

Supreme Court to resolve Clean Water Act confusion

Case will determine if landowners can fight regulatory findings

Analysis

By **MATEUSZ PERKOWSKI**
Capital Press

Should landowners be allowed to challenge whether their properties are subject to the federal Clean Water Act?

Currently, the answer to that question depends on geography.

Landowners cannot fight such regulatory findings in court if they're located within the nine Western states overseen by the 9th U.S. Circuit Court of Appeals or the three Southern states overseen by the 5th Circuit.

Both appellate courts have rejected attempts by landowners to contest "jurisdictional determinations" issued by the U.S. Army Corps of Engineers.

However, the 8th Circuit Court arrived at the opposite conclusion earlier this year.

In the seven Midwestern states in that circuit, landowners can ask federal judges to reverse those determinations, which carry the heavy regu-



Courtesy USDA

The U.S. Supreme Court will decide if landowners can challenge whether their properties are subject to the Clean Water Act.

latory burdens of complying with the Clean Water Act.

The answer is even murkier in the remaining states, where federal appellate courts haven't faced the question.

"It creates inequity around the country and uncertainty for a lot of landowners," said Ellen Steen, general counsel of the American Farm Bureau Federation.

The U.S. Supreme Court has now agreed to clear up this confusion by reviewing a lawsuit in which a Minnesota peat moss company disputed the federal government's determination that its wetlands come under federal jurisdiction.

The company, Hawkes Co., wanted to extract peat moss from the wetlands, but the U.S. Army Corps of Engineers said it would first need to apply for a Clean Water Act permit.

According to the Farm Bureau, the outcome of the case is particularly important now that the federal government has tried to expand the definition of "waters of the U.S." to bring more land under CWA jurisdiction.

"We think the government applies its authority way too broadly," said Steen, the Farm Bureau's general counsel.

The nation's highest court will resolve an issue that's

been interpreted differently by the appellate courts: Whether "jurisdictional determinations" are final agency actions that carry legal consequences.

The 8th Circuit held that such determinations have a major impact on what landowners can do with their property and thus could be challenged in federal court.

The federal government, with which the 9th Circuit and 5th Circuit agree, maintains that such determinations are merely advisory opinions about whether property is subject to the Clean Water Act.

If landowners disagree with a jurisdictional determination, they can proceed with planned activities and then challenge the finding when the government brings an enforcement action against them, federal attorneys argue.

Landowners can also go through the costly and time-consuming process of applying for a Clean Water Act permit.

If their request is denied or they disagree with permit conditions, landowners can then file a lawsuit against the Corps, the government said.

The Farm Bureau believes the federal government's ar-

guments are unrealistic, given the amount of money at risk with either option, said Steen.

"We want farmers to be able to go to court to challenge that assertion of jurisdiction rather than defy a government order," she said.

While the government considers jurisdictional determinations to be advisory, defying that advice can result in devastating financial and criminal penalties, Steen said.

"It's just not the way it works in the real world," she said. "Even if the government wants to call that an opinion, it has dramatic real world consequences for the farmer."

Applying for a Clean Water Act permit can cost hundreds of thousands of dollars, and landowners can't recoup those costs even if they're ultimately successful in challenging a denial or in altering permit conditions, said Reed Hopper, an attorney with the Pacific Legal Foundation, a property rights law firm that represents the peat moss company.

"That's not a meaningful option for a landowner," he said. "If it's wrong, the Corps has nothing to lose and the landowner has everything to lose."

Omnibus spending bill nixes COOL

Farm state legislators unable to kill WOTUS

Staff report

WASHINGTON — A compromise, \$1.1 trillion budget bill negotiated by Congress Tuesday repeals Country of Origin Labeling rules just as Canada and Mexico prepare to impose retaliatory tariffs.

The World Trade Organization this month authorized Canada and Mexico to impose more than \$1 billion worth of retaliatory tariffs on U.S. products in response to the labeling law, which requires meat labels to show where the animals were born, raised and slaughtered.

Canada and Mexico have charged since it was approved in 2008 that the rule violates the terms of trade agreements, and the WTO has agreed. The U.S. has exhausted all of its appeals before the WTO in defense of the rule.

The measure also includes provisions to extend favorable tax treatment on the purchase of farm equipment and infrastructure, increases funding for sustainability research, additional funding to implement new Food and Drug Administration food safety rules, according to a congressional summary of the bill.

- Specifically, the bill:
- Provides \$2.94 billion for agricultural research.
 - Includes \$898 million for the Animal and Plant Health Inspection Service.
 - Includes \$1.51 billion for the Farm Service Agency.
 - Provides \$2.8 billion for rural development programs.

The bill increases the permanent cap on Section 179 small business expense deductions from \$25,000 to \$50,000. Under Section 179, the cost of qualifying purchases of new or used business property can be deducted all at once instead of being depreciated over the course of several years.

The bill extends for five years a 50 percent bonus depreciation provision that allows a taxpayer to deduct up to half of the cost of new-only business property above what would normally be deductible.

Democrats pushed back attempts by Republicans to block implementation of the Environmental Protection Agency's "Waters of the U.S." regulations.

