

104<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 1949

To amend the conservation title of the Food Security Act of 1985 to give the Secretary of Agriculture jurisdiction over all wetland determinations involving agricultural lands, to provide for consultation between the Secretary of Agriculture and other Federal agencies involved in wetland conservation, and to improve the operation of the wetland conservation program of the Department of Agriculture.

---

## IN THE HOUSE OF REPRESENTATIVES

JUNE 28, 1995

Mr. MINGE introduced the following bill; which was referred to the Committee on Agriculture, and in addition to the Committees on Transportation and Infrastructure, and Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

## A BILL

To amend the conservation title of the Food Security Act of 1985 to give the Secretary of Agriculture jurisdiction over all wetland determinations involving agricultural lands, to provide for consultation between the Secretary of Agriculture and other Federal agencies involved in wetland conservation, and to improve the operation of the wetland conservation program of the Department of Agriculture.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

2 (a) SHORT TITLE.—This Act may be cited as the  
3 “Agricultural Wetlands Administration Act of 1995”.

4 (b) TABLE OF CONTENTS.—The table of contents of  
5 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings and purposes.
- Sec. 3. Department of Agriculture jurisdiction over wetland determinations re-  
garding agricultural lands.
- Sec. 4. Additional exemptions to farm program ineligibility under wetland con-  
servation program.
- Sec. 5. Mitigation, mitigation bank program, and related issues.
- Sec. 6. Contract authority for administration of wetland conservation program.
- Sec. 7. Definitions of agricultural land and farmed wetland.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—Congress finds the following:

8 (1) In addition to a range of State and local  
9 laws that govern the use of lands for agricultural  
10 purposes, subtitle C of title XII of the Food Security  
11 Act (16 U.S.C. 3821–3824) and section 404 of the  
12 Federal Water Pollution Control Act (33 U.S.C.  
13 1344) contain Federal requirements regulating the  
14 use of agricultural lands that contain or affect wet-  
15 lands.

16 (2) A number of Federal, State, and local agen-  
17 cies attempt to restrict the use of agricultural lands  
18 containing wetlands. At the Federal level, these in-  
19 clude the Consolidated Farm Service Agency and  
20 Natural Resources Conservation Service of the De-  
21 partment of Agriculture, the Fish and Wildlife Serv-

1 ice of the Department of the Interior, the Army  
2 Corps of Engineers, and the Environmental Protec-  
3 tion Agency.

4 (3) The overlapping legislation, agencies, and  
5 levels of government regulation handicap the produc-  
6 tive use of agricultural lands and cause needless con-  
7 fusion, delay, and expenses for agricultural produc-  
8 ers.

9 (4) Legislation that has resulted in the unrea-  
10 sonable classification of productive agricultural lands  
11 as possible wetlands, and the inequitable administra-  
12 tion of programs conducted under such legislation,  
13 adversely affect the value of agricultural lands.

14 (5) Agricultural producers desire to manage  
15 their lands in a manner that prevents soil erosion,  
16 avoids degradation of surface and subsurface water,  
17 and provides wildlife habitat. However, the American  
18 agricultural economy is highly competitive and mar-  
19 ginally profitable, and agricultural producers cannot  
20 reasonably be expected to absorb the cost of govern-  
21 mental requirements and procedures without com-  
22 pensation.

23 (b) PURPOSES.—The purposes of this Act are—

1 (1) to simplify decisionmaking regarding the  
2 productive agricultural use of agricultural lands con-  
3 taining wetlands;

4 (2) to consolidate in a single agency all Federal  
5 responsibility regarding agricultural lands containing  
6 wetlands;

7 (3) to relieve agricultural producers from the  
8 regulatory burden imposed on those agricultural  
9 lands that should not be classified as wetlands; and

10 (4) to provide additional opportunities for agri-  
11 cultural producers to mitigate the effects of convert-  
12 ing a wetland for agricultural purposes.

