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INSIDE

- *Federal Register* in brief
- Conference Calendar
- PACA construed to impose individual liability for corporate debts
- Eighth Circuit upholds suspension of SASS
- Jurisdictional and enforcement issues under the new EPA Region VI general CAFO permit

IN FUTURE ISSUES

- Status of workers as employees or independent contractors

1989 Disaster Assistance Act financial eligibility regulations upheld

The United States District Court for the District of Columbia has upheld the financial eligibility regulations promulgated pursuant to the Disaster Assistance Act of 1989. *Haubein Farms, Inc. v. Dep't of Agric.*, No. 92-0482 (D.D.C. Apr. 29, 1993). In upholding the regulations, the court rejected the producer's claim that eligibility should be determined on the basis of net profits instead of on the basis of "gross income."

The financial eligibility criteria of the Disaster Assistance Act of 1989 limits benefits to "persons" who have "qualifying gross revenues" of $2,000,000 or less in the most recent tax year preceding the date of the application for benefits. The Act specifies that the applicant's "qualifying gross revenues" will be either the applicant's "gross revenue" from agricultural production or the applicant's "gross revenue" from all sources, depending on the source of the "majority of the [applicant's] annual income." Specifically, the financial eligibility criteria is set forth in the Act in the following terms:

(a) General Rule.—A person that has qualifying gross revenues in excess of $2,000,000 annually, as determined by the Secretary of Agriculture, shall not be eligible to receive any disaster payment or other benefits under this title.

(b) Qualifying gross revenues.--For purposes of this section the term "qualifying gross revenues" means—

(1) if a majority of the person's annual income is received from farming, ranching, and forestry operation, the gross revenue from the person's farming, ranching, and forestry operations; and

(2) if less than a majority of the person's annual income is received from farming, ranching, and forestry operations, the person's gross revenue from all sources.

7 U.S.C. § 1421 note.

The regulations implementing the Act, however, state the financial eligibility formula differently by eliminating all of the Act's references to "gross revenue" and "annual income" and substituting in the place of "gross revenue" and "annual income" the phrase "gross income." Specifically, the regulations specify the following financial eligibility formula:

However, such a person, defined in Part 795 of this Title, who has annual gross income in excess of $2.0 million shall not be eligible to receive disaster payments under this Part. For purposes of this determination, annual gross income means:

(1) With respect to a person who receives more than 50 percent of such person's gross income from farming, ranching, and forestry operations, the annual gross income from such operations; and

(2) With respect to a person who receives 50 percent or less of such person's gross

Continued on page 2

Failure to comply with PACA trust requirements negates trust protection

The United States District Court for the District of Columbia recently granted a motion for summary judgment in favor of an intervening secured creditor rejecting various claims for trust protection under the Perishable Agricultural Commodities Act (PACA) by produce suppliers who failed to adhere to the strict procedural requirements of 7 U.S.C. section 499e(c)(3). Judge Gesell, in *N.P. Deoudes, Inc. v. Why Inc.*, Civil Action No. 92-0461 (one of his last decisions before his death), followed the Ninth Circuit's decision in *In re San Joaquin Food Serv., Inc.*, 958 F.2d 938 (9th Cir. 1992), in holding that 7 U.S.C. section 499e(c)(3) on its face required strict procedural compliance and declined to infer contrary intent from the legislative history.

Section 499e(c) of PACA creates a statutory trust in the inventory and accounts receivable of wholesalers and retailers of perishable commodities in favor of produce

Continued on page 3

income from farming, ranching, and forestry operations, the person's total gross income from all sources.

7 C.F.R. § 1477.3(g) (1989).

In *Haubein Farms*, the plaintiff argued that the Act's use of "annual income" meant that Congress intended that the applicant's "net profit" be used to determine eligibility and that the regulations' "use of the term 'gross income' runs counter to clearly expressed Congressional intent." *Haubein Farms, Inc. v. Dep't of Agric.*, slip op. at 7. The court rejected that claim, stating that "the plaintiff provides no support, either from the Act itself or the legislative history, to prove that Congress wanted this calculation to be based upon net profits." *Id.* The court concluded that the regulations' treatment of "gross revenue" as synonymous with "gross income" was not arbitrary and capricious in "the absence of evidence of Congressional intent indicating that 'gross revenue' was to be synonymous with 'net profit' and the specific grant of discretion to the Secretary.... *Id.*, slip op. at 7-8 (citing *Vculek v. Yeutter*, 754 F. Supp. 154, 156-57 (D.N.D. 1990), *aff'd sub nom., Vculek v. Madigan*, 950 F.2d 727 (8th Cir. 1991)).

