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INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

In future issues:
Proposed changes to 2003 CAFO Clean Water Act regulation

State and federal roundup

BANKRUPTCY

DISCHARGE**.** The debtors, husband and wife, leased farm land for several years. The debtors sought farm operation loans from a bank which were guaranteed by the FSA. The debtors wrote checks for the rent but the checks were returned for insufficient funds. The debtor thought that the guaranteed loans would cover the rent checks, but the bank refused to lend more money until the debtor paid off the previous loan balance. The rent remained unpaid when the debtors filed for Chapter 7. The landlord had not filed a landlord's lien, and the bank had the priority security interest in the proceeds of crops grown by the debtors. The landlord sought a ruling that the claim for unpaid rent was nondischargeable, under 11 U.S.C. § 523(a)(4), because the unfunded checks were a "debt for fraud or defalcation or both while acting in a fiduciary capacity." The court held that the rent claim was dischargeable because the debtors did not act as fiduciaries for the landlord when the unfunded checks were written. In addition, the court held that the debtors were not shown to have stolen or embezzled any of the landlord's property through the writing of the checks; therefore, the rent claim was dischargeable. ***In re Hermes*, 340 B.R. 369 (Bankr. C.D. Ill. 2006)**.

CHAPTER 12 ELIGIBILITY. The debtors, husband and wife, owned a 3.8 acre farm on which the debtors bred, boarded, trained and sold walking horses. The husband claimed to spend 80 percent of each workday on the operation and the wife claimed to spend 50 percent of each workday on the operation. The case does not mention any outside income. A creditor objected to the Chapter 12 filing, arguing that the debtors were not farmers because the debtors filed only federal income tax Schedule C for the operation and did not file Schedule F. The court held that use of Schedule C did not negate the other factors showing that the debtors were engaged in traditional farming operations subject to the risks associated with other forms of farming. ***In re Buchanan*, 2006 U.S. Dist. LEXIS 50968 (M.D. Tenn. 2006)**.

FEDERAL FARM PROGRAMS

CROP INSURANCE. In 2002, the defendants purchased crop revenue coverage insurance which continued through 2004 and covered their 2004 crop of soybeans on leased farmland in Louisiana. The defendants leased 2,000 acres but were prevented from planting all but 41 acres. The defendants filed a claim with the plaintiff insurance company, but the claim was denied because (1) the defendants did not file intended acreage reports in 2003 and 2004; (2) the land was disked before the land could be inspected by the plaintiff; and (3) the defendants did not plant and harvest at least the same number of acres in the previous crop year. The defendant presented evidence that two notices of the claim were filed with the plaintiff before the land was disked and that the land was disked by the landlord when the defendants gave notice that they were not going to continue the lease. The claim denial was submitted to arbitration, and the arbitrator awarded the claim to the defendants. The court upheld the arbitrator's decision because (1) the defendants were not required to file intended acreage reports after the year of the initial application for insurance, even though the defendants had provided sufficient information to the plaintiff as to the intended acres for 2004; (2) the failure to obtain prior consent to destroy the planted acres by disking was justified by the plaintiff's failure to timely respond to the defendants' timely claims; and (3) although the defendants did not personally raise crops on the same number of acres in 2003 as in 2004, the landlord had planted and harvested crops on those same acres in 2003. The defendants also sought damages as allowed by the CRC policy and federal crop insurance regulations. The court held that such damages were allowed where the defendants prove that the damages were the result of a culpable failure of the plaintiff to comply substantially with federal crop insurance law or regulations or were the result of actions by the plaintiff beyond the scope of its authority. ***Farmers Crop Insurance Alliance v. Laux*, 2006 U.S. Dist. LEXIS 48717 (S.D. Ohio 2006)**.

FARM LOANS. The debtor had obtained loans from the FmHA, now the FSA, and

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defaulted on the loans. The loans were secured by mortgages on the debtor's farm. The debtor also failed to pay real estate taxes, and a state tax lien was filed against the farm. The farm was sold at foreclosure by the state for the amount of unpaid state taxes. No notice of the state tax lien or foreclosure sale was given to the FSA. However, the FSA became aware of the foreclosure but did not seek to foreclose its mortgage for several years. Under Maine law, Me. Rev. Stat. Tit. 36, § 943, the FSA mortgage was extinguished three months after the FSA had actual knowledge of the state tax lien and foreclosure. The person who purchased the farm at foreclosure argued that the Maine law applied to extinguish the FSA loan as to the purchaser. The court agreed and held that the purchaser held title to the farm free of the FSA mortgage. ***United States v. Sayer*, 450 F.3d 82 (1st Cir. 2006), *rev'g*, 2005 U.S. Dist. LEXIS 2952 (D. Me. 2005)**.

