

## Swampbuster: A Report from the Front

ANTHONY N. TURRINI\*

### I. INTRODUCTION

In 1985, Congress took a bold new step in farm legislation by enacting the conservation title<sup>1</sup> of the Food Security Act.<sup>2</sup> Over the past five years, the wetland conservation provisions of that title,<sup>3</sup> known as "swampbuster,"<sup>4</sup> have generated considerable controversy.<sup>5</sup>

Swampbuster seeks to deter wetland drainage by withholding a wide range of agricultural subsidies from farmers who plant commodity crops in wetland basins drained after December 23, 1985.<sup>6</sup> Congress recognized that it is in the public's interest to discourage environmentally destructive farming practices, especially when the country is producing a surplus of commodity crops. In reporting the 1985 farm bill, the House Agriculture Committee concluded that wetlands are a priceless resource which are

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\* Counsel, Prairie Wetlands Resource Center, National Wildlife Federation, Bismarck, North Dakota. M.B.S. 1987, University of Colorado; J.D. 1982, University of Colorado School of Law; B.A. 1979, University of California at Los Angeles. The author gratefully acknowledges the assistance of Ellyn J. Bullock and Lisa C. Turrini.

1. Passed into law on the 23rd of December, the conservation title has been described as a "wonderful Christmas present for wildlife agencies." Risley & Budzik, *Implementing Swampbuster and Conservation Easements: An Ohio Perspective*, 43 J. Soil & Water Conservation 33, 33 (1988). The title consists of four basic programs: sodbuster and conservation compliance (subtitle B), swampbuster (subtitle C), and conservation reserve (subtitle D).

2. 16 U.S.C. §§ 3801-3845 (1988). For a discussion of the legislative history, see Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sod-busting, Swampbusting and the Conservation Reserve*, 34 U. KAN. L. REV. 577 (1986).

3. 16 U.S.C. §§ 3821-3823.

4. Unless otherwise noted, all references to "swampbuster" refer to the statute as originally enacted in the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1504 (1985) (codified as amended at 16 U.S.C. §§ 3821-3823).

5. In the Midwest, farmers printed signs excluding hunters and other persons from their property, purportedly in response to the unreasonable implementation of swampbuster. One sign read: "Due to the Swampbuster Act of the 1985 Farm Bill, there will be no hunting, trapping or trespassing allowed on these premises. Violators will be prosecuted" (on file with the National Wildlife Federation's Prairie Wetlands Resource Center).

6. 16 U.S.C. § 3821. The statute provides that "any person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible" for certain farm program benefits including price supports, farm storage facility loans, crop insurance, disaster payments, and loans administered by Farmers Home Administration. *Id.*

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valuable for wildlife habitat, aquaculture, flood control, water purification, groundwater recharge, and recreation.<sup>7</sup>

The Secretary of Agriculture published final regulations implementing swampbuster in 1987.<sup>8</sup> Within that regulatory scheme, two federal agencies are primarily responsible for administering swampbuster — the Agricultural Stabilization and Conservation Service (ASCS) and the Soil Conservation Service (SCS).<sup>9</sup> Principal authority for administering and enforcing the law is vested in the ASCS.<sup>10</sup> ASCS county committees make most of the day-to-day decisions concerning program eligibility<sup>11</sup> and grant certain exemptions.<sup>12</sup> Other ASCS employees conduct “spot checks” to ensure swampbuster compliance.<sup>13</sup> The SCS is charged with making the technical determinations<sup>14</sup> in identifying the wetlands subject to swampbuster<sup>15</sup> and in granting exemptions under the “minimal effects” provision.<sup>16</sup> Lesser administrative roles are performed by Farmers Home

7. H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 86-87, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1190-91. The committee succinctly stated the concerns that prompted swampbuster’s enactment:

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 [sic] 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.

*Id.* at 87, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1191.

8. 7 C.F.R. §§ 12.1-.33 (1990).

9. To help ensure proper administration of swampbuster, Congress appointed the Department of Interior as a “watchdog.” Under the statute, the Secretary of Agriculture must consult with the Secretary of Interior concerning the identification of wetlands and determination of exemptions. 16 U.S.C. § 3823. This provision has been interpreted in the final regulations as requiring the ASCS and SCS to consult with the Fish and Wildlife Service on all pending exemption applications and matters relating to the identification of wetlands. 7 C.F.R. §§ 12.6(b)(5), 12.30(c).

10. 7 C.F.R. § 12.6(b).

11. Each crop year, farmers are required to file “AD-1026” forms with their local ASCS office, certifying that they will not produce commodity crops on converted wetlands. *Id.* § 12.7(a)(2). If the county committee determines that a farmer has violated swampbuster, and is not eligible for any type of exemption, it withholds the farmer’s subsidies for that year.

12. *Id.* § 12.6(b)(3).

13. *Id.* § 12.6(b)(4).

14. *Id.* § 12.6(c).

15. *Id.* § 12.6(c)(2)(i).

16. *Id.* § 12.6(c)(2)(vi).

Administration,<sup>17</sup> the Federal Crop Insurance Corporation,<sup>18</sup> and the Agricultural Extension Service.<sup>19</sup>

Swampbuster's potential role in protecting wetlands prompted the National Wildlife Federation (NWF) to establish a field office for the purpose of monitoring the law's implementation.<sup>20</sup> NWF suspected that the Department of Agriculture lacked the conviction and expertise to adequately protect wetlands. That perception was fueled by the fact that only two producers in the entire United States had actually lost farm program benefits as a result of swampbuster violations.<sup>21</sup> After two lawsuits, a dozen administrative proceedings, and more than one hundred Freedom of Information Act (FOIA) requests,<sup>22</sup> it is apparent that swampbuster has not been adequately enforced. It is also clear that loopholes in the legislation have limited swampbuster's effectiveness.

