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# **Conservation at the Crossroads: Reauthorization of the 1985 Farm Bill Conservation Provisions**

by

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# CONSERVATION AT THE CROSSROADS: REAUTHORIZATION OF THE 1985 FARM BILL CONSERVATION PROVISIONS

*Linda A. Malone\**

The conservation provisions of the Food Security Act of 1985<sup>1</sup> (Farm Bill) provide incentives for farmers to take fragile land out of production altogether, or at least out of environmentally unmanaged production. Eligibility for many United States Department of Agriculture (USDA) support programs depends on compliance with the Act's "sodbusting," "swampbusting," and conservation compliance program requirements. These provisions are considered by some to be "the most significant land and water conservation legislation of the past half century."<sup>2</sup> Indeed, they are a rarity: a government farm program that works. Success, however, is no guarantee of full reauthorization when the Farm Bill is reconsidered by Congress in 1990. The conservation programs are politically vulnerable to pressure from farmers who resent governmental interference, from budget-cutters who are penny-wise and pound-foolish, and from a public that is reluctant to pay farmers for non-production.

This article begins with a summary of the way in which the 1985 Farm Bill's conservation programs work. It then analyzes important proposed amendments and suggested reforms to "fine-tune" the provisions for maximum, cost-efficient conservation. Finally, it discusses the reforms which promise to be most effective and efficient in preserving wetlands and highly erodible land.

## I. THE FEDERAL RENAISSANCE IN SOIL CONSERVATION

Modern soil conservation programs first gained widespread attention during the Dust Bowl and the Great Depression of the

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<sup>1</sup> Pub. L. No. 99-198, 99 Stat. 1354, codified at 16 U.S.C.A. §§ 3801-3845 (West Supp. 1988).

<sup>2</sup> Schnepf, *Preface* to Soil & Water Cons. Soc'y, *American Agriculture at the Crossroads: A Conservation Assessment of the 1985 Food Security Act* 4 (1987). For a complete legislative history of the conservation provisions, see Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting and the Conservation Reserve*, 34 U. Kan. L. Rev. 577 (1986).

1930's.<sup>3</sup> The Soil Conservation Act of 1935<sup>4</sup> and the Soil Conservation and Domestic Allotment Act of 1936<sup>5</sup> established soil conservation agencies, including the Soil Conservation Service (SCS), and various programs to encourage erosion control.<sup>6</sup> The hazards of soil erosion faded from public view over the next several decades until the 1970's, when the world market for American agricultural exports peaked.<sup>7</sup> Farmers planted in marginal lands and intensified cultivation on traditional fields.<sup>8</sup> Conservation practices were neglected, and, within a few years, concerns about the quality of American cropland reemerged.<sup>9</sup> Soil erosion was again seen as a serious problem (to some it appeared worse than during the Dust Bowl period), and there was concern about protecting future food supplies.<sup>10</sup>

In the mid-1970's, existing conservation programs were criticized for emphasizing productivity over erosion control.<sup>11</sup> In response to such criticism, Congress passed the Soil and Water Resources Conservation Act of 1977<sup>12</sup> (RCA) to reform and improve federal conservation programs. A series of influential reports from the Natural Resources Inventory in 1977 and 1982 revealed that most of the country's erosion and soil loss was concentrated on a small proportion of the land under cultivation.<sup>13</sup> Data in the Natural Resources Inventory, recommendations made by the American Farmland Trust, and discussions growing out of the RCA process led to the development of the essential conservation features of the 1985 Farm Bill.<sup>14</sup>

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<sup>3</sup> S. Batie, *Soil Erosion: Crisis in America's Croplands?* 89 (1983).

<sup>4</sup> Pub. L. No. 74-46, 49 Stat. 163 (1935).

<sup>5</sup> Pub. L. No. 74-461, 49 Stat. 1148 (1936).

<sup>6</sup> S. Batie, *supra* note 3, at 4-5.

<sup>7</sup> *Id.* at 5-8.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> American Farmland Trust, *Soil Conservation in America: What Do We Have to Lose?* 59 (1985).

<sup>11</sup> S. Batie, *supra* note 3, at 94-95.

<sup>12</sup> Pub. L. No. 95-192, 91 Stat. 1407, codified at 16 U.S.C. §§ 2001-2009 (1982). A notable feature of the program implemented under the RCA was the concept of cross-compliance, whereby the USDA would be able to restrict federal subsidies to farmers who fail to implement acceptable conservation measures. See Hjort, *Cross Compliance of Programs Affecting Soil Conservation*, in 2 *Technical Papers on Soil Conservation: Issues for the 1980's*, at 2-5 (American Farmland Trust ed.).

<sup>13</sup> Pierce, *Complexity of the Landscape*, in *Making Soil and Water Conservation Work: Scientific and Policy Perspectives* 16 (D. Halbach, C. Runge & W. Larson eds. 1987) [hereinafter *Perspectives*].

