What's Going on with Swampbuster?

Roger McEowen (roger.mceowen@washburn.edu) – Washburn University School of Law
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Overview

There have been several significant recent developments involving the Swampbuster program with potential long-term impact for farming operations that participate in the federal farm programs. The issues involve how the government delineates wetlands for Swampbuster purposes, requests for reconsideration of determinations of wetland status, certifications and the constitutionality of the Swampbuster program as a whole.

Swampbuster significant developments – that's the topic of today's post.

Background

The conservation-compliance provisions of the 1985 Farm Bill introduced the concept of "Swampbuster." Swampbuster was introduced into the Congress in January of 1985 at the urging of the National Wildlife Federation and the National Audubon Society. It was originally presented as only impacting truly aquatic areas and allowing drainage to continue where substantial investments had been made. Thus, there was virtually no opposition to Swampbuster.

Swampbuster – Wetland Delineation Rules

How does the USDA determine if a tract of farmland contains a wet area that is subject to regulation? The legislation creating Swampbuster charged the soil conservation service (SCS) with creating an official wetland inventory with a particular tract being classified as a wetland if it had (1) the presence of hydric soil; (2) wetland hydrology (soil inundation for at least seven days or saturated for at least 14 days during the growing season); and (3) the prevalence of hydrophytic plants under undisturbed conditions. In other words, to be a wetland, a tract must have hydric soils, hydrophytic vegetation and wetland hydrology. The presence of hydrophytic vegetation, by itself, is insufficient to meet the wetland hydrology requirement and the statute clearly requires the presence of all three characteristics. *B&D Land & Livestock Co. v. Schafer, 584 F. Supp. 2d 1182 (N.D. Iowa 2008).*

Interim Rules

Under the June 1986 interim rules, wetland was assumed to be truly wet ground that had never been farmed. In addition, "obligation of funds" (such as assessments paid to drainage districts) qualified as commenced conversions, and the Fish and Wildlife Service (FWS) had no involvement in ASCS or SCS decisions. In September of 1986, a proposal to exempt from Swampbuster all lands within drainage districts was approved by the chiefs of the ASCS, SCS, FmHA, FCIC and the Secretary of Agriculture. However, the USDA proposal failed in the face of strong opposition from the FWS and the EPA.

Final Rules

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, 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). If the drainage work was not completed by December 23, 1985, a request could be made of the ASCS on or before September 19, 1988, to make a commencement determination. Drainage districts must satisfy several requirements under the "commenced conversion" rules. A project drainage plan setting forth planned drainage must be officially adopted. In addition, the district must have begun installation of drainage measures or legally committed substantial funds toward the conversion by contracting for installation or supplies.

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. Under 16 U.S.C. §3801(a)(6), a "converted wetland" is defined as a wetland that is manipulated for the purpose or with the effect of making the production of an agricultural commodity possible if such production would not have been possible but for such action. *See, e.g., Clark v. United States Department of Agriculture, 537 F.3d 934 (8th Cir. 2008).* If a wetland was drained before December 23, 1985, but wetland characteristics remain, it is a "farmed wetland" and only the original drainage can be maintained.

Identifying a Wetland – The *Boucher* Saga

The process that the USDA uses to determine the presence of wet areas on a farm that are subject to the Swampbuster rules (known as the "on-site" wetland identification criteria) are contained in 7 C.F.R. §12.31. The application of the rules was at issue in a case involving an Indiana farm family's longstanding battle with the USDA.

Facts and administrative appeals. The facts of the litigation reveal that the plaintiff (and her now-deceased husband) owned the farm at issue since the early 1980s. The farmland has been continuously used for livestock and grain production for over 150 years. The tenants that farm the land participated in federal farm programs. In 1987, the plaintiffs were notified that the farm might contain wetlands due to the presence of hydric soils. This was despite a national wetland inventory that was taken in 1989 that failed to identify any wetland on the farm. In 1991, the USDA made a non-certified determination of potential wetlands, prior converted wetlands and converted wetlands on the property. In 1994, the plaintiff's husband noticed that passersby were dumping garbage on a portion of the property. To deter the garbage-dumping, the plaintiff's husband cleaned up the garbage, cleared

brush, and removed five trees initially and four more trees several years later. The trees were upland-type trees that were unlikely to be found in wetlands, and the tree removal impacted a tiny fraction of an acre. The USDA informed the landowners that the tree removal might have triggered a wetland/Swampbuster violation and that the land had been impermissibly drained via field tile (which it had not).