## II. SWAMPBUSTER'S SUCCESS IN DETERRING WETLAND DRAINAGE

Before discussing swampbuster's weaknesses, it should be emphasized that the statute has probably succeeded in deterring wetland drainage. During the past 200 years, wetlands were destroyed at a tremendous rate. Of the estimated 215 million acres of wetlands originally found in the contiguous United States, only 99 million acres remained by the mid-1970s.<sup>23</sup> Agricultural practices were responsible for 87% of the wetland loss between the mid-1950s and mid-1970s.<sup>24</sup> In 1985 (the year swampbuster was enacted), the annual rate of wetland conversion was between 300,000 and 450,000 acres per year.<sup>25</sup>

Although there have been no comprehensive studies of wetland drainage subsequent to 1985, both the Environmental Protection Agency<sup>26</sup> and

17. *Id.* § 12.6(d).

18. *Id.* § 12.6(e).

19. *Id.* § 12.6(f).

20. The National Wildlife Federation is a nonprofit conservation organization dedicated to the wise use and protection of natural resources, including the nation's remaining wetlands. NATIONAL WILDLIFE FEDERATION, 1989 ANNUAL REPORT 5, 8 (1989). NWF opened the Prairie Wetlands Resource Center in March 1987.

21. Personal communication with George Melvin, Chief of the ASCS Compliance Branch (1987).

22. Freedom of Information Act requests were submitted pursuant to 5 U.S.C. § 552 (1988).

23. U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF INTERIOR, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 29 (1984).

24. *Id.* at 31.

25. U.S. Dep't of Agric., U.S. Dep't of Agric. Envtl. Assessment for the Wetland Conservation Provisions of the Food Security Act 1985-1 (1986).

26. WILLIAMS, MIAH & FINKBEINER, AERIAL PHOTOGRAPHIC ANALYSIS OF WETLAND CONVERSION RELATED TO THE FOOD SECURITY ACT 11-17 (1990) (prepared for the United States E.P.A.).

the Soil and Water Conservation Society<sup>27</sup> have completed limited studies indicating that the rate has decreased. These findings are supported by the SCS, which recently stated that the annual loss of wetlands during the mid-1980s was between 100,000 and 200,000 acres per year.<sup>28</sup> Nonetheless, many conservation organizations believe the rate of wetland destruction remains unacceptably high.<sup>29</sup>

### III. SWAMPBUSTER'S STATUTORY LIMITATIONS

#### A. Sanctions

Swampbuster's principal shortcoming is its failure to penalize farmers for draining or otherwise manipulating a wetland. A violation does not occur unless "commodity crops" are planted in the wetland basin.<sup>30</sup> The cropping requirement substantially diminishes the incentive to preserve wetlands. Farmers can "play the system" by draining wetlands and then planting crops in only those years when commodity prices are high and they do not intend to participate in farm programs.<sup>31</sup> In other years, farmers can plant perennial crops or hay in the converted wetlands without jeopardizing their farm benefits.<sup>32</sup> The cropping requirement also makes it more difficult to detect swampbuster violations. Although the ASCS, SCS, and U.S. Fish and Wildlife Service (FWS)<sup>33</sup> are likely to observe

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27. SOIL AND WATER CONSERVATION SOCIETY, IMPLEMENTING THE CONSERVATION PROVISION OF THE FOOD SECURITY ACT 8-9 (1989).

28. SOIL CONSERVATION SERVICE, INTERPRETATIONS OF WETLAND DATA FROM THE 1987 NAT'L RESOURCE INVENTORY 1 (Aug. 1990).

29. Conservation groups that lobbied for stronger swampbuster provisions in the 1990 farm bill include the Center for Resource Economics, Natural Resources Defense Council, National Audubon Society, National Wildlife Federation, Sierra Club, and Soil and Water Conservation Society. See *Farm Bill 1990: Agenda for the Environment and Consumers* (Island Press 1990).

30. 16 U.S.C. § 3821 (1988). "Commodity crops" are defined as those agricultural commodities "planted and produced in a state by annual tilling of the soil, including tilling by one-trip planters . . ." *Id.* § 3801(a)(1)(A).

31. The financial benefits of participating in farm programs are generally greater when market prices are low. See HEIMLICH & LANGNER, SWAMPBUSTING: WETLAND CONVERSION AND FARM PROGRAMS 8 (1986) (USDA AGRICULTURAL ECONOMIC REP. No. 551).

32. The planting of perennial crops does not require annual tilling, and therefore does not trigger swampbuster sanctions. See 16 U.S.C. § 3821(a)(1)(A).

33. In addition to providing technical guidance, the FWS has emerged as the primary investigator of violations. FWS employees typically fly over wetland areas once a year to ensure that conservation easements are not violated. These easement flights often result in the detection of numerous swampbuster violations that are reported to the ASCS. In North Dakota, these practices have earned the FWS the moniker, "spies in the sky."

and report new drainage activity, they simply do not have the resources to perform an annual review of previously manipulated wetlands to determine whether they are planted with commodity crops.

Fortunately for the wetland resource, this loophole was eliminated in the 1990 farm bill.<sup>34</sup> In a major victory for conservationists, swampbuster was amended to make the act of drainage a violation.<sup>35</sup> Farmers who manipulate wetlands are ineligible for subsidies until they restore the affected wetland to its original condition.<sup>36</sup> Swampbuster now provides a real deterrent to drainage, and for the first time creates an incentive to restore converted wetlands.

### B. Scope

A second fundamental limitation of swampbuster, which was not redressed in the new farm bill, is that it pertains only to producers who participate in federal farm programs. Farm operators who do not produce crops with price supports, or who do not rely on federally subsidized loan or insurance programs, can ignore swampbuster altogether. Swampbuster is an effective deterrent only in areas where participation in farm programs is high and where subsidies contribute significantly to farm income or profitability.<sup>37</sup> Fortunately for wetlands (if not the American taxpayer), most producers participate in federal farm programs.<sup>38</sup>

### C. Administrative Appeals

A third weakness of the statute is that it fails to unambiguously provide an administrative appeals avenue for nonfarmers. Swampbuster directed the Secretary of Agriculture to promulgate regulations enabling a "person who is adversely affected by any determination" under the law to seek administrative review.<sup>39</sup> Even though many people may be adversely affected by the drainage of wetlands, the final regulations limit review to farmers who have been or will be denied farm subsidies as a result of a swampbuster determination.<sup>40</sup> Although decisions withholding benefits can be "second-guessed," decisions favoring a producer to the

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34. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 [hereinafter 1990 Farm Bill]. With few exceptions, the amendments to swampbuster apply to crop years after 1990.

