

# Legal Issues in Enforcing Federal Soil Conservation Programs: An Introduction and Preliminary Review

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## INTRODUCTION

The Food Security Act of 1985 (Act) included a conservation title with four programs representing the nation's most innovative and aggressive attempt to address soil erosion and related problems.<sup>1</sup> Legislators built the provisions on several innovative regulatory and policy concepts never used in an integrated fashion. For the first time, the Nation targeted soil conservation efforts on the most seriously eroding cropland, utilizing long-term land retirement contracts to protect soil and to reduce surplus crop production, and conditioning continued federal farm program benefits on adopting and implementing a soil conservation plan.<sup>2</sup> The programs include: (1) Sodbuster, which denies

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<sup>1</sup> See Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, 1504-1518, 16 U.S.C. §§ 3801-3845 (1988).

<sup>2</sup> For an excellent discussion of the history of the enactment of these provisions, see Malone, *An Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve*, 34 U. KAN. L. REV. 577 (1986). For a discussion of several issues in implementing the programs, see Malone, *Conservation at the Crossroads: Reauthorization of the 1985 Farm Bill Conservation Provisions*, 8 VA. ENVTL. L. J. 215 (1989); Malone, *The Renewed Concern Over Soil Erosion: The Current Federal Programs and Proposals*, 10 J. AGRIC. TAX'N & L. 310 (1989). Other articles have analyzed the programs. See, e.g., *The Conservation Reserve: A Bold Step Towards the Future*, 31 S.D.L. REV. 523 (1986); Comment, *Land Use Related Restrictions and the Conservation Provisions of the Food Security Act of 1985: Sodbuster and Swampbuster*, 11 U. ARK. LITTLE ROCK L. J. 553 (1988-).

farm program benefits to persons converting highly erodible land (HEL) to crop production; (2) Swampbuster, which denies benefits to persons converting wetlands to cropland; (3) Conservation Compliance, which requires use of a conservation plan on highly erodible cropland after 1990; and (4) The Conservation Reserve Program (CRP), which seeks to retire forty-five million acres of erosive cropland from production for ten year periods. Enactment of these programs reflected the work and thoughts of many conservation, farm, and environmental groups, as well as congressional leadership.<sup>3</sup>

Since passage in 1985, the U.S. Department of Agriculture (USDA) has begun implementing these programs and literally every farm in America is feeling the impact. Over thirty-three million acres have been accepted into the conservation reserve program in more than 300,000 contracts with individual landowners. Farmers have written more than 1.3 million conservation plans covering ninety-nine percent of the 118 million acres of highly erodible cropland in production. All remaining wetlands are now protected, and individual determinations of wetland status have been made on thousands of farms. While much work has been done to implement the new provisions, regulators must complete much more, including all wetland determinations by 1991 and implementing the million plus conservation plans by 1995. As the USDA has implemented the conservation provisions, the complexity, regulatory rigor, and legal impact of the programs are being felt. The legal impact of these programs on the actions of individual farmers across the country is perhaps the law's most significant effect. Whether the issue is the determination that a wetland cannot be converted to producing crops without losing benefits, that HEL must be farmed pursuant to a conservation plan, or that a producer violated the terms of a CRP contract triggering refund of rental and cost sharing payments, issues such as these create significant legal issues for farmers, landowners, and the attorneys representing them. As a result, a vital need exists to under-

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<sup>3</sup> Many groups contributed policy proposals and scientific research to help refine and to focus national soil conservation programs. For example, in 1984 the National Research Council's Board on Agriculture, at the request of the SCS, conducted a research program using information available from the National Resources Inventory (NRI) to improve conservation programs. *See COMMITTEE ON CONSERVATION NEEDS AND OPPORTUNITIES, BOARD ON AGRICULTURE, NATIONAL RESEARCH COUNCIL, SOIL CONSERVATION: ASSESSING THE NATIONAL RESOURCES INVENTORY 1-2* (1986). The Board on Agriculture recently formed a committee to study implementation of the 1985 provisions, the impact on local economies, and how policymakers can integrate water quality protection goals into future conservation and commodity programs.

stand the operation and consequences of the soil conservation enforcement provisions.

This Article reviews the legal authority underlying these programs, the Act, the regulations, the agency manuals, and the documents farmers sign, to identify important relationships existing between the farmer and the USDA. After this review, the Article explains the significant legal rules these programs create. Next, the Article considers the administrative procedures used by the Agricultural Stabilization and Conservation Service (ASCS) and the Soil Conservation Service (SCS), the two agencies responsible for implementing and enforcing the provisions, and reviews mechanisms for decisionmaking and appeals procedures for aggrieved farmers seeking review of adverse decisions that provide farmers and their lawyers with opportunities to influence the enforcement process. Next, the Article considers a selection of important legal questions that arise in operating these programs. Finally, the Article discusses the limited jurisprudence of the Nation's Soil Conservation Enforcement Program.<sup>4</sup>

#### I. PURPOSES OF THE CONSERVATION ENFORCEMENT PROVISIONS

The soil conservation enforcement provisions rest on a four-part legal structure for implementation. First, the statute provides underlying guidance for creating and operating the programs. Second, the SCS and ASCS regulations implement the programs. The most important regulations appear in 7 C.F.R. Part 12 concerning "Highly Erodible Land and Wetland Conservation."<sup>5</sup> Third, the legal documents and contracts that farmers participating in federal commodity programs must sign provide another method of applying these regulations to the actions of the Nation's farmers. These documents include the commodity program

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<sup>4</sup> While some of the provisions this Article discusses apply to the CRP, the Article focuses on the Sodbuster, Swampbuster, and Conservation Compliance provisions ("conservation enforcement provisions"). The Article is a preliminary analysis because many of the potential issues have not been considered yet.

<sup>5</sup> The SCS and the ASCS first promulgated part 12 as interim rules on June 27, 1986. *See* 51 Fed. Reg. 23,496 (1986). The USDA received almost 2700 letters containing 8400 comments on the proposed rules. The agencies promulgated the final rules on September 17, 1987. *See* 52 Fed. Reg. 35,194 (1987) (codified at 7 C.F.R. § 12-12.33). Parties interested in understanding the reasoning behind the rules, especially the agencies' attitude toward entertaining exceptions, should read the introductory comments and discussion in the September 17, 1987 publication. *See* 52 Fed. Reg. 35,195-35,200 (1987). The USDA revealed its views on a variety of potential enforcement issues that do not appear in the official publication of the rules in the Code of Federal Regulations.

participation contract, the conservation plan, the required annual conservation certification, and the cost sharing agreement required if public funds are used to implement conservation practices. Fourth, the office manuals and handbooks the agencies use in day-to-day implementation of the programs provide authority for fine interpretation of issues.<sup>6</sup> Only by working through the materials in these four levels of authority is one able fully to understand and appreciate the legal dynamics at work in enforcing the soil conservation programs.

The regulations implementing the conservation enforcement provisions set out the purposes of the programs. They provide that:

[T]he purposes of the provisions are in part to remove certain incentives for persons to produce agricultural commodities on highly erodible land or converted wetland and to thereby —

1. reduce soil loss due to wind and water erosion,
2. protect the Nation's long-term capability to produce food and fiber,
3. reduce sedimentation and improve water quality,
4. assist in preserving the nation's wetlands, and
5. curb production of surplus commodities.<sup>7</sup>

The programs prohibit producing commodities on HEL not formerly in production (sodbusting) and draining or converting wetland to cropland (swampbusting). After 1990, SCS provisions require that if a producer who farms HEL that was in production when Congress passed the Act wants to remain eligible for federal farm program benefits, the land must be farmed pursuant to a conservation plan. The SCS develops the "conservation plan" with the farm operator, who agrees to adopt and implement soil conservation and farm management practices necessary to protect the soil.<sup>8</sup> Penalties for violating these three restrictions include not only losing eligibility for federal price and income supports under the commodity programs and refund payments in the year of violation, but the loss of eligibility for many other federal farm programs, including loans from the Farmers Home Administration, disaster payments, federal crop insurance, and farm storage facility loans.<sup>9</sup>

At first blush the soil conservation enforcement provisions seem strict but reasonable. They maintain a tradition of voluntary compliance that has defined the history of U.S. soil conservation efforts since their in-

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<sup>6</sup> See, e.g., Field Office Technical Guide (containing standards for writing farm conservation plans).

<sup>7</sup> 7 C.F.R. § 12.1(b) (1989).

<sup>8</sup> For a discussion of conservation plans and how the SCS develops the plans, see text accompanying *infra* notes 34-41.

<sup>9</sup> 16 U.S.C. § 3811 (1988).

ception in the 1930s. It is important to recognize that it is not plowing land or draining swamps that triggers penalties and ineligibility under the conservation law. However, those actions, particularly draining wetlands, may violate other applicable state or federal environmental protections laws.<sup>10</sup> The impact of the Act is that if a farmer drains wetlands or farms HEL to plant commodities subject to farm program benefits, then no benefits are received for that land. Thus, the Act uses the economic leverage of conditioning farm program benefits to obtain compliance with the provisions. Because it is producing "an agricultural commodity on a field on which highly erodible land is predominate"<sup>11</sup> or producing an agricultural commodity "on converted wetland"<sup>12</sup> that triggers program ineligibility, one must comprehend the definitions of "highly erodible land" and "converted wetland" to understand the operation of the provisions.

## II. DEFINING "HIGHLY ERODIBLE LAND"

The statute<sup>13</sup> and the regulations<sup>14</sup> define "highly erodible land." In general, HEL is farm land subject to erosion that cannot restore itself.

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<sup>10</sup> For an example of a farmer facing prosecution for violating § 404 of the Clean Water Act, which requires a permit to drain a wetland, see *U.S. v. Akers*, 785 F.2d 814 (9th Cir. 1986). For an excellent review of wetland law as it applies to agriculture, see Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property*, 34 U. KAN. L. REV. 539 (1986).

