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INSIDE

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IRS finally requires information reporting for commodity certificate gains

The long-running controversy over whether commodity certificate gains should be the subject of information reporting[1] was resolved on July 24, 2007, with issuance of Notice 2007-63.[2] That move by the Internal Revenue Service placed all four methods of paying marketing loan benefits (loan deficiency payments, Commodity Credit Corporation [CCC] loans repaid with cash, CCC loans repaid with generic commodity certificates and forfeiture of commodities to CCC under non-recourse loans) under the federal commodity subsidy program[3] on the same footing insofar as information reporting is concerned.[4]

Background

Of the three forms of subsidies under the 2002 farm bill,[5] direct payments, countercyclic payments and marketing loan benefits,[6] only marketing loan benefits have produced controversy over how the benefits are handled. The controversy has arisen because one of the methods of paying marketing loan benefits – repayment of CCC loans with generic commodity certificates – has not involved reporting of the gain involved to the Internal Revenue Service or to the taxpayer.[7] The other three methods of receiving the benefits – loan deficiency payments, CCC loans repaid with cash and forfeiture of commodities to CCC – have all involved reporting of gains on Form 1099-G.

Example: Assume the upland cotton loan rate (which is set by Congress) is 52 cents per pound. A CCC loan is obtained for the loan rate amount, 52 cents per pound. If the adjusted world price (AWP) is 32 cents per pound (the approximation of fair market value for the commodity) the eligible participant would receive a payment of 20 cents per pound (the difference between the loan rate of 52 cents per pound and the AWP of 32 cents per pound). The 20 cents per pound would be reported to the IRS and the taxpayer on Form CCC-1099-G.

That would be the case if the benefit is paid as a loan deficiency payment (LDP), on repayment of a CCC loan with cash or by forfeiture of the commodity to CCC.

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Implementation of grazing rules for federal land frozen

The Taylor Grazing Act (TGA) of 1934 regulates grazing on federal land under the control of the Bureau of Land Management (BLM). In early 1995, the Interior Department proposed new regulations. Those regulations were challenged in court by a group of cattle industry organizations as being in violation of the TGA. In 1996, the Wyoming federal district court set aside a major portion of the regulations. On appeal, the U.S. Court of Appeals for the Tenth Circuit rendered a mixed opinion - upholding part of the regulations and holding other parts invalid. The U.S. Supreme Court affirmed. By mid-2002, however, the BLM had developed a list of proposed changes to the 1995 regulations. The proposals, which were to become effective in August of 2006, would allow ranchers to share in ownership of fencing, water wells, and other range improvements. The federal government has traditionally been the sole owner of those items. In addition, the proposed rules would no longer require BLM to consult with the public before renewing grazing permits or changing the boundaries of grazing allotments, and BLM would have less power to sanction ranchers for grazing violations. The proposed rules also allow ranchers to remove cattle from allotments for as long as desired, rather than triggering loss of a grazing permit upon three years of non-use.

The proposed rules were challenged by an environmental group, and the U.S. Fish and Wildlife Service (USFWS) (the federal agency charged with protecting endangered species) chimed in that the proposals would "fundamentally change the way BLM lands are managed," and "could have profound impacts on wildlife resources." In addition, USFWS pointed out that the BLM failed to consult with the USFWS before

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However, until issuance of Notice 2007-63 [8] that was not the case for repayment of CCC loans with generic commodity certificates.

The IRS response

Indeed, IRS had insisted in 2004,[9] in response to criticism of the long-standing practice of not requiring an information return for marketing loan gains arising from repayment with generic commodity certificates,[10] that information returns were not required although the Service conceded that such gains were taxable. The IRS pronouncement in 2004 stated –

> A farmer can use CCC certificates to facilitate repayment of a CCC loan. If a farmer uses cash instead of certificates, the farmer will receive a Form CCC-1099-G Information Return showing the market gain realized. However, if a farmer uses CCC certificates to facilitate repayment of a CCC loan, the farmer will not receive any information return.

Regardless of whether a CCC-1099-G is received, the market gain is either reported as income or as an adjustment to the basis of the commodity, depending on whether the special election has been made."[11]

By going that far but not requiring information reporting, the IRS focused attention on the moral hazard involved, by acknowledging that the gain is taxable but refusing to order information reporting *even though the other three methods of delivering marketing loan benefits all involved information reporting.* That stance was criticized.[12]

Reconsideration by IRS

On July 24, 2007, the Internal Revenue Service reversed course and issued guidance stating that "for loans repaid on or after January 1, 2007, the CCC reports market gain associated with the repayment of a CCC loan whether the taxpayer repays the loan with cash or uses CCC certificates in repayment of the loan. The CCC reports the market gain on Form 1099-G, *Certain Government Payments.*"[13]

The same publication also confirmed that a taxpayer who has elected to treat CCC loans as income[14] can account for the market gain "... for the year in which a CCC loan is repaid by making an adjustment to the basis of the commodity that secures the loan. The taxpayer's basis in the commodity before the repayment of the loan is equal to the amount of the loan previously reported as income. That basis is reduced by the amount of any market gain associated with the repayment of the loan."[15]

In conclusion

With all of the attention currently being focused on payment limitations, this development is likely to be greeted warmly by those urging a level playing field in handling subsidy payments. However, marketing loan benefits associated with repayment of CCC loans with generic commodity certificates and forfeiture of commodities to CCC in repayment of nonrecourse loans remain exempt from the statutory payment limitation of $75,000 for that type of benefit.[16]

—Neil E. Harl, Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Prof. of Econ., Iowa State Univer. Reprinted with permission fromVol. 18 Ag. L. Digest 113 (2007); ___ Tax Notes ___(2007)(forthcoming).