35. 1990 Farm Bill, Pub. L. No. 101-624, § 1421, 104 Stat. 3359, 3572.

36. *Id.*

37. Heimlich & Langner, *Swampbusting in Perspective*, 41 J. SOIL & WATER CONSERVATION 219, 224 (1986).

38. See J. BOVARD, *THE FARM FIASCO* 46-47 (1989) (citing U.S. DEPARTMENT OF AGRICULTURE, *FARMLINE* 5 (1986)). For an economic analysis of swampbuster and its probable effect on farming practices, see Heimlich & Langner, *supra* note 31.

39. 16 U.S.C. § 3843(a) (1988).

40. 7 C.F.R. § 12.12 (1990).

detriment of a wetland cannot be reversed through the formal appeals process. This one-sided procedure has produced skewed results. Seventy-seven percent of all appeals decided by the ASCS favored the farmer.<sup>41</sup> This shortcoming was not remedied in the 1990 farm bill.

#### IV. INADEQUATE IMPLEMENTATION AND ENFORCEMENT

The greatest impediment to swampbuster's effectiveness has been unenthusiastic administration. Virtually everyone agrees that agricultural drainage continues to occur.<sup>42</sup> Although the Department of Agriculture claims that more than \$1 million dollars has been withheld, the most current data indicate that the ASCS has withheld subsidies from only twenty-six farmers throughout the United States.<sup>43</sup> The total amount of farm benefits forfeited was a mere \$124,000.<sup>44</sup> Not a single dollar was withheld from a producer in the Pacific flyway, the gulf coast, or the South.<sup>45</sup> As of

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41. ENVIRONMENTAL LAW INSTITUTE, IMPLEMENTATION OF THE "SWAMPBUSTER" PROVISIONS OF THE FOOD SECURITY ACT OF 1985, at 28 (1990). The problem is exacerbated because farmers dissatisfied with an ASCS determination are offered three bites from the appeals apple. They may request reconsideration of the decision by the county committee. 7 C.F.R. § 780.3. They may appeal the county committee's decision to the state ASCS committee. *Id.* § 780.4. Finally, they may appeal to the ASCS deputy administrator (DASCO) in Washington, D.C. *Id.* § 780.5. Concerned citizens have no right to participate in any of these proceedings.

42. Even the Department of Agriculture acknowledges drainage. After surveying 25% of the farms participating in federal programs, the SCS reported that over 77,000 acres of unexempted wetlands have been converted since 1985. SOIL CONSERVATION SERVICE, FOOD SECURITY ACT PROGRESS REPORT - OCT. 1989 1.

43. Letter from Jay D. Hair, President of NWF, to Clayton Yeutter, Secretary of Agriculture (Oct. 13, 1989) (criticizing Mr. Yeutter's claim that more than \$1 million had been withheld from more than 400 producers) [hereinafter Hair Letter].

In January 1989, NWF submitted a FOIA request asking the ASCS for a list of all producers conclusively determined ineligible for agricultural subsidies as a result of swampbuster violations. The ASCS was asked to exclude any producer who was appealing, requesting an exemption, or seeking a wetland redesignation. The agency produced a list that purported to identify all swampbuster violations from December 23, 1985, to April 15, 1989. This information was double-checked by NWF, which contacted the producers, local ASCS committees, or farm bill coordinators from the Fish and Wildlife Service. The study demonstrated that the ASCS's figures were extremely inaccurate and misrepresented the extent of agency enforcement. Confronted with NWF's results, the ASCS suspended its record-keeping practice. The agency promised to publish an updated summary of swampbuster statistics by 1990, but has not yet finalized the report. *Id.*

44. *Id.* During the same time period, the Department of Agriculture gave more than \$90 billion (full dollars) to American farmers in the form of federal subsidies. FEDERAL ASSISTANCE AWARD DATA SYSTEM, U.S. DEPARTMENT OF AGRICULTURE, CCC FEDERAL ASSISTANCE FY 1982-1989: SUMMARY BY STATE (1989).

45. Hair Letter, *supra* note 43. Wetlands in these areas provide critical breeding and wintering habitat for waterfowl, and are threatened by agriculture, industry, and other

April 1989, only six states had ever withheld agricultural subsidies as a result of swampbuster violations.<sup>46</sup>

#### A. ASCS County Committees

Lax enforcement is largely due to the organizational structure of the ASCS.<sup>47</sup> The primary responsibility for implementing swampbuster is in the hands of locally elected county committees, which frequently misconstrue, misapply, or ignore swampbuster in order to excuse farmers for wetland drainage. A wetland conservation analysis team made up of experts from the ASCS, SCS, FmHA, FWS, and the Environmental Protection Agency specifically found that ASCS county committees are reluctant to withhold farm program benefits.<sup>48</sup> The interagency team concluded that the purposes of swampbuster would be best achieved by replacing the committees with interagency review boards.<sup>49</sup>

The county committees' failure to fully enforce swampbuster is the result of several factors. First, the ASCS is institutionally biased — its original and primary function is to supervise the distribution of federal subsidies to farmers,<sup>50</sup> not to regulate environmental transgressors. ASCS employees are trained to administer farm programs and are more knowledgeable about agriculture than environmental protection. Naturally, they tend to sympathize with the concerns of their traditional constituency, the farm community. County committees are reluctant to penalize farmers for the sake of "newfangled" environmental ideals.

Second, committee members are sometimes personally biased. To be eligible to become a committee member, an individual must be a resident

land uses. See U.S. FISH AND WILDLIFE SERVICE/CANADIAN WILDLIFE SERVICE, WATERFOWL FOR THE FUTURE: THE NORTH AMERICAN WATERFOWL MANAGEMENT PLAN (1987). The Pacific flyway is one of four north-south migratory routes used by waterfowl in North America. See Ducks Unlimited, Ducks Unlimited in Your Flyway (1986).

