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Wetlands Conservation Compliance

What Every Ag Lender Should Know About Swampbusters

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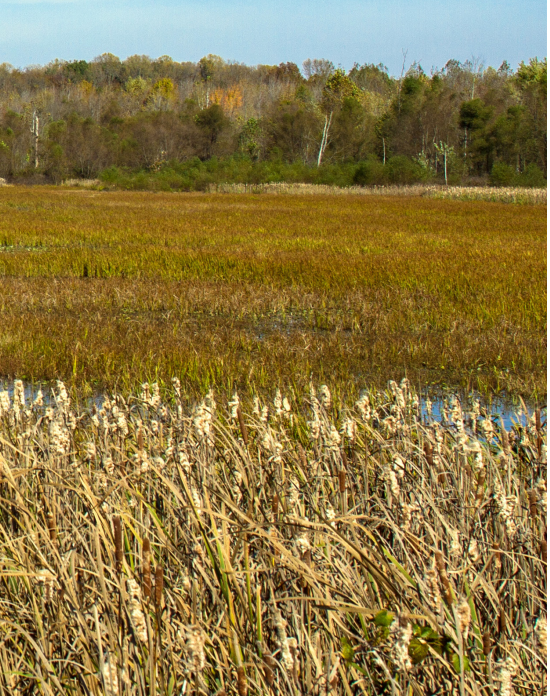
In addition to commonly known environmental laws, regulations and compliance requirements concerning wetlands, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Clean Water Act, there exists another body of federal laws and regulations that apply to the use and development of wetlands in connection with production agriculture—the conservation compliance provisions of the Food Security Act of 1985, as amended (the "Act").[1] The conservation compliance provisions of the Act can be divided into two components: the Wetland Conservation provisions, commonly referred to as "Swampbusters," and the Highly Erodible Land Conservation provisions, also known as "Sodbusters." This article will only discuss the former and not the latter, but it is noted that many of the regulations implementing Sodbusters are similar to, and in some instances mirror, those applicable to Swampbusters.

Swampbusters became law on December 23, 1985. However, because the applicability of Swampbusters is limited to agricultural operations, many lenders have little knowledge of Swampbusters or the extent to which its provisions can adversely affect collateral. Many lenders may be shocked to learn that non-compliance with Swampbusters can result in a borrower losing all or a significant portion of collateral typically pledged to secure agricultural operating loans, rendering the loan either wholly or partially unsecured. Accordingly, any lender extending credit to finance an agricultural operation should, at the very least, have a limited understanding of Swampbusters and the consequences that can stem from failure to comply with its mandates.

The purpose of Swampbusters is twofold: (1) discourage the conversion of wetlands to croplands; and (2) protect those croplands (and the owners and producers thereof) that were converted from wetlands before December 23, 1985. Today, the current version of Swampbusters provides that any person who, after December 23, 1985, produces an agricultural commodity on a converted wetland or, after November 29, 1990, converts a wetland for the purpose of making the production of an agricultural commodity possible thereon shall be ineligible to receive certain farm program payments and benefits under certain programs administered by agencies of the United States Department of Agriculture ("USDA"). [2]

The term "converted wetland" is defined as a "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...such production would not have been possible but for such action..."[3] From this definition came the "prior converted cropland" designation, which refers to a wetland converted prior to Swampbusters' effective date. Converted wetlands are subject to use restrictions imposed by Swampbusters, while lands designated as "prior converted croplands" or "PCCs" are not. Thus, use of PCCs for agricultural production is not prohibited by Swampbusters and does not trigger farm-program ineligibility.

Compliance with Swampbusters is



jointly administered and enforced by USDA's Farm Service Agency ("FSA") and Natural Resources Conservation Service ("NRCS") through collection and periodic reviews of agricultural production data, including crops planted, tillable acreage, tract/field boundaries, land designations, aerial imagery and wetland delineations/determinations. Additionally, compliance is monitored through mandatory self-certifications, which must be made by required persons via a Wetland Conservation Compliance Certification (Form AD-1026) filed with FSA.