[1] IR 2004-38, March 18, 2004. See Harl and McEowen, *Inconsistency in Handling Farm Income?* 99 Tax Notes 923 (2003); Harl and McEowen, *Inconsistency in Handling Farm Income: One More Time*, 103 Tax Notes 476 (2004). See generally Harl, Farm Income Tax Manual § 305(b) (2006 ed.); Harl, Agricultural Law Manual § 4.02[1][b] (2007).

[2] I.R.B. 2007-33.

[3] Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002).

[4] Gains from the use of commodity certificates in 2001 nationally amounted to $1,974,000,000. Report of the Commission on the Application of Payment Limitations for Agriculture, U.S. Dept. of Agriculture, August 2003, Table 4.8, p. 82.

[5] *See* note 3 *supra*.

[6] *Id*.

[7] *See* Harl and McEowen, *Inconsistency in Handling Farm Income?* 99 Tax Notes 923 (2003).

[8] I.R.B. 2007-33.

[9] IR-2004-38, March 18, 2004.

[10] Harl and McEowen, *Inconsistency in Handling Farm Income?* 99 Tax Notes 923 (2003).

[11] IR-2004-38, March 18, 2004.

[12] Harl and McEowen, *Inconsistency in Reporting Farm Income: One More Time*, 103 Tax Notes 476 (2004).

[13] Notice 2007-63, I.R.B. 2007-33.

[14] I.R.C. § 77(a). *See* Rev. Proc. 2002-9, 2002-1 C.B. 327, App. § 1.01.

[15] Notice 2007-63, I.R.B. 2007-33.

[16] Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 1603(a), 116 Stat. 134 (2002), amending 7 U.S.C. § 1308.

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proposing the regulations in accordance with the Endangered Species Act. Just before the rules were to go into effect, a federal court enjoined implementation of the rules on the basis that it was likely that the plaintiff was likely to prevail on its claim that the BLM violated the National Environmental Policy Act (NEPA) by improperly minimizing the detrimental effects of limiting public input, and by excluding a report of BLM experts critical of the modifications to the regulations.

Upon further review, the Federal District Court for the District of Idaho froze the proposed regulations. The court noted that the BLM had caved-in to pressure from the livestock industry to loosen the rules. As a result of the BLM's haste to implement the new rules, the court held that the BLM had violated NEPA and the Federal Land Policy and Management Act.The BLM justified the regulatory changes as making grazing rules more efficient, but the court noted that BLM was not the originator of the new rules. Instead, the court noted that the livestock industry (particularly the National Cattlemen's Beef Association) had first proposed the rules. As a result of the court's most recent decision, the new rules will not take effect until the BLM consults with the USFWS and examines the potential environmental impacts of the proposed rules. *Western Watersheds Project v. Kraayenbrink, et al.*, No. CV-05-297-E-BLW, 2007 U.S. Dist. LEXIS 41973 (D. Idaho Jun. 8, 2007).

—Roger McEowen, Director of the ISU Center for Agricultural Law and Taxation

Agricultural law bibliography: 2nd Quarter 2007

Administrative law

Bryson, *United States Food and Agriculture in the 21st Century: Is USDA Still Relevant?*, 2 J. Food L. & Pol'y 1-9 (2006).

Aquaculture

Note, *Net Pens with Adaptive Management: How to Manage the Expansion of Aquaculture Using the Clean Water Act*, 30 Vt. L. Rev. 1007-1043 (2006).

Biotechnology

Angelo, *Regulating Evolution for Sale: An Evolutionary Biology Model for Regulating the Unnatural Selection of Genetically Modified Organisms*, 42 Wake Forest L. Rev. 93-165 (2007).

Kowalski, *Rational Risk/Benefit Analysis of Genetically Modified Crops*, 12 J. Intell. Prop. Rights 92-103 (2007).

Redick, *The Cartagena Protocol on Biosafety: Precautionary Priority in Biotech Crop Approvals and Containment of Commodities Shipments*, 18 Colo. J. Int'l. Envtl. L. & Pol'y 51-116 (2007).

Corporate farming (restrictions on corporate farming/family farm preservation)

Schroeter, et. al., *Anti-Corporate Farming Laws and Industry Structure: The Case of Cattle Feeding*, 88 Am. J. Of Agric. Econ. 1000-1014 (2006).

Energy issues

Note, *A Grassroots Vehicle for Sustainable Energy: The Conservation Reserve Program & Renewable Energy*, 31 Wm. & Mary Envtl. L. & Pol'y Rev. 571-602 (2007).