46. Hair Letter, *supra* note 43. Those states are Indiana, Minnesota, New York, Pennsylvania, South Dakota, and Wisconsin.

47. Keith Bjerke, ASCS Administrator, characterizes this criticism of the local committees as "a bunch of bunk." According to Mr. Bjerke, "This American system of ours says that, No. 1, you are innocent until proven guilty. No. 2, you should be tried by a jury of your peers, not outside agitators. What is going on is best judged by local folks rather than outsiders." Brisbane, *A Farm Belt Fight Over Protected 'Potholes,'* Washington Post, Dec. 6, 1989, at A3.

48. Memorandum from Mike Hein, Chairman of the Wetland Conservation Analysis Team, to John B. Campbell, Deputy Under Secretary of the Department of Agriculture (Nov. 28, 1989) (discussing wetland protection and restoration recommendations for the Conservation Title of the 1990 Farm Bill) (available at the Prairie Wetlands Resource Center).

49. *Id.*

50. For an overview of the structure and function of the ASCS, see C. KELLEY & J. HARBISON, A LAWYER'S GUIDE TO ASCS ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW OF ASCS DECISIONS 4-18 (1990).

farmer of the county in which she is to serve.<sup>51</sup> Only farmers living in the county are entitled to vote in committee elections.<sup>52</sup> This arrangement, which asks members of the regulated community to enforce swampbuster, disfavors objective decision-making. County committees are hesitant to take actions that may harm friends or neighbors.

Third, ASCS personnel lack technical expertise in wetland issues. They receive little or no formal training enabling them to recognize wetlands or to determine the scope and effect of drainage systems. Nevertheless, it is the ASCS that is responsible for spot checking farms to ensure swampbuster compliance.<sup>53</sup>

Finally, committee members have little professional or financial incentive to enforce laws or regulations with which they disagree. Committee membership is a part-time position. The full-time farmers who sit on the committees are sometimes more concerned with maintaining their standing in the agricultural community than they are with losing a part-time job and a nominal pay check.

### B. Exemptions

Exemptions have been the most widely abused provisions of swampbuster. The Department of Agriculture currently grants five different exemptions which allow farmers to convert wetlands to cropland and continue receiving agricultural subsidies. The exemptions are known as the "commenced determination,"<sup>54</sup> "hardship exemption,"<sup>55</sup> "third party exemption,"<sup>56</sup> "good faith reliance exemption,"<sup>57</sup> and "minimal effects exemption."<sup>58</sup>

1. *Commenced Determinations.*—The exemption most frequently used to justify wetland drainage is the "commenced determination." Swampbuster provides that a producer who plants crops on a converted wetland remains eligible for agricultural subsidies if the conversion was begun prior to the enactment of the Food Security Act on December 23, 1985.<sup>59</sup> As of April 1989, the ASCS had received 5,259 requests for commenced determinations and granted 78% of the requests considered.<sup>60</sup> Many of

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51. 7 C.F.R. § 7.15 (1990).

52. *Id.* § 7.4.

53. *Id.* § 12.6(b)(4).

54. *See infra* notes 59-75 and accompanying text.

55. *See infra* notes 76-83 and accompanying text.

56. 7 C.F.R. § 12.5(d)(vi) (1990).

57. *See infra* notes 84-97 and accompanying text.

58. *See infra* notes 98-112 and accompanying text.

59. 16 U.S.C. § 3822(a)(1) (1988).

60. AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, SOD/SWAMP CUMULATIVE DATA REPORT FOR APRIL AND MARCH (1989).



the exemptions approved by the ASCS were not justified by swampbuster or its regulations.<sup>61</sup>

In a recently completed study, the Government Accounting Office (GAO) concluded that the ASCS frequently issued commenced determinations without appropriate documentation.<sup>62</sup> The GAO examined twenty-three approved commenced determination requests and found that in nine cases (39%), farmers had failed to submit evidence sufficient to justify an exemption.<sup>63</sup>

One particularly egregious commenced determination moved NWF to sue the ASCS in April 1989.<sup>64</sup> The action was the first legal challenge to the ASCS's administration of swampbuster. NWF sought to reverse an agency decision to exempt 6,500 acres of prairie wetlands in Bottineau County, North Dakota. A county drainage district had requested a commenced determination for a project known as the White Spur/Stone Creek drainage project.<sup>65</sup> Although none of the prerequisites to a commenced determination was met,<sup>66</sup> an accommodating county committee exempted every wetland in the 139-square mile assessment area.<sup>67</sup> The district court dismissed the action for want of standing,<sup>68</sup> finding that

61. The Environmental Law Institute characterizes the issuance of commenced determinations as "problematic," noting that the ASCS often grants the exemption even if the literal requirements of the regulations are not met. ENVIRONMENTAL LAW INSTITUTE, *supra* note 41, at 33.

According to the Soil and Water Conservation Society, "there seems little doubt that county committees were lenient in granting commenced determinations." SOIL & WATER CONSERVATION SOCIETY, *supra* note 27, at 42.

62. GENERAL ACCOUNTING OFFICE, FARM PROGRAMS: CONSERVATION COMPLIANCE PROVISIONS COULD BE MADE MORE EFFECTIVE 32-33 (1990).

63. *Id.*

64. National Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv., No. A4-89-067 (D.N.D. 1989). NWF's state affiliate, the North Dakota Wildlife Federation, is a co-plaintiff in the suit.

65. To obtain a commenced determination, a drainage district must establish, *inter alia*, that before December 23, 1985, it "started installation of the drainage measures, or legally committed substantial funds toward the conversion of wetlands by entering into a contract for the installation of [drainage measures] . . . or by purchasing construction supplies and materials for the primary and direct purpose of converting wetland." 7 C.F.R. § 12.5(d)(4)(ii) (1990).

66. The contract for the White Spur/Stone Creek drainage project was not executed until September 1988. Construction and the purchase of construction materials began after that date.