13 **SEC. 3. DEPARTMENT OF AGRICULTURE JURISDICTION**  
14 **OVER WETLAND DETERMINATIONS REGARD-**  
15 **ING AGRICULTURAL LANDS.**

16 (a) **ELIMINATION OF REQUIRED CONCURRENCE BY**  
17 **FISH AND WILDLIFE SERVICE.**—Section 1222(j) of the  
18 Food Security Act of 1985 (16 U.S.C. 3822(j)) is amend-  
19 ed—

20 (1) in paragraph (1), by striking “through the  
21 agreement” and all that follows through the period  
22 at the end of the paragraph and inserting “by the  
23 local representative of the Natural Resources Con-  
24 servation Service of the Department of Agriculture,

1 under the supervision of the relevant State Con-  
2 servationist.”;

3 (2) by striking paragraph (2); and

4 (3) by redesignating paragraph (3) as para-  
5 graph (2).

6 (b) JURISDICTION OVER WETLAND CONSERVATION  
7 EASEMENTS ON FMHA INVENTORY LANDS.—Section  
8 335(g)(1) of the Consolidated Farm and Rural Develop-  
9 ment Act (7 U.S.C. 1985(g)(1)) is amended by adding at  
10 the end the following new sentence: “The Secretary shall  
11 carry out this subsection through the Natural Resources  
12 Conservation Service of the Department of Agriculture.”.

13 (c) EXPANSION OF CONSULTATION.—Section 1223 of  
14 the Food Security Act of 1985 (16 U.S.C. 3823) is  
15 amended—

16 (1) by striking “shall consult” and inserting  
17 “may consult”;

18 (2) by inserting “, the Administrator of the En-  
19 vironmental Protection Agency, and the Chief of the  
20 Army Corps of Engineers” after “Secretary of the  
21 Interior”;

22 (3) by striking “as are necessary” and inserting  
23 “as the Secretary of Agriculture considers appro-  
24 priate”.

1 (d) ANNUAL COMMENTS AND RECOMMENDATIONS  
2 REGARDING WETLAND CONSERVATION PROGRAM.—Sec-  
3 tion 1223 of the Food Security Act of 1985 (16 U.S.C.  
4 3823), as amended by subsection (c), is further amend-  
5 ed—

6 (1) by striking the section heading and “SEC.  
7 1223.” and inserting the following:

8 **“SEC. 1223. CONSULTATION WITH OTHER FEDERAL**  
9 **AGENCIES.**

10 “(a) CONSULTATION AUTHORITY.—”; and

11 (2) by adding at the end the following new sub-  
12 section:

13 “(b) ANNUAL COMMENTS AND RECOMMENDATIONS  
14 REGARDING PROGRAM.—The Secretary of the Interior,  
15 the Administrator of the Environmental Protection Agen-  
16 cy, and the Chief of the Army Corps of Engineers shall  
17 individually submit to the Secretary of Agriculture each  
18 year comments and recommendations regarding the gen-  
19 eral administration of this subtitle. Within 120 days after  
20 receiving the comments and recommendations submitted  
21 under this subsection, the Secretary of Agriculture shall  
22 submit a report to Congress describing the comments and  
23 recommendations received and containing the comments  
24 of the Secretary thereto.”.

1 (e) ELIMINATION OF DUPLICATIVE REGULATION BY  
2 ARMY CORPS OF ENGINEERS AND EPA.—Section 1222  
3 of the Food Security Act of 1985 (16 U.S.C. 3822) is  
4 amended by adding at the end the following new sub-  
5 section:

6 “(k) EXCLUSION OF AGRICULTURAL LANDS FROM  
7 SCOPE OF CLEAN WATER ACT.—Agricultural lands sub-  
8 ject to this subtitle shall be exempt from the permit proc-  
9 ess under section 404 of the Federal Water Pollution Con-  
10 trol Act (33 U.S.C. 1344) and shall not be considered ‘wa-  
11 ters of the United States’ or ‘navigable waters’ for pur-  
12 poses of such Act.”.

