

Agriculture and the Clean Water Act  
Idaho Bar Association/Environment & Nat. Res. Law Section  
October 26, 2016  
Boise, Idaho

A. CWA Definition of Point Source:

The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural storm water discharges and return flows from irrigated agriculture.*

33 U.S.C. § 1362(14) (emphasis added).

B. Sec. 402(l): “The Administrator shall not require a permit under this section for discharges composed *entirely* of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.” 33 U.S.C. § 1342(l)(1) (emphasis added).

C. National Cotton Council v. EPA, 553 F.3d 927 (6<sup>th</sup> Cir. 2009) (vacating EPA’s final pesticide rule which stated that pesticides applied according to the FIRA label require no NPDES permit, held that under Chevron I analysis, EPA’s rule does not meet plain meaning of “pollutant” under CWA; rejected argument that if pesticide becomes a pollutant after it is discharged, it is not a point source discharge; biological pesticides are “biological materials” and therefore pollutants under the Act; court of appeals has jurisdiction to hear challenge to rule under § 509(b)(1)(f))

81 Fed. Reg. 4289 (Jan. 26, 2016) (Draft NPDES Pesticide General Permit for Point Source Discharges from the Application of Pesticides; Reissuance)

78 Fed. Reg. 38591 (June 27, 2013) (EPA, in response to a 2009 decision by the Sixth Circuit, removed language contained in its 2006 NPDES Pesticides Rule that exempted the application of pesticides from NPDES permit requirements)

76 Fed. Reg. 68750 (Nov. 7, 2011) (Final NPDES Pesticide General Permit for Point Source Discharges from the Application of Pesticides)

71 Fed. Reg. 68,483 (November 27, 2006) (final rule, “Application of Pesticides to Waters of the United States in Compliance with FIFRA”)

70 Fed. Reg. 5093 (February 1, 2005) (proposed rule, “Application of Pesticides to Waters of the United States in Compliance with FIFRA”)

68 Fed. Reg. 48385 (August 13, 2003) (“Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA”)

EPA, “Interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders v. Forsgren* on Application of Pesticides and Fire Retardents” (September 3, 2003)

EPA, “Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA” (July 11, 2003)

#### D. Wetlands - Prior Converted Croplands

33 C.F.R. § 328.3(a) (“The term waters of the United States means ... (8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.” (emphasis added))

40 C.F.R. § 122.2 (“Waters of the United States or waters of the U.S. means: ... (g) ‘Wetlands’ adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States [See Note 1 of this section] Waters of the United States do not include prior converted cropland....” (emphasis added))

40 C.F.R. § 411(l) (“The term *navigable waters* includes: All navigable waters of the United States; interstate waters; intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce. Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.” (emphasis added))

58 Fed. Reg. 45008, 45032 (Aug. 23, 1993) (“By definition, [prior converted] cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, [prior converted] cropland no longer performs the functions or has the values that the area did in its natural condition. [Prior converted] cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the [Clean Water Act].”)

58 Fed. Reg. 45008, 45034 (Aug. 23, 1993) (abandonment provision)

USDA/Corps Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and Section 404 of the Clean Water Act (February 25, 2005) at ¶ III.A.5 (PCC determinations are no longer valid if property is taken out of production)

Corps RGL 05-02, Appendix F (Expiration of Geographic Jurisdictional Determinations) at ¶ 3.e (“Additional guidance for expiration of jurisdictional determinations on lands designated as prior converted cropland (PC) by the [NRCS] is addressed in a separate regulatory guidance letter.”)

Corps RGL 90-07 (Clarification of the Phrase “Normal Circumstances” as it Pertains to Cropped Wetlands) (Sept. 26, 1990) at ¶ 5.e (“If prior converted cropland is abandoned . . . and wetland conditions return, then the area will be subject to regulation under section 404. An area will be considered abandoned if for five consecutive years there has been no cropping, management or maintenance activities related to agricultural production. In this case, positive indicators of all mandatory wetlands criteria, including hydrophytic vegetation, must be observed.”)