67. Letter from Ronald Deraas, Bottineau County ASCS Executive Director, to Clifford Issendorf, Chairman of the Bottineau County Water Resource District (Sept. 29, 1988) (Exhibit 1 to amended Complaint in *National Wildlife Federation*, No. A4-89-067).

68. *National Wildlife Federation*, No. A4-89-067, Memorandum and Order (Aug. 21, 1989).

NWF's members would not suffer an "injury in fact"<sup>69</sup> and that the injury was speculative.<sup>70</sup> The court also suggested that any injury threatening NWF or its members was outside the zone of interest protected by swampbuster.<sup>71</sup>

On appeal, the Eighth Circuit reversed the district court's dismissal.<sup>72</sup> In holding that NWF had standing to sue, the court made three principal findings. First, the injuries alleged by NWF — a reduction in soil moisture, adverse effects on water purity, and the destruction of wildlife habitat — are more than identifiable trifles; they are statements of specific harm that will be experienced by ascertainable individuals.<sup>73</sup> Second, the link between the wrongful issuance of a commenced determination and injury resulting from wetland drainage is not too speculative to support standing.<sup>74</sup> Third, landowners participating in farm programs are not the only individuals within the zone of interests the statute seeks to protect: "The Swampbuster provisions, on their face, establish the goal of decreasing the conversion of private wetland into cropland in order to help preserve, for the Nation and its citizens, the beneficial attributes of wetlands."<sup>75</sup>

Although the court did not decide the merits of the case, the Eighth Circuit's decision concerning the threshold issue of standing has important implications. Allowing nonfarmers to sue the ASCS injects some accountability into the administration of swampbuster. It is now clear that "outsiders" have a legitimate interest in farm programs and the environmental effects of agricultural subsidies. The decision also serves notice to drainage districts and other drainers that questionable swampbuster exemptions cannot always be relied upon. Persons who intend to convert wetlands must consider the cost of litigation and the possibility of having invalid exemptions reversed by a federal court.

2. *Hardship Exemptions.*—A related, but separate, exemption allows DASCO to grant a commenced determination to an otherwise ineligible producer upon a showing that "undue economic hardship will result

69. *Id.* slip op. at 4. The court concluded that only those persons directly affected by the ASCS's decision (the drainage district and the landowners) would suffer injury sufficient to support standing.

70. The court noted that "landowners may not decide to drain wetlands on their property regardless of the exemption." *Id.*

71. *Id.* In effect, the district court ruled that environmental organizations and other concerned citizens could never obtain judicial review of improper swampbuster exemptions.

72. *National Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv.*, 901 F.2d 673 (8th Cir. 1990).

73. *Id.* at 677.

74. *Id.* at 677-78.

75. *Id.* at 678.

because of substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland.”<sup>76</sup> During NWF’s lawsuit, the ASCS changed its rationale for exempting the White Spur/Stone Creek drainage project. The agency maintained that the commenced determination was “arguably” justified, but that the more “appropriate” basis on which to decide the case was the so-called “hardship” provision.<sup>77</sup> This mid-litigation turnabout was the first occasion on which the ASCS granted “hardship” relief.<sup>78</sup> The agency has since used the provision to exempt other large, politically popular drainage projects.<sup>79</sup>

NWF amended its complaint to address the ASCS’s new theory. In addition to arguing that the hardship exemption was arbitrary and capricious,<sup>80</sup> NWF alleged that the ASCS violated the National Environmental Policy Act (NEPA)<sup>81</sup> by failing to prepare an environmental impact statement (EIS).<sup>82</sup> Many swampbuster exemptions are ministerial in the sense that farmers meeting certain criteria are entitled to an exemption. In the Eighth Circuit, ministerial decisions are not subject to NEPA.<sup>83</sup> The hardship exemption, however, involves a discretionary act on the part of the ASCS — the agency must weigh the hardship of the landowners if an exemption is denied, against the environmental damage if it is granted. In other words, the ASCS must determine whether economic

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76. 7 C.F.R. § 12.5(d)(5)(iv) (1990).

77. Letter from Keith Bjerke, ASCS Administrator, to Murray Sagsveen, attorney for the Bottineau County Water Resource District (Aug. 1, 1989) (Exhibit 3 to amended complaint in *National Wildlife Federation*, No. A4-89-067) [hereinafter Bjerke Letter].

78. Some commentators have questioned the ASCS’s authority to grant hardship exemptions. See ENVIRONMENTAL LAW INSTITUTE, *supra* note 41, at 34 n.39.

79. In North Dakota, hardship relief was granted to the Heimdal drainage project, Oak Creek drainage project, Wells County Drain #1, and Crystal Lake Drain #6. Each of these projects had previously been denied commenced determinations for all or a portion of the proposed drainage. Letter from Keith Bjerke to the Wells County [North Dakota] Water Resource District Board (Sept. 25, 1989).

80. The ASCS found that \$65,000 was spent before December 23, 1985. The agency justified its decision by noting that the drainage district and landowners would be deprived the benefit of their investment if hardship relief were denied. The ASCS did not determine that any particular person would suffer financial hardship as a result of that expenditure. Bjerke Letter, *supra* note 77.

81. 42 U.S.C. §§ 4321-4370a (1988).

82. Under NEPA, federal agencies are required to prepare and circulate for public and interagency comment a detailed draft and final environmental impact statement for major federal actions significantly affecting the quality of the human environment. *Id.* § 4332(2)(C).

83. See, e.g., *Goos v. I.C.C.*, 911 F.2d 1283, 1296 (8th Cir. 1990) (holding that the Interstate Commerce Commission’s issuance of a certificate permitting the conversion of a railroad corridor to a recreational trail was ministerial, and that a NEPA review was therefore unnecessary).

hardship is, in fact, "undue." This is precisely the sort of discretionary decision in which a NEPA review is appropriate. The ASCS should consider the environmental consequences of its actions and the alternatives to environmentally harmful hardship exemptions. The preparation of an EIS would help ensure that the ASCS does not use its equitable authority thoughtlessly or for improper purposes.