An issue similar to the issue decided in *Haubein Farms* is currently pending before the United States District Court for the Western District of Wisconsin in a case involving the Disaster Assistance Act of 1988. *Doane v. Espy*, No. 91-C-0852-C (W.D. Wis. filed Oct. 1, 1991). That case also involves a challenge to the ASCS's inclusion in the "gross income" of the applicant for disaster assistance of receipts belonging to third parties derived from consignment sales made by the applicant as an agent for the third parties. The ASCS has taken the position that the proceeds from consignment sales received by the applicant on behalf o third parties are to be included in the applicant's "gross income" except where the proceeds are deposited in a custodial account under the regulations implementing the Packers and Stockyards Act. *See ASCS Handbook*, 1-PAD (Rev. 1), Ex. 8 (Amend. 4). A decision in that case is expected this summer.

—*Christopher R. Kelley, Hastings, MN*

PACA trust/continued from page 1

suppliers who sell to those entities on credit. However, before the statutory trust is perfected, produce suppliers must adhere to various procedural requirements of section 499e(c)(3), which reads as follows:

> The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.

In the case before Judge Gesell, as in *San Joaquin*, the PACA trust claimants had failed to adhere to the procedural requirements of section 499e(c)(3). In particular, many of the produce suppliers and the purchasers had agreed to a payment time period different from that established by the Secretary but failed to disclose those precise terms of payment on the invoices as required by statute.

Opponents to the motion urged the court to look beyond the literal language of the statute and infer intent from the legislative history. By so doing, the opponents argued, it should become clear that Congress did not intend to deny trust protection to parties who failed to disclose agreed upon payment terms on invoices, but substantially complied with section 499e(c)(3).

Judge Gesell, however, following the Supreme Court's decision in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. , 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991), refused to infer Congressional intent from the legislative history. Judge Gesell added that:

> The payment disclosure requirement is included in the subsection as another condition that must be met in order to qualify for PACA funds. Deference to the legislative history instead of to the natural reading of the statute would be illogical.

Finally, Judge Gesell held that "Congress's purpose is best found in the statute itself," and that the use of legislative history is like "looking over a crowd and picking out your friends." The failure to comply with the literal requirements of PACA was therefore fatal to the claims made by many of the PACA claimants. The intervening secured creditor thus recovered its losses from the trust fund.

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CONFERENCE CALENDAR

Environmental Litigation
June 21-25, 1993, University of Colorado School of Law, Boulder, CO
Topics include: jurisdiction, standing, the law of pre-enforcement review under CERLA, discovery in environmental litigation, and confidentiality of environmental audits.
Sponsored by ALI-ABA and University of Colorado School of Law
For more information, call (800) CLE-NEWS.

Drake University's Agricultural Law Summer Institute
June 14-17, Business planning for farm operations; June 21-24, The law of farmer cooperatives; June 28-July 1, Migrant and seasonal farmworker law; 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.

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*

Eighth Circuit upholds suspension of "specifically-approved stockyard status"

The Eighth Circuit has affirmed a district court decision upholding the USDA's suspension of the "specifically-approved stockyard status" of a Missouri stockyard. *Moore v. Madigan*, No. 92-2272, 1993 WL 92430 (8th Cir. Apr. 1, 1993). The Eighth Circuit rejected the stockyard operator's claims that he was entitled to a formal hearing before an administrative law judge, that the USDA failed to comply with certain Administrative Procedure Act (APA) requirements relating to the withdrawal or suspension of licenses, and that the USDA failed to adduce evidence justifying the suspension.

Plaintiff Jackie Moore operated Joplin Regional Stockyards in Joplin, Missouri. Three livestock brokers leased space from the stockyard. In 1987, Mr. Moore, as the "legally responsible operator" of the stockyard, entered into a "specifically-approved stockyard status" (SASS) agreement with the USDA.

The USDA grants SASS to stockyards that agree to participate in the USDA's brucellosis eradication program. SASS stockyards must maintain sanitary conditions and identify and separate cattle according to the brucellosis classification of the state from which the cattle arrive for sale. In 1988 and 1989, Missouri was classified as an "A" state and Oklahoma as a "B" state.

In 1988, a USDA inspection of the stockyard concluded that it had not satisfied the sanitation requirements under the SASS agreement and that cattle from Oklahoma had been sold through the stockyard as class A Missouri cattle. Similar violations were again found in a 1989 inspection of the stockyard.

After the 1989 inspection, the USDA notified Mr. Moore of the infractions and proposed to withdraw the stockyard's SASS. Moore unsuccessfully challenged the allegations in an informal hearing, and the stockyard's SASS was suspended for five years. Moore then commenced an action for judicial review under the federal Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1988), which resulted in the district court upholding the suspension but reducing its length to six months.