Smith, *Wind Energy: Siting Controversies and Rights in Wind*, 1 Envtl. & Energy L. & Pol'y J. 281-317 (2007).

Environmental issues

Nanda, *Agriculture and the Polluter Pays Principle*, 54 Am. J. Comp. L. Supp. 317-339 (2006).

Equine law

Note, *Putting the Cart Before the Horse: Barriers to Enforcing a Code of Ethics for Thoroughbred Auctions in the United States*, 72 Brooklyn L. Rev. 1061-1099 (2007).

Estate planning/divorce

McEowen, *IRS Issues Proposed Regulations Providing Guidance on How Post-Death Events Impact Taxable Estate Value*, 24 Agric. L. Update 4-6 (5-2007).

Farm labor

Aliens

Note, *Of Policies, Procedures, and Packing Sheds: Agricultural Incidents of Employer Abuse of the H-2B Nonagricultural Guestworker Visa*, 10 J. Gender Race & Justice 143-192 (2006).

General & social welfare

Connally, *What Farmers Should Know about Employing Migrant and Seasonal Workers*, 24 Agric. L. Update 4-6 (4-2007).

Farm policy and legislative analysis

International

Giupponi et al., *The Kyoto Protocol and the Effect of Existing and Planned Measures in the Agricultural and Forestry Sector in the EU25*, Fondazione Eni Enrico Mattei (FEEM) Working Paper No. 13.2007, http://ssrn.com/abstract=962380

Lightbourne, *Organization and Legal Regimes Governing Seed Markets in the People's Republic of China*, 2006 U. Ill. J. L., Tech. & Pol'y 229-262.

Farmer-processor bargaining—production contracts

Goodhue & Hoffmann, *Reading the Fine Print in Agricultural Contracts: Conventional Contract Clauses, Risks and Returns*, 88 Am. J. Of Agric. Econ. 1237-1243 (2006).

MacDonald, *Agricultural Contracting, Competition and Antitrust,* 88 Am. J. of Agric. Econ. 1244-1250 (2006).

Schieffer & Wu, *Private Mechanisms, Informal Incentives, and Policy Intervention in Agricultural Contracts*, 88 Am. J. Of Agric. Econ. 1251-1257 (2006).

Finance and credit

Roberts-Caudle, *Producer's Liens Follow the Money in California*, 24 Agric. L. Update 4-6 (6-2007).

Food and drug law

Coutrelis, *European Union Food Law Update*, 2 J. Food L. & Pol'y 121-136 (2007).

Milne, *Protecting Islam's Garden from the Wilderness: Halal Fraud Statutes and the First Amendment*, 2 J. Food L. & Pol'y 61-84 (2007).

Note, *Food Supplements Directive: An Attempt to Restore the Public Confidence in Food Law*, 29 Loy. L.A. Int'l & Comp. L. Rev. 105-120 (2007).

Peltz & Finklehoffe, *Sea Food–Who is Liable for a Bad Catch? An Analysis of a Ship Owner's Liability for Claims of Food Poisoning*, 19 U. San Fran. Maritime L. J. 121-137 (2006).

Roberts, *United States Food Law Update*, 2 J. Food L. & Pol'y 137-155 (2007).

Soltis, *Between a Rock and a Hard Place: FDA's Regulation of Dietary Ingredients in Dietary Supplements*, 2 J. Food L. & Pol'y 11-38 (2007).

Hunger & food issues

Ndulo, *Imagine a World Without Hunger: The Hurdles of Global Justice*, 39 Cornell Int'l L. J. 779-787 (2006).

International trade

Comment, *Tearing the Fabric of the World Trade Organization. (Dispute Settlement: Dispute DS 267, United States-Subsidies on Upland Cotton, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm)*, 32 N. C. J. Int'l L. & Com. Reg. 547-603 (2007).

Dorn, *The Regulation of Genetically Modified Organisms: Why the Biotech Products Case is a Win-Win Situation for the European Union*, 37 Envtl. L. Rep. News & Anal. 10225-10229 (2007).

Smith, *Regulating State Trading Enterprises in the World Trade Organization: An Urgent Need for Change? Evidence from the 2003-2004 U.S.-Canada Grain Dispute*, 29 Rev. Of Agric. Econ. 187-200 (2007).

Land reform

Note, *Comprehensive Land Reform as a Vehicle for Change: An Analysis of the Operation and Implications of the Tanzanian Land Acts of 1999 and 2004*, 45 Colum. J. Transnat. L. 551-585 (2007).

Land use regulation

Land use planning and farmland preservation techniques

Krannich, *A Modern Disaster: Agricultural Land, Urban Growth, and the Need for a Federally Organized Comprehensive Land Use Planning Model*, 16 Cornell J. L. & Pub. Pol'y 57-99 (2006).

Livestock and Packers & Stockyards

Comment, *Cow 54 Where Are You? Producer Liability and the National Animal Identification System*, 23 J. Contemp. Health L. & Pol'y 106-135 (2006).