<sup>11</sup> 16 U.S.C. § 3811 (1988). Congress developed the Conservation Reserve Program (CRP) partly to salvage soil conservation gains when economic forces encourage increased production. The enforcement of conservation laws rests on the economic importance of federal farm program benefits. Consequently, those programs become vulnerable when the farm program benefits are less important. This occurs in periods of shortage and high demand.

<sup>12</sup> *Id.* § 3821.

<sup>13</sup> The statute defines "highly erodible land" as land

(i) that is classified by the Soil Conservation Service as class IV, VI, VII, or VIII land under the land capability classification system in effect on December 23, 1985; or

(ii) that has, or that if used to produce an agricultural commodity, would have an excessive average annual rate of erosion in relation to the soil loss tolerance level, as established by the Secretary, and as determined by the Secretary through application of factors from the universal soil loss equation and the wind erosion equation, including factors for climate, soil erodibility, and field slope.

*Id.* § 3801(a)(7)(A).

<sup>14</sup> The regulations define "highly erodible land" as "land that has an erodibility index of 8 or more." 7 C.F.R. § 12.2(a)(14) (1989).

Two types of HEL exist. The first, "highly erodible cropland,"<sup>15</sup> includes land that farmers began farming before Congress passed the Act, referred to as "cropped HEL." The second is HEL that farmers have not converted yet. The sodbuster provision treats the two types of land quite differently. Farmers can convert unfarmed HEL to cropland and retain eligibility for farm program benefits only if the land is farmed pursuant to an SCS-approved conservation plan. Under the plan, potential soil loss cannot exceed  $T$ , the value representing the soil loss tolerance rate, or the rate at which the soil is believed to regenerate itself. For cropped HEL, farmers had until January 1, 1990, to develop a soil conservation plan and have until January 1, 1995, to "comply with the plan" without losing program eligibility. In other words, the Act gave farmers five years to adopt a conservation plan and five more years to "actively apply" the plan.<sup>16</sup>

Further, the regulations treat cropped HEL differently than newly converted HEL in one other important way. As noted, the conservation plan for newly converted HEL must satisfy an erosion protection standard, " $T$ ," "designed to control soil losses to a level that will attain or approximate the soil loss tolerance level."<sup>17</sup> However, conservation plans for cropped HEL only must satisfy the standards of the SCS field office technical guide. Under these locally developed guides, soil loss is not based on  $T$ , and the actual level of soil protection may exceed  $2T$ . This variation in treatment means the difficulty of complying with a conservation plan for this lower level of protection becomes much less costly for the farmer. However, it also means the level of soil protection may be less.

Determining the level of erosion protection to require for cropped HEL conservation plans was perhaps the most significant and controversial policy development in implementing the sodbuster program. When policymakers first proposed the regulations in 1986, the standard for all conservation plans was  $T$ , expressed as "the reduction of soil loss to a level not in excess of the soil loss tolerance level established for the soil."<sup>18</sup> However, the SCS could write the plan to  $2T$  if it determined

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<sup>15</sup> 16 U.S.C. § 3801(a)(6) (1988).

<sup>16</sup> The statute provides an exception to these time guidelines if the SCS has not completed a soil survey for the farm. In those cases, the farmer has two years from completing the soil survey or the statutory time guidelines, whichever occurs later. *Id.* § 3812(a)(2). However, "completed soil survey" refers only to the cropland portion of a farm, not the entire farm. SCS policy requires completing farm soil surveys as the resources become available. *See* Fed. Reg. 35,196 (1987) (not codified in C.F.R.).

<sup>17</sup> 7 C.F.R. § 12.23(a) (1989).

<sup>18</sup> 51 Fed. Reg. 23,504 (1986); *cf.* 7 C.F.R. § 12.5(b)(2) (1989).

"through the application of reasonable judgment of local professional soil conservationists and after considering the economic consequences in establishing requirements for measures to be included in conservation plans, that reduction of soil loss on such land to a lower level is impracticable."<sup>19</sup> The SCS proposed giving local authorities discretion to alter the protection level at which plans were written depending on the economic consequences for the producer. However, this proposed relief sparked a controversy within the conservation and environmental community, where the exception was perceived as gutting the level of soil protection achievable under the plans. At the same time, the proposal evoked complaints from farmers that conservation compliance would remain too costly. The language was so controversial that, in the summer of 1987, the USDA promulgated a proposed interim rule separate from the main regulations, asking for comments.<sup>20</sup> The USDA's proposal, which developed the current language, noted:

The Act does not prescribe "T" value standards for soil loss reductions for conservation plans and systems. Rather, it promotes a scientific and professional approach to solving soil erosion problems. The lack of specific standards in the Act itself, in addition to relevant legislative history, suggests that the Department should have the latitude to adopt and apply locally developed standards to implement the Act.

To achieve the practical goals of soil loss reductions as contemplated by the Act, and in a manner which effects fair and reasonable determinations of ineligibility, this amendment to the interim rule substitutes the use of required conservation systems as provided by the Soil Conservation Service (SCS) field office technical guides as opposed to reliance on soil loss tolerance levels characterized by "T" values.<sup>21</sup>

Thus, the SCS moved away from strictly using *T* values, criticized by some as unscientific,<sup>22</sup> and toward using the SCS field office technical guides as the basis for writing conservation plans.

Determining which land receives the lower level of erosion protection that results from the difference in treatment between cropped HEL and newly sodbusted HEL is an important issue. The statute provides farmers had until January 1, 1990, to adopt a conservation plan on land: "(A) cultivated to produce any of the 1981 through 1985 crops of an agricultural commodity; or (B) set aside, diverted or otherwise not cultivated under a program administered by the Secretary for any crops

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<sup>19</sup> 51 Fed. Reg. 23,504 (1986); cf. 7 C.F.R. § 12.5(b)(3) (1989).

<sup>20</sup> See 52 Fed. Reg. 24,132 (1987) (codified at 7 C.F.R. § 12.5 (1989)).

<sup>21</sup> *Id.* at 24,133 (citations omitted).

<sup>22</sup> See Johnson, *Soil Loss Tolerance: Fact or Myth?*, 42 J. SOIL & WATER CONSERVATION 155 (1987).

to reduce production of an agricultural commodity.”<sup>23</sup> This straightforward rule for classifying land focused on two issues. Either the farmer raised an agricultural commodity during the time in question or had idled the land under an existing commodity program. The Act defines agricultural commodity as “any agricultural commodity planted or produced in a State by annual tilling of the soil, including tilling by one-trip planters” or “sugarcane planted and produced in a State.”<sup>24</sup>

The question of how to treat farmers who planted HEL with alfalfa as part of a long-term rotation using forage crops, arose under the rule. The SCS held that “[a]lfalfa, other legumes or grasses are not tilled annually and thus do not meet the definition of an agricultural commodity.”<sup>25</sup> Thus, even though a person raised alfalfa on HEL during 1981 to 1985, planting the land after 1986 to a commodity could trigger the sodbuster penalties. The SCS does allow farmers to use alfalfa as part of a residue cover program under a conservation system for a farm.<sup>26</sup> In April 1987, Congress attempted to resolve the dispute over alfalfa production and sodbusting by passing an amendment providing that if a farmer planted alfalfa on HEL each year from 1981 to 1985 as part of a rotation practice, the farmer had until June 1, 1988, to comply with a conservation plan, without facing program ineligibility under the sodbuster provisions.<sup>27</sup>

### III. DEFINING A “WETLAND”

The concept of “wetland” appears straightforward, including land with the characteristics of swamps, marshes and pot holes.<sup>28</sup> However,

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<sup>23</sup> 16 U.S.C. § 3812(a)(1) (1988).

<sup>24</sup> *Id.* § 3801(a)(1).

<sup>25</sup> 52 Fed. Reg. 35,196 (1987).

<sup>26</sup> *See id.*

<sup>27</sup> *See* Food Security Act of 1985, Pub. L. No. 100-28, § 2, 101 Stat. 291 (1987) (amending 16 U.S.C. § 3812(b)) (also referred to as 1985 Farm Bill); *see also* 52 Fed. Reg. 35,196 (1987) (discussing amendment); 7 C.F.R. § 12.5(b)(2) (1989).

<sup>28</sup> Regulations define “converted wetland” as:

[W]etland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity without further application of manipulations described herein if

- (i) such production would not have been possible but for such action; and
- (ii) before such action land was wetland and was neither highly erodible land nor highly erodible cropland.

7 C.F.R. § 12.2(a)(6) (1989).



because wetland may exist on land not exhibiting these features, the determination of which land qualifies as wetland may prove the most controversial provision of the Act. The statute defines "converted wetland"<sup>29</sup> and "wetland," the latter by focusing on two physical and biological characteristics, the predominance of hydric soils and the prevalence of hydrophytic vegetation, adapted to living in saturated soil conditions.<sup>30</sup> The Act defines hydric soil as "soil that, in its undrained condition, is saturated, flooded, or ponded long enough during the growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation."<sup>31</sup> The Act defines "hydrophytic vegetation" as "a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content."<sup>32</sup> The regulations provide the same definitions and add very important mechanisms and criteria for identifying hydric soils and determining the prevalence of hydrophytic vegetation.<sup>33</sup> The characterization and identification of HEL or wetlands is one of the fundamental regulatory efforts under the Act and has proven to be one of the most controversial. Because these functions

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<sup>29</sup> The statute defines "converted wetland" as:

Wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if

- (i) such production would not have been possible but for such action; and
- (ii) before such action
  - (I) such land was wetland; and
  - (II) such land was neither highly erodible land nor highly erodible cropland.
- (B) Wetland shall not be considered converted wetland if production of an agricultural commodity on such land during a crop year
  - (i) is possible as a result of a natural condition, such as a drought; and
  - (ii) is not assisted by an action of the producer that destroys natural wetland characteristics.

16 U.S.C. § 3801(a)(4) (1988).

<sup>30</sup> The statute defines "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." *Id.* § 3801(a)(16).

<sup>31</sup> *Id.* § 3801(a)(8).

<sup>32</sup> *Id.* § 3801(a)(9).

