

Wetland Victories Among Farm Bill Reforms

On February 7, 2014, President Barack Obama signed the Agricultural Act of 2014, commonly known as the Farm Bill, to provide for the reform and continuation of agricultural and other programs of the Department of Agriculture through fiscal year 2018. As with past legislation, the Farm Bill has implications for wetlands. Below, the author looks at some of the bill's features.

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The recently enacted 2014 Farm Bill¹ contains a number of provisions critical to wetlands protection. Most notably, the Farm Bill reestablished the link between crop insurance and conservation compliance, meaning that farmers who choose to drain and fill wetlands will be ineligible for crop insurance premium subsidies unless they mitigate those wetland losses. The 2014 Farm Bill also secures permanent funding for wetlands protection and preservation through the creation of the Agricultural Conservation Easement Program, which consolidated a number of U.S. Department of Agriculture (USDA) easement programs. The legislation also creates a new wetlands mitigation program that provides \$10 million in funding to USDA to support the development of an agriculture mitigation bank.

CROP INSURANCE AND CONSERVATION COMPLIANCE

Restoring the link between crop insurance premium subsidies and conservation compliance was the top priority for conservation organizations in the Farm Bill debate for a variety of reasons. Originally enacted as part of the 1985 Farm Bill, conservation compliance has been the most effective deterrent to wetland drainage and soil loss. Conservation compliance has been credited with protecting an estimated 3.3 million acres of wetland and saving 295 million tons of soil annually as a result of conservation treatments applied to 140 million acres of highly erodible farmland.²

With many traditional wetland protections eroded in the U.S. Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), the “Swampbuster” provisions of conservation compliance now provide the sole source of protection for many smaller wetlands that are not part of a larger watershed system, particularly temporary and seasonal wetlands. Farmers receiving farm and/or conservation program payments are prohibited from draining wetlands and converting the land to agricultural production unless they mitigate the loss of those wetlands.

Crop insurance premium subsidies were originally included among the conservation compliance mandates. However, conservation compliance was decoupled from crop insurance in 1996 to increase participation in the crop insurance program and to alleviate the need for annual disaster relief payment legislation for farmers. At that time, the vast majority of corn, soybean, and wheat producers were receiving some form of Title I farm program payments, whether in the form of direct or countercyclical payments, through the receipt of marketing loans, or from benefits received through participation in the conservation program—all of which necessitated participation in conservation compliance. Decoupling crop insurance premium assistance did not significantly impact conservation compliance in 1996 because producers were receiving benefits from a variety of other programs that mandated compliance.

However, by the time the debate on the 2014 Farm Bill began, the agricultural landscape had changed dramatically. High commodity prices had reduced the need for countercyclical payments and marketing loans. More importantly, direct payments had lost political favor, and there were clear signals that these Title I farm payment programs would be eliminated. The loss of Title I programs would leave few benefits for farmers' continued participation in conservation compliance. Reestablishing the linkage between the receipt of crop insurance premium assistance and conservation compliance made sense from both a policy and financial perspective.

By 2012, a major shift had also taken place in the taxpayer supported financial safety net for farmers. Public funding for crop insurance had surpassed farm program payments. With the contemplation of farm payment programs being phased out in favor of subsidized crop insurance, recoupling conservation compliance provided an opportunity to preserve the investment in natural resource protection and ensured that the taxpayer would continue to receive conservation benefits for their contribution to the farmers' financial safety net.

Successfully relinking conservation compliance to crop insurance therefore represented a huge victory for the con-

conservation community in the 2014 Farm Bill. The newly enacted Wetland Conservation Program differs from the program enacted in the 1985 Farm Bill and represents a compromise among conservation, farm, and commodity groups. The most significant differences include:

- Farmers will continue to be eligible to receive crop insurance premium subsidies until all appeals are exhausted and there is a final determination on alleged violations;
- Farmers will be ineligible to receive crop insurance premium subsidies only for those years after a final determination is made and until he/she comes back into compliance;
- Farmers will be held harmless for violations and will not have eligibility impacted if USDA does not evaluate Certificates of Compliance in a timely manner;
- Farmers in violation will be required to make an equitable contribution to conservation; and
- If a violation impacts less than five acres of an entire farm, the farmer may contribute 150% of the cost of mitigation in lieu of wetland restoration and will remain eligible for crop insurance premium subsidies.