**ENVIRONMENT & NATURAL RESOURCES LAW SECTION of  
IDAHO STATE BAR  
As of December 31, 2014, 2015 & 9/30/2016**

Year Ended 2014	Year Ended 2015		Actual Sep 2016	Budget 2016	Variance-- Favorable (Unfavorable)
<b><u>INCOME STATEMENT</u></b>					
<b>REVENUE (NON-CLE)</b>					
3,240	3,550	Dues	3,570	3,500	70
0	0	Donations	0	0	0
0	0	Special event revenue	0	0	0
0	0	Other income	0	0	0
<u>3,240</u>	<u>3,550</u>	<b>TOTAL NON-CLE REVENUE</b>	<u>3,570</u>	<u>3,500</u>	<u>70</u>
<b>EXPENSE (NON-CLE)</b>					
1,025	1,164	Administrative fee to ISB	710	1,150	440
16	16	Postage	9	10	1
27	12	Copies	0	10	10
16	0	Supplies	14	5	(9)
1,576	1,896	Governing Board	1,009	2,000	991
10	19	Bank & credit card fees	42	20	(22)
250	1,000	Donations	500	1,000	500
0	0	Other	0	0	0
<u>2,920</u>	<u>4,106</u>	<b>TOTAL NON-CLE EXPENSE</b>	<u>2,284</u>	<u>4,195</u>	<u>1,911</u>
<b>CLE, RECORDED PROGRAMS &amp; PUBLICATIONS:</b>					
<b>Revenue:</b>					
3,299	3,213	CLE registrations	3,097	3,000	97
0	0	Publications	0	0	0
170	555	Recorded programs	440	200	240
422	483	Royalties	0	400	(400)
<u>3,891</u>	<u>4,251</u>	<b>CLE Revenue</b>	<u>3,537</u>	<u>3,600</u>	<u>(63)</u>
<b>Expense:</b>					
1,488	1,254	CLE seminar expense	1,129	1,150	21
1,244	1,342	CLE administrative fee paid to ISB	844	850	6
225	225	Recorded program expense	260	225	(35)
<u>2,957</u>	<u>2,821</u>	<b>CLE Expense</b>	<u>2,233</u>	<u>2,225</u>	<u>(8)</u>
935	1,430	<b>NET CLE INCOME (LOSS)</b>	1,305	1,375	(70)
<u>1,255</u>	<u>874</u>	<b>NET INCOME (LOSS)</b>	<u>2,591</u>	<u>680</u>	<u>1,911</u>

ENVIRONMENT & NATURAL RESOURCES LAW SECTION of  
IDAHO STATE BAR  
As of December 31, 2014, 2015 & 9/30/2016

Year Ended 2014	Year Ended 2015		Actual Sep 2016	Budget 2016	Variance-- Favorable (Unfavorable)
<b><u>BALANCE SHEET</u></b>					
<b>ASSETS</b>					
4,348	5,106	Cash and cash equivalents	7,566		
241	121	Accounts receivable	0		
166	783	Due from (to) other funds	230		
226	215	Prepaid expenses	0		
<b>4,982</b>	<b>6,225</b>	<b>TOTAL ASSETS</b>	<b>7,797</b>		
<b>LIABILITIES AND FUND BALANCE</b>					
<b>LIABILITIES</b>					
0	0	Accounts payable	0		
650	1,020	Deferred revenue	0		
650	1,020	<b>TOTAL LIABILITIES</b>	0		
<b>FUND BALANCE</b>					
3,077	4,332	Beginning fund balance	5,205		
1,255	874	Current year income (loss)	2,591		
<b>4,332</b>	<b>5,205</b>	<b>TOTAL FUND BALANCE</b>	<b>7,797</b>		
<b>4,982</b>	<b>6,225</b>	<b>TOTAL LIABILITIES &amp; FUND BALANCE</b>	<b>7,797</b>		