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INSIDE

IN FUTURE ISSUES

AAMA does not preclude milk producers from seeking judicial review

In *Farmers Union Milk Marketing Cooperative v. Yeutter* CA 6, No. 89-2298 (April 11, 1991), the United States Court of Appeals for the Sixth Circuit recently ruled that the Agricultural Marketing Agreement Act does not explicitly or implicitly preclude judicial review by milk producers of amendments to market orders.

Producers Equalization Committee (PEC), which represents dairy producers located in the lower Michigan peninsula, filed a petition with USDA in 1988, seeking modifications of Market Order No. 40, which would allow producers located in the southern supply area to receive higher minimum prices while the remaining producers in more distant outlying areas would collect lower prices.

USDA approved the modifications sought by PEC in February, 1989. Throughout the rulemaking process, Farmers Union Milk Marketing Cooperative (Farmers Union), which represents producers from Wisconsin and the upper Michigan peninsula areas, vigorously opposed the amendments to the location adjustments.

Having no success before the USDA, Farmers Union and several affiliated producers then filed suit in U.S. District Court for the Sixth Circuit, claiming that the changes to Order 40 were made for reasons not authorized by the AMAA; that the Order was not supported by substantial record evidence as required by the Administrative Procedure Act; and that the Secretary exceeded his authority by amending Order 40 without a finding that disorderly market conditions existed. Their suit was consolidated with a similar action brought by three milk handlers.

The district court dismissed the handlers' claim on the basis that they had not exhausted their administrative remedies under the AMAA. The district court also dismissed the Farmers Union claims as well. Relying on *Block v. Community Nutrition Institute*, 467 U.S. 340, 104 S.Ct. 2450 (1984), the court ruled that no lawsuit can ever be initiated to challenge an action taken under the AMAA by anyone other than a handler unless no handler has standing to challenge the action before the agency. Since several handlers with the requisite standing were also contesting the modifications to Order 40, the court ruled that Farmers Union's action is precluded from review. The handlers did not appeal their dismissal before district court. However, Farmers Union, on behalf of its milk producers, did appeal its dismissal.

In beginning its analysis, the Sixth Circuit noted that the APA confers a general cause of action upon persons adversely affected or aggrieved by agency action within the meaning of a relevant statute, 5 U.S.C. § 702, but withdraws that cause of action to the extent the relevant statute precludes judicial review. 5 U.S.C. § 701(a)(1).

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Two district courts reject challenges to their jurisdiction to review ASCS decisions

Two federal district courts have recently upheld their jurisdiction to review administrative decisions of the Agricultural Stabilization and Conservation Service (ASCS). *Olenhouse v. Commodity Credit Corporation*, No. 89-1029-T (D. Kan. May 10, 1991)(1991 U.S. Dist. LEXIS 6588); *Vandervelde v. Yeutter*, No. 90-1372-LFO (D.D.C. May 2, 1991)(1991 U.S. Dist. LEXIS 6007). In each case, the court rejected arguments by the government that exclusive jurisdiction resided in the United States Claims Court. The two decisions are significant because they involve an issue that has repeatedly been presented to the district courts beginning with the decision

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Whether an agency action is reviewable is often a matter of Congressional intent, which may be express or implied. *See, Barlow v. Collins*, 397 U.S. 159, 165, 90 S.Ct. 832, 837 (1970). A court should first determine whether Congress precluded all judicial review, and, if not, whether Congress intended to foreclose review to the class to which the plaintiff belongs. *See, Association of Data Processors Service Organization, Inc. v. Camp*, 397 U.S. 150, 173, 90 S.Ct. 827, 841 (1970) (Brennan, J., concurring).

The Sixth Circuit relied on *Community Nutrition* in holding that it is clear that Congress did not intend to strip the judiciary of all authority to review the Secretary's milk market orders. 467 U.S. at 346, 104 S.Ct. at 2454.

The Sixth Circuit then turned to the more difficult issue of whether the AMAA precludes judicial review to the class (milk producers) to which the plaintiff, Farmers Union, belongs. Farmers Union relied on the Supreme Court holding in *Stark v. Wickard*, 321 U.S. 288, 64 S.Ct. 559 (1944). In *Stark*, the plaintiff milk producers challenged a market order condition that required certain deductions from the producer settlement fund be used as payments to cooperatives. The handlers had no financial interest in the deductions, and therefore lacked standing. Thus, unless the producers were permitted to seek such review, the Secretary's actions could never be challenged. The Supreme Court had no trouble inferring that producers should be allowed to bring this action, stating that "[t]he statute and Order create a right in the producer to avail himself of a minimum price afforded by Governmental action." *Id.* at 303, 64 S.Ct. at 567-68.