HORSES. The plaintiff was an experienced, life-long horseback rider and visited the defendant's riding stables to practice riding. The plaintiff was injured when the horse bit the plaintiff as the plaintiff approached the horse, a horse which the plaintiff had ridden before. The plaintiff had observed the horse eating and had waited until the horse had finished before approaching the horse. The defendant provided evidence that the plaintiff was aware that horses can kick and bite. The trial court dismissed the plaintiff's suit for negligence, holding that the plaintiff had assumed the risk of the injury as part of the natural risks of horseback riding. The appellate court affirmed. ***Tilson v. Russo*, 818 N.Y.S.2d 311 (N.Y. Sup. Ct. 2006)**.

FEDERAL INCOME TAX

AUDITS. The IRS has published "MSSP Audit Technique Guide on Farming Operations." For this and other farm-related IRS publications, see http://www.irs.gov/businesses/small/farmers/index.html

LABOR

EXEMPT EMPLOYEES. The plaintiffs were crew leaders employed as salaried workers for the defendant. The plaintiffs supervised chicken catcher crews. The plaintiffs' duties included transporting the catchers from their residences to the job location and back. The plaintiffs did not hire or fire crew members but did report misconduct and crew performance. Although the plaintiffs received annual salaries, the plaintiffs' pay could be decreased for non-worked hours. Vacation and sick pay were calculated using an hourly rate. The plaintiffs were not paid overtime when the transportation duties caused work weeks to exceed 40 hours and the plaintiffs brought suit under the Fair Labor Standards Act, 29 U.S.C. §§ 206(a)(1), 207(a)(1), for recovery of back overtime pay. The plaintiffs were first hired as hourly employees but were changed to salaried status in 2002. The defendant argued that the plaintiffs were exempt from the overtime provisions, under 29 U.S.C. § 213(a)(1), because the plaintiffs were executives. The court reviewed the plaintiffs' responsibilities under the definition of executive employee provided by 29 C.F.R. § 541.100. The court found that the plaintiffs met the first three conditions: (1) paid on a salaried basis; (2) having primarily management duties; and (3) customarily and regularly directed the work of other employees. However, the court held that the plaintiffs were not executives because the plaintiffs did not meet the fourth requirement that the plaintiffs had the authority to hire, fire, or discipline employees. The court found that, although the plaintiffs had made reports and recommendations about employees, all hiring, firing and disciplinary actions were the sole authority of the defendant's administrators. ***Davis v. Mountaire Farms of Delmarva, Inc.*, 2006 U.S. App. LEXIS 18224 (3d Cir. 2006), *rev'g*, 2005 U.S. Dist. LEXIS 12534 (D. Del. 2005)**.

PRODUCT LIABILITY

STRAY VOLTAGE. The plaintiffs owned a dairy farm, and the dairy herd suffered from various health problems. The plaintiff investigated the herd's feed, consulted with a nutritionist and a veterinarian, and finally had the farm tested for stray voltage. The defendant electric utility tested the farm and found some ground voltage but indicated that the amount was below any "level of concern." The plaintiffs hired an electrician who found substantial amounts of stray voltage and installed an isolation transformer. The herd improved but continued to have health problems. Again, an independent electrician found stray voltage but the defendant found no stray voltage. The plaintiffs sued for negligence, nuisance, strict liability and trespass for damage to the herd from stray voltage. Although the trial court dismissed the claims for strict liability and trespass, the jury awarded damages to the plaintiffs on the claim of negligence. The defendant initially raised an objection that the suit was barred by the six-year statute of limitation imposed by Wis. Stat. § 805.14(1) because the plaintiffs did not exercise reasonable diligence in discovering the problem. The trial court included a jury instruction that provided that the plaintiffs could be found negligent if they failed to exercise ordinary care to discover the source of the problem. The appellate court held that this instruction was sufficient to cover the issue of whether the six-year statute of limitations applied to the action. Because the jury found that the plaintiffs were not negligent, the six-year statute of limitation did not apply. The defendant also objected to the trial court's refusal to allow a specific jury instruction that other causes, such as poor herd management, could have caused the damages to the herd. The court upheld the trial court, holding that the trial court's comparative negligence instruction allowed the defendant an opportunity to argue that non-electrical factors caused the damages to the herd. The defendant also argued that the damages should be limited to injuries suffered after the plaintiffs notified the defendant that stray voltage was suspected of causing the health problems. The court held that there was no precedent for limiting damages in a stray voltage case to those occurring after notice. ***Gumz v. Northern States Power Co.*, 2006 Wis. App. LEXIS 634 (Wis. Ct. App. 2006)**.

