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An Agricultural Law Research Article

Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996

by

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in addressing the potential delegation to the states of administration of the section 404 program.¹⁶⁷ “The result of this legislative process was to leave the section 404 program substantially intact and to give the administering agencies little new guidance for the definition or delineation of wetlands.”¹⁶⁸

Further attempt at clarification of the definition of wetlands continued at the agency level. The FWS continued to work on its definition and classification system.¹⁶⁹ A 1979 report entitled “Classification of Wetlands and Deepwater Habitats of the United States,” which expanded on a previous FWS circular, was significant for several reasons:

First, it introduced the concepts of hydrophytes and hydric soils, and it was the impetus for the development of official lists of these. Second, it embraced the concept of predominance (hydrophytes or undrained hydric soils had to be “predominant” in wetlands). Third, it introduced the use of three factors for wetland identification: soils, vegetation, and hydrology. Finally, it included some areas that lack vascular plants or soils. Each of these concepts was later developed in one or more of the wetland delineation manuals.¹⁷⁰

Congress finally codified the term “wetland” in the Food Security Act of 1985 (FSA).¹⁷¹ Further amendments were made by the Food, Agricultural, Conservation, and Trade Act of 1990 (FACTA).¹⁷² Presently, the FSA defines a wetland as that which:

- (A) has a predominance of hydric soils;
- (B) is inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (C) under normal circumstances does support a prevalence of such vegetation.¹⁷³

167. See 33 U.S.C. § 1344(g)(1) (1994).

168. WETLANDS: CHARACTERISTICS AND BOUNDARIES, *supra* note 137, at 54.

169. See generally COWARDIN ET AL., *supra* note 147 (setting forth the definition and classification system).

170. WETLANDS: CHARACTERISTICS AND BOUNDARIES, *supra* note 137, at 55.

171. Pub. L. No. 99-198, 99 Stat. 1504 (1985).

172. Pub. L. No. 101-624, 104 Stat. 3359 (1990).

173. 16 U.S.C. § 3801(a)(16) (1994).

2. *Wetland Delineation and Determinations Under the Food Security Act*

Wetland delineations and determinations under the Food Security Act (FSA) are different for several reasons from decisions as to whether an area meets the definition of wetlands under the CWA. First, the underlying definitions are not the same.¹⁹⁹ Second, some activities allowed under section 404 of the CWA are subject to FSA wetlands compliance measures.²⁰⁰ Finally, the CWA is strictly regulatory while the FSA wetlands conservation guidelines are intermingled with participation in federal farm programs.

The Wetland Conservation (Swampbuster) Provision of the FSA requires agricultural producers to protect the wetlands on the farms they own or operate in order to be eligible for USDA farm program benefits.²⁰¹ Specifically, producers are not eligible for benefits if they plant an agricultural commodity on wetlands that were converted by drainage, leveling, or any other means after December 23, 1985 (the effective date of the FSA), or if they convert a wetland for the purpose of agricultural commodity production after November 28, 1990.²⁰²

199. See *supra* notes 162, 173 and accompanying text.

200. Many normal farming, silvicultural, and ranching activities that involved discharges of dredged or fill materials into wetlands are exempted from section 404; that is, they do not require a permit. U.S. ENVIRONMENTAL PROTECTION AGENCY, WETLANDS FACT SHEET NO. 19, WETLANDS ON AGRICULTURAL LANDS: SECTION 404 AND SWAMPBUSTER 1 (1995).

201. See 16 U.S.C. § 3821 (1994).

202. See *id.* § 3821(b) (1994). The 1990 amendments to the Food Security Act changed the “trigger” that is used to determine when a violation has occurred. Under the present FSA, a wetland is deemed to be “converted” when an agricultural commodity could be produced on it, even if the commodity has not yet been produced. The Senate Report from the 1990 amendments states:

Currently, a person may drain a wetland and not be in violation of swampbuster until the person produces an agricultural commodity on that land. Therefore, a person can produce on the converted wetland during a time of high commodity prices and stay out of the production adjustment programs. During a year of low commodity prices, the person can simply not produce on the converted wetland and regain eligibility for farm program benefits. The functional value of the wetland, however, is lost as long as it is converted.

