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INSIDE

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IN FUTURE ISSUES

No deferral where payment received by agent (payments constructively received)

One of the basic elements of federal income tax law has been the doctrine of constructive receipt.[1] The doctrine of constructive receipt has been frequently litigated in agriculture2 and, most recently, was applied to a fact situation involving year-end payments made by a value-added cooperative.[3]

The doctrine of constructive receipt

Income is constructively received when it is credited to the taxpayer's account, set apart, for the taxpayer, made available so the taxpayer could have drawn on it or could have drawn upon the amount if notice of intent to withdraw had been given.[4] As the regulations note-

"However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions."[5]

Thus, IRS has successfully argued that a check is income in the year received (even if it is lost) and not two years later when the check is reissued,[6] the proceeds of livestock sold and delivered one year with proceeds received the following year are constructively received in the earlier year[7] and government farm payments are income in the year the funds are available to the taxpayer.[8]

IRS has also argued, successfully, that sales to a purchaser considered to be an agent of the seller are considered ineligible for deferral of income tax liability.[9]

Scherbart v. Comm'r

In the 2004 Tax Court case of *Scherbart v. Commissioner*,[10] the taxpayer was a member of a cooperative, Minnesota Corn Processors (MCP), which was owned by corn producers for the purpose of marketing and processing their corn. Under a document denominated as the Uniform Marketing Agreement, the taxpayer designated MCP as the taxpayer's agent. The taxpayer was obligated to deliver bushels of corn equal to the number of "Units of Equity Participation" held in MCP.

MCP made "value added" payments to its members subsequent to each of the three required delivery periods for corn during the year and, in addition, made discretionary year-end value-added payments determined after the close of MCP's fiscal year ending September 30. The year-end payments were not mandatory and were based on MCP's "net proceeds."[11]

In 1995, the taxpayer attempted to defer the year-end value added payment for 1995 to 1996 (as the taxpayer had done in 1994 and in each year since becoming a member of MCP "in the early 1980s."[12]

Citing the regulations[13] and *Warren v. United States*,[14] in which a cotton gin acted as taxpayer's agent in collecting and holding the proceeds of cotton sale, the Tax Court held that MCP served as taxpayer's agent for making the corn sales and receiving sales income with the only limitations placed on taxpayer's receipt of income being self-imposed. Therefore, the limitations were ineffective to achieve a deferral for tax purposes with the taxpayer constructively receiving the year-end value added payments during the taxable years in issue.[15]

Possible solution

In the 1982 Fifth Circuit Court of Appeals case, *Busby v. United States*,[16] the sale of a cotton crop on a deferred basis was successful in withstanding an IRS challenge where an irrevocable escrow account was established by the cotton gin with no right by the taxpayer to the funds until the following year.[17] The deferred payment was the result of an arm's length agreement and was held by the court to shift the income to the next year.18 Although there may be resistance to the time and possible expense involved with such an irrevocable escrow account, and there is always the risk of an IRS challenge, particularly in another Court of Appeals area, the irrevocable escrow does offer one possible solution.

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[1] Treas. Reg. § 1.451-2. See generally 4 Harl, *Agricultural Law* section 25.03[2](2004); Harl, *Agricultural Law Manual* § 4.01[1][b](2004).

[2] E.g., *Warren v. United States*, 613 F.2d 591 (5th Cir. 1980).

[3] *Scherbart v. Comm'r*, T.C. Memo. 2004-143.

[4] Treas. Reg. § 1.451-2(a).

[5] *Id*.

[6] *Walter v. United States*, 148 F.3d 1027 (8th Cir. 1998)(cash basis seller of livestock).

[7] *Romine v. Comm'r*, 25 T.C. 859 (1956).

[8] Rev. Rul. 68-44, 1968-1 C.B. 191.