In his appeal to the Eighth Circuit, Moore claimed that he should have been accorded a formal hearing before an administrative law judge instead of an informal hearing. The Eighth Circuit rejected that claim on the grounds that neither the statute authorizing the USDA's brucellosis eradication program, 21 U.S.C. § 111 (1988), nor the regulations implementing that statute authorized a formal hearing.

The Eighth Circuit declined to find the right to a formal hearing in the statute because the statute did not provide for hearings "on the record," the usual term of art for formal hearings, and because there was no other indication of a congressional intent to provide a formal hearing. Noting that the USDA's regulation listing the circumstances in which a formal hearing is available, 7 C.F.R. § 1.131, did not list the brucellosis program, the court also rejected Moore's claim that the brucellosis program regulation providing for a hearing, 9 C.F.R. § 78.44, should be construed to refer to the USDA's formal hearing procedures found at 7 C.F.R. section 1.131.

In addition, the Eighth Circuit refused to accept Moore's contention that the USDA had violated the "notice and comment" provisions of the APA by adopting rules providing only for an informal hearing. Because Moore had not raised that issue prior to the conclusion of the administrative proceedings and because "the record contain[ed] nothing to refute the sanitation and identification violations found by the USDA," the court concluded that a remand based on an APA violation would "reward" Moore "for failing to present his full case to the USDA" and would be futile. *Moore v. Madigan*, 1993 WL 92430, at *4-5.

Moore also claimed that the suspension was invalid because the USDA had not complied with the APA's requirement that license suspensions or withdrawals must be preceded by notice and an opportunity to achieve compliance. *See* 5 U.S.C. § 558(c) (1988). The Eighth Circuit, assuming arguendo that the SASS and the SASS agreement constituted a license within the meaning of the APA, held that the administrative record showed that the USDA had complied with the APA.

Finally, the Eighth Circuit rebuffed Moore's contention that the USDA failed to produce sufficient evidence to support a suspension of any duration. The court noted that all that was required under the brucellosis regulations for withdrawal of a stockyard's SASS was proof of a breach of the SASS agreement. *Moore v. Madigan*, 1993 WL 92430, at *6 n. 5. Thus, contrary to Moore's claim, the USDA was not required to present evidence of the propriety of its proposed penalty such as "the size of suspect stockyards, the effect of SASS suspension on communities that use suspect stockyards, and any aggravating or mitigating circumstances." *Id.* at *5-6.

—*Christopher R. Kelley, Hastings, Minnesota*

Members' publications noted

The following three synopses are of agricultural law-related books written by members of the AALA.

TITLE: *Income Taxes and Farm Debt Restructuring*

AUTHOR: Pete Morrow, David Bott

DESCRIPTION: "While there is a good deal of accounting and technical literature out there for practitioners [about FmHA loan restructuring programs and their income tax consequences], we could not find anything written in vernacular for farmers, so I teamed with David Bott, a farm oriented CPA from Oklahoma City and wrote *Income Taxes and Farm Debt Restructuring*. While it is primarily in-

Continued on page 7

Jurisdictional and enforcement issues under the new EPA Region VI general CAFO permit

By Larry Frarey

Permit overview

On February 8, 1993, EPA Region VI published its new National Pollutant Discharge Elimination System (NPDES) general permit for concentrated animal feeding operations (CAFOs).[1] This general permit incorporates changes made to the draft general permit published in July, 1992.[2] Reasons for changes to, and responses to comments on, the draft permit were published in the Federal Register together with the new permit.[3]

The general permit applies to CAFOs in four of the five states in Region VI: Texas, Oklahoma, New Mexico and Louisiana.[4] CAFOs in Arkansas are not required to comply with the specific provisions of the general permit because EPA has delegated NPDES authority to Arkansas.[5] The permit applies to those animal feeding operations constituting CAFOs under 40 C.F.R. section 122, Appendix B,[6] and takes effect on March 10, 1993.[7]

Region VI issued the general permit because:

> the time for federal permitting action in the four states administered by this Region is past due .... In Region 6 the water quality inventories which are compiled by the state water quality agencies show a significant number of water bodies which are being impaired by the contribution of animal wastes.[8]

Additional comments accompanying publication of the permit explained that:

> EPA believes that the first step in protecting the water quality in these watersheds and others in the Region from water quality impairments from animal wastes is the issue of this general permit. This will provide stringent requirements which are protective of water quality, and at the same time provides EPA with a strong enforcement tool against non-compliance.[9]

The new general permit provides Region VI far greater enforcement capability than is possible by relying solely on individual NPDES permits. A draft memorandum from EPA's office of Policy, Planning and Evaluation states that "EPA's regional offices and the relevant delegated states have issued roughly 800 permits to CAFOs, although perhaps as many as 10,000 feedlots currently meet the 1,000 animal unit cutoff."[10] EPA simply does not have the resources to develop and enforce individual permits on that scale.

