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DATES TO REMEMBER:

July 1, 2011 - Official Michigan Wheat Referendum Return Forms must be postmarked

July 1, 2011 - Applications for the Famers Market Promotion Program must be received by the USDA Agricultural Marketing Service (see <http://www.ams.usda.gov/AMSv1.0/FMPP>)

July 13, 2011 - Michigan Agri-Women Meeting (Curtis Community Building, Coloma, MI - see www.countrylovin.com/MAWomen/index.htm)

July 15-19, 2011 - Michigan Livestock Expo (MSU Pavilion) **Please join us at the Sale-a-bration Event to support youth in agriculture!**

July 18-23, 2011 - Michigan Dairy Expo (MSU Pavilion)

July 19-21, 2011 - Michigan Ag Expo (MSU) **Stop and visit our booth!**

July 19, 2011 - Michigan Commission of Agriculture and Rural Development Meeting (Geagley Lab, Guyer Conf. Room in East Lansing - 9:00 a.m.)

EPA Issues New Draft Clean Water Act Guidance as its First Step in "Waters of the United States" Rulemaking

by: Liza C. Moore

On April 27, 2011, the Environmental Protection Agency (EPA) issued draft guidance for the Clean Water Act. This guidance was issued in conjunction with the Obama Administration's release of a national clean water framework, which according to an EPA news release "showcases its comprehensive commitment to protecting the health of America's waters."

Agriculture Secretary Tom Vilsack shared his thoughts on the Clean Water Act and the new guidance. "As our nation's foremost conservationists, farmers, ranchers and forest owners have a values system rooted in rural America that recognizes we cannot continue to take from the land without giving something back," said Vilsack. "At USDA, we are working with farmers, ranchers and forest owners to conserve land, plant stream buffers for cleaner water, and install other conservation practices. We also will continue to invest in rural water and community facility projects that help small towns ensure their citizens have access to safe and reliable drinking water. The draft Clean Water Act guidance released today reflects USDA's work with our federal partners by maintaining existing exemptions for ongoing agricultural and forestry activities, thereby providing farmers, ranchers and forest landowners with certainty that current agricultural and forestry activities can continue," said Vilsack.

The draft guidance is supposed to clarify how the EPA and U.S. Army Corps of Engineers (Corps) identify "waters of the United States," which are the waters covered by the federal Clean Water Act (CWA). The draft guidance also discusses these agencies' implementation of the United States Supreme Court decisions regarding the breadth of the

"waters of the United States," namely *Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers* (known as the SWANCC decision) and *Rapanos v United States*, or *Rapanos*. The draft guidance explains: "The agencies expect, based on relevant science and recent field experience, that under the understandings stated in this draft guidance, the extent of waters over which the agencies assert jurisdiction under the CWA will increase compared to the extent of waters over which jurisdiction has been asserted under existing guidance, though certainly not to the full extent that it was typically asserted prior to the Supreme Court decisions in SWANCC and *Rapanos*." The draft guidance recognized that "decisions concerning whether or not a waterbody is subject to the CWA have consequences for State, tribal, and local governments and for private parties," and stated that "key goals of this draft guidance are to increase clarity and reduce costs" in permitting "by reducing the complexity" of existing decisions regarding the scope of the CWA.

The EPA has represented that the proposed guidance does not affect existing exemptions for agriculture. "This draft guidance does not address the regulatory exclusions from coverage under the CWA for waste treatment systems and prior converted croplands, or practices for identifying waste treatment systems or prior converted croplands. It does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal agriculture, forestry and ranching practices. This guidance also does not address the statutory and regulatory exemptions from

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NPDES permitting requirements for agricultural stormwater discharges and return flows from irrigated agriculture.” (Draft Guidance, p. 3). EPA posted another statement (linked below) indicating that the proposed guidance does not change existing agricultural exemptions.

The draft guidance is not a binding rule, but it is intended to guide agency field staff in making determinations about whether waters are protected by the Clean Water Act. EPA and the Corps will accept public comments on the guidance, and then intend to begin the rulemaking process consistent with the Administrative Procedure Act. In other words, issuing this draft guidance is the agencies’ first step towards rulemaking that clarifies the extent of Clean Water Act jurisdiction and explains which waters are considered “waters of the United States.”

