



Wetlands: The New Land Grab by EPA

Posted on June 06, 2011 at 12:03 PM

[Click here](#) to view [recent posts](#)

EPA's draft guidance on identifying waters which may be wetlands was issued on April 27, 2011. My recent blog discussed the concern an Illinois congressman had regarding the impact of this guidance on agriculture and farmers.

The draft wetlands guidance has major implications for agriculture, but there are protections for agriculture which need to be addressed.

U.S. EPA, the U.S. Army Corps of Engineers and USDA have provided some protection for farm operations. Wetland Exemptions helpful to agriculture are:

- Agricultural stormwater discharges and return flows from irrigated agriculture;
- Normal, ongoing agricultural, silvicultural and ranching activities;
- Normal activities related to construction and maintenance of irrigation ditches, and maintenance of drainage ditches;
- Normal activities associated with construction or maintenance of farm, forest, and temporary mining roads.

EPA and USDA also address agricultural activities and list several of those activities as being exempted from wetland jurisdiction. They are:

- Non-tidal drainage and irrigation ditches not connected to a jurisdictional water;
- Artificially irrigated areas that would revert to upland if irrigation stops;
- Artificial lakes or ponds used purposes such as stock water;
- Artificial ornamental waters created for primarily aesthetic reasons;
- Water-filled depressions created as a result of construction activity.

These wetland exemptions, on balance, are helpful until you review Section 6 of the EPA guidance.

EPA, in an effort to gain as much jurisdiction over agriculture as possible, defines "other waters" or "(a) (3) waters". These waters are described as "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce..."

This language creates the potential for EPA to substantially increase its jurisdictional reach over private property.

EPA makes a major point of artificial lakes or ponds not being subjected to jurisdiction but as one reviews what is a wet meadow or wetland, it is obvious that EPA will review whether such water body may "significantly affect" water by draining to a traditional navigable water or interstate water. In fact, EPA can claim that certain agricultural areas which are close to traditional navigable waters as being adjacent and therefore wetlands. The "prior converted cropland" exemption will be critical in terms of protecting property under this interpretation.

Under Section 6 of its guidance, EPA claims possible jurisdiction of "...lakes, ponds, and other non-wetland waters that are bordering, contiguous, or neighboring to jurisdictional waters, including waters that are separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and the like." EPA believes that these lakes and ponds should be evaluated, and if there is a significant nexus these waters will be regulated.

Another reason Congressman Jerry Costello, D, Ill., may be concerned over EPA's expanding jurisdiction, is EPA's efforts to regulate waters which are not physically close to jurisdictional waters. EPA calls these waters "non-physically proximate" and states clearly these waters are isolated and can be intrastate and even non-navigable. EPA declares it will rely on whether there is a "significant nexus" that can connect these waters to a jurisdictional tributary.

Significant mischief can be created by this loose standard!

EPA admits it is more difficult evaluating geographically separated water from jurisdictional tributaries and says "...establishing a significant nexus may be more challenging." However, EPA directs its field staff to work with the EPA regional office in making determinations when a water is not "physically proximate". This will allow EPA staff to spend millions of taxpayer dollars hiring more staff and consultants to harass farmers on determining if a geographically isolated water has a significant impact on a navigable water miles away.

EPA declares that even though "...such waters may be widely scattered geographically, and physically remote from jurisdictional waters, field staff should generally conduct a "significant nexus" analyses for such waters individually, unless there is a compelling scientific basis for treating a group of such waters as similarly situated waters in the same region."

The fine print in EPA's April 27, 2011, guidance document clearly was read by Congressman Costello. Agriculture should be extremely pleased that Congressman Costello is sounding the alarm regarding another power grab by a federal agency over farming operations in this country. When you read the EPA and Corps April guidance you conclude, as Congressman Costello did, that these agencies need major congressional oversight.

[Add a Comment](#)

Recent Posts

[Back to Top](#)

Wetlands: The New Land Grab by EPA

Posted on June 06, 2011 at 12:03 PM

New government plan creates the potential for EPA to substantially increase its jurisdictional reach over private property.

Category: [Issues](#)