Agricultural Law Update

VOLUME 8, NUMBER 8, WHOLE NUMBER 93 MAY 1991

Official publication of the American Agricultural Law Association

INSIDE

IN FUTURE ISSUES

- USDA issues final regulations implementing 1990 Farm Bill changes in the conservation enforcement programs

UCC disclaimers in ag chemical case

In *Southland Farms, Inc. v. Ciba-Geigy Corp.*, 575 S.2d 1077, 1991 WL 31719 (1991), the Alabama Supreme Court found that Ciba-Geigy's disclaimer of incidental and consequential damages on the labels of its herbicide Dual and its fungicides Ridomil MZ 58 and Ridomil Bravo 81W was not unconscionable and was effective to preclude the recovery of consequential damages.

The United States District Court for the Southern District of Alabama had granted Ciba-Geigy's motion for partial summary judgment, limiting the plaintiff's recovery to the cost of the product. Plaintiff appealed to the Eleventh Circuit, which certified the question of conscionability to the Alabama Supreme Court. In its opinion, the Alabama Supreme Court held that where a provision excluding consequential damages is so widely used and accepted in a particular trade that it can be characterized as a "usage of trade," it has been found to be reasonable. The Court said:

> Agricultural chemicals are sold, on an industry-wide basis, subject to an exclusion of liability for consequential damages. The affidavit of Dr. Everett Cowett, director of technical services for the Agricultural Division of Ciba-Geigy, has attached to it sample labels from 18 different pesticide manufacturers, all containing clauses excluding consequential damages. Clauses excluding consequential damages are permitted under the U.C.C. because they are an allocation of unknown or undeterminable risks.
>
> Slip Op. at 6.

After quoting with approval the Minnesota Supreme court's decision in *Kleven v. Geigy Agricultural Chemicals*, 303 Minn. 320, 227 N.W.2d 566 (1975) (enforcing the identical disclaimer in a claim involving the herbicide AAtrex), and the Fifth Circuit's holding in *Lindemann v. Eli Lilly & Co.*, 816 F.2d 199 (5th Cir. 1987) (enforcing a similar disclaimer in a claim involving the herbicide Treflan), the Alabama Supreme Court concluded:

> As these cases demonstrate, a consequential damages exclusion in the commercial context of the sale of agricultural chemicals is an accepted method of risk-shifting in the industry . . . There are several reasons that make these clauses an accepted usage of trade: (1) the vagaries of nature and the nature of such products; (2) the fact that the numerous factors affecting crop yield are beyond the manufacturer's control; (3) the fact that if the potential for consequential losses

Continued on page 3

Federal agencies required to adopt dispute resolution policies

The Administrative Dispute Resolution Act (Pub. L. No. 101-552) requires each federal administrative agency to adopt a policy that addresses the use of alternative dispute resolution and case management. This new law could prove important to farmers and agribusinesses entering into government contracts involving farm programs and such contracts as the Uniform Grain Storage Agreement under which grain warehouseman operate.

Under the statute, alternative dispute resolution includes settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration. The law requires the head of each federal agency to designate a senior official as the "dispute resolution specialist."

The statute requires each federal agency to review each of its standard agreements for contracts, grants, and other assistance and to determine whether to amend any such standard agreements to authorize and encourage the use of alternative means

Continued on page 3

Bibliography of ag law articles

Administrative Law

Kelley & Harbison, *A Guide to the ASCS Administrative Appeal Process and to the Judicial Review of ASCS Decisions*, 36 S.D.L. Rev. 14-53 (1991).

Sisk, *Two Proposals to Clarify the Tucker Act Jurisdiction of the Claims Court*, 37 Fed. B. News & J. 47 (1990).

Webster, *Choice of Forum in Claims Litigation*, 37 Fed. B. News & J. 534 (1990).

Animal Rights

Francione, *Access to Animal Care Committees*, 43 Rutgers L. Rev. 1-14 (1990).

Bankruptcy

Farmers

Chapter 11

Kratzke & Depperschmidt, *"Reasonable Rent" and Opportunity Cost in the Family Farmer Bankruptcy Act*, 39 Drake L. Rev. 863-879 (1990).

Langston, *A Practical Guide to the Use of Chapter 11 of the Bankruptcy Code in Large Farm and Ranch Reorganizations*, 21 Tex. Tech. L. Rev. 2087-2125 (1990).

General

Casenote, *Bankruptcy Law —The Absolute Priority Rule Reasserted —No Equity Participation Without Tangible Capital Contribution. [Norwest Bank Worthington v. Ahlers, 108 S. Ct. 963, 1988]*, 23 Suffolk U. L. Rev. 857-865 (1989).

Biotechnology

Comment, *The Monkey's Paw: Regulating the Deliberate Environmental Release of Genetically Engineered Organisms*, 66 Wash. L. Rev. 247-265 (1991).

Jurgensen, *Of Plants, Patents, and Breeders' Rights: Some Proposals For International Unification of Proprietary Protection of Plant Biotechnology*, 12 J. Agric. Tax'n & L. 291-333 (1991).

W. Lesser, *Animal Patents: The Legal, Economic and Social Issues* (Stockton Press 1990).

Cooperatives

Organizational Issues

Hoekstra, *The Fiduciary Duty Owed by the Farm Credit System Cooperatives to Their Member-Borrowers*, 13 J. Agric. Tax'n & L. 3-34 (1991).