Certifications are generally made annually and must be made by any person receiving farm program payments or benefits, including "affiliates" of such persons (such as crop-share landlords). Once a Certification is filed, it remains valid and constitutes a continuing certification of compliance until a new Certification is filed. While a Certification must be filed by any person planning to receive farm program payments or benefits, the regulations also require a new Certification to be filed by any person who plans to bring new land into production or make land-use changes, combine established fields or tract, remove fence rows or perform maintenance or improvements to an existing drainage system, or perform clearing, land-leveling, filling, dredging, drainage or other activities that may alter or affect a wetland area.

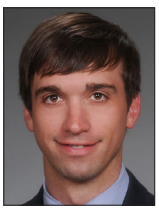
Compliance with all aspects of Swampbusters is critical, as even failure to file a Certification constitutes non-compliance, triggering the ineligibility provisions. If a person is determined by FSA to be out of compliance with Swampbusters, the farm program payments and benefits for which the person will be ineligible to receive include (i) any disaster payments and payments made under any price-support program administered by FSA, including Price Loss Coverage (PLC) and Agricultural Risk Coverage (ARC) payments; (ii) conservation program payments made under the Conservation Security Program (CSP), Conservation Stewardship Program (CStP), Environmental Quality Incentive Program (EQUIP) and Wildlife Habitat Incentive Program (WHIP); (iii) contract payments under a production flexibility contract, marketing assistance loans and any type of price support or payment available under Agricultural Market Transition Act; (iv) farm storage facility loans available from the Commodity Credit Corporation; (v) farm operating loans under the Consolidated Farm and Rural Development Act (including FSA direct and guaranteed loans); and (vi) as of 2014, crop insurance benefits and premium subsidies paid under the Federal Crop Insurance Act.[4]

Because the program payments and insurance proceeds typically account for a significant portion of the collateral given to secure agricultural loans—particularly row-crop production loans—non-compliance with Swampbusters can have a substantial effect not only on agricultural producers but also the lenders who finance their operations. For instance, consider a common scenario where a lender extends credit to an agricultural producer to finance the cost of producing a rice and soybean crop, and in exchange, the producer-borrower grants the lender a security interest covering all crops and proceeds, as well as an assignment of indemnity covering all crop insurance proceeds and an assignment of all farm program payments attributable to the crops and farming operations of the producer-borrower. If the producer-borrower is subsequently determined to be ineligible to receive crop insurance and farm program payments and benefits due to non-compliance with Swampbusters, the lender's collateral and security for the loan will have been essentially reduced to only the crops harvested by the producer-borrower.

Considering the adverse impacts that can result from violation of Swampbusters, lenders should consider proactive steps that can be implemented to limit the risks associated with agricultural production loans, such as requiring additional collateral that is not subject to divestment under Swampbusters or inclusion of additional loan covenants specifically requiring compliance with Swampbusters, timely filings of compliance certifications and prior notice to the lender of planned activities involving changes in the use or physical characteristics of farmlands that may require submission of additional compliance certifications. In addition, lenders should also consider requiring producer-borrowers to annually provide updated FSA Form 156EZs and FSA Farm/Tract maps for all lands farmed by the producer-borrowers as a condition to the loan. These documents may prove particularly useful in assessing loan risks, because each of these documents generally include references indicating whether a wetland determination has been completed with respect to the particular lands, and if so, whether a violation was discovered.

Sources

1. See 16 U.S.C. §§ 3801 et seq.
2. See 16 U.S.C. §§ 3821.
3. 16 U.S.C. § 3801(a)(7)(A).
4. See 16 U.S.C. § 3821(b); see also USDA NRCCS, National Food Security Act Manual, Part 510, § 510.1 (5th ed. Dec. 2015).



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