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Cranberry Farmer, EPA Still Nose to Nose in 20-Year-Old Wetlands Fill Case

By JOHN MCARDLE of

Second in a three-part series on muddled federal wetland regulations. [Click here for part one.](#)

Seventy-nine-year-old Charles Johnson has seen nine grandchildren born in the time that he's been battling U.S. EPA over a soggy 50 acres on his cranberry farm in Carver, Mass. He estimates that he's spent \$2 million on the case since the early 1990s -- and he admits he has hundreds of thousands of dollars in unpaid legal bills.

The case, which tests the scope of the federal government's authority to regulate wetlands, is set to be heard in U.S. District Court -- for the second time -- in April. But after fighting for so long, Johnson has finally run out of money, and now he is worried that he will be forced to settle his case before he can head back to a courtroom.

It is a thought that gnaws at the stubborn Korean War veteran who works cranberry fields that his father once oversaw as a farm foreman.

"To have to concede to these bastards, that's an awful tough pill to swallow," Johnson said in a telephone interview last week. "It's not my nature to succumb to something that in my judgment is not right."

The case, which also names as defendants Johnson's wife Genelda and son Francis, represents one of the longest ongoing enforcement matters on EPA's docket, in part because it has been swept up in the legal confusion created through the Supreme Court's ambiguous 2006 decision in *Rapanos v. United States*.

Filed in 1999, the Johnson case concerns three cranberry fields built on his 400 acres, which lie about 8 miles southwest of Plymouth, Mass. EPA claims Johnson violated the Clean Water Act when he created about 50 acres of his cranberry bogs because he filled wetlands regulated under the Clean Waters Act. Johnson said EPA began looking into his property around 1990 after a neighbor complained about having access to water.

Johnson lost an initial U.S. District Court ruling in 2005, but he appealed his case to the 1st U.S. Circuit Court of Appeals in Boston where it was being considered when the *Rapanos* decision was handed down by the Supreme Court in June 2006.

In light of the Supreme Court decision and new jurisdictional tests it created, the circuit court decided to vacate the lower court ruling and remanded the Johnson case back to U.S. District Court for more fact finding.

Four years and an exhausting number of legal moves later, Johnson's case is now set to go to trial on April 11 -- that is, if Johnson can find the money to keep his case going.

'Not Bill Ruckelshaus' EPA'

Gary Baise served as EPA's first chief of staff and went on to work for the FBI and Department of Justice before going into private practice in the District of Columbia. About a decade ago, Baise learned of Johnson's case and signed on to defend him against the agency that he previously helped lead. Baise stepped down as Johnson's lead attorney in 2004 in part because it was costing Johnson too much, but he continues to be interested in the case.

Last week, Baise estimated that the government has spent somewhere between \$2 million and \$5 million just for outside experts in building their case against Johnson. That figure does not include money that the agency spent for its own agents and lawyers or the money the Department of Justice has spent trying the case.

Baise maintains the government is throwing away millions of dollars to prosecute Johnson to satisfy its own ego.

Johnson's case has long been held up as an example of EPA going too far. Back in 2001, Johnson testified about his experience before the House Transportation and Infrastructure Subcommittee on Water Resources and Environment.

Last week, a spokeswoman for Rep. Mike Simpson (R-Idaho) -- the new chairman of the Appropriations subcommittee with jurisdiction over the EPA -- said the Johnson case is "one of many, many examples that have been brought to the congressman's attention of the EPA overstepping. It's why he's so interested in reining in the agency."

Baise said Johnson's case is not so much EPA overstepping as it is the agency misplacing its priorities and investigating the wrong people.

"They wouldn't do this to Exxon," Baise said. "This is a bully taking on a true American patriot. ... If I were still at EPA I would fire the people who are continuing to authorize

actions like this. This is what causes people to have their confidence undermined with regards to fair government and fair implementation of the law."

Invoking the name of the first EPA administrator who is almost universally beloved in the agency and among environmentalists, Baise added, "This is not Bill Ruckelshaus' EPA."

Last week, both the local and national EPA declined to discuss the Johnson case because it was still active.

"EPA has a long-standing policy of not commenting on cases or the issues surrounding them while in litigation," said Dave Deegan, a spokesman for EPA's Region 1 office in New England.

Deegan did question Baise's estimate on the amount of money the government has spent, but he declined to provide an estimate of his own.

A spokesman for DOJ referred any questions to documents filed by the government in court.

Navigable waters or power grab?

According to those documents, the waterways that Johnson polluted without a permit include the Beaver Dam Brook and two unnamed streams.