[9] *Arnwine v. Comm'r*, 696 F.2d 1102 (5th Cir. 1983), rev'g, 76 T.C. 532 (1981)(cotton gin (acting on seller's behalf insofar as distribution of proceeds of crop sales concerned) received proceeds which were income to producer-seller); *Williams v. United States*, 219 F.2d 523 (5th Cir. 1955)(receipt by agent is receipt by principal; escrow arrangement unilateral and not product of bona fide arm's length negotiation); *Warren v. United States*, 613 F.2d 591 (5th Cir. 1980)(cotton gin acted as taxpayer's agent in collecting and holding proceeds of cotton sale); *P.R. Farms, Inc. v. Comm'r*, 820 F.2d 1084 (9th Cir. 1982), aff'g,T.C. Memo 1984-549 (sale of fruit by agent; proceeds includible in taxpayer's income in year of sale even though not remitted to taxpayer until later year). Compare *Busby v. United States*, 679 F.2d 48 (5th Cir. 1982)(sale of cotton crop on deferred basis with irrevocable escrow account established by cotton gin with no right by taxpayer to funds until following year.

[10] T.C. Memo 2004-143.

[11] *Id.*

[12] *Id*.

[13] Treas. Reg. § 1.451-2(a).

[14] 613 F.2d 591 (5th Cir. 1980).

[15] *Scherbart v. Comm'r*, T.C. Memo. 2004-143.

[16] 679 F.2d 48 (5th Cir. 1980).

[17] *Id*.

[18] Id. See Maurer and Harl, "Using Escrow Accounts and Letters of Credit to Assure Payment Under Credit Sales Agreements," 14 J. Agr. Tax & L. 3, 17 (1992). See also *Reed v. Comm'r*, 723 F.2d 138, 145-148 (1st Cir. 1983)(taxable income not recognized until funds payable from escrow account).

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

Agricultural tax and law seminars
August 24-27, 2004
Interstate Holiday Inn, Grand Island, NE
Topics include: farm and ranch estate planning and income tax by Dr. Neil E. Harl; farm and ranch business planning and agricultural commercial and property law with taxation by Roger A. McEowen.
For further information, contact Robert Achenbach at 541-302-1958 or by e-mail, Robert@agrilawpress.com

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Iowa's right to farm law declared unconstitutional

By Barclay Rogers

The Iowa Supreme Court has declared that state's right to farm law unconstitutional. In its June 16, 2004 decision in *Gacke v. Pork Xtra*, No. 02-0417, 2004 WL 1344973 (Iowa 2004), the Iowa Supreme Court held that the right to farm statute amounted to an unconstitutional taking and imposed an unduly oppressive burden on property owners who would be precluded from bringing nuisance lawsuits because of the immunity protections provided by the statute. The *Gacke* decision builds upon the Iowa Supreme Court's earlier ruling in *Bormann v. Board of Supervisors in and for Kossuth County*, 584 N.W.2d 309 (Iowa 1998), in which the court held unconstitutional a statute providing for immunity from nuisance lawsuits in designated agricultural areas.

Right to farm laws

Right to farm laws exist in all fifty states in one form or another. In general, these laws were designed to protect agricultural operations from encroaching urban sprawl. *See* Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 Drake J. Agric. L. 121, 127-8 (2000) ("As more urban dwellers moved into agricultural areas, 'nuisance' lawsuits by those urbanites threatened the existence of many farms"). States and localities adopted right to farm laws to shield agricultural operations from nuisance lawsuits. The Iowa right to farm law for animal operations is typical of most right to farm statutes and provides:

> 1. The purpose of this section is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa's competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations.
>
> 2. An animal feeding operation, as defined in section 459.102, shall not be found to be a public or private nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action. However, this section shall not apply if the person bringing the actions proves that an injury to the person or damage to the person's property is proximately caused by either of the following:
>
> a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.
>
> b. Both of the following:
>
> (1) The animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the person's life or property.
>
> (2) The animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation.

Iowa Code § 657.11.

Iowa's right to farm law unconstitutional

Uncompensated taking in violation of the takings clause of the Iowa Constitution

In *Gacke*, the Iowa Supreme Court held that the right to farm statute constituted an uncompensated taking under the Iowa constitution. Having decided that the statute violated the Iowa constitution, the court declined to address whether the statute also violated the Takings Clause of the Federal Constitution.

