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INSIDE

IN FUTURE ISSUES

Renewal of water contracts

On February 2, 1993, the United States District Court for the Eastern District of California handed down an opinion regarding renewal of water contracts by the Secretary of the Interior. This decision is of substantial importance to farmers in areas dependent upon water that is subject to reclamation contract agreements.

During the late 1930's, the Madera Irrigation District, like other Irrigation Districts, entered into an agreement with the United States for permanent supply of Class One watsr. When the projects were completed in 1951, the Madera Irrigation District and the United States entered into a forty-year contract for the purchase and sale of such water. The contract acknowledged that a future price could not be fixed for water beyond the initial contract. *Madera v. Hancock*, 93 DAR 1533, 1534 (9th Cir. February 2, 1993). In recognition of this problem, the contract included provisions that limited the rates for water to be charged to Madera and provided that the rates could not "exceed charges made to others in the District for the same class of water and service from Friant Dam and Reservoir." *Madera* at 1534.

Near the end of the initial forty-year term, the parties commenced negotiation of renewal contracts. Madera Irrigation District took issue with two of the government's new contract proposals. In the new contract, the government wanted to recoup the excess of operation and maintenance costs under the 1951 contract that exceeded the rates charged during the contract's initial term. *Id.* The government also wanted a new provision in the contract that could potentially require an Environmental Impact Statement and an Endangered Species Act consultation, both of which would result in subsequent modifications to the contract. *Id.*

Madera's position was that an increase in the price of water to recover maintenance and operation costs was an improper retroactive charge violating the equal rate provision of the 1951 contract. *Madera* at 1534-1535. The court acknowledged that the contract right of an irrigation district is a property right protected by the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Madera* at 1535. The court found that the right Madera had was a renewal right under the 1951 contract entitling Madera to a permanent supply of water. The court also emphasized that it was compelled to "construe legislation in a constitutional manner, if fairly possible." *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir. 1982); *Madera* at 1535.

The government contended that the Reclamation Act had always contemplated that the full cost of water would be paid and the resultant subsidy of the 1951 contract was accidental; thus, permitting recoupment would not violate the 1951 contract.

The Ninth Circuit, through its review of the subsidy, raised an important policy issue underlying the initial transaction by which the United States obtained the transfer of Madera's water rights, inducing people to settle in the west and start a farm or invest in farming. The court acknowledged that when Madera transferred its water

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ASCS denial of disaster payments not arbitrary or violative of producer's due process rights

In *Wilson v. United States Department of Agriculture*, the United States Court of Appeal for the Fifth Circuit rejected a Louisiana rice producer's argument that the Department of Agriculture's Agricultural Stabilization and Conservation Service (ASCS) had violated the federal Constitution and the Administrative Procedures Act (APA) in denying the producer's request for federal disaster relief on grounds that improper farming practices, not an eligible disaster condition, caused his crop losses. 1993 WL 151361 (5th Cir. La. May 27, 1993).

In May 1988, Elmer Wilson completed planting 1,013 acres of rice. Although some rain fell after the planting, a drought followed, and the seed failed to germinate within

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rights, federal policy was geared toward promoting family farmers and agriculture in the west. However, what the Ninth Circuit gave with one hand, it took away with the other. Acknowledging that Congress could change federal policy and that policy changes are limited by interests created under prior policies (i.e. families, businesses, and towns built on agriculture), the Ninth Circuit then observed that most of the farmers who used the subsidized water under the 1951 contract had probably sold out, retired, or died. Thus, any rcoupment of operations and maintenance charges placed a burden on the future users of water, and not on those who had an expectation of the subsidy.

Apparently the court's observations were in reaction to its acknowledged lack of authority to make policy choices and that "for all ... they [the court] knew..., some supporters of the changes may have felt that farms should have turned back into desert, and the west should be depopulated...." *Madera* at 1536. Therefore, a policy of raising water beyond cost "by an increment representing seller's remorse for the old subsidy is a permissible instrument to achieve policy changes." *Madera* at 1536. While Congress cannot take back a subsidy that it has given, it has the authority to stop subsidizing.