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State Nutrient Management Act interpreted

By John C. Becker

Nutrient Management Planning is a topic that has garnered significant attention at the state and federal level over the past 15 years. A number of states addressed this issue before the federal government directed its attention to the subject. In the 2003 proposed changes to the Clean Water Act's CAFO regulations, comprehensive nutrient management planning was introduced at the federal level. *Burkholder v. Richmond Township* is the first appellate level decision that interprets Pennsylvania's Nutrient Management Act. *Burkholder v. Zoning Hearing Board of Richmond Township and Richmond Township, Cross Appellants;* 2006 Pa. Commw. LEXIS 388, July 14, 2006. The decision is significant for its support of a major component of that law, namely the preemption of inconsistent local regulations by state regulations. In Burkholder, the issue of preemption received little attention from the litigants. Rather the Township defended its local ordinance on grounds that the Nutrient Management Act, by its own terms, did not apply to the facts of the case which, if it were a successful argument, would have avoided the premption result. As the case summary describes, Commonwealth Court decided that the Nutrient Management Act did apply to the facts of the case and, therefore, preemption was applied in favor of the landowners. The dissent points out the Township's position was viewed as having some merit. How will this case fare if it is appealed to the Pennsylvania Supreme Court?

The facts

The Burkholders purchased a 57-acre triangular shaped property in 1993 from Stephen Burkholder's parents who previously subdivided a larger tract of 152 acres into the 57-acre parcel and one other parcel. The entire 152-acre tract, including the property, lies within the Township's Agricultural Security Area (ASA) under the Agricultural Area Security Law (AASL) and is subject to an agricultural conservation easement.

Beginning in 1957, the elder Burkholders conducted a hog raising operation over the entire 152-acre property. The present landowners assumed control of the operation in 1985 and continued to conduct the operation on the property. The landowners' current operation is subject to the Nutrient Management Act (NMA) and its implementing regulations. Notably, the landowners maintain a nutrient management plan approved by the Pennsylvania Department of Environmental Protection (DEP) and the Pennsylvania State Conservation Commission (PSCC).

Currently, the landowners operate a "partial", "all in/all out" hog raising operation. In the "all in/all out" method, a farmer raises hogs from birth to maturity before selling them. The "all in/all out" method consists of three stages. The landowners currently house 3,500 to 4,000 young pigs. They do not, however, possess sufficient facilities to "finish" all pigs born on the subject property. As a result, the landowners' operation is a "partial," rather than a "total", "all in/all out" hog raising operation.

As a "partial", "all in/all out" operation, the landowners sell approximately half of the pigs born on their property as "feeder" pigs at eight to ten weeks of age at a substantially lower price than could be obtained for "finished" pigs. The landowners seek zoning relief to expand their operation from a "partial" to a "total", "all in/all out" hog raising operation so they can "finish" all pigs born on this property. Expansion to a complete "all in/all out" operation will enhance the health of the landowners' herd and will result in financial gain for the landowners. Because all of the pigs would remain on the property until "finished," the overall population would increase to approximately 5,300 pigs.

In order to expand their operation, the landowners propose to construct two new facilities. More specifically, the landowners seek to construct a 68-foot by 202-foot building that would house approximately 1,750 pigs during the "finishing stage" (finishing building). Landowners propose to construct the finishing building directly above a nine-foot deep manure storage pit.

In addition, the landowners seek to construct a 70-foot by 42-foot addition to the end of an existing farrowing and nursery building. The addition would enable the landowners to consolidate their existing, separate nursery and farrowing operations into one building. Temporary manure storage would occur in shallow pits directly below the addition.