In 1996, Pork Xtra, a farming corporation, built two hog confinement buildings approximately 1,300 feet from the house that Joseph and Linda Gacke have resided in since 1974. The Gackes filed a lawsuit in 2000 alleging that Pork Xtra's operation was a nuisance. In the lawsuit, the Gackes sought compensatory and punitive damages for the diminution in the value of their property and pain and suffering; they also sought an injunction restraining the defendant from operating a nuisance. After trial, the district court found that the hog confinement facilities were a nuisance and awarded the Gackes $50,000 for loss in property value and $46,500 in compensatory damages for past inconvenience, emotional distress, and pain and suffering. The court, however, refused to award punitive damages and declined to issue an injunction. Pork Xtra appealed the decision arguing that the district court erred in allowing the nuisance case to proceed because it was barred by Iowa's right to farm law.

The Iowa Supreme Court relied on its earlier decision in *Bormann* to conclude that the right to farm law created an easement over the Gacke's property. In *Bormann*, the Iowa Supreme Court determined that immunity protections from nuisance lawsuits in areas designated as agricultural zones created easements over the land affected by the nuisance. *Bormann*, 584 N.W.2d at 316. The court held that the right to maintain a nuisance was an easement and that a physical invasion of the property was not necessary for the intrusion to become a taking. *Id.* at 321. Accordingly, the court treated the nuisance protections as a *per se* taking, requiring compensation without regard to the state's interest in establishing the protections. *Id.* at 316. The statute granting nuisance immunity was therefore "a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution … [and] article I, section 18 of the Iowa Constitution." *Id.* The court's decision in *Bormann* recognized that the nuisance protections "took one of the sticks (the right to not be subject to unreasonable interference with the reasonable use of your land) from the bundle representing the property rights of the farmer's neighbor." Richardson & Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 Drake J. Agric. L. at 133.

The *Bormann* decision hearkens back to the debate, familiar to all first year law students, over whether one party can obtain the right to pollute a neighbor's property. In *Boomer v. Atlantic Cement Co.*, 309 N.Y.S.2d 312 (N.Y. 1970), the New York Court of Appeals ruled that a large cement plant could avoid the issuance of an injunction by paying the plaintiffs' damages for future operation of the plant as a nuisance. The dissent in *Boomer* argued that "the majority is, in effect, licensing a continuing wrong" and is "impos[ing] servitude on land, without the consent of the owner, by payment of permanent damages where the continuing impairment of land is for a private use." *Boomer*, 309 N.Y.S.2d at 321 (Jasen, J., dissenting). The *Boomer* dissent essentially became the majority's reasoning in *Bormann*.

In *Gacke*, Pork Xtra argued that the Iowa Supreme Court had incorrectly concluded in *Bormann* that the protections from nuisance lawsuits were *per se* takings and that instead they should be analyzed according to the balancing test developed in *Penn Central Transportation Co. v. City of New*

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York, 438 U.S. 104 (1978). Under *Penn Central*, so-called *regulatory* takings—those that fall short of *per se* takings–are subject to a balancing test that weighs the economic impact of the regulation, the government's interference with investment backed expectations, and the character of the government's action to determine whether an unconstitutional taking has occurred. *Id.* at 124. The Iowa Supreme Court declined to retreat from *Bormann*, reasoning that "[w]hether the nuisance easement created by section 657.11(2) is based on a physical invasion of particulates from the confinement facilities or is viewed as a nontrespassory invasion akin to the flying of aircraft over land, it is a taking under Iowa's constitution." *Gacke*, 2004 WL 1344973, * 4.

