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Mixed news to estate planners using GRITs

A valuable estate planning technique used in the farm and ranch setting to reduce estate and gift taxes is the split-interest trust in which beneficiaries receive a remainder interest with the grantor reserving an income interest for a term of years. This type of trust is commonly referred to as a grantor retained interest trust (GRIT). The benefit of using a GRIT is that while the gift of the remainder interest is a taxable transfer, the gift's value is reduced by the actuarial value of the reserved income interest. In addition, if the grantor outlives the trust term, the value of the trust property escapes taxation in the grantor's estate. While the value of the gifted remainder interest does not qualify for the annual exclusion and does reduce the grantor's unified credit that would otherwise be available, the valuation leverage that can be achieved by using a GRIT can be substantial.

For estate and gift tax purposes, term and remainder interests are valued under I.R.C. section 7520. Section 7520 applies to transfers taking place on or after May 1, 1989, and requires the use of an interest rate equal to 120% of the federal mid-term rate as published on a monthly basis by the I.R.S. The section 7520 rate for December 1993 was 6.1%. Rev. Rul. 93-82, 1993-___ C.B. ___. For transfers taking effect before May 1, 1989, such interests were valued under Treas. Reg. section 25.2512-f(5), which dictated the use of tables that assumed a 10% annual return. The current low section 7520 rate produces higher values for annuity interests and remainders and lower values for income interests.

The term and remainder interest values under various section 7520 rates and for various ages of measuring lives are set forth in proposed regulations promulgated on November 2, 1992. The proposed regulations also provide the methodology for valuing term interests, remainders, and annuities. The most important provisions are Prop. Reg. sections 20.2031-7 and 25.2512-5.

Until recently, it was thought that the use of section 7520 rate and the principals of actuarial valuation under sections 2031 and 2512 were required in all but a small minority of cases -- those in which the undisputed facts make such valuation clearly unreasonable. An example would be the valuation of a life estate measured by the life of a terminally ill person whose death is "clearly eminent" (see, e.g., Rev. Rul. 80-80, 1980-1 CB 194) or the valuation of a partial interest involving a depletable asset (see, e.g., *Froh v. Commissioner*, 100 T.C. No. 1 (1993)). However, a recent Eighth Circuit opinion has importantly changed this assumption and created a level of uncertainty for estate planners.

In *O'Reilly v. Commissioner*, 973 F.2d 1043 (8th Cir. 1992), the taxpayers made inter-vivos gifts in trusts to their children of remainder interests of stock in a closely-

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Eighth Circuit interprets FmHA buyout regulations

The Eighth Circuit recently interpreted certain Farmers Home Administration (FmHA) regulations implementing the debt restructuring provisions of the Agricultural Credit Act of 1987 (the Act) and issued a decision supporting FmHA's actions. *Kinion v. Espy*, No. 93-1067, 1993 WL 441739 (8th Cir. Nov. 3, 1993). At issue in *Kinion* were the net recovery buyout provisions of the regulations, and specifically, the debtor's right to enforce the buyout offer made by the FmHA county supervisor.

The *Kinions* are Arkansas farmers who owed FmHA approximately \$430,000 secured by mortgages on the *Kinions'* farm. After defaulting on their FmHA loan, the *Kinions* were offered and applied for debt restructuring. FmHA processed their application and evaluated their debt restructuring proposal. Using the calculations in the regulations, the FmHA county supervisor computed the FmHA's "net recovery

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held corporation. The taxpayers retained the right to all income from the trusts for the term of each trust. The corporation consistently paid dividends of only two tenths of 1% of the value assigned to the stock. The taxpayer argued that the remainder interest had to be valued under Treas. Reg. section 25.2512-5(f), which dictated use of the 10% tables. Use of these tables produced a much lower value for the remainder interest than would valuation that took into account the low stock yield.

The Commissioner disagreed, arguing that the 10% return assumption was wholly unrealistic as applied to the stock in question. The tax court agreed with the taxpayers, pointing out that the Commissioner had consistently mandated use of the tables despite the actual yield of the property. *O'Reilly v. Commissioner*, 95 T.C. 646 (1990). The Eighth Circuit reversed, holding that the tables do not control if they produce an "unrealistic and unreasonable result." The court held that application of the 10% tables to the *O'Reilly* stock would be unreasonable,

and remanded to the tax court for use of an alternative method (not specified) to determine a "more accurate valuation." 92-2 U.S.T.C. ¶ 60,111, at 86,225.

