EPA BEATS BLUEBERRY FARMER – "BUY LOCAL" NOT A PRIORITY FOR CLEAN WATER RULE

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Today, US Environmental Protection Agency made the widow of a rural Washington blueberry farmer pay $210,000 in penalties and agree to restore the function of 12 acres of forested wetlands that were allegedly harmed or disrupted in violation of the Clean Water Act when the widow's deceased husband constructed a gravel road, a ditch, and cleared 10 acres of his property to plant blueberries. See *United States v. Suellyn Rader Blymyer, individually and in her capacity as the Personal Representative of the Estate of Lyle J. Rader, and Uptrail Group, LLC*, No. 2:13-cv-01555 JCC. The Consent Decree was proposed June 24, 2015 and finalized today, September 16, 2015.

This case is an example of the type of cases that will flood in now that EPA has the discretion to regulate intermittent impoundments of water under the Clean Water Rule. Farmers across the country will now need permits from the U.S. Army Corps of Engineer for any improvements on their land, or preparation for planting that disturbs land, because most agricultural property in the United States could fall within the definition of "waters of the United States" under EPA's new Clean Water Rule. The Clean Water Rule went into effect in the State of Washington on August 28, 2015. The State of Washington has not challenged the rule.

EPA had been fighting in courts with the blueberry farmer in the rural County of Whatcom, Washington since August 2013 over approximately ten acres of a 33-acre undeveloped parcel, for the alleged filling of wetlands. The blueberry farmer allegedly violated the Clean Water Act section 301(a) when it filled the ten acres with material to prepare it to plant blueberries. This is not a situation where a developer is grading and filling a wetland area in order to construct a multi-million dollar building complex or a business center or a hotel or residential development. This is a small farmer striving to provide local produce to the stores and farmers markets in rural Washington. The alleged violation pales in comparison, in fact, to EPA's own debacle Clean Water Act spill in the Animas River in Colorado, impacting hundreds of miles of riverbeds and sediments and public drinking water sources. That spill has yet to be addressed. And yet, EPA aggressively pursued this Clean Water Act violation with a passion, as if the blueberry farmer had gone out in the middle of the night and dumped toxic waste.

Section 301 is being used more and more aggressively by EPA, as evidenced by this case, to seek penalties and environmental offsets from otherwise law-abiding people and businesses, in the name of protecting the waters of the U.S. EPA is targeting farmers and small business owners using the new Clean Water Rule, regulations which would give EPA discretion under the Clean Water Act to seek penalties and offsets and issue injunctions with respect to development or farming or use of any kind that may disturb "quasi" wetlands, such as vernal pools, prairie potholes, pocosins, and other impressions in the land where water may periodically pond.

In the instant case, the owner of the site died and his widow was managing the property. In August 2013, EPA filed a lawsuit against the widow of the deceased alleging that "approximately 10 acres of wetlands that are bordered on three sides by ditches or stream channels" constitute "waters of the United States," which abut and have a continuous surface hydrological connection with ditches flowing into a "channel" on the south side of the site. Because the channel has the "contours of a natural stream," it is considered to be a perennial or seasonal stream. Prior to his death, Mr. Rader had contracted for the construction of a gravel road, which required the excavation of a ditch running east-west through the parcel. The road and ditch construction "resulted in approximately 0.35 acres of wetland being cleared, graded, and filled with dredged or fill material." (Case 2:13-cv-01555-JCC Document 1 Filed 08/29/13 Page 7 of 10). Subsequently, another 9.65 acres of wetland was cleared, graded, and filled with material south of the road. The Department of Justice on behalf of EPA

claimed that the fill material constituted “pollutants” as defined in CWA section 502(6), and that such material was placed without first obtaining a permit from the Army Corps of Engineers under CWA Section 301(a).

EPA demanded that the widow, Mrs. Rader, “undertake measures to completely restore the waters of the United States at the Site to their pre-fill condition” and to pay civil penalties. EPA originally sought $86 million of penalties for building the gravel road, ditch, and clearing an area for the blueberry patch. Under the Clean Water Act, the Corps and EPA can limit or prohibit the use of any water or property subject to their jurisdiction and back up their enforcement with ruinous fines ($37,500 a day for alleged violations) and even criminal prosecution.

Local Whatcom County Council Chairwoman Kathy Kershner weighed in attempting to sway DOJ and EPA to back off from the lawsuit, admonishing EPA for what the Chairwoman considered a job-killing action in response to minor environmental damage.

Over two-dozen states have filed lawsuits challenging EPA’s Clean Water Rule, claiming it is an abuse of power. The complaints brought by various states and industry groups challenge EPA and the Army Corps of Engineers for harms that the states will face in complying with the Clean Water Rule. The states argue that the rule runs afoul of their state authority. In addition, the states claim the rule is overreaching because it could be applied to areas that are dry most of the time. The rule could give EPA and the Corps jurisdiction over waters within a stream's 100-year floodplain or within 4,000 feet of a high-tide line, which were not previously regulated by the Clean Water Act as “navigable waters of the U.S.” The states also argue that the rule will require them to devote more state resources in order to comply with federal pollution and water quality standards. The State of Washington has not yet challenged the rule. However, the Puget Soundkeeper Alliance filed a complaint on August 20, 2015 in the Western District of Washington District Court against EPA, which asserts that EPA watered down the rule and that the rule protects fewer waterways overall. *Puget Soundkeeper Alliance et al. v. McCarthy et al.*, Case No. 2:2015cv01342.