Part III(B)(2) of the permit requires all CAFOs covered by the permit to develop a detailed pollution prevention plan and retain that plan on site.[11] Large CAFOs with over 1,000 animal units must implement the plan within one year from the permit's "issuance date."[12] Those facilities deemed CAFOs because they contain more than 300 animal units and "discharge pollutants into navigable waters either through a man-made ditch, flushing system, or other similar man-made device, or directly into waters of the United States" have two years in which to implement the plan."[13]

The pollution prevention plan requires detailed information on retention facilities and structures, e.g., anaerobic waste water lagoons. That information must include the capacity of retention structures, design standards for structure embankments, and a schedule for dewatering the structures to insure adequate freeboard (unused storage capacity) after a rainfall event.[14] The plan must also include information concerning liners used in any retention structure. A liner is required for every retention structure unless the CAFO operator can document that "no significant hydrological connection exists between the contained wastewater and surface waters of the United States."[15]

Part III(B)(2)(f)(2)(I) of the permit lists best management practices (BMPs) that "shall apply" where waste water from retention structures is applied to land.[16] Subpart (i) provides that "[t]he discharge or drainage of irrigated wastewater is prohibited where it will result in a discharge to a water of the U.S."[17] Part III(B)(2)(f)(2)(J), Manure and Pond Solids Handling and Land Application, includes a similar prohibition against discharge after land application:

> Storage and land application of manure shall not cause a discharge of significant pollutants to waters of the United States or cause a water quality violation in waters of the United States.
>
> ...
>
> (d) Waste manure shall be applied to suitable land at appropriate times and rates. *Discharge (run-off) of waste from the application site is prohibited.*[18]

Jurisdictional issue

CAFO: a unique point source

The Federal Water Pollution Control Act, or Clean Water Act (CWA, the Act),[19] prohibits the discharge of any pollutant by any person.[20] The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[21] The definition of "pollutant" includes "solid waste" and "agricultural waste" discharged into water.[22] The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged."[23]

Notwithstanding the section 1311 prohibition against *any* discharge, section 1342, titled National pollutant discharge elimination system (NPDES), establishes a permitting scheme under which EPA "may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants ... upon ... such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."[24] Because all CAFOs are expressly included in the Act's definition of "point source," once an animal feeding facility falls under the 40 C.F.R. section 122, Appendix B definition of CAFO, that facility must obtain an NPDES permit prior to discharging pollutants to the waters of the United States.[25] Moreover, 40 C.F.R. section 412.13 establishes the effluent limitation for CAFOs: "There shall be no discharge of process waste water pollutants to navigable waters." The only exception to the no-discharge rule is for "chronic or catastrophic" rain events.[26] Thus, any discharge by a CAFO without an NPDES permit is illegal unless the result of such a rain event.[27]

The CWA's definition of "point source" includes CAFOs together with a list of other "discernible, confined and discrete conveyance(s)." However, CAFOs are inherently different from a "pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure." CAFOs represent a dynamic production process, and not simply a physical structure through which pollutants discharge into navigable waters.

Further, CAFOs pose two distinct but interrelated discharge problems, both of which are addressed in the Region VI general permit: 1) discharge from the feedlot or other areas where animals are confined, and 2) discharge from manure ap-

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plication fields. EPA clearly has jurisdiction to enforce permit provisions relating to the former;[28] however, the agency's authority to enforce prohibitions against runoff from manure application fields is questionable under both the CWA and EPA regulations.

If an application field is not part of a CAFO — thus constituting a nonpoint source rather than a point source — then EPA cannot enforce the permit prohibitions against application-field runoff: "Although nonpoint sources have been described in a number of ways, they are defined as sources of water pollution that do not meet the legal definition of 'point source' in section 502(14) of the Clean Water Act."[29] Nonetheless, the "Duty to Comply" clause in the general permit states that "[t]he permittee must comply with *all* conditions of this permit. Any permit noncompiance constitutes a violation of the Act and is grounds for enforcement action."[30]

Statutory authority

The threshold determination of whether EPA has authority to prohibit nutrient and manure runoff from application fields turns on interpretation of "concentrated animal feeding operation" in subsection 1362(14) of the CWA. To date, no reported opinion has examined the scope of that term. Significantly, subsection 1362(14) was amended in 1987 to exclude "agricultural stormwater discharges" from the definition of "point source."