The defense countered that *Block v. Community Nutrition Institute* (467 U.S. 340, 104 S.Ct. 2450) was more on point. In *Community Nutrition*, the plaintiffs were ultimate consumers of milk products who wanted to challenge a market order that increased the prices that they had to pay. The Supreme Court held that the AMAA implicitly precluded consumers from bringing suit pursuant to its provisions.

> Congress channeled disputes concerning marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them. Had Congress intended to allow consumers to attack provision[s] of marketing orders, it surely would have required them to pursue the administrative remedies provided in § 608c(15)(A) as well. The restriction of the administrative remedies to handlers strongly suggests that congress intended a similar restriction of judicial review of market orders.

Id. at 347, 104 S.Ct. at 2455.

USDA and PEC argued that like consumers, the omission of producers from having any administrative remedies indicated Congress' intention that they be precluded from seeking judicial review as well.

The Sixth Circuit, however, asserted that the defense's reading of *Community Nutrition* was too narrow. The Sixth Circuit pointed out that the Court in *Community Nutrition* also looked to other factors in determining Congressional intent, including the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative actions involved.

Regarding the statutory scheme, milk producers, like consumers, are not afforded administrative remedies under the AMAA. All things being equal, this could give rise to an inference that producers are precluded from challenging market orders. However, the Sixth Circuit noted that the considerations that would cause direct review by consumers to be "particularly pernicious" do not apply to review in suits instituted by producers. The number of producers who can be adversely affected by a particular decision is far smaller than the number of consumers who could make such a claim

More importantly, unlike consumers, producers are a class protected by AMAA's statutory scheme. The legislative purpose of increasing producer prices is furthered by allowing producers to challenge actions that they believe reduce prices illegitimately.

It is worth comparing the Sixth Circuit's interpretation of *Stark* and *Community Nutrition* with that of the Ninth Circuit in *Pescosolido v. Block*, 765 F.2d 827 (1985). In *Pescosolido*, the plaintiff producers wished to get a declaration of their rights under a citrus marketing order. The Ninth Circuit held that, based on *Community Nutrition*, the statutory scheme of the AMAA precludes judicial review by anyone other than handlers. The Ninth Circuit went on to note that "[t]he *Stark* exception is limited to situations in which producers claim that some 'definite personal right' granted by the statute is being infringed by the Secretary of Agriculture acting outside the scope of his delegated authority, with no handlers having standing to protest." *Id.* at 832. In the view of the Ninth Circuit, it would be anomalous to "leave handlers in the disadvantaged position of being limited to the statutory remedy while producers are free to raise direct challenges in the district court." *Id.* at 832.

The Sixth Circuit acknowledged *Pescosolido* in its opinion, but disagreed with its interpretation. The Sixth Circuit believed that placing milk producers in a favored position is consistent with AMAA's legislative purpose and would enhance, rather than undermine, the statutory purpose.

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Federal Register *in brief*

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

1. ASCS; Liquidation and informal hearing procedures under the U.S. Warehouse Act; proposed rule; correction. 56 Fed. Reg. 23105.

2. ASCS; Warehouses; cotton warehousemen, licensed; reginned motes, warehouse receipts issuance; proposed rulemaking withdrawn; effective date: 5/21/91. 56 Fed. Reg. 23234.

3. USDA; Rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes; final rule; effective date 5/14/91. 56 Fed. Reg. 22105.

4. USDA; Highly erodible land and wetland conservation; Food, Agriculture,

of Justice v. Lyng, 716 F. Supp. 1567 (D. Ariz. 1988), 716 F. Supp. 1570 (D. Ariz. 1989).

In *Olenhouse*, the plaintiffs challenged he use of temporary yield reductions in the deficiency payment calculations for their 1987 wheat crops. In part, they alleged that the ASCS's actions violated the statutes, regulations, and internal agency manual provisions governing the calculation of deficiency payments, and they asserted that they had been denied due process in the imposition of the yield reductions and in the appeal procedures that followed.

Apparently invoking the district court's general federal question jurisdiction under 28 U.S.C. § 1331 and the waiver of sovereign immunity provided by the Administrative Procedure Act, 5 U.S.C. §§ 702-703, the plaintiffs asked the court to declare the defendants' actions unlawful and to enjoin the defendants from reducing their deficiency payments and from seeking to enforce the reduction through setoff. Monetary damages were not sought.

