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A commentary on SARA Title III and its role in air quality litigation involving agriculture

In 1986, Congress passed the Emergency Planning and Community Right to Know Act. This Act was part of a larger Bill intended to re-authorize the Comprehensive Environmental Response, Compensation and Liability Act (*CERCLA)*, a law that is commonly referred to as the "Superfund Act" as it created a fund from which the cost of cleaning up hazardous waste facilities would be paid.[1] Since the 1986 amendment was part of this larger Bill, the 1986 amendment became known as Title III of the Superfund Amendment and Reauthorization Act[2], or SARA Title III for short.

When the 1986 amendment was passed, events occurring far from U.S. shores were vivid in the minds of the members of Congress. Specifically, Congress was concerned about the release of harmful chemical substances from manufacturing and industrial sites and the threat that such releases presented to emergency response agencies as well as the general public living and working near these facilities. In Bhopal, India, such releases killed and injured thousands in December, 1984.[3] To address this concern, Congress adopted a plan that incorporated a variety of reporting obligations. One involved reporting the presence of specific substances at the facility location. Congress authorized the Administrator of the Environmental Protection Agency to designate the substances to be reported and include a "threshold planning quantity" that would trigger the obligation to report its presence on the site.[4] Ammonia and hydrogen sulfide both appear on the Administrator's list of Extremely Hazardous Substances that are the subject of SARA Title III. In addition, Congress required facilities to report releases of hazardous substances if the amount released exceeded the "reportable quantity" that the EPA Administrator set and the substance actually escapes from the property on which it was released. Failure to file either of these required reports was identified as a violation that could be subject to a civil penalty.

In 2003, a federal district court ruled in *Sierra Club v. Tyson Foods*[5] that releases of ammonia from manure management facilities at a number of poultry production facilities were subject to these reporting obligations even if the federal or state environmental protection agencies did not initiate the litigation to enforce the obligations. The lawsuit was brought by the Sierra Club and interested citizens against an agricultural integrator that set specifications for raising animals at a contract farmer's location. This case calls into question whether the law passed in 1986 is being properly applied to animal production facilities across the country. This article is designed to present several different perspectives on the issues raised by the decision in the Kentucky case and the legal basis on which the decision rests. The article is presented in a point and counterpoint format to demonstrate the issues being debated in the case.

Point: Application of the SARA Title III (which will be shortened to ST3 hereafter) framework to emissions from "routine" agricultural operations, especially features of animal production, could create dilemmas on the land and in the legal arena. Some discussion of the implications resulting from its application should precede the actual implementation. The consequences, both expected and unintended, seem to be too great to miss this opportunity. Figure 1 (page 6) defines various types of noxious discharges from farms. It could be the basis for determining if ST3 applies to them. This typology is a starting point for the discussion. We will focus on these discharges rather then the inventory of chemicals since the *Sierra Club v. Tyson* case involves trespass from animal waste emissions rather than an actual inventory of the chemical.

Counterpoint: When Congress passes laws to address specific situations, it may not be in a position to know how its work product will be applied beyond the circumstances or situations that were mentioned as the need for the law. Finding a new application for an existing law can merit praise for the person for being creative and forward looking or criticism for expanding the application to areas where it was not intended to go. One's perspective on that question will be influenced by where he or she sits in regard to the

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underlying question or issue. The point about considering unintended consequences before a law is passed is well taken, but whose job should it be to consider these consequences and when should this consideration be made? When courts interpret statutes, they attempt to identify the legislature's intent in describing a situation to which the law would apply. Flexibility in legislation is a strength at times, but it can also be a weakness if the application of the law is unclear.

Point: One understanding of ST3 is that it was designed to encourage accounting for "emergency" releases. The perception is that emergency discharges are outside the expected range of normal operations in rate, quantity, and intent so that they pose an unanticipated threat. The incentive to regulate after Bhopal was certainly different from the concerns emerging from fire on the Cuyahoga River that led to the development of the Clean Water Act.[6] Can we really say that ST3 applies to routine release without establishing that point? This may be at the crux of the whole case.

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Counterpoint: ST3 was intended to cover emergency release situations, but there is ample evidence that emergency situations were not the only cases to which it applied.