Note, *Not In My Neighborhood: The Fight Against Large-Scale Animal Feeding Operations in Rural Iowa, Preemptive Tactics, and the Doctrine of Anticipatory Nuisance*, 55 Drake L. Rev. 497-539 (2007).

Post, *Compelled Subsidization of Speech: Johanns v. Livestock Marketing Association*, 2005 S. Ct. Rev. 195-228.

Patents, trademarks & trade secrets

Comment, *The Grape Debate: Geographic Indicators vs. Trademarks*, 35 Sw. U. L. R. 603-622 (2007).

Quach, et al., *Biotechnology Patenting Takes Off in Developing Countries*, 8 Int'l J. Of Boptecj 43-59 (2006).

Public lands

Comment, *Bringing Green Power to the Public Lands: The Bureau of Land Management's Authority and Discretion to Regulate Wind-Energy Developments*, 21 J. Envtl. L. & Litig. 445-508 (2006).

Shepherd, *The Future of Livestock Grazing and the Endangered Species Act*, 21 J. Envtl. L. & Litig. 383-444 (2006).

Rural development

Richerzhagen & Virchow, *Sustainable Utilisation of Crop Genetic Diversity Through Property Rights Mechanisms: the Case of Coffee Genetic Resources in Ethiopia*, 9 Int'l. J. of Biotech. 60-86 (2007).

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Massachusetts v. the Environmental Protection Agency[1] — standing to challenge lack of regulation of emissions of greenhouse gases

On October 20, 1999, a group of private organizations filed a rulemaking petition asking EPA to regulate "greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act."

Petitioners maintained that greenhouse gas emissions have significantly accelerated climate change; and that the Intergovernmental Panel on Climate Change (IPCC)1995 report warned that "carbon dioxide remains the most important contributor to [man-made] forcing of climate change." The petition further alleged that climate change will have serious adverse effects on human health and the environment.

As to EPA's statutory authority, the petition observed that the agency itself had already confirmed that it had the power to regulate carbon dioxide; that in 1998, Jonathan Z. Cannon, then EPA's General Counsel, prepared a legal opinion concluding that "CO[2] emissions are within the scope of EPA's authority to regulate," even as he recognized that EPA had so far declined to exercise that authority. Cannon's successor, Gary S. Guzy, reiterated that opinion before a congressional committee just two weeks before the rulemaking petition was filed.

The claim

Massachusetts and a group of States, local governments, and private organizations, alleged in a petition for certiorari that the Environmental Protection Agency (EPA) has abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide. Specifically, petitioners asked the Supreme Court to answer two questions concerning the meaning of § 202(a)(1) of the Act: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the statute.

In response, EPA, supported by 10 intervening States and six trade associations, correctly argued that the Supreme Court could not address those questions unless at least one petitioner has standing to invoke jurisdiction under Article III of the Constitution. Standing requires parties before the court to have suffered some type of injury that was caused by the party being sued and that can be redressed in the action brought before the Court.

Section 202(a)(1) of the Clean Air Act provides:

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare ....

The Act defines "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive ... substance or matter which is emitted into or otherwise enters the ambient air." § 7602(g). "Welfare" is also defined broadly: among other things, it includes "effects on ...weather ... and climate." § 7602(h).

Background

When Congress enacted the Clean Air Act, the study of climate change was in its infancy. In the late 1970's, the federal government began devoting serious attention to the possibility that carbon dioxide emissions associated with human activity could provoke climate change. In 1978, Congress enacted the National Climate Program Act, 92 Stat. 601, which required the President to establish a program to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications," President Carter, in turn, asked the National Research Council, the working arm of the National Academy of Sciences, to investigate the subject. The Council's response was unequivocal: "If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible .... A wait-and-see policy may mean waiting until it is too late."

In 1987, Congress next addressed the issue when it enacted the Global Climate Protection Act, Title XI of Pub. L. 100-204 finding that "manmade pollution – the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere — may be producing a long-term and substantial increase in the average temperature on Earth," § 1102(1),

Congress directed EPA to propose to Congress a "coordinated national policy on global climate change, §1103(b), and ordered the Secretary of State to work "through the channels of multilateral diplomacy" and coordinate diplomatic efforts to combat global warming, § 1103(c). Congress emphasized that "ongoing pollution and deforestation may be contributing now to an irreversible process" and that "necessary actions must be identified and implemented in time to protect the climate." § 1102(4).

Meanwhile, the scientific understanding of climate change progressed. In 1990 the IPCC, a multinational scientific body organized under the auspices of the United Nations, published its first comprehensive report on the topic. Drawing on expert opinions from across the globe, the IPCC concluded that "emissions resulting from human activities are substantially increasing the atmospheric concentrations of ... greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface."

Responding to the IPCC report, the United Nations convened the "Earth Summit" in 1992 in Rio de Janeiro. President George H. W. Bush attended and signed the United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding agreement among 154 nations to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of "preventing dangerous anthropogenic interference with the [Earth's] climate system." The Senate unanimously ratified the treaty.