The *O'Reilly* case brings mixed news to estate planners using GRITs to reduce estate and gift taxes. The bad news is that taxpayers (and their attorneys) have lost the benefit of certainty in planning partial interest gift and death transfers. It is difficult to discern the circumstances under which the Commissioner will step in and assert that the tables produced "unrealistic and unreasonable" values.

The good news is that if the Commissioner can use the *O'Reilly* argument to escape the usual valuation methodology, surely the taxpayer can use the same argument as well. Thus, estate planners may want to use the Service's own argument that the regulations control against the Service itself.

It should be noted that *O'Reilly* involved a taxable year prior to adoption of section 7520. Hence, the Eighth Circuit displaced only regulations, not a code provision. As to transfers taking place on

or after May 1, 1989, which are subject to section 7520, there is arguably a statutory mandate that the section 7520 rate be used, regardless of the reasonableness of that rate as applied to the assets in question. Section 7520(a) states that the value of any term, remainder, or annuity interest "shall be determined" using the specified interest rate. The conference committee report states that section 7520 "requires that the value of any annuity, interest for life or terms of years, remainder or reversionary interest be determined" under the tables implementing section 7520. Conference Report on H.R. 4333, at 148 (1988).

It is possible that the *O'Reilly* rule would not apply to valuation of interests transferred on or after May 1, 1989. Thus, a question remains as to whether a court would be willing to overturn section 7520 if the facts in the *O'Reilly* case would arise today. Arguably, a statute is less easily displaced in unrealistic and unreasonable situations than regulations.

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value" for the collateral to be \$79,836. This amount estimates the amount that FmHA will recover in the event of foreclosure. The FmHA county supervisor further determined this amount to be greater than the present value of the restructured loan.

On the basis of these calculations, on March 3, 1989, the county supervisor informed the Kinions that they were ineligible for restructuring, but that they could buy out the loan for the net recovery value amount. Under this "net recovery buyout," the Kinions could pay FmHA the net recovery value for their farm, and FmHA would forgive the balance of the outstanding loan. Although the county supervisor made this offer to the Kinions, the state supervisor did not approve the offer.

On March 5, 1989, a snow storm hit the the Kinions farm, and two of the poultry houses located on the farm collapsed. The Kinions received a check for \$264,000 from their insurance company. Upon receiving notice of the collapse of the houses, the FmHA county supervisor notified the Kinions that their file had been put on hold. The Kinions were subsequently told that the \$79,836 net recovery amount was no longer valid. On September 9, 1989, the FmHA county supervisor recomputed the net recovery buyout amount as \$306,365. On November 15, the state supervisor approved this amount and the buy-out offer.

The Kinions rejected the recalculation and maintained that FmHA was bound by the initial computation. They filed a declaratory judgment action in federal district court. The court granted FmHA's motion for summary judgment, however, holding that the March 3, 1989 calcula-

tions did not bind the FmHA because the state supervisor did not approve the buyout and that the subsequent calculations were valid.

On appeal, the Eighth Circuit affirmed the district court. On the issue of the authority to offer net recovery buyout, the appellate court examined the following regulation:

All loan servicing decisions will be made by the County Supervisor except write-down of a borrower's debt. County Supervisors are authorized to accept a buyout when the borrower(s) pay the net recovery value of the FmHA security set forth in s 1951.909. Only State Directors are authorized to approve write-down of a borrower's debt. This includes debt written down when buy out at net recovery value takes place.... 7 C.F.R. § 1951.903(b) (1989).

The Kinions argued that a "buyout" is not a "write down" and that therefore, this regulation authorized the county supervisor to make a binding offer on behalf of FmHA. In contrast, FmHA argued that the regulation meant that only the state director has the authority to approve a buyout at net recovery value. The FmHA distinguished between the words "accept" and "approve," arguing that a county director may accept the buyout transaction once the state supervisor has approved the buyout.

The court noted the narrow standard of review afforded to an agency's interpretation of its own regulations and stated that reversal of the agency's interpretation is appropriate only "if the agency action is without a rational basis." *Kinion*, at *5. The court found FmHA's interpretation

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Clean Water Act takings claims: two recent views

The law of takings is becoming increasingly important to the agricultural community, particularly as applied to wetland regulation and other environmental land use controls. See, e.g., James B. Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway?*, 19 Wm. Mitchell L. Rev. 133 (1993) (hereinafter Wadley & Falk). While the legal and policy issues presented by the Fifth Amendment's takings clause are numerous, two important issues remain unresolved. The first issue, the federal government's current potential liability for takings claims arising under section 404 of the Clean Water Act, has practical implications for Congress as it debates reauthorization of the Clean Water Act. The second issue, how diminution of value is to be measured when only a portion of the affected property is burdened by the regulation, is one of the legal issues left unanswered in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Perspectives on each issue were recently offered in a U.S. General Accounting Office (GAO) study and a Federal Circuit decision affirming the dismissal of a taking claim included in the GAO's study.