The court, however, determined that the plaintiffs' remedy under the takings theory was limited to the diminution of property values and did not include damages for pain and suffering, emotional distress, and the like. The court noted that "[t]he standard of compensation required for the taking of an easement is the decrease in value of the dominant estate … resulting from the taking of the easement," and explained that this measure is "the difference in fair market value of the property before and immediately after imposition of the easement." *Id.* at * 5 (internal citations and quotations omitted). The court concluded that "[b]ecause the recovery of diminution-in-value damages fully compensates the burdened property owners for the unlawful taking of an easement, the restrictions of the Takings Clause end at that point." *Id.*

Unreasonable exercise of police power in violation of the inalienable rights clause of the Iowa Constitution

The Iowa Supreme Court then analyzed the right to farm statute under the inalienable rights clause of the state constitution, which provides:

> All men are, by nature, free and equal and have certain inalienable rights – among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Iowa Const., Art I, § 1. The court noted that the right to use and enjoy property, the basis of nuisance law, had long been recognized as an inalienable right under the Iowa constitution. *Gacke*, 2004 WL 1344973, * 8 *citing State v. Osborne*, 154 N.W. 294 (Iowa 1915). The court explained that inalienable rights were not absolute but were "subject to reasonable regulation by the state in the exercise of its police power." *Gacke*, 2004 WL 1344973, * 7.

In evaluating the right to farm law, the Iowa Supreme Court held that it was an unreasonable use of the police power and therefore ran afoul of the inalienable rights clause. The court ruled that the "oppressive effect of the statutory immunity … distinguishes this case from those where the plaintiffs are simply adversely affected by the statute." *Gacke*, 2004 WL 1344973, * 10 *distinguishing May's Drug Stores v. State Tax Comm'n*, 45 N.W.2d. 245, 250 (Iowa 1950). The court also distinguished *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995), a case in which the Iowa Supreme Court upheld a mandatory contribution to a partition fence against a challenge under the inalienable rights clause, on the grounds that "the Gackes receive no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general" and that they "sustain significant hardship" in the form of a continuing nuisance. *Gacke*, 2004 WL 1344973, * 9. The court looked to two factors to support its conclusion that the immunity provisions violated the inalienable rights clause: (1) the Gackes had vested rights in their property, including considerable expenditures associated with improving the property, and (2) the statute would essentially leave them with no right of recovery. *Id.* The court concluded that Iowa's right to farm statute "as applied to the Gackes is unduly oppressive and, therefore, not a reasonable exercise of the state's police power." *Id.* at 10.

The court went on to order a new trial because it concluded that the district court had erroneously admitted prejudicial hearsay evidence during trial.

Implications of *Gacke* and *Bormann* decisions

Right to farm statutes create special protections for agricultural operations while imposing burdens on the general public. The Iowa Supreme Court termed these special protections "flagrantly" unconstitutional and remarked that "[w]hen all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of the few." *Bormann*, 584 N.W.2d at 322. The court further stated in *Bormann* that "[i]n short, it appropriates valuable private property interests and awards them to strangers." *Id.* In *Gacke*, the court was less vitriolic but nevertheless concluded that "one property owner – the producer – is given the right to use his property without due regard for the personal and property rights of his neighbor." *Gacke*, 2004 WL 1344973, * 10.

The *Gacke* and *Bormann* decisions cast into doubt the constitutionality of right to farm laws across the country. At heart, all of these laws sacrifice the rights of aggrieved neighbors for the corresponding benefit of agriculture. While this shifting of rights has been generally accepted by the public, the changing face of agriculture – particularly the concentration in the livestock sector – may bring further pressure to bear on right to farm laws. *See* Neil D. Hamilton, *A Changing Agricultural Law for a Changing Agriculture*, 4 Drake J. Agric. L. 41, 58 (1999) ("[S]everal developments reflect the continued industrialization of agriculture, both as to changes in scale and in the public impression of what agriculture is and how deserving it is for special legal consideration").

