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NATIONAL WILDLIFE FEDERATION

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Statement of the National Wildlife Federation

on the Application of the Food Security Act of 1985, Title XII, Subtitle C ("Swampbuster")

Before the House Committee on Agriculture

Field Hearings Moorhead, Minnesota

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National Wildlife Federation
Fergus Falls Fish and Game Club
Minnesota Conservation Federation
Natural Resources Defense Council
Environmental Defense Fund

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On behalf of the National Wildlife Federation, the Fergus Falls Fish and Game Club, the Minnesota Conservation Federation, the Natural Resources Defense Council and the Environmental Defense Fund, we submit the following comments on the "Swampbuster" provisions (Title XII, Subtitle C) of the Food Security Act of 1985 for inclusion in the record of the House Committee on Agriculture, during field hearings held June 24, 1988 in Moorhead, Minnesota.

The National Wildlife Federation (NWF), a strong supporter of Swampbuster during passage of the Food Security Act of 1985, today reaffirms its ardent support for the protection of our Nation's wetland resources. The world's largest not-for-profit conservation-education organization, the NWF has over 4.8 million members and supporters, with affiliated organizations in 49 states, the Virgin Islands and Puerto Rico. The NWF and our Minnesota affiliate, the Minnesota Conservation Federation, together with its affiliate, the Fergus Falls Fish and Game Club, collectively represent over 33,000 members and supporters in Minnesota who are concerned about wetlands destruction.

A long-standing supporter of the Food Security Act's conservation provisions, the Natural Resources Defense Council (NRDC) is a national nonprofit corporation with more than 77,000 members and contributors, dedicated to the preservation, enhancement and defense of the world's natural resources. Through several of its programs, the NRDC

promotes a clean, healthy and productive rural environment across the United States.

The Environmental Defense Fund (EDF) is a national non-profit organization that has been active for over 20 years in the protection of wetlands, wildlife and other environmental resources. The EDF has approximately 50,000 members from all states of the U.S., and maintains offices in seven cities.

INTRODUCTION

On December 23, 1985 Congress took a dramatic and much-needed step, effectively declaring that America's taxpayers would no longer fuel the destruction of wetlands through agricultural subsidies. Congress understood that subsidizing wetlands destruction is inconsistent with well-established national policy to protect our valuable but declining wetlands resources.[1] It simply makes no sense to encourage agricultural conversion of wetlands, especially considering the burdens this policy adds to the national debt.

More than two years have passed since the adoption of "Swampbuster" provisions of the Food Security Act of 1985 (FSA), yet enforcement of these provisions remains largely nonexistent. The pace of agricultural conversion of wetlands has not slowed appreciably since Swampbuster was passed, and

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[1] For example, Section 404 of the Clean Water Act, 33 USC 1344; the Emergency Wetlands Resources Act, Pub. L. No. 99-645.

only two producers in the entire United States have lost eligibility for benefits under the Act, to our knowledge. Despite this dismal record, farmers, farm groups and their elected officials are now calling for dramatic reduction of Swampbuster's coverage.

This opposition is strongest in the State of North Dakota, a state in which Swampbuster could potentially protect thousands of acres of valuable wetlands. These wetlands have a truly national and international value as breeding areas for migratory waterfowl, and provide farmers important flood control and groundwater recharge benefits. Yet, agricultural conversion of wetlands in that state has actually increased since Swampbuster's passage, and not one producer in the state has lost program eligibility due to Swampbuster.

The application of Swampbuster is inconsistent and ineffective for two reasons: (1) lack of enthusiasm for enforcement of the law within the U.S. Department of Agriculture (USDA), and (2) political pressure on USDA to refrain from enforcing the Act.

We are concerned that Swampbuster is not working and that, not only farmers, but officials within USDA as well, are attempting to use these hearings, and others that may be contemplated, to reduce Swampbuster's scope without amending the law.

In order for Swampbuster to protect wetlands effectively, it must be implemented in a comprehensive, uniform manner. Indeed, nonexistent enforcement of

Swampbuster will only exacerbate agricultural economic problems because it puts the honest, law-abiding farmer at a competitive disadvantage with the farmer who drains wetlands for crop production and continues to receive subsidies.

The NWF, NRDC and EDF joined other conservation and farm organizations in lobbying vigorously for enactment of Swampbuster because the legislation is needed, makes sense, and is amply justified. We strongly feel that Congress should not second-guess itself until the law has had an opportunity to work.

WHY CONGRESS PASSED SWAMPBUSTER

Congress adopted Swampbuster to address the massive destruction of wetlands resulting from agricultural drainage. In reporting the 1985 Farm Bill the House Committee on Agriculture, recited facts beyond dispute: wetlands are valuable for wildlife habitat, aquaculture, flood control, water purification, groundwater recharge, and recreation. H.R. Rep. No. 99-271, Part 1 99th Cong., 1st Sess. 86-87 (1985). The Committee described the problem facing Congress and the Nation:

> Currently, wetlands are being destroyed at a rate that is environmentally unacceptable .... [N]early 14.7 million acres of freshwater wetlands and approximately 500,000 acres of saltwater wetlands have been destroyed from the mid-1950s to the mid-1970s.
>
> Much of the wetlands lost in recent years can be attributable to conversion to agricultural uses. At the present time of surplus agricultural production there is certainly no need for the conversion of more resources into

> agricultural production especially when those wetlands resources have such inherent value and provide such practical benefits as discussed above.
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> Id.

The House Committee was well advised to express this concern because in 1984 Congress' Office of Technology Assessment estimated that 80 percent of all freshwater wetland destruction resulted from agricultural conversion. Office of Technology Assessment, Wetlands: Their Use and Regulation 108 (1984).

This Subcommittee need not take our word for the need for Swampbuster. The Congress addressed the issue and in 1985 concluded that subsidized agricultural conversion of wetlands is bad fiscal and environmental policy in this day and age of surplus agricultural production, fiscal responsibility, and conservation awareness.

Moreover, nothing has changed about wetlands destruction since Congress passed Swampbuster. The U.S. Fish and Wildlife Service (FWS) has estimated an annual average loss of 458,000 acres of wetlands between 1955 and 1975. U.S. Fish and Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 31 (1984) ("Wetlands Status and Trends"). There is no evidence to suggest the trend has slowed. Therefore, the only difference between today and the passage of Swampbuster in 1985 is the loss of an additional 900,000 acres of wetlands.

IMPLEMENTING REGULATIONS FOR SWAMPBUSTER

When Congress enacted Swampbuster in 1985, it directed the Secretary of Agriculture to promulgate regulations by June, 1986. 16 USC 3844. To meet that deadline, USDA published "interim" regulations, 51 Fed. Reg. 23496 (June 27, 1986), which were then supplemented by field manuals and oral communications to local officials in the Agricultural Stabilization and Conservation Service (ASCS) and the Soil Conservation Service (SCS) charged with administering the law.

Farmers learned early in 1986 that they had to certify any drainage plans on USDA forms (AD-1026) in order to receive federal farm benefits. At the same time, local ASCS and SCS personnel were put in the position of requiring compliance from farmers whom they had previously assisted with voluntary programs. Neither the "regulators" nor the regulated agricultural community were happy in their new roles and gave the law little attention.