Taxation

Butwill, *IRS Expands Availability of Patronage Dividend Deductions and Tax-exempt Status For Cooperatives But Restricts Benefit of Package Design Expenditures*, 12 J. Agric. Tax'n & L. 342-351 (1991).

Environmental Issues

Erwin, *Agricultural Pollution and the Everglades: A Clean Water Act Solution*, 10 Va. Envtl. L.J. 165-185 (1990).

N. Hamilton, *What Farmers Need To Know About Environmental Law: Iowa Edition* (Drake Univ. Agric. Law Ctr. 1990).

Hawrylak, *What You Should Know About Wetlands*, 7 The Prac. Real Est. Law. 59-68 (1991).

Noble, *Lender Liability and CERCLA*, 12 J. Agric. Tax'n & L. 352-360 (1990).

Schneider, *The Regulation of Agricultural Practices to Protect Groundwater Quality: The Nebraska Model For Controlling Nitrate Contamination*, 10 Va. Envtl. L.J. 1-44 (1990).

Equine Law

Husband, *Taxpayers Engaged in Breeding, Raising, and Training Horses are Generally Subject to Withholding Liability*, 12 J. Agric. Tax'n & L. 361-362 (1991).

Note, *Consumer Protection—Deceptive Trade Practices — Avoiding the Issue of Whether Implied Warranties Extend to Professional Services By Defining Horse Training as a Modification of an Existing Tangible Good [Archibald v. Act III Arabians, 755 S.W.2d 84 (Tex. 1988)]*, 20 St. Mary's L.J. 731-736 (1989).

Estate Planning/Divorce

Dickinson, *Marital Deduction Pitfalls: Part I*, 12 J. Agric. Tax'n & L. 363-372 (1990).

Dickinson, *Marital Deduction Pitfalls: Part II*, 13 J. Agric. Tax'n & L. 82-90 (1991).

Farm Policy and Legislative Analysis

Sharpston, *European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and For Whom?*, 11 Nw. J. Int'l L. & Bus. 87-103 (1990).

Wynne & Bradley, *Is the 1990 Farm Bill the Opening Shot in a "Quiet Revolution?"*, 44 Sw. L.J. 1383-1392 (1991).

Fiduciary Duties of Lenders

Note, *The Duty of Good Faith: Let the Borrowers Beware or Let Them Eat Acreage? [Federal Deposit Insurance Corp. v. Coleman, 33 Tex. Sup. Ct. J. 557 (1990)]*, 44 Sw. L. J. 1289-1298 (1990).

Food and Drug Law

Malloy, *The Codex Alimentarius Provides International Standards for Food Production and Safety*, 12 J. Agric. Tax'n & L. 334-341 (1991).

Scott, *Continuity and Change in British Food Law*, 53 Mod. L. Rev. 785-801 (1990).

Hunger & Food Issues

Comment, *Introduction to the WIC and CSFP Programs*, 24 Clearinghouse Rev. 820-828 (1990).

Hunting, Recreation & Wildlife

Hill, *The Convention on International Trade in Endangered Species: Fifteen Years Later*, 13 Loy. L.A. Int'l & Comp. L.J. 231-278 (1990).

Meyers & Bennett, *Answering the "Call of the Wild": An Examination of U.S. Participation in International Wildlife Law*, 7 Pace Envt'l. L. Rev. 75-116 (1989).

International Trade

Comment, *The EC Hormone Ban Dispute and the Application of the Dispute Settlement Provisions of the Standards Code*, 10 Mich. J. Int'l L. 872-885 (1989).

Land Use Regulation

Land Use Planning and Farmland Preservation Techniques

Glenn, *Real Property —Land Use Control — Protection of Agricultural Land — Vest Rights*, 69 Canadian B. Rev. 784-794 (1990).

Holloway & Guy, *Emerging Regulatory Emphasis on Coordinating Land Use, Soil Management and Environmental Policies to Promote Farmland Preservation, Soil Conservation and Water Quality*, 13 Zoning & Plan. L. Rep. 49-55 (1990).

Iconitskaya, *Legal Protection of Land in the USSR*, 7 Pace Ent'l. L. Rev. 161-170 (1989).

Leases, Landlord-Tenant

Agricultural Law Update

VOL. 8, NO. 6, WHOLE NO. 92 Apr. 1991

AALA Editor.....Linda Grim McCormick
188 Morris Rd., Toney, AL 35773

Contributing Editors: Winthrop A. Rockwell, Faegre & Benson, Minneapolis, MN; David C. Barrett, Jr. National Grain and Feed Assoc., Washington, D.C.; Drew L. Kershen, The University of Oklahoma College of Law, Norman, OK; Linda A. Malone, The Marshall-Wythe School of Law, The College of William & Mary, Williamsburg, VA; Linda Grim McCormick, Toney, AL;

State Reporters: Terence J. Centner, University of Georgia, Athens, GA; The Honorable John C. Akard, Bankruptcy Judge for the Northern District of Texas; Neil D. Hamilton, Drake University School of Law, Des Moines, Iowa.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313.