Because of the triangular-shape of the property, the landowners propose to locate both structures less than 1,500 feet from adjoining residential properties and/or zoning district boundaries. This aspect of the proposal is the basis for much of the litigation.

Under the terms of the Richmond Township Zoning Ordinance of 1998, the proposed expansion is an "Intensive Agricultural Activity." To engage in this type of activity in the R-A zoning district, the landowners are required to obtain a special exception. Section 804.7 of the ordinance sets forth five criteria an applicant must satisfy to obtain a special exception for an intensive agricultural activity. Section 804.7 states:

> Intensive Agricultural Activity
>
> Intensive agricultural activities include, but are not limited to, mushroom farms, poultry and egg production, and dry lot farms, wherein the character of the activity involves a more intense use of land than found in normal farming operations.[1]
>
> a. Intensive agricultural activities shall not be located within one thousand five hundred (1,500) feet of another zoning district or existing residence located within the Agriculture or any other zoning district.
>
> b. A minimum lot size of five (5) acres is required for intensive agricultural activities; which shall be so located on the lot as to provide front, side, and rear yards of one hundred (100) feet. The maximum height of [a] building used for intensive agricultural use is thirty-five (35) feet or two and one-half (2-1/2) stories, excluding appurtenances.
>
> c. Commercial composting is prohibited. Any on-site composting shall be limited for use on premises on which such composting is made and produced.
>
> d. Solid and liquid wastes shall be disposed of daily in a manner to avoid creating insect or rodent problems, or a public nuisance. No emission of noxious, unpleasant gases shall be permitted in such quantities as to be offensive outside the lot lines of the tract occupied by an intensive agricultural user.
>
> e. Dry lot feeding stations shall be permanently paved.

In October 2002, the landowners filed an application with the Richmond Township Zoning Hearing Board (ZHB) seeking special exceptions for the proposed facilities pursuant to Section 804.7 of the ordinance.[2] In their amended application, the landowners asserted, among other things, the 1,500-foot setback requirement was invalid because it conflicted with the NMA's less stringent setback requirements.

The ZHB issued a 2-1 decision rejecting all of the landowners' requested relief. The landowners appealed. Without taking additional evidence, the trial court affirmed in part and reversed in part. The trial court addressed Landowners' contention that the NMA preempts the 1,500-foot setback requirement contained in Section 804.7 a. Accordingly, the trial court determined that to the extent Section 804.7 a. of the ordinance regulates manure storage facilities, it is more restrictive than the NMA, and it is in conflict with the NMA and its regulations.

The issue

The trial court framed the issue: Are the landowners' proposed finishing building

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and addition considered "manure storage facilities" under the NMA's regulations? If the proposed buildings are "manure storage facilities" under the regulations, then the issue turns to whether the Richmond Township ordinance is inconsistent with or more stringent than the NMA regulation of them as "manure storage facilities" and subject to the NMA preemption provision, 3 P.S. section 1717.

Discussion

Are these buildings "manure storage facilities"?

On its face, the NMA's "preemption" provision expressly prohibits local regulation of the "construction, location or operation of facilities used for storage of animal manure ... if the municipal ordinance or regulation is in conflict with [the NMA] and [its] regulations ...Former 3 P.S. § 1717. The NMA's regulations define a "manure storage facility" as:

> A permanent structure or facility, or portion of a structure or facility, utilized for the primary purpose of containing manure. The storage facility of a waste management system is the tool that gives the manager control over the scheduling and timing of the spreading or export of manure. Examples include: liquid manure structures, manure storage ponds, component reception pits and transfer pipes, containment structures built under a confinement building, permanent stacking and composting facilities and manure treatment facilities. The term does not include the animal confinement areas of poultry houses, horse stalls, freestall barns or bedded pack animal housing systems.

25 Pa. Code § 83.201

Section 83.351 of 25 Pa. Code contains a variety of siting criteria for manure storage facilities. Of particular import here, the siting criteria include setback requirements for manure storage facilities from surface water bodies, wells, sinkholes, property lines and public water supply sources. More particularly, section 83.351 imposes setback requirements of 100, 200, and 300 feet. 25 Pa. Code § 83.351(a)(2)(iv)(A)-(F), (v)(A)-(G). Read in its entirety, the most stringent setback requirement for a "manure storage facility" contained in the NMA's regulations is 300 feet.