Political pressure to weaken the Act was translated into field guidance which interpreted the vague interim rules to exempt significant wetland conversion from the impact of the law. Where the law could not be side-stepped through interpretation, it was simply ignored by local officials and farmers. This open disdain for Swampbuster implementation was, and continues to be, most apparent in the prairie pothole states.

Because the interim rules were viewed as temporary, USDA staff in Washington, D.C. focused immediately on developing

final rules. In the meantime, local ASCS and SCS officials, themselves members of the local agricultural community, were able to enforce or ignore Swampbuster as they saw fit. Consequently, implementation during the 1986 and 1987 growing seasons was extremely variable, and generally lax.

This picture of administrative inertia changed superficially when the Final Rules were published in September, 1987. 52 Fed. Reg. 35194 (Sept. 17, 1987). These rules were the product of considerable inter-agency haggling among ASCS, SCS, FWS, the Office of Management and Budget, and, to some extent, the Environmental Protection Agency (EPA). Conservation groups, including the National Wildlife Federation, supported FWS in pushing for strong final rules. The final rules were detailed and more stringent, and seemed to send a signal that USDA headquarters genuinely intended to implement Swampbuster, that the law was here to stay, and the field representatives and the agricultural community should obey the law.

Since issuance of the final rules, SCS and ASCS seem to have made a concerted effort to provide uniform training to their state-level officials in Swampbuster implementation. We believe this training has reinforced the strong message sent by the final rules. The agencies are relying upon those state officials, in turn, to train county-level staff. The speed and effectiveness of such trickle-down training will be a critical factor in assessing Swampbuster implementation over the next few years.

SWAMPBUSTER IMPLEMENTATION TO DATE

The real test of Swampbuster's effectiveness will come during this growing season and next. The record so far looks dismal. Though ASCS and SCS have not released records or statistics evaluating the program, the available information is disturbing.

Wildlife professionals and local landowners have documented increased wetland drainage throughout North Dakota, South Dakota, and Minnesota in 1987 and 1988. Drainage proponents have admitted that drainage has increased. The agricultural community, at least in the prairie states of the Dakotas and Minnesota, has shown open defiance for Swampbuster rules and implementation.

In North Dakota, 221 potential violations have been reported by the FWS alone, yet not one producer has been denied benefits. In South Dakota, 420 potential violations have been reported, yet no benefits have been withheld. In Minnesota, over 100 potential violations have been reported, yet only one producer has been denied benefits.

It is now 1988, three years since the passage of the Swampbuster provisions which conservationists hoped would provide far-reaching wetland protection. It is abundantly clear that Swampbuster has not been effective in the prairie states of North Dakota, South Dakota, and Minnesota. The administering agencies have proven unwilling to fully implement and enforce the wetland conservation provisions of the Food Security Act of 1985. A more detailed review of Swampbuster implementation follows.

Minnesota

Initially, Swampbuster implementation in Minnesota showed signs of working due to interagency agreements for consultation between the ASCS, SCS, and FWS. However, despite these agreements it is clear that Swampbuster has not been enforced adequately. Over 100 potential Swampbuster violations have been reported by the FWS since the fall of 1987, yet only one producer has been denied benefits (personal communication with Eric Nelson, FWS).[2] Significantly, the rate of wetland drainage actually increased during that time (Exhibit A).[3]

Both the SCS and the FWS have acknowledged frustration with Swampbuster implementation. The SCS has indicated that while Minnesota landowners have requested 15,000 wetland determinations through the Form AD-1026, another 15,000 drainage cases which should have been referred to the SCS for determinations were not. Thus, fully one half of the wet areas drained by farmers in Minnesota have never been considered by the SCS for a wetland determination.

In some circumstances, the SCS has attempted to avoid its responsibilities under Swampbuster. The SCS has created

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[2] To our knowledge, only two producers in the United States have been sanctioned under Swampbuster, one in Minnesota and one in Georgia.

[3] Exhibits A through C are attached at the end of this testimony.

a concept known as the "zone of influence" to determine on which wetlands conversion "commenced" prior to the Act as the result of a drainage project. Utilizing the zone of influence, the SCS exempts entire categories of wetlands from Swampbuster. In doing so, SCS ignores its legal obligation to determine wetlands on a case-by-case basis. Instead, the agency appears to be making arbitrary determinations based upon area wide presumptions. The result will be an unnecessary and unauthorized loss of wetlands.

The FWS has expressed concern with its relationship with the ASCS. The final rules require the ASCS to consult with the FWS on "commenced" conversion determinations. 7 C.F.R. 12.6(b)(5). Even when the consultation does occur, the FWS characterizes the situation as "continual hair-splitting that accommodates more drainage."(Exhibit B)

Yellow Medicine River Watershed District Ditch 18 typifies the inadequate implementation of Swampbuster in Minnesota. On May 18, 1987, the Minnesota State ASCS committee reversed the county committee determination and granted a commenced conversion exemption to the Ditch 18 drainage project. The USDA regulations require that commencement must consist of actual movement of dirt to manipulate the hydrologic regime in a wetland or a substantial financial obligation to do the same by entering into contracts for work or purchase of construction materials

before passage of the Act.[4] However, none of these prerequisites to a commenced determination were present. The State ASCS committee acted in blatant disregard of the rules implementing Swampbuster, ASCS rules and regulations, and ASCS Handbook 6-CP. Consequently, numerous wetlands and hundreds of acres of wildlife habitat may be lost.

North Dakota

Swampbuster has been a failure in North Dakota, primarily due to pressure from drainage proponents. In North Dakota, enforcement ranges from ineffective to non-existent, while wetland drainage has escalated. This accelerated drainage has resulted from antagonism of farmers toward Swampbuster. Some farmers are draining wetlands now for fear that someday Swampbuster will be effective in North Dakota.

In November, 1987, North Dakota Congressman Byron Dorgan held meetings in North Dakota to discuss Swampbuster. At these meetings, farmers and farm organizations turned out in large numbers and expressed heated antagonism toward having federal officials (ASCS, SCS, and FWS) "looking over their

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[4] USDA regulations provide, in essence, that "commencement" must consist of activities such as draining, filling, dredging, leveling, or otherwise manipulating wetlands to make it possible to produce agricultural commodities therein. These activities must have actually started before December 23, 1985, or a contract for such work must have been entered or construction supplies purchased by such date. 52 Fed. Reg. 35201 and 35203, to be codified at 7 CFR 12.2(a)(6) and 12.5(d)(1)(vi) and (2)-(3).

shoulders" and having a say in what owners do on their land (even though they are doing it with federal taxpayer's assistance). These groups also expressed frustration over ASCS and SCS delays and inconsistencies in implementation. These frustrations are shared by the conservation community.

A primary goal of the farm groups in North Dakota is to exempt temporary wetlands from Swampbuster sanctions. Position Paper of North Dakota Farmers Union, et al. 1987. Other measures have been proposed which essentially would eliminate Swampbuster sanctions for conversion of prairie potholes. Id. The reaction of ASCS and SCS to this type of pressure has been to ignore or compromise on enforcement on the premise that strict enforcement will result in pressure to amend or repeal the law.