Barr, *Value in an Agricultural Tenancy*, 35 J. L. Soc'y of Scotland 478-480 (1990).

Livestock and Packers & Stockyards

Note, *Constitutional Law—First Amendment—Federal Requirement that Cattle Producers Fund Statutorily Created Cattlemen's Board and Beef Promotion Operating Committee Does Not Violate Free Speech and Associational Rights [United States v. Frame, 885 F.2d 1119 (3rd Cir. 1989)]*, 35 Vill. L. Rev. 762-782 (1990).

Pesticides

Brett & Potter, *Risks to Human Health Associated With Exposure to Pesticides at the Time of Application and the Role of the Courts*, 1 Vill. Envt'l. L.J. 355-430 (1990).

Brinchuk, *Soviet Environmental Law: Ecological and Legal Problems of Agro-Chemicalization*, 7 Pace Envt'l. L. Rev. 171-178 (1989).

Brownback, Krissek, & Maxwell, *An Overview of Kansas's Regulation of Agricultural Chemicals and Pesticides*, 13 J. Agric. Tax'n & L. 66-72 (1991).

Comment, *Carcinogen Roulette: The Game Played under FIFRA*, 49 Md. L. Rev. 975-1007 (1990).

Comment, *Inert Ingredients and Pesticide Registration Data Requirements: EPA's Complacency Compounds FIFRA's Inadequacies*, 15 Vt. L. Rev. 265-299 (1990).

Uram, *International Regulation of the Sale and Use of Pesticides*, 10 Nw. J. Int'l L. & Bus. 460-478 (1990).

Public Lands

McClaran, *Livestock in Wilderness: A Review and Forecast*, 20 Envt'l. L. 857-889 (1990).

Taxation

Klein, *Special-use Valuation: Tax Court Rejects Attempt To Validate Faulty Election*, 18 J. Real Est. Tax'n 278-281 (1991).

Note, *Tax Law —I.R.C. § 2032A Special Use Valuation (Estate of Thompson v. Commissioner, 864 F.2d 1128, 4th Cir. 1989)*, 12 W. N. Eng. L. Rev. 195-215 (1990).

Sobotka, *Recent Changes in Agricultural Tax Policy Encourage Reliance on Economic Realities*, 13 J. Agric. Tax'n & L. 35-65 (1991).

Uniform Commercial Code.

Federal Preemption of Farm Products Exception

Meyer, *Litigating Under the Federal Farm Products Rule*, 12 J. Agric. Tax'n & L. 373-382 (1991).

Veterinary Law

King, *The Standard of Care For Veterinarians in Medical Malpractice Claims*, 58 Tenn. L. Rev. 1-71 (1990)

Water Rights: Agriculturally related

Bell & Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 Envt'l. L. 1-88 (1991).

Comment, *The Stagnation of Texas Ground Water Law: A Political v. Environmental Stalemate*, 22 St. Mary's L.J. 493-517 (1990).

Davidson, *Emerging Issues in Western Water Transfers*, 13 J. Agric. Tax'n & L. 73-81 (1991).

Hamilton, *Iowa Surface Drainage Law and Groundwater Quality Protection: Is There Potential Landowner Liability for Plugging Agricultural Drainage Wells and Sinkholes?*, 39 Drake L. Rev. 809-841 (1990).

Hanson, *Minnesota's Groundwater Protection Initiative*, 10 Hamline J. Pub. L. & Pol'y 275-299 (1989).

Malone, *The Necessary Interrelationship Between Land Use and Preservation of Groundwater Resources*, 9 UCLA J. Envt'l. L. & Pol'y 1-72 (1990).

If you desire a copy of any article or further information, please contact the Law School Library nearest your office.

—Drew L. Kershen, Professor of Law, The University of Oklahoma College of Law, Norman, OK

UCC DISCLAIMERS IN AG CHEMICAL CASE/cont. from page 1

were shifted to the seller, the cost of the product would be prohibitive; and (4) the fact that crop insurance is available to the farmer to mitigate any burdensome effect that such an exclusion would have.

Slip Op. at 8 (footnote omitted).

The Alabama Supreme Court had previously confirmed the validity of "risk shifting provisions in the commercial context" in *Kennedy Electric Co. v. Moore-Handley, Inc.*, 437 So.2d 76 (Ala. 1983), and in *Puckett, Taul & Underwood v. Schreiber Corp.*, 551 So.2d 979 (Ala. 1989).

The Court's holding in *Southland Farms*, followed its holding twelve years earlier in *Majors v. Kalo Laboratories, Inc.*, 407 F.Supp. 20 (M.D. Ala. 1979) denying the enforcement of UCC disclaimers in a case involving a defective soybean innoculent. In that case, Kalo had represented its product as "100% guaranteed," while limiting the guarantee to the return of the purchase price. The *Majors* court found that tests conducted before the sale to plaintiff had revealed doubt as to whether the manufacturing process relied upon by Kalo was effective. The Court found that Kalo knew of the uncertainty and did nothing to disclose the uncertainty to plaintiff.

> In summary, the situation presented here is one of an alleged latent defect in a product whose effectiveness was known by its manufacturer to be questionable and an exclusion which has the effect of foreclosing any recovery by a farmer for large and foreseeable consequential damages for crop failure.