Section 804.7a. of the ordinance imposes a setback requirement of 1,500 feet from "another zoning district or existing residence located within the agriculture or other any other zoning district." Clearly, the 1,500-foot setback requirement conflicts with and is more stringent than the setbacks imposed by the NMA regulations. To the extent Section 804.7a. attempts to regulate manure storage facilities, it is preempted by the NMA.

Does the NMA and its attendant regulations apply to landowners' proposed structures? To answer this it is necessary to consider whether the proposed finishing building and addition are "manure storage facilities." As noted, a "manure storage facility" includes a "portion of a ... facility, utilized for the primary purpose of containing manure." The regulation also cites several specific examples of manure storage facilities, including "component reception pits" and "containment structures built under a confinement building."

As to the proposed finishing building, the landowners propose to construct this building in order to enable them to finish all pigs born on the property. The floor of the finishing building would be slatted to allow droppings from the pigs to fall into a large storage pit situated directly below the building. F.F. No. 18. The manure storage pit would be nine feet deep as measured from the slats to the floor of the pit, with a total capacity of approximately 500,000 gallons. F.F. No. 19. It would collect all manure generated from the hogs confined in the finishing building. N.T. 4/1/03 at 77. All aspects of the storage and removal of the manure are regulated within the approved nutrient management plan entered into by the landowners in accordance with the NMA. N.T. at 90-92.

Based on these characteristics, the landowners' proposed finishing building qualifies as a "manure storage facility." Clearly, the building's manure storage pit is "portion of a facility ... utilized ... for the primary purpose of containing manure." See 25 Pa. Code § 83.201. Indeed, the manure storage pit falls squarely within the specific examples of manure storage facilities cited in section 83.201, which include "manure reception pits" and "containment structures built under a confinement building."

The Township concedes the manure pit itself is the type of containment structure contemplated by the NMA. It challenges the proposed finishing building above the pit, claiming the building exists for the purpose of housing the pigs and is incidental or unrelated to the manure storage functions. Contrary to this assertion, the finishing building is utilized as a confinement structure that holds the pigs in a fixed location, which ultimately facilitates the gathering of the manure in a containment structure underneath the building. In short, because the containment structure underneath the finishing building is used for the primary purpose of containing manure, the NMA applies and preempts application of the ordinance's setback requirement to the proposed finishing building.

With regard to the proposed addition, this building would house the operation's farrowing and nursery area and would also have a slatted floor. ZHB Hearing, 6/10/03, N.T. at 53-54. The base of the structure, below where the pigs are housed, would consist of a concrete pit that is approximately 24 inches deep. N.T. 6/10/03 at 54. The storage pit would function as a concrete vault that contains the manure that falls through the slatted floor. *Id*. As with the proposed Finishing Building, all aspects of the storage and removal of the manure are regulated in accordance with Landowners' approved "nutrient management" plan. N.T. at 90-92.

Like the landowners' proposed finishing building, the proposed addition falls within the broad language of the "manure storage facility" definition, as it too is a portion of a facility utilized for the primary purpose of containing manure. See 25 Pa. Code § 83.201. Like the containment structure beneath the finishing building, the manure storage reception pit beneath the addition falls squarely within the regulation's cited examples. *Id*. Because the containment structure below the addition is utilized for the primary purpose of containing manure, the NMA applies and preempts application of the ordinance's setback to the addition.

The ZHB denied the landowners' requests for special exceptions for the proposed finishing building and addition based solely on its determinations that the proposed structures did not comply with Section 804.7a. of the ordinance's setback requirement. Based on the Commonwealth Court's determination that the NMA and its regulations preempt Section 804.7a.'s setback requirement as applied to the finishing building and the addition, the court concluded the landowners are entitled to special exceptions to construct both buildings.

Holding

Accordingly, the Commonwealth Court affirmed the trial court's determination that the NMA preempts the local setback requirement as applied to the proposed finishing building and reversed the trial court's determination that the NMA does not preempt the local setback requirement as applied to the proposed addition. By reversing the trial court, the Commonwealth Court concluded that the addition was a "manure storage facility" and that NMA regulations applied to it. As they applied to it, the NMA regulations preempted inconsistent and more stringent local regulations. The landowners are entitled to special exceptions to construct both buildings.

In a dissent by two members of the seven-member court, Justice Rochelle Freidman drew a different conclusion on the pivotal question of whether the finishing building and addition met the definition of a "manure storage facility."

