The Prior Converted Cropland Exception - More Troubles Ahead?

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Overview

The federal government's jurisdiction over "wetlands" continues to be a contentious issue. Recently, I completed a three-part series on the USDA/NRCS Final Rule of August 28, 2020, on highly erodible land and wetland. That series raised some questions, several of which involved the exemption for "prior converted cropland" contained in the "Swampbuster" provisions of the 1985 Farm Bill. The exemption was later adopted by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) for purposes of the Clean Water Act (CWA).

How does the exception apply? When does it not apply? What's the history behind the exception? What have the courts had to say about it?

The prior converted cropland exemption from wetland regulation – it's the topic of today's post.

Swampbuster

The conservation-compliance provisions of the 1985 Farm Bill introduced the concept of "Swampbuster." Swampbuster was introduced into the Congress in January of 1985. Later, in 1985, the Swampbuster provisions were introduced into the House Agriculture Committee as an amendment to Title XII resource conservation, to deny federal farm program benefits to persons planting agricultural commodities for harvest on converted wetlands. *16 U.S.C. § 3821(a)-(b).* The USDA defines "converted wetland" as a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including…the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if: (i) such production would not have been possible but for such action, and (ii) before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland. *7 C.F.R. § 12.2(a).*

The report of the conference committee a week before the 1985 Farm Bill was signed into law stated that wetland conversion was considered to be "commenced" when a person had obligated funds or begun actual modification of a wetland.

The final Swampbuster rules were issued in 1987 and greatly differed from the interim rules. The final Swampbuster rules eliminated the right to claim prior investment as a commenced conversion. Added were farmed wetlands, abandoned cropland, active pursuit requirements, Fish and Wildlife Service (FWS) concurrence, a complicated "commenced determination" application procedure, and special treatment for prairie potholes. Under the "commenced conversion" rules, an individual producer or a drainage district is exempt from Swampbuster restrictions if drainage work began before December 23, 1985 (the effective date of the 1985 Farm Bill). This is the genesis of the "prior converted cropland" exemption.

The final rules defined "farmed wetlands" as playa, potholes, and other seasonally flooded wetlands that were manipulated before December 23, 1985, but still exhibited wetland characteristics. Drains affecting

these areas can be maintained, but the scope and effect of the original drainage system cannot be exceeded. *7 C.F.R. § 12.33(b)*. Prior converted wetlands can be farmed, but they revert to protected status once abandoned. Abandonment occurs after five years of inactivity and can happen in one year if there is intent to abandon. A prior converted wetland is a wetland that was totally drained before December 23, 1985. If a wetland was drained before December 23, 1985, but wetland characteristics remain, it is a "farmed wetland" and only the original scope and effect of the drainage *of the affected land* can be maintained. *Barthel v. Unites Stated Department of Agriculture, 181 F.3d 934 (8th Cir. 1999)*.

1996 Farm Bill

Under the 1996 Farm Bill, a farmed wetland located in a cropped field can be drained without sacrificing farm program benefit eligibility if another wetland is created elsewhere. Thus, through "mitigation," a farmed wetland can be moved to an out-of-the- way location. In addition, the 1996 legislation provides a good faith exemption to producers who inadvertently drain a wetland. If the wetland is restored within one year of drainage, no penalty applies. The legislation also revises the concept of "abandonment" for purposes of USDA farm program eligibility only. Cropland with a certified wetland delineation, such as "prior converted" or "farmed wetland" is to maintain that status, as long as the land is used for agricultural production. In accordance with an approved plan, a landowner may allow an area to revert to wetland status and then convert it back to its previous status without violating Swampbuster. Also, while there is an exception from the Swampbuster restrictions for prior converted wetland that returns to wetland status after December 23, 1985, as a result of specified events. *16 U.S.C. §3822(b)(2)(D)*. The exception does not apply, however, if the land had returned to wetland status before or as of December 23, 1985.