There has, in fact, been virtually no enforcement of Swampbuster in North Dakota. FWS has reported 221 potential violations to local ASCS offices, yet not one individual has been denied benefits.

While FWS alone reported over 150 potential Swampbuster violations in 1986, ASCS acknowledged receipt of only 83 reports from all sources, including neighboring farmers (See Exhibit C). Of at least 23 ASCS county offices which received reports of potential violations, only three made any attempt to field check reported violations. In four counties and at least 15 instances, ASCS contacted farmers with potential violations and were told the work was simply to clean out existing drains. These ASCS county offices did not field check any of these drains, apparently accepting the producer's determination at face value.

No federal farm benefits have been withheld under Swampbuster in North Dakota. In fact farmers in North Dakota collected $750 million in federal agricultural subsidies in 1987. Where there have been findings of noncompliance in North Dakota, they have not resulted in the withholding of farm benefits. In some cases, the producer has been notified, the drain has been closed, and the crop planted on the wetland has been destroyed.

There are several ASCS determinations which demonstrate that agency's abuse of the commencement exemption.[5] In two of those cases, the farmers had drained wetlands and planted commodity crops on wetlands after December 23, 1985, the effective date of the statute. In these two cases, ASCS allowed the exemption even though the producers lacked actual documentation that earth moving had started before December 23, 1985 or that a contract to do such work was entered by that date, despite the requirements of USDA regulations. One farmer admitted to ASCS personnel that no dirt was moved, no contract to move dirt was entered, and no substantial funds were committed for such work before December 23, 1985. The ASCS State Director has acknowledged that the county committee's initial determinations that these two farmers met the exemption were improper. Nonetheless, the State Director upheld the exemption and refused to declare the producers ineligible.

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[5] Swampbuster exempts farmers from sanctions for production of commodity crops "on converted wetland if the conversion of such wetland was commenced before December 23, 1985." 16 USC 3822(a)(1).

Interestingly, on February 19, 1988, the same ASCS county committee denied a second commenced exemption to one of these same two landowners based on the same information. The FWS was consulted in this more recent determination.

An extreme example of improper Swampbuster implementation is the blanket exemption granted for five large drainage district projects in Wells County, North Dakota. Bowing to political pressure, the Deputy Administrator of the ASCS reversed an earlier decision and granted commenced conversion exemptions to these projects without evidence that either earth-moving or a contract for such work occurred prior to December 23, 1985. The exemptions granted violate both the substantive and procedural requirements of the Swampbuster legislation, the implementing rules, and the ASCS Handbook 6-CP.

The exemptions are particularly objectionable because they grant blanket authority to landowners to drain virtually every wetland within the drainage assessment areas. The impact on wetland resources potentially is enormous. Approximately 5,400 acres of wetlands will be drained ultimately according to the project proponents. Moreover, other water resource districts consider the Wells County exemptions a precedent and intend to obtain similar blanket exemptions for their drainage projects.

SCS mapping of the Red River Valley wetlands has helped to resolve farmers' concerns (Exhibit C). Yet, North Dakota ASCS officials continue to side-step the Swampbuster statute and regulations in an effort to accomodate producers at every turn.

The effort to reduce Swampbuster's coverage has focused on the wetland definition, and, in particular, the inclusion of temporary or seasonal wetlands. Three farm groups in North Dakota have expressly advocated elimination of these wetlands from Swampbuster. However, these are some of our most valuable wetlands.

These wetlands are referred to as "Type 1" wetlands because they have been classified in this way in an FWS

document ("Circular 39").[6] Circular 39 describes Type 1 wetlands as

> **Seasonally flooded basins or flats** .... The soil is covered with water, or is waterlogged, during variable seasonal periods but usually is well drained during much of the growing season.
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> FWS, Wetlands of the United States 20 (1971) ("Circular 39").

Type 1 wetlands may not always appear to the untrained eye to be wetlands because they are usually flooded only during part of the year. They may be dry during most parts of the year, and all year during dry years. Nonetheless, they meet the definition of "wetland" in Swampbuster and their protection from agricultural conversion was a major reason why the NWF, NRDC and EDF supported the passage of Swampbuster.

Opponents of Swampbuster have concentrated their efforts on temporary wetlands. They are attempting to eliminate Swampbuster protection for these wetlands through either: 1) an exemption for Type I wetlands, or 2) an exemption for all wetlands that have been cropped previously. Whether based on cropping history or classification as Type I wetlands, both of these strategies have the same goal:

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[6] Circular 39 is an FWS publication entitled "Wetlands of the United States" first issued in 1956 and republished in 1971. Circular 39 has been updated by FWS' "Classification of Wetlands and Deepwater Habitats of the United States," published in 1979. Despite its venerability, the classification concepts in Circular 39 remain valid.

exemption of a significant portion of our Nation's wetlands from protection under Swampbuster.

Swampbuster explicitly does include temporary wetlands as demonstrated by a review of the law and Congress' actions during enactment of Swampbuster. See pages 36-37 below. Furthermore, we strongly feel that Swampbuster should continue to include these wetlands. First, temporary wetlands provide critical habitat for waterfowl, as well as providing groundwater recharge and flood control. Second, the destruction of these wetlands by agricultural practices continues at an alarming rate. Finally, if temporary wetlands are exempted, not only will 20 to 30 percent of the remaining prairie potholes no longer be protected by Swampbuster, but implementation of Swampbuster for all wetlands in the prairie potholes region and throughout the country will be severely handicapped.

THE VALUE OF WETLANDS

Temporary wetlands were included in Swampbuster for good reason. They are extremely valuable. Indeed, of all the wetlands in the country, the northern plains prairie potholes, of which over 18% are temporary wetlands, are perhaps the most deserving of federal protection for their role in waterfowl production as well as a variety of important hydrological functions.

Waterfowl Production

Prairie potholes represent America's duck factory: "Prairie potholes are the most valuable inland marshes for waterfowl production in North America." Wetlands Status and Trends, p. 42. While the Prairie Pothole Region comprises only 10% of North America's waterfowl breeding area, it produces 50% or more of the continent's ducks. Id.[7] About 87% of the ducks bred in the lower 48 states breed in the Dakotas, Minnesota, and Montana. Wittmier, "Prairie Potholes: Can We Save Them From The Plow?," 50 Outdoor America (No. 4), p. 9 (1985) ("Can We Save Potholes?"). Over 93% of the waterfowl produced in North Dakota come from privately owned wetlands. During 1967-69 North Dakota averaged 1.6 million breeding pair of ducks. Waterfowl production in one South Dakota study area averaged 140 ducks per square mile per year. Stewart & Kantrud, "Breeding Waterfowl Populations in the Prairie Pothole Region of North Dakota," 76 Condor (No. 1) 70 (1974). When drought strikes Canadian breeding areas, the United States and especially North Dakota areas can be crucial to maintaining the continental waterfowl population.

