

EPA's reversal on What's Upstream rings hollow to ag groups

Senators request investigation

By **DON JENKINS**
Capital Press

The Environmental Protection Agency reversed course Tuesday and said EPA funds should not have been used to finance What's Upstream, a media campaign to arouse public support in Washington state for stricter regulations on agriculture.



Don Jenkins/Capital Press

A billboard in Olympia advertises a website that advocates for stricter regulations on farmers. A tribe and environmental groups put up this billboard and one in Bellingham with a grant from the U.S. Environmental Protection Agency. The billboard fails to disclose the funding source, as required by the terms of the grant.

Until Tuesday, the EPA had refrained from commenting on the campaign's substance other than to say it did not violate prohibitions on using federal funds to lobby, even though What's Upstream sought to organize a letter-writing campaign to state lawmakers.

In a statement, the EPA took to task the grant's original recipient, the Northwest Indian Fisheries Commission, and the Swinomish tribe. The commission, a consortium of 20 tribes, "sub-awarded" the money to the tribe.

"The consortium made a sub-award for a campaign

which should not be using EPA funds. We are in the process of correcting that," an EPA spokesman said in a written statement.

Efforts to reach the commission and tribe were unsuccessful.

Two U.S. senators Tuesday sent a letter to EPA Inspector General Arthur A. Elkins Jr. requesting an investigation into how the grant funds were used.

"We are troubled to learn that EPA's financial assistance appears to improperly fund an advocacy campaign in Washington state that unfairly targets and demonizes farmers

and ranchers," wrote Kansas Sen. Pat Roberts and Oklahoma Sen. Jim Inhofe, both Republicans.

Roberts, who chairs the Senate Agriculture Committee, and Inhofe, who chairs the Environment Committee, zeroed in on whether the letter-writing campaign amounted to illegally funded lobbying and political activities.

"The fact that the Northwest Indian Fisheries Commission campaign website fully or partially funded by the EPA enables the public to use a script criticizing agricultural producers in an effort to influence lawmakers deserves immediate legal scrutiny," the senators wrote.

An Inspector General spokesman Tuesday said the agency doesn't confirm or deny the existence of any ongoing investigation.

IG investigators have already had a preliminary telephone conference call with farm groups, though it's unclear whether the office will conduct a full investigation.

"Based on our conversations with the people from the Inspector General's Office, we think it is a pretty significant issue for the EPA," said Save Family Farming director Gerald Baron, who participated in the call.

Save Family Farming, based in northwestern Washington, was recently formed to respond to critics of farming practices.

Baron said EPA should be held accountable.

"I think it's dishonest for them to try to put the responsibility for this on the grantee," he said. "The record shows they were very closely involved in the content."

The tribe submitted regular reports to EPA over several years as Strategies 360 polled voters and met with focus groups. The polling found that voters were largely unconcerned about water pollution and held farmers in high regard, though the public relations firm reported that opinions could be changed with the right message.

EPA distanced itself from the campaign one day after Roberts rebuked EPA for funding it.

"The tone and content of this outside campaign does not represent the views of the EPA," the EPA spokesman said.

In a statement issued Monday, Roberts directed his ire at What's Upstream billboards put up in Olympia and Bellingham, Wash., calling them "disturbing" and "malicious."

The billboards, which ad-

vertise the campaign's website, picture dairy cows standing in a stream. The words say: "Unregulated agriculture is putting our waterways at risk."

The billboards do not disclose that they were funded by the EPA, a standard requirement for all EPA-funded materials.

Gordon, himself a dairy farmer in Western Washington, said he was especially pained to see the billboard on a busy street in Olympia.

"Seeing that right in the middle of Olympia, knowing it was paid for by taxpayer dollars, that was the one that hit me the hardest," he said. "When you see it, you just go, 'It's just not fair.'"

The environmental groups involved in What's Upstream defend the campaign as public education, a permissible use of the EPA grant.

"I still contend its use was for public education and was not a misuse of funds," said Trish Rolfe, director of the Center for Environmental Law and Policy. "It (whatsupstream.com) is an educational website. It doesn't lobby for or against a particular piece of legislation."

The EPA did not elaborate on what its next step will be.

The agency should act quickly, Baron said.

Christmas tree checkoff raises \$1.5 million

By **MATEUSZ PERKOWSKI**
Capital Press

About \$1.5 million has been collected from Christmas tree farmers in recent months to fund the industry's newly established checkoff program aimed at promoting the crop.

This first-ever collection of checkoff fees marks an important milestone for the Christmas Tree Promotion Board, which plans to devote much of the money to an advertising campaign for the 2016 holiday season.

"It feels positive to have reached our goal," said Betty Malone, a farmer from Philomath, Ore., and the board's chair.

The ability to effectively collect fees was one of the major uncertainties about a national checkoff program for Christmas trees.

The trees are sold through many channels that are hard to track compared to other commodities, such as milk, that are received at processing and packaging facilities.

"Our industry is different from all the other checkoffs in that we have no first handler," said Malone.

The USDA originally approved the checkoff in 2011 but then suspended it abruptly in reaction to an online furor that characterized it as a "Christmas tree tax," putting fee collection into limbo for years.

The 2014 Farm Bill required the USDA to move forward with the Christmas tree checkoff, but the program wasn't able to begin collecting the fees of 15 cents per tree until the 2015 harvest and sales season was finished.