Also, farm program payments are not forfeited for producing agricultural commodities on converted wetland if the land was determined to be "farmed wetland" or "farmed wetland pasture," and NRCS determines that the conversion would have only a minimal effect on the wetland functions and values of wetlands in the area. *16 U.S.C. § 3822(f)*; *7 C.F.R. § 12.30*. *See, e.g., Rosenau v. Farm Service Agency, 395 F. Supp. 2d 868 (D. N.D. 2005)*; *Holly Hills Farm Corp. v. United States, 447 F.3d 258 (4th Cir. 2006)*, *aff'g, No. 3.04CV856, 2005 U.S. Dist. LEXIS 12875 (E.D. Va. Jun. 29, 2005)*.

2020 NRCS Circular

The NRCS recently released Circular 180-20-1 with an effective date of September 1, 2020. It can be found here: https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=45476.wba. Its stated claim is "To provide updated policy and guidance for the wetland and highly erodible land conservation policy in Title 180, National Food Security Act Manual (NFSAM), 5th Edition. The Circular states that a new icon (a green triangle with a dot in the center) will be placed on NRCS-certified wetland determination (CWD) maps. For lengthy water features, the green dot will appear every half-mile. Perhaps such clear designation will make it easier for farmers to challenge the determinations – the determinations are often wrong. But, the point is that the use of the green dot is to identify cropland areas that might be subject to federal government jurisdiction. Any farmland containing a green dot could mean that the owner/operator will have to complete the NRCS Form CPA-026, available here: https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_020039.pdf. This Form notifies the government that the land contains prior converted wetland that could be subject to federal regulations under either the Swampbuster provisions or the CWA.

In addition, the Circular states that CWD map legend will include the cautionary icon with the identifier: "Potential Jurisdictional Waters (PJW)." The "remarks" section of Form NRCS-CPA-026 will caution that the area flagged by the icon could be within the jurisdiction of the CWA, and beyond the scope of the FSA CWD. "Areas identified as Potential Jurisdictional Waters (PJW) are not subject to the Food Security Act but are potentially subject to the Clean Water Act. Related to this, the Circular attempts to clarify when the NRCS will provide CWA-related technical assistance to the Farm Service Agency (FSA). On this point, the Circular

states, "NRCS may also provide technical assistance on prior converted cropland abandonment determinations which may affect CWA exclusion applicability." Likewise, the Circular states, "In some cases, it may be helpful to a USDA client to share information NRCS gathered during a previously conducted…site visit for FSA purposes with the USACE [U.S. Army Corps of Engineers] or EPA." For farmers (and their lawyers) who have been involved in wetland matters administratively and/or in the courts, that last quote should bother you. It spells bureaucratic trouble.

Recent Cases

The following is a short summary of some of the relatively recent cases involving prior converted wetland under Swampbuster:

- In *Horn Farms, Inc. v. Johanns, 397 F.3d 472 (7th Cir. 2005), rev'g, 319 F. Supp. 2d 902 (N.D. Ind. 2004), cert. den., 547 U.S. 1018 (2006),* the plaintiff was found to be in violation of Swampbuster for producing covered commodities on converted wetland. The plaintiff claimed that the conversion had occurred before the Swampbuster rules took effect on December 23, 1985. The USDA determined that because the site had returned to wetland status as of the effective date of Swampbuster, the prior converted exemption of 16 U.S.C. 3822(b)(2)(D) did not apply. The appellate court, reversing the trial court, agreed.

- *Groenendyk v. Johanns, No. 4:06-cv-00214 JAJ, 2008 U.S. Dist. LEXIS 11153 (S.D. Iowa Feb. 12, 2008).* In this case, the NRCS designated a 0.7-acre portion of the plaintiff's field as wetland and determined that the prior converted wetland exemption did not apply. After exhausting administrative appeals, the plaintiff sought judicial review to overturn the designation. The court upheld the government's decision that the 0.7-acre site was not exempt as prior converted wetland because the government's determination was not capricious, an abuse of discretion or otherwise unlawful. While the basic facts and data were in dispute, the court gave the government substantial deference on its determination.