With this acknowledgement of "volatility in government policy," the court's determination that the recoupment of operations and maintenance expenses are not retroactive charges under the 1951 contract is more easily understood. The rationale in determining that the "recoupment" was not a retroactive charge for the old water, is that recoupment was part of the price for new water, not part of the price for old water. In distinguishing these charges, the court found that "service requiring more expensive operation and maintenance is different from *service* requiring less expensive operation and maintenance." *Madera* at 1536. The "equality" promised back in the 1951 contract applies to "rates" and not to operation and maintenance costs contained in a separate section of the 1951 contract, and, thus, the government did not "surrender [ ] in unmistakable terms" its authority to charge more for water *service* via increased operation and maintenance costs. *Madera* at 1537, citing: *Cf. Peterson v. U.S. Department of the Interior*, 899 F.2d 799 (1990).

The second objection of Madera to the new contract was its requirement that it be subject to modification in accordance with the result of meetings, discussions with the contractor, and the results of Environmental Impact State/Endangered Species Act consultation. The basis of Madera's objection was that section 203(d) of the Reclamation Reform Act of 1982 prevented the addition of environmental regulations. Section 203(d) of the Reclamation Reform Act of 1982 provides: "amendments to contracts which are not required by the provisions of this title shall not be made without consent of the non-federal party."

The Ninth Circuit found that because the government was seeking a new contract in this case and not an amendment to the existing 1951 contract, that section 203(d) of the Reclamation Reform Act of 1982 was not applicable. The renewal provisions of the 1951 contract were found not to require all terms in a renewal to be identical to the expired contract. The Ninth Circuit again stated that the government had not "surrendered in unmistakable terms" the right to impose environmental laws on the contractual relationship. *Madera* at 1537, citing: *Bowan v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986). However, since the government had decided to go through with the renewal contract *prior* to any such environmental reviews and the government's applicaction of the clause, the applicability of the environmental laws to the renewal contract was not yet a ripe controversy, and, accordingly, the court lacked jurisdiction.

—Thomas P. Guarino, Myers & Overstreet, Fresno, CA

Asgrow expected to seek Supreme Court review

The United States Court of Appeals for the Federal Circuit denied a combined petition for rehearing and suggestion for rehearing *en banc* filed by the Asgrow Seed Company in *Asgrow Seed Company v. Winterboer*. Asgrow had sought rehearing or rehearing *en banc* in this significant case involving an interpretation of the Plant Variety Protection Act (PVPA) about the extent to which farmers may sell seed subject to a PVPA certificate.

Although the court denied Asgrow's petition, five judges voted to grant the petition and would have reheard the case *en banc*. That relatively high number of judges voting in favor of an *en banc* hearing apparently has prompted Asgrow to petition the Supreme Court of the United States for a writ of certiorari. Asgrow's petition is due to be filed on June 25, 1993.

Whether the Supreme Court agrees to hear the case will be watched with great interest by seed manufacturers and farmers alike because of the impact brown bagging of seed protected by PVPA certificates has on the seed industry. This case also could affect the United States position as a signatory to the 1991 International Convention for the Protection of New Varieties of Plants (UPOV). The 1991 UPOV is more restrictive with respect to a farmer's ability to utilize seed subject to a PVP certificate than the PVPA permits, as interpreted by the Federal Circuit. Congress, however, has not yet considered the incorporation of UPOV into the PVPA.

—Mark Dopp, Hogan & Hartson, Washington, DC

CONFERENCE CALENDAR

Drake University's Agricultural Law Summer Institute
July 5-8, Water law and agriculture; July 12-15, Legal issues in industrialization of agriculture: contract production, biotechnology, intellectual property rights, and land tenure; July 19-22, Comparative agricultural law: a civil law perspective.
Sponsored by the Agricultural Law Center, The Law School, Drake University.
For more information, call 1-515-271-2947.

Land Use Institute
August 18-20, Stouffer Madison Hotel, Seattle
Topics include: zoning and land use development for environmentally sensitive areas; wetlands regulations and the Clinton administration.
Sponsored by: ALI-ABA, Fla. Atlantic U./Fl. Int. U. Joint Center for Environmental and Urban Problems.
For more information, call 1-800-CLE-NEWS.

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Agricultural law bibliography

Biotechnology

Comment, *Genetically Modified Organisms: A New Proposal Regarding Deliberate Release*, 16 B.C. Int'l & Comp. L. Rev. 137-147 (1993).

Maher, *The Patent Environment: Domestic and European Community Frameworks For Biotechnology*, 33 Jurimetrics J. 67-132 (1992).

Mostow, *Reassessing the Scope of Federal Biotechnology Oversight*, 10 Pace Envtl. L. Rev. 227-273 (1992).