The seasonal variability of pothole inundation is one of the prime reasons why these wetlands are so important to waterfowl. Smaller, shallower potholes are important to breeding pairs because these wetlands thaw early in the spring and provide abundant invertebrates and aquatic plant food. The large number of these small, isolated wetlands also facilitates waterfowl production by permitting breeding pairs to disperse and claim territory, and by reducing the

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[7] Part of the pothole region is located in Canada where it is under the same pressure from agricultural conversion.

risk of disease which is increased when waterfowl are concentrated on shrinking habitat. Id. at 43; Can We Save Potholes?, p. 9.

Type 1 wetlands are especially critical because they tend to be smaller than other potholes and studies have shown that the number of individual wetlands is more important to duck production than the total number of wetland acreage. Linder & Hubbard, "Wetland Values in the Prairie Pothole Region of North America," in Proceedings of Great Plains Agricultural Council (1982). One study found that temporary wetlands, including Type 1 wetlands, composed 35 percent of the wetlands in North Dakota but supported over 57 percent of the breeding population of ducks. U.S. Fish & Wildlife Service, "Use of Shallow Wetlands by Breeding Waterfowl (unpubl.). During years when there is plenty of water, nearly two-thirds of the breeding population uses these temporary wetlands, including wetlands that have been tilled but not converted in previous years. Id. Although these wetlands may hold water for only a short time each year that period is critical to migrating ducks for resting stops and for courtship and egg-laying. U.S. Fish & Wildlife Service, "Wetland Resource North Dakota" (unpubl.).

Although it may seem more convenient to humans to ask or expect the ducks to use more permanently flooded, larger wetlands for all stages of breeding, the ducks simply have not evolved that way. Whether we like it or not, destruction of these Type 1 wetlands means further losses in already declining duck populations. That is inconsistent with the statute because wildlife protection was an express purpose of Swampbuster. H.R. Rep. No. 99-271, 99th Cong., 1st Sess. 87 (1985).

These ducks belong to the Nation. Waterfowl banded in North Dakota, for example, have been recovered in 46 states,

10 Canadian provinces and territories and 23 other countries. Wetlands Status and Trends, p. 1. As recognized by Justice Oliver Wendell Holmes over a half-century ago, these are "birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away." Missouri v. Holland, 252 U.S. 416, 434 (1920).

These birds are money in the bank. In 1980 an estimated $638 million was spent by hunters pursuing migratory birds. U.S. Fish & Wildlife Service, 1980 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, p.70. Moreover, they are highly valued by the 2 million or so duck hunters found in every state of the Union.

But these birds are in trouble. Duck populations have crashed to their lowest levels in recorded history. The reason, according to FWS, is simple: loss of habitat. U.S. Fish & Wildlife Service, A National Waterfowl Management Plan for the United States 5 (1982). The loss of habitat in the United States precipitating this decline is directly attributable to the agricultural conversion of the highly productive prairie pothole wetlands.[8]

Therefore, pothole conversion in the Dakotas is far from a parochial problem. As Justice Holmes observed, no single state can save our duck populations. However, failure to enforce Swampbuster in just two states, North and South Dakota, can have dramatic impacts on continental waterfowl populations. Only Congress can effectively represent the interest of the entire Nation in preventing federal tax

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[8] Protection of waterfowl wintering habitat is also critical.

dollars from fueling the destruction of prairie potholes. The language employed in Swampbuster and the legislative history defining wetlands could not be any clearer, and the importance of maintaining these seasonal wetlands could not be more critical. Type 1 wetlands can only be read out of the Act by interpretive sleight of hand.

Soil and Water Conservation.

Wildlife is far from being the only or even the most important reason for protecting prairie potholes. Indeed, prairie potholes play a major role in maintaining the viability of agriculture by preventing flooding and recharging groundwater supplies.

Groundwater Recharge

The prairie potholes of the Dakotas are important in recharging groundwater aquifers in this region. Hubbard & Linder, "Spring Runoff Retention in Prairie Pothole Wetlands," 41 Journ. of Soil and Water Conservation (No. 2) 122 (1986). One study in Northeastern South Dakota has estimated that 213 wetlands produced a total minimum recharge of about 12 acre-feet in a 1602-acre area. This volume could irrigate 160 acres with 1.4 inches of water, or supply water for 1,699 head of cattle for 1 year. Id.

Because prairie wetlands are hydraulically connected with the water table, their drainage should eventually result in declines in water table elevation. Id. The reverse is true

if wetlands are saved. Thus prairie potholes are really savings banks for groundwater when drought strikes, as it often has in the Dakotas, with vicious effects on agriculture. Braun, et al., "Stream Flow Changes in the Southern Red River Valley of North Dakota," 38 North Dakota Farm Research Bimonthly Bull. (No. 5) 11 (1981) ("Stream Flow Changes in Red River Valley").

Flood Control

Flooding is a substantial problem in the Dakotas and can often lead to total destruction of crops and bridges, damage to homes and businesses, and erosion of valuable soils. In Enderlin, North Dakota, major sections of the town have been abandoned to repeated flooding, a phenomenon that has developed in only the last 25 years. Stream Flow Changes in Red River Valley, p. 11. While climate plays a major role in the timing and degree of flooding, potholes reduce flood flows. Drainage of wetlands that would otherwise store excess water is a factor that has aggravated unprecedented flooding in the Southern Red River Valley in North Dakota. Id.; Ludden, et al., "Water Storage Capacity of Natural Wetland Depressions in the Devils Lake Basin of North Dakota," 38 Journ. of Soil and Water Conservation (No. 1) 45 (1983).

Prairie pothole wetlands store spring snow melt and storm runoff and thereby moderate flooding in the Dakotas. The 213 small wetlands in the 1602-acre South Dakota study area discussed above retained a minimum of 158.7 acre-feet of water during the spring thaw. Drainage of these wetlands would contribute to flooding at lower elevations in the watershed under certain conditions. Id. Prairie potholes in

the Devils Lake Basin of North Dakota have a maximum storage capacity of 657,000 acre-feet, and retain 72% of the total runoff of a 2 year event. These potholes would retain about 41% of the total runoff of a 100 year event. Luddon, et al. "Water Storage Capacity of Natural Wetland Depressions in the Devils Lake Basin of North Dakota," 38 Journ. of Soil and Water Conservation (No. 1) 45 (1983). Drainage of these wetlands could significantly affect flooding in the Devils Lake Basin.

In South Dakota the flood control value of wetlands was recognized when, on December 8, 1987, Governor George S. Mickelson endorsed a proposal by NWF's Prairie Wetland Resources Center for the restoration of over 26,000 acres of drained wetlands to alleviate flooding from Lake Thompson--flooding which probably resulted from the destruction of these same wetlands. Floodwater runoff raised the lake each year and caused serious local flooding.

