
DREDGED, FILLED, PLOWED, AND PLANTED: THE DEFICIENCIES OF WETLAND PROTECTION IN THE UNITED STATES

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I. WETLANDS AND AGRICULTURE: A COMPETITION FOR RESOURCES

“In marshes, life’s undercurrents and unknowns and evolutionary changes are exemplified with a high degree of independence from human dominance as long as [they] remain in marshy condition.”¹ This observation, enunciated in 1957 by American naturalist, author, and professor Paul Errington, remains true today. Evidence of its veracity can be found in the ample legislation regarding wetlands, areas naturally saturated with water, often found bordering coastlines and riverbanks or dotting agricultural landscapes.² Government guidelines, for

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1. Paul L. Errington, *Preface* to OF MEN AND MARSHES, at viii (1st ed. 1957).

2. *Wetland*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/wetland> (last visited April 9, 2014).

example, dictate water quality, protect wildlife habitats, and restrict or limit many actions deemed to negatively interfere with this natural resource.³

Given the many tasks they perform, it's difficult to overstate the importance of wetlands in a balanced ecosystem. Filtering water on a massive scale, preventing soil erosion, and sheltering wildlife, including several endangered species, are but a few of the environmental services provided by wetland environments. Highlighting their importance, Congress has passed many regulatory and incentive programs designed to protect wetlands and encourage their preservation.⁴

Wetland protection often conflicts with agricultural operations, however. For the farmer, who physically alters the natural landscape, be it through clearing, filling, plowing, or a myriad of other methods, the presence of wetland may mean costly management practices or the loss of valuable acres for production. Agriculture's position in society, directly linked to the sustenance of a population, means it too has received a large share of legislative attention.

Indeed, many of the laws that govern wetlands have extensive exemptions for agricultural operations. This Article will examine two significant pieces of wetland legislation: Section 404 of the Clean Water Act and the "Swampbuster" provision of the Food Security Act of 1985. It will also argue that the goals of each have been undermined by their numerous deficiencies, and in particular, by exemptions granted to agricultural operations. Additionally, this Article will propose that, with some modifications, the Wetlands Reserve Program currently run by the Natural Resources Conservation Service can serve as a solution to many of the deficiencies found in the legislation.

II. THE CASE FOR WETLANDS: AN INTERCONNECTED RESOURCE

Estimates suggest there are nearly 5.5 million square miles of wetland on Earth, totaling nearly six percent of the surface.⁵ Why does so much attention focus on a resource found in abundance around the globe? Perhaps it is because

3. See generally Dep't of Energy & Env'tl. Prot., *40 Years of the Clean Water Act*, ST. OF CONN., http://www.ct.gov/deep/cwp/view.asp?a=2719&q=325598&depnav_gid=1654 (last visited April 9, 2014) (providing a timeline of governmental action under CWA related to wetlands).

4. See THOMAS E. DAHL & CRAIG E. JOHNSON, U.S. DEP'T OF THE INTERIOR, FISH & WILDLIFE SERV., *WETLANDS: STATUS AND TRENDS IN THE CONTERMINOUS UNITED STATES MID-1970'S TO MID-1980'S* at 3 (1991), available at <http://www.fws.gov/wetlands/Documents/Wetlands-Status-and-Trends-in-the-Conterminous-United-States-Mid-1970s-to-Mid-1980s.pdf>.

5. *Wetlands of the World*, UNIV. OF ARIZ. COLL. OF AGRIC. AND LIFE SCI., <http://ag.arizona.edu/azaqua/aquaplants/classnotes/WetlandsoftheWorld.pdf> (last visited April 9, 2014).

wetlands are valued not only as a resource in and of themselves, but also act as a host for other resources as well.⁶ Actions that affect a wetland, for better or worse, often directly impact any resources found therein.⁷ This connectivity increases the importance of wetlands dramatically.

What constitutes a wetland? Wetlands come in many forms and can be supported on several different terrains, ranging from woodlands to prairies, though the Environmental Protection Agency (EPA) has compiled a set of defining characteristics common to all wetlands.⁸ According to its definition, wetlands are comprised of “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”⁹

Given their unique conditions, wetlands play host to a number of species. Along coastal wetlands from Texas to Maine, crabs, clams, and oysters thrive in marshlands, while inland wetlands from the Great Lakes to the Pacific Northwest offer breeding grounds for fish as diverse as salmon to the blue backed herring.¹⁰ Even more at home in the moist atmosphere of a wetland are many species of duck.¹¹ Estimates by the EPA suggest that over two-thirds of waterfowl in the United States nest in wetland conditions.¹²

While these examples show creatures with stable or thriving populations, a number of endangered species also can be found in wetlands.¹³ Studies conducted by the U.S. Fish and Wildlife Service have determined that forty-three percent of species which can be considered endangered are “wetland dependent,” meaning at least some portion of their life-cycle is spent in wetland environments.¹⁴ Unsurprisingly, studies have shown that the decline of a wetland has a direct bearing upon the species that live and nest there, and even non-endangered species, such as the common wood duck, can sustain large losses in population when wetlands are destroyed.¹⁵

6. See generally KATHRYN FLYNN, ALA. COOP. EXTENSION SYS., UNDERSTANDING WETLANDS AND ENDANGERED SPECIES: DEFINITIONS AND RELATIONSHIPS 2 (1996), available at <http://www.aces.edu/pubs/docs/A/ANR-0979/ANR-0979.pdf> (describing the immense populations of endangered species native to wetlands).

7. See generally *Wetlands Overview*, EPA 1 (Dec. 2004), <http://water.epa.gov/type/wetlands/outreach/upload/overview.pdf>.

8. See *id.* at 1.

9. 40 C.F.R. § 230.3(t) (2013).

10. FLYNN, *supra* note 6, at 2–4.

11. *Id.*

12. *Wetlands Overview*, *supra* note 7, at 1.

13. FLYNN, *supra* note 6, at 3–4.

14. *Id.* at 2, 4.

15. *Id.* at 2.

Perhaps the most important functions of a wetland, however, are those that go unobserved by the human eye. Wetland areas adjacent to waterways such as lakes, rivers, and oceanic coasts act as massive water purifiers, absorbing silt and sediment that would otherwise be carried into the water.¹⁶ To gauge an idea of the amount of water a wetland can purify, conservationists with Purdue University's School of Agriculture have shown that one acre of wetlands with an average depth of one foot can absorb 330,000 gallons of water.¹⁷ Furthermore, studies demonstrate that wetland vegetation can dispose of otherwise harmful chemicals.¹⁸ Nitrates, commonly used as fertilizers, for example, are often washed from fields into waterways.¹⁹ When trapped by a wetland, however, cattails, bulrushes, and other common flora can break down the chemicals and absorb them as nutrients.²⁰ Runoff that would otherwise make its way unimpeded into water sources, then, is swallowed up by the wetland.²¹

These studies highlight an equally important task accomplished by wetlands: flood control. When rivers leap their banks following the melt of a heavy snow or the torrents of a pounding rain, populations in close proximity live with the threat of extensive property damage.²² When wetlands are in place, however, they provide a buffer zone, with the absorption rates mentioned above acting as a natural flood control.²³ Likewise, when the water has a place to flow, soil erosion is significantly reduced.²⁴

What these preceding paragraphs suggest then, is that the wetland is an extremely valuable natural resource. Standing alone, it is excellent at catching runoff, absorbing excess floodwater, and keeping soil in place. The wetland's importance is amplified by the number of species, many of which are endangered, dependent on the wetland's unique environmental qualities for survival during part or all of their lives.

