Decision to Not Review USDA Wetland Certification Upheld – What Does the Grassley Amendment Require?

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Overview

The "Swampbuster" rules were enacted as part of the conservation provisions of the 1985 Farm Bill. In general, the rules prohibit the conversion of "wetland" to crop production by producers that are receiving farm program payments. A farmer that is determined to have improperly converted wetland is deemed ineligible for farm program payments. But an exception exists for wetland that was converted to crop production before December 23, 1985 – the effective date of the 1985 Farm Bill.

Under the Swampbuster rules, "wetland" has: (1) a predominance of hydric soil; (2) is inundated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions, and (3) under normal circumstances does support a prevalence of such vegetation. *7 C.F.R. §12.2(a).* In other words, to be a wetland, a tract must have hydric soils, hydrophytic vegetation and wetland hydrology.

However, there have been several prominent cases in recent years illustrating that the Natural Resources Conservation Service (NRCS) has trouble applying the definition as it attempts to determine whether a particular tract has wetlands. A recent decision of the United States Department of Agriculture (USDA) National Appeals Division (NAD) makes the point.

Congress amended the Swampbuster statute in 1996 to curtail attempts of NRCS to frequently change wetland delineations. The amendment specified that prior wetland delineations could only be changed upon a farmer's request. That amendment was the subject of a recent case involving a South Dakota farmer.

The 1996 amendment to the Swampbuster rules – that's the topic of today's post.

The "Grassley" Amendment

In 1990, the Congress amended the Swampbuster Act to provide a review provision specifying that a prior wetland certification "shall remain valid and in effect…until such time as the person affected by the certification requests review of the certification by the Secretary." *16 U.S.C. §3822(a)(4).* This became known as the "Grassley Amendment" named after Senator Charles Grassley of Iowa. Based on the statutory amendment, the USDA developed a regulation, known as the "Review Regulation," providing procedural requirements a farmer must follow to make an effective review request. The regulation said a request to review a certification could be made only if a natural event had altered the

topography or hydrology of the land or if NRCS believed that the existing certification was erroneous. *7 C.F.R. §12.30(c)(6).*

The *Foster* Case

Facts and trial court decision. In *Foster v. United States Department of Agriculture, No. 4:21-CV-04081-RAL, 2022 U.S. Dist. LEXIS 117676 (D. S.D. Jul. 1, 2022),* the plaintiff owned farmland containing a .8-acre portion that USDA certified as a "wetland" in 2011 under the Swampbuster provisions of 16 U.S.C. §§3801, 3821-3824. The wetland was about 8.5 inches deep at certain times during the year, particularly in the spring after snow melt and didn't drain anywhere. The wetland resulted from a tree belt that had been planted in 1936 to prevent soil erosion. Snow accumulated around the tree belt in the winter and melted in the spring with the water collecting in a low spot in of the field before soaking into the ground or evaporating. In about one-half of the crop years, the puddle would dry out in time or planting. The certification meant that the puddle could not be drained so that it and the surrounding land could not be farmed without the loss of federal farm program benefits.

In 2008, Foster request a review of a certification and USDA granted the request simply on the basis of the statute which plainly states that a review of a certification is available upon request. The request was granted even though the regulation was in place at that time. The area was recertified as a wetland in 2011. This was despite Foster having dug two test holes to monitor water levels in the disputed area – one of which was immediately next to the trees. The data Foster collected showed that the trees slowed the drying of the soil in the hole next to the trees. The USDA/NRCS refused the data, claiming that Foster didn't' have the expertise to interpret the data. As a result, Foster installed two weather stations and hired an engineering firm to "officially" conclude that the tree belt was slowing the drying of the soil.

Foster challenged the 2011 recertification, but the trial court affirmed the determination as not arbitrary and capricious (the judicial deference standard given administrative agency decisions). The U.S. Court of Appeals for the Eighth Circuit affirmed, and the U.S. Supreme Court declined to review the case. *Foster v. Vilsack, 820 F.3d 330 (8th Cir. 2016), cert. den., 137 S. Ct. 620 (2017).*

Note: Before Foster's request for review of the 2011 certification, another South Dakota farmer with a similar set of facts successfully had NRCS remove a wetland label on a .3-acre portion of a field. Like Foster's situation, the .3-acre portion was impacted by snow caught in a tree belt. Thus, after the court decisions, the question remained as to whether a farmer has a legal obligation to present evidence of changed conditions. The statute contains no such requirement. In 2008, the recertification request was granted with no obligation on Foster's part to provide evidence of changed conditions. The evidence provided was not requested. Also, published NRCS infiltration rates for the soil type of the depression indicated that the ponding would be gone in less than two weeks (the required inundation period for a wetland finding).