The perspective offered by the GAO involved an examination of the potential governmental liability arising from takings claims filed in the U.S. Court of Federal Claims (Claims Court) as a result of regulatory actions under section 404 of the Clean Water Act, 33 U.S.C. § 1344. U.S. Gen. Acct. Office, *Clean Water Act: Private Property Takings Claims as a Result of the Section 404 Program* (RCED-93-176FS, Aug. 1993). While the government's ultimate liability is necessarily uncertain because of the difficulty of predicting the outcome of pending cases, the GAO's study identified twenty-eight cases filed as of May 31, 1993. Of the thirteen cases that had been decided, the claimants prevailed in three cases, and

the government prevailed in ten. One case had been settled, and fourteen cases were pending. *Id.* at 2.

In the three cases in which the claimants prevailed, the Claims Court awarded compensation totaling \$4.6 million, interest totaling \$5.2 million, and attorney fees and costs exceeding \$1 million. Because the government appealed two of the cases, payments had been made in only one case. In the single case that had been settled, the total award was about \$762,000, including interest, attorney fees, and costs. *Id.*

Acknowledging that it had no way of predicting the outcome of the pending cases, the GAO found that eight of the fourteen pending cases sought compensation totaling nearly \$140 million. To underscore the uncertainty of that potential governmental liability, the GAO noted that in one of the cases in which the government prevailed, the claimant was ordered to pay the government's costs. *Id.* at 3.

Shortly after the release of the GAO's fact sheet, the Claims Court's dismissal of one of the cases was affirmed by the Federal Circuit. *Tabb Lakes, Ltd. v. United States*, No. 93-5029, 1993 WL 482378 (Fed. Cir. Nov. 24, 1993), *aff'g*, *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334 (1992). An aspect of the Federal Circuit's decision bears significance to the agricultural community for its answer to a question raised and left unanswered in *Lucas*.

In *Lucas*, the Supreme Court noted that a taking occurs categorically "where regulation denies all economically beneficial or productive use of land." *Lucas*, 112 S. Ct. at 2893-94. When a taking claim involves wetlands, for example, and the land at issue contains both wetlands and nonwetlands, the question arises as to how the loss of economic value is to be measured—is the loss to be measured by looking at the parcel as a whole, or is the

loss measured by looking only at the wetland portion? In *Lucas*, the Court raised essentially the same question in the following manner: "When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Id.* at 2894 n. 7.

The Supreme Court did not resolve that question in *Lucas*. *But see* Wadley and Falk, at 350 n. 73 ("The Court intimates that when the test is applied, it should be applied to particular interests or rights of the land and not to the property in its entirety." (citation omitted)). However, the Federal Circuit in *Tabb Lakes* answered the question, in dicta, by asserting that the loss of value is measured by looking at the property as a whole. In other words, when the property includes both wetlands and nonwetlands, "the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands." Instead, the focus is on the "extent of the interference with rights in the parcel as a whole." *Tabb Lakes*, 1993 WL 482378 at * 5 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31 (1978), and *Concrete Pipe & Prods. Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2290 (1993)).

How the Supreme Court will resolve the question it left unanswered in *Lucas* in wetland regulation and similar cases remains to be seen. Because the law of takings is still evolving, that question and the question of how much takings litigation will cost the government are among the many that remain unanswered.

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of its regulations as requiring state supervisor approval of a buyout to be reasonable. On this basis, the court held that the county supervisor's March 3, 1989 calculations did not bind the FmHA because they lacked the state supervisor's approval.

The Kinions also objected to the long period of time that FmHA took to compute the second net recovery buyout amount. The court noted that the Act specifically requires that FmHA make all of its calculations and notify the borrower in writing of the results within sixty days of the request for restructuring. *Kinion*, note 8 (citing 7 U.S.C. s 2001(c)(4)).

The court found that FmHA did not meet this sixty day requirement, but struggled with the appropriate consequences. *Id.* at *5-6. The court noted that the Act does not specify consequences and cited several circuit court decisions in which the courts have refused to remove other agencies' jurisdiction for failure to act within a mandatory time frame. The court also cited the U.S. Supreme Court case of *Brock v. Pierce County* where the Court noted that it "would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights

are at stake." 476 U.S. 253, 260 (1986). On this basis, the court held that although it could not "countenance agency disregard for mandatory statutory procedures, in this case, where the FmHA delay resulted in part from an independent act of God, we hold that the FmHA did not lose jurisdiction after the sixty-day period." *Kinion*, at 6. Therefore, the court held that the FmHA's recalculations of the net recovery value using information gained after the sixty-day period was not improper.

