navigatable waters or their tributaries is beyond the limits allowed by the Commerce Clause.¹³⁶ The court held that when the only connection to interstate commerce is the fact that migratory birds *may* land on the area, the connection is not sufficient to qualify for an interstate commerce connection.¹³⁷

Upon granting a motion for rehearing filed by the EPA, this opinion was vacated and was referred for settlement negotiations.¹³⁸ This was a clever move by the EPA. If the EPA could have settled with Hoffman Homes, the EPA would have successfully eliminated this adverse authority. However, settlement negotiations failed and the case was again before the Seventh Circuit in 1993. This time the majority held that the EPA's interpretation that its jurisdiction covers isolated wetlands that could affect interstate commerce was reasonable.¹³⁹

131. 896 F.2d 354 (9th Cir. 1990).

132. *Id.* at 361.

133. *Id.*

134. *Id.* at 357.

135. 961 F.2d 1310 (7th Cir. 1992).

136. *Id.* at 1321-22.

137. *Id.* For a criticism of this decision, see Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1 (1993).

138. *Hoffman Homes, Inc. v. EPA*, 975 F.2d 1554 (7th Cir. 1992).

139. *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993).

The court also held that it was reasonable for migratory birds to be the connection to interstate commerce.¹⁴⁰

Despite these conclusions, the court nevertheless held that this particular wetland area was not subject to the EPA's jurisdiction because of the lack of evidence that migratory birds actually used this area.¹⁴¹ The holding appears to say that there need only be a showing of a potential effect on interstate commerce with respect to regulation of isolated wetlands but that if the "reasonable bird" theory is used to show this potential effect, there must be evidence of actual use by these birds.¹⁴² Both sides are claiming victory after this final decision.¹⁴³

This same type of argument may be asserted against the authority of other government agencies to regulate these areas. Although some violations of the Swampbuster provisions may not constitute violations of the CWA, many other Swampbuster violations often do violate the CWA.

This argument will likely be very difficult to win considering the lack of precedent and the overwhelming authority against this argument. Also, *Hoffman Homes* and *Tabb Lakes* can be distinguished from Swampbuster cases because they involved a violation of the CWA and not Swampbuster, thus their applicability is not certain. Another difference is that the CWA allows for civil and criminal penalties, which are much more serious penalties than ineligibility for payments from the voluntary programs to which Swampbuster provisions apply. But the CWA and the Swampbuster provisions are so closely related that if the EPA's jurisdiction can be defeated with respect to small isolated wetlands under the CWA, other government agency's exercise of authority over these same wetlands may also be subject to dispute as well.

VIII. CONCLUSION

The debate on the wetland/Swampbuster issue is far from over. Because this issue involves strong arguments and influence on both sides of the issue, any final decision will result in at least one unsatisfied party. Most people agree that obvious wetlands—those areas that come to mind when one thinks of wetlands, such as swamps, mar-

140. *Id.* at 262.

141. *Wetlands, Federal Appeals Court Vacates Penalty, But Rules EPA May Regulate Isolated Areas*, 24 ENV'T REP. (BNA) 510 (July 23, 1993).

142. *Id.* at 510. ("Possible effect on interstate commerce if migratory birds actually use" as opposed to "possible effect on interstate commerce if migratory birds might use.")

143. *Id.* at 510. The EPA is pleased the court ruled it had jurisdiction under the CWA to regulate isolated, intrastate wetlands, and *Hoffman Homes* is pleased the court held that there are some wetlands that are not subject to federal regulation.

shes, and bogs—should be preserved. Fewer people agree that the not-so-obvious wetlands, such as the wet spots in the fields that dry up every year, should be protected at the same level as the swamps.

Congress has tried to lessen the impact of the wetland conservation provisions on the farmer by offering exemptions, graduated sanctions, mitigation and restoration opportunities, and alternatives such as the Wetlands Reserve and the Water Bank programs.¹⁴⁴ It is clear that the agricultural community does not believe that Congress has done enough to protect their interests. The conservationists and environmentalists believe that Congress is too lenient. A compromise must be met. The most logical place to compromise is in the delineation manuals.

The proposed manual will result in less acres of wetlands and will eliminate mostly the small, isolated wetlands. These wetlands are of the lowest functional value. A compromise that results in greater protection of the more critical and functional wetlands at the expense of the least functional wet areas is not a bad compromise for either side.

Also, because the 1991 proposed manual would require positive identification of the required components, the determinations will be more accurate. This should reduce the amount of litigation by the farmer and provide SCS with a more concrete defense of its determinations.

Such a revision to the delineation manual would please the landowners by eliminating some of the restrictions on their small isolated areas and lessening the economic impact that a wetland determination causes. The conservationist would get more concrete protection of the most functional wetlands. While all parties may not be completely pleased with such a compromise, all parties tend to gain something over the current system.

144. These programs are available options for the farmer with wetlands that have not been manipulated. In both programs, contracts are entered with the landowner and ASCS. Wetlands are entered in the Wetland Reserve for a 30 year period. Only certain wetlands are eligible and those converted after December 23, 1985 are not eligible for this program. *See* 16 U.S.C. § 3837 (Supp. IV 1992). Waterbank programs are for lands along streams and other bodies of water that are likely used by migratory birds. During the 10 year contracts, these areas are maintained and enhanced for migratory bird use. *See* 16 U.S.C. §§ 1301-1311 (1988). Because this Essay is limited to a discussion of Swampbuster issues, these programs are not discussed in depth.