In 2017, Foster again sought a review of the certification under 16 U.S.C. §3822(a)(4) which, as noted, provides for review of a final certification upon request by the person affected by the certification. The USDA/NRCS didn't respond on the basis that Foster didn't provide new information that the NRCS hadn't previously considered. Foster filed for review again in 2020 along with professionally prepared

engineering reports from two firms that concluded that the area in question ponded due to the tree belt and was an artificial wetland not subject to Swampbuster.

The USDA denied review in 2020 citing its own regulation of 7 C.F.R. §12.30(c)(6) which required the plaintiff to show how a natural event changed the topography or hydrology of the wetland that caused the certification to no longer be a reliable indicator of site conditions. The plaintiff claimed that new evidence existed that would refute the 2011 certification, and also claimed that 16 U.S.C. §3822(a)(4) provided no restriction on the ability to get a review and, as a result, 7 C.F.R. §12.30(c)(6) violated the due process clause by restricting reviews and was arbitrary and capricious under the Administrative Procedure Act.

The trial court held that 7 C.F.R. §12.30(c)(6) merely restricted *when* an agency must review a final certification. The trial court also determined that 7 C.F.R. §12.30(c)(6) did not violate the due process clause as the plaintiff did not show any independent source of authority providing him with a right to certification review on request. The USDA's denials of review were found not to be arbitrary or capricious and that the plaintiff failed to provide any evidence that the natural conditions of the site had changed, which would require a review of the certification. The plaintiff also claimed that the Swampbuster provisions were unconstitutional under the Commerce Clause and the Tenth Amendment.

The trial court rejected the plaintiff's claims and determined that the statute of limitations on challenging the certification had run. The trial court also held that the USDA was entitled to summary judgment on the plaintiff's claim that Swampbuster was unconstitutional, holding that the provisions were within the power of the Congress under the spending clause of Article I, Section 8 of the Constitution. The trial court also ruled that Swampbuster did not infringe upon state sovereignty by requiring states to implement a federal program, statute or regulation. The trial court further rejected the plaintiff's claim that a part of Swampbuster violated the Congressional Review Act, finding that the provision at issue was precluded from judicial review. The court dismissed all the plaintiff's claims against the USDA and denied the ability for the area to be reviewed again.

The appellate court. Foster filed an appeal with the U.S. Court of Appeals for the Eighth Circuit on August 16, 2022, and the appellate court issued its opinion on May 12, 2023. The appellate court affirmed. The court stated that NRCS noted the engineer's report and asked the engineering firm to identify any evidence that the NRCS had not fully considered the tree belt at the time of the 2011 recertification decision. The appellate court stated, "Neither Foster nor the engineering firm ever responded to the request." The court went on to state that the NRCS reviewed the engineering report, compared it to the record, and declined the review request for noncompliance with the regulation.

Note: The court's statement that the NRCS requested additional evidence is false. The NRCS letter of May 14, 2020, to Foster by State Conservationist Jeffrey Zimprich merely stated that, "Based on the evidence you provided, I am unable to determine that any of the conditions mentioned above for a redetermination apply." There was no request for additional information from either Foster or the engineering firms.

The appellate court concluded that the regulation was not inconsistent with the Swampbuster Act. There was simply nothing that could be gleaned from the Grassley Amendment as guidance to what constitutes a proper review request. As such the statute was ambiguous and the administrative procedural requirements were permissible. The Grassley Amendment was merely so that farmers had a way to contest new NRCS wetland delineations for Swampbuster purposes. It did not preclude USDA/NRCS from developing procedural requirement to challenge a certification.

The appellate court also affirmed the trial court's finding with respect to the Congressional Review Act for lack of authority to review the claim. The appellate court also affirmed the trial court's finding that the NRCS refusal to consider the request was not arbitrary and capricious.

Note: In the concluding paragraph of the appellate court's opinion, the appellate court stated that, "the NRCS requested Foster's engineering firm to identify evidence showing the NRCS had failed to consider the tree belt on the Site when it made its prior certification. The record shows no indication that Foster or his engineering firm responded to this request." Unfortunately, the appellate court offers no support for this assertion and there is no record of such a request ever having been made. What the appellate court bases this statement on is not known.

Conclusion

The Grassley Amendment is clear that can rely on a wetland determination until a new determination is requested. The point of the amendment is to bar NRCS from unilaterally changing a determination once made. A farmer may request a redetermination. While it is reasonable to require that new information bearing on a stie's wetland status be provided when a redetermination is requested, Foster provided that information in the form of professional engineering reports. Here, NRCS failed to understand the professional reports submitted with the review request and also did not make a clear request for additional information/clarification. Indeed, no request at all was made for additional information. Clearly, the .8-acre depression was the result of snowpack caused by a tree belt and NRCS' own data showed that the ponding of the depression would be gone in less than two weeks. A regulation that allows a farmer to receive a redetermination upon NRCS admitting it made an error (one of the two possibilities for a review to be granted) makes it highly unlikely that a review would be granted.

In the Foster case, perhaps an en banc review will be requested.