Majors, 407 F. Supp. at 23.

In light of the holding in *Southland Farms* it seems clear that the *Majors* Court would not have reached its holding absent two factors. First, there was not only a mere allegation of defect in *Majors*, but also actual evidence of defect from product tests; second, there was evidence that Kalo knew of the problem and not only failed to disclose it but claimed in its promotional brochure that the product was 100% grower guaranteed. The *Majors* court acknowledged:

> Were this exclusion to operate merely to prevent Kalo from becoming an insurer of crop yields, which are affected by numerous and incalculable variables of weather and other factors a different case might be presented.

Majors, 407 F. Supp. at 22. *Southland Farms* is clearly the "different case" forecast by the *Majors* court.

—Winthrop A. Rockwell, Faegre & Benson, Minneapolis, MN

DISPUTE RESOLUTION POLICIES/ cont. from page 1

of dispute resolution. Consequently, farmers and agribusinesses entering into contracts with USDA and other federal agencies will need to be aware that arbitration or other alternative dispute resolution clauses may be included in government contracts in the future. While all parties to a dispute must consent to submit a dispute to alternative dispute resolution, the statute provides that "consent may be obtained either before or after an issue in controversy has arisen." However, the statute also provides that "an agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit."

Generally, arbitration awards under the new law become final 30 days after service of the decision on the parties. However, the head of an administrative agency is given the right to set aside an arbitration award before it becomes final. If an arbitration award is vacated by the head of an administrative agency, a party to the arbitration may petition the agency head for an award of attorney fees and expenses incurred in connection with the arbitration proceeding.

—David C. Barrett, Jr. National Grain and Feed Association, Washington, DC

The Conservation Title of the 1990 Farm Bill

By Linda A. Malone

The conservation title of the 1990 Farm Bill, known as the "Conservation Program Improvements Act," significantly expands the scope of the conservation reserve programs, creating several new environmental reserve programs, while broadening the exemptions and weakening enforcement of the sodbuster and swampbuster programs.

SODBUSTER

Section 3812 of title 16 governing exemptions from sodbuster compliance provides that a tenant's inegibility payments may be limited to the farm that was the basis for the ineligibility determination if the tenant has made a good faith effort to comply with the sodbuster requirements (including enlisting the assistance of the Secretary to get a reasonable conservation compliance plan), the landlord refuses to comply with such plan for the farm, and the tenant's lack of compliance is not part of a scheme or device to avoid compliance.[1]

Moreover, failure to "actively apply" a conservation plan for sodbuster compliance will not result in ineligibility for program payments if the person has not violated the sodbuster provision within the previous five years and acted in good faith without intent to violate the act. [2] Instead, the violator's program benefits for that crop year alone will be reduced by not less than $500 nor more than $5,000, depending on the seriousness of the violation, so long as the person actively applies the conservation plan according to schedule in subsequent crop years.[3] Finally, no person will be found ineligible for payments under the sodbuster program if: (1) the violation is technical, minor in nature, and has a minimal effect on the erosion control purposes of the conservation plan; (2) the failure is due to circumstances beyond the control of the person; or (3) the Secretary has granted a temporary variance from the practices in the plan for handling a specific problem.[4]

Excluded from sodbuster compliance altogether under the amendments is noncommercial production of agricultural commodities if limited to two acres or less and if the Secretary determines the production was not intended to circumvent the requirements of the program.[5]

SWAMPBUSTER

The most extensive changes in the amendments are to the swampbuster and conservation reserve programs. In addition to the previous statutory and regulatory exemptions to the swampbuster prohibition, also exempt is production on a converted wetland if the wetland has been frequently cropped prior to conversion and the conversion is mitigated by restoration of another wetland converted before December 23, 1985. The restoration must be in accordance with a restoration plan, be in advance of or concurrent with the conversion, not be at the expense of the federal government, be on not greater than a one-for-one acreage basis unless more acreage is necessary for adequate mitigation, be on lands in the same general area of the local watershed as the converted wetland, and be subject to a recorded easement so long as the other wetland is not returned to its original state.[6] A producer has a right to appeal the imposition of a mitigation agreement requiring more than one-to-one acreage mitigation.[7]

A good faith exemption to the sanctions of the program is provided as with the sodbuster program. A person's payment may be reduced by not less than $750 nor more than $10,000 for the crop year rather than terminated altogether if the person is actively restoring the converted wetland under an agreement with the Secretary or the wetland has been restored, the person has not violated the swampbuster requirements in the previous ten-year period, and the conversion was done in good faith without intent to violate the requirements of the program.[8]

Any violator of the swampbuster program can once again become eligible for program payments by fully restoring the illegally converted wetland to its prior wetland state.[9] Cropland will not be considered a wetland in the first instance if its wetland characteristics result from the actions of an "unrelated person or public entity, outside the control of, and without the prior approval of the landowner or tenant. . . ."[10]

ECARP

Lands qualifying to be placed in reserve are broadly expanded pursuant to the amendments under the umbrella of the "environmental conservation acreage reserve program."[11] In addition to highly erodible land, wetlands and lands with water quality problems may be placed in reserve.[12] Land placed in the environmental conservation reserve program during the 1986 though 1995 calendar years must take not less than 40,000,000 nor more than 45,000,000 acres.[13]