WETLAND LOSSES

Congress was well advised to ensure that temporary wetlands were included in Swampbuster because these wetlands remain significantly threatened by this conversion. Originally, the prairie pothole region of the Dakotas and Minnesota had 17 million acres of prairie wetlands. According to FWS's National Wetlands Inventory, only 5.3 million acres remain today. North and South Dakota have lost 60 percent and 35 percent of their prairie wetlands, respectively. Most of this destruction was caused by conversion to farming. Wetland Status and Trends, p. 42. Prairie pothole destruction continues today at the rate of 33,000 acres per

year. Id. Type 1 wetlands are 18 percent of remaining United States prairie wetlands acreage, totaling nearly one million acres. U.S. Fish & Wildlife Service, "Wetland Resource North Dakota" (unpubl.).

About eighty percent of the remaining wetlands in these three states are in private ownership, according to the National Wetlands Inventory. Twelve percent of the 4.9 million non-federal wetland acres in the prairie potholes of the Dakotas and Minnesota, or about 588,000 acres, have a moderate to high potential for conversion to agriculture. Swampbusting in Perspective, p. 223. Given the vulnerability of these wetlands to conversion, and the high rate of farm program participation in these states, Swampbuster must play a significant role in reducing the rate of prairie wetland loss, and conserving the soil, water, and wildlife resources associated with them.

ARGUMENTS FOR EXEMPTING TEMPORARY WETLANDS ARE NOT PERSUASIVE

The foremost goal of Swampbuster opponents in North Dakota is the elimination of temporary wetlands from the Act. It is said that the statute should not cover small "wet spots" that are "nuisances." Moreover, farmers in North Dakota argue that it is "unacceptable" to eliminate eligibility for agricultural benefits if farmers drain those areas.

First, federal taxpayers all over the country are footing the bill for wetlands conversion in North Dakota. These taxpayers have spoken through their legislators to say

that the farm subsidy program should not be encouraging farmers to bring new land into production at the expense of wetlands.

Second, if these "wet spots" really are just nuisances, then the farmer can freely drain them without loss of benefits by not planting an agricultural commodity on them after they are converted. If the farmer's true intent is just to eliminate "nuisance wet spots," then he can do so without fear of loss of benefits. However, if these "nuisances" are drained and then farmed, the intent of drainage is to increase farmland and that is what Swampbuster was designed to discourage.

Third, if these wetlands are flooded only temporarily each year, the farmer can farm them without loss of benefits as long as he does not destroy their wetland characteristics. Even tilled Type 1 wetlands provide waterfowl values so long as they are not drained. In such areas Swampbuster allows the farmer to farm and the wetlands to stay wetlands so farmers and wildlife can both benefit. When these areas are drained, only the individual farmer benefits at the expense of flood control, groundwater recharge, and wildlife.

Fourth, if the areas are too wet to crop at any time without drainage then one has to wonder how it can be claimed that these areas are not wetlands.

The only thing Swampbuster prevents is the creation of more farmland at the expense of wetlands, which we are fast losing.

TEMPORARY WETLANDS ARE NOW INCLUDED IN SWAMPBUSTER

A review of the Swampbuster provisions of the FSA and the congressional record demonstrates that temporary wetlands are included in Swampbuster's definition of a wetland, and that they were intended to be included.

Swampbuster's Wetlands Definition Includes Type I Wetlands

Swampbuster defines a wetland as

> land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.
>
> 16 USC 3801(a)(16).

This is virtually the same definition of wetlands employed by the U.S. Army Corps of Engineers and the Environmental Protection Agency in administering Section 404 of the Clean Water Act.[9] See 33 CFR 328.3(b)(1987) (Corps definition); 40 CFR 230.3(t)(1986) (EPA definition).

This definition, like the one used in Section 404, focuses on three components: water, hydric soils, and

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[9] Certain wetlands in Alaska are expressly excluded by Swampbuster but are not excluded from the Corps' and EPA's definitions of wetlands. 16 USC 3801(a)(16).

hydrophytic vegetation. See U.S. Army Corps of Engineers, Multiparameter Approach for the Identification and Delineation of Wetlands (1986). The presence of water is obviously the key component for wetlands delineation but it is unrealistic to assume that water must be present year-round to create a wetland. As the House Merchant Marine and Fisheries Committee Swampbuster Report notes: "The single feature that most wetlands share is soil or substrate that is at least periodically saturated with or covered by water." H.R. Rep. No. 99-271, Part 2, 99th Cong., 1st Sess. 16 (1985) (emphasis added). (This report is significant because the House Committee's version of the wetland definition ultimately became part of Swampbuster.)

This point is also demonstrated by Swampbuster's definitions of "hydric soils" and "hydrophytic vegetation."

The Act defines "hydric soil" as

> soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.
>
> 16 USC 3801(a)(8).

"Hydrophytic vegetation" is defined by Swampbuster to mean

> a plant growing in (A) water; or (B) a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.
>
> 16 USC 3801(a)(9).

According to these definitions, water needs to be present only for a duration sufficient to create "anaerobic conditions" or an oxygen deficiency during all or part of the

growing season. To constitute a wetland the soils must hold water long enough to deprive the plants of oxygen in the root zone during the growing season so that only plants that can tolerate such saturation, the "hydrophytic vegetation," can survive and outcompete species of vegetation that cannot do so. Congress' recognition of this phenomenon is reflected in the House Report: "The water creates severe physiological problems for all plants and animals except those that are adapted for life in water or saturated soil." H.R. Rep. No. 99-271, Part 2, 99th Cong., 1st Sess. 16 (1985); see 40 CFR 230.41(a)(3) (EPA regulation describing "wetlands vegetation").

Type 1 wetlands such as prairie potholes and bottomland hardwoods meet this definition because they are seasonally flooded or saturated during the growing season, although they may be dry during other parts of the year. By literal application of the terms of the statute, Type 1 wetlands are included in Swampbuster. Only by amending Swampbuster can these wetlands be exempted from the Act's protection.

Congress Intended To Include Type I Wetlands

The legislative history demonstrates that Congress fully intended that Type I wetlands be subject to Swampbuster sanctions. The House Merchant Marine and Fisheries Committee Report refers explicitly to "prairie potholes" and, indeed, uses FWS' experience with wetlands in the prairie pothole states as a model for the legislation. H.R. Rep. No. 99-271, Part 2, 99th Cong., 1st Sess. 16 (1985). Congress' recognition that seasonally flooded prairie potholes are wetlands is also reflected in

the express statutory language permitting cultivation of seasonally dry wetlands, when this operation is feasible, without the need for draining. 16 USC 3801(a)(1)(B).[10] As explained by the House Report,

> During the wetter years, these potholes will exhibit true wetland characteristics and will again provide valuable wetland functions and producers who convert these wetlands in such years shall be denied farm program benefits.
>
> Id. at 16-17.

By definition Type 1 wetlands are seasonally flooded or saturated, and not permanently flooded or dry. Congress recognized the importance of protecting these, and all other wetlands, in their most valuable, that is, natural state: "[T]he purpose of the Act [is] to discourage destruction of wetlands as they naturally exist." Id. at 17 [emphasis added].

The law as it stands today includes Type 1 wetlands even though, to some, they may not appear to be wetlands at certain times of the year or during certain years. These wetlands cannot be excluded from Swampbuster without amending the Act, and should not be excluded because of their environmental importance. To exclude these wetlands through the expedient of nonenforcement violates the law as passed by Congress.