Point: For the next series of comments, refer to Figure 1 (page 6). The application of ST3 to emergency releases is identified as a Type I noxious discharge. Another discharge that may be incriminated by those sensitive to the functioning of contemporary agriculture would be that caused by poor management (Type II). Although this discharge may be part of normal operations, it may be "off-label" in amount, timing, crop situation, etc. or simply not within the realm of normal production recommendations. This type of discharge seems to be outside the purview of ST3 because it requires additional background information to differentiate good from poor management of routine operations and is distinct from damage caused by the unintended character of Type I discharges. This differentiation of good versus poor management could be accomplished with sufficient effort only if the will were there. Developing an enforcement effort for "label" requirements might be a better approach than attempting to stretch the "emergency" release provisions of ST3 to fit this situation.

Counterpoint: The management analogy is valuable to a point. If ST3 is applicable only in the case where "poor" management resulted in an accidental release of a listed substance, then Congress would be creating a fault-based system, such as commonly found where negligent acts are considered to be the cause of actions that later damage or injure someone in such cases. Most environmental laws, such as CERCLA, the Clean Water Act[7] and the Clean Air Act[8] do not consider fault as a basis for imposing liability and ST3 fits in that same category.

The threshold quantity for reporting under ST3 refers back to the basic Superfund law[9] which distinguishes "releases" from "federally permitted releases", which are later referred to as limited situations in which authority to release the substance is given by some other federal law or it is considered to be a continuous release which requires notice annually or when a significant change in the release occurs. If a user of a FIFRA-regulated pesticide applies it according to the label directions and for the product's intended purpose, this is an allowed release. If a truck loaded with chemicals for lawn care is in an accident and the load is spilled into a ditch, that is a release that requires notification, even if the product is a FIFRA-registered pesticide

Point: This difference in situations is covered by Figure 1 because the routine application would not be in the universe of noxious discharges, but the truck wreck would.

Counterpoint: That is not to say that negligent actions are not at the root of some problems, rather it is to say that even if negligence is not found, ST3 and its applications will still apply.

Point: As defined in the introduction, there is an inventory of the chemical (ammonia) and possibly release beyond some threshold to report for the animal facilities contested in *Sierra Club v. Tyson Foods* under the purview of ST3. How is the threshold determined? Is it a release that is likely to be due to (1) accident/emergency, (2) negligence, or (3) a redefined routine "process" level? This is key since ST3 only applies to releases that are not "federally permitted."

Counterpoint: Do not get hung up on the negligence point. Since a strict liability standard is applied in many environmental protection laws, whether reasonable care was exercised does not matter. Simply establishing the fact that the user controlled the facility where the release occurred is enough to establish responsibility for the release. Some people think this is unfair. When Congress wrestled with the question, its choice was either to retain the negligence standard, which was the principle method by which environmental consequences were addressed before 1970, or move to a strict liability standard on the basis that public health and safety required the protection that strict liability could provide. Congress in the 1970's decided to protect public health and safety.

Point: Another classification of noxious discharge is based on changing societal expectations for routine agricultural discharges (Figure 1, Type III). This revision of discharge acceptability could be based on the discovery of previously unrecognized threats from routine discharges (Type IIIa). Amendments to the use of atrazine seem to be an example of a workable management response to this threat discovery rather than the application of ST3. The possible incrimination of ammonia emissions from land-applied animal manure seems to be a candidate for this class of discharge. The merit of extending ST3 compared to the development of other means to regulate these emissions seems to be open to question. Such an extension of the ST3 intent could generate a scoff-law situation by practitioners because the enforcement capacity required to control these emissions would exceed the resources available.

Counterpoint: Are you saying that some interpretations of ST3 could make the law too easy to apply and result in abuses? Lawsuit abuse is something that many people are concerned about, including lawyers. Whether lawsuit abuse exists is a

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U.S. agricultural lawyers participate in CEDR Congress

In October 2003, the European Council for Agricultural Law (the CEDR) held its 22nd Agricultural Law Congress and Colloquium in Almerimar, a coastal village in the town El Ejido, located about 45 minutes from Almería, in southern Spain.