The government moved to dismiss the complaint on the grounds that the United States Claims Court had exclusive jurisdiction. Apparently, the government sought to characterize the action as one seeking monetary damages in excess of $10,000 against the United States, actions over which the Claims Court has exclusive jurisdiction under the Tucker Act, 28 U.S.C. §§ 1491(a)(1).

The district court rejected the government's claim that it was without subject matter jurisdiction. Primarily relying on *Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989); and its earlier decision in *Cessna Aircraft Co. v. Department of the Navy*, 744 F. Supp. 260 (D. Kan. 1990), the court essentially applied a twofold analysis to test the existence of its jurisdiction. That analysis was dictated by the Administrative Procedure Act's requirement that the action under review must not seek "money damages" and that there must not be any other "adequate" forum for review. *See* 5 U.S.C. §§ 702-703.

First, the court determined whether the purpose of the plaintiffs' action was to obtain money damages against the government as compensation for a loss. If such a purpose existed, then the action properly resided in the Claims Court. In finding no such purpose, however, the court reasoned that the plaintiffs' action was not one for money damages against the United States as compensation for a loss. Rather, it was an action for specific relief, specifically, to enforce the plaintiffs' rights to entitlements under a federal subsidy program through injunctive and declaratory relief.

In addition, the court reasoned that even if an underlying purpose for the action was the receipt of money from the United States, that result would not necessarily follow from the court's granting of the relief they sought. Because the essence of the plaintiffs' complaint was the adequacy of the ASCS's compliance with both procedural and substantive requirements, the court noted that if the plaintiffs' prevailed "the ordered relief might well take the form of a remand to the ASCS to conduct the appropriate review." Slip op. at 18. Finally, the court observed that a "district court's jurisdiction is not defeated by the fact that a remand or some form of injunctive or declaratory relief may ultimately lead to the payment of monies from the federal government." *Id.* (citations omitted).

In the second prong of its analysis, the court concluded that the Claims Court did not provide an adequate substitute for district court review. In essence, it reasoned that "[w]hen an agency administers a statute that governs complex ongoing relationships, the district court's authority to review agency action should take precedence over the Claims Court Tucker Act jurisdiction," and that the Claims Court's lack of equitable jurisdiction arguably left it without authority to award it the full scope of relief, such as a remand to the agency, that might be appropriate in the action. *Id.* at 20. Thus, the action was properly before the district court.

In the second recent district court case, *Vandervelde*, the plaintiffs challenged the ASCS's denial of payments to them under the Dairy Termination Program. Seeking only nonmonetary relief, the plaintiffs sought to have the ASCS enjoined from suspending payments and a declaratory judgment that they were entitled to payments on the grounds that the ASCS's action was arbitrary and capricious and a denial of due process.

The district court in *Vandervelde* was confronted with the same argument for dismissal on the grounds of lack of subject matter jurisdiction from the government that was made in *Olenhouse* and reached the same conclusion as the court in *Olenhouse*, for essentially the same reasons. However, in *Vandervelde*, the government coupled the argument that it made in *Olenhouse* with a claim that the contractual relationship formed between the plaintiffs and the government under the Dairy Termination Program placed the claim within the Claims Court's exclusive contractual jurisdiction under the Tucker Act.

The *Vandervelde* court declined to accept the government's argument that the plaintiffs' claim was within the Claims Court's exclusive contractual jurisdiction. Relying on *Esch v. Yeutter*, which, in turn, had relied extensively on *Bowen v. Massachusetts*, the *Vandervelde* court concluded that the presence of a contract between the plaintiffs and the government did not necessarily bring the dispute within the exclusive jurisdiction of the Claims Court, particularly when, as here, the plaintiffs' challenge was directed at allegedly unlawful administrative actions and did not present questions of contract interpretation.

The jurisdictional issues presented in *Olenhouse* and *Vandervelde* decisions have repeatedly been a central issue in the judicial review of ASCS administrative determinations. *See* Kelley, *In Depth: ASCS Appeals: An Observation and a Suggestion*, 7 Agric. L. Update 4 (May 1990); Malasky, *Claims Ct. Asserts Exclusive Jurisdiction, Ignoring Justice and Esch*, 8 Agric. L. Update 1 (Dec. 1990); Malasky, *Mississippi Federal District Court Reinstates Farm Program Payments, Impermissible Congressional Interference Found*, 8 Agric. L. Update 1 (Feb. 1991). *See generally* Kelley & Harbison, *A Guide to the ASCS Administrative Appeal Process and to the Judicial Review of ASCS Decisions (pts. 1 & 2)*, 36 S.D.L. Rev. 14 (1991), 36 S.D.L. Rev. 435 (1991). Whether the definitive resolution has been reached remains to be seen.