CRP

Eligible lands for the conservation reserve program are defined as:

"(1) highly erodible croplands that—

(A) if permitted to remain untreated could substantially reduce the production capability for future generations; or

(B) cannot be farmed in accordance with a plan under section 1212;

(2) marginal pasture lands converted to wetland or established as wildlife habitat prior to the enactment of the Food, Agriculture, Conservation, and Trade Act of 1990;

(3) marginal pasture lands to be devoted to trees in or near riparian areas or for similar water quality purposes, not to exceed 10 percent of the number of acres of land that is placed in the conservation reserve under this subchapter in each of the 1991 through 1995 calendar years;

(4) croplands that are otherwise not eligible—

(A) if the Secretary determines that (i) such lands contribute to the degradation of water quality or would pose an on-site or off-site environmental threat to water quality if permitted to remain in agricultural production, and (ii) water quality objectives with respect to such land cannot be achieved under the water quality incentives program established under chapter 2;

(B) if such croplands are newly-created, permanent grass sod waterways, or are contour grass sod strips established and maintained as part of an approved conservation plan;

(C) that will be devoted to, and made subject to an easement for the useful life of, newly established living snow fences, permanent wildlife habitat, windbreaks, shelterbelts,

(D) if the Secretary determines that such lands pose an off-farm environmental threat, or pose a threat of continued degradation of productivity due to soil salinity, if permitted to remain in production."[14]

Although contracts may range from ten to fifteen years, contracts for certain lands devoted hardwood trees, shelterbelts, windbreaks, or wildlife corridors are more flexible in their duration.

Linda A. Malone is Professor of Law at The Marshall-Wythe School of Law, The College of William & Mary, Williamsburg, VA.

[15]Upon application by the appropriate state agency, the Secretary can also designate watershed areas of the Chesapeake Bay region, the Great Lakes region, the Long Island Sound region and other areas of special environmental sensitivity for inclusion in the reserve. *Id.*[16]

Not less than one-eighth of the land placed in the reserve from 1991 to 1995 must be devoted to trees or noncrop vegetation or water that may provide a permanent habitat for wildlife.[17] The Secretary is also authorized under certain conditions to permit "alley cropping," which is the "practice of planting rows of trees bordered on each side by a narrow strip of groundcover, alternated with wider strips of row crops or grain."[18]

WRP

A new wetlands reserve program is also created for approximately one million acres from 1991 to 1995.[19] Eligible wetlands are farmed wetlands or converted wetlands (along with adjacent lands functionally dependent on such wetlands) if "the likelihood of the successful restoration of such land and the resultant wetland values merit inclusion . . . in the program taking into consideration the cost of such restoration."[20] Some other wetlands may be eligible under certain conditions.[21]

The owner of qualifying wetlands must agree to grant an easement on the land to the Secretary with an appropriately recorded deed restriction and to implement a wetland conservation plan to preserve the wetlands values. [22] The easement must be for thirty years, be permanent, or have the maximum duration allowed under applicable state laws.[23]

Compensation is provided for the easement in cash in an amount not to exceed the difference in the fair market value of the land unencumbered and as encumbered with the easement.[24] Cost sharing for conservation and technical assistance are also provided by the Secretary. [25]

VOLUNTARY INCENTIVE PROGRAM

The amendments also create a voluntary incentive program to encourage development of water quality protection plans. [26] From 1991 to 1995 the Secretary can enter into agreements of three to five years on 10 million acres with owners and operators of farms to implement such plans in return for which the Secretary will provide cost sharing assistance for the implementation of wetland preservation or wildlife habitat improvement [27] and an "annual incentive payment."[28] Payments to a participant may not exceed $3,500 per person per year in incentive payments and not more than an additional $1,500 per person per contract in cost-sharing assistance.[29] Eligible lands include:

"(1) areas that are not more than 1,000 feet from a public well unless a larger wellhead area is deemed desirable for inclusion by the Secretary in consultation with the Environmental Protection Agency and the State agency responsible for the State's operations under the Safe Drinking Water Act (42 U.S.C. 300h-7);

(2) areas that are in shallow Karst topography areas where sinkholes convey runoff water directly into ground water;

(3) areas that are considered to be critical cropland areas within hydrologic units identified in a plan submitted by the State under section 319 of the Federal Water Pollution Control Act (33 U.S.C. 1329) as having priority problems that result from agricultural nonpoint sources of pollution;

(4) areas where agricultural nonpoint sources have been determined to pose a significant threat to habitat utilized by threatened and endangered species;

(5) areas recommended by State lead agencies for environmental protection as designated by a Governor of a State;

(6) in consultation with the Secretary, other areas recommended by the Administrator of the Environmental Protection Agency or the Secretary of the Interior;

(7) lands that are not located within the designated or approved areas but that are located such that if permitted to continue to operate under existing management practices would defeat the purpose of the program as determined by the Secretary; or

(8) areas contributing to identified water quality problems in areas designated by the Secretary."[30]

Priority in accepting agreements is given to lands on which agricultural production contributes to or creates potential failure to meet water quality standards or the goals and requirements of federal or state water quality laws.[31] A separate environmental easement program is created for the Secretary to acquire easements on land placed in the conservation reserve, land under the Water Bank Act (16 U.S.C. § 1301), and other cropland that contains riparian corridors, is a critical habitat or that contains other environmentally sensitive areas.[32] In return for the easement and implementation of a natural resource conservation management plan, the Secretary will provide cost-sharing, technical assistance, and annual easement payments for a period not to exceed ten years in an amount not to exceed the lesser of $250,000 or the difference in the land's value with and without the easement.[33]

Reauthorization highlighted the disagreement between environmentalists on the one hand and producers and the administering agencies on the other over the need to strengthen and expand the 1985 provisions. The object of most of this controversy was wetlands preservation.