Note, *Product and Process Patent Protection in Biotechnology: Too Much or Too Little?*, 17 J. Corp. L. 659-689 (1992).

Note, *Regulation of Biotechnology in the European Community: How Twelve Nations are Transforming a Global Industry*, 16 Md. J. Int'l L. & Trade 255-278 (1992).

Commodities Futures

Belozertsev & Markham, *Commodity Exchanges and the Privatization of the Agricultural Sector in the Commonwealth of Independent States — Needed Steps in Creating a Market Economy*, 55 Law & Contemp. Probs. 119-155 (1992).

Markham, *Fiduciary Duties Under the Commodity Exchange Act*, 68 Notre Dame L. Rev. 199-270 (1992).

Energy Issues

Colton & Smith, *Co-op Membership and Utility Shutoffs: Service Protections that Arise as an Incident of REC "Membership,"* 29 Idaho L. Rev. 1-40 (1992-1993).

Hinman, *Biomass: An Ideal Feedstock For Ethanol Production*, 28 Cal. W. L. Rev. 113-122 (1991).

Environmental Issues

Johnson, *Federal Regulation of Isolated Wetlands*, 23 Envtl. L. 1-42 (1993).

Farm Labor

General & Social Welfare

Migrant Legal Action Program, *Farm Worker Law Developmens*, 26 Clearinghouse Rev. 1163-1174 (1993).

Farm Policy and Legislative Analysis

Domestic

Rosenzweig & Binswanger, *Wealth, Weather Risk and the Composition and Profitability of Agricultural Investments*, 103 The Econ. J. 56-78 (1993).

International

Comment, *Distillation: An Effective Response to the Wine Surplus in the European Community?*, 16 B.C. Int'l & Comp. L. Rev. 149-160 (1993).

Farmers Home Administration

Riskin, *Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program*, 45 Admin. L. Rev. 21-64 (1993).

Food and Drug Law

Comment, *Issues in the Regulation of Bioengineered Food*, 7 High Tech. L.J. 107-136 (1992).

Forestry

Brown & Harris, *The United States Forest Service: Changing of the Guard*, 32 Nat. Resources J. 449-466 (1992).

Levin, *Russian Forest Laws — Scant Protection During Troubled Times*, 19 Ecology L.Q. 685-725 (1992).

International Trade

Agather & Tuggey, *The Meat and Potatoes of the North American Free Trade Agreement*, 24 St. Mary's L.J. 829-882 (1993).

Comment, *Agriculture and Textiles: The Fare and Fabric of Current GATT Negotiations*, 3 Ind. Int'l & Comp. L. Rev. 155-175 (1992).

Strating, *The GATT Agriculture Dispute: A European Perspective*, 18 N.C. J. Int'l L. & Com. Reg 305-350 (1993).

Land Reform

De Aguinaga, *The New Agrarian Law — Mexico's Way Out*, 24 St. Mary's L.J. 883-901 (1993).

P. Dorner, *Latin American Land Reform in Theory and Practice: A Retrospective Analysis* (Univ. Wisc. Press, 1992).

Ng'ong'ola, *Land Problems in Some Peri-Urban Villages in Botswana and Problems of Conception, Description and Transformation of "Tribal" Land Tenure*, 36 J. Afr. L. 140-167 (1992).

Land Use Regulation

Land Use Planning and Farmland Preservation Techniques

M. Grossman & W. Brussaard, *Agrarian Land Law In The Western* World (Edited collection, Univ. Ariz. Press, 1992).

Livestock and Packers & Stockyards

Keiter & Froelicher, *Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem*, 28 Land & Water L. Rev. 1-75 (1993).

Taylor & Geyer, *Sitting on the Fence with the Supreme Court of Virginia — An Analysis of the Economic Consequences of Obsolete Fence Law* (No. 79 Land: Issues and Problems, Va. Coop. Ex., Va. Tech. January 1993).

Pesticides

Chappuis, *The Flight of Toxic Tort— Aerial Application of Insecticides and Herbicides: From Drift Liability to Toxic Tort*, 58 J. Air L. & COM. 411-453 (1992).

Comment, *Local Pesticide Regulation Since ... (Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 1991), 20 B.C. Envtl. Aff. L. Rev. 65-97 (1993).

Comment, *No More Excuses: Adopt the "Circle of Poison Prevention Act of 1991"*, 21 Cap. U. L. Rev. 963-985 (1992).