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[10] "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."

Swampbuster Does Not Exempt All Wetlands Cultivated Prior to the Act

A second argument put forth to reduce Swampbuster's coverage is that Congress intended to exempt from Swampbuster all wetlands cultivated in any of the 1981-1985 crop years and, as a result, ASCS should determine that any wetland cultivated during those years is a "converted wetland" exempt from Swampbuster. Neither the statute nor the legislative history supports such a broad exemption.

The argument that Congress intended to supply the same broad exemption for wetlands as for highly erodible croplands fails when the language of the Swampbuster and Sodbuster provisions is compared. Section 1211 of the FSA, 16 USC 3811, makes a person ineligible for benefits due to production of an agricultural commodity "on a field on which highly erodible land is predominate." Section 1212(a)(1)(A) of the FSA, which sets forth the exemptions from Sodbuster, provides that no person shall become ineligible for benefits for planting a crop on any highly erodible land:

> that was - (A) cultivated to produce any of the 1981 through 1985 crops of an agricultural commodity....

In contrast, the Swampbuster ineligibility provision, Section 1221 only restricts crop production on "converted wetland", and Section 1222(a)(1) contains only a limited exemption for wetlands whose conversion was commenced prior to the Act. Thus, the Act contains no broad cropping exemption for

Swampbuster, express or implied. Congress certainly demonstrated in Sodbuster the necessity for express language when it wanted to achieve an exemption for previously cropped lands.

Furthermore, a broad exemption for cropped wetlands would not, as some suggest, "equalize" the Sodbuster and Swampbuster provisions. In fact, an exemption for all wetlands cropped between 1981 and 1985 would make Swampbuster substantially more liberal. Land exempted from Sodbuster due to cropping history still becomes subject to a conservation plan by 1990 under the conservation compliance provision of the Act. 16 USC 3812(a)(2). Since there is no comparable allowance for a wetlands conservation plan, an exemption for all cropped wetlands would be a much broader exemption than that provided under Sodbuster. Farm Bill drafters must have recognized this connection between the cropping exemption and the conservation plan, since the House Farm Bill, H.R. 2100, included both a broad exemption for cropped wetlands and a requirement for a wetland conservation plan, and the Conference Committee deleted both of these provisions from the farm bill that ultimately became the law. See, Conf. Rep. No. 441, 99th Cong., 1st Sess. 458-460 (1985).

The statute and the legislative history also make it crystal clear that planting a crop does not, in and of itself, convert a wetland. As discussed previously, a wetland is covered by Swampbuster if, in addition to hydric soil and water conditions, it supports hydrophytic vegetation under "normal circumstances." 16 USC 3801(a)(16). The House

Merchant Marine and Fisheries Committee Report[11] clearly provides that the removal of hydrophytic vegetation through cropping will not disqualify an area as a wetland if it otherwise meets the definition:

> Within the definition of the term wetlands, the term "normal" is intended by the Committee to make clear that areas that are saturated by surface or groundwater but have had wetland vegetation destroyed are nonetheless considered wetlands for the purposes of this Act.
>
> H.R. Rep. No. 99-271, Part 2, 99th Cong., 1st Sess. 16 (1985).

Recognition that cropping history alone does not convert a wetland is also evident from the express exemption for "wetland on which production of an agricultural commodity is possible as a result of a natural condition, such as drought...." 16 USC 3822(a)(4). As the House Merchant Marine and Fisheries Committee Report explains, this exemption was included to cover

> certain areas of the prairie pothole region where production of an agricultural commodity in such potholes is feasible and practicable during certain dry years without altering the wetland characteristics. During the wetter years, these potholes will exhibit true wetland characteristics and will again provide valuable wetland functions and producers who convert these wetlands in such years shall be denied farm program benefits.

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[11]As stated previously in the discussion of Type I Wetlands, the House Report is particularly significant since it is the House Committee's version of the wetland definition which ultimately became part of Swampbuster.

Id. at 17. See, also, S. Rep. No. 99-145 , 99th Cong., 1st Sess. 304 (1985); H.R. Rep. No. 99-271, Part 1, 99th Cong., 1st Sess. 88 (1985).

The House Merchant Marine and Fisheries Committee Report further provides that the exemptions are to be read narrowly, and specifically, that the provision allowing production of agricultural commodities in wetlands during drought does not apply "if diking, filling, drainage, or other artificial means is necessary to continue or initiate agricultural production for the particular area." Id. H.R. Rep. No. 99-271, Part 2, at 17. Congress clearly intended to permit cropping of wetlands where such cropping was made feasible by dry conditions, but not to permit cropping of these wetlands in wet years where such cropping could only occur with the help of drainage activity. Congress expressly provided for a much narrower exemption for previously cropped areas (that are wetlands) than that provided in Sodbuster.

The narrow "natural condition" exemption would be illogical and duplicative if Congress actually intended to grant a blanket exemption for all wetlands cropped between 1981 and 1985, since any wetland cropped in any of those years under natural conditions would then receive a blanket exemption for drainage and crop production thereafter. Such a result is totally inconsistent with the express statutory language, the legislative history, and plain common sense.

In addition, the statutory definition of "converted wetland" confirms that Swampbuster does not exempt wetlands based on cropping history alone. This definition spells out the conditions under which the exemption for converted wetland applies. The law requires that to be considered "converted," a wetland must have been:

> (1) drained or otherwise manipulated prior to the Act;
>
> (2) in order to make crop production possible;
>
> (3) where such production would not otherwise have been possible.
>
> 16 USC 3801(a)(4)(A).

This definition expressly excludes wetlands on which a crop can be produced as a result of a natural condition. 16 USC 3801(a)(4)(B). Consequently, Congress could not possibly have intended to exempt all wetlands with a cropping history regardless of whether crop production was made possible by natural conditions alone or through wetland conversion activity.

The chronology of the legislative history also supports the conclusion that Congress did not intend to exempt all wetlands cropped between 1981 and 1985. The House Bill, H.R. 2100, did include an express exemption for any land cultivated between 1981 and 1985, apparently including wetlands. It also included the narrow "natural condition" exemption which, as explained above, was inconsistent with the broad exemption for cropped wetlands. The Senate Bill, S. 1714, did not contain the same broad exemption for cropped wetlands as it contained for highly erodible croplands. The Conference Committee consciously approved the House and Senate exemption for land cultivated between 1981 and 1985 for Sodbuster, but specifically deleted that cropping exemption for Swampbuster. Conference Rep. No. 99-441, 99th Cong., 1st Sess. 458, 460.

In addition, the Conference Committee chose the Senate bill's format, which provided separate and distinct sets of exemptions for Sodbuster and Swampbuster, over the House version's format, which lumped the two provisions together. Separating the two provisions was a wise decision which recognized the different ecological considerations involved in each.

This sequence of events confirms that Congress considered a broad exemption from Swampbuster for cropped wetlands and rejected that option in favor of carefully defined exemptions for "converted wetlands" and wetlands farmed under natural conditions.