- *Riechenbach v. United States Department of Agriculture, No. 1:10-cv-994-WTL-TAB, 2013 U.S. Dist. LEXIS 1328 (S.D. Ind. Jan. 4, 2013)* involved central Indiana farmland for which the plaintiffs sought the FSA's permission to remove timber from existing fence rows. The NRCS examined the property and found a potential wetland violation, ultimately resulting in a determination that the plaintiff had converted 4.4 acres of wetland. Later, the NRCS expanded the converted wetland acres to five. Mediation was denied. The plaintiffs claimed that the area in question was prior converted cropland. After exhausting administrative appeals, the plaintiffs sought judicial review. The plaintiffs pointed to the existence of clay tile associated with a drainage system created in 1900 according to county records, and plastic tile dating to 1988. The NRCS claimed that the site in question had reverted to wetland status by 1985 based on aerial photos taken from 1981 to 1987 that showed the presence of wetland vegetation. While the plaintiffs argued that the photos were insufficient evidence, they failed to raise that argument during the administrative appeal process and the court would not entertain it and dismissed the case.

- The timing of wetland conversion to crop production was again at issue in *Maple Drive Farms Family Limited Partnership v. Vilsack, 781 F.3d 837 (6th Cir. 2015), rev'g., No. 1:11-CV-00692, 2012 U.S. Dist. LEXIS 176539 (W.D. Mich. Dec. 13, 2012).* The plaintiff had installed farm field drainage tile in the 1960s to allow crop production on the tract in issue. The defendant, however, claimed that the plaintiff converted wetland in violation of Swampbuster on the basis that crop production had ceased before the effective date of the Swampbuster provisions and had reverted to wetland status when Swampbuster went into effect. The court agreed with the defendant's interpretation of "vague" statutory language in holding that the prior converted wetland exemption applied only to wetland that had been converted to crop production before December 23, 1985, and remained converted as of December 23, 1985 and did not exhibit wetland characteristics. The case was reversed, however, because the defendant was required to grant the plaintiff a minimal-effect exemption and had failed to consider the plaintiff's minimal-effect evidence.

- In *Davids v. United States Department of Agriculture, No. 17-CV-3091-LRR, 2018 U.S. Dist. LEXIS 222979 (N.D. Iowa Oct. 16, 2018),* the plaintiff installed farm field drainage tile in 2011. The next year, the county completed a drainage project. The plaintiff then filed USDA Form AD-1026 to indicate that a new drainage system existed on the land that the NRCS had not evaluated. After a field visit, the NRCS determined that 1.55 acres of the plaintiff's land was converted wetland as a result of the drain tile installation. No "minimal effect" determination was made that would have exempted the 1.55 acres from Swampbuster under 16 U.S.C. 3822(f). The plaintiff claimed that the 1.55 acres was prior converted wetland based on an expert's report. The government rejected the expert's report as to whether the land should be classified as prior converted wetland because it did not constitute a functional assessment of a wetland. After exhausting administrative remedies, the plaintiff sought judicial review. The court determined that under the administrative rules in place during the relevant timeframe, the plaintiff bore the burden to request a minimal effect functional assessment determination (even though Form AD-1026 does not provide any place for a farmer to specifically request that NRCS perform a functional assessment) because the wetland had already been converted when the request for such a determination was made. As such, the government was not required to make a functional assessment determination and the 1.55 acres remained classified as converted wetland rather than prior converted wetland.

Conclusion

The prior converted wetland rule was designed to be an important exemption for farmers who had already converted wetland to cropland before the Swampbuster rules took effect. It has proven to be a tricky snare for farmers. In addition, even if the Swampbuster hurdle is cleared, prior converted wetland can still be regulated by the EPA of the COE. I will write more on that issue in a future article.

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