The IPCC subsequently issued a second comprehensive report in 1995 concluding that "the balance of evidence suggests there is a discernible human influence on global climate" — the UNFCCC signatories met in Kyoto, Japan, and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because those targets did not apply to developing and heavily polluting nations such as China and India, the Senate unanimously passed a resolution expressing its sense that the United States should not enter into the Kyoto Protocol. President Clinton did not submit the protocol to the Senate for ratification.

In 2001, EPA requested public comment on "all the issues raised in [the] petition," adding a "particular" request for comments on "any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA's consideration of this petition." EPA received more than 50,000 comments over the next five months.

Before the close of the comment period, the White House sought "assistance in identifying the areas in the science of climate change where there are the greatest certainties and uncertainties" from the National Research Council, asking for a response "as soon as possible." The result was a 2001 report titled Climate Change: An Analysis of Some Key Questions (NRC Report), which, drawing heavily on the 1995 IPCC report, concluded that "greenhouse gases are accumulating in Earth's atmosphere as a result of human activities,

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causing surface air temperatures and subsurface ocean temperatures to rise. Temperatures are, in fact, rising."

EPA's position

On September 8, 2003, EPA entered an order denying the rulemaking Petition and giving two reasons for its decision: (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change, and (2) that even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.

In concluding that it lacked statutory authority over greenhouse gases, EPA observed that Congress "was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990," yet it declined to adopt a proposed amendment establishing binding emissions limitations. Congress instead chose to authorize further investigation into climate change. EPA further reasoned that Congress' "specially tailored solutions to global atmospheric issues," in particular, its 1990 enactment of a comprehensive scheme to regulate pollutants that depleted the ozone layer, see Title VI, 104 Stat. 2649, 42 U.S.C. §§ 7671-7671q — counseled against reading the general authorization of § 202(a)(1) to confer regulatory authority over greenhouse gases.

EPA reasoned that climate change had its own "political history": Congress designed the original Clean Air Act to address "local" air pollutants rather than a substance that "is fairly consistent in its concentration throughout the "world's" atmosphere;" declined in 1990 to enact proposed amendments to force EPA to set carbon dioxide emission standards for motor vehicles and addressed global climate change in other legislation. Because of this political history, and because imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco, EPA was persuaded that it lacked the power to do so. In essence, EPA concluded that climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the agency to address it.

Even assuming that it had authority over greenhouse gases, EPA explained in detail why it would refuse to exercise that authority. The agency began by recognizing that the concentration of greenhouse gases has dramatically increased as a result of human activities, and acknowledged the attendant increase in global surface air temperatures. EPA gave controlling importance to the NRC Report's statement that a causal link between the two "cannot be unequivocally established." Given that residual uncertainty, EPA concluded that regulating greenhouse gas emissions would be unwise.

The agency furthermore characterized any EPA regulation of motor-vehicle emissions as a "piecemeal approach" to climate change and stated that such regulation would conflict with the President's "comprehensive approach" to the problem, such as support for technological innovation, the creation of non-regulatory programs to encourage voluntary private-sector reductions in greenhouse gas emissions, and further research on climate change — not actual regulation. According to EPA, unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the President's ability to persuade key developing countries to reduce greenhouse gas emissions.

Petitioners, now joined by intervenor States and local governments, sought review of EPA's order in the United States Court of Appeals for the District of Columbia Circuit. Although each of the three judges on the panel wrote a separate opinion, two judges agreed "that the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rule making." 367 U.S. App. D.C. 282, 415 F.3d 50, 58 (2005). The court therefore denied the petition for review.

Standing issue

The principal legal question in this case involves the question whether the state of Massachusetts had standing to bring this petition for review of EPA's refusal to act on greenhouse gas emissions from new cars. If Massachusetts did not have standing then the case was over as far as Massachusetts was concerned. The 2007 United States Supreme Court decision devoted considerable time and effort to explaining the majority and minority's divergent views on this question.

Suffice it to say that a slim majority of Court members found Massachusetts did have standing and the majority went on to consider EPA's justification for refusing to act. A strong minority took issue with the finding of standing and attacked the majority's reasoning on the standing question in vigorous fashion.

"Other" considerations

While this discussion of standing requirements is enough to make the case an important one, there are a variety of other points discussed in the decision that may give rise to other considerations that will affect Congress, policy makers, agencies and the regulated community. The remaining portion of this paper is about these "other" considerations.

The first point is that neither the majority nor the minority discussed the science of climate change in any direct way, other than perhaps to note that there is disagreement about the state of that science today. Scientists can debate science surrounding an issue, but judges generally will not do so. Those who support a science perspective on climate change will have to accept the risk of frustration when courts do not share that view or more readily accept it without question.

To many, including the dissenting justices, the degree of concrete particularized injury that global warming causes to any single individual is uncertain. Global climate change as we know it is going to have fairly wide spread effects across the world. On an individual basis, however, these effects may be quite minimal. Is a minimal impact enough on which to base this litigation? While proponents of the need for regulation believe a catastrophe is likely if no regulation is enacted, there are many others who believe this concern is unfounded. Anyone who has a genuine concern for these issues must confront the fact that these conflicts are filled with emotion that can be used either to support the need to act or criticize taking action when concrete impacts are not known.

