



## Conservation Compliance

In the 1985 Farm Bill, Congress authorized the U.S. Department of Agriculture (“USDA”) to create and administer the conservation compliance program.<sup>1</sup> The program provides a minimum level of protection for soil and water resources.<sup>2</sup> Compliance with the program—which is a prerequisite to receive funding from other USDA programs—has helped to protect thousands of acres of vulnerable agricultural land, but is overdue for reinvigoration and reinforcement. In the 2023 Farm Bill, Congress should modernize the program so it will fulfill its potential to protect the nation’s working lands and natural environment.

### I. BACKGROUND ON CONSERVATION COMPLIANCE

In 1985, Congress passed the Food Security Act of 1985, also known as the 1985 Farm Bill, which created the conservation compliance program.<sup>3</sup> The program introduced baseline conservation requirements for participation in USDA farmer assistance and subsidy programs, including those under Title I (commodity programs like Price Loss Coverage and Agriculture Risk Coverage), Title XI (crop insurance), and various other programs.<sup>4</sup> Conservation compliance limits agricultural activities on highly erodible land, like the development and implementation of a conservation plan, on farmers seeking to farm these lands.<sup>5</sup> It also prohibits conversion of wetlands for agricultural production, with limited allowances.<sup>6</sup> Given the exclusion of agriculture from critical environmental laws like the Clean Water Act and Clean Air Act, the conservation compliance program is a key mechanism for imposing some degree of environmental protection on agricultural production.<sup>7</sup>

#### QUICK SUMMARY

- Conservation compliance requires some farmers to certify they have implemented baseline conservation practices to qualify for certain USDA programs.
- Conservation compliance falls short in many respects.
- Small changes to the program could make a huge impact on agriculture’s climate resilience.

---

<sup>1</sup> CONG. RSCH. SERV., R42459, CONSERVATION COMPLIANCE AND U.S. FARM POLICY 1 (2016) <https://crsreports.congress.gov/product/pdf/R/R42459/27>.

<sup>2</sup> *Id.*

<sup>3</sup> *Conservation Compliance*, U.S. DEP’T OF AGRIC., [https://www.fsa.usda.gov/programs-and-services/payment-eligibility/conservation\\_compliance/index](https://www.fsa.usda.gov/programs-and-services/payment-eligibility/conservation_compliance/index) (last visited March 3, 2023).

<sup>4</sup> 7 C.F.R. § 12.4(d).

<sup>5</sup> *Conservation Compliance*, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> See generally J.B. Ruhl, *Farms, Their Harms and Environmental Law*, 27 *ECOLOGY L. QUARTERLY* 263 (2000), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=186848](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=186848) [<https://perma.cc/6URF-XLAA>].

Studies beginning in the late 1970s on the state of erosion on agricultural lands found severe soil erosion around the country.<sup>8</sup> By 1984, the federal government had also found that more than half of U.S. wetlands had been filled or drained in order to facilitate development or agricultural use.<sup>9</sup> In response, Congress included conservation compliance requirements in the 1985 Farm Bill. To comprehensively address erosion and wetland conversion issues, Congress created the Highly Erodible Land and Wetland Conservation provisions, colloquially referred to, respectively, as “sodbuster” and “swampbuster.”<sup>10</sup> The provisions established different requirements for relevant lands, and the programs have been renewed, with minor modifications, in each subsequent farm bill since 1985.<sup>11</sup>

## II. CONSERVATION COMPLIANCE IN PRACTICE

The conservation compliance program has its own unique requirements and applicability, focusing either on preventing deterioration of highly erodible lands or the conversion of wetlands for agricultural use.

### 1. Sodbuster

The Highly Erodible Lands provision is meant to ensure that any such “highly erodible land” used as cropland follows baseline conservation practices to mitigate soil loss.<sup>12</sup> Highly erodible land is identified using soil map units and an erodibility index.<sup>13</sup> To mitigate soil loss on this land, sodbuster regulations require any producer who plans to plant or produce a commodity crop to follow a conservation plan approved by the USDA’s Natural Resource Conservation Service (“NRCS”).<sup>14</sup> Failure to comply with the conservation plan will result in loss of eligibility for USDA programs like commodity support programs and crop insurance.<sup>15</sup> Some limited exceptions exist for smaller scale operations, planting of commodity crops on erodible lands between 1981 and 1985, reliance on FSA’s determinations of eligibility, good faith, and others.<sup>16</sup>

### 2. Swampbuster

To protect wetlands from destruction, swampbuster (or “Wetlands Conservation”) generally bars farmers from converting wetlands into cropland.<sup>17</sup> NRCS is responsible for determining whether land qualifies as a wetland and is therefore subject to the

---

<sup>8</sup> MAX SCHNEPF, ENV’T WORKING GRP., CONSERVATION COMPLIANCE: A RETROSPECTIVE... AND LOOK AHEAD 5 (2012), [https://static.ewg.org/pdf/conservation\\_comp\\_maxs.pdf](https://static.ewg.org/pdf/conservation_comp_maxs.pdf).

