Comptroller General
of the United States
Washington, D.C. 20548

B-231065

August 10, 1988

The Honorable Kent Conrad
United States Senate

Dear Senator Conrad:

This is in response to your letter of March 31, 1988, requesting our opinion on two questions dealing with a provision of the Food Security Act of 1985, which makes farmers ineligible for most federal farm programs if they produce an agricultural commodity on converted wetland when the conversion to agricultural use begins after this law was enacted.

Controversy has arisen about the United States Department of Agriculture's (USDA) interpretation of the Act to include wet spots (lands which usually contain water in the spring) as being within the law's definition of "wetland." In North Dakota, farmers traditionally have cultivated many of these wet spots either by delaying their seeding operations for a few weeks until the spot dried naturally, or by putting in drains or earthfill over the years as funds have permitted.

You request our opinion as to whether the Congress intended to place restrictions on land that had a history of cultivation or intended to "grandfather" this land while discouraging the future conversion of similar wet spots into crop land.

You also ask about a statement in a report by the House Committee on Merchant Marine and Fisheries in connection with an earlier version of the bill later enacted as Pub. L. No. 99-198, which urged caution in applying a provision which allows farm program participation when agricultural production on converted wetland will only have a "minimal effect" on wetland.

As explained below, under the Food Security Act's definitions of "wetland" and "converted wetland," the draining or filling of wet spots after passage of Pub. L. No. 99-198, which were cultivated naturally before the Act became law, may cause the loss of federal farm benefits. In answer to your second question, the House Merchant Marine and Fisheries Committee's report language dealing with the

"minimal effect" exclusion for converted wetland, is not binding on the Secretary of Agriculture.

We requested comments from the Secretary of Agriculture. A copy of his reply dated July 7, 1988, is enclosed.

Wet spots

Your first question concerns wet spots. The Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, states in section 1221 that except as exempted elsewhere in the Act, and notwithstanding any other provision of law, after December 23, 1985, a person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible for the described loans, payments, and benefits for any commodity produced during that crop year by that person. As you point out, North Dakota farmers have traditionally cultivated many shallow depressions that contain water in the spring. They do this in one of two ways: by delaying seeding operations for a few weeks until the spots dry naturally, or by putting in drains or earthfill, which has been done over the years.

The term "wet spot" is not defined by the Act, but "wetland" is defined in section 1201(a)(16) as:

> "land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions."

If the physical characteristics of a "wet spot" match those of "wetland" then it must be considered "wetland" for purposes of the Act. The natural farming of a wet spot will not change its classification as a "wetland." The Act's definition of "converted wetland" in section 1201(a)(4) specifically excludes wetland which has been naturally farmed without the destruction of natural wetland characteristics and which has not been "drained, dredged, filled, leveled, or otherwise manipulated". Further, section 1222(a)(4) exempts from program ineligibility:

> "wetland on which production of an agricultural commodity is possible as a result of a natural condition, such as drought, and without action by the producer that destroys a natural wetland characteristic."

Both the definition of "converted wetland" in section 1201 and the exemption from program ineligibility in section

1222(a)(4) assure that farmers who have naturally farmed wet spots may continue to do so in the future, or may do so even though this occurs for the first time after December 23, 1985.

You indicate that farmers are now finding that they face restrictions on wetland that they have historically cultivated. We understand this to refer to situations in which, prior to the Food Security Act of 1985, farmers naturally cultivated wet spots but now wish to install drains or otherwise manipulate the wet spots. Such modifications to wetland would create statutorily defined "converted wetland" after the effective date of the Act, and the modifications could lead to the loss of federal farm benefits in accord with section 1221. Modifications of wet spots prior to the effective date of the Act are "grandfathered."

The Secretary of Agriculture in his letter explains his views on this issue as follows:

> "[A] pothole or a playa, or any other wetland area that is seasonally flooded or ponded . . . which has been altered prior to December 23, 1985, but otherwise continues to meet wetland identification criteria, is not considered to be a converted wetland. This is intended to protect the remaining functional values of those wetlands. Producers may continue to farm those wetlands under natural conditions and as they did prior to December 23, 1985. However, no actions may be taken to increase the effects of the water regime beyond that which existed on those wetlands prior to December 23, 1985, unless it is determined that the effect on the remaining wetlands values would be minimal.
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> "With regard to those wetlands . . . cultivated by delaying seeding operations until the areas dry naturally, the Act . . . would allow such production under natural conditions to continue without loss of benefit eligibility, so long as the producer did not destroy a natural wetland characteristic."

A member of your staff prepared a brief history of the wetland conservation legislation. This history refers to remarks made on July 31, 1985, by Congressman Daschle of South Dakota during House Agriculture Committee markup of H.R. 2100, which later was enacted as the Food Security Act of 1985. Mr. Daschle is quoted as follows:

> "The soil definition of wetland would not apply to temporarily flooded acres that are normally under

production. . . . If production was underway at any time in the past, that land would be grandfathered. That is the intent of the author of this legislation . . . [Mr. Daschle]."