In documents establishing the checkoff, USDA often cited \$2 million as the amount the program was expected to generate each year.

The Christmas Tree Promotion Board estimated that roughly 17-20 million trees are harvested annually, but relied on the conservative figure of 10 million trees in its budget for 2016, said Tim O'Connor, the program's executive director.

Fee collections for trees sold in 2015 are still ongoing,



Mateusz Perkowski/Capital Press

A helicopter prepares to drop a bundle of Christmas trees into a truck at Noble Mountain Tree Farm near Salem, Ore., in this file photo. The industry's newly established checkoff program has raised about \$1.5 million in recent months.

so the program will ultimately accrue more than \$1.5 million, said O'Connor.

"I think the \$2 million is achievable," he said.

The checkoff program faced a logistical challenge because the USDA and the National Christmas Tree Association had different estimates of the number of producers, he said.

Developing a comprehensive database of farmers often involved excluding companies that grow trees for landscaping or went out of business, O'Connor said.

"We're still cleaning up the lists we have," he said.

While the program isn't just about "harassing people to collect money," it does have the authority to audit companies and issue penalties, O'Connor said. "Growers who have not cooperated to pay will not get a free pass. We will pursue them."

The program walks a fine line in regard to enforcement, as resources devoted to such efforts aren't used for promotions, he said.

Roughly \$750,000 to \$1

million of the funds generated from last year's crop will be dedicated to the 2016 advertising campaign, which the Concept Farm agency of New York City has been hired to develop.

"Their enthusiasm is just contagious," Malone said. "It was tough to break the conversation off."

The specifics of the 2016 advertising campaign have yet to be determined, but consumer research has shown the crop is associated with meaningful family experiences. Its biggest drawback, meanwhile, is perceived as a lack of convenience.

"We'll be addressing that head-on," O'Connor said.

Cocept Farm is currently evaluating how to make the biggest impact with its budget, particularly during a "crowded landscape" of advertising, said Gregg Wasiak, the firm's growth director.

Fresh-cut Christmas trees are associated with strong sentiments that the campaign will tap into, he said. "There's an emotional element of the Christmas tree that we really gravitated toward."

Supreme Court ponders fed's Clean Water Act advice

Lawsuit affects landowner ability to challenge jurisdictional determinations

By **MATEUSZ PERKOWSKI**
Capital Press

When you ask a federal agency for its opinion, sometimes the answer is more than just friendly advice.

Each year, thousands of landowners formally ask the U.S. Army Corps of Engineers whether their properties are subject to Clean Water Act regulations. The government's reply, known as a "jurisdictional determination," can have major consequences.

If property is found to come under federal Clean Water Act jurisdiction, landowners can't proceed with a planned project without obtaining an expensive and time-consuming permit — if they can move forward at all.

The U.S. Supreme Court is now pondering whether a jurisdictional determination amounts to a final government action that can be challenged by landowners in court, or if it's merely the government's opinion.

According to the Corps, a jurisdictional determination is a form of guidance that has no legal effect. Under this interpretation, landowners cannot immediately file lawsuits seeking to invalidate the agency's findings.

In this case, a Minnesota company was told it would have to obtain a permit to extract peat moss from a wetland on its property.

The Pacific Legal Foundation, a non-profit law firm that's representing the company, argues that landowners face a "catch-22" situation if they're not able to fight jurisdictional determinations in court.

"Your option is only to abandon the project at great loss, or go for a permit at great cost, or subject yourself to an enforcement action at great cost," Reed Hopper, an attorney for PLF, said during recent oral arguments before

the nation's highest court.

The government claims this predicament isn't created by jurisdictional determinations.

Even if the Corps never issued such determinations, landowners would still face the same set of alternatives, Malcolm Stewart, an attorney representing the government, said.

"It's simply a choice that's posed by the Clean Water Act," he said.

Hopper argued that jurisdictional determinations have real legal impacts because of the weight they'd carry in court if the government prosecutes landowners for violating the Clean Water Act.

Knowing violations of the statute are subject to criminal fines of up to \$50,000 a day and three years in prison, he said. "We have an actual risk."

During the hearing, Associate Justice Elena Kagan repeatedly noted that other government agencies also offer advice to regulated entities in response to questions about taxes, securities and other issues.

If the Corps decided not to provide jurisdictional determinations about a property's status under the Clean Water Act, landowners would not actually gain anything, she said.

"All you would do was to lose something, and what you

lose is accurate, reliable information provided to people about whether, in fact, these waters ... fall within the Clean Water Act," Kagan said.

However, the government may have a motive other than "the goodness of its heart" in issuing jurisdictional determinations, suggested Associate Justice Samuel Alito.

"It expands their enforcement power because landowners who have a question about the status of their land have a strong incentive to ask for a jurisdictional determination," he said.

When the government finds that a Clean Water Act permit is necessary, "as a practical matter, that's going to mean in most instances that the project is shut down," said Alito.

Chief Justice John Roberts pointed out that jurisdictional determinations give the government "extraordinary leverage."

In deciding that it has Clean Water Act jurisdiction over a property, the Corps can exercise its authority without going through the "formal enforcement process" and without subjecting its findings to "judicial review," he said.

"And that's a significant enforcement tool for them. So they might be unwilling to give it up if they had the option," Roberts said.

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