—Christopher R. Kelley, University of North Dakota, School of Law

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Conservation and Trade Act; implementation; correction. 56 Fed. Reg. 23735.

5. CCC; Food, Agriculture, Conservation and Trade Act; Implementation; final rule; effective date 5/15/91. 56 Fed. Reg. 22616.

6. CCC; Debt settlement policies and procedures; proposed rule. 56 Fed. Reg. 23250.

7. FmHA; Requirement of a 10% downpayment from any application in conjunction with insured and guaranteed farm ownership loans, including credit sales, to purchase farm real estate. 56 Fed. Reg. 22666.

8. FmHA; Inventory farmland purchase program; beginning farmers or ranchers; definition; proposed rule. 56 Fed. Reg. 24143.

9. FmHA; Holding period of suitable inventory farm property in accordance with provisions of the Food, Agriculture, Conservation and Trade Act of 1990; proposed rule. 56 Fed. Reg. 24145.

10. FmHA; Farmer programs insured loan making regulations; debt service margin; proposed rule; 56 Fed. Reg. 24356.

11. FmHA; Revisions to the insured emergency loan instructions to implement administrative decisions pertaining to applicant eligibility and sale of nonessential assets; effective date 5/13/91. 56 Fed. Reg. 24680.

12. PSA; Amendment to certification of central filing system; Oklahoma; effective date 5/15/91. 56 Fed. Reg. 23047.

—Linda Grim McCormick

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

By Neil D. Hamilton

The significant changes made by the 1990 Farm Bill in the conservation enforcement provisions were the topic of Professor Malone's recent In Depth article (8 Agric. L. Update 4-6 (May 1991)). The changes include a new trigger for swampbuster violations (draining the wetland, not planting a commodity), graduated sanctions for good faith violations, a minimal effects exemption for draining wetlands with required mitigation and restoration, and even retroactive application of the new exceptions for previous swampbuster violations.

On April 23, 1991 the USDA promulgated the final rules for implementing the new provisions. *See* 7 CFR Part 12, "Highly Edorible Land and Wetland Conservation" at 56 Fed. Reg. 18630. In doing so the USDA made a number of comments that provide insight to the agency's attitude towards conservation enforcement and provide lawyers and farmers with guidance on how the new provisions will be implemented.

The following discussion focuses on twenty five of the most significant points from the USDA's discussion of the new rules. Many of the comments reveal how the agency intends to administer the new enforcement provisions. Others made in response to individuals' comments on the proposed rules reflect the USDA's reasoning for not taking certain actions.

1. *No Taking Implications Analysis Required for Swampbuster Rules*: The USDA rejected claims a "takings implication analysis" needed to be done in connection with the swampbuster program. The USDA reasoned that because farm program participation is voluntary, no taking issue could arise in connection with the denial of benefits for violations of the swampbuster requirements.

2. *No Changes in Definition of Wetland*: Many comments suggested different definitions for the term "wetlands," such as a requirement the lands had been wet on December 23, 1985. The USDA rejected these suggestions, noting the definition of wetlands used in the rules is required by the legislation.

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3. *Suggestion to Include 21 Day Inundation Requirement in Wetland Definition Rejected*: As part of the comments to change the definition of wetland, the USDA specifically rejected requests that the definition incorporate a requirement that the land be inundated for at least 21 consecutive days. The USDA said this period is longer than the period needed for land to develop characteristics typically associated with a wetland (7-15 day inundation will result in hydric soils and prevalence of hydrophytic vegetation).

4. *On-Site Inspection Required Before Benefits Denied:* As part of the 1990 legislation, the SCS is required to make an on-site investigation of the wetland before any benefits can be denied, and that determination can be appealed. *See* 7 CFR §§ 12.30(c) and (d).

5. *Off-Site Comparisons of Property to Determine Potential for Hydrophytic Vegetation*: One comment objected to SCS's use of comparisons with other nearby properties with similar hydric soils to see if hydrophytic vegetation would grow on the site if it was not being farmed. The comment suggested requiring that vegetation be present on the site. The USDA rejected this approach, noting comparisons are needed where cultivation or other land altering activities have removed all the natural vegetation.