Generally, that portion of a CAFO where waste and process water runs off animal-confinement areas includes a channel or ditch which directs that waste into a retention structure, e.g., an anaerobic lagoon. Because man-made structures are involved in directing and retaining that waste, animal-confinement areas are clearly a "point source" subject to EPA jurisdiction under the NPDES program.[31] Moreover, the court in *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980), interpreted the notion of man-made conveyances broadly to include erosion channels formed on waste piles created by human activity.

However, in contrast to animal-confinement areas on a CAFO, manure application fields do not resemble the man-made conveyances listed in the Act's definition of "point source."[32] Rather, once waste water or manure solids are sprayed or spread on a field where pasture or field crops grow, any subsequent, rain-induced runoff from that field more accurately falls under the rubric of nonpoint source pollution: "Nonpoint source pollution generally results from land runoff, precipitation, atmospheric deposition, drainage, or seepage."[33] In fact, the 1987 "point souce" exclusion for "agricultural stormwater discharges" may well apply to manure application fields: "Although it is not certain that the word 'stormwater' describes all the waters that routinely drain from farm fields, that is the most likely interpretation."[34]

Thus, based on statutory language alone, the scope of the term "CAFO" is an open question. A court might take a broad view of the term "concentrated animal feeding *operation*," and rule that the *operation* includes *all land* owned or leased by the CAFO operator, including manure application fields. While a defending CAFO operator could challenge that interpretation based on the inherent difference between a manure application field and all other examples of a "point source" listed under the section 1362(14) definition, some case-law support for a broad interpretation can be mustered.

For example, in *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979), the court examined the policy underpinning the Clean Water Act:

> [The Act] was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes.... *The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.* It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived.... We believe it contravenes the intent of FWPCA and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point (emphasis added).

In addition to a policy-based argument, a factual inquiry might turn on the weather at the time of manure application in determining whether a manure application field constitutes a part of the CAFO, and thus a point source under EPA's control. For example, the Region VI general permit provides that "[t]he discharge or drainage of irrigated wastewater is prohibited where it will result in a discharge to a water of the U.S."[35] Considering that language, a court might examine whether irrigated waste water had dried on the application field prior to a storm event. If the waste water was applied just prior to, or during, a storm event, subsequent runoff is easily conceived of as an indirect discharge from the retention structure point source.[36] However, once irrigation waste water has dried on the application field, deposited nutrients take on the characteristics of any other fertilizer, the runoff of which is exempt from the definition of "point source" as an "agricultural stormwater discharge" under section 1362(14). Similar considerations of time and weather might apply to the application of solid manure as well, owing to the general permit's prohibition against "[d]ischarge (run-off) of [solid) waste from the application site."[37]

Whether based on statutory interpretation, CWA policy, factual determination, or a combination of all three, a reviewing court could circumscribe the scope of a CAFO to exclude manure application fields. The same result would be obtained were a court to apply the subsection 1362(14) exclusion for "agricultural stormwater discharges" to manure application fields. In that case, Congressional action to amend the CWA would be required before EPA Region VI could enforce the general permit's prohibitions against runoff from manure application fields. However, in the event a court were to take a broad view of a CAFO and decide that the subsection 1362(14) exclusion does not apply to manure application fields, pertinent EPA regulations then would be examined.

Regulatory authority

One EPA regulation could clearly preclude the agency's enforcement of the manure runoff prohibitions of the Region 6 general CAFO permit. That provision is 40 C.F.R. section 122.23(b), which provides the following definition of "animal feeding operation," a predicate to the 40 C.F.R. section 122, Appendix B definition of CAFO:

> (1) "Animal feeding operation" means a lot or facility... where the following conditions are met:
> (i) Animals ... have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) *Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility* (emphasis added).

Comments by EPA Region VI accompanying publication of the general permit echo this language:

> The definition "concentrated animal feeding operation" includes the number of animals confined; the length of time the animals are confined at the facility; and the type of the confinement. *The definition does not include areas of the facility where crops or forage crops are maintained throughout the growing season.*[38]

A second regulatory provision, 40 C.F.R. section 122.3, appears to preclude EPA jurisdiction over manure application fields as well:

Continued on page 6

The following discharges do not require NPDES permits:

> ...
> (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands,and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23.

However, by its own terms, section 122.3 applies only in cases where CAFO discharge is not involved and where agricultural storm water discharges are involved — both of which would be obviated by a court's threshold determination that a CAFO encompasses manure application fields. Thus, 40 C.F.R. section 122.3 could not prohibit EPA jurisdiction over runoff from manURe application fields in the instant case.