The CEDR is made up of national agricultural law associations from at least 15 European countries, which represent 3500 agricultural lawyers. Some individuals are also members. CEDR enjoys consultative status with the FAO and the Council of Europe and has close relationships with the European Union. The CEDR sponsors a Congress every two years, and several AALA members have been active participants in CEDR activities.

The Congress in Almerimar followed the customary CEDR format, with two Commissions and a Round Table, each focused on a different topic. Commission I discussed the main topic for the meeting, "Agriculture, Environment and Food — The Functions and Responsibilities of the Farmer." Commission II discussed "The Agricultural Economy in the Light of National and European Competition Law," and the Round Table topic was "The Repercussions of the WTO on the CAP and on National Agricultural Law, Particularly as Regards Ecological Agriculture."

Before the Congress, national representatives for each topic prepared reports, guided by a detailed questionnaire. On the basis of timely national reports, the general reporter for each topic prepared a summary report. At the Congress, general reporters and national representatives presented their reports, and copies were available for participants. At the close of discussion, members of the Commissions and Round Table prepared conclusions, presented at the final general session.

Three members of AALA co-authored the U.S. report for Commission I: Margaret Rosso Grossman, Terence J. Centner, and Peggy Kirk Hall. The report was entitled "Agriculture, Environment and Food Production—The Role and Liability of the Farmer/Grower in the United States." Grossman and Centner attended the Congress and presented the U.S. report, which will be published (in a revised version) as an article in the May 2004 issue of *Agrarisch Recht*, the Dutch agricultural law journal. During the Congress, Grossman was invited to present an impromptu U.S. report for the Round Table on "Regulation of Genetically Modified Crops in the United States."

In addition to the academic sessions of the Congress, participants had a chance to learn about agriculture and culture of the region. They were treated to displays of produce grown in the sea of plastic greenhouses that blanket the countryside near Almería. An agricultural outing offered a tour of the greenhouses of a large vegetable grower, which produces three crops per year for export and local consumption, followed by visits to a small local winery, a historic sixteenth-century church in the village of Paterno del Rio, and a national park in the Alpujarra. Other cultural events included receptions at the University of Almería and at an old coastal fort.

—Margaret Rosso Grossman, Professor of Agricultural Law, University of Illinois at Urbana-Champaign

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matter of opinion. All of us can point to cases that seem unusual or extraordinary in their approach to seeking judicial resolution of a dispute. In most civil litigation involving claims below $100,000 a dispute is first heard by a panel of lawyers before it gets to a judge or jury. This is intended to weed out the weak cases before they get to trial. Should something like that be applied in environmental protection cases? People have advocated that environmental cases should be tried in special courts where the issues are better understood. The Tax Court system is an example of a special court designed to give disputing parties the option to have their cases heard before a court that has a better understanding of the issues. The Courts of Military Justice are another example of special court. These courts exist. Should one be created for environmental cases?

Point: The size and/or distribution of the regulated community could outstrip the enforcement capacity of the agencies and the courts because there would be too many actions to take for the number of staff available. Your suggestion of an environmental court makes a lot of sense.

Point: The remaining subclass of discharge includes those resulting from "routine" operations of unprecedented situations (Figure 1, Type IIIb). These situations were simply not known (or did not exist) at the time ST3 was developed an implemented. This seems to me to be the case for the changing expectations of ammonia and other emissions from modern animal facilities as in the *Sierra Club v. Tyson Foods* case.

Counterpoint: When ST3 was adopted in 1984, it required facilities that stored or released designated chemicals to comply with it. If a new facility opened after ST3 became effective, and it released or stored a designated chemical, then ST3 was something which the company needed to address. In other words, it is the change in the production practice or scale that makes the facility subject to the regulation that already applies to other facilities. You may not like that outcome, but it seems to be what is happening here.

Point: Would not the new facility be planned within the strategic environment of ST3? To apply ST3 to a facility after it was constructed could be seen as capricious. Using ST3 to regulate these new conditions of larger and more concentrated animal production facilities and centers would seem to be either a misapplication of the spirit of ST3 (redefining federally permitted releases) or an *ex post facto* incrimination of these situations.