6. *Dairy Refund Payments Among Benefits Lost for Violations of Conservation Compliance*: One of the alleged surprises resulting from the 1990 Farm Bill's expansion of the benefits lost due to swampbuster violations was the inclusion of dairy refund payments. Because dairy producers receive most price supports through the market rather than direct payment, the soil conservation planning requirement has not been a major concern unless a producer was also in the grain price support programs. However under the new law, dairy producers who are applying to receive dairy refund payments [part of the dairy assessment program (7 CFR Part 1430)] must have a conservation plan in place and implemented before receiving the payments. This "surprise" has caused much controversy, but the USDA's rules conclude the payments are made under the 1949 Act and the law requires application of the conservation planning requirement. If the ruling is to be changed it will take Congressional action. Legislation to do so has been introduced.

7. *Variances from Conservation Plan Requirement Valid for Only One Year*: Under the new rules, 7 CFR § 12.5(a)(6), the SCS can grant a temporary variance from the requirement to have a conservation plan, but the variance is valid for only one year. The variance issue will come up where there have been reasons for delay in the implementation of the plan.

8. *Wetland Conversion Trigger Applied to Drainage District Activities for Attribution to Producers is Planting of Commodity*: One major change in the new law concerns the change in the trigger for program ineligibility under swampbuster from the planting of a commodity on a drained wetland to the converting of the wetland. The change in trigger raises an issue concerning the attribution of conduct by third parties, such as drainage districts, to member producers. Under the new law, members of a drainage district would lose benefits if any illegal draining occurred in the district. Several commentators felt this effect would be unfair if the producer did not actually farm any drained cropland. For this reason, the USDA implemented a final rule that retains the commodity production trigger for producers who are members of a drainage district, which means the producer will not lose benefits for the drainage activity of the district unless a commodity is produced on the converted land.

9. *Rules Protected "Farmed Wetlands" Retained*: Several comments were received which said drainage of "farmed wetlands" should be excluded from the act. The USDA rejected the proposals, noting it was not authorized under the act and that Congress was aware of the issue of expanding drainage of "farmed wetlands" and had determined "farmed wetlands" should be protected.

10. *Exception of Action in Reliance on SCS Advice Can Apply Retroactively*: One issue concerning operation of the various exceptions to swampbuster is the rule in 7 CFR § 12.6(b)(8) concerning actions in reliance on SCS advice. The issue has been the subject of litigation in Minnesota by the National Wildlife Federation, which argued the exception shouldn't be

available as an after-the-fact method to sanction illegal drainage, such as where a "prior commenced conversion exemption" is later determined to have been improperly granted. In the rules USDA rejected this view, specifically noting the "in reliance exemption" is available for use retroactively.

11. *Guidelines for Use of Minimal Effects Exception with Required Mitigation or Restoration*: A major change in the 1990 Farm Bill was a clarification of the USDA's ability to provide a "minimal effects" drainage exemption related to the impact on the functional value of the wetland. A related issue is the ability of the SCS to require restoration or mitigation as part of the exemption. One issue in the development of the final rules was the circumstances under which USDA would use the exception and how the rules would differ if the land was frequently cropped or infrequently cropped. The new rules contain nine guidelines the agency will follow for determining when the minimal effects exemption is appropriate and when mitigation and restoration will be required. The highlights of the requirements include: 1) minimal effect restoration or mitigation will be required in advance when the wetland to be converted was not frequently cropped; 2) replacement must occur on prior converted cropland; 3) all necessary federal, state, and local permits must be secured prior to approval of the plan to replace the wetland; 4) the plan to replace the lost wetland values must be concurred with by the SCS and agreed to by the Fish and Wildlife Service at the local level; and 5) the USDA will require a conservation easement on the mitigated land. Relief in all instances will be decided on a case-by-case bases.

12. *Mitigation Land Must be Located in the Same Watershed*: The rules clarify that in most cases mitigation will be on a acre-for-acre basis. As to the location of the land on which mitigation is to occur, USDA rules provide mitigation banking can be done but the land must be "in the same general area of the local watershed."

13. *Mitigation and Restoration Not Allowed Using "Farmed Wetlands"*: The USDA rejected the suggestion by several commentators that mitigation and restoration be allowed on "farmed wetlands." The USDA noted the law makes a clear distinction between farmed and prior converted wetlands and that restoration must occur on prior converted wetlands.

14. *Compliance with Swampbuster Does Not Exempt Application of Section 404*: One issue arising in connection with the swampbuster rules is whether producers also need to be concerned about possible application of § 404, such as to "farmed wetlands." The USDA noted determinations under Part 12 do not free producers from complying with other environmental regulations.