Both the Environmental Protection Agency and the Soil and Water Conservation Society had determined that wetland conversion had significantly decreased after implementation of the swampbuster program.[34] Many environmental organizations claimed the program had had little impact, often pointing to the fact that at least 77,000 acres of nonexempt wetlands had been converted since 1985.[35] When the ASCS reported in April of 1989 that 427 producers had lost their benefits due to the swampbuster prohibition,[36] the National Wildlife Federation asserted, based on a Freedom of Information Act request, that only twenty-six producers had actually lost benefits between December 23, 1985 and April 15, 1989.[37]

Although the battle lines were clearly drawn in the 1990 debates, there were no clear victors. The Conservation Program Improvements Act generally strengthened the conservation programs. While expanding their reach, however, the Act also added several new exemptions and did nothing to restrict the more controversial exemptions already provided (the "commencement" and "hardship" exemptions to swampbuster, for example), which environmental groups claimed were subject to abuse. Moreover, the basic enforcement mechanisms for violations remain unchanged.

The Act exemplifies the current schizophrenia in environmental regulation of soil erosion. Agriculture, like most sectors of the economy, cannot remain immune from the ever expanding sweep of environmental regulation. Yet meaningful enforcement of such regulation threatens the most fundamental premise in the agricultural economy— constantly expanding production. The difficult choice between emphasis on production or environmental preservation was skirted alto-

Continued on page 6

gether in the Act in a compromise meant to be palatable to producers and environmentalists. The scope of the conservation restrictions was expanded but there are limited possibilities for enforcement of the restrictions against those who fail to comply.

[1] House and Senate Final Approved Bill Text Report, 1990 Conservation Program Improvements Act, § 3812.

[2] *Id.* § 1412(c)(f)(1)(A), (B), amending 16 U.S.C. 3812.

[3] *Id.* § 1412(c)(f)(2), amending 16 U.S.C. 3812.

[4] *Id.* § 1412(c)(f)(4), amending 16 U.S.C. 3812.

[5] *Id.* § 1412(f)(h), amending 16 U.S.C. 3812.

[6] *Id.* § 1422, amending 16 U.S.C. 3822 § 1222(f)(2).

[7] *Id.* § 1422, amending 16 U.S.C. 3822 § 1222(g).

[8] *Id.* § 1422, amending 16 U.S.C. 3822 § 1222(h)(1).

[9] *Id.* § 1422, amending 16 U.S.C. 3822 § 1222(i).

[10] *Id.* § 1424, amending Subtitle C of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1224.

[11] *Id.* § 1431, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1230(a).

[12] *Id.*

[13] 1990 Conservation Program Improvements Act, § 1431, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1230(b).

[14] *Id.* § 1432, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1231(c).

[15] *Id.* § 1432, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1231(e)(2). The Secretary can extend the contract period for such lands up to five years with the agreement of the owners. *Id.*

[16] *Id.* § 1432, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1231(f)(1).

[17] *Id.* § 1433, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1232(c).

[18] *Id.* § 1433, amending Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1232(d)(4).

[19] *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237(b).

[20] *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237(c).

[21] *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237(d).

[22] *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237A(a).

[23] *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1237A(e)(2).

[24] *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3921 et seq.) § 1237A(f).

[25] *Id.* § 1438, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3921 et seq.) § 1237C(b).

[26] *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) §1238B(a). Agreements for incentive payments authorized under this section require implementation of an approved water quality protection plan by the owner or operator concerned as well as compliance with any other conditions included by the Secretary in the agreement to facilitate implementation of the plan or administration of the program. *Id.*

[27] *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238B(a)(4)(A).

[28] *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238B(a)(5)(C).

[29] *Id.* §1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238B(a)(6)(C)(i).

[30] *Id.* § 1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1238C(a).

[31] *Id.* §1439, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1239(b)(1).

[32] *Id.* § 1440, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1239(b)(1).

[33] *Id.* § 1440, amending Subtitle D of Title XII of the Food Security Act of 1985 (16 U.S.C. 3821 et seq.) § 1239B, and § 1239C(a), (b), (c).

[34] Environmental Protection Agency, Aerial Photographic Analyses of Wetland Conversion Related to the Food Security Act 11-17 (1990); Soil and Water Conservation Society, Implementing the Conservation Provisions of the Food Security Act 8-9 (1989).

[35] Soil Conservation Service, Food Security Act Progress Report - October 1989 (1989).

[36] Agricultural Stabilization and Conservation Service, Sodbuster/Swampbuster Cumulative Data Report for March and April (1989). More than half won back their benefits on appeal. Department of Agriculture, 11 Farmline 5 (Feb. 1990).