<sup>33</sup> See 7 C.F.R. § 12.31 (1989) (providing criteria to identify wetland).

are essentially scientific, responsibility for them lays with the SCS.

#### IV. ROLE OF CONSERVATION PLANS

Complying with the soil conservation enforcement provisions is voluntary. They apply only when a farmer applies for any farm program benefits in the Act. As a result, producers farming HEL may: (1) forfeit their eligibility for farm program benefits, by either converting new HEL without a conservation plan or by not adopting a conservation plan for cropped HEL; or (2) maintain eligibility for federal farm program benefits by adopting required conservation plans for HEL or by refraining from sodbusting. The regulations refine the statutory exemptions in the Act, providing that no person becomes ineligible for program benefits by producing an agricultural commodity on HEL "if such production is in compliance with an approved conservation plan or conservation system."<sup>34</sup> When conservation plans and soil protection standards become necessary, the plans and standards differ for cropped HEL and HEL, as noted above. Producers with wetland do not have the option of converting the wetland to cropland pursuant to a conservation plan. Because the Act protects wetland from crop production, to preserve farm program eligibility, farmers must not convert wetland to cropland.

The conservation plan plays a pivotal role in shaping a farmer's actions. The regulations define a "conservation plan" as "a document containing the decisions of a person with respect to location, land use, tillage systems and conservation treatment measures and schedule which, if approved, must be or have been established on highly erodible cropland in order to control erosion on such land."<sup>35</sup> Part of this definition comes from the 1987 congressional amendment adding the alfalfa exception. That Act contained the language that, "In carrying out this subsection, the Secretary, Soil Conservation Service, and local soil conservation districts shall minimize the quantity of documentation a person must submit to comply with this paragraph."<sup>36</sup>

Conservation plans play an important role in preserving a farmer's program eligibility and forwarding the Nation's conservation programs' goals. Thus, how policymakers and farmers develop and draft conservation plans to various levels of soil protection becomes critical. If farmers must farm pursuant to a conservation plan, the terms of the plan be-

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<sup>34</sup> *Id.* § 12.5(b) (implementing language of 16 U.S.C. § 3812 (1988)).

<sup>35</sup> *Id.* § 12.2(a)(4).

<sup>36</sup> Food Security Act of 1985, Pub.L. No. 100-28, § 3, 101 Stat. 291, 292 (1987) (amending 16 U.S.C. § 3812(a)(2)).

come a primary regulatory mechanism for influencing farmer behavior. As previously noted, the standards for developing conservation plans appear in the SCS field office technical guide. The regulations require policymakers to base conservation plans "on and in conformity with" the guide. As previously discussed, the plan's regulatory standards or the goals of the conservation compliance program are different for cropped HEL in production prior to December 23, 1985, and sodbusted land, defined as land that is converted from natural vegetation after that date. For cropped HEL, applicable conservation systems in the field office technical guide "are designed to achieve substantial reductions in soil erosion, taking into consideration economic and technical feasibility and other resource related factors."<sup>37</sup> For HEL "converted from native vegetation, i.e., rangeland or woodland, to crop production after December 23, 1985, the applicable conservation systems in the field office technical guide are designed to control soil losses to a level that will attain or approximate the soil loss tolerance level."<sup>38</sup>

The USDA received many comments on the interim rules concerning conservation plan requirements and the role of local conservation districts in plan approval. In addition, questions arose about responsibility for developing conservation plans and farmers' ability to develop plans themselves or to use other private experts. The discussion in the preamble to the current rules provides important guidance in understanding the conservation planning process and answers several related questions. It provides:

Landowners and operators are responsible for making land use and conservation treatment decisions concerning their land and for compliance with the Act. The function of the soil conservationist is to identify acceptable conservation (treatment) system alternatives and to provide this and other relevant information of the landowner or operator. This process provides maximum flexibility in terms of format and content of the plan, the conditions under which a plan is to be revised, the types of resource concerns that can be addressed in the plan, and how the plan is prepared. A plan may be prepared solely by the person, or with assistance of SCS, or with assistance of a private consultant. When a conservation plan is prepared by parties other than SCS, the person must obtain SCS certification that the plan meets SCS standards and obtain the approval of the conservation district.<sup>39</sup>

Developing a conservation plan raises the issue of which parties must sign the plan and know its contents. This issue becomes important for

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<sup>37</sup> 7 C.F.R. § 12.23(a) (1989).

<sup>38</sup> *Id.*

<sup>39</sup> 52 Fed. Reg. 35,198 (1987) (not codified in C.F.R.).

two reasons in tenant-landlord relations and in borrower-lender situations where a mortgage or contract for sale on the property exists. First, the conservation plan may force the producer to establish conservation practices by a fixed deadline. Second, failing to comply with the plan may trigger farm program ineligibility. This ineligibility runs with the land for future owners or operators until someone implements a satisfactory conservation plan, and it may affect the land's value. For example, suppose a tenant farming HEL under a four-year renewable lease signed a conservation plan in 1989 committing to install a series of conservation improvements, such as grass waterways and terraces, by 1993. But in 1992, the tenant does not renew the lease because of the cost of the practices and a dispute with the landlord over who would bear the cost. In 1993, the landlord recovers the land with an unimplemented conservation plan, facing the possibility of liability for violating conservation compliance. Should the landlord have had the right to see the conservation plan and to agree to it when the tenant and the SCS signed it, considering the temporary nature of the tenant's interest?

The SCS manual concerning the implementation of conservation plans states that the SCS will approve a plan if it "is signed by the landowner or person having control of the land for at least the time period of the crop rotation and conservation practice installation period that is specified in the plan to indicate that the conservation plan documents decisions made by the person."<sup>40</sup> However, discussions with soil conservation officials point to confusion in applying this provision. At least in some states, the SCS's practice has allowed tenants to sign conservation plans for the land they farm even if they do not have long-term leases. Landowners may not have been required to sign and may not even know the contents of the plans. The importance of the requirement to develop and comply with conservation plans and other enforcement provisions of the Act means that parties to a lease should address them in the terms of a farm lease.<sup>41</sup>

Banks holding mortgages on agricultural property that obtain the property through settlement or foreclosure only to find that the conservation plan committed the landowner to unimplemented, expensive practices, face similar concerns. Failure to comply might brand the property out-of-compliance and ineligible for farm programs. Anyone

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<sup>40</sup> FOOD SECURITY ACT MANUAL § 511.44(b)(5) (2 ed. Aug. 1988).

<sup>41</sup> For a discussion of this issue and related issues arising in connection with the growing role of farm tenancy in influencing farming, see Hamilton, *Adjusting Farm Tenancy Practices to Support Sustainable Agriculture*, 12 J. AGRIC. TAX'N & L. (1990) (forthcoming).

with a substantial interest in the property, especially landlords, should have the opportunity to see the plan, if not to sign it. The issue represents just one of the many operational wrinkles that Congress and the USDA may need to address as implementing the conservation enforcement provisions matures. Of course similar difficulties arise if the party converts a wetland to cropland.

A related issue, readily apparent to property lawyers, concerns how compliance with a conservation plan, or the presence of HEL or wetland, relate to preparing a title opinion for agricultural property. If the presence of HEL or wetland, and its subsequent treatment, determines the land's eligibility to participate in federal farm programs, these factors might affect the value of the property. The same is true for the presence of publicly funded soil conservation practices, which landowners must maintain. Another issue concerns a potential farmland purchaser's ability to inspect the soil conservation records of the farm in the SCS or ASCS office. SCS policy defines a conservation plan as a private document of the landowner, and another party may not see the plan without the landowner's permission. To help interested parties, such as potential purchasers who want to know what conservation practices are required on a farm, some county SCS offices maintain a book containing section maps designating HEL fields and the types of conservation practices required. As issues of soil conservation compliance assume greater economic importance, access to soil conservation records and statements concerning current farm program eligibility status will become important in negotiating any farmland transaction.

## V. A PRODUCER'S LEGAL COMMITMENTS

Participating in federal farm programs involves a number of legal commitments, beyond the terms of the Act, requiring a producer to comply with the conservation enforcement provisions. These include the contract to participate in the annual commodity programs, the annual conservation certification which farmers must sign when applying to participate in farm programs, and the regulations for implementing the programs. The language of these provisions is essential in understanding the "voluntary" legal commitment that a farmer makes to observing soil conservation laws. The language is particularly important because a violation or breach of these agreements would provide a direct basis for any administrative action against a producer.

### A. Contract

The contract a producer signs to participate in the annual price support and production control program includes several provisions committing the farmer to comply with the conservation enforcement requirements.

#### 1. Appendix to the Annual Commodity Program Contract

Paragraph eight of the 1989 Participation Contract Appendix, CCC-477, part of the contract every party applying to receive farm program benefits must sign, reads:

##### 8. Sodbuster/Swampbuster Provisions

- A. Each producer agrees not to produce any agricultural commodity on converted wetlands or on a field in which highly erodible land predominates except in so far as production of such commodities may be permitted in accordance with 7 C.F.R. Part 12.
- B. If there is a violation of paragraph 8 of this appendix, each producer who shares in such agricultural commodity shall refund any payments, loan or purchase amount received for all crops on all farms in which such person has an interest. Except as otherwise provided in paragraph 19 of this appendix, no liquidated damages shall be assessed.

#### 2. Annual Conservation Compliance Certification Form

Perhaps the most significant and potentially serious legal commitment the producer signs appears in the certification form that each producer must sign to receive benefits. This form, USDA Form AD1026 Highly Erodible Land and Wetland Conservation Certification, contains three different provisions committing the farmer to comply with the law and providing the legal basis for potential liability. First, a box at the top of the form notes that, "furnishing the other requested information is voluntary; however, failure to furnish the correct, complete information will result in determination of ineligibility for certain program benefits and other financial assistance administered by USDA agencies." The provision refers to the possible application of criminal and civil fraud statutes.