Public Lands

Jackson, *Grazing Rights: Time For a New Outlook*, 32 Nat. Resources J. 623-631 (1992).

Miller, *America's Public Lands: Legal Issues in the New War For the West*, 24 Urb. Law. 895-905 (1992).

Torts

Kotz & Schafer, *Economic Incentives to Accident Prevention: An Empirical Study of the German Sugar Industry*, 13 Int'l Rev. L. & Econ. 19-34 (1993).

Uniform Commercial Code

Article Seven

Helmholz, *Bailment Theories and the Liability of Bailees: The Elusive Uniform Standard of Reasonable Care*, 41 U. Kan. L. Rev. 97-135 (1992).

Article Nine

Barnes, *The U.C.C.'s Insidious Preference for Agronomy Over Ecology in Farm Lending Decisions*, 64 U. Colo. L. Rev. 457-512 (1993).

Water Rights: Agriculturally Related

Barber, *The Legal Dilemma of Groundwater Under the Integrated Environmental Plan for the Mexican-United States Border Area*, 24 St. Mary's L.J. 639-697 (1993).

Comment, *Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation*, 29 Idaho L. Rev. 153-183 (1992-1993).

Comment, *Will Federal Environmental Regulation Be Permitted to Infringe on State Vested Water Rights?*, 11 UCLA J. Envtl. L. & Pol'y 113 (1992).

Comment, *State Coordination of Water Allocation Management and Water Pollution Regulation*, 4 Vill. Envtl. L.J. 129-177 (1993).

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Complying with the OSHA Hazard Communication Standard

John C. Becker

Introduction

Since May of 1988 the OSHA Hazard Communication Standard, 29 C.F.R. section 1910.1200(c), has required many private employers to examine their workplace to identify hazardous materials and substances with which workers come in contact during the normal work situation. The introduction of the standard was accompanied with a substantial amount of fanfare and publicity.

In spite of the heightened awareness created by this publicity, the General Accounting Office's November, 1991 study of employers (GAO/HRD 92-8) found that fifty-eight percent of small employers and fifty-two percent of all employers were out of compliance with key provisions. Twenty-nine percent of small employers surveyed indicated little or no awareness of the standard. Of those who were aware of the standard, many thought employers with ten or fewer employees were not required to comply. Farming operations that do not maintain a temporary labor camp and do not employ more than ten non-family employees are exempt from OSHA inspections, but most other private sector employers are covered by it.

A potential outcome of this lack of awareness and low levels of compliance is an increased risk of injury from hazardous materials and substances that could have been avoided by the hazard information and training that employers are required to provide under the standard. In an employer's cost-competitive environment, this greater risk translates into higher costs of production and workers' compensation coverage.

The following material is intended to help professional advisors and business managers to increase their level of awareness of the standard and to test their own level of compliance against a set of objective factors based on the standard. The primary source of material from which this discussion is developed is *Hazard Communication—A Compliance Kit*, U.S. Department of Labor, Occupational Safety and Health Administration, OSHA 3104, 1988.

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Overview of an employer's obligations under the OSHA Hazard Communication Standard

The following basic steps will aid in complying with the standard and in developing a hazard communication program.

1. *Read the standard.*

2. *List the hazardous chemicals in the workplace.*

Walk around the workplace, read all you can about all materials that may be hazardous. Important information includes the manufacturer's product name, location, and telephone number; and the work area where the product is used. Be sure to include hazardous chemicals that are generated in the work operation but are not in a container (e.g., welding fumes).

Check purchase records to ensure that all hazardous chemicals purchased are included on your list. Establish a file of hazardous chemicals used in your workplace. Include a copy of the latest MSDS's, and any other pertinent information. Keep the file up to date.

3. *Obtain Material Safety Data Sheets for all chemical substances.*

If you do not have an MSDS for a hazardous substance in the workplace, request a copy from the chemical manufacturer, distributor or importer as soon as possible. A MSDS must accompany or precede the product's shipment and is the most used source of information about the material.

Make sure the MSDS is available to employees and their designated representatives.