<sup>14</sup> Berg, *Intergovernmental Relations and Soil and Water Conservation*, in *Perspectives*,

## II. THE CONSERVATION PROVISIONS OF THE 1985 FARM BILL

The 1985 Farm Bill contains four conservation provisions, commonly called the sodbuster,<sup>16</sup> swampbuster,<sup>16</sup> conservation compliance,<sup>17</sup> and conservation reserve programs.<sup>18</sup> The general approach of these provisions "explicitly incorporates consistent environmental and economic (commodity) program objectives."<sup>19</sup> The basic purpose of the sodbuster, swampbuster, and conservation compliance provisions is to ensure cross-compliance between conservation programs of the USDA and USDA price and income support programs. Under these provisions, a producer will receive no USDA program payments (price and income supports, disaster payments, crop insurance, CCC storage payments, farm storage facility loans, Farmers Home Administration loans) if the proceeds will be used to contribute to wetland conversion or to production on highly erodible land farmed without a conservation plan.<sup>20</sup> The legislation does not make soil and water conservation mandatory; farmers may still refuse to use conservation measures or preserve wetlands. If they do not implement the Farm Bill's conservation requirements, however, farmers will be excluded from certain USDA payments, and such payments can form a significant part of a farm's revenue. In 1987-88, for example, USDA farm program payments accounted for forty percent of net agricultural income.<sup>21</sup> The conservation reserve program also promotes soil conservation, but does so by paying farmers to remove highly erodible land from production altogether.<sup>22</sup>

### A. Swampbuster

The essential goal of the swampbuster provision of the 1985 Farm Bill is that federal farm subsidies not be used to subsidize

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*supra* note 13, at 73.

<sup>16</sup> 16 U.S.C.A. §§ 3811-3813 (West Supp. 1988).

<sup>16</sup> *Id.* §§ 3821-3823.

<sup>17</sup> *Id.* §§ 3811-3813.

<sup>18</sup> *Id.* §§ 3831-3836. For a discussion of the programs' statutory and regulatory requirements, see Malone, *The Renewed Concern Over Soil Erosion: The Current Federal Programs and Proposals*, 10 J. Agric. Tax'n & L. 310, 330-47 (1989), parts of which are incorporated into this article.

<sup>19</sup> Berg, *supra* note 14, at 75.

<sup>20</sup> 16 U.S.C.A. §§ 3811, 3821 (West Supp. 1988).

<sup>21</sup> Soil & Water Cons. Soc'y, *American Agriculture at the Crossroads: A Conservation Assessment of the 1985 Food Security Act 5* (1987) [hereinafter *Conservation Assessment*].

<sup>22</sup> 16 U.S.C.A. §§ 3831-3836 (West Supp. 1988).

destruction of wetlands.<sup>23</sup> Wetlands are important components of the environment, serving to reduce flooding, improve water quality, recharge groundwater, and prevent erosion.<sup>24</sup> Wetlands are also critical habitats for wildlife.<sup>25</sup> Despite federal and state protection measures, drainage of wetlands has continued at a rate of 300,000 acres annually over the past decade.<sup>26</sup> Under the swampbuster provision, anyone producing an agricultural commodity on wetlands converted after December 23, 1985, will be ineligible for price and income support and other USDA payments, subject to certain limited exceptions.<sup>27</sup>

### B. Sodbuster

A recent USDA report has identified soil erosion as "the most widespread threat to agricultural productivity and environmental quality"<sup>28</sup> of all the environmental concerns addressed by USDA programs. Under the sodbuster provision of the 1985 Farm Bill, farmers are ineligible for USDA program payments if they produce agricultural commodities on a field in which highly erodible land<sup>29</sup> is predominant,<sup>30</sup> unless an approved conservation plan is applied to that land. The USDA estimates that the 345.2 million acres of highly erodible land subject to sodbuster's restrictions represents "24.5 percent of all agricultural land and accounts for 58 percent

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<sup>23</sup> See, e.g., Ward, *Feds Finally Come Down on Wetland Conversion*, 1 Am. Land Resource Ass'n Land Rep. 1 (Nov./Dec. 1987).

<sup>24</sup> See, e.g., Office of Technology Assessment, *Wetlands: Their Use and Regulation* 37 (1984).

<sup>25</sup> *Id.*

<sup>26</sup> USDA, *A National Program for Soil and Water Conservation: The 1988-97 Update* 13 (1988).

<sup>27</sup> 16 U.S.C.A. § 3822 (West Supp. 1988).

<sup>28</sup> USDA, *supra* note 26, at 9.

<sup>29</sup> "Highly erodible land" falls within two possible statutory classifications. Highly erodible land is land that is within classes IV - VIII under the SCS classification system or that has an "excessive average annual rate of erosion in relation to the soil loss tolerance level." 16 U.S.C.A. §§ 3801(a)(7)(A)(i)-(ii) (West Supp. 1988). Under the final regulations, highly erodible land is land that has an erodibility index of 8 or more. 7 C.F.R. § 12.2(a)(14) (1988). The erodibility index is a numerical value that expresses the potential erodibility of the soil in relation to its soil loss tolerance value without consideration of applied conservation practices or management. *Id.* § 12.2(a)(9). Therefore, land that may actually be eroding at an acceptable rate but that has an inherent potential of eroding eight times faster than it is rebuilding will be considered highly erodible land. See *id.*

<sup>30</sup> Highly erodible land is considered "predominant" in a field, for purposes of sodbuster and conservation compliance, if one-third of the field is highly erodible or 50 or more acres of the field are highly erodible. 7 C.F.R. §§ 12.22 (a)(1)-(2) (1988).

of all cropland erosion.'"<sup>31</sup>

### C. Conservation Compliance

The sodbuster provision requiring immediate implementation of a conservation plan does not apply to highly erodible land that was in agricultural production or set aside under a USDA program in any year between 1981 and 1985.<sup>32</sup> Under the controversial conservation compliance provision of the Farm Bill, however, producers on such land must begin actively applying a conservation plan by January 1, 1990, or lose eligibility for USDA program payments.<sup>33</sup> It is estimated that 117.9 million acres of highly erodible land are subject to the conservation compliance requirements.<sup>34</sup>

### D. Conservation Reserve Program

The Conservation Reserve Program (CRP) is designed to take highly erodible land that was in production for at least two years between 1981 and 1985 out of agricultural production and place it into a reserve to control erosion directly.<sup>35</sup> To put highly erodible land in a conservation reserve, the owner or operator of a farm or ranch must agree by contract: (1) to apply a conservation plan removing the land from commodity production to a less intensive use;<sup>36</sup> (2) to place the land in the reserve;<sup>37</sup> (3) not to use the land for agricultural purposes except as permitted by the Secretary;<sup>38</sup> (4) to establish vegetative cover on the land;<sup>39</sup> (5) to forfeit the right to receive cost-sharing and rental payments, and to refund payments received, with interest, for any violations of the con-

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<sup>31</sup> Conservation Assessment, *supra* note 21, at 7.