Many of these provisions include language that is extremely vague (i.e., “timely manner,” “equitable contribution,” “entire farm”). The 2014 Farm Bill rulemaking and implementation processes will be critical to ensure that these provisions are defined in a way so as not to create major loopholes.

In addition, many concerns of the conservation community were not addressed in the conservation compliance provisions of the 2014 Farm Bill and will need clarification in the rulemaking processes to ensure that an effective Wetland Conservation Program is created and implemented at USDA. Enforcement of the existing wetland conservation program has been lacking, and the Natural Resources Conservation Service (NRCS) lacks sufficient funds to conduct required spot checks for compliance. As important is the need to establish adequate mechanisms to ensure that quality wetland determination decisions are made. This will require not only funding, but also leadership within USDA that makes quality wetland determinations a priority. Better information is also required to increase the quality of wetland determinations. In addition, transparent, science-based mapping conventions and procedures that accurately capture the presence or absence of wetlands, including temporary or seasonal wetlands, need to be created. Finally, mitigation should only be allowed as a last resort. Where mitigation is used, quality wetlands comparable to the functions and values of the lost wetland must be required, and the true costs of mitigation should be factored into the analysis/assessment.

One other consequence of Farm Bill politics impacting wetlands is the creation of new Title I farm payment

programs. While the 2014 Farm Bill eliminated the Direct Payment Program, the Countercyclical Payment Program, and the Agriculture Risk Coverage Program, the legislation created new programs to supplement crop insurance coverage when crop prices and/or revenues drop below established reference prices or benchmarks: Price Loss Coverage (PLC); Agriculture Risk Coverage (ARC); and the Supplemental Coverage Option (SCO).³ Farmers who receive benefits under these programs will be required to comply with the Swampbuster provisions of the 1985 Farm Bill. Farmers should be instructed by USDA that these new conservation compliance provisions apply *only* to those producers receiving crop insurance premium subsidies and no other farm program payments. Most farmers will be receiving other Title I or II benefits and, therefore, the new law is applicable to a very small number of producers.

AGRICULTURAL CONSERVATION EASEMENT PROGRAM

The 2014 Farm Bill also established the Agricultural Conservation Easement Program (ACEP), which combines the Wetlands Reserve Program (WRP), the Grassland Reserve Program, and the Farmland Protection Program.⁴ While cuts were made to overall program funding, ACEP creates permanent funding for the consolidated programs. The consolidation should make it easier for farmers to participate in the program by simplifying the application process. The new program also cures a problem that has curtailed participation in the WRP, a voluntary program that offered landowners the opportunity to protect, restore, and enhance wetlands on their property.⁵ In the past, the WRP has had a consistent shortfall in dollars allocated to technical assistance, creating a substantial backlog in applications. Until the passage of the 2014 Farm Bill, technical assistance funding determinations were made by the Office of Management and Budget. This authority has now been transferred to USDA. The Secretary, in consultation with the NRCS Chief, will determine technical assistance funding levels for wetland restoration. This change should enable more wetland acres to be brought into the program provided that NRCS allocates more program funding to technical assistance.

WETLANDS MITIGATION

The 2014 Farm Bill created a new program for wetlands mitigation. The legislation provides USDA \$10 million in funding from the Commodity Credit Corporation to operate a program or work with third parties to establish mitigation banks to assist persons in meeting Swampbuster mandates. The new program specifically prohibits USDA from holding easements, but requires the Secretary to develop policy and criteria that will enable farmers to access existing mitigation banks or other authority, which was not defined in statute.