16. Brian K. Miller, *Wetlands and Water Quality*, PURDUE UNIV. COOP. EXTENSION SERV. SCH. OF AGRIC. (Apr. 19, 1991), <http://www.extension.purdue.edu/extmedia/WQ/WQ-10.html>.

17. *Id.*

18. Edward B. Adams, *Wetlands: Nature's Water Purifiers*, WASH. STATE UNIV. EXTENSION (Dec. 1992), http://content.wsulibs.wsu.edu/cahe_arch/html/eb1723/eb1723.html.

19. Miller, *supra* note 16.

20. ADAMS, *supra* note 18.

21. *Id.*

22. See USDA, HELP IN THE MIDST OF FLOOD (Sept. 2011), available at www.fsa.usda.gov/Internet/FSA_File/floodbrochure_web.pdf (discussing generally that floods can result in major property damage).

23. Miller, *supra* note 16 (discussing that without wetlands acting as a basin for flood control, flood damage is likely to increase).

24. DAHL & JOHNSON, *supra* note 4, at 3.

Historical analysis has suggested an estimated 220 million acres of wetland covered the United States at the time of the country's founding.²⁵ In the years since, over half has been converted into other forms of terrain more suitable for development.²⁶ Recognizing a need to protect this shrinking resource, lawmakers drafted many legislative acts to offer some form of wetland preservation.²⁷ To date, the most extensive efforts are found in the permit requirement systems of Section 404 of the Clean Water Act and the incentive programs offered by the "Swampbuster" provision.²⁸

III. THE CLEAN WATER ACT: THE LIMITS OF SECTION 404

The Clean Water Act (CWA) succeeds a number of laws that aimed to reduce pollution in America's surface waters.²⁹ In spite of prior legislative attempts, some stretching as far back as the 1880s, by the mid-1960s, conditions in many waterways were deteriorating such that public outcry steadily increased.³⁰ Responding to these calls for action, Congress passed the CWA in 1972 with the stated goal of restoring and maintaining "the chemical, physical[,] and biological integrity of [the] Nation's waters."³¹ To achieve this goal, Congress outlined a pollution management plan designed to keep toxins, runoff, and wastes from flowing or seeping into surface waterways.³² Administration of the management plan envisioned by Congress fell to the newly formed EPA.³³ Interestingly, despite an inherent ability to absorb runoff and other undesired materials, wetlands were not addressed during the initial drafting of the CWA.³⁴

Section 404 of the CWA, however, was written to protect waterways from damage caused by dredging and filling activity.³⁵ To facilitate this protection, Section 404 relies on a permit system, administered by the United States Army Corp of Engineers (COE).³⁶ Specifically, the COE requires all projects

25. *Id.*

26. Joseph G. Theis, *Wetlands Loss and Agriculture: The Failed Federal Regulation of Farming Activities under Section 404 of the Clean Water Act*, 9 PACE ENVTL. L. REV. 1, 3–4 (1991).

27. *Wetland Protection*, WATER SHEDSS, N. CAROLINA ST. UNIV., <http://www.water.ncsu.edu/watershedss/info/wetlands/protect.html> (last visited April 9, 2014).

28. Theis, *supra* note 26, 4–6.

29. *See Wetland Protection*, *supra* note 27.

30. Dep't of Energy & Envtl. Prot., *supra* note 3.

31. 33 U.S.C. § 1251(a) (2012).

32. *See id.* § 1251.

33. *Id.* § 1251(d).

34. *See id.* §§ 1251–1387.

35. 40 C.F.R. § 230.1(a) (2013).

36. *Id.* § 230.2.

that result in the placement of dredge or fill material in a water of the United States be issued a permit before commencing.³⁷ The COE subsequently interpreted “waters of the United States” to include wetlands adjacent to navigable waters.³⁸ Both dredging (the scooping of earth from a body of water) and filling (the placement, and often plowing, of earth into a body of water) can destroy a wetland area.³⁹

One of two permits may be issued depending on how much impact a project will have: a general permit or an individual permit.⁴⁰ For small projects with little environmental impact, the parties involved operate under a general permit by informing the COE of their intent to comply with all requirements, and no further review is likely needed.⁴¹ Larger projects, more certain to leave a significant impact on a wetland and adjacent waters—for example, a mining operation with massive amounts of fill material—must be issued an individual permit.⁴² The application process for an individual permit may take upwards of three months.⁴³

Though the specific requirements to obtain a permit vary from project to project, there are a few common obligations applicants must observe. First, mitigating actions will usually be prescribed, which involve avoiding any unnecessary wetland destruction.⁴⁴ When destruction cannot be avoided, it must be minimized to the greatest extent possible.⁴⁵ If the impact is particularly harmful, the applicant may have to make restoration efforts when the project is completed, or may be obliged to aid in recreating wetland areas elsewhere.⁴⁶ If a party fails to seek a proper permit or fails to adhere to the conditions of a permit, both the EPA and the COE have the power to issue compliance orders requiring the offending party to remedy the situation.⁴⁷ If no action is taken, the COE may assess fines of

37. *See id.* § 225.1.

38. *Id.* § 230.3(s)(1)–(7).

39. *Wetlands—Status and Trends*, EPA, http://water.epa.gov/type/wetlands/vital_status.cfm (last updated Jan. 24, 2013).

40. EPA, MANAGING YOUR ENVIRONMENTAL RESPONSIBILITIES, SECTION IV: DREDGE AND FILL/WETLANDS (SECTION 404) PERMIT REQUIREMENTS FOR CONSTRUCTION PROJECTS 28–29, available at http://epa.gov/compliance/resources/publications/assistance/sectors/constructmyer/myer1c_dredgeandfill.pdf [hereinafter MANAGING YOUR ENVIRONMENTAL RESPONSIBILITIES]

41. *Section 404 Permitting*, EPA, <http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/> (last updated Mar. 13, 2013).

42. *Id.*

43. MANAGING YOUR ENVIRONMENTAL RESPONSIBILITIES, *supra* note 40, at 25.

44. *Id.* at 30; *Section 404 Permitting*, *supra* note 41.

45. MANAGING YOUR ENVIRONMENTAL RESPONSIBILITIES, *supra* note 40, at 30.

46. *Id.*

47. 33 U.S.C. § 1319(a) (2012).

up to \$125,000 depending on the severity of the violation.⁴⁸ In some instances, many levels of project management have been subjected to fines for not obtaining wetland permits, and when determining liability, courts will examine any party that held control over the project in question.⁴⁹

While this would seem to offer comprehensive protection for vast areas of wetlands, the limitations of Section 404 were quickly evident. The language of the CWA limits Section 404's regulatory authority to "navigable waters."⁵⁰ Accordingly, the COE can only retain control over wetlands that are adjacent to navigable waters of the United States.⁵¹ To counter this deficiency, the COE redefined "waters of the United States" to include connected tributaries and waters where degradation and declining quality could affect interstate commerce.⁵² The result of this regulatory decision was a notable enlargement of the COE's wetland authority.

A. *An Ambitious Goal with Limited Success: No-Net-Loss*

In the late 1980s, relying upon the permit system of Section 404, the COE set an ambitious goal to judge the success of their wetland preservation techniques.⁵³ It was hoped that the mitigation and restoration requirements accompanying dredge and fill permits would achieve a calculated result of no-net-loss of wetland areas.⁵⁴ This standard was conceived of in 1987 by the National Wetlands Policy Forum and was implemented the following year by then-president George H.W. Bush.⁵⁵ The no-net-loss policy is premised on the understanding that for each bit of wetland permitted to be destroyed or altered through approved projects, an equal amount will be restored, either in close proximity to the project site or in another suitable area.⁵⁶ Ideally, the payoff would be a harmonious balance between a desire for development and a recognized need for wetland preservation.