The signature line of part A contains the second commitment, "I hereby certify that the above information is true and correct to the best of my knowledge and belief." The "above information" refers to three questions concerning: (1) whether the farmer will produce any agricultural commodity on land not in production during 1981 through 1985; (2) whether the farm will produce any agricultural commodity on "a

wet area improved, drained, or modified, or converted after December 25, 1985;" and (3) whether the person plans to convert any wet areas for producing agricultural commodities this year. This section provides the ASCS with the ability to determine a farmer's intentions. If the farmer answers yes to any of the three questions, the farmer must request the SCS office to certify that the farmer will make the land conversion pursuant to a conservation plan and that no wetland violations will occur.

After the farmer receives the approval from the SCS, the farmer must fill out part C of the form, containing the third legal commitment. Entitled "Use Certification," part C, section thirteen sets out four clauses to which a producer agrees when signing the form. The provision states:

13. As a condition of eligibility for any USDA loans or other program benefits, I hereby certify that:
  - a. I will not produce an agricultural commodity on highly erodible fields (except fields that, in any crop year between 1981 and 1985, were used to produce any agricultural commodity or were enrolled in a USDA set-aside or diversion program); and I will not use the proceeds of any FmHA loan, insured or guaranteed, received after December 23, 1985, for a purpose that will contribute to production of an agricultural commodity on these highly erodible fields, as determined by SCS, unless an approved conservation system has been fully applied.
  - b. I will not produce an agricultural commodity on converted wetlands or use proceeds from any FmHA farm loan, insured or guaranteed, received after December 23, 1985, for a purpose that will contribute to the conversion of a wetland to produce an agricultural commodity, as determined by SCS.
  - c. I will not convert wetlands or bring new lands into production for the purpose of producing an agricultural commodity without first consulting all USDA agencies with which (1) I have a current contract or loan agreement, insured or guaranteed, or (2) I have a crop insurance contract issued by or reinsured by the Federal Crop Insurance Corporation.
  - d. USDA representatives may enter upon my land for the purpose of confirming any of the above statements.

The provisions clarify the significance of these commitments in providing an independent base for any future enforcement proceeding.

### 3. Farmers Home Administration Deed Restrictions

Another commitment binding a producer to comply with the soil conservation provisions appears in the agreements between the producer and the Farmers Home Administration (FmHA) when a farmer borrows funds or purchases property from the agency. Losing eligibility to

participate in FmHA federal lending programs is another consequence of violating the conservation enforcement provisions. The FmHA has at least three other ways it can impose an obligation to comply with the provisions. The 1985 Food Security Act authorized the agency to accept conservation easements from mortgaged property in exchange for debt relief. Prior to resale, the agency can place similar easements on property entering inventory through debt collection.<sup>42</sup> Each situation provides a simple way for the agency to make complying with the soil conservation laws a part of the easement restrictions. The agency also can impose such a restriction on any property it sells out of inventory, without placing it in the form of a conservation easement. For example, in Iowa, the FmHA uses the following deed restriction on property sold out of inventory:

As long as this property is to be used for farming purposes as defined in Iowa Code § 172C.1(6) (1985), the purchaser ("Grantee" herein) of the above described real property (the "subject property" herein) covenants and agrees with the United States acting by and through Farmers Home Administration (the "Grantor" herein) that the subject property must be farmed and or operated in accordance with an approved conservation plan that meets the requirements of the United States Department of Agriculture Soil Conservation Services "Field Office Technical Guide" as amended for the local conservation districts as provided in accordance with the Food Security Act of 1985. This covenant shall be binding on Grantee and Grantee's heirs, assigns and successors and will be construed as both a covenant running with the subject property and as an equitable servitude. This covenant will be enforceable by the United States in a court of competent jurisdiction.<sup>43</sup>

#### 4. Cost Sharing Obligations to Maintain Practices

Farmers signing a conservation plan agree to implement selected conservation practices pursuant to a set schedule. Farmers may receive assistance in paying the cost of these practices under the Agricultural Conservation Program (ACP), the main source of federal cost-sharing money for soil conservation efforts.<sup>44</sup> A producer accepting federal cost-

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<sup>42</sup> See 7 U.S.C. § 1997 (1988).

<sup>43</sup> Letter from Christopher Beyerhelm, FmHA, Iowa State Office to author (Nov. 22, 1989) (on file with author).

<sup>44</sup> See 16 U.S.C. §§ 590h-q (1988). The regulations for the ACP appear in 7 C.F.R. §§ 701.3-.26 (1989). In any year the USDA spends millions of dollars implementing soil conservation practices. In 1988 the USDA spent over \$360 million funding the technical services function of the SCS. Farmers spent over \$320 million constructing soil conservation practices. In 1988 the USDA spent over \$176 million under ACP cost-sharing.



sharing money signs a request for cost-sharing, which includes the following provision, in two different places:

If cost-sharing is approved for the practice requested, I agree to refund all or part of the cost-share assistance paid to me as determined by the local County Committee, if, before the expiration of the specified practice life-span, I (a) destroy the approved practice, or, (b) voluntarily relinquish control or title to the land on which the approved practice has been established and the new owner and/or operator of the land does not agree in writing to properly maintain the practice for the remainder of its lifespan.<sup>45</sup>

Similar restrictions often appear in state funded cost-sharing programs, also available for farmers who need assistance to implement needed soil conservation practices.<sup>46</sup> Such requirements protect the substantial public investment in implementing soil and water conservation practices. During the 1970s when farm land values increased rapidly, evidence indicated that some purchasers bulldozed publicly funded conservation practices, such as terraces and windbreaks, to irrigate or use larger machinery. These legal commitments may provide an independent basis for the government to take action against a farmer not complying with the soil conservation law.

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<sup>45</sup> USDA Request for Cost-shares, Form ACP-245 (approved Mar. 30, 1989). Regulations concerning this provision appear at 7 C.F.R. § 701.20 (1989).

<sup>46</sup> Iowa provides cost-sharing for soil conservation practices. See IOWA CODE § 467A.7(16) (1988 & Supp. 1989). The Iowa statute requires landowners to covenant to protect funded practices for 20 years as a condition for receiving cost-sharing funds. *Id.* This covenant does not run with the land, but is a personal charge against the owner of the land at the time any alteration or destruction occurs. *Id.* Iowa landowners must protect their soil from erosion, for example, by expending substantial funds when an enforcement action reveals violations of the state's established soil loss limits. *Id.* § 467A.43. The Iowa Supreme Court considered and upheld the constitutionality of state action requiring landowners to expend funds to protect their soil. See *Woodbury County Soil Conservation Dist. v. Ortner*, 279 N.W.2d 276 (Iowa 1979). For an excellent discussion of this case and the history of state cost-sharing efforts, see Comment, *Regulatory Authority to Mandate Soil Conservation in Iowa After Ortner*, 65 IOWA L. REV. 1035 (1980). An Iowa district court also considered an intriguing due process issue which might arise in federal efforts to enforce soil conservation programs. See *Dallas County Conservation Dist. v. Brooner*, No. 26162 (D. Iowa, Apr. 27, 1983). In a soil conservation enforcement proceeding, the court considered the due process sufficiency of relying on the Universal Soil Loss Equation, predicting, rather than measuring, actual soil loss. The defendant argued unsuccessfully that because the equation, also used in implementing federal soil conservation programs, did not show that his land violated state soil loss limits, the government could not base an enforcement action on the equation. The court considered the system using predicted loss valid and reliable as any system that science had devised.

### B. Regulations

The regulations implementing the conservation provisions offer an extensive basis for imposing the terms of the Act. The body of these rules appears in 7 C.F.R. Part 12. Related provisions appear in other USDA regulations. For example, the general regulations for operating the price support programs include: "Whenever a producer, or a person affiliated with a producer, is determined to be ineligible in accordance with Part 12 of this title, such producer shall be ineligible for any payments under this part and shall refund any payments already received in accordance with § 1413.103(e)."<sup>47</sup> These rules provide the administrative basis for integrating the soil conservation requirements with other USDA programs.

## VI. ADMINISTRATIVE DECISIONMAKING IN IMPLEMENTING SODBUSTER AND SWAMPBUSTER PROVISIONS

Success in implementing the soil conservation provisions depends on the USDA's ability to develop workable mechanisms to obtain farmer compliance with the provisions. Implementation will require USDA employees to reach a variety of decisions for literally every farm in the Nation. The administrative rules allocate decisionmaking responsibility for implementing the conservation enforcement provisions among the affected agencies, primarily the ASCS and the SCS, and secondarily, the FmHA, through its loan programs.

The ASCS's decisions include: whether the terms of a lease required the farmer to produce the crop on HEL;<sup>48</sup> whether the farmer commenced converting a wetland prior to December 23, 1985;<sup>49</sup> or whether a third party required the conversion.<sup>50</sup> Under the regulations, the agency selects a representative number of farms to "be inspected by an authorized representative of ASCS to determine compliance with any requirement specified" in the regulations as a prerequisite for obtaining benefits.<sup>51</sup>

The SCS is responsible for the determination of a number of issues, including: whether land is HEL, wetland or a converted wetland;<sup>52</sup>

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<sup>47</sup> Compliance with Sodbuster and Swampbuster Provisions, 7 C.F.R. § 1413.99 (1989).

<sup>48</sup> *Id.* § 12.6(b)(3)(vii).

<sup>49</sup> *Id.* § 12.6(b)(3)(viii).

<sup>50</sup> *Id.* § 12.6(b)(3)(ix).

<sup>51</sup> *Id.* § 12.6(b)(4).

<sup>52</sup> *Id.* § 12.6(c)(2)(i).

whether HEL predominates in a field;<sup>53</sup> whether the conservation plan a person is actively applying resulted from the local SCS field office technical guide and received approval from the agency;<sup>54</sup> whether producing an agricultural commodity on a wetland is possible as the result of a natural condition without action destroying the character of a natural wetland;<sup>55</sup> and whether producing agricultural commodities on a converted wetland will have only a minimal impact on the hydrological and biological aspects of the wetland.<sup>56</sup> Allocating decisionmaking responsibility is important for several reasons. First, the agencies' procedures may differ. Second, the county offices of the agencies may have different attitudes toward enforcing the soil conservation provisions, even though the offices are part of the USDA.