4. *Make sure all containers are labeled.*

The manufacturer, importer or distributor is responsible for labeling containers, but the employer must also meet certain requirements, such as:

- Ensuring that all containers of hazardous substances are labeled, tagged or marked and include the identity of the hazardous chemical and appropriate hazard warnings. Container labels for purchased chemicals must also include the name and address of the chemical manufacturer, importer, or other responsible party.
- Checking the labeling of all incoming shipments of hazardous chemicals. If a container is not labeled, the employer must obtain a label or the label information from the manufacturer, importer, or other responsible party or prepare a label using information obtained from these sources. Employers are responsible for ensuring that containers in the workplace are labeled, tagged, or marked.
- Instructing employees on the importance of labeling portable receptacles into which they have poured hazardous substances. If the portable container is for immediate use by the employee who transferred the substance, then the container does not have to be labeled.

5. *Develop and implement a written hazard communication program.*

This program includes four parts:

- Container label warnings;
- Material safety data sheets;
- Employee training; and
- Methods of communicating hazards and protective measures to employees and others.

Hazard communication standard sample training program

The training program is an integral part of the hazard communication program. Under the standard, each employer is required to inform and train employees at the time of their initial assignment to a work area where hazardous chemicals are present and whenever a new hazard is introduced into the work area.

While the outline of topics to be presented in employee information and training programs is the same for all employers, the actual information presented must be based on the specific hazard information conveyed by labels and MSDS's for that particular workplace or work area.

All information and training programs should include the following seven general topics:

- The provisions of the Hazard Communication Standard;
- Operations in employees' work areas where hazardous chemicals are present;

• The location and availability of the company's written hazard communication program, including the list(s) of hazardous chemicals and MSDS's;

• How to detect the presence or release of a hazardous chemical in the work area;

• The physical and health hazards of the chemicals in the work area;

• The measures employees can take to protect themselves from these hazards, such as work practices, emergency procedures and personal protective equipment required by the employer; and

• The employer's written hazard communication program, including an explanation of the labeling system used by the employer, and how employees can obtain and use hazard information on labels and in MSDS's.

Elements of a hazard communication training program

1. *Know the standard*

Be familiar with its requirements and know your responsibilities under the law. Keep employees informed about the law and their rights under it.

2. *Identify employees to be trained*

Assess the actual and potential exposure of employees to hazardous chemicals under normal and emergency conditions. Base training needs decisions on these exposures. Determine appropriate ways in which to train new employees and supervisors on the specific chemicals in their workplace.

3. Know the hazardous chemicals in your workplace

Hazardous chemicals are those that have either a physical or health hazard associated with them. A "physical hazard" is one for which there is scientifically valid evidence that the chemical is a combustible liquid, a compressed gas, an explosive, a flammable substance, an organic peroxide, an oxidizer, a pyrophoric, or an unstable (reactive) or water-reactive substance. A "health hazard" is one that includes cancer-causing, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers, hepatotoxins, nephrotoxins, neurotoxins, agents that act on hematopoietic system, and agents that damage the lungs, skin, eyes, or mucous membranes. [*Appendices A & B of the Standard 29 CFR Section 1910.1200 contain more information about hazards.*]

4. *List the hazardous chemicals in the workplace*

Identify the process or operation where the chemicals are used. Be certain there is a material safety data sheet (MSDS) for each chemical and make them readily available to employees and to other employers at your worksite at their request.

5. *Instruct employees on how to use and interpret MSDS's*

Check each MSDS you receive to ensure that it contains all the information required by the standard. Obtain MSDS's or other information when an MSDS is not received from manufacturer, importer or supplier, or when an MSDS is incomplete.

6. *Instruct employees on labeling*

Check each container entering the workplace for appropriate labeling.

Explain the importance of reading labels and of following directions for the safe handling of chemicals. Label, tag, or mark containers into which hazardous chemicals are transferred with the appropriate chemical identity and hazard warnings. An appropriate hazard warning must convey the specific physical and health hazards of the chemicals. Words such as "caution," "danger," "harmful if absorbed by skin," etc. are precautionary statements and do not identify specific hazards. Be more specific!

Label portable containers when they are not for "immediate use" by the employee transferring the chemicals. In lieu of labels, process sheets, batch tickets, standard operating procedures, or other written materials may be used on stationary process equipment if they contain the same information as a label and are readily available to employees in the work area or station.

7. *Methods of controlling workplace exposures*

ENGINEERING CONTROLS include changes in machinery, work operations, or plant layout that reduce or eliminate the hazard (e.g., ventilation hoods, isolation, etc.).