Counterpoint: Although ST3 can impose stiff fines, these provisions are considered to be administrative penalties and not criminal violations. This might seem like legal "splitting hairs", but it will negate the "ex post facto" argument. "Ex post facto" comes from the Article 1 constitutional prohibition on "ex post facto" laws. In a 1798 Supreme Court case, *Calder v. Bull*, the Supreme Court decided that the prohibition applied only to penal or criminal laws. If a law is not a criminal law, then the restriction does not apply. Soon after CERCLA was passed the courts were asked to rule whether the law applied to impose liability on companies whose actions occurred before the law was enacted. The Court ruled that it did and it pointed to the fact that laws such as CERCLA are responding to a perceived threat to public health and safety. I do not think that bankruptcy was the reason for the Superfund statute, despite the fact that damages caused by environmental releases often exceed the assets that any business has. When confronted with that problem, who should pay the cost of cleaning up the site? Society can pay these costs by accepting the burden it imposes. Most of us bristle at the idea of paying more in income taxes, so why should "we" accept this burden caused by others? The "Superfund" idea, which is based on collection of tax from the sale of certain products, was originally thought to be adequate to cover the cost of clean up. History tells us it has not been adequate. Therefore,

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Ag-environmental law: impact on ag-finance

Drew L. Kershen

Although the modern era of environmental law began in the early 1970s and federal farm bills have had environmental chapters since the 1980s, the agricultural sector of American society has been comparatively less impacted by environmental laws and expectations than any major sector of the American economy. Federal environmental laws included agricultural exemptions; state laws often excluded agriculture completely from environmental laws; the federal farm bills imposed environmental compliance lightly and gingerly; and, environmental agencies focused their enforcement attention on industries and municipalities (Davidson, 2003; Ruhl, 2000). Despite this history, environmental laws and environmental compliance are increasingly important to American agriculture. This article will survey several recent developments concerning environmental laws and agriculture. Once the survey information has been presented, the article speculates about possible agricultural finance implications of these recent developments.

The Clean Water Act and concentrated animal feeding operations

In February 2003, the EPA adopted a new regulation under the Clean Water Act (CWA) for concentrated animal feeding operations (CAFOs)(EPA, 2003a). These regulations significantly expand the application of the CWA to CAFOs, with four expansions worth highlighting.

• Many sizeable animal feeding operations considered themselves exempt from the CWA because these operations had lagoons sufficiently large to contain manures and waste waters for all events other than a 25-year/24-hour rainfall event. In the new regulations, the EPA removed the lagoon capacity from the definition of CAFOs subject to the law and placed the lagoon capacity in the effluent limitation guidelines.

• Poultry operations, depending upon size, come within the new regulations regardless of the technology (liquid-manure or dry litter) used to manage manure. Previously, the EPA regulated only liquid-manure poultry operations.

• The land areas where livestock operators apply animal manure are explicitly brought within the new regulations. Previously, the EPA almost exclusively focused its regulations on the feedlots or animal barns and their affiliated lagoons or storage sheds.

• The EPA presented its new regulations as the federal minimum standards. Consequently, the EPA will look toward states with delegated authority under the CWA to be the primary regulatory agency with particular emphasis on state authority for stricter environmental regulation of CAFOs. Stricter state authority may particularly mean that CAFOs must apply for an individual permit, rather than a general permit, and that state-specific land use regulations, such as setbacks and zoning, may apply to CAFO siting decisions and to land application of manures.

In light of these four highlighted expansions, the number of animal feeding operations required to apply for CWA permits as CAFOs will increase from approximately 4,500 to between 15,000-20,000. CAFOs will be obliged to have comprehensive waste management plans for feeding facilities and to use field-specific best management practices when spreading manure in land applications. CAFOs will be required to keep records, among others, that provide evidence about periodic inspections, manure nutrient analyses, soil nutrient analyses, and manure volume and disposal. The EPA expects presently-existing CAFOs subject to the new regulation to be in full compliance with the regulatory requirements by the end of the year 2006 (EPA Fact Sheets).

The Clean Air Act and California agriculture

In October 2002, the EPA partially withdrew approval from thirty-four California state-approved Clean Air Act (CAA) permits programs, because California state law exempted agricultural sources from clean air standards. By partially withdrawing approval from the state-approved programs, EPA became the responsible regulatory agency for creating CAA permits programs for California agriculture (EPA 2002).