EPA's response to public comment on the draft general permit indicates that the agency relied at least in part on its NPDES storm water permitting program in drafting the general permit."[39] On November 16, 1990, EPA published regulations requiring various industrial categories to apply for NPDES storm water discharge permits.[40] Those regulations required CAFOs to apply for storm water discharge permits prior to October 1, 1992, or demonstrate coverage under another permit applying to storm water discharges.[41]

While CAFOs are clearly an industrial source subject to the NPDES storm water permitting program, reliance on that fact alone begs the question of whether manure application fields comprise part of a CAFO subject to regulation under the general permit. For example, in comments accompanying publication of the storm water regulations, EPA stated that "this rulemaking only covers storm water discharges from point sources.... EPA need clarify in this rulemaking only that a storm water discharge subject to NPDES regulation does not include storm water that enters the waters of the United States via means other than a 'point source.'"[42] EPA went on to state that "[t]he entire thrust of today's regulation is to control pollutants that enter receiving water from storm water conveyances."[43]

Thus, the provision in the general permit most likely derived from EPA's storm water permitting program is that "[r]unoff from manure storage piles must be retained on site," since that runoff clearly constitutes a point source discharge under the holding in *Abston Construction.* Even though CAFOs fall under a specific industrial code for purposes of storm water regulation, that fact says little about the regulatory treatment of manure application fields."[44] Manure application fields may still fall outside the confines of a point source CAFO for all regulatory purposes.

Enforcement issue

Even assuming EPA has jurisdiction to enforce the provisions against runoff from manure application fields, enforcement of those provisions is problematic in practice. Managerial BMPs like those involved in manure application are more difficult to monitor than structural BMPs such as anaerobic lagoons. For example, in Texas, many CAFOs subject to the new Region VI general permit have already constructed retention structures under Texas Water Commission regulations.[45]

The general permit relies on a pollution prevention plan (PPP) to document adequate provisions for waste handling and disposal. However, once liquid or solid manure is applied to a field, the rate of application is very difficult to ascertain. The PPP does not require soil or manure testing prior to manure application or at any time thereafter. Further, an army of inspectors would be required to monitor application fields during storm events to observe any visible manure runoff. Even given the presence of those inspectors, nutrient runoff could still go undetected. Obviously, such a scenario is neither administratively feasible nor desirable.

Because of the difficulty involved in regulating nutrient runoff from application fields through on-site inspection, a micro-watershed pollution abatement approach may provide a viable alternative to the status quo.[46] Under such an approach, the responsibility for meeting water quality standards for designated stream segments is placed on land owners. Monitoring at the mouth of the stream segment verifies the successful implementation of structural and managerial BMPs within the micro-watershed. In the event the micro-watershed fails to achieve the established water quality standard for that stream segment, discharging land owners may be subject to direct regulation. Thus, an important component of a micro-watershed abatement program is peer pressure on recalcitrant polluters to voluntarily adopt pollution-abatement BMPs.

Conclusion

Rodgers' statement that "[t]he distinction between point and nonpoint sources will persist as one of the delightful ambiguities of modern pollution law" [47] epitomizes the regulation of CAFOs by EPA. The new Region VI general CAFO permit provides EPA with an effective enforcement tool in four states where CAFOs seriously impact water quality. However, the point source/nonpoint source dichotomy on which the CWA is based may limit the EPA's authority to regulate nutrient runoff from manure application fields. Even in the event the term "concentrated animal feeding operation" were interpreted broadly to include manure application fields, EPA regulations would likely require amendment to allow enforcement of the general permit's manure runoff prohibitions.

However, even if EPA has plenary authority over a CAFO, regulation of nutrient runoff after land application is problematic. A micro-watershed regulatory approach may prove more workable than site inspection. Ultimately, private and public investment may be required to develop alternatives to land application of manure, such as central composting facilities, manure-burning power plants, or central treatment plants.

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[1] National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges from Concentrated Animal Feeding Operations (General Permit), 58 Fed. Reg. 7610 (1993) (to be codified at 40 C.F.R. section 122.23).

[2] 57 Fed. Reg. 32475 (1992).

[3] Preamble, Parts I and II, 58 Fed. Reg. 7610 (1993).

[4] General Permit, *supra* note 1, at 26. All cited page numbers in the general permit refer to that copy of the permit mailed to interested parties by EPA Region VI.

[5] *Id.* at 4. While CAFOs in Arkansas need not submit two separate permit applications under state and federal regulations, EPA delegation of the NPDES program to Arkansas and thirty-eight other states is predicated on the assumption that "[s]tates which administer the NPDES program must control CAFOs with the same degree of stringency and in a manner consistent with the federal regulations." *Id.* at 5.

[6] *Id.* at 26-27.

[7] *Id.* at 1.

[8] *Id.* at 4.

[9] *Id.* at 6.

[10] C. Long, Livestock Waste Pollution: A Nationwide Problem 5-6 (undated)(draft memorandum, EPA Office of Policy, Planning and Evaluation).

