



Defending Agriculture

Legal, environmental hot button issues that impact U.S. farmers.

EPA 'Out of Control'

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U.S. Representative Jerry Costello, D, Ill., is quoted in the May 16, 2011, issue of *FarmWeek*, published by Illinois Farm Bureau, declaring "EPA is an agency that's out of control, and it's an agency that's not following the law..."

In the article, Costello claims, "There is an outlaw in Washington...and Congress must police it."

What is causing these strong statements? The U.S. Environmental Protection Agency (EPA) is trying to significantly expand its regulatory control over U.S. farm lands.

On April 27, 2011, EPA and the U.S. Army Corps of Engineers (Corps) issued "Draft Guidance on Identifying Waters Protected by the Clean Water Act." The draft guidance seeks to interpret two key U.S. Supreme Court decisions known as Rapanos and SWANCC. (The SWANCC case was a follow-up to a farm land wetlands case I tried involving Hoffman Homes in the Chicago area.)

The draft guidance addresses what is a wetland and what water bodies are subject to the jurisdiction of the federal Clean Water Act.

EPA and the Corps have come under substantial criticism from both environmental and farm communities. Even states are claiming the EPA guidelines are another example of the federal government running afoul of state authority.

An example of EPA running amuck and attacking the agricultural community is the Charles Johnson cranberry case in Massachusetts. After 21 years of pursuing a farmer and his son, EPA was recently victorious regarding a cranberry wetland. Mr. Johnson simply ran out of money in his fight against numerous EPA and Department of Justice staffers.

EPA used many of the arguments in the Johnson case that are set forth in the new EPA draft guidance.

By the way, testimony in the Johnson trial demonstrated EPA spent \$5.5 million on just one consultant to prove a significant nexus from the Johnson property to a water of the United States.

Speculation is that EPA spent between \$5.5-15 million to get one farmer.

The Draft Guidance

EPA Administrator Lisa Jackson is quoted as saying the new wetlands guidance will not spark a "massive increase" in federal jurisdiction. Jackson is not a lawyer so I can accept she does not understand what the guidance, which eventually will become a regulation, includes. Space here will not permit me to go through the entire draft guidance. I will discuss several areas which concern agriculture.

The document at this point is merely guidance on which EPA is taking comment for the next 60 days. I urge all those reading this piece to contact their farmer organization to insure that your organization weighs in on this guidance, which will certainly become a rule.

The EPA guidance is divided into eight sections. A critical section for agriculture deals with various types of waters which are tributaries, adjacent wetlands and other waters. There is also a section that attempts to provide examples of waters that are generally not waters of the United States.

There is disturbing language in the EPA and Corps guidance!

EPA will continue to assert jurisdiction over "...all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."

Imagine what the EPA bureaucrats can do when they claim that water on your property may be susceptible to use in interstate commerce!

EPA also claims it has jurisdiction over canals or ditches which have historically been used for commercial navigation. (I was involved in a case in Puerto Rico where the canals were completely grown over but had been used to transport charcoal in the 1800s, and EPA claimed jurisdiction.)

EPA, in its unending quest to assert its jurisdiction over farm land, uses language from the Rapanos case which discusses what is a "significant nexus" to a traditional navigable water.

Think about how far EPA can go with this argument. EPA claims waters have a "...significant nexus if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters or interstate waters."

It was this language that allowed EPA to spend millions of your taxpayer dollars to go after Mr. Johnson in Carver, Mass., for over 21 years. (I represented the Johnson family for several years).

Another red flag for agricultural operations: EPA discusses what tributaries are and how it will determine a tributary. A ditch can be considered a tributary if the ditch has relatively permanently flowing or standing water, the ditch drains a natural water body including wetlands into a tributary system of traditional navigable or interstate water, or if the ditch has been excavated in waters of the U.S., and if a natural stream has been altered by channeling, straightening or relocating.

It is easy to see why Congressman Costello claims EPA is out of control. If allowed to proceed, EPA will harm agriculture, hurt our economy and as happened to Charlie Johnson, drive farmers into potential bankruptcy.

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