## VII. PRODUCER REQUESTS FOR DETERMINATIONS

Because the presence of HEL or wetland on a farm can significantly impact a farmer's actions, producers must learn whether their land subjects them to restrictions in the law. Under USDA procedures, a party can ask the SCS for HEL or wetland determination in writing on form AD-1026, and the SCS must respond in writing to the requesting person. The determination, made on form SCS-CPA-026, sets out a detailed record of the HEL and wetland history of the farm. The SCS bases its decisions on the information and farm records in the SCS office or on an on-site determination. The district conservationist first reaches decisions "based upon existing records or other information and without the need for an on-site determination"<sup>57</sup> within fifteen days of receiving the written request.<sup>58</sup> If the requesting person disagrees with the initial determination or if "adequate information is not otherwise available to the district conservationist, the SCS inspects the cite."<sup>59</sup> The on-site determination is to occur as soon as possible, but no later than sixty calendar days following a request, unless site conditions are unfavorable for evaluating the soils or vegetation. In that case, the SCS may delay the inspection until site conditions permit adequate evaluation.<sup>60</sup> The rules contain an interesting, common sense rule concerning

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<sup>53</sup> *Id.* § 12.6(c)(2)(ii).

<sup>54</sup> *Id.* § 12.6(c)(2)(iii).

<sup>55</sup> *Id.* § 12.6(c)(2)(v).

<sup>56</sup> *Id.* § 12.6(c)(2)(vi).

<sup>57</sup> *Id.* § 12.6(c)(4)(i).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* § 12.6(c)(4)(ii).

<sup>60</sup> *Id.* § 12.6(c)(4)(iii).

wetland on-site inspections. If the area subject to a wetland determination is continuously inundated or saturated during the growing season, preventing access by foot to determine the predominance of hydric soils or prevalence of hydrophytic vegetation, the SCS presumes the area is a wetland.<sup>61</sup> When a producer receives HEL and wetland determinations for a farm, the form advises that if the producer disagrees with any determination, a reconsideration may be requested. Requests for reconsideration may be common given the impact that a finding of HEL or wetland will have.

### VIII. APPEALING ADVERSE DECISIONS BY THE SCS

The regulations concerning administering the soil conservation provisions state that parties adversely affected by an SCS determination who believe the SCS improperly applied the requirements for wetland or HEL determinations may appeal "any determination by SCS."<sup>62</sup> The appeal provision states:

Any person who has been or would be denied program benefits in accordance with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeals procedure of the agency which rendered such determination.<sup>63</sup>

Section 12.4 refers to the SCS appeals procedure set out in 7 C.F.R. Part 614 and the ASCS appeals procedure set out in part 780.

The potential for a conflict exists between section 12.12 and the provisions of part 614 over the types of SCS decisions subject to appeal. The broad language of section 12.12 appears to authorize appeals of all SCS decisions under section 12.6(c). This section allows the SCS to review determinations, which predictably will be the subject of disputes and potential appeals, including: (1) whether a producer is actively applying a conservation plan to meet the conservation compliance provision, and (2) whether producing a commodity on a wetland can result from a natural condition without action destroying the character of a natural wetland.<sup>64</sup> However, the regulations appear to limit the issues the SCS may review, providing:

Requests for reconsideration or appeals under these procedures are limited to the following determinations:

(1) Highly erodible land determinations:

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<sup>61</sup> *Id.* § 12.6(c)(4)(iv).

<sup>62</sup> *Id.* § 12.6(c)(5).

<sup>63</sup> *Id.* § 12.12.

<sup>64</sup> *See id.* § 12.6(c)(2)(v).

- (i) The land capability classification of a field or a portion thereof;
  - (ii) The predicted average annual rate or [sic] erosion for a field or [sic] portion thereof;
  - (iii) The potential average annual rate of erosions for a field or portion thereof.
- (2) Wetland determinations:
- (i) The determinations that certain land is a "wetland", as defined by the Act;
  - (ii) The determination that certain land is a "converted wetland," as defined by the Act;
  - (iii) The determination of whether the conversion of wetland for the production of an agricultural commodity on such converted wetland will have a minimal effect on the hydrological and biological aspects of wetland.
- (3) The determination by a conservation district, or by a designated conservationist in those areas where no conservation district exists, that a conservation system or a conservation plan should not be approved.<sup>65</sup>

This language appears to significantly limit SCS decisions subject to review, even though conservation enforcement regulations state "any determination made in accordance with the provisions of this part" is reviewable. The significance of this conflict appears great given the controversial nature of the decisions the agency exempted from review under part 614. Thus, a possible issue in future SCS litigation concerns what determinations the agency may review and how the courts determine which appeal authority prevails.

7 C.F.R. Part 614 sets out available SCS appeals procedure, which is very similar and in some sections identical, to ASCS procedures in 7 C.F.R. Part 780. Because no reported case applying or interpreting part 614 exists, the similarities between the two sections may become important. While jurisprudence under part 780 concerning ASCS appeals is not extensive, courts have decided a significant number of cases addressing questions common to both agencies. Attorneys have litigated important questions concerning the due process sufficiency of part 780, including the finality of agency factual determinations, conflicts in federal court jurisdiction, and application of the Tucker Act to require that plaintiffs sue in the Court of Claims.<sup>66</sup> Finality and unavailability

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<sup>65</sup> *Id.* § 614.1(b).

<sup>66</sup> See Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs*, 12 HAMLINE L. REV. 633 (1989) (addressing legal issues arising in judicial considerations of ASCS appeals); Hamilton, *Farmers' Rights to Appeal ASCS Decisions Denying Farm Program Benefits*, 29 S.D.L. REV. 282 (1984) [hereafter *Farmers' Rights*] (addressing legal issues arising in judicial considerations of ASCS appeals); see also Linden, *An Overview of the Commodity Credit*

of judicial review for factual determinations, set out in 7 U.S.C. Section 1385, appear particularly important in the soil conservation context because many issues subject to appeal, such as determining wetland status, are factual.<sup>67</sup> Attorneys involved with SCS appeals should familiarize themselves with the ASCS appeals case law on those topics.

The SCS appeals procedure begins when the producer receives written notification of a determination, such as an HEL or wetland ruling. The determinations must contain "the basis for the determination, including all factors, technical criteria, or facts relied upon in making the determination."<sup>68</sup> Any owner or operator adversely affected by a determination may request a reconsideration by the person issuing the original determination, usually the county conservationist.<sup>69</sup> Reconsideration is perhaps the most significant step because it is the first opportunity for the farmer, represented by counsel, to receive a hearing and present a case. Farmers must request reconsideration in writing and support the request with a statement of facts.<sup>70</sup> Farmers must request reconsideration or appellate review within fifteen days of receiving notice of the adverse determination.<sup>71</sup> The agency generally does not impose this limitation. In fact, some states may allow forty-five days. However, meeting the fifteen day period ensures compliance.

If reconsideration is unsuccessful, the farmer may appeal to the next level of review in the agency.<sup>72</sup> Three levels of review exist above the county conservationist. These include the area conservationist, the state conservationist, and the Chief of the SCS in Washington, D.C. The chief's decision is the USDA's final decision. If unsuccessful, the farmer must pursue claims in federal court.

The appeals regulations provide that in a reconsideration, the owner or operator "may request an informal meeting."<sup>73</sup> For an appeal, the party may choose an informal hearing or an evaluation of a written statement.<sup>74</sup> Appeals to the chief are based only on the "administrative record developed in previous proceedings and relevant written state-

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*Corporation and the Procedures and Risks of Litigating Against It*, 11 J. AGRIC. TAX'N & L. 305 (1990) (discussing jurisdictional issues in suing the USDA).

<sup>67</sup> For a discussion of the finality cases, see *Farmers' Rights*, *supra* note 66, at 291-96.

<sup>68</sup> 7 C.F.R. § 614.3(a) (1989).

<sup>69</sup> *Id.* § 614.4.

<sup>70</sup> *Id.* § 614.7(a).

<sup>71</sup> *Id.* § 614.6(a).

<sup>72</sup> *Id.* § 614.5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* § 614.7(b).

ments.”<sup>75</sup> Further, “informal hearings will not be held at the Chief’s level.”<sup>76</sup> “Informal hearing” refers to the administrative hearing the party will receive. The “hearing shall be conducted by the reviewing authority in the manner deemed most likely to obtain the facts relevant to the matter at issue.”<sup>77</sup> The agency must advise the appealing party of all “issues involved,”<sup>78</sup> and the party or its “authorized representative shall be given full opportunity to present facts and information relevant to the matter in issue and may present oral or documentary evidence.”<sup>79</sup> The reviewing authority may request or permit other persons to give information or evidence and may permit the appealing party to question those persons.<sup>80</sup> After the hearing, the reviewing authority must prepare a written record containing a “clear, concise statement of the facts as asserted by the owner or operator and the material facts found by the reviewing authority.”<sup>81</sup> The party may request a transcript of the hearing by paying for it. The reviewing authority may make a transcript if it “feels that the nature of the case makes such a transcript desirable.”<sup>82</sup> After the reviewing authority completes its review, it may affirm, modify, or reverse any determination or remand the matter to a lower authority for further consideration.<sup>83</sup> The reviewing authority must notify the requesting party of its determination<sup>84</sup> and “clearly set forth the basis for the determination.”<sup>85</sup> Upon request, the reviewing authority must make available copies of any evidence or documents.<sup>86</sup>

The USDA’s position on who may appeal a decision states: “[U]nder the Act, only the person or persons who face the loss of eligibility for USDA program benefits are adversely affected and have a right to an administrative appeal.”<sup>87</sup> This position was developed in response to rule comments requesting that interested third parties be given the right to appeal any determination under the regulations. The USDA rejected that approach, but it can request third parties to present evidence at an

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* § 614.8(b).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* § 614.8(c).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* § 614.8(d).

<sup>82</sup> *Id.* § 614.8(d)(2).