Unfortunately, a brief glance at the numbers involved in this issue indicates the COE has failed to meet their stated goal. Generally accepted figures

48. *Id.* § 1319(g)(2).

49. *Assateague Coastkeeper v. Alan and Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442 (D. Md. 2010) (*citing* U.S. v. Lambert, 915 F. Supp. 797, 802 (S.D.W.Va. 1996)).

50. 33 U.S.C. § 1344(a) (2012).

51. 40 C.F.R. § 230.3(b) (2013).

52. *Id.* § 230.3(s)(3).

53. *See Wetland Protection*, *supra* note 27.

54. *Id.*

55. *Id.*; *Wetlands*, NAT. RES. CONSERVATION SERV., USDA, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/water/wetlands> (last visited April 9, 2014).

56. *See Wetland Protection*, *supra* note 27.

concerning United States wetland destruction estimate an average of between 60,000 and 80,000 acres of wetland are lost annually.⁵⁷ Unquestionably, this is an improvement from the 1950s, when annual wetland loss averaged around 600,000 acres.⁵⁸ In the years following the implementation of the CWA, there were significant drops in wetland loss, but over the last two decades, the amount of annual wetland loss has remained steady at its current rate, if not increased somewhat.⁵⁹

A number of factors can be said to contribute to the continued loss of wetland. One culprit is a series of oversight and management problems experienced by the COE. In 1993, four years after the implementation of the no-net-loss goal, the General Accounting Office (GAO), principal auditors for the government, noted that the COE lacked guidelines for what exactly constituted wetland loss.⁶⁰ It was also found that both the COE and the EPA often neglected enforcement of permit restrictions despite the previously mentioned regulatory tools for doing so.⁶¹ Over a decade later, further GAO research revealed the COE's guidelines for wetland mitigation enforcement remained inconsistent and vague.⁶² Additionally, testimony from COE regional directors indicated mitigation compliance is given very low priority, often due to budgetary concerns.⁶³

Furthering wetland loss is the fact that restoration of destroyed wetlands, even though often required by Section 404 permits, may prove difficult or impossible. Recreating the unique environments of a wetland can often be costly and very labor intensive, particularly in areas not previously deemed wetlands, as everything from the soil to the fauna must be carefully considered.⁶⁴ Research conducted through state conservation programs has also charted the significant

57. Lois Winter & Stewart Fefer, *Protecting Maine's Wetlands: Linking Maine's Past with Its Future*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Wash. D.C.), Nov./Dec. 2007, at 6; *Annual Wetland Loss: U.S., HEALING OUR WATERS—GREAT LAKES COAL.*, http://conference.healthylakes.org/files/2010/05/CWRA_GL_FACTS_9-09.pdf (last visited April 9, 2014).

58. *Annual Wetland Loss*, *supra* note 57.

59. See THOMAS E. DAHL & SUSAN-MARIE STEDMAN, U.S. DEP'T OF THE INTERIOR, FISH & WILDLIFE SERV., STATUS AND TRENDS OF WETLANDS IN THE COASTAL WATERSHEDS OF THE CONTERMINOUS UNITED STATES 2004–2009, at 20 (2013), available at <http://www.fws.gov/wetlands/Documents/Status-and-Trends-of-Wetlands-in-the-Coastal-Watersheds-of-the-Conterminous-US-2004-to-2009.pdf>.

60. U.S. GEN. ACCT. OFFICE, GAO/RCED-93-26, WETLANDS PROTECTION: THE SCOPE OF THE SECTION 404 PROGRAM REMAINS UNCERTAIN 4 (1993) [hereinafter GAO/RCED-93-26].

61. *Id.* at 25–26.

62. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-898, WETLANDS PROTECTION: CORPS OF ENGINEERS DOES NOT HAVE AN EFFECTIVE OVERSIGHT APPROACH TO ENSURE THAT COMPENSATORY MITIGATION IS OCCURRING 4 (2005).

63. *Id.* at 16.

64. ALICE L. THOMPSON & CHARLES S. LUTHIN, WETLAND RESTORATION HANDBOOK FOR WISCONSIN LANDOWNERS 23 (Martin P.A. Griffin & Dreux J. Watermolen eds., 2d ed. 2004).

amount of time it takes to restore wetlands, adding to the imbalance between the amount destroyed and the amount of wetlands successfully restored or created.⁶⁵

Solutions for many of these challenges are readily at hand. According to the GAO's own findings, a more direct set of guidelines would likely alleviate the enforcement problems plaguing the COE and EPA.⁶⁶ Furthermore, diligent work has shown that wetlands can be restored and even created despite the difficulties discussed above.⁶⁷ There exists, however, the larger issue of agricultural exemptions built into the language of Section 404 and the CWA. Though they significantly contribute to the loss of wetlands, many activities operate free of these established protective regulations, even if the wetland areas involved would otherwise fall under the jurisdiction of the COE.⁶⁸

B. *Section 404(f): Exemptions for Normal Agriculture*

Written into the CWA are a number of express exemptions for agriculture-related activities.⁶⁹ Whereas construction companies and developers, even when operating on private lands, are obliged to seek a dredge or fill permit if the affected wetland falls within COE jurisdiction, farmers and producers often are not bound by such responsibility.⁷⁰ At first glance, the exemptions appear to be written with broad strokes. As explained by an EPA brochure "you do *not* generally need a permit under Section 404 if your discharges of dredged or fill material are associated with normal farming, ranching, and forestry activities."⁷¹

Exactly what constitutes normal farming, ranching, and forestry activities? The specific exemptions offered in Section 404(f) provide some form of guidance.⁷² Unregulated activity includes plowing, seeding, cultivation, harvesting, and minor drainage.⁷³ Alterations are also allowed for implementing soil and water conservation techniques.⁷⁴ These inclusions are indicative of legislative

65. Ind. Dep't of Env'tl. Mgmt., *Isolated Wetlands Frequently Asked Questions*, ST. OF IND., <http://www.in.gov/idem/wetlands/2359.htm> (last visited April 9, 2014).

66. GAO/RCED-93-26, *supra* note 60, at 19–26.

67. *See, e.g.*, Mary E. Kentula, *National Water Summary on Wetland Resources: Wetland Restoration and Creation*, U.S. GEOLOGICAL SURV., <http://water.usgs.gov/nwsum/WSP2425/restoration.html> (last modified Jan. 29, 2008); John Malek, *Wetland Restoration*, UNIV. OF CAL. IRVINE (June 1997), <http://darwin.bio.uci.edu/sustain/global/sensem/malek297.htm>.

68. *See generally Exemptions to Permit Requirements*, EPA, <http://water.epa.gov/type/wetlands/outreach/fact20.cfm> (last updated Oct. 5, 2012).

69. *See generally id.*

70. *See id.*

71. *Id.*

72. 33 U.S.C. § 1344(f) (2012).

73. *Id.* § 1344(f)(1)(A).

74. *Id.*

intent that each stage of a productive agricultural operation should be free of permit regulations, from till through harvest. Further, the CWA specifically exempts the construction and maintenance of stock ponds and irrigation ditches.⁷⁵ Similarly, construction of farm and forestry roads may be deemed exempt from permit requirements.⁷⁶ While the exemptions discussed above deal with the actual production of agricultural products, these additional exemptions allow for infrastructure and supporting systems to be created free of permit regulations as well.⁷⁷ EPA brochures further indicate farmers are allowed to rotate crops per certain patterns and still operate within the exemptions.⁷⁸ New farming techniques and equipment will not be found to violate the exemptions.⁷⁹ These allowances seem to result from a reluctance to confine farmers and producers to certain crops or techniques.