13 **SEC. 4. ADDITIONAL EXEMPTIONS TO FARM PROGRAM IN-**  
14 **ELIGIBILITY UNDER WETLAND CONSERVA-**  
15 **TION PROGRAM.**

16 (a) PRODUCTION AND CONVERSION EXEMPTION FOR  
17 CERTAIN SMALL TRACTS.—Subsection (b)(1) of section  
18 1222 of the Food Security Act of 1985 (16 U.S.C. 3822)  
19 is amended—

20 (1) by striking “or” at the end of subparagraph  
21 (C);

22 (2) by striking “or” at the end of subparagraph  
23 (D); and

24 (3) by adding at the end the following new sub-  
25 paragraph:

1           “(E) a tract of land less than 2 acres in  
2 size, whether or not the land has a predomi-  
3 nance of hydric soil or hydrophytic vegetation,  
4 if the land lies primarily within a field used for  
5 production of an agricultural commodity and is  
6 sufficiently free of water during 6 out of the  
7 previous 10 crop years to permit the production  
8 of an agricultural commodity;”.

9           (b) PRODUCTION AND CONVERSION EXEMPTION FOR  
10 CERTAIN WETLANDS LOCATED ON AGRICULTURAL  
11 LANDS.—Such subsection is further amended by inserting  
12 after subparagraph (E) (as added by subsection (a)) the  
13 following new subparagraphs:

14           “(F) a wetland that—

15                   “(i) is located on agricultural land;

16                   “(ii) is a shallow, freshwater, season-  
17 ally flooded basin or flat, including an up-  
18 land depression or overflow bottom land;

19                   “(iii) consists of soils that are covered  
20 with water or are waterlogged during vari-  
21 able seasonal periods but are well drained  
22 during much of the growing season; and

23                   “(iv) has emergent and persistent  
24 vegetation, which is characterized by erect,  
25 rooted, herbaceous hydrophytes, excluding

1 mosses and lichens, and normally remains  
2 standing at least until the beginning of the  
3 next growing season;

4 “(G) a wetland that—

5 “(i) is located on agricultural land but  
6 has not been used in the production of an  
7 agricultural commodity in 6 out of the pre-  
8 vious 10 crop years;

9 “(ii) is less than 2 acres in size;

10 “(iii) is a shallow, freshwater, inland  
11 fresh meadow;

12 “(iv) consists of soils that are usually  
13 without standing water during most of the  
14 growing season but are waterlogged within  
15 inches of the surface; and

16 “(v) has emergent and persistent  
17 vegetation, which is characterized by erect,  
18 rooted, herbaceous hydrophytes, excluding  
19 mosses and lichens, and normally remains  
20 standing at least until the beginning of the  
21 next growing season; or

22 “(H) a wetland that—

23 “(i) is located on land which has met  
24 the definition of agricultural land in 6 out  
25 of the previous 10 crop years;

1           “(ii) is a shallow, freshwater, inland  
2 fresh meadow;

3           “(iii) consists of soils that are usually  
4 without standing water during most of the  
5 growing season but are waterlogged within  
6 inches of the surface; and

7           “(iv) has emergent and persistent  
8 vegetation, which is characterized by erect,  
9 rooted, herbaceous hydrophytes, excluding  
10 mosses and lichens, and normally remains  
11 standing at least until the beginning of the  
12 next growing season;”.

13       (c) MINOR CLEARING OF TREES OR BRUSH.—Sub-  
14 section (b) of such section is amended by adding at the  
15 end the following new paragraph:

16           “(3) as a result of incidental clearing or grub-  
17 bing of trees or brush on or near a wetland if mini-  
18 mal alteration of wetland hydrology occurs.”.

19       (d) CLARIFICATION OF PRIOR CONVERTED EXEMP-  
20 TION.—

21           (1) CLARIFICATION.—Subsection (d) of such  
22 section is amended to read as follows:

23       “(d) PRIOR CONVERTED WETLANDS.—

24           “(1) TYPES OF PRIOR CONVERTED WET-  
25 LANDS.—The exemption for prior converted wetland

1 provided in subsection (b)(1)(A) includes lands that  
2 have hydrologic alterations caused by subsurface  
3 drainage tile, surface drainage ditches, levees, diver-  
4 sions, or similar structures constructed or com-  
5 menced before December 23, 1985, if agricultural  
6 commodities were produced on the lands before De-  
7 cember 23, 1985.

8 “(2) ABANDONMENT.—Prior converted wetland  
9 exempted under subsection (b)(1)(A) shall not be  
10 considered to be abandoned for purposes of removing  
11 the exemption unless the exempted land is not used  
12 for agricultural purposes for 10 consecutive years  
13 and once again satisfies the definition of wetland.”.