3. *Good Faith Reliance Provision.*—Although the commenced determination has been the most frequently misused section of swampbuster during the past five years, a regulation known as the "good faith reliance" provision<sup>84</sup> threatens to undermine the statute in future years. The rule enables the ASCS to make price support payments to producers who innocently and reasonably violate the terms of an ASCS farm program while relying on the misrepresentations of a county or state ASCS committee.<sup>85</sup> This provision, promulgated twenty years before the passage of swampbuster, was adopted by reference when the Department of Agriculture published the final swampbuster regulations.<sup>86</sup>

In April 1989, the ASCS relied on this rule to exempt eighty-five acres of wetlands in Yellow Medicine County, Minnesota.<sup>87</sup> The Minnesota State ASCS committee had previously granted the Yellow Medicine River Watershed District a commenced determination for a project known as Ditch 18. The ASCS Administrator found that the exemption was improper and reversed the decision, but decided to treat wetlands drained in the

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84. 7 C.F.R. § 790.2 (1990).

85. The regulation states:

(a) Notwithstanding any other provision of law, performance rendered in good faith in reliance upon action or advice of any authorized representative of a county committee or State committee as defined in Part 719 of this chapter, may be accepted . . . as meeting the requirements of the applicable program, and price support may be extended or payment may be made therefor in accordance with such action or advice to the extent it is deemed desirable in order to provide fair and equitable treatment.

(b) The provisions of this part shall be applicable only if a producer relied upon action or advice of a county or State committee or an authorized representative of such committee in rendering performance which the producer believed in good faith met the requirements of the applicable program. The authority provided in this part does not extend to cases where the producer knew or had sufficient reason to know that the action or advice of the committee or its authorized representative upon which he relied was improper or erroneous, or where the producer acted in reliance on his own misunderstanding or misinterpretation of program provisions, notices or advice.

*Id.*

86. See 7 C.F.R. § 12.11 (1990).

87. Letter from Vern Nepl, Acting ASCS Administrator, to Kevin Stroup, attorney for Ditch 18 petitioners (Apr. 14, 1989).

interim as if they were exempt from swampbuster. NWF and several other plaintiffs<sup>88</sup> contested the ASCS's decision in federal district court.<sup>89</sup>

Plaintiffs argued that the ASCS lacked authority to invent administrative exemptions. Swampbuster creates an almost absolute prohibition against public subsidization of wetland conversion: "Except as provided in section 3822 of this title and notwithstanding any other provision of law, following December 23, 1985, any person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible" for certain farm program subsidies.<sup>90</sup> As the statute unambiguously states, the only exceptions to the general rule are found in the "Exemptions" section.<sup>91</sup> That section does not establish an exemption for farmers who rely on erroneous ASCS advice, nor does it authorize the ASCS to create additional exemptions.

Plaintiffs also contended that it was arbitrary and capricious for the ASCS to grant equitable relief under the circumstances of the case. The good faith reliance provision is applicable only when a producer reasonably relies on the misrepresentations of the ASCS and believes in good faith that her actions comply with the requirements of an ASCS farm program.<sup>92</sup> The administrative record showed that project proponents chose to drain wetlands knowing the commenced determination might be invalid and that the ASCS was reviewing the exemption.<sup>93</sup>

In September 1990, the district court granted the ASCS's cross-motion for summary judgment and dismissed the case.<sup>94</sup> The court found a rational basis for the ASCS's conclusion that the "project was practically completed before petitioners were notified of the action rescinding the state committee's determination."<sup>95</sup> The district court did not address

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88. The other plaintiffs are the Minnesota Conservation Federation, the Izaak Walton League of America, and Leon Carney.

89. *National Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv.*, No. 3-89-674 (D. Minn. filed Oct. 11, 1989).

90. 16 U.S.C. § 3821 (1988).

91. *Id.* § 3822.

92. 7 C.F.R. § 790.2(b) (1990).

93. The "smoking gun" was a letter from the attorney for the project petitioners advising his clients that an ASCS official had questioned the validity of the commenced determination. He specifically warned the petitioners of the danger of proceeding without additional assurances from the ASCS. Letter from Kevin Stroup to All Ditch 18 Petitioners (Apr. 25, 1988) (available at the Prairie Wetlands Resource Center).

94. *National Wildlife Federation*, No. 3-89-674, Order (Sept. 5, 1990).

95. *Id.* at 3. Plaintiffs did not dispute that wetlands were drained prior to the reversal of the commenced determination. Rather, plaintiffs questioned whether the drainage district was legally justified in proceeding with construction under the circumstances of the case. As the Department of Agriculture clearly foresaw when it published 7 C.F.R. § 790.2, there is a difference between reliance and reasonable reliance.

plaintiffs' argument that the agency exceeded its statutory authority. The district court's order is currently on appeal to the Eighth Circuit.<sup>96</sup>

Whatever the outcome, this action will likely establish a significant precedent. In response to increasing criticism of its administration of swampbuster, the ASCS recently conducted a nationwide review of exemption decisions. The ASCS examined 986 commenced determinations that were granted without consultation with the FWS. The agency found that 556 exemptions (56%) were improperly approved.<sup>97</sup> However, the ASCS has not decided whether to reverse the exemptions outright, or to treat the affected wetlands as if they were exempt under the good faith reliance provision. Presumably, the Eighth Circuit's opinion will weigh heavily in the decision-making process.

4. *Minimal Effects Exemptions.*—The SCS, rather than the ASCS, has regulatory authority over a fourth and often controversial swampbuster exemption. The statute provides that the Secretary of Agriculture may exempt a producer "for any action associated with the production of an agricultural commodity on converted wetland if the effect of such action, individually and in connection with all other similar actions authorized by the Secretary in the area, on the hydrological and biological aspect of wetland is minimal."<sup>98</sup> The Secretary delegated the administration of the "minimal effects" exemption to the SCS,<sup>99</sup> which has granted the exemption with relative restraint.<sup>100</sup> Nevertheless, attempts have been made to liberalize the minimal effects provision to accommodate agricultural drainage. Thus far, the most ambitious effort has occurred in North Dakota.