<sup>32</sup> 16 U.S.C.A. § 3812(a)(1) (West Supp. 1988).

<sup>33</sup> 7 C.F.R. § 12.5(b) (1988). Under the conservation compliance provision, producers on such land have until January 1, 1990 (or two years after an SCS soil survey is completed) to be actively applying a conservation plan that must be fully in effect by January 1, 1995. *Id.* § 12.5(b)(1).

<sup>34</sup> Conservation Assessment, *supra* note 21, at 7.

<sup>35</sup> See 16 U.S.C.A. §§ 3831-3836 (West Supp. 1988). The stated objectives of the program are to reduce wind and water erosion, protect the nation's long-term capability to produce food and fiber, reduce sedimentation, improve water quality, create better fish and wildlife habitats, curb production of surplus agricultural commodities, and provide needed income support to farmers. See 52 Fed. Reg. 4,269 (1987).

<sup>36</sup> 16 U.S.C.A. § 3832(a)(1) (West Supp. 1988).

<sup>37</sup> *Id.* § 3832(a)(2).

<sup>38</sup> *Id.* § 3832(a)(3).

<sup>39</sup> *Id.* § 3832(a)(4).

tract;<sup>40</sup> (6) not to conduct harvesting, grazing, or commercial use of forage except when permitted by the Secretary in a drought or similar emergency;<sup>41</sup> (7) not to make commercial use of trees unless expressly permitted to do so in the contract;<sup>42</sup> (8) not to adopt any other practice that would defeat the purposes of the program;<sup>43</sup> and (9) to comply with any additional requirements the Secretary might impose.<sup>44</sup> In return, the owner receives technical assistance,<sup>45</sup> cost-sharing for conservation measures required,<sup>46</sup> and, most importantly, annual rental payments to compensate for the retirement of the land and any permanent retirement of the cropland base and allotment history, not to exceed \$50,000 a year for the duration of the contract.<sup>47</sup> Contracts may range from ten to fifteen years.<sup>48</sup>

The Conservation Reserve Program "has the potential to include 87 percent of the nation's most threatened cropland and to reduce soil erosion substantially."<sup>49</sup> According to Wilson Scaling, Chief of the Soil Conservation Service, reduced erosion on the initial 8.2 million acres which entered the reserve in 1986 is saving 209 million tons of soil annually.<sup>50</sup> If the goal of the CRP is met, 40 to 45 million acres of highly erodible cropland will eventually be retired, saving 825 million tons of soil per year.<sup>51</sup>

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<sup>40</sup> *Id.* § 3832(a)(6).

<sup>41</sup> *Id.* § 3832(a)(7).

<sup>42</sup> *Id.* § 3832(a)(8).

<sup>43</sup> *Id.* § 3832(a)(9).

<sup>44</sup> *Id.* § 3832(a)(10).

<sup>45</sup> *Id.* § 3833(3).

<sup>46</sup> *Id.* § 3833(1).

<sup>47</sup> *Id.* § 3833(2). In setting the annual rental payment, the amount may be determined by submission of bids by the owners or operators or by any other means set by the Secretary. *Id.* § 3834(c)(2). In determining acceptance of contract offers, the Secretary may consider the extent of erosion and productivity of the land, establish different criteria for different areas of the United States, give priority to farmers subject to a high degree of economic stress, and, where appropriate, accept offers that provide for establishment of shelter belts, windbreaks, or permanent vegetation to reduce sedimentation substantially. *Id.* § 3834(c)(3).

<sup>48</sup> *Id.* § 3831(e). Contracts are limited to 10 years by regulation. 7 C.F.R. § 704.12 (a) (1) (1988). The Act generally limits the amount of land from any one county that can be put in the reserve to 25% of the land in that county. 16 U.S.C.A. § 3831(d) (West Supp. 1988).

<sup>49</sup> Berg, *supra* note 14, at 75-76.

<sup>50</sup> SCS, *Conservation Reserve Cuts Soil Loss*, 8 Soil & Water Cons. News 10 (July 1987).

<sup>51</sup> *Id.*

### *E. Conservation Easements with the Farmers Home Administration*

In addition to its conservation provisions, the 1985 Farm Bill authorizes two types of conservation easements under the authority of the Farmers Home Administration Agency (FmHA). Section 1318 of the Bill authorizes the Agency to cancel a portion of its borrowers' debts secured by farmland equal to the ratio of conservation easement acreage received by FmHA to the total farmland securing the debt.<sup>52</sup> Conservation easements may be accepted to protect a variety of natural areas.<sup>53</sup>

A second type of easement is an inventory easement under section 1314 of the Farm Bill.<sup>54</sup> The Farmers Home Administration Agency may convey conservation easements or rights-of-way to local or state governments or private nonprofit organizations on property it takes into inventory from FmHA borrowers.<sup>55</sup> If the requested easement would adversely affect the value of the property and FmHA would not be compensated, the easement will be "closely" reviewed.<sup>56</sup> Inventory easements may be made for the same conservation purposes as the section 1318 easements. Under an interagency agreement, the Fish and Wildlife Service assists FmHA in identifying eligible inventory properties.<sup>57</sup>