— Susan A. Schneider, Hastings, MN

Environmental issues of hog confinement systems and feedlots: how one state's Pollution Control Agency analyzes the issues

By Christopher R. Kelley

In recent years, intensive animal production systems have increased in number and size. High-density confinement systems, for example, have permitted the average size of hog operations to grow. Production units of more than 1,000 sows are now common in some parts of the country. In Minnesota, however, they are a relatively new development.

A proposal to establish or expand a large hog confinement and feedlot facility can raise questions and concerns about the facility's environmental impact. This article examines how the Environmental Analysis Office of the Minnesota Pollution Control Agency (MPCA) has responded to such questions and concerns in connection with recent proposals to establish large hog facilities in Minnesota.

This examination is partially based on internal documents prepared by the staff of the MPCA's Environmental Analysis Office in connection with one of those proposals, a proposal by a co-op to construct a 2,000 hog facility in Renville County. Because the views expressed in these documents are subject to change, readers should not assume that the staff's perspectives discussed here will necessarily remain constant.

Background: the debate over the desirability of large hog operations

Any consideration of the potential environmental impacts of large hog confinement and feedlot facilities must acknowledge the debate over the desirability of large hog confinement and feedlot facilities. Indeed, in some respects, that debate has been defined in environmental terms by those who favor smaller, integrated crop and livestock systems, where pasture and hutch systems are used instead of high-density confinement systems where waste is applied to cropland at agronomic rates.

While any livestock facility poses the potential for environmental harm if not properly designed and operated, proponents of pasture and low-confinement systems can point to numerous ways in which the potential for harm is lessened by avoiding large concentrations of animals in a relatively small space. Such facilities generally have less waste to dis-

pose, and they emit lower levels of odor. Because the incidence of disease tends to correlate to the number of animals present, antibiotic use is decreased in pasture and low-confinement systems. See generally National Research Council, *Alternative Agriculture* 170-71 (1989) (hereinafter "*Alternative Agriculture*").

As the economic advantages of small and large hog operations are analyzed and debated, environmental costs also should be considered if the goal is a true assessment of social welfare. Traditionally, however, the debate over the profitability of small and large hog operations has not taken into account environmental costs.

Instead of focusing on environmental costs, the debate over the economics of small versus large hog operations has concentrated on the comparative advantages of each system in other respects, such as labor costs and returns on investments. For example, high-density hog confinement systems generally result in greater feed efficiency and a greater return per unit of labor when compared to pasture and low-confinement systems. Because large-scale operations produce more animals, their gross income is greater. *Alternative Agriculture* at 226-28. Also, large-scale operations usually derive greater benefits from technological developments, such as the availability of improved growth promotants, than do small-scale operations because large scale operations tend to adopt new technology earlier and because the benefits are multiplied by the sheer volume of animals produced. U.S. Congress, Office of Technology Assessment, *A New Technological Era for American Agriculture* 142-44 (1992).

On the other hand, some studies indicate that as large hog confinement facilities age, repair and maintenance costs increase to the point where the total labor costs for such systems can equal the labor costs of pasture and low-confinement systems. Also, because they require less capital investment, pasture and low-confinement systems provide the highest and most consistent returns per unit of input, particularly when hog prices are low or feed prices are high. *Alternative Agriculture* at 226-28.

If environmental costs were fully incorporated into the economic equation under the "polluter pays" principle, the economic advantages of one system over another would have to be debated in different terms. Whether the data currently exists to cast the debate in those terms with an acceptable degree of scientific certainty is

itself open to debate, a point implicitly made in the MPCA's recent analysis of the potential environmental impacts of the co-op project in Renville County, Minnesota.

The MPCA Environmental Analysis Office's response to water and air pollution issues arising from proposed construction of large confinement and feedlot facilities

The MPCA has the authority to regulate air and water pollution in Minnesota. Thus, it has authority over some of the types of environmental harm that confinement and feedlot facilities can cause.

In a number of specified circumstances, the MPCA requires livestock producers to apply for a permit for the construction, expansion, or operation of a feedlot. In some counties, permit applications are processed through the county board instead of the MPCA. See Minn. R. ch. 7020 (1993).

An Environmental Assessment Worksheet (EAW) is required in certain circumstances, including when the requested permit is for a new, total confinement facility proposing 2,000 animal units or more and when an existing site proposes expansion by 2,000 or more animal units. The EAW is used to determine whether a more extensive Environmental Impact Statement (EIS) will be required. *MPCA Feedlot Permit Application Process* (Oct. 1991).