In her view, although the "portion" of the finishing building under the animal confinement area is a "manure storage facility," the animal confinement area itself is not a "manure storage facility"

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because its primary purpose is not the storage of manure. Her view is based on the record from the zoning hearing board and on language of the regulation itself.

The record reflects that the purpose of a finishing building is to house pigs from the time they are eight- to ten-weeks old until they are five- to six-months old, or approximately 250 pounds, and ready for sale. The landowners sought to build their new finishing building in order to: (1) create a more economic and efficient "all in/all out" operation by eliminating the need to sell any of their pigs as feeder pigs; and (2) improve the health of the pigs by moving them less and by keeping them in clean and dry rooms at all times. Given these stated purposes for the finishing building, none of which relate to manure storage, Judge Friedman could not conclude that the "primary" purpose of the finishing building is to store manure. Therefore, she could not conclude that the finishing building, "as a whole" is a "manure storage facility."

Her view is that containment structures built under a confinement building are separate and distinct from the confinement building itself. Although the containment structures are "manure storage facilities," the confinement building is "not" a "manure storage facility." This interpretation of "under a confinement building" is consistent with another part of the definition that states that a "manure storage facility" may be a "portion" of a structure" utilized for the primary purpose of containing manure.

The ZHB made no finding as to whether the addition would have a manure storage pit beneath it. The trial court specifically found that the addition would "not" be built over a manure storage pit but, rather, "would utilize existing storage pits." Based on this finding, the trial court concluded that, inasmuch as "the addition is being built separate from the pits, it cannot be considered to be primarily utilized for manure containment purposes." Nevertheless, without any discussion, the majority opinion of the Commonwealth Court states, "Temporary manure storage would occur in shallow pits directly below the addition." In Judge Friedman's view, the Commonwealth Court, as an appellate court, cannot make up its own findings of fact.

The addition would be built over "a reception pit which is connected by a transfer pipe to the actual manure storage [facility]," (R.R. at 280a), and, if there had been such a finding, there would be no question that "component reception pits and transfer pipes" fall within the definition of "manure storage facility." However, because the trial court found that its primary purpose would be "the furrowing and weaning of young piglets," and "not" the containing of manure, the confinement area of the addition would "not" fall within the definition. (Trial Ct.'s op. at 17.)

Judge Friedman concluded that the confinement area of the addition is not a "manure storage facility," and, thus, the regulation governing the location of "manure storage facilities" does not apply to it. Because the addition is not a "manure storage facility" subject to 25 Pa. Code § 83.351, section 804.7a of the ordinance may regulate its distance from zoning district lines and existing residences.

Interestingly, even if the confinement areas of the finishing building and addition were themselves "manure storage facilities," Judge Friedman went on to say she perceived no conflict between 25 Pa. Code § 83.351 and section 804.7a of the Ordinance.

The regulation at 25 Pa. Code § 83.351a(2) requires that "manure storage facilities" be located, at a "minimum", 100- to 300-feet from property lines and specified water sources.[3] Section 804.7a of the ordinance requires that "intensive agricultural activities" be located 1,500 feet from zoning district lines or existing residences. Because section 804.7a pertains only to the distance of an "intense agricultural activity" from zoning district lines and existing residences, "not" the distance of "manure storage facilities" from water sources and property lines, Judge Friedman concluded that section 804.7a does not apply to "manure storage facilities" and therefore, can not be more stringent than the NMA regulations. Interestingly, as this case was being decided, the state Nutrient Management Act regulations were being considered for revision. The language in section 83.351a. was not revised in this process. Should the thrust of the dissent's interpretation been addressed in the amendment process?

Judge Friedman interprets the word "minimum" in section "a" as applicable to all of the standards that appear in section 83.351. "Minimum" appears in the first major heading of the section, but the subsection that creates the NMA setbacks is in section 351a(2). Is the meaning of "minimum" to be limited only to section "a" and have no application to a(2)? Did the drafters of section 83.351 make an unfortunate selection of words when describing what they wanted to accomplish?

More troubling would be the situation in which Judge Friedman's interpretation is accepted. If her interpretation is adopted, a conflict would certainly arise as to how the preemption provision of the Nutrient Management Act could be applied? Since the preemption provision is grounded on the offending regulation being inconsistent with or more stringent then the Nutrient Management regulations, how could those questions be answered if it is determined that the setback requirements in the regulations are only minimum setbacks? If they are minimum setbacks, who has the authority to impose other setbacks and how can these setbacks be inconsistent with "minimum standards"? Establishing standards and allowing state and local governments to impose tighter controls is not unknown in environmental law and regulation. In the Nutrient Management Act the intent was to establish state standards and accept no deviation from them.