The government argues it has jurisdiction over those streams because of their connections to navigable waterways. For instance, one unnamed stream "flows into the Rocky Meadow Brook, which is a tributary to South Meadow Brook, which is a tributary to the Weweantic River, which flows to the Atlantic Ocean," the government argued in its complaint.

EPA believes those connections put Johnson's farms on the wrong side of the Clean Water Act.

In a release touting the U.S. District Court's first ruling on the matter, EPA called the case one of the largest wetlands cases ever pursued by EPA's New England regional office, in terms of the acres of wetlands filled and altered.

"The Johnson's cranberry bog construction and associated activities destroyed existing natural wetlands and streams and severely diminished their ecological functions," EPA wrote in that January 2005 release.

"The resolution of this case will not only restore these ecological functions, but will ensure that the majority of cranberry growers, who do comply with the Clean Water Act

requirements, will not be placed at a competitive disadvantage by those farmers who violate the rules."

Johnson argues that no wetlands ever existed on the sites in question before he created them with his cranberry bogs and that he has actually helped preserve his property's natural beauty and resources.

The cranberry bogs "have attracted a wide variety of wildlife and waterfowl to my property," Johnson said in his congressional testimony in 2001. "Additionally, my creation of cranberry bogs has slowed the rate of sprawl, which is currently affecting those parts of Plymouth County which lie between Boston and Cape Cod."

Johnson said last week EPA is stretching its authority under the Clean Water Act far beyond any reasonable interpretation in an attempt to expand its own authority. He believes that by standing up to EPA for so long he has been helping to hold the gate against EPA's power grab, but that is also why the agency has pursued his case so relentlessly.

"If we prevail ... the EPA will have to back off in their pursuit of the ultimate goal of having jurisdiction over every piece of moisture in the country," he said.

'Fair questions'

More than 15 years after EPA first informed Johnson that he was under investigation, the sudden appearance of federal agents roaming his property no longer shocks him.

"Sometimes, on a nice sunny day, maybe five [EPA investigators] ... will get a couple canoes and paddle around our reservoirs," he said.

Over the years there have been more than a few serious intrusions, such as the digging of around 80 test wells to satisfy the government's investigators. Other inconveniences have been almost humorous.

"For a couple weeks they congregated in town at the parking lot between the town hall and library and would caravan to our property," Johnson recalled. "They'd drive down, pitch a tent, make sure everyone had water, suntan lotion, mosquito lotion and cell phones so they don't get lost in the wilds of Massachusetts."

Johnson once hired his own consultant to try to keep track of every agent and investigator who came on to his property, but he ended the practice when it became clear that it would be too difficult to try to keep up.

Douglas Thompson, a former chief of wetlands protection for EPA Region 1 and now a

mediator in the private sector, said he did not work directly on Johnson's case during his time with the agency, but he said he recalls a trend of cases the agency pursued concerning cranberry bogs.

"Cranberry bogs certainly don't provide the same level of environmental value and natural resource value as a functioning natural wetland," Thompson said. "My experience is that EPA doesn't pursue these things casually and it must feel it has sound environmental reasons for doing so."

Thompson added, "In a sense, what Mr. Johnson is doing here, which he has every right to do, is make EPA prove its case. ... And that requires a lot of time and money and consultant effort. It's certainly a fair question to ask EPA, 'Why not drop it?' And it may be a fair question to ask the other side, 'Why not settle it?'"

Opportunities to settle

The fact is, Johnson could have settled his case plenty of times over the years.

Back before EPA took him to court, Johnson said he could have made the matter go away by paying about \$25,000 and moving some dirt around his properties.

When EPA won its judgment in U.S. District Court, he could have accepted a ruling that required him to pay \$75,000 and restore 25 acres of wetlands at the cost of about \$1 million.

"There was a period of time where my anger was probably the reason" he kept fighting, Johnson said last week. "I stayed up nights, but that anger would not allow me to concede."

Johnson said his current lawyer -- Boston attorney Michelle O'Brien, who declined to comment for this article -- probably wants him to settle the case. He acknowledges that his continued battle with EPA does not make financial sense.

"Certainly looking at it from a numbers point of view and forget the principal, if I eliminate any emotion, it doesn't make sense to keep fighting the government," he said. "They are going to drive you in the ground. You should just pay 'em."

Johnson has sold off some property to pay his legal bills in the past but to continue the fight through his trial in April would require Johnson to dig into his cranberry farm operating funds -- something he is not willing to do.

He has tried to find a sympathetic donor who will take up his cause but hasn't gotten anywhere in his phone calls to Ocean Spray Cranberries Inc. and the billionaire brothers,

David H. and Charles Koch, owners of the energy conglomerate Koch Industries and champions of conservative causes.

Still, he said, he's not backing down.

"My mother," he said, "didn't teach me how to lose."

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