The legislative history of the exemptions in Section 404(f) reveals they were created as a concession to the agricultural sector. Tracing the origin of the exemptions, legal scholar Kenneth Varns explains that, when the COE expanded its definition of navigable waters to include many wetlands, it was regarded by farmers as an overextension of regulatory power.⁸⁰ The unease that accompanied the COE extension eventually led to an amendment of the CWA.⁸¹ According to Varns, “[i]n 1976 and 1977, the House of Representatives attempted to restrict the Corps’ jurisdiction to traditionally navigable waters. This attempt was defeated, but exemptions were put into place for certain farming, silviculture, and ranching activities.”⁸² The 1977 amendments to the CWA, therefore, can be read as an exchange for upholding the extension of COE jurisdiction.

Although this political compromise increased the amount of protectable wetlands, the exemptions it gave rise to are cited by some as the largest contributors to wetland destruction. Researching the impact of agricultural exemptions in Section 404(f), environmental law scholar Joseph Theis notes that the land clearing and minor drainage activity allowed to take place without dredge and fill permits accounts for a majority of wetland loss annually.⁸³

75. *Id.* § 1344(f)(1)(C).

76. *Id.* § 1344(f)(1)(E).

77. *Id.* § 1344(f)(1)(B).

78. *Exemptions to Permit Requirements*, *supra* note 68.

79. *Id.*

80. Kenneth E. Varns, Note, *United States v. Larkins: Conflict Between Wetland Protection and Agriculture, Exploration of the Farming Exemption to the Clean Water Act’s Section 404 Permit Requirement*, 35 S.D. L. REV. 272, 282 (1990).

81. *See id.*

82. *Id.* (citation omitted).

83. *See* Theis, *supra* note 26, at 30–31.

Similarly, a report from the National Wildlife Federation (NWF) suggests that reliance on unrealistic projected gains from the mitigation programs required by Section 404 enables the COE to support agricultural exemptions in spite of continued wetland loss.⁸⁴ Examining the policies of the EPA and the COE regarding wetland loss and preservation, the NWF argues that due to a faith in mitigation and restoration requirements, the COE accepts a wetland loss of up to 100,000 acres annually through exempted activities.⁸⁵ According to the COE, this loss will be offset by restoration programs and other incentives.⁸⁶

In addition to taking issue with the policy of allowing such a large amount of original wetland acreage to be lost, as opposed to advocating strict preservation measures, the NWF believes the COE is overly optimistic concerning the amount of wetland loss it can make up through restoration programs.⁸⁷ Criticizing the COE's projections of restoring 40,000 acres of wetlands per year through permit requirements, the NWF advises that existing restoration programs cannot attain such a number, noting that such programs "will do little to offset enormous potential losses through the regulatory program."⁸⁸

C. *The Case for Section 404(f) and the Prior Converted Cropland Controversy*

Proponents of the agricultural accommodations found in Section 404(f) suggest that the scope of activities allowed are not nearly as broad as they initially appear. According to Varns, legislative history detailing the drafting of Section 404(f) indicates Congress intended for the exemptions to be narrowly defined.⁸⁹ Additionally, as EPA regulations explain, Section 404(f) applies only to land considered part of an established agricultural operation.⁹⁰ According to the EPA, "[a]ctivities which bring an area into farming, silviculture[,] or ranching use are not part of an established operation."⁹¹ Land clearing, draining, and other activities for example, which are meant to expand, as opposed to just maintain, farming operations, would not be found exempt from permit requirements.⁹²

84. Julie M. Sibbing, *Nowhere Near No-Net-Loss*, NAT'L WILDLIFE FED'N, http://www.nwf.org/pdf/wildlife/nowhere_near_no-net-loss.pdf (last visited April 9, 2014).

85. *Id.*

86. *See id.*

87. *Id.*

88. *See id.*

89. *See Varns, supra* note 80, at 290.

90. 40 C.F.R. § 232.3(c)(1)(ii) (2013).

91. *Id.* § 232.3(c)(1)(ii)(B).

92. *See id.*

Those in favor of Section 404(f) also point out that it does not provide a means for land development to occur without a proper permit.⁹³ In response to numerous questions from landowners, believing that their exempt cropland could be sold for development, or otherwise altered without a need for Section 404 permits, the EPA clarified the issue in a memorandum given to its field personnel.⁹⁴ The memorandum emphasizes that development of wetland for purposes beyond the agricultural operation it was originally exempted for will be deemed a new use and will thus be subject to Section 404 permit requirements.⁹⁵

In recent years, however, a controversy has arisen over the development of cropland converted to agricultural usage prior to 1985. Beginning in 1993, the COE adopted a regulation allowing wetland otherwise falling under the jurisdiction of Section 404 to no longer be considered wetland provided there had been regular agricultural production on the property pre-dating 1985.⁹⁶ As reasoning for the rule, the COE cited the effects that years of farming take on the hydrology of land, leaving it fundamentally altered from its original wetland state.⁹⁷ Unlike the wetlands discussed in the preceding paragraph, property deemed prior converted cropland could be sold and developed free of any Section 404 permit requirements because it was no longer considered a regulated wetland under the CWA.⁹⁸

During the rulemaking process, the COE faced staunch opposition with commentators decrying the regulation as a violation of the general mission of Section 404.⁹⁹ Despite vocal discontent concerning the decision, it would remain in effect for nearly twelve years. In 2005, however, the COE discontinued the regulatory exemption by means of a policy directive mandating that prior converted cropland which has been taken out of agricultural use no longer be deemed automatically exempt from Section 404 permits.¹⁰⁰ Relying upon a similar policy exercised by the Natural Resources Conservation Service (NRCS), the COE now re-evaluates prior converted cropland's exempt status if the land is no

93. See Memorandum from LaJuana S. Wilcher, Assistant Adm'r for Water, EPA, on Clean Water Act Section 404 Regulatory Program and Ag. Activities (May 3, 1990), available at <http://water.epa.gov/lawsregs/guidance/wetlands/cwaag.cfm>.

94. See generally *id.*

95. *Id.*

96. Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008-01, at 45,031-45,032 (Aug. 25, 1993).

97. *Id.* at 45,032.

98. *Id.*

99. *Id.*

100. Memorandum from Bruce I. Knight, Chief, Natural Res. Conservation Serv. & George S. Dunlop, Deputy Assistant Sec'y of the Army on Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act (Feb. 25, 2005), available at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007869.pdf.

longer used for agricultural production, or is slated for other purposes such as commercial development.¹⁰¹

The policy decision to end exemptions for some prior converted cropland became the subject of litigation between agricultural organizations and the COE.¹⁰² With support from the American Farm Bureau Federation, Florida sugarcane growers asserted the COE acted outside the scope of its regulatory authority by effectively ending prior converted cropland exemptions while circumventing rulemaking procedures.¹⁰³ A Florida District Court agreed and, in 2010, granted an injunction that prohibited the COE from continuing the controversial policy directive.¹⁰⁴ For supporters of Section 404, the resulting injunction creates yet another hurdle for wetland preservation, as prior converted farmlands now fall outside the jurisdiction of the COE enforcement.¹⁰⁵ To reach these wetlands, along with all others not covered by Section 404, incentive programs must be relied upon to protect existing wetland environments.

