



December 30, 2011

Joseph W. Testa
Tax Commissioner
Ohio Department of Taxation
PO Box 530
Columbus, OH 43216-0530

RE: Recent change in interpretation of Current Agricultural use Value (CUAV) and Wetland Reserve Program (WRP)

To Commissioner Testa:

The recent story in the Columbus Dispatch (12/26/2011 "Tax may swamp wetland deals") highlighted a change in the interpretation of the federal government programs and the Current Agricultural Use Value (CAUV) Assessment. It is our understanding that as of October 2011, the Department of Taxation would no longer recognize the Wetlands Reserve Program (WRP) and Wildlife Habitat Incentive Program (WHIP) as meeting the requirements of Ohio Revised Code 5713.30(A)(1) and (2). It appears this change would penalize landowners for up to three previous years who have put their land into the WRP or WHIP. Changing the rules mid-game seems inequitable and gives a perverse incentive to land owners not to enroll in these vital conservation programs.

The Ohio Environmental Council's (OEC) mission is to secure healthy air, land, and water for all those who call Ohio home. We have over 100 environmental and conservation member organizations and thousands of individual members throughout the state of Ohio.

Background

Restored wetlands provide many benefits to our communities. Wetlands slow flood waters that could impact bridges, roads, schools, office buildings, and homes; depending on size, they can cycle millions of gallons of stormwater a year and slowly release it; increase property values; filter sediment; provide habitat to thousands of species, provide recreational and educational opportunities; and increase our quality of life. Wetlands in urban counties are especially scarce and many efforts from local, state, federal governments and non-governmental entities are underway to restore wetlands. Healthy wetlands can filter sediment and pollution from entering our waterways. This is especially important as sediment is the number one waterway pollutant according to the Ohio EPA. In addition, over-application of fertilizer on farm fields causes the development of harmful algal blooms and other negative impacts to Ohio's waters.

Wetlands in and of themselves add to the value of neighboring properties and to local economies. A 2008 study of the Tinkers Creek Watershed ("Tinkers Creek Watershed Comprehensive Wetland Assessment and Prioritization Plan for 2007/2008") revealed that the average calculated values for wetlands in that particular watershed were \$130,572 per wetland acre outside the Metroparks, and \$261,995 per wetland acre in the Metropark. This study highlights that wetlands not only provide many services, but also that investing in wetlands makes sound fiscal, ecological, and public policy sense.

CAUV

The CAUV program is critical for restoration/conservation efforts. It has reduced the land taxes, which has helped prevent farmers from unwillingly selling their land to developers to build parking lots, strip malls, and cookie-cutter housing developments. Additionally, the CAUV corrects the unfairness to farmland owners in the real estate tax system. As the Ohio State University Extension points out:

“Since Ohio farmers generally own the largest amount of land in any rural taxing district, and since local public services are funded largely through local real estate taxes, farmland owners--especially those in non-metropolitan counties--provide the bulk of the funding for local public services. Yet these farmers actually use relatively few local services. Cost of community services ... studies show that farmland generates a net surplus because of its modest demand for local public services. Farmland essentially subsidizes residences, which demand more in public services than they generate in tax revenue, even after CAUV tax savings are factored into the study. Thus, they [CAUV proponents] would argue, CAUV evens out a real estate tax “playing field” that is tilted against farmland owners.”

Furthermore, lands turned into wetlands can be turned back into farmland under catastrophic circumstances, whereas you cannot turn developed land back into farmland.

Historically, WRP and WHIP have qualified for the CAUV and are administered by the Natural Resources Conservation Service-a section of the U.S. Department of Agriculture. In addition, wetlands are recognized as a critical component of agricultural systems, thereby making it illogical to try to separate them from lands otherwise considered agricultural. How can the Ohio Department of Taxation decide that some federal conservation programs qualify while others don't when Ohio Revised Code 5713.30 (A)(1) and (2) states:

“Tracts, lots, or parcels of land totaling not less than ten acres that, ... were devoted exclusively to commercial animal or poultry husbandry, ... were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government.”

Does not the WRP qualify as a conservation program and an agreement with NRCS which is part of the U.S. Department of Agriculture (“an agency of the federal government”)? We address this in further detail below.

The recent interpretation by the Department is also contrary to current Ohio law. The Department has justified the higher tax assessments based upon an interpretation that lands set aside for wetlands are not lands devoted exclusively to agricultural use. This interpretation is contrary to Ohio statute and case law.

More fully the ORC 5713.30 defines “land devoted exclusively to agricultural use” as: “Tracts, lots, or parcels of land ... devoted exclusively to commercial animal or poultry husbandry, aquaculture, apiculture, the production for a commercial purpose of timber, field crops, tobacco, fruits, vegetables, nursery stock, ornamental trees, sod, or flowers, or the growth of timber for a noncommercial purpose, if the land on which the timber is grown is contiguous to or part of a parcel of land under common ownership that is otherwise devoted exclusively to agricultural use, **or were devoted to and qualified for payments or other compensation under a land retirement or conservation program under an agreement with an agency of the federal government.**” Therefore, the statute provides that conservation lands deriving compensation from a federal conservation program are defined as “lands devoted exclusively to agricultural use” for purposes of qualifying for the lower tax valuation. How does the Department reconcile this with its decision?

In addition, the Third District Court of Appeals has recognized lands retired or placed into a conservation program under an agreement with the federal government are entitled to CAUV treatment. The court in

Wetland Resource Center, L.L.C. v. Marion County Auditor et al, 157 Ohio App.3d 203 (2004) held that lands placed into a mitigation bank were entitled to CAUV status as the payments derived from selling the credits were deemed to be "payments or compensation under a land retirement or conservation program under an agreement with an agency of the federal government. If Ohio courts acknowledge mitigation banks qualify for CAUV status, then does it not follow that the same protection be afforded for the WRP and WHIP as they derive their authority and compensation directly from the USDA?

Therefore, both RC 5713.30 and *Wetland Resource Center* protect the CAUV status attributed to wetland preservation programs. Any action by the Department of Taxation and county auditors to deviate from this legal precedent is improper.

We are aware of the 2009 opinion issued by the Attorney General which reaches an opposite conclusion, i.e. lands associated with wetland mitigation banks are not entitled to CAUV assessment. However, AG opinions do not have precedent over judicial rulings. In the 2009 opinion, the Attorney General acknowledged, the respect that is due the judiciary and specifically stated the AG did not intend to modify the significance or the effect of the *Wetland Resource Center* case. In fact, the AG went on to state, "We do not propose any action that would interfere with appropriate judicial procedure or with the precedential value afforded to any case." It is our concern the Department has taken action contrary to Ohio law without appropriate legislative or regulatory procedure.

Process

This decision has far-reaching implications for Ohio's natural heritage, restoration/conservation efforts, and landowners. Did the Ohio Department of Taxation form a stakeholders group to determine the fullest extent this change will have? If so, was there consensus? If consensus was not reached how did the ODT address the concerns? If ODT did not form a stakeholder group, why not? What experts were consulted on this rule change? Did these experts provide overwhelming evidence that ODT felt there was no need to seek feedback from government, biology, and local experts with these programs?

Conclusion

We encourage you to reconsider this decision. If let stand it could have a devastating impact on restoration/conservation efforts while increasing the burden on local communities that lose those benefits of wetlands.

Thank you in advance for addressing our concerns, we look forward to your reply.

Sincerely,



David R. Celebrezze
Dir. of Air & Water
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