### III. REFORMS IN THE CONSERVATION PROGRAMS

Reauthorization of the Farm Bill's conservation provisions in 1990 will give Congress an opportunity to coordinate and fine-tune the programs, and perhaps expand them. Despite controversy over how the programs, particularly the conservation reserve program, should be revised, the conservation programs are working. Preliminary figures indicate that, at current enrollment levels, the conservation reserve alone will reduce erosion by 460 million tons a year for ten years.<sup>58</sup>

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<sup>52</sup> 7 U.S.C.A. § 1997(e) (West Supp. 1989). See also Am. Agric. Law Ass'n, 4 Agric. L. Update (Mar. 1987).

<sup>53</sup> Conservation easements may be placed on wetlands, highly erodible lands, or uplands to preserve wildlife habitats, scenic areas, aquifer recharge areas, historic or cultural properties, or floodplains. 52 Fed. Reg. 1,763 (1987) (to be codified at 7 C.F.R. § 1951.42).

<sup>54</sup> 7 U.S.C.A. § 1981 (West Supp. 1989).

<sup>55</sup> Conservation Assessment, *supra* note 21, at 24.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 11.

## A. The Conservation Reserve Program

### 1. Encouraging Enrollment in CRP

Enrollment in the Conservation Reserve Program has been disappointing in the Corn Belt, some eastern states, and the Chesapeake Bay region. This low enrollment is the result of the administrative bidding procedure, in which the USDA sets maximum rental rates, or "bid caps." Many experts consider these caps to be too low.<sup>59</sup> However, some minor adjustments already made to the CRP may help to increase enrollment in these areas. Certain land in the Chesapeake Bay region has been excluded from the bid caps because of the inflated price of farmland due to recreational demand for waterfront property.<sup>60</sup> In the Corn Belt, a one-time bonus based on corn base yield, offered at the time of contract acceptance, attracted participants and led to the inclusion of millions of acres in the program.<sup>61</sup> Similar bonuses could be selectively used to attract land in other underenrolled regions having one predominant crop.

A more comprehensive solution to the acceptance procedure problem would be the removal of bid caps. This type of mechanistic cost control ignores the desirability of reserving strategic properties for which higher rents are justified by productivity, rental rates, water quality problems, severe erosion, or value as habitat for endangered species. Conversely, when CRP rental payments are high in relation to market rental values, rental values are artificially inflated, encouraging land speculation.<sup>62</sup> Inflexibility in accepting bids and the pooling of bids in large counties<sup>63</sup> (particularly in the West) can easily be corrected by more refined regional pooling and removal of the bid pool maximum.

### 2. Encouraging Tree Cover on Reserve Land

A current interim rule is designed to improve the limited success of the CRP in getting reserve land planted with trees. The rule

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<sup>59</sup> *Id.* at 12.

<sup>60</sup> *Id.* at 13. CRP rental rates sometimes exceed cash rental rates in regions growing cotton, sorghum, wheat and small grains. USDA sets maximum accepted bid levels in pools based on cash rental rates. In many arid areas, the rent on dryland acres is averaged with the much higher rent on irrigated areas. Benbrook, *Trends in Federal Soil and Water Conservation Policy*, in *Perspectives*, *supra* note 13, at 85.

<sup>61</sup> See USDA 7 Landowner 7 (Feb. 10, 1986).

<sup>62</sup> Conservation Assessment, *supra* note 21, at 12.

<sup>63</sup> *Id.* at 37.

allows filter strips of land near water bodies to be included in the CRP even if the land is not highly erodible. It also allows land on which trees are to be planted to be put in the CRP if one-third of the land is highly erodible, rather than two-thirds as is currently required.<sup>64</sup> Although the rule has been criticized for giving priority to tree planting rather than inclusion of highly erodible land, it is indisputable that land planted to trees is less likely to be returned to production than land planted with any other vegetative cover.

### 3. *Conflicting Goals of CRP*

With regard to broader reforms, it has been suggested that the CRP is inefficient because it attempts to serve two purposes that are not necessarily compatible: conservation of fragile land and supply control.<sup>65</sup> Some commentators have asserted that these conflicting purposes have resulted in undesirable effects such as the "crowding out" and "base bite" effects.<sup>66</sup>

"Crowding out" occurs because farmers can idle their least productive acres under an acreage reduction program (ARP) and still qualify for USDA program payments. Acreage reduction programs require farmers to set aside a given percentage of their historical acreage in a particular crop.<sup>67</sup> Because farmers satisfy the percentage with their least productive land, the ARP's purpose of supply control is not entirely met. Taff and Runge assume that many of these less productive acres removed under the ARP would have qualified for the CRP, presumably because lower productivity is often a result of excessive erosion. Idling such acreage under the ARP leaves only more productive highly erodible land for inclusion in the CRP, and the rent paid on these acres will have to be higher because of their productivity.<sup>68</sup>

The "base bite" effect results from the requirement that crop acreage bases<sup>69</sup> be reduced for ten years in proportion to the number of CRP acres idled.<sup>70</sup> The costs to the farmer of idling these

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<sup>64</sup> 53 Fed. Reg. 733 (1988) (to be codified at 7 C.F.R. §704.7(c)(6)(d)).

<sup>65</sup> Taff & Runge, *Supply Control, Conservation, and Budget Restraint: Conflicting Instruments in the 1985 Farm Bill*, in *Perspectives*, *supra* note 13, at 4.