<sup>83</sup> *Id.* § 614.9(b).

<sup>84</sup> *Id.* § 614.9(c).

<sup>85</sup> *Id.* § 614.9(d).

<sup>86</sup> *Id.* § 614.9(e).

<sup>87</sup> 52 Fed. Reg. 35,197 (1987) (not codified in C.F.R.).

appeal even though third parties are not a party to the appeal.

Who may appeal may become significant in several ways. For example, should the mortgagee on a tract of farmland subject to a swampbuster determination lowering its value be able to appeal? The regulations define "operator" as "the person who is in general control of the farming operations on the farm during the crop year."<sup>88</sup> This definition includes a tenant or sharecropper.<sup>89</sup> The regulations define "owner" as "a person who is determined to have a legal ownership of farmland and shall include a person who is purchasing farmland under contract."<sup>90</sup> While a contract purchaser could appeal, the mortgagee probably could not. SCS appeals regulations define "owner or operator" as:

[A]n individual, partnership, association, corporation, estate or trust, or other business enterprise or legal entity and, whenever applicable, a State, a political division of a State, or an agency thereof owning or operating a farm or ranch that has been determined by the designated conservationist, area conservationist, or the State conservationist to contain highly erodible land or wetland and whose right to participate in the Conservation Reserve Program or any agriculture commodity program is adversely affected by such determination.<sup>91</sup>

This definition apparently does not change the analysis concerning a mortgagee's right to appeal.

The right to appeal also affects persons who have an interest not in the farm, but in the agencies' decisions. For example, should an environmental group believing that the SCS is too lenient in determining wetland conversions prior to December 23, 1985, be able to appeal a ruling? This issue arose in a North Dakota case in which the National Wildlife Federation (NWF) sued the USDA. The federal district court dismissed the suit, holding that the NWF had no standing under the Act.<sup>92</sup> While the issue did not concern the group's ability to obtain jurisdiction under the administrative appeals process, it illustrated that other parties have interests in how the USDA implements the programs.

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<sup>88</sup> 7 C.F.R. § 12.2(a)(19) (1989).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* § 12.2(a)(20).

<sup>91</sup> *Id.* § 614.2.

<sup>92</sup> *National Wildlife Fed'n v. Agricultural Stabilization and Conservation Serv.*, Civ. No. A4-89-067 (D.N.D. 1989). The Eighth Circuit is considering the case on appeal. The NWF filed a similar case in Minnesota.



# IX. SOIL CONSERVATION ENFORCEMENT ACTIONS: MISCELLANEOUS ISSUES

In applying the soil conservation enforcement provisions, a variety of legal and interpretative issues might arise. In this Section, the Article considers a selection of these issues to illustrate the operation of the provisions and the unique nature of the legal questions arising under them. The Article first considers the range of enforcement related decisions the SCS and the ASCS might reach in administering the soil conservation provisions. Considering the range of decisions reveals the variety and magnitude of the potentially conflicting issues.

Possible adverse decisions under the soil conservation provisions include:

- a) Determining HEL status, thus requiring a conservation plan;
- b) Determining wetland status, prohibiting conversion to farmland without losing farm program benefits;
- c) Finding that converted, nonexempt, wetland is being farmed;
- d) Determining that non-disclosed sodbusting has occurred;<sup>93</sup>
- e) Determining that sodbusting disclosed on the AD-1026 form, occurred in violation of the Act because the farmer did not implement the required conservation plan;<sup>94</sup>
- f) Failing to adopt a conservation plan for cropped HEL by January 1, 1990;
- g) Failing to fully implement a conservation plan for HEL by January 1, 1995;
- h) Failing to actively apply a conservation plan pursuant to the agreed schedule, during the period January 1, 1990, to January 1, 1995;
- i) Determining that a conversion of a wetland commenced after December 23, 1985;
- j) Deciding that another's actions, including an affiliated person, or tenant, can be attributed to a producer, resulting in benefit loss; and
- k) Determining a producer's ineligibility for benefits because of one of the justifications listed above.

This nonexhaustive listing reveals the variety and range of decisions possible under the Act and illustrates the potential for disputes between

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<sup>93</sup> A producer sodbusting or swampbusting new ground probably has made a false statement on the form AD-1026 in response to questions concerning future planting intentions. Thus, the certification form provides independent and demonstrable evidence of any violation.

<sup>94</sup> In enforcing the commodity programs, the ASCS spot checks producer compliance on a certain percentage of farms every year. For farms revealing sodbusted land or the farming of HEL pursuant to a soil conservation plan, the ASCS sends form ASCS 569 to the SCS to determine whether the farmer is fully implementing the required conservation plan. If the SCS certifies that the farmer is not actively applying the plan, the producer faces ASCS enforcement proceedings and benefit loss.

farmers and the USDA, increasing the likelihood for appeals. The following discussion considers the legal basis for several significant issues leading to disputes between producers and the USDA under the soil conservation enforcement provisions.

#### A. *Action in Reliance on SCS Determinations*

The technical guidelines and manuals for implementing soil conservation provisions have been widely adopted and accepted by soil conservationists. The science behind SCS decisionmaking is considered to be very good. This does not mean that farmers do not disagree with the decisions. However, the basis for these decisions is uniformly applied across the nation. In the first years after Congress adopted the Act, there was some confusion in local SCS offices on issues such as HEL. To deal with this expected confusion and because producers rely on the agency's advice, the law contains several provisions sanctioning such reliance. For example, the statute exempts producing agricultural commodities

on highly erodible land that is planted in reliance on a determination by the Soil Conservation Service that such land was not highly erodible land, except that this paragraph shall not apply to any agricultural commodity that was planted on any land after the Soil Conservation Service determines that such land is highly erodible land.<sup>95</sup>

The regulations contain an identical exemption.<sup>96</sup> The regulations also contain a related provision stating that, "The provisions of Part 790 of this Title, as amended, relating to performance based upon the action or advice of a County Committee (COC) or State Committee (STC) shall be applicable to the provisions of this part."<sup>97</sup> The regulations provide that notwithstanding the provisions of the law, the agency may accept "performance rendered in good faith in reliance upon action or advice of any authorized representative" of a county or state committee as meeting the requirements of the applicable program.<sup>98</sup> The producer must have relied in good faith. The exception does not apply if 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

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<sup>95</sup> 16 U.S.C. § 3812(b)(4) (1988).

<sup>96</sup> See 7 C.F.R. § 12.5(c) (1989).

<sup>97</sup> *Id.* § 12.11.

<sup>98</sup> *Id.* § 790.2(a).

program provisions, notices or advice.”<sup>99</sup> While the regulations provide some “after-the-fact” enforcement flexibility for relying on information proven wrong, the county and state committees and their representatives and employees “do not have authority to modify or waive any of the provisions” for the programs.<sup>100</sup>

While the soil conservation regulations do not refer to part 791, a farmer might consider using it when a dispute exists concerning the understanding or application of the soil conservation enforcement provisions. These regulations<sup>101</sup> authorize the agency to provide equitable relief when the producer demonstrated a “good faith effort to comply fully with the terms and conditions of the program” and “rendered substantial performance.”<sup>102</sup> The agency might argue the inapplicability of this equitable relief provision in the soil conservation context because the soil conservation regulations do not specifically refer to part 791, as they do to part 790. Further, part 791’s applicability clause refers only to the various commodity price support programs. However, the argument may succeed when equitable relief seems appropriate.<sup>103</sup>

### *B. Others’ Actions Affecting a Farmer’s Conservation Eligibility*

Implementing and enforcing the soil conservation provisions may raise an issue concerning the impact of a third party’s action on a farmer’s eligibility status. The regulations address three important examples: (1) affiliated persons;<sup>104</sup> (2) tenants and landlords;<sup>105</sup> and (3) third parties, such as a drainage district, when they convert a wetland.<sup>106</sup> The basic premise is that if the farmer was not responsible for the decision to convert the land, the agency will not penalize the farmer. However, the rules contain very specific provisions imputing a third party’s actions to the farmer applying for benefits in certain situations.

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<sup>99</sup> *Id.* § 790.2(b).

<sup>100</sup> *Id.* § 1413.2(b).

<sup>101</sup> *See* Authority to Make Payments When There Has Been a Failure to Comply Fully with the Program, *id.* §§ 791.1-.3.

<sup>102</sup> *Id.* § 791.2.

<sup>103</sup> *See id.* § 791.1.

<sup>104</sup> *See id.* § 12.8.

<sup>105</sup> *See id.* § 12.9.

<sup>106</sup> *See id.* § 12.5(d)(vi).

## 1. Affiliated Persons

The regulations impute actions of affiliated persons “to the actions of the person who has requested benefits from the Department.”<sup>107</sup> “Affiliated persons” include:

- (1) The spouse and minor child of such person and/or guardian of such child;
- (2) Any corporation in which the person is a stockholder, shareholder, or owner of more than twenty percent interest in such corporation;
- (3) Any partnership, joint venture, or other enterprise in which the person has an ownership interest or financial interest; and
- (4) Any trust in which the person or any person listed in paragraphs (a)(1) through (a)(3) of this section is a beneficiary or financial interest.<sup>108</sup>

If the applicant is a legal entity, “any participant or stockholder therein, except for persons with a twenty percent or less share in a corporation, shall also be considered to be the person applying for benefits from the Department.”<sup>109</sup>

The “affiliated persons” rules broadly impute others’ actions to farmers applying for benefits. The best legal analogy is the rule concerning person determinations under the payment limitation provisions.<sup>110</sup> While the rules on affiliated persons apply a twenty percent interest test, the payment limitations rules define “substantial beneficial interest” as ten percent or more.<sup>111</sup> Applying the affiliated party rules will require parties involved in business organizations to take notice of the land clearing and cropping activities of their business colleagues.