Because the land at issue was farmed, the USDA's Natural Resources Conservation Service (NRCS) used an offsite comparison field to compare with the tract at issue for a determination of the presence of wetland. The comparison site chosen was an unfarmed depression that was unquestionably a wetland. In 2002, an attempt was made to place the farm in the Conservation Reserve Program, which triggered a field visit by the NRCS. However, a potential wetland violation had been reported and NRCS was tasked with making a determination of whether a wet area had been converted to wetland after November 28, 1990. The landowners requested a certified wetland determination, and in late 2002 the NRCS made a "routine wetland determination" that found all three criteria for a wetland (hydric soil, hydrophytic vegetation and hydrology) were present by virtue of comparison to adjacent property because the tract in issue was being farmed. The landowners were notified in early 2003 of a preliminary technical determination that 2.8 acres were converted wetlands and 1.6 acres were wetlands. The NRCS demanded that the landowners plant 300 trees per acre on the 2.8 acres of "converted wetland."

The landowners requested a reconsideration and a site visit. Two separate site visits were scheduled and later cancelled due to bad weather. The landowners also timely notified NRCS that they were appealing the preliminary wetland determination and requested a field visit, asserting that NRCS had made a technical error. A field visit occurred in the spring of 2003 and a written appeal was filed of the preliminary wetland determination and a review by the state conservationist was requested. The appeal claimed that the field visit was inadequate. The husband met with the State Conservationist in the fall of 2003. No site visit occurred, and a certified final wetland determination was never made. The landowners believed that the matter was resolved.

The husband died, and nine years later a new tenant submitted a "highly erodible land conservation and wetland conservation certification" to the FSA. Permission was requested from the USDA to remove an old barn and house from a field to allow farming of that ground. In late 2012, the NRCS discovered that a final wetland determination had never been made and a field visit was scheduled for January of 2013 shortly after several inches of rain melted a foot of snow on the property. At the field visit, the NRCS noted that there were puddles in several fields. The NRCS used the same comparison field that had been used in 2002, and also determined that underground drainage tile must have been present (it was not).

Based on the January 2013 field visit, the NRCS made a final technical determination that one field did not contain wetlands, another field had 1.3 acres of wetlands, another field had 0.7 acres of converted wetlands and yet another field had 1.9 acres of converted wetlands. The plaintiff (the surviving spouse) appealed the final technical determination to the USDA's National Appeals Division (NAD). At the NAD, the plaintiff asserted that either tile had been installed before the effective date of the Swampbuster rules in late 1985 or that tiling wasn't present (a tiling company later established that no tiling had been

installed on any of the tracts); that none of the tracts showed water inundation or saturation; that none of the tracts were in a depression; and that the trees that were removed over two decades earlier were not hydrophytic, were not dispositive indicators of wetland, and that improper comparison sites were used. The NRCS claimed that the tree removal altered the hydrology of the site. The USDA-NAD affirmed the certified final technical determination. The plaintiff appealed, but the NAD Director affirmed. The plaintiff then sought judicial review.

Trial court decision. The trial court affirmed the NAD Director's decision and granted summary judgment to the government. *Boucher v. United States Department of Agriculture, No. 1:13-cv-01585-TWP-DKL, 2016 U.S. Dist. LEXIS 23643 (S.D. Ind. Feb. 26, 2016).* The court based its decision on the following:

- The removal of trees and vegetation had the "effect of making possible the production of an agricultural commodity" where the trees once stood and, thus, the NRCS determination was not arbitrary or capricious with respect to the converted wetland determination.
- The NRCS followed regulatory procedures found in 7 C.F.R. §12.31(b)(2)(ii) for determining wetland status on the land that was being farmed by comparing the land to comparable tracts that were not being farmed.
- Existing regulations did not require site visits during the growing season.
- "Normal circumstances" of the land does not refer to normal climate conditions but instead refers to soil and hydrologic conditions normally present without regard to the removal of vegetation.
- The ten-year timeframe between the preliminary determination and the final determination did not deprive the plaintiff of due process rights.

Appellate Decision

The appellate court reversed the trial court decision and remanded the case for entry of judgment in the plaintiff's favor and award her "all appropriate relief." *Boucher v. United States Dep't of Agric., No. 16-1654, 2019 U.S. App. LEXIS 23695 (7th Cir. Aug. 8, 2019).* On the comparison site issue (the USDA's utilization of the on-site wetland identification criteria rules), the USDA claimed that 7 C.F.R. § 12.31(b)(2)(ii) allowed them to select a comparison site that was "on the same hydric soil map unit" as the subject property, rather than on whether the comparison site has the same hydrologic features as the subject tract(s). The appellate court rejected this approach as arbitrary and capricious, noting that the NRCS failed to try an "indicator-based wetland hydrology" approach or to use any of their other tools when picking a comparison site. In addition, the appellate court noted a COE manual specifies that, "[a] hydrologist may be needed to help select and carry out the proper analysis" in situations where potential lack of hydrology is an issue such as in this case. However, the NRCS did not send a hydrologist to personally examine the plaintiff's property, claiming instead that a comparison site was not even necessary. Based on 7 C.F.R. §12.32(a)(2), the USDA claimed, the removal of woody hydrophytic vegetation from hydric soils to permit the production of an agricultural commodity is all that is needed to declare the area "converted wetland."