<sup>66</sup> *See id.* at 5.

<sup>67</sup> *Id.* at 4.

<sup>68</sup> *Id.* at 5-6.

<sup>69</sup> Farm acreage bases are accounting units used to calculate USDA deficiency payments. Deficiency payments are calculated with reference to a farm's historical base acreage, not the number of acres actually planted to a particular crop. *See id.* at 5, n.3.

<sup>70</sup> 7 C.F.R. § 704.12(a)(3) (1988).

acres are perceived as a part of the cost of participation in the reserve, resulting in decreased participation and higher bids for CRP land.<sup>71</sup>

Taff and Runge conclude that the CRP cannot serve both supply control and conservation. They suggest that the ARP be used for supply control and that it be restricted to land with high productivity and high erodibility. To improve conservation, they suggest that the CRP be limited to land with low productivity and high erodibility, and that land which is eligible for the CRP be ineligible for the ARP. To eliminate the base bite, they propose that inclusion in the reserve should not reduce the crop acreage base.<sup>72</sup> Excluding qualifying CRP land from the ARP might, in areas with a high percentage of land qualifying for the CRP, result in increased production on highly erodible land. In any event, competition between the USDA program payments and rent from the CRP may decline as a result of decreases in support and target prices and recent tightening of payment limitations.<sup>73</sup> A more direct way to encourage enrollment in the CRP would be to ignore supply control and simply eliminate or reduce the requirement that a farm's base acreage be reduced in proportion to CRP enrollment, as Taff and Runge suggest. Also, given the concentration of highly erodible land in certain areas, the twenty-five percent cap on enrollment in CRP in any one county could be raised to fifty percent with little economic impact on the rural economy.<sup>74</sup>

#### 4. *Effective Administration*

There are several impediments to effective administration of the conservation reserve program. Contract periods should be increased to ten to fifteen years to insure retirement of highly erodible land from production. There has also been confusion and dissatisfaction with cost-sharing practices, vegetative cover requirements, and noxious weed control. It is not clear from the Act which land maintenance practices are eligible for cost-sharing

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<sup>71</sup> Taff & Runge, *supra* note 65, at 6.

<sup>72</sup> *Id.* at 11-12. Taff and Runge would also have retirement under the ARP vary from one to five years, with shorter retirement for more productive, less damaged land. Taff & Runge, *Wanted: A Leaner and Meaner CRP*, Choices 16-17 (First Quarter, 1988).

<sup>73</sup> See Am. Agric. Law Ass'n, Update 4-6 (Mar. 1988).

<sup>74</sup> See Benbrook, *supra* note 60, at 87. Fifty-nine counties, primarily in the plains and mountain states, have exceeded the 25% limit. Conservation Assessment, *supra* note 21, at 13.

or what "establishment" of vegetative cover entails.<sup>76</sup> The quality of grass seed used to establish cover varies dramatically despite state and federal standards. One method of achieving quality control would be to require farmers to show certification of any seed for which cost-sharing is requested, with clear instructions to local ASCS offices as to which types of grasses may be used for cover.<sup>76</sup>

All CRP land must be planted or seeded in trees, shrubs, or grass, and maintained. However, there has been little or no enforcement of the CRP's requirement of weed control on reserve acres, and state laws for the control of noxious weeds vary in stringency. As a result, there have been complaints about CRP land becoming a habitat for pests that endanger crops.<sup>77</sup> Regulations or administrative manuals available to the public should describe, at least in general terms, those practices that are eligible for cost-sharing.<sup>78</sup>

##### 5. *Haying and Grazing on CRP Land*

A survey by the American Farmland Trust indicates that many more farmers would apply for enrollment in the CRP if regulations were changed to permit haying or grazing on the retired land.<sup>79</sup> However, grazing and haying put great stress on fragile land and should only be permitted in the near future in emergency situations, if at all. Once CRP land has been enrolled long enough for the vegetative cover to be well established, haying and grazing would have little detrimental impact on control of soil erosion and might then be allowed.<sup>80</sup>

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<sup>76</sup> Conservation Assessment, *supra* note 21, at 32-33.

<sup>76</sup> Apparently there have been complaints from farmers about the SCS requiring planting of native grasses in the Plains areas, although such grasses may not be the best cover for CRP land. Telephone interview with Alice A. Devine, Research Analyst, Kansas State Board of Agriculture (July 11, 1988).

<sup>77</sup> See Conservation Assessment, *supra* note 21, at 33, 37.

<sup>78</sup> The requirements concerning seed quality and weed control entail their own problems of monitoring and enforcement — problems that are becoming increasingly prominent in all of the Farm Bill's conservation programs.

<sup>79</sup> American Farmland Trust, 6 Am. Farmland 1 (Nov. 1986). Recently, in response to an emergency created by drought conditions, the Secretary of Agriculture permitted haying in exchange for a 25% reduction in the annual rental payment. Telephone interview with Jack L. Webb, Agricultural Stabilization Branch Chief, Agricultural Stabilization and Conservation Service (Aug. 9, 1988). It is not clear how much this haying alleviated economic distress, and some damage was done to CRP land because most of the reserve's vegetative cover is too new to withstand haying and grazing.

<sup>80</sup> Legislation was proposed during the last Congress to permit haying and grazing at any time, H.R. 4914, 100th Cong., 2d. Sess. (1988), or to permit haying and grazing for wheat

## 6. *Expanding the Scope*

According to the USDA's estimates, average soil erosion on CRP land at the end of 1987 was reduced from twenty-two tons per acre per year to less than two tons per acre per year.<sup>81</sup> In view of this success, legislation has been introduced to expand the scope of the CRP. Senator Robert J. Dole (R-Kan.), for example, introduced a bill that would have expanded CRP eligibility to include acreage with groundwater contamination or acreage on which pesticide use is restricted because of endangered species.<sup>82</sup> Such "environmental conservation acreage reserve" land would have been counted toward acreage reduction limitations.