Members of the public can comment on the EAW, and the staff of the MPCA's Environmental Analysis Office responds to those comments. The staff also makes a recommendation to the MPCA whether to require an EIS on the particular permit application for which an EAW has been prepared. For that reason, the analysis, response, and recommendations of the Environmental Analysis Office's staff are significant.

The MPCA Environmental Analysis Office staff's recent analysis of a proposed 2,429 hog confinement facility on separate breeding and finishing sites on two adjoining sections of land located in Renville County is representative of its position regarding the potential environmental consequences of large hog confinement and feedlot facilities. An EAW was prepared, and comments were received from private citizens and several state and federal agencies.

As described in the staff's analysis and recommendations on the co-op's proposal, the proposal contemplated the following facilities for waste disposal:

Both sites would use large earthen ba-

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sins [one basin would be 3.5 acres and 17 feet deep; the other would be 6.5 acres and 17 feet deep] for manure storage. Manure would be periodically flushed from the barns to these basins by means of recycled wastewater from the basins, which would be initially filled by means of one-time appropriations from nearby county ditches. Manure and wastewater would be periodically pumped from the basins and applied as fertilizer to surrounding cropland at agronomic rates based on soil and waste testing. The basins would be lined with compacted clay to minimize leakage to ground water. Since Renville County is characterized by high water tables, drain tile would be installed around the periphery of the base of each basin to relieve ground water flow pressure on basin sidewalls.

MPCA, Environmental Analysis Office, *Request for Approval of Findings of Fact and Authorization to Issue a Negative Declaration on the Proposed Co-op Total Confinement Hog Feedlot Facility Environmental Worksheet, Brookfield Township 1-2* (Oct. 26, 1993).

The comments considered by the Environmental Analysis Office staff primarily expressed concern over ground and surface water impacts and odor. Specifically, because many nearby residents relied on shallow wells, from 35 to 45 feet deep, concerns were expressed over possible contamination by the relatively large storage basins proposed by the co-op. Concern was also expressed over the proposed initial charging of the basins with water from nearby ditches, which, if done during low flow conditions, could deplete flows and negatively affect ditch biota. Surface runoff and odors were also included among the expressed concerns.

After considering the EAW and the public comments, the staff recommended against requiring the preparation of an EIS. That recommendation, concluding that the co-op's proposed facility did not have the potential for significant environmental effects, was adopted by the MPCA on October 29, 1993.

The staff's discussion and analysis of the potential environmental consequences of the co-op's proposed facility made several generally applicable observations. These observations, summarized below, reveal the Environmental Analysis Office staff's current perspective on the environmental impacts of large hog confinement and feedlot facilities. Because that perspective is significant both to those who desire to develop large confinement and feedlot facilities in Minnesota and to those who oppose their development, it warrants review.

Unlike some potential sources of water and air pollution, the potential environmental impact of large confinement and feedlot facilities is "site specific."

The Environmental Analysis Office's staff noted that the potential environmental impacts of large hog confinement and feedlot facilities were largely "site specific." In other words, while all confinement facilities and feedlots are potential sources of air and water pollution, the likelihood of significant adverse environmental impacts depends largely on the facility's location. Thus, "odors, while troublesome at one site, may not be a problem at another because of topography, wind patterns, distance to receptors, and mitigative procedures. Ground water may be at risk at one site because of shallow water table, permeable soils, or liner construction, but not a problem elsewhere because those factors are different." *Id.* at 4.

In contrast, the likely impact of other potential sources of pollution is not so "site specific." As the staff observed, "air emission sources, for example, have a relatively predictable effect on the environment once the fuel, type of furnace, and type of emission control technology are known." *Id.*

Among other consequences, the "site-specific" nature of the potential for pollution from confinement facilities and feedlots means that considerable information is needed to thoroughly and reliably assess the potential for significant environmental impacts. Indeed, the absence of complete information was repeatedly noted by the staff in its analysis, response, and recommendation to the MPCA on the co-op project.

Information to thoroughly and reliably assess the potential environmental impacts of large confinement and feedlot facilities is lacking.

The absence of complete information on which to assess potential environmental impacts was a predominant staff concern. While recognizing the potential for environmental problems, the Environmental Analysis Office's staff concluded that more information was needed "both to determine the extent to which such facilities actually represent greater environmental problems than the smaller facilities the MPCA has dealt with, and also to develop appropriate mitigative strategies to address them." *Id.* at 3.