ADMINISTRATIVE CONTROLS include good housekeeping procedures, safe work practices, personal and medical monitoring, shortened shifts or changed work schedules, etc.

PERSONAL PROTECTIVE EQUIPMENT includes safety glasses, goggles, face shields, earplugs, respirators, gloves, hoods, boots, and full body suits.

8. *Compare current procedures with recommended practices identified on MSDS's and labels*

9. *Maintain a record of employee/supervisor training*

Follow-up and evaluate the training program. Make sure employees know how to handle chemicals they use and are applying the training you have given them.

10. *Establish a written emergency action plan*

Provide training for important procedures such as emergency controls and phone numbers, evacuation plans, alarm systems, emergency leak or spill reporting and shut-down procedures, first-aid, personal protection, etc.

OSHA Hazard communication standard — training guidelines

1. *Match training to employees*

While all employees are entitled to know as much as possible about the safety and health hazards to which they are exposed, the resources for such an effort frequently are not, or are not believed to be, available. Thus, employers are often faced with the problem of deciding who is in the greatest need of information and instruction and then addressing those training needs first. One way to differentiate between employees who have priority needs for training and those who do not is to identify employee populations which are at higher levels of risk. The nature of the work will provide an indication that such groups should receive priority for information on occupational safety and health risks.

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2. *Identify employees at risk*

One method of identifying employee populations at high levels of occupational risk (and thus in greater need of safety and health training) is to pinpoint hazardous occupations. Within industries which are hazardous in general, there are some employees who operate at greater risk than others. In other cases the hazardousness of an occupation is influenced by the conditions under which it is performed, such as noise, heat or cold, or safety or health hazards in the surrounding area. In these situations, employees should be trained not only on how to perform their job safely but also on how to operate within a hazardous environment.

A second method of identifying employee populations at high levels of risk is to examine the incidence of accidents and injuries, both within the company and within the industry. If employees in certain occupational categories are experiencing higher accident and injury rates than other employees, training may be one way to reduce that rate. In addition, thorough accident investigation can identify not only specific employees who could benefit from training but also identify company-wide training needs.

The following variables are identified as being related to a disproportionate share of injuries and illnesses at the worksite on the part of employees:

a. Younger employees have higher incidence rates than older employees.

b. New employees have higher incidence rates.

c. Medium-size firms have higher incidence rates than smaller or larger firms).

d. Incidence and severity rates vary significantly when many different types of work are performed.

e. The use of hazardous substances increases the incidence of injury and illness among employees.

3. *Training employees at risk*

Determining the content of training is similar to determining what any employee needs to know. A useful tool is the Job Hazard Analysis. This analysis examines each step of a job, identifies existing or potential hazards, and determines the best way to perform the job to reduce or eliminate the hazards. Its key elements are 1) job description; 2) job location; 3) key steps (preferably in the order in which they are performed); 4) tools, machines and materials used; 5) actual and potential safety and health hazards associated with these key job steps; and 6) safe and healthful practices, apparel, and equipment required for each job step.

PACA construed to impose individual liability for corporate debts

Facing what it characterized as a "novel question regarding individual liability under [the Perishable Agricultural Commodities Act (PACA)]," a federal district court has held that the sole shareholder of a PACA-licensed corporation that failed to pay for its purchases is liable to the unpaid seller for whatever amount is not recoverable from the corporation. *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, No. 91 Civ. 6888, 1993 WL 51481 (S.D.N.Y. Feb. 22, 1993). In other words, the corporation is primarily liable, and the sole shareholder is secondarily liable for "whatever shortfall may exist." *Id.* 1993 WL 51481, at *5.

In reaching its holding, the court relied on an unreported Bankruptcy Appeal Panel of the Ninth Circuit, *In re Paul Shipton*, BAP No. CC-90-1366-OVP, and *In re Nix*, 1992 WL 119143 (M.D. Ga. Apr. 10, 1992). Those cases reached similar results on the theory that an individual, including the controlling shareholder of a corporation, who is in the position to control PACA trusts assets but "who does not preserve them for the beneficiaries has breached a fiduciary duty, and is personally liable for that tortious act." *Id.* at 1993 WL 51481, at *3. Accordingly, "a PACA trust in effect imposes liability on a trustee, whether a corporation or a controlling person of that corporation, who uses the trust assets for any purpose other than repayment of the supplier." *Id.*

—Christopher R. Kelley, Hastings, Minnesota

ASCS denial/continued from page 1

the expected time. In response, Wilson tried to flush his fields with water from a nearby river in June. Heavy rain fell in July and flooded Wilson's farm. Wilson sought payment pursuant to his federal crop insurance policy and also applied for federal disaster relief from the ASCS. Both ASCS and the Federal Crop Insurance Corporation (FCIC) denied Wilson's claims, and, after exhausting his administrative remedies, Wilson sued. The FCIC argued that Wilson had failed to give timely notice of his claim. The ASCS asserted that Wilson's failure to follow proper farming practices, not the flooding rain, had caused his losses.