The appellate court concluded that this understanding of the statue was much too narrow and went against all the other applicable regulatory and statutory provisions by completely forgoing the basis of

hydrology that the provisions are grounded in. Accordingly, the appellate court reasoned that because hydrology is the basis for a change in wetland determination, the removal of trees is merely a factor to determine the presence of a wetland, but is not a determining factor. In addition, the appellate court pointed out that the NRCS never indicated that the removal of trees changed the hydrology of the property during the agency appeal process – a point that the USDA ignored during the administrative appeal process. The appellate court rather poignantly stated, "Rather than grappling with this evidence, the hearing officer used transparently circular logic, asserting that the Agency experts had appropriately found hydric soils, hydrophytic vegetation, and wetland hydrology…".

Observation: The USDA-NRCS was brutalized (rightly so) by the appellate court's decision for its lack of candor and incompetence. Those same agency characteristics were also illustrated in the Eighth Circuit decision of *Barthel v. United States Department of Agriculture, 181 F.3d 934 (8th Cir. 1999).* Perhaps much of the USDA/NRCS conduct relates to the bureaucratic unilateral decision in 1987 to change the rules to include farmed wetland under the jurisdiction of Swampbuster. That decision has led to abuse of the NAD process and delays that have cost farmers untold millions.

Certification Requests - the "Grassley" Amendment

In 1990, the Congress amended the Swampbuster Act to provide a review provision specifying that a prior wetland certification "shall remain valid and in effect…until such time as the person affected by the certification requests review of the certification by the Secretary." *16 U.S.C. §3822(a)(4).* This became known as the "Grassley Amendment" named after Senator Charles Grassley of Iowa. The purpose of the amendment was to prevent farmers from being subjected to multiple certifications based on new methods the NRCS had begun using to make wetland determinations. Under the rule, a farmer could request a recertification upon demand.

However, based on the statutory amendment, the USDA developed a regulation, known as the "Review Regulation," providing procedural requirements a farmer must follow to make an effective review request. The regulation said a request to review a certification could be made only if a natural event had altered the topography or hydrology of the land or if NRCS believed that the existing certification was erroneous. *7 C.F.R. §12.30(c)(6).*

The *Foster* Case

Facts and trial court decision. In *Foster v. United States Department of Agriculture, 609 F.Supp.3d 769 (D. S.D. 2022),* the plaintiff owned farmland containing a .8-acre portion that USDA certified as a "wetland" in 2011 under the Swampbuster provisions of 16 U.S.C. §§3801, 3821-3824. The wetland was about 8.5 inches deep at certain times during the year, particularly in the spring after snow melted and didn't drain anywhere. The wetland resulted from a tree belt that had been planted in 1936 to prevent soil erosion. Snow accumulated around the tree belt in the winter and melted in the spring with the water collecting in a low spot in of the field before soaking into the ground or evaporating. In about one-half of the crop years, the puddle would dry out in time or planting. In other years it had to be drained to plant crops. The certification meant that the puddle could not be drained so that it and the surrounding land could not be farmed without the loss of federal farm program benefits.

In 2008, Foster request a review of a certification and USDA granted the request simply on the basis of the statute which plainly states that a review of a certification is available upon request. The request was granted even though the regulation was in place at that time. The area was recertified as a wetland in 2011. This was despite Foster having dug two test holes to monitor water levels in the disputed area – one of which was immediately next to the trees. The data Foster collected showed that the trees slowed the drying of the soil in the hole next to the trees. The USDA/NRCS refused the data, claiming that Foster didn't' have the expertise to interpret the data. As a result, Foster installed two weather stations and hired an engineering firm to "officially" conclude that the tree belt was slowing the drying of the soil.