Congressman Daschle, who sponsored the Swampbuster amendment to H.R. 2100, discussed the bill reported by the Conference Committee on the House floor on October 8, 1985. He specifically described a broad Sodbuster exemption for lands put into production between 1981 and 1985, but was noticeably silent with regard to such an exemption for Swampbuster. Cong. Rec. H 8482 (daily ed. October 8, 1985). Instead, in the very next breath, Congressman Daschle explained that he offered Swampbuster to reduce the rapid rate of wetlands conversion to agriculture, that the law was intended to eliminate subsidies for wetland drainage, and that such "bold steps" were necessary. These comments seem consistent with the action taken by the Conference Committee, and inconsistent with an intent to broadly exempt all wetlands cultivated between 1981 and 1985.

The statute and the legislative history do not provide an exemption for wetlands based on cropping history alone.

Congress was wise to restrict the exemption for prior converted wetlands. A broad exemption for all cropped wetlands would result in at least as much new wetland drainage as an exemption for all Type 1 wetlands. FWS estimates that 20 to 30% of the remaining prairie wetlands in North Dakota, some 200,000 to 300,000 acres, would be exempted from Swampbuster if cropping history could be used to exempt a wetland as a converted wetland (Exhibit C). The FWS further estimates that eliminating Type I wetlands would exclude one-third of the wetlands in an eight state region including Indiana, Minnesota and Wisconsin (Exhibit A).

Furthermore, change in the statute or the regulations at this stage in Swampbuster implementation would result in increased drainage. First, a change that broadens an exemption from Swampbuster sends yet another signal to farmers in the prairie pothole states that neither Congress

personnel caution that any wetlands deleted from the Swampbuster definition "will be drained immediately." Id.

Having already lost over 50 percent of the wetland acreage originally existing in the prairie pothole region, additional loss of wetlands, including temporary wetlands, cannot occur without significant adverse effects on wildlife and water resources.

Denial of Benefits under Swampbuster Should Not Be Relaxed

Farmers have argued that the Swampbuster ineligibility provision is too severe and that "inadvertent" wetlands destruction should not result in loss of all benefits. Their argument that "the penalty should fit the crime" is

compliance determination, without the assistance of the ASCS and the SCS, he does so at his own risk. Such a violation is no more "inadvertent" than the taxpayer who elects to interpret the tax code in his favor and is penalized for non-payment of taxes..

Second, if a farmer can demonstrate a good faith effort to get an agency determination and to comply with Swampbuster, the formal USDA appeal process provides a remedy that should avoid any unfair result. SCS sources report that the appeal process has worked well in many parts of the

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[12] Continued mapping such as in the Red River Valley of North Dakota and individual wetlands determinations such as those performed in Minnesota should further remove the likelihood of truly "inadvertent" wetlands destruction.

Similarly, county committee practices to date suggest that any change from the current total ineligibility for annual payments to a graduated and discretionary scheme of withholding benefits will simply be too complex and variable to be properly implemented by ASCS county committees.

Finally, relaxing Swampbuster ineligibility conditions will seriously undermine the deterrent effect of loss of benefits. Farmers could then drain wetlands virtually without risk because, if they are caught, they could claim the wetland drainage was inadvertent. Penalties that only exact a modest fee and require restoration will simply become a cost of doing business with little risk for the farmer unlucky enough to actually be caught in violation.

Other Wetlands at Stake

The prairie potholes are not the only place where millions of acres of wetlands are at risk if Congress turns its back on Swampbuster. The remaining wetlands most vulnerable to agricultural conversion are palustrine (upland, generally fresh water) wetlands in private ownership. According to the 1982 Natural Resources Inventory (NRI) conducted by SCS, approximately 80% of wetlands not federally protected are privately owned. Heimlich & Langner, "Swampbusting in Perspective," 41 Journ. of Soil & Water Conservation (No. 4) 219 (1986) ("Swampbusting in Perspective"). Of the 70.7 million acres of non-federal palustrine wetlands, the 1982 NRI rated 5.1 million acres as having a moderate to high potential for conversion to cropland in 1982. About 85 percent of these high potential wetland conversions could be easily brought into production. Id.

Approximately 16 million acres of wetlands remaining in 1982 would have earned short-term positive returns if converted, assuming 1985 crop prices and subsidy program participation rates. Heimlich & Langner, "Swampbusting: Wetland Conversion and Farm Programs," USDA Ag. Econ. Rep. No. 551 (1986); Swampbusting in Perspective, pp. 220-221. Therefore, the 5.1 million acre estimate of wetlands vulnerable to agricultural conversion actually may represent the low end of the range.

In 1984 FWS identified nine types of wetlands in the United States "that are in greatest jeopardy from a national standpoint." Wetlands Status and Trends, pp. 35-36. According to a USDA economic study, agricultural conversion is a major threat to six of these nine types, including the palustrine wetlands of South Florida, the Nebraska Sandhills and Rainwater Basin, the pocosins of the North Carolina coastal plain, and western riparian wetlands, as well as the prairie potholes and the Lower Mississippi River bottomlands. Swampbusting in Perspective, pp. 223-224.

South Florida's palustrine wetlands provide freshwater run-off which maintains the salinity balance in coastal estuaries supporting 85 percent of Florida's off-shore fishery. Wetlands Status and Trends, pp. 40-41. These wetlands also provide breeding and wintering habitat for many bird species, and support a number of endangered species. Id. Agricultural conversion and projects to protect agricultural land from floods have been major factors in past wetland conversion. Id. Approximately 382,500 wetland acres, about 8.5 percent of the 4.5 million acres of non-federal wetlands in this area, were rated in the 1982 NRI as having a moderate to high potential for conversion. Swampbusting in Perspective, p. 223.

Nebraska's Sandhills and Rainwater Basin areas are migration stopovers critical for waterfowl and sandhill cranes in the Central Flyway. Wetlands Status and Trends, pp. 46-48. Agricultural conversion and irrigation-related wetland losses have concentrated migratory birds in remaining wetlands, resulting in increased disease. Id. About 128,850 wetland acres are estimated to have a moderate to high potential for conversion in this area. Swampbusting in Perspective, p. 223.

The North Carolina pocosin wetlands are principal groundwater recharge areas, and, like the South Florida wetlands, provide fresh water run-off essential to maintaining the salinity balance of the coastal estuaries. These wetlands also provide important wildlife habitat. Wetlands Status and Trends, pp. 49-50. The SCS has estimated that about 380,000 acres of pocosin wetlands in North Carolina have a moderate to high potential for agricultural conversion. However, conversion may be profitable on a much larger acreage due to economies of scale in large-scale wetland conversions. Swampbusting in Perspective, pp. 223.

The western riparian wetlands provide important food and cover for resident and migratory species of fish and wildlife in what are otherwise arid regions. Wetlands Status and Trends, pp. 50-51. These areas have been reduced significantly, in part due to agricultural conversion. Id. About 35,000 wetland acres in this area have a moderate to high conversion potential. Swampbusting in Perspective, pp. 223-224.