The history also indicates that in response to Committee members' concerns regarding specific situations, Mr. Daschle replied that farmers would still be able to alter certain wetlands if the alteration were part of an approved conservation plan. (This conservation plan provision was deleted by the Conference Committee.)

From the foregoing, it appears that Mr. Daschle wanted to exclude from the definition of wetland those lands "normally under production," i.e., cropland, which might temporarily be flooded. Altering wetlands was another matter, only to be permitted under a conservation plan. This history is consistent with the Secretary's view and does not support the view that wetland which had been farmed naturally when conditions permitted can be altered after the legislation was enacted without penalty.

Whether a particular piece of land is wetland, or converted wetland, is a determination to be made by USDA after review of the land's physical characteristics. USDA has determined that land meeting the statutory definition of "wetland" may not be modified after the date the Act became law whether or not the land was cultivated naturally before that date. If, on the other hand, land was cultivated by draining, etc., prior to the Act and this caused it to be considered "converted wetland" under the Act's definition, then there is no penalty for any kind of continued agricultural production.

Accordingly, having previously cultivated wet spots by natural methods does not entitle producers, without penalty, to convert these wetlands through physical change to the land to improved croplands, i.e., converted wetlands. In our view, this is consistent with the purpose of Subtitle C of Title XII of the Act--to conserve existing wetland.

Minimal effects

Section 1222(c) of the Act exempts from the penalties prescribed in section 1221 any action associated with agricultural production on converted wetland after the date the Act became law if the effect on the wetland's hydrology and biology is "minimal." You question the Secretary's implementation of this exemption. In particular, you are concerned that the Secretary may be bound by language appearing in the report on H.R. 2100 by the House Committee on Merchant Marine and Fisheries, H.R. Rep. No. 271, Part 2,

99th Cong., 1st Sess. 17 (1985). In discussing the proposed exemption, the Committee stated that it "anticipates that USDA will rarely use this provision." The Committee explained that the provision:

> ". . . . is to be applied with great caution in recognition that most of this country's remaining wetlands are of considerable value. The provision is intended to exclude from this Act actions that are truly minimal, both individually and cumulatively, in their impact on wetlands."

You point out that the provision considered by the House Committee and passed by the House of Representatives, differed from a similar one which was passed by the Senate and enacted as section 1222(c). The Conference Report, H.R. Rep. No. 447, 99th Cong., 1st Sess. 460 (1985), adopted the Senate version. Senate Report No. 145, 99th Cong., 1st Sess. 304 (1985), in commenting on the provision that was enacted later, stated that:

> "It is . . . the Committee's intent that a person continue to be eligible for farm program benefits . . . where the impact of such conversion on wetland functional values would be diminutive."

The USDA's regulations dealing with eligibility for benefits under the wetland conservation provisions of the Food Security Act of 1985 appear at 7 C.F.R. § 12.5(d)(1)(v). The language of the section concerning minimal effect is similar to that found in section 1222(c) of the Act. This regulation was discussed by USDA incident to the publication of interim rules as follows:

> "A review of the legislative history concerning minimal effects indicates that a minimal effect is one which does not significantly alter wetland functional values and that the minimal effect exemption is expected to be rarely used." 51 Fed. Reg. 33490 (1986).

Reference to the rare use of a minimal impact determination also appears in the publication of the final rules. This was done in the course of a discussion explaining why a categorical exception to the rules for converted wetland could not be granted on the basis that the loss of fish and wildlife values would be mitigated. (52 Fed. Reg. 35200 (1987).)

The Secretary of Agriculture, in referring to the "minimal effect" exception in his July 7, 1988 letter, stated the general rule that legislative history guidance is not

ordinarily binding on the agency charged with implementing the law. He further explained that:

> "Because the guidance provided by the House Merchant Marine and Fisheries Committee was clear and uncontroverted by the other committees' reports and because several parties, including the Fish and Wildlife Service, commented on this language in the administrative rulemaking, the Department gave the language due consideration. It should be noted that the references to limited use of the 'minimal effect' exemption do not appear in the regulations, but are discussed in the preamble to the final rule at 52 F.R. 35200 (September 17, 1987)."

Our review shows that the report language indicating that the exemption should be applied with "great caution" and the anticipation that USDA would "rarely use" this exemption, does not appear in the statute, nor are the comments incorporated by reference into the law. At most, they provide guidance to USDA. The extent to which USDA uses the guidance will depend on circumstances yet to be faced by the Department.

Unless you publicly announce its contents earlier, we do not plan to distribute this opinion further until 10 days from its issue date.

Sincerely yours,

for Comptroller General
of the United States

Enclosure