A recent survey of cases concerning right to farm laws revealed that "more than half of the litigation around right to farm statutes has involved the nuisance conditions allegedly created by large livestock facilities, rather than nonlivestock commercial farms." Andrew C. Hanson, *Wisconsin's Right to Farm Law*, 75-Dec Wis. Law. 10, 61 (2002). "Of the cases in which livestock operations sought the protection of a state right to farm law, roughly two-thirds related to alleged nuisance conditions by large confinements" and relatively few cases concerned small confinements or other types of livestock facilities. *Id.* Perhaps most telling of all, "[w]hen the defendants raised a right to farm as an affirmative defense, plaintiffs prevailed three quarters of the time." *Id.*

Conclusion

The *Gacke* and *Bormann* decisions have focused the agricultural law community's attention on the viability of right to farm statutes. Are these statutes justified? Do they serve a public interest or do they simply benefit the few? Do they work an unfair hardship on the general public that outweighs any corresponding benefit? The Iowa Supreme Court has left little room for doubt as to its answers.

Alternatives to right to farm law protection

New Thunderbird, new Harley Davidson. New house in the country sans the smog and rat race of the big city. Life is a dream, especially since the new T-Bird and Hog have the classic looks but the fit, finish, and technology of today. And the house in the country is a 3,500 square foot dream with a pool, great room, walk-out basement, and the sweet smell of the dairy down the road? If you are quiet, you can actually hear the T-Bird racing back to the city lawyer's office to file a lawsuit.

This is a more and more common occurrence as those fulfilling the dream of living in the country find they have failed to adequately investigate or understand all that living in the country entails. Well water, septic systems, slow moving vehicles: those who have never lived in rural America often get a rude awakening when they discover these joys of country living. The end result is sometimes bad neighbors and litigation against the seller of the property and the farmer.

By now, nearly every agricultural state has enacted legislation that provides farmers with some protection for their farming operations. These are the right to farm laws, and they have been at least partially successful in stopping litigation instituted by neighbors of farming operations, especially those cases relying on nuisance as the cause of action. Still, problems arise either because of the lack of the buyer's knowledge of rural life, a lack of communication between buyer, seller, and their respective agents, or because circumstances can quickly change.

Are there any alternatives? It seems that the old caveat emptor theory is being supplanted by a movement toward disclosure and due diligence. Some local governments are investigating and adopting special disclosure rules to be signed by those purchasing property in any unincorporated areas. These statements are specifically directed at the rural and agricultural issues and at a minimum require the buyer to acknowledge the potential nuisance issues before the sale is completed. Sample language follows:

> The Grantees acknowledge that this property lies partially or wholly within an agricultural part of _____County that is involved with the production of food and related agricultural products and that such farming activities include, but are not limited to, activities that cause noise, dust, and odors. The Grantees further acknowledge that they have met and talked with the owner of the adjacent land(s) and are familiar with the use of such property.

Some states have codified such provisions. For example, Alaska Stat. 34.70.050 provides that a:

> disclosure statement must [be provided that will] include a provision that notifies transferees
> …
> (3) that they are responsible for determining whether, in the vicinity of the property that is the subject of the transferees potential real estate transaction, there is an agricultural facility or agricultural operation that might produce odor, fumes, dust, blowing snow, smoke, burning, vibrations, noise, insects, rodents, the operation of machinery including aircraft, and other inconveniences or discomforts as a result of lawful agricultural operations.

Even local developers are aware of this issue, as evidenced by preemptive language found in the 21-page disclosure document for Green Oak Estates in New Caney, Montgomery County, Texas, available online at www.providianhomes.com/providianhomes_disclaimer.pdf:

> Agricultural Operations: The Community is located near areas where land may be used for agricultural purposes. Many procedures normal and necessary to the operation of agricultural uses such as field crops, vineyard, orchards, dairy and poultry farms, and feed lots result in noise, noxious odors (particularly fertilizer odor), chemical spraying, dust, irrigation or other potentially detrimental effects to residential use of adjacent properties. Purchaser should carefully investigate in person the potential impact of such noise, odor, dust, spraying, irrigation or other effects resulting from the nearby agricultural uses, as these conditions may be disturbing to certain sensitive individuals.