IV. AN INCENTIVE FOR PRESERVATION: THE SWAMPBUSTER PROVISION

Such incentives were created in the Food Security Act of 1985.¹⁰⁶ The Act tackled a number of problems plaguing the agricultural sector, from commodity support payments to changing loan rates.¹⁰⁷ Also drafted in the Act, however, were several conservation-oriented provisions.¹⁰⁸ With names like Sodbuster, Swampbuster, and Conservation Reserve Program, the programs initiated through these provisions were designed to protect different elements of the environment by offering agricultural producers incentives, in the form of federal subsidies, for complying with conservation management plans.¹⁰⁹

101. 33 U.S.C. § 1344 (2012); *see also* Clean Water Act Regulatory Program, 58 Fed. Reg. 45,008.

102. Complaint, *Am. Farm Bureau Fed'n v. United States Army of Corps of Eng'rs*, No. 1:10-cv-00489-RWR (D.D.C. Mar. 24, 2010); Jeff Kray, *Farm Bureau Suit Seeks to Reinstate Exclusion from Wetland Regulation for Former Farmlands*, MARTEN LAW, Apr. 28, 2010, <http://www.martenlaw.com/newsletter/20100428-wetland-regulation-exclusion>.

103. Kray, *supra* note 102.

104. *New Hope Power Co. v. United States Army Corps of Eng'rs*, 746 F. Supp. 2d 1272, 1284 (S.D. Fla. 2010) (holding the Army Corps of Engineers may not engage in rulemaking without appropriate notice-and-comment procedure).

105. *See id.*

106. *See generally* Food Security Act of 1985, 16 U.S.C. §§ 3801–3862 (2012).

107. *Id.*

108. *Id.*

109. *Id.* §§ 3821, 3831.

As noted above, the Swampbuster provision was introduced in 1985 with the aim of preserving wetlands endangered by agricultural production.¹¹⁰ The name of the program itself is a bit of a misnomer, as busting up a wetland is the very thing it seeks to prevent.¹¹¹ In general, the Swampbuster provision accomplished the tying of federal farm subsidies to the preservation of wetlands.¹¹² Unlike Section 404 of the CWA, this incentive is not limited in jurisdiction and applies to *all* wetlands that may be affected by agricultural operations.¹¹³

Each year, farmers and other producers seek subsidies from the federal government to aid their operations. These come in the form of direct cash payments, price supports, subsidized loans for equipment and infrastructure, and many other benefit payments issued by the Commodity Credit Corporation (CCC).¹¹⁴ As a branch of the United States Department of Agriculture, CCC benefits are administered by the Farm Service Agency (FSA).¹¹⁵ With the passage of the Swampbuster provision in 1985, in order to gain eligibility for these annual benefits, applicants must certify that they are in compliance with the rules established by the FSA.¹¹⁶

To become certified as compliant, farmers and producers must implement a conservation management plan.¹¹⁷ Management plans are created by soil technicians working for the NRCS.¹¹⁸ Applicants seeking eligibility submit to an inspection by the NRCS, which conducts surveys to determine which lands are considered wetlands.¹¹⁹ According to regulations governing the program, NRCS technicians have the power to determine the boundaries of wetlands on the farmland in question and to outline steps the producer must take to preserve those wetlands.¹²⁰

Once the survey is complete, producers are bound by the results. The principal requirement is that producers may not convert any wetland on their

110. *Id.* § 3821.

111. *Id.*

112. See JEFFREY A. ZINN & CLAUDIA COPELAND, CONG. RESEARCH SERV., IB97014, WETLAND ISSUES, at CRS-10 (2001).

113. *Id.*

114. *About the Commodity Credit Corporation*, FARM SERV. AGENCY, USDA, <http://www.apfo.usda.gov/FSA/webapp?area=about&subject=landing&topic=sao-cc> (last modified Aug. 20, 2008).

115. *Id.*

116. *Providing an Effective Farm and Natural Resource Safety Net*, NAT'L ASS'N OF ST. DEP'TS OF AGRIC., <http://www.nasda.org/File.aspx?id=19578> (last visited April 9, 2014).

117. 7 C.F.R. § 12.5(a)(2) (2013).

118. *Id.* § 12.2(a)(3).

119. *Id.* § 12.6(c).

120. *Id.* § 12.6(c)(2)(i).

property for agricultural purposes.¹²¹ According to Section 3821, “any person who in any crop year produces an agricultural commodity on converted wetland, as determined by the Secretary, shall be ineligible for loans or payments in an amount determined by the Secretary to be proportionate to the severity of the violation.”¹²²

A. *Self-Certification and Inspection: Enforcement of the Swampbuster*

One of the problematic features of the Swampbuster provision is that it relies upon a self-certification system. Farmers seeking to apply for federal benefits annually pledge they are in compliance with the rules spelled out in their conservation management plan concerning wetland preservation.¹²³ While this system makes it possible for large numbers of farmers to apply for benefits, it simultaneously makes enforcement very difficult.

In spite of this difficulty, NRCS and FSA agents have a number of regulatory tools at their disposal to ensure that self-certifying farmers are actually in compliance. First, upon request, applicants must grant agents and technicians access to their land for compliance inspections.¹²⁴ Once on the land, technicians may take soil tests and surveys to ultimately determine if wetlands have been converted at all for agricultural use.¹²⁵ They may also make determinations for proposed expansions or changes to agricultural plans to see if they would damage any wetlands.¹²⁶ If a violation is deemed to have taken place, such as a wetland having been drained, plowed, or planted upon, it is up to the soil technicians to determine the extent of the damage and the severity of the violation.¹²⁷

While the NRCS makes the technical determinations concerning wetland boundaries and destruction, officials with local and state branches of the FSA determine how it will affect the farmer’s benefits.¹²⁸ It is up to the FSA to judge which, if any, benefits the farmer or producer will become ineligible for following a wetland conversion violation.¹²⁹ In addition to this, FSA officials have the regulatory power to accept or deny appeals of the NRCS findings.¹³⁰ After considering the facts of each situation, they may decide whether the violation was

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121. *Id.* § 12.7(a)(2).
 122. 16 U.S.C. § 3821(a) (2012).
 123. 7 C.F.R. § 12.7(a)(2).
 124. *Id.* § 12.7(a)(5).
 125. *Id.* § 12.6(c)(2)(viii).
 126. *Id.* §§ 12.6(c)(2)(v)–(vi).
 127. *Id.* § 12.6(b)(3)(ix).
 128. *See id.* § 12.30(a)–(c)(4).
 129. *See id.* § 12.4(c), 12.30(c)(1)–(4).
 130. *Id.* § 780.11.

done in “good faith” or by a third party, and assess the receipt of benefits accordingly.¹³¹

In addition to withholding CCC benefits, cases have shown the FSA is enabled to seek recompense from producers discovered to have falsely claimed compliance in order to collect subsidy money.¹³² Depending on the circumstances, the FSA may sue for several years of benefits if NRCS technicians can show that wetland conversion has taken place over a series of planting seasons.¹³³ Because many CCC benefits total into the tens of thousands of dollars, judgments against producers who are found to have falsely indicated compliance can often be very large.¹³⁴

As suggested above, the massive amount of farmland enrolled in the Swampbuster benefits program makes it difficult for the FSA and the NRCS to ensure compliance.¹³⁵ To solve the problem of limited resources and personnel, the NRCS inspects land based on random samples taken from an annual survey.¹³⁶ Known as the Compliance Status Review, the survey consists of local FSA offices compiling a randomly selected list of registered tracts of farmland.¹³⁷ According to NRCS policy, the selected tracts are inspected in their entirety for any possible conservation plan violations.¹³⁸ If a violation is discovered using the techniques described above, it is reported to both the producer and the controlling FSA office.¹³⁹ Using this system, the NRCS and the FSA are able to judge the overall success or failure of conservation plans in certain localities.

