*Is the Conservation Reserve Program a Clean Water Act Trap for the Unwary?*

American Agricultural Law Association

2020 Annual Educational Symposium

November 14, 2020

Kansas City, MO

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I. Clean Water Act

A. Statutory Clean Water Act Exemption for “normal farming practices”

B. Agency Interpretation of Exemption

1. Regulations: 33 C.F.R. Section 323.4(a)(1)(ii); 323.4(c).

2. Regulatory Guidance Letters: 86-01; 96-02

3. Enforcement Memoranda: May 3, 1990; January 3, 1993

4. *Duarte Nursery*/*LaPant* litigation briefing

C. Case Law

* *Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d 897 (5th Cir. 1983)
* *U.S. v. Akers*, 785 F.2d 814 (9th Cir. 1986)
* *U.S. v. Cumberland Farms*, 826 F.2d 1151 (1st Cir. 1987)
* *U.S. v. Larkins*, 852 F.2d 189 (6th Cir. 1988)
* *U.S. v. Brace*, 41 F.3d 117 (3rd Cir. 1994)
* *Borden Ranch v. Army Corps*, 261 F.3d 810 (9th Cir. 2001)
* *U.S. v. Cundiff*, 555 F.3d 200 (6th Cir. 2009)

D. Summation: Resumption of plowing after significant period of non-cultivation risks enforcement for violation of Clean Water Act, despite exemption for “normal farming practices.”

II. Conservation Reserve Program

A. Statutory Provisions at 16 U.S.C. § 3831-3835

1. Participating owner/operator has duty under 16 U.S.C. § 3832(a)(1) to implement conservation plan to “convert[] eligible land normally devoted to the production of agricultural commodity … to a less intensive use” in exchange for payments under 10-15 year contract with USDA.

2. Participant prohibited from harvesting land subject to contract. 16 U.S.C. § 3832(a)(8)

3. Participating owner/operator must refund payments if the limitations on use of the enrolled land are violated. 16 U.S.C. § 3832(a)(6).

B. Agency Interpretation of Statute

1. Regulations at 7 C.F.R. § 1410.1-1410.90

a. “Agricultural commodity means any crop planted and produced by annual tilling of the soil[.]” 7 C.F.R. § 1410.2

b. Participants must agree to “not allow … harvesting, or other commercial or agricultural use of the land[.]” 7 C.F.R. § 1410.20.

C. Case Law

*Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989)

*Small v. United States*, 837 F. Supp. 427 (E.D. Ms., 1993)

*Strong v. Glickman*, 50 F. Supp. 2d 1 (D. D.C., 1999)

*Beard v. Glickman*, 189 F. Supp. 2d 994 (C.D Cal. 2001)

*Payton v. U.S. Dep’t of Agriculture*, 373 F.3d 1163 (10th Cir. 2003)

*Mittelstadt v. Perdue*, 913 F.3d 626 (7th Cir. 2019)

D. Summation: Agreement not to till property enrolled in CRP contracts for 10-15 years may result in the lapse of the Clean Water Act exemption for normal farming practices.