We are extremely concerned that any signs of weakness in Swampbuster enforcement in the prairie states will stimulate agricultural conversion in these other important wetland

areas. If Swampbuster is rendered a dead letter in the prairie states there is little reason to believe that it will be any easier to enforce in any other states. This will be especially true if Congress shows a lack of resolve to support existing legislation.

SWAMPBUSTER BENEFITS THE AMERICAN FARMER

Effective enforcement of Swampbuster actually creates a net benefit for farming. Drainage of wetlands may seem like a short term gain for an individual farmer, but this ignores the fact that such drainage merely externalizes the loss of wetlands values, such as flood control, to the entire agricultural community. In times of economic hardship this sort of individual, short term decision-making may be exacerbated by financial pressure to maximize individual yield. Our painful awareness of the long-term overall economic costs of this individual decision-making led to the creation of much of the existing farm subsidy program. Farmers must be stimulated to make decisions (for example to reduce production) that might reduce individual profits but in the aggregate are necessary to preserve the farm economy (by keeping a floor under commodity prices). Similarly, farmers must be discouraged from draining wetlands, a decision that may yield an individual, short-term profit, but that may collectively spell disaster for the entire farming community.

Compensation Is Appropriate for Farmers Who Protect and Restore Wetlands

Farmers in the prairie pothole states believe that they should be compensated for maintaining or restoring wetlands on their property. We recognize the potential environmental benefits of such compensation and support existing and proposed conservation programs.

Existing compensation programs include the Water Bank program, of which North Dakota landowners have been the primary beneficiaries; the FWS waterfowl production area easement purchase program; the FmHA debt restructure easement provision in the Act, 16 USC 3918; state easement programs, such as the "Reinvest in Minnesota" (RIM) program; and state tax credit programs. Some or all of these programs could be expanded to provide additional compensation to farmers conserving wetlands.

S. 2143: Expansion of CRP to Include Wetlands

We also support legislation like S. 2143, which would enable conservation reserve program (CRP) enrollment of certain wetlands with a history of crop production. This legislation provides an opportunity to reverse wetland loss nationally, and in many states to bring natural wetlands back from the brink of extinction. If attached to expanded CRP acreage authority, such as that proposed in S. 1521 and S. 2045, wetland eligibility need not dilute the erosion control objectives of the existing reserve program.

Nevertheless, any wetland reserve must be framed to provide the greatest and most enduring conservation benefits

for each public dollar invested. To this end, four interrelated conditions would conform S. 2143 to the FSA's CRP authority, certain other government conservation programs, and tenets of sound policy.

First, Congress should not enact S. 2143 in tandem with any weakening of Swampbuster. It would be indefensible to spend substantial federal funds toward "renting" wetland protection, only to subsidize a new round of agricultural conversion after CRP contracts expire. This could happen, for example, if Congress simultaneously opened the reserve program to, and created a blanket Swampbuster exemption for, wetlands that were previously cropped but never converted.

Moreover, if S. 2143 becomes law, Swampbuster coverage must be expanded to include ecologically important uplands enrolled in the reserve in association with wetland areas. This is critical given that as much as two-thirds of individual fields enrolled under S. 2143 may be unaffected by the FSA's existing sodbuster, conservation compliance or Swampbuster provisions.

Second, the bill should articulate a preference for restoring converted wetlands. This approach has proved successful within the landmark Reinvest in Minnesota (RIM) program, which limits wetland eligibility to areas that have already been lost to agriculture. This would also be consistent with a leading purpose of the CRP, which is to repair damages that have arisen in part from misplaced policy incentives for cropland expansion.

In this regard, S. 2143 should mandate that natural characteristics be restored on any converted wetland enrolled in the CRP; as with the existing program for erosion control, ample provision could be made for USDA to share in the cost of the physical restoration. As drafted, the bill imposes no such requirement. The CRP conservation plan specifications in 16 USC 3832 are not sufficient; they relate to highly erodible land reclamation and are generally inappropriate for wetland restoration.

Third, S. 2143 should contain an option for easement restrictions proscribing agricultural wetland conversion in perpetuity. This, too, would follow the RIM model, as that state program mandates permanent easements for compensated wetland restoration. Applicable precedent also exists in programs of the U.S. Fish and Wildlife Service that have placed more than one million acres of wetlands under conservation easement.[13]

The permanent easement option recognizes the difficulty of undertaking any agricultural practices, even those less intensive than annual row crop production, without sacrificing natural wetland values. The situation is different for the highly erodible land being enrolled in the CRP, much of which can, with appropriate conservation precautions, be committed to alternative economic pursuits after the CRP expires. For example, ten years of rental payments will likely facilitate an enduring transition to

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[13]Barrett and Livermore, The Conservation Easement in California 4 (1983).

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sustainable livestock grazing or tree farming on many fields now enrolled in the reserve.

Fourth, for the sake of fairness and fiscal responsibility, compensation for wetland CRP contracts must be commensurate with locally prevailing land values and rental rates.[14] This will prevent any serious disjunction between the conservation reserve and the RIM program or other state efforts that may imitate the Minnesota example. Perhaps most important, CRP compensation under ten-year contracts must never "out-compete" RIM or other government programs that pay for permanent wetland conservation.

Swampbuster and Private Property

Finally, we wish to emphasize what Swampbuster does not do. It does not prevent farmers from destroying wetlands on their property to increase the amount of land in production. Moreover Swampbuster results in ineligibility for benefits only if a farmer drains a wetland and produces an "agricultural commodity" in the converted wetland. 16 USC 3821.[15] Thus a farmer may safely drain a wetland for any

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[14] This may be partially alleviated by the requirement approved in the omnibus spending bill for FY 89 that bid ceilings for CRP rental payments not exceed prevailing local cropland rental rates.

[15] The Act defines "agricultural commodity" as "any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters ...." 16 USC 3801(a)(1)(A).

purpose other than production of agricultural commodities without loss of benefits.

Swampbuster is not a statute where the federal government is telling landowners what they can and cannot do with their private property. Instead, Congress has said to farmers, "You can drain your wetlands if you want, but don't expect the federal taxpayer to pay for it." Of course, we realize that, in many cases, removal of all agricultural subsidies will be a powerful disincentive. But, this disincentive is clearly necessary to allow Congress to ensure that the expenditure of federal tax dollars is consistent with federal policies.

As a result, the farm economy crisis and the sanctity of private property are superficially appealing, but ultimately false issues in the context of Swampbuster.

Allowing Swampbuster's provisions to continue to be ignored represents a shortsighted disregard for the realities of Nature--a Nature that can bring drought and devastating floods as well as abundant, diverse wildlife. Congress must recognize that wetlands can play a major role in banking the dividends of good years and tempering the adversity of bad years brought by the unpredictable forces of Nature.

Effective application of Swampbuster does not mean economic disaster for the American family farm. We reject the notion that a viable farm economy is incompatible with preserving wetlands. Over the years we have worked closely with farmers and farm organizations to show that farms can be economically productive without removing valuable wildlife

habitat. In addition, the critically important services performed by wetlands, including flood control and groundwater recharge, demonstrates that wetlands benefit farmers and all of our society, as well as wildlife.