While the 2014 Farm Bill requires the Secretary to mitigate against the loss of wetland values and functions in operating the program or establishing mitigation banks with third parties, directives to USDA written by the Agriculture Committees require a 1:1 acre ratio be applied, which would arguably undermine the statutory mandate of “mitigating against the loss of wetland values and functions.” Notably, this program was not included in either the U.S. Senate or U.S. House of Representatives-passed versions of the Farm Bill and had little or no public discussion during the Farm Bill debate. Careful attention will therefore need to be given to how the program is structured and administered during the rulemaking and program implementation phases.

CONCLUSION

The inclusion of conservation compliance in the 2014 Farm Bill represents a significant victory for wetland protection advocates. Much work still needs to be done in the rulemaking and program implementation phases to solidify those victories. Those battles are largely played out quietly, inside the Beltway by organizations that are well-connected and better resourced than many wetland protection allies. Vigilance will be critical. ■

ENDNOTES

1 Agricultural Act of 2014, Pub. L. No. 113-79.

2 JIM MOSELEY, CONSERVATION COMPLIANCE: A 25-YEAR LEGACY OF STEWARDSHIP

(American Farmland Trust 2013).

3 For more information about these programs, visit USDA, *Crop Commodity Programs*, <http://www.ers.usda.gov/agricultural-act-of-2014-highlights-and-implications/crop-commodity-programs.aspx#.U0PWJaI3c9Y> (last visited Apr. 8, 2014).

4 Natural Resources Conservation Service, *Agricultural Conservation Easement Program*, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (last visited Mar. 19, 2014).

5 Natural Resources Conservation Service, *Wetlands Reserve Program*, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/wetlands/> (last visited Mar. 19, 2014).

BARNES, *continued from page 13*

10 Virginia Department of Environmental Quality, *Virginia Clean Water Revolving Loan Fund Land Conservation Loan Program Guidelines*, <http://www.deq.virginia.gov/Programs/Water/CleanWaterFinancingAssistance/LandConservation.aspx> (last visited Mar. 19, 2014).

11 Minnesota's Legacy, *About the Funds*, <http://www.legacy.leg.mn/about-funds> (last visited Mar. 19, 2014).

12 Minnesota's Legacy, *Clean Water Fund*, <http://www.legacy.leg.mn/funds/clean-water-fund> (last visited Mar. 19, 2014).

13 U.S. EPA, *Clean Water State Revolving Fund*, http://water.epa.gov/grants_funding/cwsrf/cwsrf_index.cfm (last visited Mar. 19, 2014).

14 Virginia Department of Environmental Quality, *supra* note 10.

15 Minnesota Association of Soil and Water Conservation Districts, home page, <http://www.maswcd.org/> (last visited Mar. 19, 2014).

16 See Iowa Finance Authority, *State Revolving Fund Water Quality Programs*, <https://www.iowalinkeddeposit.com/index.cfm?fuseaction=Controller.lenders> (last visited Mar. 19, 2014).

17 Federal Deposit Insurance Corporation, *Statistics on Banking*, <http://www2.fdic.gov/SDI/SOB/> (last visited Mar. 19, 2014).

18 National Credit Union Administration, *5300 Call Report Quarterly Data*, <http://www.ncua.gov/DataApps/QCallRptData/Pages/default.aspx> (last visited Mar. 19, 2014).

19 Farm Credit Administration, *FCS Major Financial Indicators*, <http://www.fca.gov/reports/fcsindicators.html> (last visited Mar. 19, 2014).

May Is American Wetlands Month

American Wetlands Month was created in 1991 by EPA and its federal, state, tribal, local, nonprofit, and private-sector partners to celebrate the vital importance of wetlands to the nation's ecological, economic, and social health and to educate Americans about the value of wetlands as a natural resource. Historically, annual events such as national and regional conferences have been organized to include a broad range of people including wetland scientists, educators, and public interest. The annual celebration of American Wetlands Month in May seeks to inspire people to work throughout the year to protect, preserve, and expand wetlands.

Look for events in your area throughout the month of May. For more information, be sure to check out EPA's website at <http://water.epa.gov/type/wetlands/outreach/>.