In 1987, North Dakota passed a drainage law protecting a farmer's ability to remove water from her land while affording some protection to wetlands.<sup>101</sup> The statute permits a farmer to convert any wetland to

96. *National Wildlife Fed'n v. Agricultural Stabilization and Conservation Serv.*, No. 90-5483MN (8th Cir. filed Sept. 21, 1990).

97. AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, REPORTS ON COMMENCED DETERMINATIONS: NOTICE CP-373 (1990).

98. 16 U.S.C. § 3822 (1988).

99. 7 C.F.R. § 12.6(c)(2)(vi) (1990).

100. As of October 1989, the SCS had granted only 171 minimal effects exemptions affecting fewer than 3,000 wetland acres. SOIL CONSERVATION SERVICE, *supra* note 42.

101. The law, inappropriately called the "North Dakota no-net-loss" law, is found at N.D. CENT. CODE §§ 61-32-01 to -11 (Supp. 1989). A policy statement reveals the priorities of the legislature:

The legislative assembly finds that agriculture is the most important industry in North Dakota and that agricultural concerns must be accommodated in the protection of wetlands. Wetlands can be a hindrance to farming practices. Even though property taxes are generally paid on such lands, wetlands provide limited economic return to the landowner. Wetland policies can obstruct water development and water management projects, and can affect other developments.

*Id.* § 61-32-01.

cropland, but requires mitigation in some circumstances.<sup>102</sup> In practice, private drainage is recorded as a debit in the state wetland bank, and restoration projects of the government or nonprofit organizations such as Ducks Unlimited are counted as mitigation. The drainer is required to pay only 10% of the estimated mitigation costs.<sup>103</sup> In November 1989, the North Dakota State Engineer's Office and the state office of the SCS agreed to use the minimal effects exemption in conjunction with the state drainage law.<sup>104</sup> In brief, they agreed that farmers who convert wetlands to cropland would be able to obtain a minimal effects exemption by using restored wetlands in the state wetland bank as mitigation.

NWF promptly criticized the arrangement as unlawful, and threatened to sue the SCS.<sup>105</sup> NWF observed that there is little legal support for such an expansive interpretation of the minimal effects exemption.<sup>106</sup> Neither the legislation nor the final rules suggest that mitigation can be used to compensate for drainage that has more than a minimal effect on wetlands. NWF also argued that the agreement was inconsistent with a sound public policy.<sup>107</sup> Swampbuster was intended to prevent wetland drainage and to reduce the nation's surplus of agricultural commodities.<sup>108</sup> Allowing private parties to convert wetlands to cropland and use publicly funded restoration projects as mitigation undermines both purposes. In

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102. The mitigation requirement applies only to wetlands with a watershed area exceeding 80 acres. *Id.* § 61-32-03.

103. *Id.* § 61-32-04(4).

104. SOIL CONSERVATION SERVICE, NATIONAL FOOD SECURITY ACT MANUAL pt. 512, amend. ND13 (1989).

105. The FWS also responded to the agreement, but its reaction was mixed. Region 6 of the FWS, which includes North Dakota, defended the generous use of minimal effects exemptions. Regional Director, Galen Buterbaugh, suggested it was in the best interest of the resource to work with farmers and permit drainage that "landowners believe is necessary for their farming operations." Letter from Galen Buterbaugh, Regional Director, to John Turner, Director of the FWS (Mar. 16, 1990). A less pacific Region 3 "adamantly opposed" the agreement and warned it would establish an "extremely dangerous precedent." Letter from James Gritman, Regional Director, to John Turner, Director of the FWS (Mar. 8, 1990).

106. Letter from Jay Hair, President of NWF, to Wilson Scaling, Chief of the SCS (Mar. 26, 1990). In the preamble to the final rules, the Department of Agriculture specifically rejected the proposal that mitigation be used routinely to justify minimal effects determinations: "[T]he rule has not been changed to allow the production of agricultural commodities on converted wetland to be exempted categorically through the mitigation of the loss of fish and wildlife values." The Department acknowledged that mitigation might be appropriate in "limited" circumstances, but emphasized that "the legislative intent for the minimal effect determination is that it should rarely be used." Preamble to the Highly Erodible Land and Wetland Conservation Final Regulations, 7 C.F.R. pt. 12 (1990).

107. Letter from Jay Hair, *supra* note 106.

108. *See* 7 C.F.R. § 12.1.

essence, it requires the taxpayer to subsidize private drainage, then pay for its mitigation.

In a victory for conservationists, the SCS rescinded the agreement after two meetings involving state and federal officials and other concerned parties.<sup>109</sup> The SCS also established "sideboards" limiting the circumstances in which credits in a wetland bank can be used to justify a minimal effects exemption.<sup>110</sup> Notably, these sideboards became the basis for amendments to the minimal effects exemption in the 1990 farm bill. The exemption now allows farmers to drain wetlands if they restore wetlands of comparable size and ecological value.<sup>111</sup> The new provision is subject to certain conditions that are expected to limit the number of exemptions requested. For instance, only frequently cropped wetlands are eligible to be drained, the restored wetland must be in the same general area of the local watershed as the converted wetland and must be protected by easement, and the restoration cannot be financed by the federal government.<sup>112</sup>

### C. *Wetland Delineations*

Although most critics of swampbuster implementation have focused on exemptions, improper delineations pose a far greater threat to the nation's wetland base.<sup>113</sup> The alarming consequences of "overlooking" wetlands are best illustrated by recent events in Kansas.

In early 1990, the Kansas Department of Wildlife and Parks (DWP) discovered that the SCS had identified only three wetlands in a seven-county area of southwest Kansas.<sup>114</sup> These counties are part of the playa lakes region, an area known to contain tens of thousands of temporary and seasonal wetlands.<sup>115</sup> The DWP was skeptical of the SCS's inventory,

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109. Letter from Wilson Scaling, Chief of the SCS, to Ronnie Clark, North Dakota State Conservationist (Apr. 25, 1990).

110. *Id.*

111. Pub. L. No. 101-624, § 1422, 104 Stat. 3359 (1990).

112. *Id.*

113. The SCS is responsible for identifying wetland areas subject to swampbuster. 7 C.F.R. § 12.6(c) (1990). For example, the SCS must conduct a wetland inventory before a farmer may receive federal subsidies. *Id.* § 12.7(a).

