

Congress Should Enact a Landowner Bill of Rights to Reign-in the Ever-Expanding Administrative State¹

❖ Legislative Reform

- A proposed Landowner Bill of Rights should be enacted into federal law that tracks but goes beyond the administrative [IRS Taxpayer Bill of Rights](#). At the very least it should provide for the following:
 - *Right to Be Informed*

Landowners have the right to know what they need to do to comply with the Clean Water Act and the Food Security Act of 1985 and accompanying Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“USACE”) implementing regulations. They are entitled to clear explanations of the laws and EPA/USACE procedures in all agency forms, instructions, publications, notices and correspondence. They have the right to be informed about agency decisions about their activities – i.e., whether or not they are regulated – and to receive clear explanations of the outcomes. They have the right to receive copies of agency inspection and other reports and findings that serve as the bases for violation notices and orders to restore. Agency refusal to provide such information results in inability to base Violation Notices (“VNs”) or Orders to Restore (“OTRs”) or Enforcement Orders (“EOs”) on such reports and findings.
 - *Right to Quality Service*

Landowners have the right to receive prompt, courteous, and professional assistance in their dealings with EPA/USACE, to be spoken to in a way they can easily understand, to receive clear and easily understandable communications from EPA/USACE, and to speak to a supervisor about inadequate service. Landowners have the right to schedule an inspection in advance at a mutually convenient time with EPA/USACE and/or to be informed with sufficient notice barring disruption of the work day, ahead of a EPA/USACE inspection.
 - *Right to Pay No More than the Correct Amount of Fine or Penalty*

Landowners have the right to pay only the amount of EPA/USACE fine legally due, including penalties, and to have the EPA/USACE apply all remittances properly.
 - *Right to Challenge EPA/USACE’s Position and to Be Heard*

Landowners have the right to raise objections and provide additional documentation in response to formal EPA/USACE actions or proposed actions (VNs/OTRs/EOs), to expect that EPA/USACE will consider their timely objections and documentation promptly and fairly, and to receive a response if EPA/USACE does not agree with their position.
 - *Right to Appeal EPA/USACE Decision in an Independent Forum*

Landowners are entitled to a fair and impartial administrative appeal of most EPA/USACE decisions, including many penalties, and have the right to receive a written response regarding the appeals entity decision. Landowners generally have the right to take their cases to court.
 - *The Right to Finality*

Landowners have the right to know the maximum amount of time they have to challenge EPA/USACE position as well as the maximum amount of time EPA/USACE has to investigate a particular landowner property or pursue a VN or OTR. Landowners have the right to know when EPA/USACE has finished an inspection/investigation.

- *Right to Privacy*
Landowners have the right to expect that any EPA/USACE inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a violation due process hearing.
- *Right to Confidentiality*
Landowners have the right to expect that any information they provide to EPA/USACE will not be disclosed unless authorized by the landowner or by law. Landowners have the right to expect appropriate action will be taken against EPA/USACE employees and others who wrongfully use or disclose landowner information.
- *The Right to Retain Representation*
Landowners have the right to retain an authorized representative of their choice to represent them in their dealings with EPA/USACE.
- *Right to a Fair and Just Regulatory System*
Landowners have the right to expect the EPA/USACE regulatory systems to consider facts and circumstances that might affect their underlying liabilities, including restoration, their ability to pay and their ability to provide information timely. Landowners have the right to receive assistance from a EPA/USACE advocate if they are experiencing financial difficulty or if EPA/USACE has not resolved their regulatory issues properly and timely through its normal channels.

¹ EPA/USACE’s continued assumption of legal jurisdiction under Section 404 of the Clean Water Act to take private agricultural lands for public use as preserved wetlands without payment of just compensation only further facilitates the expansion of the administrative state and “statist conception of legal rights, at the expense of the common law/‘negative rights’ that serve as the foundation of our individual sovereignty, economic freedom and unique constitutional republic. See Lawrence A. Kogan, *Revitalizing the Information Quality Act as a Procedural Cure for Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study*, Washington Legal Foundation Critical Legal Issues Working Paper Series No. 191 (Feb. 2015), at pp. 1-3, available at: <http://www.wlf.org/upload/legalstudies/workingpaper/2015Kogan.pdf> (discussing how the federal Information Quality Act serves as a check on the unaccountable and ever-expanding administrative state and statist conceptions of legal rights). See also Institute for Trade, Standards and Sustainable Development, *Supplement to ITSSD Response to the WIPO Report on the International Patent System Paragraph 104 (Document SCP/12/3)* (Nov. 7, 2008), available at: http://www.wipo.int/export/sites/www/scp/en/meetings/session_13/pdf/itssd_supplement.pdf (surveying the literature distinguishing between ‘negative’ and ‘positive’ property rights under the Anglo-American common law and Napoleonic civil law systems).