Senator Sam Nunn (D-Ga.) introduced expansive legislation to accelerate enrollment, with a goal of enrolling 35 million additional acres and expanding the CRP to 65 million acres.<sup>83</sup> The bill also would have authorized the Secretary of Agriculture to offer base acreage retirement bonus payments and to begin a pilot program using the reserve to address groundwater quality and supply problems. For producers with FmHA financing, debt restructuring plans would have been allowed to include advance CRP payments. Up to fifty percent of CRP rental payments for a ten year contract could have been paid upon signup, and CRP acres could have been considered toward an acreage limitation or set aside if the Secretary determined the CRP rental payments were "on the average, substantially less than payments made" under the commodity program."<sup>84</sup>

Expansion of the CRP could include nonfederal rangeland, sixty-one percent of which is in substandard condition and nine percent of which has excessive erosion.<sup>85</sup> The CRP also does not include land planted in a non-commodity crop, or land with gully, streambank, or roadside erosion. However, a mechanism already

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and feed grains in areas that had been declared national disaster areas during the preceding calendar year. H.R. 4954, 100th Cong., 2d Sess. (1988). Under another bill, the Secretary of Agriculture could have authorized haying and grazing on a state-by-state basis if such use would not have a detrimental effect on established operations producing livestock, hay, or grass-based silage, and there was a downward adjustment in the rental payment "to reflect the probable economic return to the farm operation associated with the production of a forage crop on lands placed in the reserve." S. 1521, 100th Cong., 1st Sess. (1987), *reprinted in* Benbrook, *supra* note 60, at 92-95.

<sup>81</sup> Conservation Assessment, *supra* note 21, at 11.

<sup>82</sup> S. 2045, 100th Cong., 2d Sess. (1988).

<sup>83</sup> S. 1521, 100th Cong., 1st Sess. (1987), *reprinted in* Benbrook, *supra* note 60, at 92-95.

<sup>84</sup> Benbrook, *supra* note 60, at 93-95.

<sup>85</sup> SCS, Fact Sheet (April 1988).

exists for identifying highly erodible land that is currently impairing water quality and that could be included in the reserve. The Clean Water Act requires the governor of every state to provide EPA with a state assessment report<sup>86</sup> identifying waters where water quality is being threatened by nonpoint source pollution, including soil erosion and agricultural runoff.<sup>87</sup> This information could be used to qualify regional categories of sources with excessive erosion rates for inclusion in the CRP. An owner of land which is a source of erosion and water pollution could then determine whether inclusion in the reserve or compliance with best management practices would be more cost-effective.

Expansion of the CRP along these lines would also be in keeping with the National Program for Soil and Water Conservation.<sup>88</sup> The priorities of the program, which is required by the Soil and Water Resources Conservation Act, are to: (1) "reduce the damage caused by excessive soil erosion on crop, pasture, range, forest and other rural lands"<sup>89</sup> and (2) "protect the quality of ground and surface water against harmful contamination by nonpoint sources."<sup>90</sup>

## 7. State Programs

States have already taken the initiative in creating programs and providing financial assistance to supplement the CRP. Some states have been paying farmers to plant trees on CRP land and proposing wildlife programs utilizing CRP land.<sup>91</sup> The governor of South Dakota has proposed state purchase of CRP contracts from farmers as a form of debtor relief.<sup>92</sup> Many states have programs to compensate landowners for public access for recreation and wildlife management.<sup>93</sup> A few states have augmented the CRP with state programs for conservation easements. Minnesota, for example offers landowners lump sum payments for twenty year or perpetual conservation easements on erodible cropland.<sup>94</sup>

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<sup>86</sup> Clean Water Act § 319(a)(1), 42 U.S.C.A. § 1329(a)(1) (West Supp. 1988).

<sup>87</sup> See Environmental Protection Agency, Nonpoint Source Guidance 1-2 (1987).

<sup>88</sup> See generally, USDA, *supra* note 26.

<sup>89</sup> *Id.* at 8.

<sup>90</sup> *Id.*

<sup>91</sup> Interview with Alice A. Devine, Research Analyst, Kansas State Board of Agriculture August 15, 1988).

<sup>92</sup> *Id.*

<sup>93</sup> BPI, Land Use Planning Report 366 (Nov. 23, 1987).

<sup>94</sup> Conservation Assessment, *supra* note 21, at 14. The "Reinvest in Minnesota" program propped over 20,000 acres of cropland in the 1986-87 program. *Id.*

## B. Sodbuster and Conservation Compliance

### 1. Conservation Plans

The sodbuster program applies to previously uncultivated land, whereas the conservation compliance program applies to land under cultivation any year from 1981 to 1985. Both programs require land users to obtain and adhere to a conservation plan. The statutory provisions, however, did not define the level of conservation required by the mandatory conservation plans. The controversy over the contents of these plans has been tentatively settled in a final rule that requires less rigorous erosion control under the conservation compliance program than under the sodbuster program.<sup>95</sup>

A "conservation system" is defined under the regulations as that part of a resource management system that is applied to a field to provide for "cost effective and practical erosion reduction based upon the standards contained in the SCS field office technical guide."<sup>96</sup> A "conservation plan" is the document describing the "location, land use, tillage systems, and conservation treatment measures and schedule which, if approved, must be or have been established on highly erodible cropland in order to control erosion."<sup>97</sup> Elaboration on these definitions have significant ramifications for the farmer. An interim rule promulgated in June, 1987 did not require absolute environmental protection. Instead, it provided for consideration of environmental protection along with "economic and technical feasibility and other related factors."<sup>98</sup> This type of rule provides a dangerous opportunity for SCS to succumb to pressure from farmers to weaken conservation requirements. From a practical perspective, however, an unrealistic requirement of extensive conservation may cause farmers to forego federal payments rather than meet conservation requirements, particularly if commodity prices rise.