In acknowledging that the MPCA "has little experience with large feedlots with large storage basins," the staff noted that "the chemical nature of contaminants (including odors), their behavior in the environment, vicinity and regional ground

water characteristics, basin leakage rates under various conditions, and others, are imperfectly known or not at all." *Id.* at 4. Using existing large facilities as sources of data poses difficulties because the "fact that no background data was gathered at existing sites before they were built means that it would be impossible to separate site impacts, if any, from contamination from other sources." *Id.* at 5.

The staff also noted that the cumulative effect of constructing a new feedlot in an area with existing feedlots would be difficult to determine. The existing feedlots, both large and small, use a variety of manure management practices, some more successfully than others. Although the staff recognized that the region where the proposed facility under review would be located "has been significantly impacted by nitrogen compound contamination" caused by human activity, it observed that the "contribution from feedlots is not known." *Id.* at 20.

The staff specifically noted difficulties in determining ground and surface water quality effects.

In assessing the potential for ground and surface water contamination, the staff noted the two potential sources for contamination — field application of manure and basin leakage. It summarized the potential problems from field application as follows:

Application on frozen ground or in wet conditions can cause runoff impacts to surface waters. Solid application may result in uneven application and 'hotspots' in the soil. Leaching of nitrogen compounds from storage areas and over-application without considering nitrates already present in the soil from other sources can aggravate nitrate contamination in ground water already impacted by over-application of commercial fertilizer, improperly constructed or managed septic systems, and other sources.

Id. at 6-7.

The staff also noted that the applicant for the permit under review had committed to "land apply wastes at agronomic rates, observe recommended setbacks [from waterbodies], apply waste during favorable weather whenever possible, and in other ways control the release of contaminants of concern." *Id.* at 14.

Basin leakage is a recognized source of groundwater pollution, and basin overflows can contaminate surface water. The MPCA has developed guidelines for basin construction. The guidelines specify liner construction methods and materials that are expected to limit leakage to a rate no greater than 500 gallons per acre per day.

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As the staff noted, however, "the leakage guideline was 'borrowed' from the municipal lagoon program, and "[t]he use of this guideline for feedlot manure storage basins is potentially problematic because feedlot wastewater is more concentrated than municipal wastewater, and because feedlot basins are typified by greater hydraulic head than municipal lagoons." *Id.* at 7.

The staff noted that there may be problems with the MPCA's basin guidelines, particularly when used to construct large basins. Specifically, the staff's concern was that "a leakage rate of 500 gallons per acre per day of relatively strong waste clearly has more potential to impact the environment, other things being equal, if it is coming from a ten-acre basin than does the same rate from a one-acre basin." *Id.* at 8.

Recognizing the incompleteness of the needed data on basin leakage, the staff included in its analysis, response, and recommendations a listing of possible information that would be required to be submitted with applications for permits. The requirements, listed below, would be designed to gather information on area and project characteristics:

a. Possible permit application requirements.

- * Depth to the water table (any perched water must also be identified);
- * Ground water flow volume, direction, and rate;
- * Soil material characteristics between basin bottom and bedrock or a depth of 50 feet, whichever is shallower (includes all soil characteristics that affect the movement of contaminants from the site, to include, but not be limited to: type, cation exchange capacity, permeability, grain sized distribution, texture, clay content, and plasticity);
- * Ground water discharge points, including any ground water that emerges above ground;
- * Active wells within one mile radius, their well logs, and pollutant concentrations in well water;
- * Abandoned wells within one mile radius and closure documentation;
- * Permeability coefficient of liner and how accomplished;
- * Hydraulic head on liner when basin full;
- * Estimate of leakage rate, and time for leakage wetting front to fully penetrate liner;
- * Annual wastewater leakage through liner after stabilization;
- * Problematic contaminants in wastewater, and concentrations;
- * Baseline contaminant concentrations in ground water and surface water;
- * Receptors (residences, surface waters, public buildings) in one mile radius in path of ground water flow;
- * Documented efficiency of various types

of manure as basin sealants;

- * Plans for control of odors;
 - * Contingency plan for occurrence of problematic contaminant concentrations in the monitoring system; and
 - * Contingency plan for responding to odor complaints.
- Id.* at 9-10.

The staff also recommended several mitigation requirements that could be imposed as permit conditions. The mitigation steps would be required if the information gathered revealed a need to take corrective action. The suggested mitigation requirements are as follows:

- b. Mitigation
- * Liner construction with materials capable of achieving a hydraulic conductivity coefficient of 1×10^{-7} cm/sec or less without manure sealing;
 - * Testing to confirm permeability;
 - * Monitoring system (may include ground water, surface waters, tile lines);
 - * Land application at agronomic rates and during favorable weather conditions;
 - * Setbacks; and
 - * Required odor control.
- Id.* at 11.

