

## Top Ag Law and Tax Developments of 2022 – Numbers 10 and 9

Roger McEowen ([roger.mceowen@washburn.edu](mailto:roger.mceowen@washburn.edu)) – Washburn University School of Law  
January 2023

Agricultural Law and Taxation Blog, by Roger McEowen: <https://lawprofessors.typepad.com/agriculturallaw/>  
Used with permission from the Law Professor Blog Network

---

### Overview

With this post, I begin the trek through what I believe to be the Top 10 developments in agricultural law and agricultural taxation of 2022. Today, I look at developments No. 10 and nine.

### No. 10 – USDA’s Emergency Relief Program

**Background.** The *Extending Government Funding and Delivering Emergency Assistance Act* was signed into law on September 30, 2021. This legislation includes \$10 billion for farmers impacted by weather disasters during calendar years 2020 and 2021. It directs \$750 million to assist livestock producers for losses incurred due to drought or wildfires in calendar year 2021 through the Emergency Livestock Relief Program (ELRP). Through the Emergency Relief Program (ERP), the legislation also provides funding for noninsured crop losses incurred.

The United States Department of Agriculture (USDA) released information in August of 2022 involving the question of whether income from the sale of farm equipment counted as farm income for purposes of the ERP. The issue is an important one because an enhanced payment limit might be at stake.

ERP payments may only be made to a producer with a crop eligible for federal crop insurance or the noninsurance crop disaster assistance program (NAP). The crop for which the recovery is sought must have been subject to a qualifying disaster, which is defined broadly. As a type of qualifying disaster, droughts are rated in accordance with the U.S. Drought Monitor, which publishes a list of qualifying counties.

An ERP payment is not made to any producer that did not receive a crop insurance or NAP payment in 2020 or 2021. Because of this requirement, crop insurance premiums that an ERP recipient has paid are reimbursed by recalculating the ERP payment based on the ERP payment rate of 85% and then backing out the crop insurance payment based on coverage level.

In addition, the ERP requires that the producer receiving a payment obtain either NAP or crop insurance for the next crop years. Also, a producer that received prevented planting payments can qualify for ERP Phase 1 payments based on elected coverage.

**Note.** ERP payments are for damages occurring in 2020 and 2021, so if they were received in 2022 they are not deferrable to 2023.



**Payment limit.** The ERP payment limit is \$125,000 for specialty crops. For all other crops, ERP imposes a limit of \$125,000 combined for ERP Phases 1 and 2. However, for an applicant with “average adjusted gross farm income” (average adjusted gross income (AGI)) based on the immediate three prior years but skipping the first year back (e.g., in 2022, tax years 2018, 2019, and 2020 are used to compute the percentage) that is comprised of more than 75% from farming activities (the “75% test”), the normally applicable \$900,000 AGI limit is dropped, and the payment limit goes to \$900,000 for specialty crops and \$250,000 for all other crops. There are separate payment limits for 2020 and 2021.

Definition of farm income. Farm income for ERP purposes includes the following.

- Net income from Schedule F, *Profit or Loss From Farming*
- Pass-through income from farming activities
- Wages from a farming entity
- Interest charge domestic international sales corporation (IC-DISC) income from an entity that materially participates in farming (has a majority of gross receipts from farming)
- Income from packing, storing, processing, transporting and shedding of farm products
- Gains from the sale of farm equipment, but only if farm income is at least two-thirds of overall AGI (excluding gains from equipment sales and the sale of farm inputs).

**Observation.** Under the Tax Cuts and Jobs Act (TCJA), for tax years after 2017, a trade-in of farm equipment is treated as a sale that is reported on Form 4797, *Sales of Business Property*. As a result, many farmers may have little income reported on Schedule F for a tax year that they incurred a large gain from trading in farm equipment reported as having been sold on Form 4797. Thus, sale of farm equipment could cause such a farmer not to receive an additional ERP payment.