<sup>9</sup> *Wetlands*, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/conservation-basics/natural-resource-concerns/land/wetlands> (last visited May 3, 2023)

<sup>10</sup> Schnepf, *supra* note 8, at 6.

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

<sup>12</sup> *In the Dirt: Introduction to Sodbuster*, NAT’L AGRIC. L. CTR., (Apr. 1, 2021), <https://nationalaglawcenter.org/in-the-dirt-introduction-to-sodbuster/>.

<sup>13</sup> *Id.* “The erodibility index for a soil is determined by dividing the potential average annual rate of erosion for each soil by its predetermined soil loss tolerance (T) value. The T value represents the maximum annual rate of soil erosion that could occur without causing a decline in long-term productivity.” 7 C.F.R. § 12.20(a).

<sup>14</sup> *Id.*

<sup>15</sup> 7 C.F.R. § 12.4(d).

<sup>16</sup> *In the Dirt: Introduction to Sodbuster*, *supra* note 12.

<sup>17</sup> *Stuck in the Swamp? A Look At Prior-Converted Croplands Under Swampbuster*, NAT’L AGRIC. L. CTR. (Sep. 24, 2020), <https://nationalaglawcenter.org/stuck-in-the-swamp-a-look-at-prior-converted-croplands-under-swampbuster/>.



prohibition on conversion to agricultural use.<sup>18</sup> Like the Highly Erodible Lands provisions, any violation of the requirements results in loss of eligibility for many of USDA's financial assistance programs.<sup>19</sup> There are some technical exceptions and a good faith exception to the general prohibition on converting wetlands, the most substantial of which excludes land that was converted prior to passage of the 1990 Farm Bill.<sup>20</sup> This is particularly important given that even if those lands have reverted to wetlands, the exemption continues to apply, and the land may at any time be converted back to agricultural use.<sup>21</sup> Additionally, under the good faith exception, farmers who are found to have acted in good faith in violating the terms of the program are given a 1-year grace period to remedy their violation, such as by taking steps to restore the wetland.<sup>22</sup> Beyond these and several other limited circumstances, however, the law bars the conversion of wetlands.<sup>23</sup>

### III. KEY ISSUES

While these programs are important to protecting the degradation of vulnerable lands, they fall short of their potential due to relatively weak program standards, infrequent and lax enforcement, and a lack of transparency.

#### 1. Weak Standards

Both the Highly Erodible Land and Wetlands Conservation provisions suffer from outdated and weak standards that prevent them from effectively protecting the lands they govern. The highly erodible soil formula used to identify Highly Erodible Lands relies on a nearly 60-year-old formula, called the Universal Soil Loss Equation, which was developed in 1965<sup>24</sup> and used after passage of the 1985 Farm Bill to identify those lands at the greatest risk of erosion.<sup>25</sup> Those determinations are frozen in time as of 1990.<sup>26</sup> Moreover, any NRCS conservation plans approved prior to July 3, 1996, are deemed presumptively compliant with conservation compliance requirements.<sup>27</sup> These determinations and compliance plans are now outdated, such that even if every producer complied with the requirements of the program, soil on their farm may well erode at an unsustainable level.<sup>28</sup> Under current standards, Highly Erodible Land-designated soils are allowed to erode at twice the rate of replenishment, and any

---

<sup>18</sup> See 16 U.S.C. § 3822; see also 7 C.F.R. § 12.30-12.33.

<sup>19</sup> See 16 U.S.C. § 3821; *Conservation Compliance – Highly Erodible Lands and Wetlands*, U.S. DEP'T OF AGRIC. (Aug. 2015), <https://www.rma.usda.gov/en/Fact-Sheets/National-Fact-Sheets/Conservation-Compliance-Highly-Erodible-Land-and-Wetlands>.

<sup>20</sup> 16 U.S.C. § 3822(b)(1)(A).

<sup>21</sup> 16 U.S.C. § 3822(b)(2)(D).