Storms loosen drought's grip on Washington state

By **DON JENKINS**
Capital Press

Storms are rolling back the drought in Washington, but the state also has seen record-high temperatures in some places, a wet-and-warm weather combination that last winter led to Washington's "snowpack drought."

"For the drought situation, in some ways, this week has been very good," Washington State University meteorologist Nic Loyd said Dec. 11. "My general outlook hasn't changed. I'm still thinking that come next spring the snowpack will be below normal."

The U.S. Drought Monitor reported Dec. 10 that the percentage of Washington in "extreme drought" had dropped to 34 percent from 44 percent the week before. Some 60 percent of the state remains in moderate to extreme drought. The report was completed two days before its release and before some of the week's heaviest rains.

Precipitation in the past few days has pushed the Yakima River Basin's five reservoirs well above normal levels.

The reservoirs were 47 percent full Dec. 11 and held 121 percent of the normal amount of water for that date, according to the U.S. Bureau of Reclamation. Water stored in the reservoirs has increased



Don Jenkins/Capital Press

Heavy rains have soaked fields in Western Washington, like this one in southwest Washington pictured Dec. 11. The percentage of drought in the state has dropped to 34 percent from 85 percent in last August, according to the U.S. Drought Monitor.

nearly fivefold since the end of the irrigation season.

Elsewhere in the West, 88 percent of Oregon is either in severe or extreme drought, while 42 percent of Idaho is in severe or extreme drought.

California also did not improve. Some 92 percent of the state is in severe, extreme or exceptional drought.

Washington snowpacks are still taking shape, swinging wildly from above-average to below-average levels every day as snow levels rise and fall.

The Bureau of Reclamation won't project whether there will be summer water shortages until early March.

The U.S. Climate Pre-

diction Center predicts that El Nino will take hold and keep temperatures above normal. But that time has been postponed.

The center predicted Dec. 10 that Washington, Oregon, Idaho and California will have wetter and colder weather than normal through Dec. 24.

"The bottom line is we're still kind of waiting for the El Nino," Washington State Climatologist Nick Bond said. "We haven't gotten into the typical El Nino weather pattern. There's still strong indications that we will."

Low snowpacks last winter created drought conditions in pockets of Washington. The

entire state fell into a drought because of a hot and dry spring and summer.

Bond said he doesn't expect a repeat of last year's extraordinarily low snowpacks, even though El Nino likely will eventually raise temperatures.

"It's not like we can write off the El Nino. Certainly, it's strong and very likely to have a lot of the effects we've seen before," he said.

Washington's drought peaked in late August with 85 percent of the state in extreme drought and the other 15 per-

cent in severe drought.

In Western Washington, drought conditions have been washed away, replaced in some places by flooding.

The drought is also yielding in the Cascades and north-central and northeast Washington.

Extreme drought continues to prevail over all or portions of 20 counties in Central and Eastern Washington, where long-term rain deficits have not been made up.

While rain fell west of the Cascades, temperatures rose to the east. Spokane, Wenatchee, Ephrata and Omak set record highs Dec. 9, according to the National Weather Service.

WSU's AgWeatherNet reported record highs that day in Pasco, Prosser, Kennewick and Walla Walla.

"In terms of the drought, I'm still worried about next year," Loyd said. "I still think some of the El Nino impacts will be more obvious later."

Oregon, Idaho and California's drought status has changed little, according to the drought monitor, a partnership between the U.S. Department of Agriculture, the National Oceanic and Atmospheric Administration and the University of Nebraska-Lincoln.

Auditors: EPA broke law in social media blitz

By **MATTHEW DALY**
Associated Press

WASHINGTON — The Environmental Protection Agency broke the law in a social media campaign intended to generate public support for a controversial rule to protect small streams and wetlands from development and pollution, congressional auditors said Monday.

The EPA's campaign violated restrictions against lobbying and propaganda by federal agencies, the Government Accountability Office said in a 26-page report. The agency blitzed social media in a campaign that urged the public to submit comments on the draft water rule. The effort reached at least 1.8 million people.

Republican Sen. James Inhofe of Oklahoma said the GAO finding confirms what he has long suspected: "that EPA will go to extreme lengths and even violate the law to promote its activist environmental agenda."

The Obama administration says the water rule will safeguard drinking water for 117 million Americans, but Republicans and a handful of Democrats from rural states say they fear a steady uptick in federal regulation of every stream and ditch.

Inhofe and other lawmakers have vowed to block the rule as an example of overreach by the Obama administration.

Federal courts have already put the regulations on hold as they consider a number of lawsuits challenging the water regulations. The rules clarify which smaller waterways fall under federal protection after two Supreme Court rulings left the reach of the Clean Water Act uncer-

tain. Those decisions in 2001 and 2006 left 60 percent of the nation's streams and millions of acres of wetlands without clear federal protection, according to the EPA, causing confusion for landowners and government officials.

More than half the states have filed legal challenges.

The EPA said in a statement that it disagrees with the GAO's assessment, but will fulfill whatever reporting requirements are necessary.

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