## 2. Landlords and Tenants or Sharecroppers

Farm leases and tenancies also involve the actions of others. The regulations define landlord as “a person who rents or leases farmland to another person”<sup>112</sup> and define a tenant as:

[A] person usually called a “cash tenant,” “fixed-rent tenant,” or “standing rent tenant” who rents land from another for a fixed amount of cash or a fixed amount of a commodity to be paid as rent; or a person (other than a sharecropper) usually called a “share tenant” who rents land from another person and pays as rent a share of the crops or the proceeds therefrom.<sup>113</sup>

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<sup>107</sup> *Id.* § 12.8(a).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* § 12.8(b).

<sup>110</sup> *See id.* §§ 1497.1-28 (implementing payment limitation provisions).

<sup>111</sup> *Id.* § 1497.3(b).

<sup>112</sup> *Id.* § 12.2(a)(17).

<sup>113</sup> *Id.* § 12.2(a)(27). The rules require a tenant to meet this definition and to oper-

The rules for tenants and landlords provide that if the tenant or sharecropper becomes ineligible for benefits, the landlord does not lose eligibility for benefits on land unrelated to the tenant or sharecropper.<sup>114</sup> An exception subjects a landlord to a penalty if the farmer produced an agricultural commodity on HEL or converted wetland "under the terms and conditions of the agreement between the landlord and such tenant or sharecropper and such agreement was entered into after December 23, 1985, or if the landlord acquiesced in such activities by the tenant or sharecropper."<sup>115</sup> The ASCS has authority to make these determinations.<sup>116</sup>

### 3. Water Districts and Converting Wetlands

A third way the actions of others might render a farmer ineligible appears in the wetland conversion provisions. The regulations provide an exception to ineligibility for "wetlands converted by actions of persons other than the person applying for USDA program benefits or any of the person's predecessors in interest after December 23, 1985, if such conversion was not the result of a scheme or device to avoid compliance with this part."<sup>117</sup> However, the person may not improve drainage on the land unless the SCS determines that the improvement would minimally effect remaining wetland values.<sup>118</sup> The SCS begins its determinations presuming that the applicant converted the wetlands unless "the person can show that the conversion was caused by a third party with whom the person was not associated through a scheme or device."<sup>119</sup>

For third parties' actions, such as a drainage district's, the regulations include a restrictive limitation holding the producer responsible if the producer belongs to the district. The regulations provide:

[A]ctivities of a water resource district, drainage district or similar entity will be attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetlands are converted due to the actions of the district or entity, the person shall be considered to have caused or per-

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ate the farm pursuant to §§ 12.1-.12 and §§ 719.1-.14. *Id.* The rules define "operator" as a "person who is in general control of the farming operations on the farm during the crop year." *Id.* § 12.2(a)(19).

<sup>114</sup> *Id.* § 12.9(a).

<sup>115</sup> *Id.* § 12.9(b).

<sup>116</sup> *Id.* § 12.6(b)(3)(vii).

<sup>117</sup> *Id.* § 12.5(d)(1)(vi).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

mitted the drainage.<sup>120</sup>

#### 4. Schemes or Devices To Defeat Program Purposes

The final concept important in understanding how the rules impute others' actions to a farmer concerns operating a scheme or device. The agency may withhold all or part of an applicant's benefits or require the applicant to refund money if the applicant "adopts or participates in adopting any scheme or device designed to evade, or which has the effect of evading, the provisions of this part."<sup>121</sup> Activities constituting a scheme or device include:

- 1) Concealing from the Department any information having a bearing on the application of the HEL and wetland conservation provisions;
- 2) Submitting false information to the USDA;
- 3) Creating entities for the purpose of concealing the interest of a person in a farming operation; or
- 4) To otherwise avoid compliance with the HEL and wetland conservation provisions.<sup>122</sup>

This list includes "acquiescence in, approval of or assistance to acts which have the effect of, or the purpose of, circumventing these regulations for the production of an agricultural commodity."<sup>123</sup> This language is analogous to regulations concerning enforcement of the \$50,000 payment limitation.

#### C. Definition of "Actively Applying a Conservation Plan"

The issue of whether a producer is "actively applying" a conservation plan may arise before 1995. Some people in the farm community believe that merely adopting a conservation plan by January 1, 1990, ensures a five-year exemption before potential benefit loss under the Act for failing to implement the plan, because under the Act, farmers have until 1995 to fully implement the plan.<sup>124</sup> Some farmers also believe the USDA or Congress will relax the standards for plans before 1995. However, the Act clearly requires a producer to "actively apply[] a conservation plan" on HEL during the period between 1990 and 1995 or lose benefits.<sup>125</sup> The regulations recognize active application when "the plan is being applied according to the schedule specified in

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* § 12.10.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See supra* note 16.

<sup>125</sup> *See* 16 U.S.C. § 3812(a)(2) (Supp. 1989).

the plan and the applied practices are properly operated and maintained.”<sup>126</sup> The regulations require a farmer to:

- 1) Annually certify that the farmer is actively applying the conservation plan after January 1, 1990; and
- 2) Revise the conservation plan with the SCS if changes occur in land use, crop rotation or management, conservation practices, or in the original schedule of practice installation.<sup>127</sup>

These requirements reflect the producer’s commitment to perform the conservation plan.

The SCS probably will publish further regulations defining “active application.” Alternatively, the SCS may add definitions to its Food Security Act Manual. For parties whose conservation plans only requires changes in crop rotation, signing the annual certification may be all that is required to satisfy “actively applying the plan.” Conservation plans requiring parties to construct terraces or grass waterways, provide more opportunity to fail in applying the plan. The ASCS and the SCS can and will aggressively enforce the “actively applying” requirement. The factor limiting enforcement concerns whether the agency has the personnel necessary to spot check and inspect. Producers concerned about this issue should comply with any schedule-of-practice adoption appearing in the plan and notify the agencies in advance of any delay or change in ability to implement the plan.

To counter charges of not meeting the plan schedule, producers might claim insufficient cost-sharing funds to offset the cost of the practices. While this argument appears to have equitable merit and will undoubtedly garner political support, no legal basis exists for such a defense. Implementing and enforcing the conservation provisions do not depend on the availability of federal cost sharing. The USDA stated:

Some respondents suggested that compliance should be based on the availability of cost-share assistance, and that persons should receive payment for complying with the regulations.

USDA does not have the legislative authority to rescind or relax these conservation provisions or make compliance contingent on the availability of cost-share funds. However the Department has sought to implement and administer the Act’s requirements in a reasonable manner.

Furthermore, to the extent that cost-share funds are available, cost-share programs such as Agricultural Conservation Program (ACP), and Great Plains Conservation program (GPCP) may be utilized to apply required conservation treatment on highly erodible cropland.<sup>128</sup>

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<sup>126</sup> 7 C.F.R. § 12.23(d) (1989).

<sup>127</sup> *Id.*

<sup>128</sup> 52 Fed. Reg. 35,195 (1987).

Some officials argue that the agency should not provide cost sharing for practices that the Act requires because farmers must implement those practices anyway and because the agency should use cost-sharing money for additional conservation. Yet the USDA's language seems to negate this argument. However, the rules concerning the Agricultural Conservation Program offer some indirect support for the officials' view. The regulations provide that "the practices to be included in the State or county programs shall be only those practices for which cost-sharing is essential to permit accomplishment of the program objective."<sup>129</sup> Another regulation provides:

The maximum level of cost-sharing for each practice shall be the percentage of the average cost of performing the practice considered necessary to obtain needed performance of the practice, but at a level such that the participant will make a significant contribution to the cost of performing the practice.<sup>130</sup>

While this regulation contains legal support, decisions concerning availability of cost-sharing funds may become political, and availability of cost-sharing will allow the government to obtain producer compliance with the soil conservation provisions.

#### *D. Decisions Concerning Wetlands: Exceptions and "Commenced Conversions"*

Determining that a farmer converted wetland triggers the full force of the swampbuster law. The law punishes converting the land to cropland by revoking farm program benefit eligibility. Under the Act, five classifications of wetlands exist: natural wetlands (protected), abandoned wetlands (protected), converted wetlands (farming these lands can trigger ineligibility), farmed wetlands (limited protection), and prior converted wetlands (farmable and not protected).

Producing agricultural commodities on converted wetlands triggers immediate benefit ineligibility unless the producer qualifies for an exception under the Act.<sup>131</sup> The most important exception applies to wetlands "converted before, or for which conversion was commenced before, December 23, 1985."<sup>132</sup> For wetlands converted before 1985, farmers may maintain or improve the converted area, but may not improve additional wetland.<sup>133</sup> Converted wetland can regain protected

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<sup>129</sup> 7 C.F.R. § 701.12 (1989).

<sup>130</sup> *Id.* § 701.13(a).

<sup>131</sup> *See id.* § 12.5(d).

<sup>132</sup> *Id.* § 12.33(b); *see also* 16 U.S.C. § 3822(a) (1988); 7 C.F.R. § 12.5(d)(i) (1989).

<sup>133</sup> *See* 7 C.F.R. § 12.5(d) (1989).



status if the farmer abandons it for farming. Abandonment is defined as the "cessation of cropping, management or maintenance operations related to production of agricultural commodities."<sup>134</sup> Five years of inactivity lead to a presumption of abandonment, but abandonment can occur after one year if there is an intent to abandon farming.

Establishing December 23, 1985, as the date to determine when a farmer converted a wetland places a premium on establishing the history of land draining activities at that time. The inclusion of "commenced" in the Act to modify the conversion activity further complicated the issue by requiring the agency to promulgate regulations to interpret "commenced a wetland conversion."<sup>135</sup> The definition focuses on two factors: (1) whether physical activities enabling farmers to produce agricultural commodities such as draining, dredging, leveling, or other manipulations that make it possible to produce commodities "were actually started,"<sup>136</sup> and (2) whether the applicant "expended or legally committed substantial funds" for the conversion, either by contracting for installation or "by purchasing construction supplies and materials for the primary and direct purpose of converting the wetland."<sup>137</sup>

Because the actions of drainage districts may result in many "swampbusting" projects, the USDA developed special rules covering commencing conversions for drainage districts and similar entities.<sup>138</sup> Under these rules, the USDA considers converting wetlands within the boundaries of the district to have commenced before December 23, 1985, if the district can satisfy a three-part test. The test requires that:

- i) A project drainage plan setting out in detail the planned drainage measures [be] officially adopted; and
- ii) The district start[ ] installation of the drainage measures or legally commit[ ] substantial funds toward the conversion by entering into a contract of installation or purchase of supplies; and
- iii) The person applying for benefits . . . show that the wetland conversion was the basis of a financial obligation to the district prior to December 23, 1985, and that a specific assessment for the project of a legal obligation to pay a specific assessment was made as to the person's wetlands, prior to December 23, 1985.<sup>139</sup>

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<sup>134</sup> *Id.* § 12.33(b).