<sup>22</sup> 16 U.S.C. § 3822(h).

<sup>23</sup> *Stuck in the Swamp?*, *supra* note 17.

<sup>24</sup> *About the Universal Soil Loss Equation*, AGRIC. RSCH. SERV. (Aug 12, 2016) <https://www.ars.usda.gov/midwest-area/west-lafayette-in/national-soil-erosion-research/docs/usle-database/research/> [https://perma.cc/D3M8-KZPC].

<sup>25</sup> Nat. Res. Conservation Serv., *Technical Soil Services Handbook* (Part 616.01) [https://perma.cc/LMB7-PTY7].

<sup>26</sup> *Id.*

<sup>27</sup> 7 C.F.R. § 12.23.

<sup>28</sup> EMMA SCOTT ET AL., FARM BILL LAW ENTER., *CLIMATE & CONSERVATION 54* (Aug. 2022), <https://www.farmbilllaw.org/wp-content/uploads/2023/03/Climate-and-Conservation-Report.pdf> [https://perma.cc/TQ6H-EK8B].

erosion on non-Highly Erodible Land-designated soils is not monitored or accounted for at all.<sup>29</sup>

Wetlands have seen stronger protections given the restrictions on converting wetlands under the conservation compliance program, but recent changes made by NRCS under the Trump Administration and in the 2018 Farm Bill have weakened protections.<sup>30</sup> Now, the determination of wetlands for protection has been undermined in several key ways. First, NRCS now entirely excludes seasonal wetlands (areas that meet the criteria for wetlands at only certain times of year) from its determinations, increasing the risk of excluding wetlands from protection.<sup>31</sup> Second, determinations of wetlands made before 1996 are accepted as certified, despite their widespread inaccuracy.<sup>32</sup> Third, NRCS now relies on rain data from a historically dry period for determinations, ignoring more recent changes to the land.<sup>33</sup>

Another major issue for wetland protection is the policy of allowing violators of the prohibition on wetland conversion to merely “offset” the destruction by creating a new wetland.<sup>34</sup> These new wetlands may not offer the same ecological benefits as the natural wetland.<sup>35</sup> In addition, the offset is allowed at a ratio of less than 1:1 acres of converted wetland to new wetland.<sup>36</sup> This means that when farmers convert one acre of wetland, they can meet conservation requirements even if they create less than one acre of new wetland elsewhere, with no guarantee that the new wetland will recreate any of the ecosystem functions performed by the original wetland. With poor determination standards and the ability to be exempted from the provision without fully offsetting the harm, the wetland protection program fails to achieve its statutory aims.

## 2. Poor enforcement

Effective enforcement has been an issue for the program, even with these weak standards. A 2003 Government Accountability Office report found that almost half of NRCS field offices had failed to implement the necessary conservation compliance provisions, including failing to check for wetland violations or to assess violations

---

<sup>29</sup> 7 C.F.R. §12.20-.23; *National Food Security Act Manual (5th ed.), Part 510 – General Information*, NATURAL RES. CONSERVATION SERV., <https://directives.sc.egov.usda.gov/rollupviewer.aspx?hid=29340> [<https://perma.cc/F2ZF-YY2X>].

<sup>30</sup> *Id.* at 56. See also Comments on the NRCS Interim Rule on Highly Erodible Land and Wetland Conservation, Rulemaking Docket, NRCS-2018-26521, <https://www.regulations.gov/docket/NRCS-2018-0010/comments> [<https://perma.cc/324R-EJ9V>] (Comment ID NRCS-2018-0010-0048 (joint comments from 83 organizations representing conservation, water, and agriculture organizations from across the country); NRCS-2018-0010-0045 (comment from Center for Biological Diversity and the North Carolina Coastal Federation); NRCS-2018-0010-0049 (comment from the National Wildlife Federation); NRCS-2018-0010-0047 (516 unique and individually submitted comments from National Wildlife Federation members and supporters); NRCS-2018-0010-0051 (14,446 individually submitted comments from National Wildlife Federation Members and Supporters)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 57; 16 U.S.C. § 3822(f)(2).

<sup>35</sup> NAT'L ACADS. OF SCI. ENG'G, & MED., COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 22-45 (2001).