Act 38 and its non-application to this case

This case was filed before Act 38 of 2005 was passed in July, 2005. The court noted that under Act 38, the NMA re-codified the legislative intent, judicial construction, administration or implementation and it was to be the same as that which existed before Act 38.

After the case was submitted to the Commonwealth Court, Attorney General Tom Corbett sent a letter to Richmond Township. The attorney representing the Burkholder's attempted to have the letter added to the record before the Court. The communication consisted of two letters from the Office of Attorney General in which the Attorney General stated "Richmond Township Ordinance No. 81-2000 unlawfully prohibits or limits a normal agricultural operation in violation of Act 38 of 2005, 3 Pa. C.S. §§ 311-318, the [NMA] ...."

The Township moved to strike the post-submission communication, asserting the letters are irrelevant, and Pa. R.A.P. 2501 does not provide the appropriate procedure by which to share the Attorney General's opinions with this court.

The Commonwealth Court granted the Township's application to strike. More specifically, the court said "[the] letters from the Attorney General's Office do not specify the sections of the Ordinance that violate the NMA. Thus, it is unclear whether the Attorney General is of the opinion that the specific section of the Ordinance at issue here violates the NMA."

Therefore, the action of the Attorney General played no part in the decision of the case.

The Commonwealth Court's comments are enlightening as they seem to indicate the court will impose an obligation on the Attorney General to specify the nature of his objection to local regulations when reviewing action he takes under ACRE.

As the first appellate decision interpreting the NMA, this case is important to all livestock producers and community officials.

Key unanswered questions

The Burkholder property was located within an Agricultural Security Area, sometimes referred to as an "Agricultural District." Within such an Area or District, what obligation does the Township accept regarding future support for agriculture in that Security Area, or District? By adopting the 1500 feet setback requirement,

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was the Township fulfilling its obligation to the agricultural producers who sought the Security Area designation? If the Township was not fulfilling its obligation, what consequence would flow to the Township?

The Burkholder land was subject to a conservation easement that limited the future use of the land to agricultural production uses. Therefore, the economic viability of the Burkholder Farm was critical to its future under limited use opportunities. That being the case, does Burkholder have grounds to argue that the local community must assist him in finding a profitable use? Since profitability of any use is subject to a large number of factors that can affect economic performance, how can achievement of the community's obligation be correctly measured? Can the Burkholders undertake a "risky" venture in search of profitability and must the Community support their efforts?

The Township ordinance established a setback from an "Intensive Agricultural Activity." While the intent of the measure is clear, how would one go about determining if a proposed facility met the requirement or did not meet it? From what point is the 1500 feet measured: a corner of a building involved in the activity; the "center of mass" of the activity; from a property line? Since the measurement is taken from the activity to either an existing residence or another zoning district, the ordinance refers to several factors that are beyond the control of the producer, such as Burkholder, raising the question of why Burkholder should be subject to them if he has no way to control them?

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[1] The term "normal farming operation" is one that has taken on a distinct meaning under a variety of laws, including the Pennsylvania's "Right to Farm" law and Municipalities Planning Code. In this ordinance, the local community is attempting to exert its influence by using the term to refer to farming operations that are at a less-intensive scale. This would seem to change the meaning considerably from what has developed and make the term subject to local, rather than state interpretation.

[2] The NMA, originally enacted in 1993, was repealed and recodified as Act 38 in July 2005. Landowners submitted their special exception application in October 2002 with amended applications filed in January and July 2003; thus, the 1993 version of the NMA applies here. As a result, all references to the NMA in this opinion are to the 1993 version. Notably, Section 4 of Act 38 indicates, with certain enumerated exceptions, "any difference in language between [Act 38] and the [NMA] is intended only to conform to the style of the Pennsylvania Consolidated Statutes and is not intended to change or affect the legislative intent, judicial construction or administration and implementation of the [NMA]."

[3] Section 83.351 provides: (a) The minimum standards contained in this section apply to new manure storage facilities constructed and existing manure storage facilities expanded as part of a plan developed for a CAO.