<sup>135</sup> *See id.* § 12.5(d)(4).

<sup>136</sup> *See id.* § 12.5(d)(3)(i) (defining commencement as beginning § 12.2(a)(6) activity).

<sup>137</sup> *Id.* § 12.5(d)(3)(ii).

<sup>138</sup> *See id.* § 12.5(d)(4).

<sup>139</sup> *Id.*

The date that a farmer begins converting wetland becomes critical in implementing the swampbuster rules. As a result, the USDA established a special procedure for these determinations.<sup>140</sup> Under this procedure, to receive an exemption, any person who believed the conversion of a wetland had commenced but had not been completed by December 23, 1985, had until September 19, 1988, to request the ASCS to determine commencement.

Rulings concerning drainage districts' prior conversions are controversial because the district's actions may cover large tracts of wetland and become visible examples of enforcing or not enforcing the Act.<sup>141</sup> As a result, the ASCS already has defended two lawsuits determining that drainage districts began converting wetlands prior to the December 23, 1985 deadline. The National Wildlife Federation sued the ASCS in North Dakota.<sup>142</sup> The district court dismissed the case, holding that only farmers adversely affected by agency determinations, not environmental groups, had standing to challenge "commenced conversion."<sup>143</sup> The plaintiffs appealed the decision. The same plaintiffs filed a similar challenge to a "commenced conversion" ruling in Minnesota.

Other wetland exceptions include:

- a) Production of agricultural commodities made possible on a wetland by a natural condition such as a drought, if possible without action that destroys natural wetland characteristics;
- b) Production of agricultural commodities on an artificial lake, pond or wetland created by non-wetland, diking or excavation for purposes such as collecting water for livestock, irrigation, fish or rice production, or flood control;
- c) Production on a wet area created by a water delivery system or in connection with irrigation; and
- d) Production of an agricultural commodity on a wetland when it is possible with only a minimal impact on the hydrological and biological aspect of wetlands.<sup>144</sup>

The exception concerning "minimal impact" triggered extensive discussion in the preamble of the final rules. Several comments suggested mitigating fish and wildlife values as an exemption. The SCS specifi-

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<sup>140</sup> *Id.* § 12.5(d)(5)(i).

<sup>141</sup> See Stone, *Pocahontas Challenges Drainage Ruling*, Des Moines Register, Jan. 11, 1990, at 2M; Brisbane, *A Farm Belt Fight Over Protected 'Potholes'*, Wash. Post, Dec. 6, 1989, at A3.

<sup>142</sup> See National Wildlife Fed'n v. Agricultural Stabilization and Conservation Serv., Civ. No. A4-89-067 (D.N.D. 1989).

<sup>143</sup> See *supra* note 92 and accompanying text.

<sup>144</sup> 7 C.F.R. § 12.5(d)(1) (1989). See also *id.* § 12.31(d) (providing rules for applying exceptions).

cally rejected these suggestions and stated the Act should encourage preserving *natural* wetlands rather than replacing them with *artificial* wetlands containing similar wildlife or fish values. As a result, the final rule adopts minimal impact as an "exception, rather than the rule."<sup>145</sup>

Another exception important to farmers, not appearing in the regulations, involves farmed wetlands. The idea of a farmed wetland is land on which there has been some manipulation, such as tilling, which allows a farmer to produce a commodity without removing all the wetland characteristics. Farmers can continue farming these wetlands, but cannot improve drainage beyond repairing it to the December 23, 1985 level.<sup>146</sup>

#### X. SCS HANDBOOKS AND MANUALS IMPLEMENTING THE PROVISIONS

Individuals attempting to understand the operation and administration of soil conservation programs or any other federal farm program should utilize the valuable handbooks and manuals developed by the SCS. These manuals can be critical to understanding the programs. The agency prepares this information for the office staff and agency personnel involved in day-to-day administration and implementation of the programs. The handbooks contain an organized restatement of the program regulations and other valuable information which the local staff can follow.<sup>147</sup> For example, the handbooks contain form letters the agency uses to notify producers of actions or determinations. Further, because producers raise many practical and individualized questions concerning their own farming operations at the local offices, the handbooks contain illustrations of how various program rules apply in different circumstances. The examples guide office personnel when deliberating over program interpretations. These factual examples also aid producers and their representatives in determining or predicting how the agency will respond to a particular set of facts.

The SCS utilizes three handbooks or manuals in implementing the conservation provisions of the Act. These include: (1) the field office technical guide to prepare conservation plans; (2) the Food Security Act

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<sup>145</sup> 52 Fed. Reg. 35,199-35,200 (1987).

<sup>146</sup> For a discussion of this exception, see, e.g., Johnson, *Swampbuster Rules Murky for Iowa farmers*, Iowa Farm Bureau Spokesman, July 29, 1989, p.9.

<sup>147</sup> *Westcott v. United States Dep't. of Agric.*, 622 F. Supp. 351 (D. Neb. 1984), *aff'd*, 765 F.2d 121 (8th Cir. 1985), addressed whether the Agency could use and rely on these manuals. The court held the manuals merely interpretive and not subject to formal notice and comment rulemaking. *Id.* at 357.

manual containing common provisions for implementing the conservation title of the Act (currently under revision); and (3) a wetlands identification manual, which the major agencies involved in wetland issues agreed to in 1989, including the SCS, the EPA, the Army Corp of Engineers, and the U.S. Fish and Wildlife Service. This manual consists of commonly agreed upon protocols for identifying wetlands, replacing the Fish and Wildlife Circular 39. The SCS wetlands regulations contain the most detailed regulatory provisions concerning identification of wetlands.<sup>148</sup> The manual adopts the SCS guidelines for this task. The protocol may result in some shifts in jurisdictions between agencies.

Parties involved in disputes over the conservation enforcement provisions should obtain copies of the manuals in preparing a defense. To obtain the manuals, a party may inquire first at the county office. Even if copies are unavailable, the party may read and copy the applicable sections. If the manuals are unavailable locally, one can obtain them by writing to: USDA, Management Services Division, 3096 So. Agriculture Building, P.O. Box 2415, Washington, D.C. 20013.

#### XI. HUMAN RESOURCES ON LEGAL ISSUES INVOLVING SOIL CONSERVATION ENFORCEMENT

Often the best assistance in understanding the workings of a governmental program involves speaking to individuals responsible for administering it. A number of individuals in the Washington offices of the USDA are responsible for implementing the conservation enforcement provisions. People with questions about interpreting and applying program rules to their situations should contact these individuals to receive authoritative guidance on problem issues. These individuals will address inquiries because they are public servants and because they would rather provide advice to resolve potential disputes in advance than face subsequent litigation or political controversy.<sup>149</sup>

In each state, valuable individuals in state offices of the ASCS and the SCS have state-wide responsibility to determine program interpre-

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<sup>148</sup> See 7 C.F.R. §§ 12.30-.33 (1989).

<sup>149</sup> Parties available to provide information include: (1) Stuart Shelton, Natural Resources division of the USDA Office of General Counsel, responsible for SCS legal determinations, (202) 447-5566; (2) Terry Jackson, USDA Office of General Counsel, responsible for ASCS legal determinations relating to soil conservation programs, (202) 447-5733; (3) Lloyd Wright, staff of the Chief of the SCS, responsible for wetland determinations, (202) 382-1853; (4) Karl Reinhardt, staff of the Chief of the SCS, responsible for sodbuster determinations, (202) 382-1841.

tation and compliance. A value, or danger, depending on one's perspective, of federal farm programs, is that the programs are administered in a somewhat informal and personal manner. While this provides opportunities to resolve potential problems, as opposed to a rigid and formalized environment requiring full-scale adversarial proceedings for results, it also can introduce variable interpretations. In enforcing soil conservation programs, a timely phone call soliciting interpretation of a regulation may prove more valuable than an administrative appeal through all four levels of the SCS and a possible federal court appeal.

### CONCLUSION

Enacting the soil conservation title of the 1985 Food and Security Act proved one of the most significant legislative developments in the Nation's history of dealing with soil and water conservation. Likewise, implementing and enforcing those provisions may prove one of the most significant chapters in developing the law concerning operation of federal farm programs and farmers' relations with the federal government. Protecting the Nation's remaining wetlands from farming and requiring farmers to farm HEL pursuant to a soil conservation plan that federal officials approve, trigger many legal issues. This Article identifies the legal authority for enforcing the soil conservation laws and considers a variety of legal issues that may confront farmers and their attorneys in complying with the requirements.

Conditioning eligibility for federal farm program benefits on complying with the soil conservation laws has increased the stakes in the legal disputes that will arise. Similarly, assigning responsibility to the SCS and the ASCS for policing compliance has altered their traditional roles in dealing with their farmer clientele. No longer is the sole function of the agencies to provide farm program payments or cost-sharing in implementing soil conservation practices. While the agencies still befriend farmers, enforcing soil conservation laws and the disputes that might arise create the potential to add tension to the USDA-farmer relation. Understanding the law and its requirements enables farmers to comply with the law and to avoid losing benefits. Disputes and ambiguities undoubtedly will arise in enforcing any program as wide ranging as the soil conservation enforcement provisions. This Article only begins to analyze a long period of implementing and resolving the legal issues likely to arise. How various parties resolve these issues will determine the soil conservation programs' success and the Nation's ability to protect natural resources from destruction to achieve a sustainable agricultural policy for the United States.