[37] Presentation by Anthony N. Turrini, National Wildlife Federation to the Annual Meeting of the American Agricultural Law Association, November 3, 1990.

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in April, 1991.

1. FCIC; General crop insurance regulations; interim rule; comments due 6/3/91. "Deletes a subsection which provides that FCIC does not insure against losses caused by flooding on any unit subject to a water flowage easement." 56 Fed. Reg. 13576.

2. CCC; 1992 wheat program; acreage reduction percentage; proposed rule. 56 Fed. Reg. 13787.

3. CCC; Cooperative marketing associations; eligibility requirements for price support; final rule; effective date 4/12/91. 56 Fed. Reg. 14856.

4. CCC; Food, Agriculture, Conservation, and Trade Act; Implementation; final rule; effective date 4/18/91. 56 Fed. Reg. 15964.

5. CCC; Grains and similarly handled commodities; FOR program; 1990 wheat as collateral; final rule; effective date 4/18/91. 56 Fed. Reg. 15812.

6. CCC; Grain and similarly handled commodities; FOR program; final rule; effective date 4/22/91. 56 Fed. Reg. 16263.

7. USDA; Delegation of authority by the Secretary of Agriculture for adjudication of sourcing area applications pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990; final rule; effective date 4/5/91. 56 Fed. Reg. 14009.

8. USDA; Small or Limited Resource Famers' Initiative; proposed rule. 56 Fed. Reg. 15302.

9. USDA; Highly erodible land and wetland conservation; Food, Agriculture, Conservation, and Trade Act; implementation; final rule; effective date 11/28/90. 56 Fed. Reg. 18630.

10. FmHA; Agricultural Credit Act of 1987 and additional amendments of portions of farmer program regulations; final rule; effective date 4/18/91. 56 Fed. Reg. 15813.

11. ASCS; CCC; Agricultural Resources Conservation Program; final rule; effective date 4/19/91. 56 Fed. Reg. 15980.

12. ASCS; CCC; Food, Agriculture, Conservation, and Trade Act; Implementation; final rule; effective date 4/19/91. 56 Fed. Reg. 16156.

—Linda Grim McCormick

AG LAW CONFERENCE CALENDAR

1991 Summer Ag Law Institute at Drake University
June 3-6: Analysis of the farmer's comprehensive liability insurance policy; June 10-13: International ag. trade law; June 17-20: Tax issues in agriculture; June 24-27: Wetlands protection law and agriculture (swampbuster and section 404); July 9-11: Legal aspects of livestock production and marketing; July 15-18: The 1990 Farm Bill and federal farm programs.
Sponsored by Drake University Agricultural Law Center.
For more information, contact Prof. Neil D. Hamilton at 515-271-2065.

Innovation in Western Water Law and Management
June 5-7, 1991, Univ. Memorial Center, Univ. of Colorado School of Law.
Topics include: Designing dispute resolution systems for water policy and management; federal regulatory interests in water; can conjunctive use and the priority system co-exist?
Sponsored by Nat. Resources Law Ctr.
For more information, call 303-492-1297.

Seventh Annual Farm, Ranch & Agri-Business Bankruptcy Institute
October 17-19, 1991, Lubbock Texas.
Sponsored by Texas Tech University School of Law, the Association of Chapter 12 Trustees, and the West Texas Bankruptcy Bar Association, Inc.
For more information, call Robert L. Jones, 806-762-5281.

State Roundup

FLORIDA. *Right-to Farm Act - changes in operation.* A Florida District Court has ruled in *Pasco County v. Tampa Farm Service, Inc.*, 573 So.2d 909 (Fla. Dist. Ct. App .2d 1990), that a change in farming operation may not be protected by the Florida Right-To-Farm Act. The change involved the substitution of a wet manure distribution process for a dry process.

Tampa Farm Service, Inc., a poultry farm, was cited by Pasco County in 1987 for violation of county waste disposal ordinances for the distribution of its wet manure. Tampa Farm subsequently requested a declaratory judgment and an injunction against the enforcement of the ordinances, claiming protection under the Florida Right-to-Farm Act. Fla. Stat. § 823.14.

The appellate court noted that the Florida Right-to-Farm Act provides that technologies implemented by farmers in Florida after 1982 may be subject to nuisance law and reasonable governmental regulations. The Florida law does not "permit an existing farm operation to change to a more excessive farm operation with regard to noise, odor, dust, or fumes where the existing farm operation is adjacent to an established homestead or business on March 15, 1982." Fla. Stat. § 823.14(5).

Thus, local governments may regulate changes in agriculture practices, and new agricultural practices may not be permitted if they cause unreasonable degradation of established neighborhoods. The case was remanded to the trial court to determine whether the change from dry to wet manure distribution resulted in a substantial degradation of the locale.

—Terence J. Centner, University of Georgia, Athens, GA.

TEXAS. *Chapter 12 status report.* [This article summarizes the report of Walter O'Cheskey, Chapter 12 Trustee in the Northern District of Texas concerning operations for the year ended December 1990.]

Funds disbursed to creditors under Chapter 12 plans total $4,417,192. [Of this total disbursement, 83% was paid to secured creditors; 1% to priority creditors; 14% to unsecured creditors; 1% to debtor attorneys; and less than 1% to other administrative expenses.]