14 (2) RELOCATION OF FORMER SUBSECTION.—  
15 Section 1221 of the Food Security Act of 1985 (16  
16 U.S.C. 3821) is amended by adding at the end the  
17 following new subsection:

18 “(c) PRIOR LOANS.—This section shall not apply to  
19 a loan described in this section made before December 23,  
20 1985.”.

21 **SEC. 5. MITIGATION, MITIGATION BANK PROGRAM, AND**  
22 **RELATED ISSUES.**

23 (a) MITIGATION.—Subsection (f) of section 1222 of  
24 the Food Security Act of 1985 (16 U.S.C. 3822) is  
25 amended—

1 (1) in paragraph (2)—

2 (A) in the matter before the subpara-  
3 graphs, by inserting “farmed wetland or” be-  
4 fore “converted wetland”; and

5 (B) by striking subparagraphs (E) and (F)  
6 and inserting the following new subparagraphs:

7 “(E) performed in the same general area  
8 of the local watershed as the converted wetland  
9 or land being converted or within 10 miles of  
10 such lands; and

11 “(F) with respect to such restored wetland,  
12 made subject to a contract that—

13 “(i) is for a term of 10 years or for  
14 as long as the converted wetland is not re-  
15 turned to its original wetland classification  
16 with equivalent functions and values,  
17 whichever occurs first; and

18 “(ii) prohibits making alterations to  
19 such restored wetland that lower the re-  
20 stored wetland’s functions and values;”;

21 (2) in paragraph (3)—

22 (A) by inserting “is a farmed wetland or”  
23 after “such wetland”;

24 (B) by inserting “farmed wetland or” be-  
25 fore “converted wetland”; and

1 (C) by striking the period at the end and  
2 inserting “; or”; and

3 (3) by adding at the end the following new  
4 paragraph:

5 “(4) the conversion of such wetland is com-  
6 pensated for through a contribution to a mitigation  
7 bank program.”.

8 (b) MITIGATION BANKS.—Such section is further  
9 amended by inserting after subsection (k), as added by  
10 section 3(e), the following new subsection:

11 “(l) MITIGATION BANKS.—Not later than 6 months  
12 after the date of the enactment of this subsection, and  
13 after providing notice and opportunity for public review  
14 and comment, the Secretary shall issue regulations for the  
15 establishment, use, maintenance, and oversight of mitiga-  
16 tion banks. The Secretary may develop these regulations  
17 in consultation with other appropriate Federal agencies.”.

18 (c) GOOD FAITH EXEMPTION.—Subsection  
19 (h)(1)(B)(i) of such section is amended by striking “10-  
20 year” and inserting “5-year”.

21 (d) RESTORATION.—Subsection (i) of such section is  
22 amended by inserting after “its prior wetland state” the  
23 following: “or entered into an approved mitigation plan  
24 relating to such converted wetland”.

1 **SEC. 6. CONTRACT AUTHORITY FOR ADMINISTRATION OF**  
2 **WETLAND CONSERVATION PROGRAM.**

3 Section 1222(j) of the Food Security Act of 1985 (16  
4 U.S.C. 3822(j)), as amended by section 3(a), is further  
5 amended by adding at the end the following new para-  
6 graphs:

7 “(3) CONTRACT AUTHORITY FOR PERFORM-  
8 ANCE OF DUTIES.—

9 “(A) IN GENERAL.—The Secretary may  
10 enter into contracts, agreements, and similar  
11 arrangements with other Federal agencies,  
12 agencies of State and local governments, and  
13 private entities to perform any or all respon-  
14 sibilities of the Secretary in delineating, regu-  
15 lating, supervising, issuing permits or otherwise  
16 dealing with wetlands and drainage activities on  
17 agricultural lands. The Secretary shall be re-  
18 sponsible for costs incurred by the other parties  
19 to carry out such contracts, agreements, and  
20 similar arrangements. The Secretary shall mon-  
21 itor the performance of the other parties to  
22 such contracts, agreements, and similar ar-  
23 rangements to ensure that such parties satisfac-  
24 torily perform the determinations and actions  
25 required by this subtitle. The Secretary may  
26 terminate such a contract, agreement, or simi-

1 lar arrangement consistent with the terms of  
2 the contract, agreement, or arrangement. In  
3 contracting for such services, the Secretary  
4 shall endeavor to simplify the regulatory proc-  
5 ess. In order to achieve simplification of the  
6 regulatory process, the Secretary shall eliminate  
7 inconsequential differences identified by the  
8 Secretary between the requirements of Federal  
9 law administered by the Secretary and State  
10 and local laws regarding wetlands.