Obviously a contractual disclosure may provide a potential developer or buyer a leg up on the investigative process, and perhaps support a cause of action at a later date if found to be erroneous or misleading. Still the goal of disclosure is to allow a prudent develop or buyer the opportunity to speed up the investigation and either avoid a future problem or move forward with the comfort of knowing that any concerns have been dealt with appropriately.

—Jeffrey A. Mollet, Highland, Illinois

Phosphorus management policy/Cont. from page 7

Likewise, plans must be reviewed by a certified reviewer under the PA Department of Agriculture Nutrient Management Certification Program who has also completed the P Index and RUSLE trainings. The SCC will assist with reviews where the local reviewer has not yet had this training.

Financial assistance for phosphorus-based planning

Finally, because of the increased planning costs associated with this new policy, the SCC adopted new higher cost share rates under the Plan Development Incentives Program (PDIP). This additional cost share is available for all nutrient management plans submitted for approval after May 25, 2004 that include a phosphorus component (See the table below). Details on the cost share program including eligibility and how to apply can be obtained from your local county conservation district nutrient management staff or from the Nutrient Management Staff at the Pennsylvania Department of Agriculture (PDA) (717-772-4187).

Summary of new PDIP cost share rates for phosphorus-based nutrient management plans.

Operation Size	*Maximum Cost Share Rate*	*Maximum Cost Share Payment*
0-85 Acres	75% of actual costs	Maximum = $640.00 per operation
86-200 Acres	75% of actual costs	Maximum = $7.50 per acre
200 + Acres	75% of actual costs	Maximum=$1500.00 per operation

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Interim phosphorus management policy for nutrient management plans in Pennsylvania

A major policy change has occurred in Pennsylvania's nutrient management program. In May 2004 the State Conservation Commission (SCC) adopted a new interim policy requiring Pennsylvania Nutrient Management Act (Act 6) plans to include a phosphorus application component.

Phosphorus (P) has been of concern to farmers and other water quality stakeholders for some time. Excess nutrients, particularly phosphorus in freshwater, increase biological activity in water systems, thereby speeding up the process called eutrophication. Eutrophication is the most common reason for impairment of surface waters for fishing, recreation, industrial and domestic water uses.

While concerns about eutrophication, and the potential environmental impact of phosphorus, have existed and been part of management recommendations for some time, concerns with nitrogen (N) have received more attention. As scientific evidence clarifying the importance of phosphorus in water quality protection grew and concerns about impaired uses of surface water increased, public policy makers turned more attention to phosphorus management. In early 2003, the US Environmental Protection Agency (EPA) adopted new regulations for Concentrated Animal Feeding Operations (CAFOs) that require nutrient management plans based on both nitrogen and phosphorus. Regulations to implement these federal requirements are currently being developed for Pennsylvania. Also, in 2003, PA Natural Resources Conservation Service (NRCS) implemented a revised 590 Standard for Nutrient Management, consistent with the NRCS national standard for nutrient management. This national standard requires nitrogen and phosphorus-based nutrient management plans for farmers receiving financial or technical assistance from US Department of Agriculture (USDA).

One important outcome of this changing emphasis on phosphorus was increased research on environmental phosphorus issues. An offshoot of this research was the development of the Phosphorus Index (P Index). By targeting, the P Index has the potential for reducing costs to farmers and government agencies by focusing their management and financial resources on areas most likely to contribute phosphorus to surface waters.

Phosphorus management concerns have been integral to the process of adapting state policies to new scientific information and federal policies. As a result of its review of the state's current nutrient management regulations after five years of running the program, the SCC has proposed that phosphorus be addressed, using the P Index, in upcoming Act 6 regulation revisions. This interim policy on phosphorus is consistent with the proposed revisions to the regulations.

Why was the interim policy adopted?