15. *Burden of Proof to Establish Exemption is on Producer*: The USDA rules place the burden of proof to establish the eligibility for an exemption on the producer, which is reasonable because information to establish the exemption will be in the producer's possession.

16. *Conversion to Pasture Not Included in Allowable Conversions*: In connection with the operation of the new trigger linking ineligibility to converting land to make possible the production of an agricultural commodity, the USDA exempted certain land related activities, including conversions for producing cranberries, vines, and shrubs. The USDA specifically rejected a request to include conversion to pasture in this list of exempt activities.

17. *Agency Guidelines for Use of Graduated Sanctions for "Good Faith" Violations Designed to Insure Relief Rarely Used*: One major change in the 1990 act was inclusion of language to allow USDA to apply graduated sanctions ranging from $750 to $10,000 for first time violators who acted in "good faith." The USDA rejected a suggestion the rules include a table with a schedule for the application of graduated sanctions, arguing it would unduly limit the ability of the ASCS to tailor relief to individual cases. To prevent the use of the relief in inappropriate cases, the agency has included specific provisions for internal USDA review of each case. The rules state the purpose of the provisions is to "ensure that relief pursuant to the specific criteria of section 12.6(b)(3)(ix), as proposed, will be *rarely granted*." (emphasis added)

The guidelines provide the ASCS District Director will review any use of the provision if: 1) the land was certified by SCS as a wetland; 2) the USDA met with the producer concerning the location of the wetland; 3) the producer was involved in a previous swampbuster violation; or 4) the wetland is in an uncropped field and the conversion brought new land into production through extensive modification of the vegetation and hydrology.

18. *Good Faith Violation Required Restoration to Wetland Status as of December 23, 1985*: In order for a producer to receive the graduated sanctions made possible under a finding of a good faith violation, the wetland must be restored. The USDA rules clarify the restoration must be to the status of the wetland as of December 23, 1985.

19. *Public Listing of Wetlands But Not of Highly Erodible Lands (HEL)*: The act requires USDA to make a public listing with county maps of wetlands. The agency rejected a suggestion for listing Highly Erodible Land because the law did not require it and the administrative burden would be too great.

20. *Appeal Process Not Delayed Until National ASCS Appeal Office Developed*: One comment suggested the agency delay implementing the appeal process under section 12.12 until the National Appeals Division in the ASCS is created as authorized by the 1990 Farm Bill. The agency rejected the proposal as being beyond the scope of the rules and for placing an unfair burden on producers who currently have a legitimate claim for relief. It should be noted the USDA has suspended actions to implement the National Appeals Division on the basis that subsequent appropriation legislation containing language preventing the creation of new USDA offices overrides the provision.

21. *Conservation Planning Assistance Will Not Include Specific Advice on Alternative Agricultural Practices Such as Crop Rotations*: One criticism some farm groups have of the conservation planning process is that it emphasizes structural practices to control erosion and has not adequately considered changes in agricultural practices. The USDA rejected a suggestion that the conservation planning assistance process include specific advice on using practices such as crop rotations to meet erosion control goals. The USDA noted it would be impracti-

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cable to establish guidelines for the many circumstances and different regions of the country. The rules note the Field Office Technical Guides (FOTG) used in planning are developed on a local basis and can include all practical combinations of agricultural practices including crop rotations.

22. *No Change in Rules Concerning Replacing Tile on "Farmed Wetlands"*: One issue which has come up related to continued cropping of "farmed wetlands" concerns the possible need to replace existing drainage systems such as shallow hand dug tile. The USDA rejected requests to include specific language allowing the replacement of such systems, noting the rules for farmed wetlands provide for the maintenance and replacement of drainage systems if it can be done without increasing the "scope and effect" of previous drainage.

23. *Request to Allow Third Parties to Appeal Wetland Rulings Rejected*: The USDA rejected a request to expand the group of parties who can appeal determinations made under the regulations to include interested third parties. The agency noted such participation is not provided for in the law, and the only issue in the hearings is the eligibility of producers for benefits. Appeals by third parties has come up in litigation by the National Wildlife Federation to scrutinize the USDA's administration of the law. The Eighth Circuit Court of Appeal held the NWF had standing to appeal an ASCS determination. *See* 901 F.2d 673 (1990). On further review the federal district court in early April 1991 upheld the Bottineau County North Dakota ASCS Committee's grant of a prior commenced conversion exception to a drainage district.

24. *Notification of Appeals Period Remains at 45 Days*: One comment suggested USDA extend the time period in which a producer could file notice of an appeal of a wetland determination. The USDA determined the current 45-day period is adequate to provide producers an opportunity to notify SCS of their objections.