Foster challenged the 2011 recertification, but the trial court affirmed the determination as not arbitrary and capricious (the judicial deference standard given administrative agency decisions). The U.S. Court of Appeals for the Eighth Circuit affirmed, and the U.S. Supreme Court declined to review the case. *Foster v. Vilsack, 820 F.3d 330 (8th Cir. 2016), cert. den., 137 S. Ct. 620 (2017).*

Note: Before Foster's request for review of the 2011 certification, another South Dakota farmer with a similar set of facts successfully had NRCS remove a wetland label on a .3-acre portion of a field. Like Foster's situation, the .3-acre portion was impacted by snow caught in a tree belt. Thus, after the court decisions, the question remained as to whether a farmer has a legal obligation to present evidence of changed conditions. The statute contains no such requirement. In 2008, the recertification request was granted with no obligation on Foster's part to provide evidence of changed conditions. The evidence provided was not requested. Also, published NRCS infiltration rates for the soil type of the depression indicated that the ponding would be gone in less than two weeks (the required inundation period for a wetland finding).

In 2017, Foster again sought a review of the certification under 16 U.S.C. §3822(a)(4) which, as noted, provides for review of a final certification upon request by the person affected by the certification. The USDA/NRCS didn't respond on the basis that Foster didn't provide new information that the NRCS hadn't previously considered. Foster filed for review again in 2020 along with professionally prepared engineering reports from two firms that concluded that the area in question ponded due to the tree belt and was an artificial wetland not subject to Swampbuster.

The USDA denied review in 2020 citing its own regulation of 7 C.F.R. §12.30(c)(6) which required the plaintiff to show how a natural event changed the topography or hydrology of the wetland that caused the certification to no longer be a reliable indicator of site conditions. The plaintiff claimed that new evidence existed that would refute the 2011 certification, and also claimed that 16 U.S.C. §3822(a)(4) provided no restriction on the ability to get a review and, as a result, 7 C.F.R. §12.30(c)(6) violated the due process clause by restricting reviews and was arbitrary and capricious under the Administrative Procedure Act.

The trial court held that 7 C.F.R. §12.30(c)(6) merely restricted *when* an agency must review a final certification. The trial court also determined that 7 C.F.R. §12.30(c)(6) did not violate the due process clause as the plaintiff did not show any independent source of authority providing him with a right to certification review on request. The USDA's denials of review were found not to be arbitrary or

capricious and that the plaintiff failed to provide any evidence that the natural conditions of the site had changed, which would require a review of the certification. The plaintiff also claimed that the Swampbuster provisions were unconstitutional under the Commerce Clause and the Tenth Amendment.

The trial court rejected the plaintiff's claims and determined that the statute of limitations on challenging the certification had run. The trial court also held that the USDA was entitled to summary judgment on the plaintiff's claim that Swampbuster was unconstitutional, holding that the provisions were within the power of the Congress under the spending clause of Article I, Section 8 of the Constitution. The trial court also ruled that Swampbuster did not infringe upon state sovereignty by requiring states to implement a federal program, statute or regulation. The trial court further rejected the plaintiff's claim that a part of Swampbuster violated the Congressional Review Act, finding that the provision at issue was precluded from judicial review. The court dismissed all the plaintiff's claims against the USDA and denied the ability for the area to be reviewed again.

The appellate court. Foster filed an appeal with the U.S. Court of Appeals for the Eighth Circuit on August 16, 2022, and the appellate court issued its opinion on May 12, 2023. *Foster v. United States Department of Agriculture, 68 F.4th 372 (8th Cir. 2023).* The appellate court affirmed. The court stated that NRCS noted the engineer's report and asked the engineering firm to identify any evidence that the NRCS had not fully considered the tree belt at the time of the 2011 recertification decision. The appellate court stated, "Neither Foster nor the engineering firm ever responded to the request." The court went on to state that the NRCS reviewed the engineering report, compared it to the record, and declined the review request for noncompliance with the regulation.

Note: The court's statement that the NRCS requested additional evidence is false. The NRCS letter of May 14, 2020, to Foster by State Conservationist Jeffrey Zimprich merely stated that, "Based on the evidence you provided, I am unable to determine that any of the conditions mentioned above for a redetermination apply." There was no request for additional information that was made to either Foster or the engineering firms.

The appellate court concluded that the regulation was not inconsistent with the Swampbuster Act. There was simply nothing that could be gleaned from the Grassley Amendment as guidance to what constitutes a proper review request. As such the statute was ambiguous and the administrative procedural requirements were permissible. The Grassley Amendment was merely so that farmers had a way to contest new NRCS wetland delineations for Swampbuster purposes. It did not preclude USDA/NRCS from developing procedural requirement to challenge a certification.

The appellate court also affirmed the trial court's finding with respect to the Congressional Review Act for lack of authority to review the claim. The appellate court also affirmed the trial court's finding that the NRCS refusal to consider the request was not arbitrary and capricious.