The federal district court for the Western District of Louisiana dismissed Wilson's claims. With respect to the FCIC claim, the Fifth Circuit remanded the proceeding to the district court, noting ambiguity in the regulations pertaining to the required deadline for notice of loss. However, the appellate court affirmed the trial court's dismissal of Wilson's APA and constitutional claims against the ASCS.

Respecting Wilson's APA claim, the Fifth Circuit noted that ASCS decisions are subject to narrow judicial review and may be overturned only if the court concludes that the ASCS determination is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Slip opinion at paragraph 4, *citing Gibson v. United States*, 11 Cl. Ct. 6, 15 (1986)(*quoting Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *Madsen v. Dep't of Agric.*, 866 F.2d 1035, 1036 (8th Cir. 1989). Thus, an ASCS decision will be upheld by a court if it rests on a rational basis even though the court would not have reached that decision.

In Wilson's case, the appellate court found a "rational basis" for the ASCS denial of Wilson's request for disaster relief in an affidavit executed by the Executive Director of the local ASCS committee regarding testimony presented by a local ASCS agent and an FCIC agent during three hearings before the local ASCS committee. The FCIC agent reported that he had visited the Wilson farm in August 1988 and observed a lack of "gates" on the levees, indicating to him that the Wilson rice fields could not have been adequately flushed. The ASCS local agent reported that stands of rice were only four to six inches tall when he visited the Wilson farm in late July although, by that time, rice planted in May should have been fourteen inches tall if properly cultivated. According to its Executive Director, the local ASCS committee concluded from this testimony that Wilson had failed to employ necessary farming practices to harvest a rice crop. Wilson presented testimony of six witnesses disputing this conclusion. However, the district and appellate courts found the ASCS decision plausible and upheld it.

Respecting his constitutional claim against ASCS, Wilson argued that he was denied due process of law because (1) the local ASCS committee did not inform him of meetings during which Wilson's disaster claim would be considered, (2) the committee heard testimony from the ASCS and FCIC agents in Wilson's absence, and (3) Wilson was deprived of the opportunity to cross examine the agents.

The Fifth Circuit was unconvinced by Wilson's contentions. That court noted that Wilson's due process claim could not

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State Roundup

FLORIDA. *Florida legislature provides for agricultural land conservation easement.* The 1993 Florida legislature recently passed an omnibus growth management bill, which grew out of recommendations from the Environmental and Land Use Management Study (ELMS) III Committee, which dramatically modified and expanded Florida law regulating local comprehensive planning and developments of regional impact. Part of the ELMS III legislation modified the conservation easement statutes of Florida Statutes chapter 704, to allow conservation easements for the protection of agricultural lands.

Florida Statutes section 704.06, as amended, entitles a fee owner to unilaterally create a conservation easement or to transfer a conservation easement to a governmental body or charitable entity whose purposes include protection of natural, scenic, or open space property values, assurances that land will remain available for agricultural, forest, recreational or open space use, protection of natural resources, and maintenance or enhancement of air or water quality.

The amended section allows for third party enforcement rights in such conservation easements. The ownership or attempted enforcement of such third party rights does not subject a holder of the conservation easement or a third party rights to any liability for damage suffered by any person on the property as a result of its encumbrance by a conservation easement.

—Sidney F. Ansbacher, Brant, Moore, Sapp, Macdonald & Wells, Jacksonville, FL

TEXAS. *Odors as air contaminants.* At issue in the case of *F/R Cattle Company, Inc. v. Texas*, 1993 WL 121781 (1993) was the proper interpretation of the clause "produced by processes other than natural" found in the state's Clean Air Act, Tex. Health and Safety Code section 382.001-141. The state's Clean Air Act gives the Texas Air Control Board the authority to control "air contaminants," which are defined to exclude those produced by natural processes. Section 382.003(2).