EPA indicated in the October 2002 regulation that it will focus its attention on three facets of California agriculture–diesel irrigation pumps, large dairies, and large concentrated animal feeding operations. EPA considers each of these targeted facets as agricultural sources that are equivalent to stationary end-of-pipe major sources of air pollution. In addition, EPA has proposed new technology-based regulations for manufacturers of diesel equipment (such as tractors or combines) to reduce emissions (EPA 2003b). On the more distant California horizon, the EPA may classify animal flatulence, tillage dust, harvest dust, wind dust from fields, field burning, and chemical sprays as fugitive sources (non-controllable and exempt) or non-fugitive major sources (controllable and covered) under the CAA.

By its regulatory actions, EPA manifests that specific California agricultural activities contribute emissions above the threshold necessary to be categorized as a "major source of air pollution," which is the statutory trigger for the CAA to apply. California may be a field test for the significant application of the CAA directly to agricultural activities nationwide.

Nonpoint source pollution and total maximum daily loads

In March 2003, the EPA withdrew from further consideration a proposed July 2000 regulation that would have implemented a comprehensive total maximum daily load (TMDL) program for nonpoint source pollution. TMDL plans are pollutant budgets that allocate allowable amounts of pollutants between point sources (such as the discharge pipes from municipal sewage treatment plants) and nonpoint sources (such as runoff from agricultural fields). The total pollutant budget allocated is set at an amount that does not exceed or degrade state-created water quality standards established for specific segments of individual lakes, streams, and rivers. In its March 2003 withdrawal, the EPA stated that "significant changes would need to be made to the July 2000 rule before it could represent a workable framework for an efficient and effective TMDL program." (EPA 2003c).

TMDLs are of significant importance to agriculture because the major nonpoint source pollutant is sediment from farm fields. Sediment carries with it manures, fertilizers, and chemical residues of herbicides, pesticides, and fungicides. Depending upon how TMDLs are written and implemented, farmers could potentially face regulations about farming methods, farming inputs, crop selection, and land utilization. Moreover, TMDLs must be designed and written for geographic-specific concerns of topography, water flow, land use, soil texture, rainfall patterns–to name a few parameters–in order to satisfy water quality standards designated for specific segments of lakes, streams, or rivers. Consequently, TMDLs will be information-intensive regulations that will be time-consuming to create and numbering in the hundreds for each lake, stream, or river.

While creating each TMDL will be a complex task, behind the TMDLs is the additional legal and policy debate about the

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state-created water quality standards themselves. States must properly assess lakes, streams, and rivers to determine their water quality status. Once the water quality status is assessed, states must set water quality standards for the assessed waters that are acceptable, sensible, and feasible for the affected constituencies, including, to name three, agriculture, municipalities, and recreational users.

The implementation of a regulatory TMDL program for nonpoint source pollution would likely be the most far-reaching and comprehensive environmental program that agriculture may face in the foreseeable future.

Ag-finance impacts from ag-environmental laws–speculations

Ag-environmental law will impact ag lenders by raising the operating costs of their customers but also by potentially offering new opportunities as farmers and ranchers adopt new technologies to comply with these regulations. Compliance with the agricultural environmental regulations surveyed in this article will be costly. Leaving aside the administrative costs for drafting, implementing, and enforcing these regulations, farmers and ranchers will directly incur costs. The EPA estimates that each large-size CAFO will spend $26,800 per year to comply with the new CAFO regulations; each medium-size CAFO, $8,600 per year (EPA, 2003a). Better-capitalized farms and ranches will be able to absorb these environmental compliance costs than poorly-capitalized farms and ranches.

Moreover, depending upon whether "small" farms and ranches are exempted from these environmental regulations, small farms and ranches may be the agricultural enterprises most adversely affected by compliance costs. However, if small farms and ranches are exempted, the environmental benefits expected from these environmental regulations may be undermined to a significant degree. Depending upon how many agricultural enterprises are exempted as "small," the small-farm-and-ranch exemptions may allow significant environmental pollution to continue. Of course, these exempted small farms and ranches could be subsidized by the government to pay the compliance costs. But these subsidies may face opposition from those who espouse the environmental principle that the polluter must internalize the cost itself–i.e, the polluter-pays principle. In addition, larger farms and ranches, forced to internalize the compliance costs, may oppose these subsidies to small farms and ranches by endorsing the polluter-pays principle for everyone in order to gain competitive advantage.