The final rule includes two different standards. Conservation systems under the sodbuster provision must control soil loss to "attain or approximate" the soil loss tolerance value (T value).<sup>99</sup> For purposes of conservation compliance, however, the conserva-

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<sup>95</sup> 53 Fed. Reg. 3,997 (Feb. 11, 1988).

<sup>96</sup> 7 C.F.R. § 12.2(a)(4) (1988).

<sup>97</sup> *Id.* § 12.2(a)(5).

<sup>98</sup> 53 Fed. Reg. 24,133 (June 29, 1987).

<sup>99</sup> 53 Fed. Reg. 3,999 (1988) (to be codified at 7 C.F.R. § 12.23(a)).

tion system is to "achieve substantial reductions in soil erosion, taking into consideration economic and technical feasibility and other resource related factors."<sup>100</sup> Comments to the regulation justify the difference by asserting that stringent erosion control would be less onerous and more equitable on land previously uncultivated than on land already in use for commodity production. Removing the requirement of T value compliance for conservation compliance, however, leaves the provisions of a conservation plan to the discretion of local SCS officials, whose determinations are often based on outdated technical guides.<sup>101</sup> Because this current standard gives so little guidance to SCS, a T value standard may have to be introduced for conservation compliance as well as sodbuster, to provide a uniform method for preparing conservation plans.

## 2. Allocation of Responsibility

The sodbuster and conservation compliance provisions do not adequately address the relative responsibilities of landlords, tenants, and new owners of highly erodible land. The final regulations require that all highly erodible land be farmed under a conservation plan. Neither landlords nor tenants are eligible for USDA payments for production achieved without a conservation plan, although landlords may be eligible for commodities produced on other land in which the disqualifying tenant has no interest.<sup>102</sup> The extent of a tenant's liability is less clear. For example, assume a farmer owns one hundred acres and rents an additional adjacent eighty acres. The land the tenant owns is under a conservation plan, but the owner of the adjacent eighty acres refuses to obtain a plan. The regulations merely state that the SCS must determine whether any "farm" in which a "person applying for benefits has an interest" contains highly erodible land.<sup>103</sup> Is the tenant then ineligible for benefits for all commodities produced by the tenant? If so, is that a desirable result? Does it make a difference if the tenant is producing non-program crops on the rented land? If the owner and tenant agree to apply a conservation plan to the rented land, who bears the expense of installing any conservation measures above the available cost-sharing? Does it depend on the duration of the rental agreement, as with other "fixtures" to the

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<sup>100</sup> *Id.*

<sup>101</sup> Conservation Assessment, *supra* note 21, at 17.

<sup>102</sup> 7 C.F.R. § 12.9(a) (1988).

<sup>103</sup> *Id.* § 12.7(a)(1).

land? Finally, if there is a new purchaser of land to which a conservation plan applies, does the plan "run with the land" so that the new owner must continue to apply the plan?

### C. *Swampbuster*

The primary difficulty with the swampbuster provision is the initial determination of what constitutes a wetland. Wetland determinations have been inconsistent among counties and states.<sup>104</sup> Pilot testing in six states indicated a need for additional training of field personnel in identifying wetlands.<sup>105</sup> A recent conference on the conservation provisions revealed a similar problem with FmHA conservation easements under section 1314.<sup>106</sup>

### D. *Farmers Home Administration Easements*

A fundamental problem with FmHA conservation easements is the Farmers Home Administration policy of selling inventory as quickly as possible, which discourages local FmHA administrators from taking the time to evaluate the possibility of an easement, even in critical habitat areas. As with swampbuster, there is a problem with identifying wetlands. Improvements in identification would necessitate additional training for agency officials and conservation professionals. Two officials from the Ohio Department of Natural Resources have recommended that easements be granted "to state or federal wildlife agencies or other qualifying groups on all inventory lands with wetlands. Any inventory farm that cannot adequately meet SCS technical guide specs with common local rotations or structural practices should not be sold without a conservation easement."<sup>107</sup> When deed restrictions are used in place of detailed conservation easements, responsibility for monitoring and enforcement is also more complicated and confused.<sup>108</sup> The reduction in property value resulting from a conservation easement is an additional disincentive to local administrators. It is not clear whether FmHA is expected to bear the loss from such a reduced value.<sup>109</sup>

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<sup>104</sup> Conservation Assessment, *supra* note 21, at 33.

<sup>105</sup> *Id.* at 20. The six states were Illinois, Nebraska, California, Maryland, North Dakota, and Mississippi. *Id.*

<sup>106</sup> See text accompanying note 107, *infra*.

<sup>107</sup> Conservation Assessment, *supra* note 21, at 24.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

It is difficult even to begin to evaluate FmHA's program for debt restructuring under section 1318 because final regulations have yet to be promulgated. When such rules are promulgated, consistency with the regulations for donation of easements qualifying for a charitable contribution would improve and expedite administration.