<sup>36</sup> 16 U.S.C. § 3822(f)(2). See also Agricultural Act of 2014 Conference Report to accompany H.R. 2642, H.R. 113-333, 113th Cong., § 418 (2014), <https://www.congress.gov/113/crpt/hrpt333/CRPT-113hrpt333.pdf>.



when producers fail to implement aspects of their conservation plan.<sup>37</sup> Producers self-certify compliance with the program requirements by filling out and signing a short form, and USDA very rarely uses its authority to verify compliance through inspection.<sup>38</sup> When conservation compliance standards are enforced, it is unclear what those standards are, with NRCS guidance differing across offices, and some states with the highest erosion failing to promulgate guidance on certain lands altogether.<sup>39</sup> Finally, USDA has been reluctant to enforce the loss of eligibility for financial assistance or other programs due to violations, removing the programs' most powerful tool to secure compliance.<sup>40</sup>

### 3. Lack of transparency

The final key issue for conservation compliance is the lack of available data to validate the efficacy of the program. With no legal mandate to collect and report data on enforcement or program efficacy to Congress or the public, it is difficult to verify how effective the program is at protecting these lands and identifying areas for improvement.<sup>41</sup> The data that NRCS makes available are limited and do not provide the necessary insights to determine whether the program is achieving its purported aims.<sup>42</sup> USDA also frequently rejects Freedom of Information Act requests seeking to obtain more useful data, which it is permitted to release in aggregate form, claiming that it is statutorily barred from sharing such private information disclosed by producers.<sup>43</sup> With such an opaque structure, it is challenging to understand the true efficacy of the program and to improve it.

### RECOMMENDATIONS

Congress should update the conservation compliance requirements and address the gaps noted above in order to secure U.S. investments in agricultural land and ensure public dollars are not used to exacerbate environmental degradation. FBLE's **Climate & Conservation** Report details recommendations to improve conservation compliance in a number of ways:

- Use conservation compliance to promote climate-friendly farming on all farms receiving government support (pg. 52).
- Reform Highly Erodible Land standards to better protect the nation's soils by revising conservation plan standards to prevent soil erosion and expanding conservation compliance to all cropland (pg. 53).

---

<sup>37</sup> See U.S. GEN. ACCOUNTING OFF., GAO-03-418, AGRICULTURE CONSERVATION: USDA NEEDS TO BETTER ENSURE PROTECTION OF HIGHLY ERODIBLE CROPLAND & WETLANDS 42 (2003), <https://www.gao.gov/assets/gao-03-418.pdf>.

<sup>38</sup> Scott et al., *supra* note 28, at 58.

<sup>39</sup> See OFF. OF INSPECTOR GEN., AUDIT REP. 50601-0005-31, USDA MONITORING OF HIGHLY ERODIBLE LANDS AND WETLAND CONSERVATION VIOLATIONS - INTERIM REPORT 6 (2016), [https://www.usda.gov/sites/default/files/50601-0005-31\\_Interim.pdf](https://www.usda.gov/sites/default/files/50601-0005-31_Interim.pdf) [<https://perma.cc/4CUD-JWCL>].

<sup>40</sup> Scott et al., *supra* note 28, at 58–59 (Aug. 2022), <http://www.farmbilllaw.org/wp-content/uploads/2022/08/Climate-and-Conservation-Report.pdf>.

<sup>41</sup> *Id.* at 59.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 60.

- Strengthen wetland protections and protect watersheds by revising policies for making wetland determinations and raising wetland mitigation standards (pg. 55).
- Improve conservation compliance enforcement by better funding NRCS enforcement activities and targeting monitoring activities in areas of potential high non-compliance (pg. 58).
- Bring transparency to conservation compliance by requiring data reporting and removing statutory disclosure limitations (pg. 59).

## CONCLUSION

A strong conservation compliance program is an important tool to preserve healthy soils and wetlands in the United States. However, weak standards, poor enforcement, and lack of transparency have made the Highly Erodible Lands and Wetlands Conservation provisions of conservation compliance ineffective. Congress should rectify the faults of this program in the 2023 Farm Bill and give it the tools it needs to accomplish its conservation purpose. Enforcement should be standardized across the country, and USDA should be held accountable for carrying out enforcement activities. Finally, Congress should require USDA to be more transparent in releasing data related to the conservation compliance program.

## ACKNOWLEDGEMENTS

This brief was written by Luca Greco (Clinical Student, JD '23), Liz Turner (Clinical Student, JD '23), and Trevor Findley (Clinical Instructor) of the Harvard Law School Food Law and Policy Clinic, and Codi Coulter (University of Maryland Francis King Carey School of Law, JD '23). Additional support and review provided by Emma Scott (Associate Director & Clinical Instructor, HLS Food Law & Policy Clinic).