How to comply with agricultural environmental regulations is a second issue. Compliance depends primarily upon two considerations–the style of the regulations and the technologies available.

Regulations that are command-and-control regulations provide less flexibility to agricultural enterprises than regulations that specify quality standards and quality goals. Command-and-control regulations tell farmers and ranchers what they can and cannot do–e.g. limitations on the number of animals in a feedlot or mandatory exports of manures from geographic areas. Regulations that specify standards and goals allow agricultural enterprises to choose how to meet those standards and goals–e.g., runoff water may not exceed "x" parts per million of phosphorus.

If agricultural enterprises are given flexibility to choose how to meet environmental standards and goals, agricultural enterprises will likely look for cost-effective technologies to comply. Technologies that show promise of assisting farmers and ranchers in reducing the environmental impacts of agriculture include:

- better designs for animal-confinement buildings and lagoons;
- diesel and gasoline engines for farm equipment designed to meet air pollution standards;
- manure separation into solid and liquid components that makes the manure a more valuable, consistent fertilizer;
- adoption of herbicide-resistant crops that allows farmers to choose low-till or no-till agronomic practices;
- precision-farming equipment that measures the nutrient needs of crops and adjusts the application-rate as the equipment passes through the field;
- insect-resistant crops from agricultural biotechnology that reduce the use of chemical pesticides;
- animals and animal-feeds from agricultural biotechnology that enhance digestion and feed-conversion ratios for better growth and nutrition; and
- forages and crops from agricultural biotechnology that better utilize available water and nutrients for equivalent yields.

Of course, these technologies are feasible for agricultural enterprises only if the technologies make economic sense and if the regulatory agencies permit their use. Indeed, this author has argued elsewhere that environmental agencies should encourage agricultural enterprises to adopt the best available technologies to reduce the environmental impacts of agriculture (Kershen, 2002).

Conclusion

Environmental regulations for agriculture will be a prominent feature of the agricultural landscape in the years to come. Environmental regulations will shape the faces, the landscapes, and the technologies of agriculture. Agricultural finance will have to respond to these environmental regulations while maintaining an economically viable agricultural sector to meet the food and fiber needs of people in the United States and around the world.

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the law looks to a variety of other "responsible parties" and has them contribute to the cost of the cleanup.

Point: ST3 application in either case could lead to difficulties in response on the land – the rules have changed from those under which the operations were conceived and business plans created. Routine discharges of these unprecedented situations are simply not the emergencies for which ST3 was developed. If ST3 is applied without some visioning, substantial investments of time and resources may be required to resolve its application to these discharges. Furthermore, well-meaning actions that apply a tool to a situation for which it was not developed often lead to the most disruptive unintended consequences.

Counterpoint: It seems that businesses are constantly adapting to change in the workplace as well as in government regulatory approaches. Can businesses argue that new regulations should not be applied to them, because they never expected that these regulations would be created and enforced? I do not think they could do so successfully. Nothing stays unchanged forever.

Point: There are many cases of "grandfathering" when the requirements for compliance are perceived and agreed upon to be onerous.

Counterpoint: Grandfathering is a possibility, but at some point in time a grandfathered facility must become a complying facility. If Congress chooses to "grandfather" some activities it must decide when the grandfather status ends. If Congress chooses not to "grandfather", as it did in the case of ST3, what signal does that send? What intent can be drawn from what Congress has not done?

Point: Granfathering could be based on the obsolescence of the buildings. They have notoriously short lives and the companies are often involved in determining when an old building needs to be renovated or replaced. This is much like the current Clean Air Act flap over the rephrasing of when changes to an existing power plant trigger the need to comply with new source performance standards. Is this a place to wrestle with the consequences of *Sierra Club v. Tyson* for the individual owners of the buildings? In this case, the action is against a company that does not "own" the buildings.