The subject of the controversy was F/R Cattle Company, a cattle feeding facility, which at the time of suit maintained on average 5,900 calves. Complaints about the resultant odors prompted the state to seek to enjoin the facility as being in violation of the Texas Clean Air Act by releasing air contaminants without a permit. A trial court dismissed the suit on the grounds that the Texas Air Control Board had no jurisdiction "because the facility was producing natural odors and therefore was excluded from the Clean Air Act."

The court of appeals reversed, concluding as a matter of law that the odor at the calf-feeding facility was not produced by natural processes, regardless of vicinity.

The Supreme Court reviewed two court of appeals cases that had previously interpreted the "natural processes" wording. In *Europak, Inc. v. County of Hunt*, 507 S.W.2d 884 (Tex. Civ. App. 1974), a case involving a horse slaughter and packing plant, the court of appeals defined a "'natural process' as 'one that occurs in nature and is affected or controlled by human devices only to an extent normal and usual for the particular area involved'" and upheld the trial court's finding of fact. In *Southwest Livestock and Trucking Co. v. Texas Air Control Board*, 579 S.W.2d 549 (Tex. Civ. App. 1979), a case involving a feeding operation within city limits in close proximity to residences and small commercial enterprises, the trial court's finding that the Board had jurisdiction was upheld by the court of appeals.

In the *F/R* case the court of appeals held that regardless of the vicinity, the confinement of so many calves in such a small area was unnatural. The Texas Supreme Court applied the *Europak* and *Southwest Livestock* holdings to say that location is a factor to be considered in determining whether a pollutant was "produced by processes other than natural." Further the supreme court declined to say that the test in *Europak* and *Southwest Livestock* was a question of law for the court.

The supreme court remanded the case to the court of appeals to review the facts.

—Linda Grim McCormick, Toney, AL

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stand absent a property interest in ASCS disaster payments. In two steps, the court concluded that no such property interest existed. First, the mere existence of the ASCS disaster benefits program did not create a property interest for Wilson therein. Second, Wilson was properly determined by ASCS to be ineligible for disaster payments because of failure to follow proper farming practices.

The court, therefore, rejected Wilson's due process claim without responding to Wilson's three specific arguments. Instead, the decision merely included a parenthetical suggesting that, although Wilson was not informed of all the ASCS meetings, he was able to present his views at all levels of the ASCS decision process. The *Wilson* outcome contrasts with *Doty v. United States*, a 1991 dairy payments case involving a disputed statement by a herdsman. In *Doty*, the United States Claims Court found abuse of discretion in the failure of the ASCS Deputy Administrator for State and County Operations to call a material witness as requested by the producer. 24 Cl. Ct. 615 (1991). The Claims Court remarked that, when it is necessary to resolve conflicting versions of facts or directly conflicting testimony to ascertain the truth, agency discretion to permit or deny cross-examination "is subject to abuse to a much greater extent than in most other aspects of informal hearings." 24 Cl. Ct. at 630.

—Stephanie Karen Payne, McGlinchey, Stafford, Lang, New Orleans, LA

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* during the month of June, 1993.

1. FmHA; Insured farmer program loans; pledging all assets as collateral; final rule; effective date 5/5/93. 58 Fed. Reg. 26679.

2. FmHA; Farmer program account servicing policies for delinquent farm borrowers for section 1816(n) of the 1990 FACT Act; interim rule with request for comments. 58 Fed. Reg. 30102.

3. Farm Credit System Insurance Corporation; policy statement concerning financial assistance to operating insured banks; effective date; 4/27/93. 58 Fed. Reg. 27285.

4. USDA; Rules of practice governing formal adjudicatory proceedings instituted by the Secretary; CFR correction. 58 Fed. Reg. 30696.

—Linda Grim McCormick, Toney, AL

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

EARLY REMINDER
Remember that the 1993 Annual Conference is being held at the Hotel Nikko in San Francisco, November 11-13, 1993. This year the Conference will begin on Thursday afternoon at 1:00 PM and end Saturday at noon.

CALL FOR ARTICLES, AUTHORS
The membership is encouraged to submit to the editor 1-4 page (250-1,000 word) articles on agricultural law matters — cases, legislation, etc. Please provide the underlying case, statute, document, etc. Include your name, position, and phone number. Persons interested in developing an "In Depth" article should consult with the editor as to topic and scheduling. Editor's phone number and fax number are: (205) 828-0367.