### *E. Enforcement*

For the sodbuster, swampbuster, conservation compliance and conservation reserve programs, effective monitoring and enforcement is one of the most immediate problems. It may be necessary to utilize conservation groups to supplement USDA personnel for monitoring, and the USDA should maintain formal procedures for investigating reported violations. Despite publicity to the contrary, only a few individuals have lost eligibility because of their noncompliance with sodbuster and swampbuster requirements.<sup>110</sup> It is not at all clear that compliance, particularly with the swampbuster provision, is causing significant or widespread hardships.<sup>111</sup> Nevertheless, a bill introduced in the last Congress proposed eligibility of wetlands for the CRP to compensate for any economic hardship created by the swampbuster provision.<sup>112</sup>

Continued success with the programs will require a massive educational effort, necessitating the assistance of the Cooperative Extension Service. Adequate funding is crucial for enforcement and for ASCS and SCS staffing to meet the National Program for Soil and Water Conservation's immediate goals of reducing soil erosion damage and protecting surface and ground water quality from nonpoint source contamination.<sup>113</sup> It will be necessary to provide an "intensified educational and informational program"<sup>114</sup> on controlling soil erosion; currently many important rulings in the conservation programs are not even published in the Federal Register.

By 1990, the SCS will have to develop 800,000 individual farm conservation plans.<sup>115</sup> In seventeen states, compliance work will

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<sup>110</sup> *Id.* at 38.

<sup>111</sup> There has been some suggestion that hardship justifies a "grandfather" exemption from swampbuster similar to the exemption from the sodbuster provision. 43 *J. Soil & Water Cons.* 147 (1988).

<sup>112</sup> S. 2143, 100th Cong., 2d Sess. (1988); see also 134 *Cong. Rec.* 2022 (daily ed. Mar. 4, 1988)(statement of Sen. Boschwitz, introducing the bill).

<sup>113</sup> USDA, *supra* note 26, at 8.

<sup>114</sup> *Id.* at 9.

<sup>115</sup> USDA, *Landowner* 4 (Dec. 28, 1987).

take most SCS staff time for twenty-four months.<sup>116</sup> Not surprisingly, many farmers are delaying conservation compliance in anticipation of Congress loosening the Act's requirements by 1990. Deputy Secretary of Agriculture Peter Meyers has warned that the conservation provisions will not "go away,"<sup>117</sup> and Congress needs to make it clear that the conservation provisions will not be eliminated or weakened. Congress must be consistent in its support of the programs or lose credibility with farmers accustomed to vacillating governmental farm policies. There are, of course, dangers to tying conservation programs of any kind to farm programs and an economy that can and does change dramatically within a few years or even seasons. A significant increase in farm prices, for example, would necessitate a reworking of all the programs because farmers would be willing to forego USDA program payments for better prices, and the removal from production of conservation reserve land would have little appeal.

#### IV. THE FUTURE OF THE CONSERVATION PROVISIONS

The continued success of the 1985 Farm Bill's conservation provisions is far from certain. In the short term, arguments for continuance of these programs have, by necessity, been largely based on general impressions of success or failure. A recent study of the conservation reserve by the American Farmland Trust, however, has added empirical data to assertions of that program's effectiveness. The study projects that the federal government will save millions of dollars and farm income will increase from the reserve's reduction of subsidized crop production.<sup>118</sup> The report estimated a \$578 million net reduction in federal budget costs.<sup>119</sup> The reserve program will cost \$8.1 billion, less than the \$8.7 billion in farm payments for which the enrolled land would otherwise have been eligible.<sup>120</sup> American Farmland Trust projects that, as production drops, increased commodity prices will result in \$2.3 billion more in income for farmers by 1990.<sup>121</sup> According to the report, an incidental benefit of the program will be rising farmland values in ar-

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 5. Recent studies have demonstrated a disturbing lack of understanding of the Act's applicability and requirements. See Osterman & Hicks, *Highly Erodible Land: Farmers Perceptions Versus Actual Measurements*, 43 *J. Soil & Water Cons.* 177 (1988).

<sup>118</sup> American Farmland Trust, 8 *Am. Farmland* 4 (Aug. 1987).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

areas where the supply of farmland is limited because of enrollment in the reserve.<sup>122</sup> The SCS itself estimated that 209 million tons of soil were saved annually on the initial 8.2 million acres of land enrolled in the reserve in 1986, and the chief of the SCS during the first years of the reserve stated that the program is "exceeding our expectations."<sup>123</sup>

If Congress weakens its commitment to these programs, they are likely to fail, as the Soil Bank and many other half-hearted efforts at soil conservation failed. The conservation provisions of the 1985 Farm Bill were the result of long overdue recognition that there is no more right to destroy the soil in order to produce than there is to pollute air and water in order to manufacture. If Congress fails to give its full support to these programs in 1990, it will reinforce farmers' understandable skepticism about vacillating government farm policies. The suggestions discussed in this article would strengthen the incentives under the Farm Bill for farmers to adopt wise land use practices. Environmental protection, in this context as in any other, requires a long-term commitment that transcends changing economies and administrations.

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<sup>122</sup> *Id.*

<sup>123</sup> SCS, Soil & Water Cons. News 10 (July 1987). The impact of the program has exceeded the original expectations for the reserve. For example, the USDA itself projected only limited benefits from the reserve. The agency estimated that of the 2.3 million acres of highly erodible land converted between 1979 and 1981, only 1.9 million acres would have come under the sodbuster provision. That equals only 17% of the newly converted cropland and less than one-half of one percent of the total United States cropland. If owners of this land participated in farm programs, the benefits would have made a significant difference for only 384,000 acres. USDA, 6 Farmlines 8 (1985). It is not surprising, then, that initial aspirations for the reserve were relatively limited.