114. The counties are Stevens, Morton, Hamilton, Stanton, Gray, Kearny, and Seward. Letter from Charles Lee, Kansas Dept. of Wildlife & Parks, to Tony Turrini (July 23, 1990).

115. Playas are shallow, circular depressions formed during the Pleistocene by wind erosion. They have been described as "islands of wildlife habitat in a sea of intensive agriculture." U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, PLAYA LAKES REGION WATERFOWL HABITAT CONCEPTION PLAN: CATEGORY 24 OF THE NORTH AMERICAN WATERFOWL MANAGEMENT PLAN 1 (1988). The playa lakes region includes portions of Texas, Kansas, New Mexico, Oklahoma, and Colorado. *Id.* at 3.



especially because the FWS reported 5,846 wetland basins in those same counties.<sup>116</sup> Despite the DWP's repeated requests, the state office of the SCS refused to redo its wetland inventory.<sup>117</sup>

In September 1990, the SCS elevated the issue to its national office in response to NWF's criticism of the wetland inventory and a FOIA request submitted in anticipation of litigation.<sup>118</sup> The agency assembled a national review team to conduct a field investigation of wetland determinations in southwest Kansas. After reviewing several counties, the team concluded that the concerns of NWF and the DWP were well founded.<sup>119</sup> State SCS personnel had committed several chronic errors during the inventory process, and wetlands had indeed been grossly underestimated. The national review team recommended, *inter alia*, that wetland mapping conventions be revised to account for the unique characteristics of playa wetlands, that the state SCS office redelineate wetlands in southwest Kansas and any other part of the state where similar inventory errors were made, and that the DWP and FWS be fully involved in future efforts to delineate wetlands.<sup>120</sup> The SCS has since adopted the recommendations of the review team.<sup>121</sup>

Although the agency finally took measures to correct the mistakes of its state office, the situation underscores the danger of misidentification. If the DWP had not monitored the activities of the SCS and then insisted on a redetermination, tens of thousands of acres of wetlands would have been improperly excluded from the protection of swampbuster. Moreover, there is a very real possibility that this was not an isolated incident. The review team concluded that errors in Kansas occurred because the national

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116. Memorandum from Charles Lee to Tony Turrini (Sept. 19, 1990) (interpreting U.S. FISH AND WILDLIFE SERVICE, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL WETLANDS INVENTORY (1987) (draft inventory maps)).

117. Letter from James Habiger, Kansas State Conservationist, to Joel Kramer, Chief of the Fisheries and Wildlife Division, Kansas Department of Wildlife and Parks (Apr. 10, 1990).

118. The request sought all records pertaining to wetland delineations in southwest Kansas, with particular emphasis on documents describing the conventions and methodologies used by the SCS to identify wetlands. Letter from Anthony Turrini, counsel to NWF's Prairie Wetlands Resource Center, to R. Mack Gray, Acting Chief of the SCS (Aug. 30, 1990).

119. Report from the National Review Team to R. Mack Gray, Acting Chief of the Soil Conservation Service (undated) [hereinafter Report from National Review Team]. After watching ducks flush from a "nonexistent" playa, an exasperated team leader stated: "When I see standing water, waterfowl use and wetland plants, I have to think that these are wetlands." Comment of Billy Teels, SCS National Biologist (Sept. 25, 1990).

120. Report from National Review Team, *supra* note 119.

121. Personal communication from Gerald Root, Acting Director of the SCS Conservation Planning Division (Nov. 30, 1990).

and state offices provided inadequate training and guidance.<sup>122</sup> The implication is that the same defect may have tainted wetland delineations in other parts of the country.

It should be noted that the SCS's acknowledgement of delineation problems does not insure that Kansas playas are protected by swampbuster. The 1990 farm bill provides that "No person shall be adversely affected because of having taken an action based on a previous [wetland] determination by the Secretary."<sup>123</sup> The legislative history suggests that producers who drain wetlands while reasonably relying on improper wetland delineations may be exempt from swampbuster.<sup>124</sup>

## V. CONCLUSION

In 1985, environmentalists heralded swampbuster as an innovative and much-needed effort to protect the nation's dwindling wetland base. That enthusiasm waned as it became apparent that the Department of Agriculture was either unwilling or unable to vigorously enforce the law. We now have a new farm bill and a significantly amended swampbuster. Overall, the wetland conservation provisions are probably stronger than their predecessors, but are also more complicated, subjective, and technical. The result is that the Department of Agriculture will exercise far greater discretion than before. For the first time, it will evaluate the "good faith" of violators,<sup>125</sup> impose graduated penalties,<sup>126</sup> and approve mitigation efforts.<sup>127</sup> The amendments to swampbuster will provide new opportunities for administrative abuse. It is up to concerned citizens — and the courts — to persuade the Department of Agriculture that a strong, effective swampbuster is in society's best interest.

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122. Report from National Wetlands Review Team, *supra* note 119.

123. Pub. L. No. 101-624, § 1422, 104 Stat. 3359, 3573 (1990).

124. H.R. CON. REP. NO. 916, 101st Cong., 2d Sess. 911, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 4656, 5436.

125. Under certain circumstances, a person who converts a wetland "in good faith and without the intent to violate the provisions of [swampbuster]" will be eligible for a reduced penalty. Pub. L. No. 101-624, § 1422, 104 Stat. 3359 (1990).

126. If the Secretary of Agriculture determines that a swampbuster violator is eligible for a graduated sanction, she will "reduce by not less than \$750 nor more than \$10,000, depending on the seriousness of the violation, program benefits" the violator would otherwise be entitled to receive. *Id.* Under the former law, a violation resulted in the loss of all farm program benefits, regardless of the blameworthiness of the violator or the magnitude of the infraction. 16 U.S.C. § 3821 (1988). Critics of swampbuster referred to this provision as the "drop dead" penalty.

127. Pub. L. No. 101-624, § 1422, 104 Stat. 3359 (1990).