The staff also noted difficulties in assessing odor pollution.

Although the MPCA has an odor rule, the Environmental Analysis Office staff noted that "odors are very difficult to regulate in practice," and "the rule has been seldom invoked." *Id.* at 12 (citing Minn. R. pt. 7005.0900 (1993)). As the staff observed, odor "testing is bound to be subjective, and impacts can clearly vary from site to site, so that a finding at one site may have no relevance at another site." *Id.*

Also, the rule exempts the application of manure as fertilizer. The Minnesota Attorney General's office, however, has interpreted the rule as applying to manure storage. *Id.*

Enforcement of the MPCA's odor rule requires the creation of an odor concentration test panel. The panel's task is to determine if the odor exceeds the specified limit of no more than four odor concentration units. An "odor concentration unit" is defined as "the number of standard cubic feet of odor-free air needed to dilute each cubic foot of contaminated air so that at least fifty percent of the odor concentration test panel does not detect any odor in the diluted mixture." *Id.* (quoting Minn. R. 7005.0900 (3) (1993)).

The staff's recommendation for dealing with potential odor problems was to include in the required information on permit applications plans for the control of odors and contingency plans for responding to odor complaints. The staff also recommended requiring odor control as a possible permit condition. *Id.* at 13.

Assessing the cumulative impact of new, expanded, and existing confinement and feedlot facilities will require more data.

As new confinement and feedlot facilities develop and existing facilities expand, an increasingly critical concern will be the cumulative effects of feedlots within a geographical area. The staff suggested to the MPCA three possible alternatives to insure that new, large feedlots do not contribute to a cumulative impact on the environment:

* Place a moratorium on large feedlot permitting, possibly in conjunction with an EIS;

* Require absolute containment, as with concrete, as well as agronomic land application and setbacks; or

* Permit such facilities, require data gathering and submittal with subsequent mitigation including monitoring, and require contingency plans to be followed if problems are discovered.

Id. at 20.

Thus, while in the co-op's case the staff concluded that the project "would utilize technology and procedures that have been reviewed and approved by MPCA staff . . . [and was] capable of being operated and controlled so as to minimize adverse environmental impacts," it also indicated that certain needed information and scientific knowledge was inadequate or missing. *Id.* at 21. Instead of recommending an EIS to gather that information, it recommended conditioning the permit on requiring additional information through monitoring during an interim permit period. The final permit would then be conditioned based on the information submitted. *Id.* at 21-22.

How the information gathered in the EAW for the co-op project or in any subsequent monitoring of it will be used in future reviews remains to be seen. The specific difficulties noted with respect to water quality impacts and air pollution, however, suggest that gathering information, through permit application requirements, permit conditions or otherwise, will be a major concern.

Federal Register in brief

The following is a selection of matters that were published in the Federal Register from November 12 through the end of November, 1993.

1. SCS; Emergency Wetlands Reserve Program; interim rule. 58 Fed. Reg. 62495.

2. FCA; Borrower rights notices for distressed loans; content; final rule. 58 Fed. Reg. 62513.

— Linda Grim McCormick, Toney, AL

State Roundup

PENNSYLVANIA. The Nutrient Management Act. The Nutrient Management Act, 3 Pa. Stat. sections 1701-1718 (1993), is intended to establish criteria, nutrient management planning requirements, and an implementation schedule for the application of nutrient management measures on certain agricultural operations that generate or utilize animal manure. The Act also provides for the development of educational programs on the proper utilization and management of nutrients on farms to prevent pollution of surface water and ground water. The Act authorizes technical and financial assistance for nutrient management plan purposes and alternative uses of animal manure, including marketing and distribution programs. Assessment of the extent of nonpoint source pollution from other nutrient sources, such as on-site sewage systems, well water construction, application of chemical nutrients, storm water run-off and atmospheric deposition is also an important purpose of the Act. The Department of Environmental Resources is charged with the responsibility of assessing the extent of pollution from these sources and determining whether existing programs are adequate to manage it (Act section 2).

The central requirement of the law is that "concentrated animal operations" develop and implement nutrient management plans consistent with the Act's requirements (Act section 6). A concentrated animal operation is one on which the animal density exceeds two animal equivalent units on an annualized basis (Act section 3). Each animal equivalent unit is equal to one thousand pounds of live weight livestock or poultry regardless of the actual number of individual animals comprising the unit (Id.). Presumably, mixed enterprises of livestock and poultry will aggregate the total of all animals in making this determination.

