

## Wetland Conservation Act (WCA) Topic of the Week

### Swampbuster and WCA

May 20, 2020

*WCA topics of the week are a series of informal fact sheets that provide practical information on WCA program implementation in a question and answer format. They are intended to better clarify and summarize certain aspects of WCA implementation and should be considered as supplemental to WCA statutes, rules and any associated BWSR guidance and policy. Information in these fact sheets are subject to change over time.*

**Question:** What are the Swampbuster provisions of the Food Security Act?

**Answer:** The U.S. Dept of Agriculture (USDA), via the 1985 Food Security Act, as amended, provides financial benefits (loans, assistance payments, insurance premium subsidies, cost-share, etc.) to eligible producers of agricultural crop commodities. These programs and benefits are collectively referred to as the “Farm Program”. To remain eligible for Farm Program benefits, a person must comply with certain Wetland Conservation Provisions (better known as “Swampbuster provisions”), which prohibit conversion of a wetland or production of an agricultural commodity on a converted wetland. Producer benefit eligibility is determined by the Farm Service Agency (FSA), with the Natural Resources Conservation Service (NRCS) providing technical assistance to help producers maintain eligibility and completing technical determinations upon which FSA’s eligibility determinations are based. Participation in the program is strictly voluntary.

**Question:** Do Farm Program participants have to comply with WCA?

**Answer:** Yes. WCA is a state program that regulates activities affecting most wetlands and applies to all individuals, regardless of whether they receive Farm Program benefits or not. Swampbuster provisions are fundamentally different from the regulatory provisions of WCA.

**Question:** If the Farm Program has Swampbuster provisions, why does WCA need to regulate activities that affect wetlands for Farm Program participants?

**Answer:** Swampbuster wetland protections only apply as long as the producer is voluntarily participating in the program. Additionally, Swampbuster provisions do not satisfy all minimum state standards established in state statute and WCA rule (various Farm Program exemptions for example).

**Question:** Is there any overlap or interaction between Swampbuster and WCA?

**Answer:** Yes. WCA includes a provision that allows for the creation of an exemption to WCA replacement requirements for Farm Program participants provided minimum state standards are met. A limited exemption under this provision was established in 2013. This exemption is commonly referred to as the “Ag Bank Exemption”. Ag Bank exemption applicability and requirements as they apply to Farm Program participants are specified in the attached appendix.

**Question:** Aside from the Ag Bank Exemption, do Farm Program participants need to seek WCA approval for activities that are compliant with Swampbuster provisions of the Farm Program?

**Answer:** Yes, unless the activity is eligible for a WCA exemption or no-loss. WCA exemption applicability is independent of and separate from compliance with Swampbuster provisions of the Food Security Act. Aside from the Ag Bank Exemption, WCA includes a number of exemptions for drainage and agricultural activities that are independent of the producer being a Farm Program participant. If any of these exemptions apply, the producer can proceed without applying for WCA approval (unless the WCA LGU has a local requirement to apply). However, these exemptions are complex and often difficult to interpret and apply to various proposed activities. BWSR recommends that producers consult with their local LGU representative and either request a WCA decision or at least seek advice on the applicability of a WCA exemption for any proposed activities that could affect wetlands.

**Question:** Are certified wetland determinations completed by NRCS useful for WCA compliance evaluation?

**Answer:** Yes. Certified wetland determinations (CWDs) can be useful in the review of a project activity for WCA compliance. However, the criteria and methods used by NRCS to complete CWDs are different from wetland delineation and determination methods required for WCA. Therefore, labels assigned to areas in a CWD cannot be directly used for WCA compliance. Some labels such as W, FW, and FWP are likely to be wetlands subject to WCA regulation. Other labels such as PC, CW and CWTE are related to Farm Program policy and may or may not be wetlands subject to WCA regulation. CWDs submitted as part of a WCA application can be a useful source of information but will require review in light of WCA wetland delineation methods. Some CWDs will accurately represent WCA wetlands, others will not.

**Question:** NRCS provides setback distances for drainage features (ditches, tile) that help producers comply with Swampbuster provisions. Can these be used for WCA compliance?

**Answer:** Yes, with caveats. BWSR has developed guidance on the use of NRCS-developed setback tables for WCA implementation. This guidance and the setback tables on BWSR's [Lateral Effect and Drainage Setback page](#) should be used. For some soil types (e.g. soils known to have high organic content) users of NRCS setback tables will be prompted to seek further assistance from NRCS staff. In those instances, users for WCA purposes should not seek NRCS staff assistance and should instead use the setback distance in the 2012 drainage setback tables that BWSR has adopted and provided on the webpage.

**Question:** Can an AD-1026 form be used for a WCA application?

**Answer:** Information on a AD-1026 form can be useful in assessing WCA compliance. However, further information is often needed to assess the applicability of WCA drainage and agricultural exemptions. LGUs can use the information on a 1026 to offer advice on WCA applicability, but an acceptable WCA application form (Joint Application Form, locally-developed application form) is necessary to obtain a WCA decision. USDA agencies cannot directly share a person's AD-1026 form or the details of its content unless written consent has been provided by the USDA program participant.

## Appendix – Agricultural Bank Exemption Requirements for Federal Farm Program Participants

Full text of exemption and requirements are in [2013 BWSR-NRCS MOU](#).

A WCA wetland replacement plan is not required for the mitigation of wetland impacts resulting from agricultural activities when:

- The activity impacts an eligible wetland<sup>1</sup>;
- The activity is proposed by a Federal Farm Program participant and subject to the Swampbuster provisions of the program;
- Wetland mitigation is required for Swampbuster compliance;
- Wetland mitigation is provided by withdrawal of credits from the Minnesota Agricultural Wetland Bank in accordance with specific conditions<sup>2</sup>;
- The activity and associated wetland credit withdrawal is authorized by NRCS;
- The landowner agrees to share information relating to the proposed activity and associated wetland bank credit withdrawal;
- BWSR credit withdrawal form is completed and provided to BWSR; and
- The approved credits are withdrawn from the wetland bank and the landowner has received confirmation from BWSR of the withdrawal.

<sup>1</sup>Eligible wetlands per a certified wetland determination by NRCS are:

- FW (farmed wetland);
- FWP (farmed wetland pasture);
- W (wetland). Wetlands with a W label must either qualify for WCA exemption 8420.0420 Subp. 2A (planted 6 of 10 prior to 1991), exemption 8420.0420 Subp. 3C(1) (planted 8 of the last 10) or be less than five acres in size, predominantly bordered by land that has been planted 8 of the last 10 years, and is degraded according to the BWSR Agricultural Wetland Evaluation Tool; and
- Converted Wetland (CW) that, prior to conversion, qualifies as FW, FWP or W per above as determined by NRCS staff.

<sup>2</sup>Mitigation conditions include 1:1 replacement ratio for impacts and mitigation within the same Bank Service Area (BSA) and 2:1 for impacts and mitigation in adjacent BSAs. Cannot replace in BSA that is not adjacent to BSA of wetland impact. Impacts in BSA 10 can be replaced in BSA 8 or 9 at a 1:1 ratio.