The same rule likely applies to income from custom farming or harvesting services and the income derived from providing seed to farmers (offset by allocated expenses).

### **No. 9 – Decision to not Review USDA Wetland Certification Upheld**

***Foster v. United States Department of Agriculture, No. 4:21-CV-04081-RAL, 2022 U.S. Dist. LEXIS 117676 (D. S.D. Jul. 1, 2022)***

The plaintiff owned farmland with a .8-acre portion that USDA certified as a “wetland” in 2011 under the Swampbuster provisions of 16 U.S.C. §§3801, 3821-3824. The wetland was about 8.5 inches deep at certain times during the year, particularly in the spring after snow melt. The wetland resulted from a tree belt that had been planted in 1936 to prevent soil erosion. Snow accumulated around the tree belt in the winter and melted in the spring with the water collecting in a low spot in of the field before soaking into the ground or evaporating. In about one-half of the crop years, the puddle would dry out in time or planting. In other years it had to be drained to plant crops. The certification meant that the puddle could not be drained so that it and the surrounding land could not be farmed without the loss of federal farm program benefits.



The plaintiff sought a review of the certification under 16 U.S.C. §3822(a)(4) which provides for review of a final certification upon request by the person affected by the certification. The USDA denied review in 2020 citing its own regulation of 7 C.F.R. §12.30(c)(6) which required the plaintiff to show how a natural event changed the topography or hydrology of the wetland that caused the certification to no longer be a reliable indicator of site conditions. The plaintiff claimed that new evidence existed that would refute the 2011 certification, and also claimed that 16 U.S.C. §3822(a)(4) provided no restriction on the ability to get a review and, as a result, 7 C.F.R. §12.30(c)(6) violated the due process clause by restricting reviews and was arbitrary and capricious under the Administrative Procedure Act.

The trial court held that 7 C.F.R. §12.30(c)(6) merely restricted when an agency must review a final certification. The trial court also determined that 7 C.F.R. §12.30(c)(6) did not violate the due process clause as the plaintiff did not show any independent source of authority providing him with a right to certification review on request. The USDA's denials of review were found not to be arbitrary or capricious and that the plaintiff failed to provide any evidence that the natural conditions of the site had changed, which would require a review of the certification. The plaintiff also claimed that the Swampbuster provisions were unconstitutional under the Commerce Clause and the Tenth Amendment.

The trial court rejected the plaintiff's claims and determined that the statute of limitations on challenging the certification had run. The trial court also held that the USDA was entitled to summary judgment on the plaintiff's claim that Swampbuster was unconstitutional, holding that the provisions were within the power of the Congress under the spending clause of Article I, Section 8 of the Constitution. The trial court also ruled that Swampbuster did not infringe upon state sovereignty by requiring states to implement a federal program, statute or regulation. The trial court further rejected the plaintiff's claim that a part of Swampbuster violated the Congressional Review Act, finding that the provision at issue was precluded from judicial review. The court dismissed all the plaintiff's claims against the USDA and denied the ability for the area to be reviewed again.

**Note:** The trial court's ruling seems incorrect and the plaintiff docketed an appeal with the U.S. Court of Appeals for the Eighth Circuit on August 16. *No. 22-2729*. The Constitution limits what the government can regulate, including water that doesn't drain anywhere. In addition, the U.S. Supreme Court has said the government cannot force people to waive a constitutional right as a condition of getting federal benefits such as federal farm program payments.

## Conclusion

In the next installment I will look at some more of the Top Ten of 2022.

---

For more information about this publication and others, visit [AgManager.info](https://www.agmanager.info).  
K-State Agricultural Economics | 342 Waters Hall, Manhattan, KS 66506-4011 | 785.532.1504  
[www.ageconomics.k-state.edu](https://www.ageconomics.k-state.edu)

Copyright 2021: [AgManager.info](https://www.agmanager.info) and K-State Department of Agricultural Economics