B. *Exemptions and Disincentives: Is Swampbuster Effective at Reducing Wetland Loss?*

Using data collected through the Compliance Status Review, the NRCS has claimed a high success rate for the Swampbuster program.¹⁴⁰ Officials in the

131. *Id.* § 12.6(b)(3)(vii)–(ix).

132. *See, e.g.*, United States v. Dierckman, 201 F.3d 915, 919, 921 (7th Cir. 2000) (evidencing an instance in which the government sued for misappropriated benefits).

133. *See id.*

134. *See id.* at 917, 928.

135. *See supra* text accompanying notes 102–132.

136. *See* FSA COMPLIANCE STATUS REVIEWS (VERSION 2.3), NAT. RES. CONSERVATION SERV., USDA 5 (2009), available at <http://ias.sc.egov.usda.gov/Help/csr/docs/CSR.pdf>.

137. *See id.*

138. *See id.*

139. *See id.* at 18.

140. *See* Stephen J. Brady, *Highly Erodible Land and Swampbuster Provisions of the 2002 Farm Act*, in FISH & WILDLIFE BENEFITS OF FARM BILL CONSERVATION PROGRAMS: 2000–2005 UPDATE at 5, 11–12 (Jonathan B. Haufler ed., 2005), available at http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/technical/?cid=nrcs143_014152.

agency credit Swampbuster with reducing the amount of wetland destroyed annually through agricultural conversion to productive cropland by over 200,000 acres by the mid-1990s.¹⁴¹ Echoing this success, a report by the animal interest organization Defenders of Wildlife argues Swampbuster has become a primary factor in saving wetland habitats in the United States.¹⁴² Additionally, the report claims Swampbuster is “virtually halting loss of wetlands in farm country.”¹⁴³

Even with these signs of success, there have been challenges with the Swampbuster program that reveal the limits of its power. Similar to Section 404 of the CWA, critics have pointed to oversight and enforcement problems within the NRCS and the FSA.¹⁴⁴ Some of these problems appear virtually identical to issues plaguing the COE and EPA.¹⁴⁵ Chiefly, a lack of funds and personnel to adequately discover and follow up on violations leads to uneven enforcement.¹⁴⁶ Reviewing the program, the GAO noted that uniform enforcement measures were lacking and often differed from location to location.¹⁴⁷ In 1994, several members of the House of Representatives Committee on Agriculture reached a similar conclusion, after debating whether the agencies responsible for enforcing conservation plans were up to the task.¹⁴⁸ Although it was noted that management problems existed, the debate concluded with no action, because a better regulatory structure could not be agreed upon.¹⁴⁹

The GAO also identified the problem of “good faith” waivers for producers who violated their conservation plans by converting wetlands for agricultural purposes.¹⁵⁰ If producers appeal a violation to the FSA, they may argue that the wetland was converted by accident, or was done with a good faith belief that

141. *See id.* at 11.

142. *See Expanding Crisis in the Prairie Pothole Region*, DEFENDERS OF WILDLIFE, <http://www.defenders.org/sites/default/files/publications/farm-bill-fact-sheet-expanding-crisis-in-the-prairie-pothole-region.pdf> (last visited April 9, 2014).

143. *Id.*

144. *See, e.g.*, 33 U.S.C. § 1344 (2012); *see also* Memorandum from LaJuana S. Wilcher, *supra* note 93.

145. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-833, ENVIRONMENTAL PROTECTION: EPA-STATE ENFORCEMENT PARTNERSHIP HAS IMPROVED, BUT EPA'S OVERSIGHT NEEDS FURTHER ENHANCEMENT 6 (2007).

146. *Id.*

147. U.S. GEN. ACCOUNTING OFFICE, GAO-03-418, AGRICULTURAL CONSERVATION: USDA NEEDS TO BETTER ENSURE PROTECTION OF HIGHLY ERODIBLE CROPLAND AND WETLANDS 14 (2003) [hereinafter GAO-03-418].

148. *See Conservation Compliance Provisions of the 1985 Farm Bill: Hearing Before the Subcomm. on Env't, Credit, and Rural Dev. of the Comm. on Agric.*, 103d Cong. 44–45, 144 (1994) (statement of H. Montee Wynn on behalf of Nat'l Wildlife Fed'n).

149. *See id.*

150. *See* GAO-03-418, *supra* note 147, at 2–3, 35–36.

the producer was in compliance with their management plan.¹⁵¹ If determined to be in good faith, the FSA may still offer full benefits to the producer, despite the violation.¹⁵² The GAO noted in their review that one constant between different offices of the FSA was an overuse of the good faith exemption.¹⁵³ Similarly, in testimony before the House Committee on Agriculture, representatives for the NWF explained that the good faith waiver, coupled with fifteen other, much less common exemptions, were hampering any beneficial effects Swampbuster was producing.¹⁵⁴ The GAO provided a specific set of numbers.¹⁵⁵ Its report suggested that out of 8000 discovered violations, well over 4000 were determined to be good faith violations, and the producer received full benefits from the CCC in spite of their known wetland conversion.¹⁵⁶

Overuse of this exemption undercuts the efficacy of the Swampbuster program. The purpose is to deny agricultural producers substantial benefits if steps are not taken to preserve wetlands on their property.¹⁵⁷ The good faith waiver, then, essentially allows the producer to reap the financial rewards of wetland conservation while still placing wetland acres into production.¹⁵⁸ Without the fear of losing financial assistance, the preservation incentives diminish significantly. Additionally, when a good faith waiver is granted, the fear of legal action for falsely certifying compliance vanishes, as the waiver is an official judgment from the FSA absolving the producer of culpability.¹⁵⁹

As suggested above, the GAO's report indicates the overuse of the good faith waiver is an effect of understaffing within the NRCS and the FSA.¹⁶⁰ What it appears to be suggesting is that, due to a lack of resources, the FSA simply grants exemptions rather than fighting producers on the issue of violations.¹⁶¹ While some wetland violations may indeed be minor and in good faith, the large number of cases receiving exemptions point to a bureaucratic inability to handle the number of violations discovered.¹⁶² While theoretically this issue could be solved with a larger budget, more personnel, and better guidelines, a larger problem exists affecting the Swampbuster program. As noted above, the program is

151. *See id.*

152. *See id.* at 2–3, 36.

153. *See id.* at 35.

154. *See Conservation Compliance Provisions of the 1985 Farm Bill*, *supra* note 148, at

145.

155. *See* GAO-03-418, *supra* note 147, at 35.

156. *Id.*

157. *Id.* at 2.

158. *See id.* at 45.

159. *See id.* at 2.

160. *Id.* at 24.

161. *See id.* at 5.

162. *See id.* at 42.

voluntary, and each year, producers must weigh the benefits granted through the program with the expected price of their particular commodity.¹⁶³ If, as in recent years, commodity prices are expected to be high, the producer may determine it is more valuable to place conservation land back into production.