[11] General Permit, *supra* note 1, at 30-35.

[12] *Id.* at 31.

[13] *Id.*

[14] *Id.* at 32.

[15] *Id.* at 33.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 34 (emphasis added).

[19] 33 U.S.C. §§ 1251-1387 (West 1992).

[20] 33 U.S.C. § 1311(a)(West 1992).

[21] 33 U.S.C. § 1362(12)(West 1992).

[22] 33 U.S.C. § 1362(6)(West 1992).

[23] 33 U.S.C. § 1362(14)(West 1992)(emphasis added).

[24] 33 U.S.C. § 1342(a)(1)(West 1992).

[25] 40 C.F.R. § 122.23(a)(Lexis 1993).

[26] 40 C.F.R. § 412.13 (Lexis 1993).

[27] *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1059 (5th Cir. 1991).

[28] *Alta Verde*, 931 F.2d at 1061.

[29] EPA, Managing Nonpoint Source Pollution, Final Report to Congress on Section 319 of the Clean Water Act (1989) 5 (1992).

[30] General Permit, *supra* note 1, at 37 (emphasis added).

[31] *See Sierra Club v Abston Construction Co.*, 620 F.2d 41, 44 (5th Cir. 1980)("The ultimate question [on the issue of "point source"] is whether the pollutants were discharged from "discernible, confined, and discrete convey-ances(s).")

[32] A manure application field could include a ditch and other man-made devices. However, many application fields will not.

State Roundup

FLORIDA. *Caveat emptor upheld, but Florida appellate court begs state supreme court to overrule doctrine.* The Florida First District Court of Appeal in *Haskell Co. v. Lane Co., Ltd.*, 612 So.2d 669 (Fla. 1st Dist. Ct. App. 1993), recently upheld the doctrine of *caveat emptor* in commercial real estate transactions. Nonetheless, the court certified to the state supreme court the following question as one of great importance: "Should the common law doctrine of *caveat emptor* continue to apply to commercial real property transactions; and, if not, with what legal principles should it be replaced?" 612 So. 2d 669, 676. The court clearly wanted to apply the doctrine of fair dealing, but held that only the Florida Supreme Court could reverse what it perceived to be the rule of law in the State.

In *Haskell*, Lane, as owner of a commercial parcel, contracted with Haskell, as prime contractor, to construct a commercial building on Lane's parcel. After Haskell built the improvements, Lane leased the building to Service Merchandise. Lane sold the property to First Capital, subject to the lease.

Part of the roof of the building collapsed in a rainstorm. The tenants suffered great property damage, and two shoppers were injured.

The tenant and its wholly-owned subsidiary sued Lane, Haskell, and others for the property damage. They alleged that Haskell was liable for negligent construction. Lane was sued for negligent failure to disclose the defect to the tenants or "their predecessors in interest." 612 So. 2d 669, 670. Haskell crossclaimed against Lane.

The record did not disclose whether Lane or its buyer knew or reasonably should have known of the defect. The record did not show whether the defect was latent. The record did not show that Lane misrepresented or intentionally hid from its buyer any defect in the roof drainage system. 612 So. 2d 669, 671.

The plaintiffs claimed that section 353 of the Restatement (Second) of Trusts controlled to protect commercial buyers and their invitees from "unreasonable risks on the land." Lane moved for summary judgment, arguing that *caveat emptor* barred the claim. The trial court granted the motion, holding that Lane had no duty to disclose. The plaintiffs appealed.

The appellate court explicated the origins and development of *caveat emptor*. The court stated that the doctrine had originated in commercial personalty transactions. It noted that every state except Louisiana had adopted UCC section 2-314, in lieu of *caveat emptor*. The new personalty standard required that the parties deal fairly and in good faith and imposed implied warranties of merchantability. 612 So. 2d 669, 672.

It cited *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985), in which the Florida Supreme Court held that *caveat emptor* no longer applied to residential real estate sales. Interestingly, *Johnson* involved a latent roof defect. In *obiter dictum*, the Florida Supreme Court in *Johnson* held that a seller's duty to disclose latent defects "is equally applicable to *all forms of real property*, new and used." 480 So. 2d 6625, 629 (emphasis added).

The *Haskell* court noted that *caveat emptor* survives in Florida commercial transactions, regardless of *Johnson*. 612 So. 2d 669, 674 (citations omitted). It wanted desparately to overrule the doctrine in favor of a duty of fair dealing. Nonetheless, it held that Florida law allows only the state supreme court to overrule "ancient doctrine." 612 So. 2d 669, 675 (citations omitted). Therefore, it certified the question to the Florida Supreme Court as one of great importance. The legal community anxiously awaits the outcome.