Groups like Michigan Farm Bureau are concerned with the proposed guidance and new action. We will continue to monitor the federal government’s actions regarding water. For more information, please visit:

- **EPA Press Release:** <http://yosemite.epa.gov/opa/admpress.nsf/0/2AB54D0018C3478A8525787F005B91FD>
- **EPA Website Regarding the Guidance:** <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>
- **Draft Guidance:** http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf
- **EPA Statement that Agriculture Exemptions Remain:** <http://water.epa.gov/lawsregs/guidance/wetlands/upload/cwa-guidance-agriculture.pdf>

OBAMA ADMINISTRATION RELEASES NATIONAL CLEAN WATER FRAMEWORK

Also released on April 27, 2011, the Obama Administration’s national clean water framework set forth the following “new and ongoing initiatives” for the EPA, the Corps, Department of the Interior, and U.S. Department of Agriculture:

1. Promoting innovative partnerships;
2. Ensuring water quality to protect public health;
3. Enhancing communities and economies by restoring important waterbodies;
4. Innovating for more water-efficient communities;
5. Enhancing use and enjoyment of our waters;
6. Updating the nation’s water policies and regulations;
7. Making better use of science to solve water problems.

Several of the framework’s initiatives pertain to agriculture, including one goal of “increased regulatory certainty for farmers.” (Framework, p. 5). The framework highlighted the USDA’s Voluntary Public Access and Habitat Incentive Program, also known as Open Fields, as well as the Conservation Reserve Program and Wetlands Reserve Program. (Framework, pp. 14-15). The framework discussed the federal government’s investment in the Great Lakes Restoration Initiative and funding of rural water treatment systems. (Framework, pp. 9, 7).

Liability for Personal Injuries Caused by Loose Livestock

by: April L. Neihsl

Increased urbanization puts livestock farms closer than ever to highways and population centers, heightening the risk of accidents and resulting liabilities. Consequently, it is important to understand Michigan law regarding liabilities for damages caused by loose livestock. Previously, this newsletter discussed liabilities for property damage cause by livestock running at large, which is governed by statute (MCL § 443.11, *et seq.*). This article addresses liabilities for personal injuries suffered by people other than employees of the owner or keeper. Liabilities for injuries to employees will be discussed in an upcoming newsletter.

In Michigan, the issue of liability for injuries to a person (other than the owner or keeper’s employee) caused by an animal

running at large is generally determined based on the common law theory of negligence. This legal standard essentially requires the injured person to prove that the animal’s owner or keeper acted unreasonably in causing the animal to escape.

In an attempt to prove negligence, the injured party could present evidence based on the specific facts and circumstances of the accident. Examples of negligence claims can include, but are not limited to, the following:

- Poorly maintained, or damaged facilities, fencing and/or enclosures from which the livestock escaped.
- Facilities, fencing and/or enclosures that, although in good repair, were deficient in some other way, e.g., fencing of

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- inadequate height, improper latches used to secure barn doors, and/or enclosures made of improper materials which allowed the livestock to escape.
- Improperly or inadequately trained staff that failed to properly handle or restrain the animal. Examples of negligent conduct can include gates left open, use of improper equipment, employing unqualified and inexperienced individuals, failure to regularly inspect the facility, just to name a few.
- The animals' owner or keeper knew of past escapes but failed to take appropriate corrective action to prevent future escapes.

Depending on the facts and law, owners of loose livestock have a few possible defenses that can include:

- The animal was properly restrained, and the owner or keeper was not negligent. Proving this defense can sometimes require testimony from an "expert" knowledgeable of keeping and/or handling the particular animal.
- The animal owner or keeper played no role in its escape because someone else, such as a vandal or a reckless driver,

damaged or tampered with the fence allowing the animal to escape.

- The incident was caused, at least in part, by the injured person's own negligence.

Animal producers can take advantage of several risk management options to help reduce potential liabilities. Good day-to-day management practices and maintenance programs can go a long way to prevent accidents and liabilities. But because accidents can happen at even at well-run, well-maintained facilities, proper liability insurance is extremely important. Additionally, for facilities that allow people to enter the premises, a well-drafted release of liability can potentially be a powerful defense. These documents are most commonly utilized by horse farms, but other farms can also require visitors to execute a release before visiting or touring its facility.