Evidence indicating that farmers are choosing production over conservation was demonstrated in a study released in 2012 by the Environmental Working Group.¹⁶⁴ Its research suggests that between 2008 and 2011, millions of acres of sensitive land, including much wetland, were plowed under for agricultural production.¹⁶⁵ The principal reason for this increase in converted land, they argue, is the rise in price of agricultural commodities, such as corn and wheat, during those same years.¹⁶⁶ Given that the Swampbuster program is voluntary and implemented on an annual basis, no amount of regulatory improvement is likely to keep farmers from seeking a higher income through production when possible.¹⁶⁷

V. THE WETLANDS RESERVE PROGRAM: A POSSIBLE SOLUTION?

What the preceding sections have attempted to demonstrate are the problems inherent in two of the primary wetland protection programs in the United States.¹⁶⁸ Section 404 of the CWA suffers from extensive agricultural exemptions, as well as limits on jurisdictional power which prevents it from reaching many wetlands.¹⁶⁹ While the Swampbuster program has no such limitations, it is hindered by numerous good faith exemptions and is subject to declining use when commodity markets rise.¹⁷⁰ Both programs are also plagued by oversight, budgetary, and understaffing problems.¹⁷¹ Needed then is a process which can overcome these challenges and limitations, offering a more fixed system of wetland protection which has no jurisdictional limitations.

A program with such features was created in the 1990 Farm Bill.¹⁷² Modeled upon the Conservation Reserve Program introduced five years prior, the Wetlands Reserve Program (WRP) sought to “restore, protect, or enhance wet-

163. See 7 C.F.R. § 12.7(a)(2) (2013).

164. SCOTT FABER ET AL., *PLOWED UNDER: HOW CROP SUBSIDIES CONTRIBUTE TO MASSIVE HABITAT LOSSES* 3–4 (2012), available at http://static.ewg.org/pdf/plowed_under.pdf.

165. *Id.* at 3.

166. *Id.*

167. See 7 C.F.R. § 12.4(h).

168. Parts III, IV *supra* above.

169. 33 U.S.C. § 1344(f)(1) (2012).

170. See, e.g., FABER ET AL., *supra* note 164.

171. See, e.g., GAO-03-418, *supra* note 147, at 24, 42.

172. See generally Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359.

lands on private or tribal lands.¹⁷³ Unlike Section 404 of the CWA, the WRP can extend to any private wetland, regardless of whether it is adjacent to navigable waters.¹⁷⁴ Further, the WRP protects wetlands from agricultural production not on an annual basis, but for long periods of time.¹⁷⁵

The WRP achieves this goal by relying on a system of conservation easements. Upon enrollment in the program, the landowner grants an easement to the USDA, which then works with the owner to restore the land.¹⁷⁶ As compensation for granting the easement, the USDA, through CCC financing, pays the owner.¹⁷⁷ Payment amounts vary based on a number of different factors, including the amount of land and the geographic region.¹⁷⁸ As amended in the 2008 Farm Bill, the USDA offers owners the least expensive of three options: the value of the land based on an area wide survey; a regional payment cap, if one is in place; or an offer made by the landowner.¹⁷⁹

Similar to the Swampbuster, NRCS officials provide technical assistance for restoring any converted wetlands and also make the initial determination of eligibility.¹⁸⁰ According to the governing laws, in order to be eligible, the land must be private or tribal, and must be able to maximize wildlife benefits and wetland functions.¹⁸¹ Furthermore, the property must be either converted wetland or cropland that morphed into wetland following a natural flooding of the area.¹⁸² As a final requirement, it must be possible to salvage the wetland conditions that once existed on any converted land.¹⁸³ Recognizing the importance of a wetland's total ecological system, easements are also often granted to the USDA for riparian areas that connect otherwise isolated wetlands on the property as well.¹⁸⁴ While this shows there are some limitations on which land can be enrolled in the

173. 16 U.S.C. § 3837(a)(2).

174. See Food, Agriculture, Conservation and Trade Act of 1990 § 1438.

175. See 16 U.S.C. § 3837(b)(2) (demonstrating easements under the WRP being permanent or for thirty years).

176. *Id.* § 3837a(c).

177. 16 U.S.C. § 3837a(f); see also *Wetlands Reserve Program*, NAT. RES.

CONSERVATION SERV., USDA, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/wetlands/> (last visited April 9, 2014) [hereinafter *Wetlands Reserve Program*, NRCS].

178. See 16 U.S.C. § 3837a(f).

179. *Wetlands Reserve Program*, NAT'L SUSTAINABLE AGRIC. COAL., <http://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/wetlands-reserve-program/> (last visited April 9, 2014) [hereinafter *Wetlands Reserve Program*, NSAC].

180. *Wetlands Reserve Program*, NRCS, *supra* note 177.

181. 16 U.S.C. § 3837(b)-(d).

182. *Id.* § 3837(c)(2)(A)-(B).

183. *Id.* § 3837(c)(3).

184. *Id.* § 3837(d)(3).

WRP, it also demonstrates that it is not subject to the jurisdictional boundaries of Section 404.

Additionally, the USDA offers lengthy easement periods. For private landowners, the USDA offers three options for easement terms.¹⁸⁵ The first is a permanent easement, existing in perpetuity, for which the USDA will pay up to one hundred percent of the costs accrued during the restoration process.¹⁸⁶ The second, and more common term, is an easement for thirty years in which the USDA pays up to seventy-five percent of the restoration costs.¹⁸⁷ The final option does not actually involve an easement, but rather a cost-sharing agreement between the USDA and the owner to restore the wetland, for which the USDA will also pay up to seventy-five percent.¹⁸⁸ If the land is deemed eligible, the USDA also pays for all of the costs associated with creating the easement including survey, recording, and filing costs.¹⁸⁹

Charting the progress of the WRP since its inception, the National Sustainable Agriculture Coalition notes that, by 2007, nearly two million acres of wetland had been enrolled in the program and restored.¹⁹⁰ Furthermore, individual states have achieved a number of positive benefits by coordinating WRP easements into larger conservation projects. In northeastern Minnesota, for example, the Red River was subject to overflows resulting in expensive disaster declarations due to a loss of natural flood plains.¹⁹¹ Beginning in 1996, conservation officials began acquiring a number of WRP easements along the river, creating miles of restored wetlands to absorb any subsequent floodwaters.¹⁹²

Perhaps the most recognizable effect of the lengthy terms required by the easement system is a removal of yearly economic concerns on behalf of a producer.¹⁹³ While the Swampbuster program often sees waning participation during seasons when commodity prices exceed benefits offered by the government, the WRP effectively prevents producers from deciding production out-values conservation.¹⁹⁴ While this undoubtedly causes some consternation during years

185. See *Wetlands Reserve Program*, NRCS, *supra* note 177.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Wetlands Reserve Program*, NSAC, *supra* note 179.

191. *Emergency Watershed Protection (EWP) Floodplain Easements Help Protect Marshall County, Minnesota Floodplain*, NAT. RES. CONSERVATION SERV. MINN., USDA, http://www.nrcs.usda.gov/wps/portal/nrcs/detail/mn/programs/financial/ewp/?cid=nrcs142p2_023864 (last visited April 9, 2014).

192. *Id.*

193. *See id.*

194. *See id.* (discussing the land and financial benefits gained through easement programs).

when WRP payments do not add up to the amount a cultivated field could bring, it also provides a steady income source during low-value years.¹⁹⁵ Input from participating farmers suggests satisfaction with the amount they receive for their easements; farmers also note that the promise of a steady payment can allow for further investment in suitable farmland elsewhere.¹⁹⁶

The management structure of WRP land also eliminates the problem of good faith exemptions that hamper the Swampbuster program. According to an NRCS field guide, when a violation is discovered such as cultivation, grazing, dumping, or other altering activities, the landowner is notified of the problem.¹⁹⁷ A period of fifteen to thirty days is given for rectification and, if no action is taken, the NRCS corrects the issue itself.¹⁹⁸ This can include seizing grazing cattle, eliminating invasive species, clearing accumulated junk, or any other necessary tasks.¹⁹⁹ The landowner is billed for the cost and is subject to lawsuits if payment is not received.²⁰⁰ While there is an appeals process for landowners to contest the finding of a violation, it is either upheld or overturned and there appears to be no place for exemptions or waivers.²⁰¹ Similarly, because the land is protected by an easement held by the USDA, the agricultural exemptions granted through Section 404 would not be applicable either.²⁰²

VI. CONCLUSIONS: MODIFICATIONS TO HELP WITH THE FUTURE OF THE WRP

These features of the WRP solve a number of the deficiencies facing other wetland programs in the United States by removing jurisdictional limits, removing annual economic concerns from the equation, and eliminating good faith waivers. Still, problems in the program exist or have the potential to arise.