The SCC's Interim Phosphorus Policy was developed in response to a May 2004 decision by the Pennsylvania Environmental Hearing Board (EHB). This decision arose from a local citizens group's appeal of a nutrient management plan approval. The EHB ruled in favor of the citizens group specifically citing their concern that the Act 6 regulations, and the plan, did not address nutrients other than nitrogen. Specifically, they stated that application rates for phosphorus are required to be included in a plan. The Board ruled that Act 6 requires the SCC to consider phosphorus and other nutrients within the nutrient management plan. The ruling is available at: http://www.ehb.verilaw.com/democorpus/Converted/50012372002189.pdf

As a result of the EHB decision, the SCC decided to immediately implement an interim policy on phosphorus management. This interim policy is consistent with the proposal evolving as part of the review of the Act 6 regulations. The Interim Phosphorus Policy will only be in effect until the proposed regulations are finalized, expected sometime in early 2005. The Pennsylvania Nutrient Management Program can be found on line at the web site: http://panutrientmgmt.cas.psu.edu/.

Who is affected?

The interim policy applies to all concentrated animal operations (CAOs), concentrated animal feeding operations (CAFOs) and volunteer operations submitting Act 6 nutrient management plans or plan amendments to the SCC or conservation district after May 25, 2004. The policy also states that the SCC is to be consulted concerning plans under review at the time the policy took effect.

Implementation of the interim policy

As of May 25, 2004 all nutrient management plans submitted for approval under Act 6 are to include a phosphorus application component. The SCC recommended approach to address phosphorus is the P Index. This process will build on the existing nitrogen-based planning process. Developing a plan that includes phosphorus under this policy does not require starting from scratch. The approach is to develop a nitrogen-based nutrient management plan, as required under the current Act 6 regulations, and then evaluate this plan using the P Index to determine if management changes are required to address phosphorus. Use of any other approach to address phosphorus application will require review by the SCC.

The Phosphorus Index

The P Index is a field evaluation tool that was developed to identify areas that have a high vulnerability or risk of phosphorus loss to surface water bodies. The Pennsylvania P Index was developed by scientists at the USDA Agricultural Research Service (ARS) Pasture Systems and Watershed Management Research Unit at University Park, PA and Penn State University College of Agricultural Sciences. It is the outcome of a major state and regional effort as part of an international research and development endeavor to produce a management approach that protects water quality from phosphorus pollution and enables sustainable, economic animal agricultural production.

This tool combines indicators of phosphorus sources and of phosphorus transport. The phosphorus source factors used in the Pennsylvania P Index are the Mehlich-3 soil test phosphorus, fertilizer phosphorus application rate and method, and manure phosphorus application rate, method, and phosphorus availability. The transport factors used are soil erosion, runoff potential, subsurface drainage, distance to a water body, and an evaluation of management practices that impact how phosphorus is potentially lost from a field. These factors are combined in a simple calculation to arrive at a P Index value for the field. The P Index value indicates whether the manure application rate may be limited and/or other management practices may be required to address phosphorus concerns. Other management practices may include installation of best management practices to reduce transport potential, such as common erosion control practices or buffers. Alternatively, changes in the time or method of manure application may reduce the risk of phosphorus loss to the point where manure can be applied.

The P Index is an effective method of addressing phosphorus in manure applications because it addresses phosphorus loss from croplands by focusing on the critical factors found to impact phosphorus loss. The index identifies those fields that are likely to affect water quality by the loss of soluble and sediment phosphorus and limits application rates or directs the implementation of other management practices, as the situation warrants. This same approach is currently in use by NRCS in PA as part of their 590 Standard for Nutrient Management.

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

The 25th Annual Educational Symposium of the American Agricultural Law Association is quickly approaching on October 1 and 2, 2004 in Des Moines, Iowa. This year's conference has something for everyone. Session topics range from international trade to farm taxation, as well as a session on ethics that will discuss challenging ethical problems confronted by attorneys with agricultural interests. This year, the traditional Ag. Law Update presentations are expanded to 30 minutes each to provide greater review of the year's developments. Registration brochures will be mailed as soon as all presentations have been confirmed. Members can make hotel arrangements now by calling the Hotel Fort Des Moines at 1-800-532-1466 and telling them that you plan to attend the AALA conference. A special dinner for students attending the conference has been planned for the evening of Oct. 1, 2004 sponsored by the Drake Ag. Law Student Ass'n.