If you would like additional information regarding liability issues and risk management options, please contact **April Neihsl** at **248-785-4732**.

Referendum on Michigan Wheat Program June 20, 2011 through July 1, 2011

The Michigan Department of Agriculture & Rural Development authorized a referendum to establish a Michigan Wheat Program, to be conducted June 20, 2011 through July 1, 2011. Official Wheat Referendum Return Forms will be mailed to Michigan wheat producers of record on June 17, 2011 that have a value at first point-of-sale of more than \$800 in any one growing season within the last three years. Eligible producers that have not received a form after June 20, 2011 should contact MDARD at P.O. Box 30017, Lansing, MI 48909, (800) 292-3939 or request a form from merrilld@michigan.gov. More than 50 percent of the votes cast must approve the proposal for the checkoff program to be adopted.

- **MDARD press release:** www.michigan.gov/mdard/0,1607,7-125-1572_28248-256436--,00.html
- **MDARD Director's Order for the Referendum:** www.michigan.gov/documents/mda/Wheat_-_Directors_Order_5-9-11_352508_7.pdf
- **Proposed Michigan Wheat Program:** www.michigan.gov/documents/mda/5-9-11_Final_Proposed_Michigan_Wheat_Program_352506_7.pdf

\$8 Million in Disaster Assistance Available Under the Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish Program

by: [Liza C. Moore](#)

More than \$8 million in disaster assistance will be issued to livestock, honeybee, and farm-raised fish producers that suffered losses in 2010 because of disease, adverse weather, or other conditions. The Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program (ELAP) will be funding

the aid. Under ELAP, producers are compensated for losses that are not covered through other disaster assistance programs established by the 2008 Farm Bill, like the Livestock Forage Disaster Program (LFP), Livestock Indemnity Program (LIP) and Supplemental Revenue Assistance Payments (SURE) Program.

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ELAP sign-up for 2011 losses is underway. Producers with 2011 losses must file an ELAP application no later than January 30, 2012, but must have also filed a notice of loss within 30 calendar days of when the loss is apparent to the producer or October 31, 2011, whichever date is earlier. ELAP benefits related to 2011 losses are expected to be issued in early 2012.

Please visit your local Farm Service Agency service center for more information, or visit www.fsa.usda.gov/FSA/webapp?area=home&subject=diap&topic=elap.

ENTER TO WIN AN ESTATE PLAN VALUED AT UP TO \$2,000!

STOP BY AND VISIT OUR BOOTH AT THE 2011 MICHIGAN AG EXPO

Foster Swift Collins & Smith, PC will randomly select one entrant to receive a comprehensive estate plan prepared by our estate and succession planning attorneys. The winner, and his or her spouse, will receive:

- An initial meeting with Foster Swift attorney Todd W. Hoppe to develop your estate plan;
- The preparation of your estate planning documents, including wills, trusts, patient advocate designations, general durable powers of attorney, and if necessary deeds necessary to transfer Michigan real property to your trust.
- Recording fees and other disbursements of up to \$100. The winner will be solely responsible for out of pocket disbursements, including deed recording fees, in excess of \$100.
- A signing conference at which you will execute your estate planning documents.

Office conferences will be held in Foster Swift's Lansing, Grand Rapids, Holland, or Farmington Hills offices. This promotion covers up to \$2,000 in legal fees and disbursements. This allowance is generally adequate to cover most estate plans. However, due to the unique nature of each client's goals, personal situation, and financial situation, additional legal work may be necessary to complete a comprehensive estate plan. In the event additional legal work is necessary to draft your estate plan, you will be notified in advance. Additional authorized legal services (if any) will be billed at Foster Swift's ordinary hourly rates. All disbursements in excess of \$100 will be billed at actual cost.

The winner must be a Michigan resident, and must execute a signed engagement letter setting forth the terms of our engagement to provide legal services. Due to ethical rules applicable to legal professionals, the winner must be an individual that Foster Swift is permitted to represent in light of the Michigan Rules of Professional Conduct. In the event of a conflict, Foster Swift will select another winner at random from all entries.

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