195. *See id.*

196. *See, e.g.,* Kenneth J. Forshay et al., *Landowner Satisfaction with the Wetlands Reserve Program in Wisconsin*, 36 ENVTL. MGMT. 248 (2005) (using Wisconsin as example evaluating landowner satisfaction with WRP).

197. *Manuals: Wetland Reserve Program*, NAT. RES. CONSERVATION SERV., USDA, at §§ 514.67(C), 514.68(C)(4), <http://directives.sc.egov.usda.gov/RollupViewer.aspx?hid=17111> (last visited April 9, 2014).

198. *Id.* § 514.67(A)(5).

199. *See id.* § 514.68(C)(6)(ii).

200. *Id.* § 514.68(C).

201. *See generally Manuals: Appeals and Mediation*, NAT. RES. CONSERVATION SERV., USDA, at §§ 510.01–78, <http://directives.sc.egov.usda.gov/RollupViewer.aspx?hid=17108> (last visited April 9, 2014).

202. *See* Wilcher, *supra* note 93 (demonstrating Section 404 exemptions are for active farming activities, whereas easements prevent such activities in the first place).

One of the principal issues facing the WRP is its enrollment cap.²⁰³ While the program is not hindered by jurisdictional boundaries, there is a limit on the total number of acres that can be placed into reserve and still be eligible for funding.²⁰⁴ This number has gradually increased since the program's inception, now totaling just over three million acres.²⁰⁵ Because Congressional approval is needed to expand the enrollment allowance,²⁰⁶ raising the number of acres is often a lengthy process. An expansion in 2002 saw the enrollment ceiling grow from one million to 1.075 million acres, though this only came after studies revealed many willing participants were rejected due to a combination of the acreage cap and a lack of funding.²⁰⁷

One modification to the WRP that may help alleviate each of these concerns would be a greater focus on perpetual conservation easements. Currently the NRCS weighs six factors to determine which applicants are admitted to the WRP.²⁰⁸ Among the criteria examined is how well the land will meet the overall goal of the WRP with perpetual easements offering the best means to reach that goal.²⁰⁹ It could be argued that placing more focus on this factor, or establishing an official policy of preference towards perpetual easements, would allow NRCS officials to better focus their enrollment efforts on taking land out of production permanently. This would also free up funding currently spent on short-term easements and restoration cost-share agreements, while reducing the pool of applicants to those willing to place their land under a perpetual easement.

It is questionable, however, how much this modification will relieve the pressure on the WRP's budget and enrollment cap. Currently, over seventy-seven percent of enrollments are already in perpetuity.²¹⁰ Additionally, perpetual easements already account for almost ninety percent of the payments made through the WRP.²¹¹ These figures indicate that attempts are being made to offer preference to perpetual easements, and the program remains strained nevertheless.

203. *Wetlands Reserve Program*, NSAC, *supra* note 179 (“The program is competitive, with landowners submitting bids to USDA for enrollment.”).

204. *Id.*

205. *Id.*

206. *See id.*

207. ZINN & COPELAND, *supra* note 112, at CRS-10.

208. JEFFREY FERRIS & JUHA SIIKAMÄKI, CONSERVATION RESERVE PROGRAM AND WETLAND RESERVE PROGRAM: PRIMARY LAND RETIREMENT PROGRAMS FOR PROMOTING FARMLAND CONSERVATION 16 (2009), available at http://www.rff.org/RFF/Documents/RFF-BCK-ORRG_CRP_and_WRP.pdf.

209. *See id.*

210. *Id.* at 17 tbl. 3.

211. *Id.*

This raises another issue facing the WRP: chronic underfunding. Changes in the funding structure would likely be needed to ensure not only greater promotion to expand participation, but also to ensure easement payments adequate enough to attract interested parties. The history of WRP funding suggests a reluctance to allocate financial assistance to the program for periods longer than a few years. In 2002, for example, the total number of acres allowed was expanded and given appropriate funding only after the budget had been depleted and the ceiling had been reached.²¹²

This process was repeated in 2008 when Congress approved an expansion of the WRP acreage cap and a continuation of its budget, but only through 2012.²¹³ Currently, the future of the program once again appears to be in limbo, as its funding has been tied up in the debates surrounding agricultural appropriations in the 2012 farm bill.²¹⁴ These short periods of funding lead to uncertainty and dissuade farmers from investing in the program, ultimately handicapping its goal of long term wetland protection. Needed then, are longer budgetary commitments that can lead to a more stable future for the WRP, greater awareness of its existence, and increased farmer participation.

However, this goal of increased participation presents a slight paradox. While achieving greater protection for wetlands, it will also likely give rise to another set of problems currently not experienced by the WRP. With each expansion of the total number of acres allowed into the WRP, greater strain is placed on the NRCS in their attempts to enforce the program. Currently, the WRP operates on a structure of enforcement very similar to the Swampbuster program, whereby limited staff often must personally discover violations in order for action to be taken.²¹⁵ As discussed above, the Swampbuster program has been prone to oversight problems due to the large number of participants, leading to many violations going unnoticed or simply being waived away.

The limited appeals process offered by the WRP alleviates the threat of waivers and exemptions, but as the total number of enrolled acres grows, a greater number of personnel will likely be needed to maintain proper oversight of the enrolled land in order to adequately ensure violations are not taking place.²¹⁶ Currently, the limited number of acres enrolled in the WRP and the concentrated nature of the land currently appear to keep this problem at bay, and incidents of

212. *Id.* at 23–24.

213. *Id.* at 18.

214. See Sarita Wahba, *The Farm Bill—What Now?*, LIVABLE FUTURE BLOG (Oct. 11, 2012), <http://www.livablefutureblog.com/2012/10/the-farm-bill-%E2%80%93-what-now>.

215. See CLAUDIA COPELAND, CONG RESEARCH SERV., RL33483, WETLANDS: AN OVERVIEW OF ISSUES 14 (2010).

216. See *Wetlands Reserve Program*, NSAC, *supra* note 179.

regulatory enforcement and legal action are very limited.²¹⁷ Similar to Section 404 of the CWA and Swampbuster program, this issue could be solved through preemptive increases in funding. As noted above, however, this is unlikely given the history of WRP funding.

Thus, while by no means perfect, the Wetlands Reserve Program offers solutions to a number of the deficiencies found in Section 404 of the Clean Water Act and the Swampbuster Provision. The program operates well at present, in part due to its limited nature and, though the NRCS seeks to expand it, this may threaten the efficiency it currently enjoys. Like many ambitions born from politicized legislation, the WRP could benefit from stable funding and larger staff resources. Unfortunately, as the legislative history of WRP funding and the current aversion to additional political spending reveal, this solution has a small chance of occurring.²¹⁸ Maintaining current levels and funding appears possible and will at least continue the small-scale achievements made by the Wetlands Reserve Program.

217. *See id.*

218. *See id.* (providing examples of Congressional shifting of funds that result in an overall lack of funding for all programs).