a. Wetland Definition and “Triggers” Under the Food Security Act

The Food Security Act was the first statute to define “wetland” using explicit terms and requirements. Within the definition, the FSA set out three indicators that must be present for an area to be labeled a wetland: hydric soil, hydrophytic vegetation, and wetland hydrology (i.e., an inundated or saturated surface).²⁰³ The FSA, also separately defines “hydric soil” and “hydrophytic vegetation.”²⁰⁴ Once the NRCS determines that property contains a wetland according to the above criteria,²⁰⁵ the producer who participates in federal farm programs must abide by certain wetland conservation measures in order to remain eligible for program benefits.²⁰⁶

Among the wetland conservation measures producers must abide by is a prohibition on “converting” a wetland. The FSA defines the term “converted wetland” as well as the “trigger” that causes the change from a “wetland” to a “converted wetland.”²⁰⁷ The body of the section entitled “Program ineligibility” explains which “program benefits” a producer would lose if he

203. See 16 U.S.C. § 3801(a)(16) (1994); see also *supra* note 173 and accompanying text.

204. See 16 U.S.C. § 3801(a)(8)–(9) (1994).

205. See *infra* notes 214–216 and accompanying text (discussing in more detail the NRCS’s procedures and responsibilities under NRCS regulations, the NRCS manual, and the interagency Memorandum of Agreement).

206. Some refer to this as “coupling.” See *supra* notes 134–136 and accompanying text.

207. See 16 U.S.C. § 3801(a)(4) (1994). The statute states:

(A) The term “converted wetland” means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if—

(i) such production would not have been possible but for such action; and
(ii) before such action—

(I) such land was a wetland; and

(II) such land was neither highly erodible land nor highly erodible cropland.

(B) Wetland shall not be considered converted wetland if production of an agricultural commodity on such land during a crop year—

(i) is possible as a result of natural condition, such as drought; and
(ii) is not assisted by an action of the producer that destroys natural wetland characteristics.

produces an agricultural commodity on a converted wetland²⁰⁸ or “converts a wetland . . . for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland.”²⁰⁹ Finally, the FSA exempts certain activities that seem to convert a wetland but do not result in a participant losing program eligibility.²¹⁰

The first step in deciding whether FSA conservation measures will apply to a producer is a wetland delineation. The NRCS must produce a public record of the boundaries of each wetland, to be marked on a wetland delineation map.²¹¹ In conjunction with recording the wetland’s boundaries, the NRCS must provide the affected property owner a chance to appeal the delineation and to request an on-site investigation of the delineation in the case of an appeal.²¹²

b. NRCS’s Regulations and Guidance for Wetlands Delineation

After examining the FSA’s description of wetland conservation measures, it may seem that delineating the boundaries of a wetland

208. *See id.* § 3821(a) (1994). This is known as the original 1985 Food Security Act trigger and was originally used to determine when a wetland was actually “converted.”

209. *Id.* § 3821(b) (1994). This is known as the 1990 FACTA trigger, and is used to determine when a wetland is deemed “converted.” *See supra* note 20 for the legislative history of the change.

210. *See* 16 U.S.C. § 3822(b) (1994). Until the 1996 amendments to the FSA, these exemptions included:

- (1) production of an agricultural commodity on—
 - (A) converted wetland if the conversion of such wetland was commenced before December 23, 1985;
 - (B) an artificial lake, pond, or wetland created by excavating . . . ;
 - (C) a wet area created by a water delivery system . . . or the application of water for irrigation . . . ;
 - (D) wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where such production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic; or
- (2) for the conversion of—
 - (A) an artificial lake, pond, or wetland created by excavating . . . ; or
 - (B) a wet area created by a water delivery system . . . or the application of water for irrigation.

Id.; *see infra* notes 341–373 and accompanying text for a discussion of the added and modified exemptions from the 1996 Act. *See also infra* note 256 for a discussion of two proposed exemptions that would have severely weakened Swampbuster, but failed.

211. *See* 16 U.S.C. § 3822(a)(1) (1994).

212. *See id.* § 3822(a)(2).