Who controls the environmental agenda in this country? EPA among its reasons for refusing to take regulatory action stated that taking such action would interfere with the President's international agenda. Congress also has a role as it wrote the laws which the court was interpreting. The public also has a clear interest in seeing that the environmental agenda moves forward. The Supreme Court was generally unimpressed by the argument that the President's agenda should have priority over Congress' or the public's agenda.

Executive agency officials are often cloaked with discretionary authority to act in specific situations. If discretion is involved, overturning a decision based on discretion is generally considered difficult to do. But, discretion can not support a wholesale turning away from the problems and issues within the agency's purview. More is needed than simply saying the agency official decided not to act. So, if an agency uses discretion and decides not to act, what evidence must it establish to support its discretionary decision not to take action? The majority in this case found the agency's justification lacking in what it believed the agency needed to justify its action while the dissent asked the question, "What more could the agency have done to satisfy the majority justices?"

If any agency official decides that it would not be wise to regulate a specific problem at this time, is that an exercise of official discretion to manage the regulatory agenda or is it an abdication of agency responsibility?

What will be the net impact of this litigation on the problem to be redressed? What if that impact is slight? What if it will have no positive impact at all? What if we simply do not know what this impact will be? Assuming there are positive impacts, what if these positive impacts can be easily offset by the actions of others who cannot be

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controlled? Should the case proceed in any or all of these situations?

Environmental law and regulation has been in place for about forty years. In more than one instance, problems have been recognized that were not recognized when the laws were written. Should existing law cover "new developments" if the language of the law is reasonably broad enough and clear enough to address the new developments? Is it desirable for laws and regulations to be flexible, or should they be rigid in their scope and interpretation? Regulation of air emissions from agricultural facilities is a key example of this type of situation. How will this decision affect efforts to amend laws, such as CERCLA and EPCRA, to exempt animal manure as a source of regulated air emissions on grounds that these emissions were not intended to be covered when the law was written? If courts interpret laws in a broad fashion to incorporate these new developments under existing laws, are the courts demonstrating the flexibility that Congress intended the law to have or are they overstepping their judicial authority by "making law" in areas where Congress did not explicitly intend to go?

Perhaps the most telling result of this decision is to reinforce the philosophical divisions among the Court's current members. As another 5-4 decision, movement of one vote could make the dissent's position the majority position. Some may disagree with the value to be gained from reading dissenting opinions, but in this context, the dissent may well be the law some day and understanding its philosophical foundation is worth the effort to read and understand what the dissenting justices said and thought about the issues in the case. The dissent has a stronger argument than the majority decision, but limited its focus solely to an attack on the legal requirements of standing. While the three elements of standing, viz. injury, causation and redressability, are legitimate questions to ask in any lawsuit, the divergence in legal philosophy among the justices is most apparent in how the majority and dissenting justices staked out their positions.

—John C. Becker, The Penn. St. U.

[1] *The United States Supreme Court, April 2, 2007,* No. 05-1120, 127 S.Ct. 1438, 2007 U.S. Lexis 3785, 75 U.S.L.W. 4149

Orderly marketing of ag products in Ontario, Canada

Although the most urban province in Canada, Ontario has by far the largest and most diverse agricultural sector.

Since the Great Depression, the Ontario government has provided a legal basis for the orderly marketing of agricultural products.

In addition, as a member of the Canadian federation, Ontario has joined with other provinces and with the Government of Canada to establish comprehensive federal/provincial marketing schemes for some commodities.

In Ontario, The Farm Products Marketing Act allows producers of any commodity to ask for the establishment of a marketing board. If the government of the day is willing, a producer vote is undertaken and if the results indicate significant majority support both in terms of number of producers and volume of production, a board will be established.

Each board consists of elected producer members representing the various regions in Ontario. Each board is delegated certain regulatory powers to enable it to operate the orderly marketing system desired by its producers. These include such things as central sales agencies with single desk selling, negotiating agencies which establish prices and terms and conditions of sale, supply management boards which establish production and marketing quotas, as well as other boards which promote marketing of their commodity and encourage research and advanced production techniques. Over time, powers can be increased or decreased to meet the needs of that commodity group and to recognize the market and trade realities.

These systems are mandatory for producers of the commodities involved. The degree of regulation varies greatly. While licences and licence fees are universal, the cost of each system varies along with the degree of regulation and is paid for by the producers.

While primarily focused on its producers, buyers, dealers, processors and others in the particular trade are also impacted by the applicable board. Some boards licence processors, some use an appointed agent system for sales and others regulate the terms and condition of all sales of the commodity.

For people coming to Ontario for the first time to do business, these systems are often misunderstood, feared and in some cases, for a while at least, ignored.

However, it has been my experience over the past 30 years that after an initial "orientation" of sorts, these newcomers soon adapt to the established systems. In fact, these same players often embrace the system they first resisted. Orderly marketing has benefited both the producers and buyers of the commodity involved.