25. *No Definition of "Scope and Effect" for Farmed Wetland Drainage*: An issue within the operation of the farmed wetland exception is that further drainage activities can result in a violation if they exceed the scope and effect of the original alteration or manipulation. The USDA rejected a suggestion that the rules include a definition of the term "scope and effect" because the determination is a "technical hydrological determination" that must be left to SCS officials.

Ninth Circuit holds APA does not require an ALJ to preside over ASCS debarment hearings

The Ninth Circuit has held that the Administrative Procedure Act (APA) does not require an administrative law judge (ALJ) to preside over debarment hearings conducted by the Agricultural Stabilization and Conservation Service (ASCS). *Girard v. Klopfenstein*, 930 F.2d 738 (9th Cir. 1991). In addition, the court held that procedural due process also does not require that such hearings be conducted by an administrative law judge.

At issue was a proposed one year debarment of United Dairymen of Arizona for its allegedly improper sales of barrel cheese to the ASCS under a federal price support program. As contemplated by ASCS and other regulations, the debarment hearing process offered to United Dairymen was an "informal" one to be presided over by an ASCS "debarring officer," specifically, the ASCS Deputy Administrator for Commodity Operations. Prior to the commencement of the informal hearing process, United Dairymen challenged the proposed proceedings on the grounds that the APA and the constitutional guarantee of due process required that an ALJ preside over the hearing.

After finding that United Dairymen was excused from satisfying the exhaustion of administrative remedies requirement because of the nature of its challenge to the administrative process, the Ninth Circuit held that neither the APA nor the due process clause required the participation of an ALJ in ASCS debarment proceedings. Noting that the ALJ requirement of section 554 of the APA is applicable only to adjudications "required by statute to be determined on the record after opportunity for agency hearing," the court found that prerequisite was not present in ASCS debarment proceedings because such hearings are within the inherent authority of the agency and are not required by statute.

The court also found that procedural due process guarantees were satisfied by the hearing process afforded under the ASCS debarment regulations. In particular, the court noted that the regulations did not merge the functions of prosecutor and decision-maker, an issue raised by United Dairymen because the debarment proceedings had been preceded by an investigation conducted by the USDA's Office of Inspector General. The claim that the ASCS Deputy Administrator for Commodity Operations could not be an impartial hearing officer was dismissed as moot because the individual holding that office resigned after the appeal was filed.

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AG LAW CONFERENCE CALENDAR

1991 Summer Ag Law Institute at Drake University
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.

Seventh Annual Farm, Ranch & Agri-Business Bankruptcy Institute
October 17-19, 1991, Lubbock Plaza Hotel.
Topics include: Creditor strategies in bankruptcy cases and environmental problems.
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For more information, call Robert L. Jones, 806-762-5281.

Land Use Institute
July 31-August 2, 1991, Coronado (San Diego), California.
Topics include: Wetlands and stormwater; overview of recent decisions; and extractions, dedications and impact fees.
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For more information, call 1-800-CLE-NEWS.

State Roundup

TEXAS. *DTPA applicable to sale of a cow's future embryos.* In *Teague v. Bandy*, 793 S.W.2d 50 (1990), the Austin Court of Appeals held that purchasers of an interest in a donor cow could recover damages under the Texas Deceptive Trade Practices Act for the failure of that cow to produce embryos. The court also held that the statute governing implied warranties of merchantability and fitness in sales of existing livestock and its unborn young did not apply to the sale of a cow's future embryos.

On May 25, 1985, the buyers (Bandy) purchased a 1/2 nonpossessory interest in a pregnant Brangus cow, a 1/2 interest in her unborn natural calf, and an interest in her future embryo transfers. Apparently, Bandy purchased the interest in order to receive the resulting live embryos and offspring. The sellers (Cow Creek Ranch) had arranged financing for the $75,000 purchase price, as well as guaranteeing the purchase-money note to Lago Vista National Bank.

Subsequently, in July, 1985 the cow delivered a stillborn calf. In December, 1985, an attempt to induce the cow to produce multiple embryos failed. In January, 1986, Bandy met with one of the Cow Creek partners. At this meeting, the partner stated that if no results occurred within one year, the purchase price would be refunded. On May 9, 1986, after several failed attempts to induce the cow to produce multiple embryos, a veterinarian advised that the cow could no longer be considered an "embryo transfer donor." After Bandy demanded a refund and Cow Creek refused, Bandy brought suit. Cow Creek counterclaimed, seeking reimbursement for the balance of the purchase-money note it was called upon to pay pursuant to its guarantee.