11 “(B) JOINT ARRANGEMENTS.—In addition  
12 to, or as an alternative to, a contract under  
13 subparagraph (A), the Secretary may enter into  
14 a joint power agreement with other Federal  
15 agencies, agencies of State and local govern-  
16 ments, and private entities to create a special  
17 entity to perform the functions described in  
18 such subparagraph on behalf of all such inter-  
19 ested governmental entities. The Secretary shall  
20 pay to such joint power entity the amount  
21 which the entity reasonably incurs to perform  
22 those functions that are otherwise the respon-  
23 sibility of the Secretary.

24 “(C) WAIVER AUTHORITY.—To facilitate  
25 the making of technical determinations and the

1 development of restoration and mitigation plans  
2 by the Natural Resources Conservation Service,  
3 the Secretary may waive requirements of this  
4 subtitle and section 404 of the Federal Water  
5 Pollution Control Act (33 U.S.C. 1344) and of  
6 regulations adopted pursuant thereto if the Sec-  
7 retary finds, in the discretion of the Secretary,  
8 that such a waiver would not compromise the  
9 essential purposes of such laws but would con-  
10 tribute to effective, simplified administration  
11 within the purposes of this subtitle.

12 “(4) STANDARDS FOR ALTERNATION OF DELIN-  
13 EATIONS.—Once a delineation is made it shall not be  
14 changed unless—

15 “(A) the landowner requests a change, and  
16 either—

17 “(i) the definition has been changed  
18 and such change is relevant to the land in  
19 question; or

20 “(ii) the existing delineation is not  
21 being contested within the agency;

22 “(B) significant events warrant a change,  
23 such as landscape changes caused by a major  
24 flood, or abandonment by the landowner of  
25 prior converted wetlands;

1           “(C) a delineation has been made which is  
2           erroneous beyond a reasonable doubt, provided  
3           such an erroneous delineation shall not be  
4           changed if the landowner has relied thereon and  
5           the change would be to the significant economic  
6           detriment of the landowner; or

7           “(D) a change has been made in the legal  
8           standard.”.

9   **SEC. 7. DEFINITIONS OF AGRICULTURAL LAND AND**  
10                           **FARMED WETLAND.**

11           Section 1222 of the Food Security Act of 1985 (16  
12   U.S.C. 3822) is amended by inserting after paragraph (1),  
13   as added by section 5(b), the following new subsection:

14           “(m) DEFINITIONS.—For purposes of this section:

15           “(1) AGRICULTURAL LAND.—The term ‘agricul-  
16           tural land’ means—

17           “(A) land that is intensively used for the  
18           production of an agricultural commodity;

19           “(B) land that is managed for the produc-  
20           tion of an agricultural commodity;

21           “(C) land that is used for other agricul-  
22           tural use, including use as cropland, orchard,  
23           vineyard, or nursery, unused land ancillary  
24           thereto, and pasture land which produced a  
25           crop for sale in 6 out of the previous 10 crop

1 years (excluding pasture land solely used for  
2 grazing of livestock); or

3 “(D) a drainage ditch and other similar  
4 structures that—

5 “(i) are in existence on the date of the  
6 enactment of the Agricultural Wetlands  
7 Administrative Act of 1995;

8 “(ii) primarily serve lands described in  
9 subparagraph (A); and

10 “(iii) have a watershed of 2 square  
11 miles or less.

12 “(2) FARMED WETLAND.—The term ‘farmed  
13 wetland’ means a wetland which has been used for  
14 production of an agricultural commodity and is suf-  
15 ficiently free of water during 6 out of the previous  
16 10 crop years to permit the production of an agricul-  
17 tural commodity.”.

○

HR 1949 IH—2