Legal challenges to these systems at both federal and provincial levels have been frequent, but unsuccessful. The courts, including The Supreme Court of Canada, have consistently upheld the constitutionality of these orderly marketing schemes.

Of more concern to producers at this time are the trade challenges and the continuing negotiations at both the WTO and NAFTA levels. Canadian farmers and their agricultural industry partners are worried that their interests may be overlooked in the rush to remove real and perceived trade barriers.

—Robert A. Wilson, Wilson, Spurr, LLP
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Bibliography/Cont. from p. 3

Sustainable & organic farming

Note, *The Manic Organic Panic: First Amendment Freedoms and Farming or the Attack of the Agriculture Appropriations Rider*, 26 J. Land Resources & Envtl. L. 423-445 (2006).

Torts and insurance

Cantu, F*attening Food: Should Purveyors of Fast Food Be Required to Warn? A Call for a New Tort*, 2 J. Food L. & Pol'y 39-60 (2007).

Comment, *Caveat Venditor*: *Products Liability and Genetically Modified Foods*, 2 J. Food L. & Pol'y 85-119 (2007).

Water rights: agriculturally related

Beatie, *Water Rights Title Insurance: Cure for Dusty Books and Rickety Ladders?* 10 U. Denv. Water L. Rev. 127-133 (2006).

Case Note, *Colorado Water Court's Exclusive Jurisdiction for the Adverse Possession of Water (Archuleta v. Gomez, 140 P.3d 281, Colo. Ct. App. 2006)*, 10 U. Denver Water L. Rev. 135-140 (2006).

Comment, *Non-navigable Lakes and the Right to Exclude: The Common Misunderstanding of the Common Law Rule*, 1 Charleston L. Rev. 157-184 (2007).

Comment, *At the Confluence: Oregon's Instream Water Rights Law in Theory and Practice*, 36 Envtl. L. 1383-1420 (2006).

Comment, *The Row on the Rugby: State Management of Public Trust Resources, the Right to Exclude, and the Future of Recreational Stream Access in Montana*, 36 Envtl. L. 1421-1443 (2006).

Comment, *Attention Kansas Water Right Holders: Be Nice to Your Neighbors, They're Policing Your Water Rights (Hawley v. Kansas Dep't of Agric., 132 P.3d 870, Kan. 2006)*, 46 Washburn L. J. 429-452 (2007).

Grant, *ESA Reductions in Reclamation of Water Contract Deliveries: A Fifth Amendment Taking of Property?* 36 Envtl. L. 1331-1382 (2006).

MacDonnell, *Public Water–Private Water: Anti-Speculation, Water Reallocation, and High Plains A&M, LLC v. Southeastern Colorado Water Conservancy District*, 10 U. Denver Water L. Rev. 1-21 (2006).

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

Commission for listing property for sale on company website (and nothing else)

One of the fundamental principles of contract law is to read the contract and understand what the contract provisions mean before signing the contract. That was certainly true in this case involving the sale of a ranch in southeast Kansas. The owners signed a non-exclusive right-to-sell agreement with a realtor. The contract provided that the realtor could list and sell the property for $1,500,000 during a 5-month period in 2004 for a 5 percent commission. A prospective buyer in Florida noticed the ranch on the realtor's corporate website and called the realtor. The buyer came to Kansas. Although the realtor did not come to the ranch with the buyer, he did give the buyer directions to the ranch and called the sellers to tell them that a prospective buyer was staying at a local hotel. The sellers contacted the buyers and showed them around the ranch. The sellers drew up a contract for sale which the buyer signed. The sellers then called the realtor to inform him of the sale. The transaction was part of a tax-free exchange by both the sellers and the buyer, so closing on the ranch did not occur until early 2005. The realtor requested his 5 percent commission, but the sellers refused. The realtor's company moved for summary judgment, and the trial court agreed and declined the sellers request to alter or amend the judgment. The sellers appealed.

The Kansas Court of Appeals upheld the award of summary judgment for the realtor. While the seller retained the right to personally sell his ranch, the court determined that the realtor actually was the party that "found" the buyer. But for the realtor's website, the buyer would not have found the sellers' ranch, the court reasoned. As such, it was the realtor that procured the buyer. Thus, even though the sellers showed the ranch to the buyer and wrote the contract for sale, the buyer was sent to them by the realtor. Under Kansas case law, that is all it takes to entitle a realtor to a commission unless the brokerage contract specifies otherwise - and this contract did not. The court also ruled that the brokerage contract did not require the contract to close within the 5-month period in 2004 specified in the contract for the realtor to be entitled to the commission. The contract language required only an "agreement to sell or exchange" be entered into within 90 days after the 5-month period expired, and did not require the sale of the property to close within that timeframe. The court also stated that it was an unreasonable construction of the contract language to construe it to mean that the broker agreed to waive the commission if the sale involved a tax-free exchange. *Antrim, Piper, Wenger, Inc. v. Lowe*, 159 P.3d 215 (Kan.Ct. App. 2007).