The trial court found: (1) that the sellers had represented that the goods buyers purchased had characteristics, uses, or benefits that they did not have. Specifically that "the cow would 'work' in embryo transfer, that she would super ovulate and produce multiple embryos which would become pregnant and result in the birth of live calves;" and (2) that there was an unconscionable gross disparity between the value that buyers received and the consideration they had paid sellers. Based on these findings, the trial court concluded that Bandy should recover their actual damages under the DTPA.

On appeal, sellers alleged that there was no evidence that they misrepresented the cow's condition as of the date of sale; that there was no evidence that there was a gross disparity between the consideration paid and the value received as of the date of sale; and that therefore no proof of damages under either of the two bases of recovery on the date of sale. In short, the sellers urged that the facts of the deceptive practice are to be considered as of the date of sale.

The court of appeals held that the facts as of the date of the deceptive practice, not necessarily the date of sale, determine the applicability of the DTPA. There is no requirement that the unconscionable act occur simultaneously with the sale that forms the basis of the complaint. If in the context of the transaction any person engages in an unconscionable course of action that adversely affects the consumer, that person is subject to liability under the DTPA. There was no deceptive practice at the time of sale; it occurred when the cow did not perform as Cow Creek had represented it would.

—William D. Ballard, Jr., Bryan, Texas

PENNSYLVANIA. *Warrantless search of commercial facilities.* In the case of *Commonwealth of Pennsylvania v. Buckman*, 574 A.2d 697 (Pa. Super. 1990), two deputy sealers employed by the Bucks County Department of Weights and Measures entered a lawn and garden supply center in Doylestown and asked to open two bags of pine bark mulch selected at random from inventory to check the accuracy of the weight. The Department had not received a complaint about the products sold at the store, and the agents had no reason to believe the store had ever sold falsely labeled merchandise.

The owner objected that opening the bags would ruin them for later retail sale. If the agents wanted to buy the mulch, they would be more than welcome to do so. After unsuccessful negotiations, the owner was eventually cited for hindering the agents on the performance of their official duties, a summary offense. He was tried and convicted by a district justice. He appealed to the Court of Common Pleas and was again convicted. He then appealed to the Superior Court of Pennsylvania.

The owner argued that a warrantless, non-consensual inspection of consumer goods at a lawn and garden supply store by agents of the Weights and Measures Department was an unreasonable search prohibited by the fourth amendment.

Although Buckman prevented the search from taking place, he was convicted of a summary offense for refusing to allow the search. He therefore had standing to litigate the fourth amendment issue. If the proposed search would have violated Buckman's fourth amendment rights, he cannot be penalized for failing to comply with the demand to open the bags. (*See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d. 943 (1967)).

Warrantless administrative searches of commercial facilities authorized by statute or duly promulgated regulation are valid if (1) the business establishment that is the target of the search is part of a closely regulated industry; (2) there is a "substantial" government interest that forms the regulatory scheme pursuant to which the inspection is made; (3) the warrantless search is necessary to further the regulatory scheme; and (4) the regulatory statute advises the owner that the search is being made pursuant to law, has a properly defined scope, and limits the discretion of the investigating officer.

An industry is closely regulated if the regulatory presence is so comprehensive and defined that the owner of a commercial property cannot help but be aware that his property will be subject to periodic inspections for specific purposes (i.e:, sale of alcohol, guns, mining industry, automobile junkyards). Not every commercial enterprise that is subject to government inspection by statute qualifies as closely regulated.

The court held that the retail sale of lawn and garden supplies is *not* part of a closely regulated industry. It has not been the focus of a long history of close government supervision. The state does not require a license or permit before a retailer can sell a bag of pine bark mulch. The Commonwealth did not come forward with evidence that such stores pose a significant threat to public health and safety. Although the Weights and Measures Act authorizes a warrantless search, it is not a detailed and comprehensive legislative scheme designed to regulate a narrowly defined sector of the economy.

The court held therefore that a warrantless non-consensual search of a lawn and garden supply store under the provisions of the Weights and Measures Act is an unreasonable search that violates the fourth amendment protection against unreasonable searches.

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Annual Meeting and Education Conference.
The American Agricultural Law Association will hold its twelfth annual conference on November 1 and 2, 1991 at the Colony Square Hotel, in Atlanta, GA.

Watch next month's Agricultural Law Update for a full agenda and conference registration details. Please plan to attend.