Counterpoint: In developing some type of regulatory approach, some people think it unfair if one facility operator chooses to close a facility rather than comply with the new regulation. Many processes by which regulations are developed weigh the cost of the proposal against its benefits. If the costs are less than the benefit, the regulation is adopted. In this context, costs include a variety of things, including the costs that others will have to bear in complying with the regulatory scheme. Some think this process to be unfair since it would allow the regulation to be implemented even though it recognizes that some "cost" will be incurred for implementing it.

Conclusion: The *Sierra Club v. Tyson Foods* case raises a number of important issues for livestock producers, the farmers they contract with, and people who believe their first allegiance is to a safe environment. The January, 2004 edition of the *Agricultural Law Update* focused on the issue of whether Tyson Foods was a person in charge and an operator for purposes of ST3. This article addresses a broader question, whether ST3 was properly applied to the facts. *Sierra Club v. Tyson Foods* is but one decision in a single federal district court, but it does alert all of us to consider the reason why laws are created and the importance of thinking in broad terms when viewing the regulatory landscape. The question of whether ST3 was properly applied in this case is far from resolved. Stay tuned.

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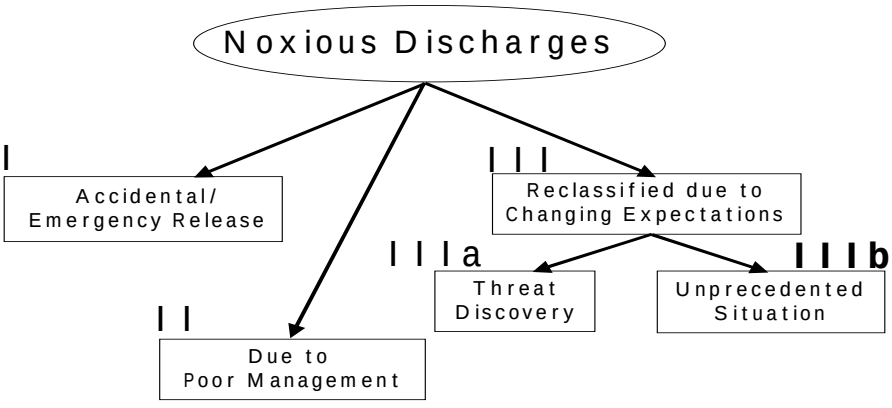
[8] Public Law 95-95, Aug. 7, 1977, 91 Stat. 685.
[9] Public Law 96-510, Title 1 section 103 Dec. 11, 1980.

Figure 1. Classification of noxious discharges from farms.



Manufacturers not joint employers with farm labor contractors

In *Gonzalez-Sanchez v. International Paper Co.*, 346 F.3d 1017 (11th Cir. 2003), the United States Court of Appeals for the Eleventh Circuit held that two paper manufacturers were not joint employers along with the farm labor contractors that employed the plaintiffs and therefore could not be held liable for monetary relief under either the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 or the Migrant and Seasonal Agricultural Protection Act ("AWPA"), U.S.C. §§ 1801-1872. *See id.* The court further held that although the plaintiffs did not prevail on the joint employer issue, that fact alone did not make the issue of class certification moot, and it therefore remanded the case back to the district court on the class certification issue. *See id.*

Defendants International Paper Company (IP) and Union Camp Corporation (UC), are manufacturing companies that cultivate forest land to produce paper products. *See id.* at 1020. The defendants used farm labor contractors to provide workers to maintain the forest land. *See id.* Five migrant employees of farm labor contractors sued the defendants for monetary relief under violations of the FLSA and the AWPA. *See id.* at 1019. The migrant employees claimed that the defendants were joint employers with the farm labor contractors. *See id.* Suing on behalf of themselves and other migrant workers, the plaintiffs requested class certification. *See id.* The United States District Court for the Northern District of Florida granted summary judgment for defendants, holding that they were not joint employers and therefore determining that certification of a class would be moot. *See id.* at 1017. The plaintiffs appealed the district court's decision to the Eleventh Circuit. *See id.*

The plaintiffs argued that the defendants, along with the farm labor contractors, were their joint employers and were therefore liable for the monetary damages owed for their alleged violations of FLSA and AWPA. *See id.* at 1020.