—Roger McEowen, Director of the ISU Center for Agricultural Law and Taxation

Federal Register Summary from June 16, 2007 to July 27, 2007

ANIMAL AND PLANT HEALTH INSPECTION SERVICE. APHIS has announced a new web site that will list significant guidance documents and other information provided by APHIS. See http://www.aphis.usda.gov/guidance. **72 Fed. Reg. 40270 (July 24, 2007)**.

BOVINE SPONGIFORM ENCEPHALOPATHY. The FSIS has adopted as final regulations prohibiting the processing for human consumption non-ambulatory "downer" cattle and cattle tissue identified as specified risk materials (SRMs) and prohibiting the use of high pressure stunning devices that could drive SRM tissue into the meat. **72 Fed. Reg. 38699 (July 13, 2007)**.

BRUCELLOSIS. The APHIS has adopted as final regulations which eliminate the requirement for pre-export tuberculosis and brucellosis testing of certain cattle being exported to countries that do not require such testing. **72 Fed. Reg. 40064, (July 23, 2007)**.

The APHIS has adopted as final regulations amending the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Idaho from Class A to Class Free. **72 Fed. Reg. 40062 (July 23, 2007)**.

CLEAN WATER ACT. The Environmental Protection Agency and Army Corps of Engineers have issued agency guidance, effective immediately, regarding Clean Water Act jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States, 126 S. Ct. 2208 (2006)*. The agencies stated that this guidance was issued to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under the CWA are consistent with the *Rapanos* decision and provide effective protection for public health and the environment. The agencies are concurrently providing a six-month public comment period to solicit input on early experience with implementing the guidance. The guidance is available at http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html. **72 Fed. Reg. 31824 (June 8, 2007)**.

DAIRY PRODUCT REPORTING PROGRAM. The AMS has issued final regulations establishing the Dairy Product Mandatory Reporting Program authorized by the Farm Security and Rural Investment Act of 2002 to provide for timely, accurate, and reliable market information to facilitate more informed marketing decisions and promote competition in the dairy product manufacturing industry. **72 Fed. Reg. 36341 (July 3, 2007)**.

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

Ch. 12 bankruptcy plan

The debtors, husband and wife, operated a farming and custom harvesting business. The wife also began employment off the farm after the bankruptcy proceedings started. The debtors submitted a Chapter 12 plan based on projections of income from the farming and custom harvesting business and the wife's employment. The value of farm equipment was sufficient to secure several loans from one creditor. The debtors projected sufficient income to fund the plan, although the farm and harvesting operations had not shown a profit in the previous two years. The debtors argued that the farm income in those two years was artificially low because of poor weather conditions. In addition, the debtors had additional income now because of the wife's employment. The creditor objected to the plan as unfeasible, but the court rejected the income and expense opinions of the creditor's accountant as lacking in expertise concerning farming. The court noted that the plan provided for immediate dismissal of the case if any plan payment was not made on time. The court also noted that the creditor had sufficient collateral to protect the creditor's lien during the plan and that the debtor kept the equipment in good working order. The court approved the plan, although noting that any projections were risky. ***In re* Hermesh Entities, Inc., 2007 Bankr. LEXIS 900 (Bankr. E.D. Okla. 2007)**.

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

AMERICAN AGRICULTURAL LAW ASSOCIATION

New AALA Fax Number
I've been having trouble with receiving faxes on a consistent basis and decided to change to a dedicated fax number. The new AALA fax number is 541-302-8169. The new number will also be displayed on the AALA web site and all AALA correspondence.

AALA Board Election
The AALA Board Nominations Committee has selected an excellent slate of candidates for the 2008-2010 seats on the board of directors and new president-elect. The ballots have been sent and need to be returned to the AALA office by August 15, 2007. If you did not get a ballot, e-mail me your fax number or request an e-mail attachment of the ballot. RobertA@aglaw-assn.org

2007 Annual Conference.
President-elect Roger McEowen has completed the planning of an excellent program for the 2007 Annual Agricultural Law Symposium at the Westin San Diego Hotel (formerly a Wyndham hotel) in sunny downtown San Diego, CA, October 19-20, 2007. Mark your calendars and plan a trip to enjoy the sights (Gaslight District), sounds (sea gulls and trolley bells), animals (San Diego Zoo and Seaworld) and sunshine. The program has been posted on the AALA web site with a registration form for those who want to get the registration fee in early. Conference brochures are at the printers and will be mailed soon. If you would like extra copies to distribute in your area, please let me know by e-mail.

Special note: A full block of rooms has been reserved at the conference rate for Thursday and Friday evenings. However, there are only a small number of rooms available at the conference rate on Wednesday and Saturday night. So if you plan to come a day early or stay a day late, you may not be able to get the conference rate for all days. If you are prevented from getting the conference rate on Wednesday or Saturday, please let me know and I will try to get an increase in the room blocks for these days. If you seek a reservation that includes these early/late days, the hotel may tell you that the conference rate is not available because the block is full for just one or more of these early/late days. The conference rate may still be available for the regular conference nights (i.e. Thursday and Friday). Room blocks are limited because the association is severely penalized financially if the room blocks are not filled.

Robert P. Achenbach, Jr,
AALA Executive Director