Note: In the concluding paragraph of the appellate court's opinion, the appellate court stated that, "the NRCS requested Foster's engineering firm to identify evidence showing the NRCS had failed to consider the tree belt on the Site when it made its prior certification. The record shows no indication that Foster or his engineering firm responded to this request." Unfortunately, the appellate court

offers no support for this assertion and there is no record of such a request ever having been made. What the appellate court bases this statement on is not known.

Note: As of late April 2024, NRCS field offices are not authorized to give out wetland determinations.

The Grassley Amendment is clear that can rely on a wetland determination until a new determination is requested. The point of the amendment is to bar NRCS from unilaterally changing a determination once made. A farmer may request a redetermination. While it is reasonable to require that new information bearing on a stie's wetland status be provided when a redetermination is requested, Foster provided that information in the form of professional engineering reports. Here, NRCS failed to understand the professional reports submitted with the review request and also did not make a clear request for additional information/clarification. Indeed, no request at all was made for additional information. Clearly, the .8-acre depression was the result of snowpack caused by a tree belt and NRCS' own data showed that the ponding of the depression would be gone in less than two weeks. A regulation that allows a farmer to receive a redetermination upon NRCS admitting it made an error (one of the two possibilities for a review to be granted) makes it highly unlikely that a review would be granted.

Note: On August 10, 2023, Foster filed a petition for certiorari with the U.S. Supreme Court. Presently, the Court has not ruled on the petition. That could mean that the Court is holding the case until it decides two cases involving the amount of deference to be given federal administrative agencies. Those two cases will likely be decided in June of 2024.

More Certification Problems

In early 2024, a federal trial court vacated a 2020 NRCS final rule specifying that ag wetlands that the agency designated between 1990 and 1996 would be considered "certified" if the maps that created them at the time were "legible." *National Wildlife Federation v. Lohr, No. 19-cv-2416 (TSC), 2024 U.S. Dist. LEXIS 29975 (D. D.C. Feb. 22, 2024).* From 1996-2013, a pre-1996 delineation map was considered "certified" based on the map's accuracy and wouldn't have to be recertified. Then NRCS changed the certification process because it was trying to clear a backlog of requests for certified wetland determinations. So, under the 2020 final rule, any map delineating wetlands between 1990 and 1996 that was "legible" was deemed "certified." The court determined that the final rule violated the Administrative Procedure Act because the rule amounted to a change in agency policy and did not constitute "reasoned decision making." It was not simply a clarification in agency policy. While the NRCS claimed that the 2020 final rule was intended to "clear up state-level confusion" the court disagreed and determined the final rule was not entitled to deference

Constitutional Challenge

With a case filed on April 16, 2024, an Iowa farming operation is challenging the constitutionality of the Swampbuster program. *CTM Holdings, LLC v. United States Department of Agriculture, No. 6:24-cv-02016 (N.D. Iowa)(filed Apr. 16, 2024).* The plaintiff is a family farming operation that owns a 72-acre tract at issue in the case. On the tract, the NRCS determined that nine acres are "wetland" based on a 2010 determination that was made for a prior owner which the plaintiff's request for a redetermination was

denied and which could not be appealed. The suit seeks to set aside the Swampbuster regulations that led the agency to that conclusion on the basis that the regulations impose unconstitutional conditions and are in excess of the agency's statutory authority.

The plaintiff asserts several claims:

- The Swambuster regulations violate the Congress' power under the Commerce Clause because the 9-acre wetland is purely intrastate.
- The Swampbuster regulations impose unconstitutional conditions by conditioning a government benefit on the waiver of a constitutional right.
- The Swampbuster regulations amount to an unconstitutional "taking" of the plaintiff's private property – a "per se" physical taking by appropriating a permanent conservation easement without paying for it.
- The Swampbuster regulations exceed the agency's statutory authority by adding "woody vegetation" to the statutory definition of "converted wetland."
- The Swampbuster regulations exceed the agency's statutory authority violate the Grassley Amendment by including regulatory requirements for a farmer to receive a certification review of a wetland when the statute requires none.

On the claims, it will be extremely difficult for the plaintiff to prevail on its "unconstitutional conditions" and "takings" claims. A farmer need not participate in the farm programs (although the economics often dictate that non-participation is not a consideration), but once participation occurs the rules of the various programs must be complied with. But the Commerce Clause and conduct in excess of statutory authority claims could have "legs."

Conclusion

Much has been happening in the Swampbuster world recently. The future of the current litigation should help provide more guidance on the issues that have been troublesome for awhile.