The nutrient management plan must be developed by a nutrient management specialist who certifies that the plan was prepared in accordance with the requirements of the Act and its regulations (Act section 6). For concentrated animal operations in existence on July 19, 1993, the deadline for preparing a nutrient management plan is one year following the effective date of DER regulations (Id.). For covered operations coming into existence after DER regulations are issued, the plan must be prepared within three months after the operation comes into existence or commences operation, whichever is later. If an existing agricultural operation expands to the point where the operation is subject to the Act's requirements, compliance will be required within three months after the operation is subject to the Act.

Following preparation, the plan will be submitted for review and approval to the

local conservation district or alternatively to the State Conservation Commission in the case of agricultural operations in counties not delegated administrative authority (Id.). Within ninety days of receipt of a plan or plan amendments, the reviewing agency shall either approve, modify or disapprove the plan or plan amendments. Notice of approval, modification or disapproval shall be made in writing to the person submitting the plan. In the case of modification or disapproval, the notice of such determination will also include a specific explanation of the reason for the action taken.

Within three years of plan approval, the plan must be fully implemented. The three-year limit can be extended an additional two years for individual, substantial, capital improvements required under an approved plan. To gain an extension, the owner or operator must demonstrate that the cost of all or part of the individual improvements for which the extension is applicable cannot be financed through available funding mechanisms, including funds appropriated for grants and loans to the Nutrient Management Fund created by the Act (Id.).

A plan approved under the Act is transferable to a subsequent owner of an agricultural operation upon notification thereof to the local conservation district, unless the transfer results in operational changes requiring plan modification.

The Act states its provisions are of statewide concern and occupy the whole field of regulation regarding nutrient management to the exclusion of all local regulations. Upon adoption of regulations by DER, no ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way regulate practices related to the storage, handling or land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by the Nutrient Management Act (Act section 17). Political subdivisions and home rule municipalities are authorized to adopt and enforce regulations that are consistent with and no more stringent than the requirements of the Nutrient Management Act and its regulations. Fines assessed by the Nutrient Management Act preclude imposition of fines under such municipal ordinances.

An item of particular concern to farm owners and operators is the degree of protection provided to them from fines, penalties and other complaints. Three sections in the Act touch on this subject. Section 12 states that if nutrient pollution results from actions that are taken in accordance with a nutrient management

plan, the farm owner or operator is exempt from fines and penalties under the Nutrient Management Act. Section 13 provides if a person is fully and properly implementing an approved management plan, the person's actions will be given "appropriate consideration" as a mitigating factor in any civil action for damages alleged to be caused by actions carried out under the approved plan. Section 16 puts the Nutrient Management Act in the context of other environmental protection laws, such as the Clean Streams Law, the Solid Waste Management Act and even common law. It provides that nothing in the Nutrient Management Act limits in any way whatever the powers conferred on state agencies and departments to enforce other statutes or legal concepts, such as nuisance. This seems to imply these other bases remain unaffected by the Nutrient Management Act.

If the plan approval agency fails to exercise reasonable care in the review and approval of a plan, these three sections provide interesting insight to the position of the farm owner or operator. Section 12 would insulate the farm owner from fines and penalties under the Act itself. Section 13 gives the owner's compliance "appropriate consideration" as a mitigating factor in any other civil action that may be brought. Section 16 simply states that other bases are unaffected by adoption of the Nutrient Management Act. From a pure negligence perspective, however, an owner's compliance with the terms and conditions of a plan prepared by a nutrient management specialist and reviewed and approved by the local conservation district should be viewed as reasonable care under the circumstances.

—John C. Becker, Professor,
Penn State University

Back from bit-byte heaven

The following paragraph is the concluding paragraph, with the missing last line, of the article titled "Payment limitation rules, procedures," which appeared in the November/December, 1993 *Agricultural Law Update*.

DASCO's notice issued on October 25 does not explain what the ASCS intends to do about each of the unauthorized "procedures." Thus, it remains to be seen whether the ASCS will enforce Handbook directives that the Report concluded are unauthorized.

—Christopher R. Kelley,
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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

A message from the Director

1993 was another productive year for the Association culminating in an outstanding educational meeting in San Francisco. A special thanks to the many volunteer speakers for their time and effort in preparing course materials and making outstanding presentations. For those of you not able to attend, we do have some extra copies of the course materials available, which you may order for \$50.00 postage paid.

As the year draws to a close, we would also like to thank each of you for your support, kind words, and help during this past year and look forward to another good year in 1994.

—*Bill Babione and Martha Presley*