The court explained that both FLSA and AWPA define the term "employ" as when an entity "'suffer[s] or permit[s] an individual to work.'" *Id.* (quoting 29 U.S.C. § 203(g) and 29 U.S.C. § 1802(5)). It also explained that "'[a]n entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependant on the entity.'" *Id.* (quoting *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999)) (citation omitted). The court further explained that because "joint employment relationships–where a single individual stands in relation of an employee to two or more persons at the same time–are common in agriculture, ... both statutes deliberately make 'it clear that a worker can be economically dependent on, and thus jointly employed by more than one entity at the same time.'" *Id.* (quoting *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996)). *See also* (29 C.F.R. § 500.20(h)(5). Finally, the court explained that a joint employment relationship exists if, as a matter of economic reality, a laborer is dependent upon both the farm labor contractor and the agricultural employer, but "if the two entities are commonly disassociated with respect to the employment of a particular employee, a joint employment situation does not exist." *Id.* at 1021 (citing *Antenor*, 88 F.3d at 930; 29 C.F.R. § 500.20(h)(5)).

The court used the seven factors discussed in *Martinez Mendoza v. Champion International Corp.*, 340 F.3d 1200 (11th Cir. 2003) as a guidepost in determining whether the defendants were joint employers. *See id.* at 1021. The *Champion* factors addressed whether the agricultural employer has direct control over the worker, the employer's hiring and firing power, the duration of the relationship between the employer and employee, the complexity of skills required by the worker, how integral was the task performed in light of the business operation, whether the job was performed on the employer's premises, and whether the job was the kind ordinarily performed by actual employees. *See id.*

The court determined that the evidence presented did not support the plaintiffs' claim that the defendants had direct control over the workers. See *id.* at 1022. The court also determined that the defendants did not exercise power customary to the role of employer, such as, the power to hire and fire and issue payroll. *See id.* at 1022, 1023. The court further determined that forestry maintenance was just a small part–not an integral part–of the defendants' business operation. *See id.* at 1022.

The court therefore held that the defendants were not joint employers along with the farm labor contractors of the migrant workers. *See id.* at 1023. The court also held, however, that its holding did not automatically preclude consideration of the plaintiffs' request for class certification. *See id. See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1383 n.16 (11th Cir. 1998) (en banc) (recognizing that in some cases a plaintiff can appeal a decision to deny class certification even if the plaintiff no longer has a controversy with the defendant). The court therefore remanded the matter to the district court with respect to the class certification issue. *See id.*

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Livestock purchase-money security interest

In *Zink v. Vanmiddlesworth*, 2003 U.S. Dist. LEXIS 17302 (N.D. N.Y.), U.S. District Judge Norman Mordue upheld the legal ruling of the Bankruptcy Judge for the Northern District of New York denying plaintiff (Zink) priority for a properly perfected security interest in 54 head of dairy cattle that Zink had sold in November 2001 to defendant (Vanmiddlesworth). The bankruptcy judge ruled that Zink had a purchase-money security interest but that Zink did not have a priority livestock purchase-money security interest [N.Y. UCC § 9-324(d)] as against other security interest holders. The bankruptcy judge ruled that Zink did not have a priority livestock purchase-money security interest because Zink had not complied with subsections (2) to (4) of section 9-324(d). Zink had not sent notice of the security interest in the dairy cattle to the holders of conflicting security interests.

The *Zink* case is the first reported decision under Revised Article 9 about the newly-created livestock purchase-money security interest. U.C.C. § 9-324(d).

Zink sold the dairy cattle to Vanmiddlesworth in the fifth month (November 2001) after the uniform effective date for Revised Article 9 on July 1, 2001. Zink clearly did not know, and did not receive advice, about section 9-324(d). From the facts, it is clear that Zink, and his attorney, were thinking in terms of the pre-July 2001 Article 9. They lacked awareness that Revised Article 9 had created a livestock purchase-money security interest that would have given Zink a priority security interest if Zink had complied with its requirements.

—Drew L. Kershen, University of Oklahoma, Norman, OK

AALA Conference Reminder

The 2004 AALA Annual Educational Symposium will be held at the Hotel Fort Des Moines, in Des Moines, Iowa, October 1-2, 2004. President-elect Bill Bridgforth is putting together an excellent program that will highlight the critical information needed by attorneys who practice agricultural law. Please reserve these dates and help us to spread the word about this excellent continuing legal education opportunity.