(1) Manure storage facilities shall be designed, constructed, located, operated, maintained, and, when no longer used for the storage of manure, removed from service, to prevent the pollution of surface water and groundwater, and the offsite migration of pollution, by meeting the standards contained in the *Pennsylvania Technical Guide*, except if these standards conflict with this subchapter.

(2) In addition to complying with paragraph (1), manure storage facilities shall be designed and located in accordance with the following criteria: …

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If you desire a copy of any article or further information, please contact the Law School Library nearest your office. The National AgLaw Center website < http://www.nationalaglawcenter.org > http://www.aglaw-assn.orghas a very extensive Agricultural Law Bibliography. If you are looking for agricultural law articles, please consult this bibliographic resource on the National AgLaw Center website.

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

Fed. Register 7/15-8/9

COOPERATIVES. The CCC has adopted as final regulations amending the regulations governing Cooperative Marketing Associations to provide that a CMA is no longer required to distribute Marketing Assistance Loan (MAL) and Loan Deficiency Payment (LDP) proceeds directly to members of the CMA within 15 days of receipt of such proceeds from CCC. The new regulations allow delayed payment under deferred payment agreements between the CMA and its members. **71 Fed. Reg. 42749 (July 28, 2006)**.

CROP INSURANCE. The FCIC has issued proposed regulations amending the fresh market sweet corn crop insurance provisions of the common crop policy to allow for the expansion of fresh market sweet corn coverage into more areas where the crop is produced, when provided in the actuarial documents and when it is marketed through direct marketing. This change will be applicable for the 2008 and succeeding crop years. **71 Fed. Reg. 42770 (July 28, 2006)**.

The FCIC has issued proposed regulations amending the common crop insurance regulations; northern potato crop insurance provisions, northern potato crop insurance quality endorsement, northern potato crop insurance processing quality endorsement, potato crop insurance certified seed endorsement, northern potato crop insurance storage coverage endorsement, and the central and southern potato crop insurance provisions to provide policy changes and clarify existing policy provisions to better meet the needs of the insureds, and to reduce vulnerability to fraud, waste and abuse. The changes are intended to apply for the 2008 and succeeding crop years. **71 Fed. Reg. 42761 (July 28, 2006)**.

FARM AND RANCH LANDS PROTECTION PROGRAM. The Natural Resources Conservation Service has issued interim final regulations amending the Farm and Ranch Lands Protection Program at 7 C.F.R. Part 1491 to clarify (1) fair market value definition; (2) program eligibility as to forest lands; (3) the nature of the real property rights the United States is acquiring and how it will exercise those rights; (4) compliance with Department of Justice Title Standards; (5) exercising United States' rights; (6) the implementation of federal appraisal requirements required by the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970; (6) impervious surface limitations on the easement area; and (6) indemnification requirements. **71 Fed. Reg. 42567 (July 27, 2006)**.

NATIONAL ORGANIC PROGRAM. The AMS has issued proposed regulations amending the USDA National List of Allowed and Prohibited Substances regulations to add 13 substances, along with any restrictive annotations, to the list of substances allowed for organic livestock production. The list of approved substances for livestock production can be found at 7 C.F.R. 205.603. Note that some substances are allowed only for specific uses, such as cleaning equipment. **71 Fed. Reg. 40623 (July 17, 2006)**.

—Robert P. Achenbach, Jr., AALA Executive Director

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

2006 CONFERENCE. There is an error in the 2006 conference brochure. Under the Conference Hotel section it states that the conference guest room rate is available three days before and three days after the conference. That is incorrect. There is a very limited room block for two days before and one day after the conference and both blocks are full so the conference guest room rate is available only on Thursday, Friday and Saturday. Remember that the room block expires on September 18, 2006 so reserve your room today. Savannah is very popular in October so rooms may get scarce for the conference dates. See www.aglaw-assn.org for more conference details and the latest program.

NOMINATIONS FOR ANNUAL SCHOLARSHIP AWARDS. The Scholarship Awards Committee is seeking nominations of articles by professionals and students for consideration for the annual scholarship awards presented at the annual conference. Please contact Jesse Richardson, Associate Professor, Urban Affairs and Planning, Virginia Tech, Blacksburg, Virginia 24061-0113,(540) 231-7508 (phone) (540) 231-3367 (fax) email: jessej@vt.edu

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