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

Members' publications/continued from page 3

tended for farmers and ranchers, and it is not technical in nature, I have heard from both lawyers and CPAs that it is helpful in their practices." —J.P. Morrow

AVAILABLE FROM: Westwood Press, Debt. R-5, P.O. Box 34505, Phoenix, AZ 85067. Prepaid cost is $14.95.

TITLE: *Agrarian Land Law in the Western World*

AUTHORS: Margaret Rosso Grossman, Department of Agricultural Economics, University of Illinois, and Wlm Brussaard, Department of Agrarian Law, Wageningen Agricultural University, The Netherlands

DESCRIPTION: "This book is the first to provide a comparative review of agrarian land policy and regulation within 'western' developed economies. An introductory chapter provides an overview of relevant European Community law; twelve chapters cover specific countries; and a concluding chapter compares issues raised in the country-specific chapters."

AVAILABLE FROM: University of Arizona Press, 1230 N. Park Ave., Tucson, AZ 85719; $94.00 plus $2.00 postage and handling.

TITLE: *Understanding the Farmers Comprehensive Personal Liability Policy*

AUTHOR: John D. Copeland

DESCRIPTION: "...a basic primer on liability insurance in general and the farmers comprehensive personal liability policy in particular. This 150-page guide is designed to be useful to farmers, attorneys, and insurance agents alike." Topics include: a short primer on insurance law. identification of who is covered under the insurance contract; which activities are covered under the FCPL policy; definition and discussion about the insured premises; the increasingly important problem of pollution and environmental damage.

AVAILABLE FROM: NCALRI, School of Law, Univ. of Arkansas, Fayetteville, AR 72701; (501) 575-7646; $25.00.

[33] EPA, *supra* note 29, at 5.

[34] Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. Rev. 20, 34 (1989).

[35] General Permit, *supra* note 1, at 33. Irrigated waste water sprayed on an application field at a rate exceeding the soil's absorption capacity, which directly runs off into a nearby waterway, may clearly constitute a point source. *See United States of America v. Oxford Royal Mushroom Products*, 487 F. Supp. 852, 854 (E.D. Pa. 1980). However, rain-induced runoff after application represents a distinct issue.

[36] The general permit prohibits the application of waste water irrigation "when the ground is frozen or saturated or during rainful events (unless used to filter wastewaters from retention structures which are going to overflow directly to a water of the U.S.)."

[37] General Permit, *supra* note 1, at 34. The general permit provides that "[t]iming and rate of applications to [sic] shall be in response to crop needs, assuming usual nutrient losses, expected precipitation and soil conditions."

[38] General Permit, *supra* note 1, at 9 (emphasis added).

[39] General Permit, *supra* note 1, at 6-7.

[40] National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990 (1990) (Lexis 1993).

[41] General Permit, *supra* note 1, at 6. CAFOs have been assigned Standard Industrial Classification code 0211, and fall within Category 1 of the storm water regulations because they are subject to National Effluent Guidelines listed at 40 C.F.R. § 412. *Id.* Category 1 facilities were required to submit a storm water permit application prior to October 1, 1992. However, compliance with the provisions of the general permit "satisfies all permitting requirements for the feedlot industry and CAFOs." *Id.* at 7.

[42] 55 Fed. Reg. 47990 (Lexis 1993).

[43] *Id.*

[44] *But cf.* 55 Fed. Reg. 47990 (Lexis 1993)("Today's rule clarifies the regulatory definition of 'associated with industrial activity' by adopting the language used in the legislative history and supplementing it with a description of various types of areas that are directly related to an industrial process [e.g., ... sites used for the application or disposal of process waters].")

[45] A recent inspection program conducted by the TWC in Erath County, Texas, found that 78 of 88 permitted dairies (those with 250 or more milking cows) exhibited no major deficiencies. A major deficiency includes the absence of waste water retention structure.

[46] *See* Foran, Butler, Cleckner and Bulkley, *Regulating Nonpoint Source Pollution in Surface Waters: A Proposal*, 27:3 Water Resources Bulletin 479, 480 (1991); N. Bushwick Malloy, Ideas for the Livestock Compact 1 (1992)(unpublished draft, National Center for Food and Agricultural Policy).

[47] 2 W. Rodgers, Environmental Law Air and Water § 4.10, at 162 (1986).

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

MEMBERSHIP DIRECTORY
The Association plans to reprint the membership directory this summer. Please submit any name, phone, or address changes to Bill Babione, AALA Director, University of Arkansas, Fayetteville, AR, by June 15, 1993. In particular, we would like to include members' e-mail addresses. Further, if you have not paid your 1993 dues, please so do immediately so that your name can be included in the directory.

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.