The debtors disbursed approximately an additional 32% or $1,413,501 in direct payments to secured creditors under their plans.

Since enactment of the Chapter 12 legislation in November, 1986, 297 cases have been filed in the Lubbock, Abilene, Amarillo, and San Angelo divisions. To date, 23 cases have been completed. It is projected that 80 to 100 additional cases will be completed in 1991.

Total debt being serviced direct by debtors is $43,264,193, and the Trustees office is disbursing on $94,876,743, for a total of $138,140,936. Debtors are paying 32% of their debt direct to creditors. Overall over $2 million have been disbursed to unsecured creditors under Chapter 12 plans.

The Office of the Trustee is preparing a program that will assist farmers in obtaining operating loans during and after completion of their Chapter 12 plans. Debtors will also be assisted in cleaning up their credit files with the credit reporting services upon completion of their plans.

—Submitted by the Honorable John C. Akard, Bankruptcy Judge for the Northern District of Texas

IOWA. *Court rules Iowa State University Swine Nutrition Research facility a nuisance and enjoins waste disposal practices.* In a livestock related nuisance action, a Boone county district court judge ruled the recently completed Iowa State University Swine Nutrition and Management Center, constructed on 200 acres west of Ames, was a private nuisance. *Sayre v. Iowa State University*, Cause No. 32306, Iowa District Court for Boone County, December 29, 1990.

The plaintiffs, two families who lived north of the facility, alleged odors from the 1.5 million gallon waste slurry storage tank were a private nuisance that interfered with the use and enjoyment of their property and reduced its value.

The properties are located in Boone County, which has no county zoning. The University has owned the site since 1965, the same year the Sayres purchased their 18-acre farmstead, while the Gaugers purchased their acreage and home in 1981. Construction of the facility was begun in June 1989 and the suit was filed in September 1989. Construction was completed by the time of trial in September 1990. The research facility is a collection of different hog production units, which when completed will hold 200 sows, 10 boars, 1150 finishing hogs and 650 pigs in the nursery and farrowing facilities. The 1.5 million gallon glass lined waste slurry holding tank system is considered the state of the art in waste storage, offering advantages over lagoon systems in "no ground pollution, less surface exposed, greater odor control" and preservation of more nutrients for spreading.

At the time of the trial the facility was populated by only 160 sows, resulting in underloading of the slurry holding tank which caused it to act more as an open lagoon. At the trial, the Sayres testified odors from the facility were "offensive, sickening and causing anxiety and frustration." The Gaugers also complained of offensive, nauseating odors. The parties testified the values of their properties had been reduced by 30-35% by the presence of the facility.

In considering the testimony as to the amount of interference caused by the odors, the court determined that based on the prevailing winds and expert testimony, "the odors which would be considered objectionable reach the Plaintiffs' properties between 1.8 and 2 percent of the year." The court concluded the odors from the slurry tank will be a nuisance, noting:

> Because livestock production is prevalent in Iowa, it is reasonable to expect certain amount of odors from animals and their waste to exist in rural areas. When the concentration and noxious character becomes objectionable, it becomes a nuisance within the meaning of the law. The mere existence of the hog confinement facility on the site is not a nuisance. The presence of hogs within the facility is not a nuisance, nor does the fact they may create an odor of itself cause a claim or actionable nuisance. The storing of the waste from the hog confinement operation in the open slurry tank in proximity to the homes of the Plaintiffs creates offensive odors. The storage in this manner and the spreading of manure in question near the Plaintiff's homes will create an interference with the Plaintif's comfortable enjoyment of their property. The odor from these sources is, or will be, a nuisance within the definition of the statute. The problem may be dealt with in the form of abatement of the nuisance.

The court ordered that within 120 days the defendant had to abate the nuisance "by installing a cover over the slurry tank to preclude the emission of noxious odors from the tank as the waste accumulates." In addition the court ordered that "distribution of wastes from the slurry tank will be by incorporation into the soil by knifing so that the slurry does not form or accumulate on the surface of the earth." The spreading of the slurry was ordered to be limited to "one time per year and shall not be distributed into the soil within 1320 feet in any direction of the residences of any of the Plaintiffs in these proceedings."

Though the ruling is a serious threat to the operation of the research facility, the University decided not to appeal the case. The court's injunction will have a definite impact on the ability of the University to use the facility for research purposes, in particular as to the timing and methods of waste disposal.

—Neil D. Hamilton, Drake University, School of Law, Des Moines, Iowa

219 New York Avenue
Des Moines, Iowa 50313

Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Eighth Annual Writing Competition

The AALA is sponsoring its eighth annual Student Writing Competition. This year, the AALA will award two cash prizes in the amount of $500 and $250. Papers must be submitted by June 30, 1991, to Prof. Leon Geyer, Virginia Tech, Blacksburg, VA 24061-0401. (703) 231-4528.

AALA Distinguished Service Award

The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration, or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information of no more than four pages in support of the nominee. The nominee must be a current member of the AALA and must have been a member for at least the preceding three years. Nominations should be sent to Prof. Leon Geyer, Virginia Tech, Blacksburg, VA 24061-0401. (703) 231-4528.