America's Commitment to Clean Water Act

and

Prior Converted Croplands under the Clean Water Act

America's Commitment to Clean Water Act, H.R. 5088, would codify an exemption from the Clean Water Act for farming activities on prior converted croplands. Currently, this exemption exists only in regulation, and could be changed or repealed at any time. Codifying the exemption offers greater certainty and clarity to the agricultural community. A farmer will be guaranteed the exemption with enactment of America's Commitment to Clean Water Act.

The exemption for prior converted cropland in the bill is drafted using the language in the current regulations of EPA and the Corps; including retaining the significant role of the Secretary of Agriculture in determining what constitutes prior converted cropland. The proposed definition of prior converted cropland comes directly from Department of Agriculture regulations, implementing documents, and the statutes of 1985 and 1996.

Since 1993, Clean Water Act regulations have excluded from the jurisdiction of the Act waters of the United States that are also prior converted croplands. The regulations promote consistency between farm programs and environmental protection. The affect of the exclusion has been that farming in prior converted croplands does not require a Clean Water Act permit while the lands are used for agriculture. This is in addition to the "normal farming activities" exemption in the statute.

Opponents of *America's Commitment to Clean Water Act* would have you believe that the bill fails to reflect the prior converted cropland exemption – even though the bill uses the current regulatory language. Instead, opponents argue that farmlands containing wetlands that were drained, dredged, filled, or otherwise manipulated prior to December 23, 1985 – wetlands that are considered prior converted croplands – are exempt from the Clean Water Act without qualification and regardless of whether the lands are farmed, used as pasture, or paved into subdivisions and shopping malls.

The arguments of the opponents are based on the *fictions* of what they wish the law was, not on the *facts* of what the law actually is.

As American humorist Artemus Ward is reported to have said, "It ain't so much the things we don't know that get us into trouble. It's the things we know that just ain't so."

Do today's regulations provide an unqualified exemption from the Clean Water Act for prior converted croplands taken out of agricultural use? It "just ain't so."

If you would like more information on America's Commitment to Clean Water Act, H.R. 5088, contact the Subcommittee on Water Resources and Environment at (202) 225-0060.

Fact or Fiction?

The Prior Converted Cropland (PCC) Exemption and Agricultural Use

Fiction: The exemption from the Clean Water Act for prior converted cropland is independent of whether the land is used for agricultural purposes.

Fact: When Congress created the concept of prior converted cropland in the 1985 Farm Bill – the Food Security Act of 1985 – prior converted croplands (PCC) were wetlands that were converted from a non-agricultural use to cropland prior to December 23, 1985. The lands had to be in agricultural use to qualify as PCC, and had to continue to be in active agricultural use through agricultural production at least every 5 years after 1985, or the PCC were considered to be abandoned and the exemption was lost. To argue that land need not be in agricultural use when the law required the production of an agricultural commodity every 5 years is inconsistent with the law and inaccurate. The 1996 Farm Bill – the Federal Agriculture Improvement and Reform Act of 1996 – revised the concept of abandonment to eliminate the requirement that PCC be actively farmed at least every 5 years as long as the area is devoted to an agricultural use. EPA, the Corps, and the Department of Agriculture use this revised definition for prior converted croplands.

The PCC Exemption is a Permanent Exemption from the Clean Water Act

Fiction: Once lands are determined to be prior converted croplands by the Department of Agriculture for purposes of Swampbuster, the lands are forever exempt from the jurisdiction of the Clean Water Act regardless of the use of the lands.

Fact: Neither the Corps nor EPA has ever supported a permanent exemption from the Clean Water Act for prior converted croplands. In the Corps' first statement on the issue, Regulatory Guidance Letter 90-7 (September 26, 1990), the Corps stated:
If prior converted cropland is abandoned (*citation omitted*) and wetland conditions return, then the area will be subject to regulation under section 404. An area will be considered abandoned if for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production (*emphasis added*).

In the 1993 preamble to the rule exempting prior converted croplands from the definition of waters of the United States, the Corps and EPA stated that the changes were proposed to "clarify which areas in agricultural crop production would not be regulated as waters of the United States" (*emphasis added*). (58 FR 45008)

In discussing the continuity of the PCC exemption, the Corps and EPA indicate their intent to follow the then-applicable Soil Conservation Service [predecessor to the Natural Resources Conservation Service] concept of abandonment:

> In particular, PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production (*emphasis added*). (58 FR 45034)

The Corps and EPA consistently assumed that the prior converted cropland exemption from the Clean Water Act depended on continuing agricultural use.

The current joint NRCS and Corps "Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act" (February 2005) confirms this long-standing conclusion:

> A certified PC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the PC determination is no longer applicable and a new wetland determination is required for CWA purposes. * * * Certified wetland determinations made by NRCS remain valid for swampbuster purposes as long as the land is devoted to agricultural use or until such time as the person affected by it requests review of the certification (*emphasis added*).

The Clean Water Act Diminishes the Ability of Farmers to Farm Their PCC

Fiction: If prior converted croplands are subject to Clean Water Act jurisdiction it would diminish the value of the land and impair farmers ability to raise capital to buy seeds and farm equipment via loans on the land.

Fact: The exemption for PCC continues indefinitely as long as the land stays in agricultural use. This concept was clarified in the 1996 Farm Bill – the Federal Agriculture Improvement and Reform Act of 1996 – when the concept of abandonment (the quinquennial requirement for production of an agricultural commodity) was revised. The value of farm land as farm land is specifically preserved and not diminished even where lands are placed into conservation programs. If a farmer seeks to borrow against the land to buy seeds and farm equipment, the farmer obviously intends to keep the land in agricultural use. The Clean Water Act exemption is affected only when the land is taken out of agricultural use, such as converted into commercial or residential development.

In 1993 the Corps and EPA Provided a Permanent Exemption for PCC

Fiction: Under the 1993 regulation, the Corps and EPA notified agricultural producers that prior converted cropland would not be regulated as waters of the United States, period.

Fact: The fiction is based upon an incomplete reading and selective editing of the preamble to the 1993 regulation. That complete preamble discussion continues:

> The agencies also note that today's rule will provide a mechanism for "recapturing" into Section 404 jurisdiction those PC croplands that revert back to wetlands where the PC cropland has been abandoned. Finally, in response to the request that a PC cropland not be considered abandoned if the area is used for any agricultural production, regardless of whether the crop is an agricultural commodity, we note that SCS's [Soil Conservation Service] abandonment provisions do recognize that an area may be used for other agricultural activities and not be considered abandoned. In particular, PC cropland which now meets wetland criteria is considered to be abandoned *unless*: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production. (*emphasis added*). (58 FR 45034)

The complete preamble and history of the exemption clearly indicate that the original PCC exemption was and remains dependent upon continuing agricultural use. This requirement was included in the 1985 Farm Bill, the 1990 Regulatory Guidance Letter, the 1993 rulemaking, the 1996 Farm Bill, and the interpretive documents of the Natural Resources Conservation Service and the Corps.