Agricultural Law Update

VOLUME 6, NUMBER 10, WHOLE NUMBER 70 JULY 1989

Official publication of the American Agricultural Law Association

INSIDE

IN FUTURE ISSUES

Income tax consequences of drought payments

The Internal Revenue Service has issued Notice 89-55 to clarify the income tax treatment of payments received under the Disaster Assistance Act of 1988 and other drought payments.

The Notice explains that payments received under Title II of the Disaster Assistance Act for crop damage caused by the drought qualify for the election under I.R.C. section 451(d) to be reported in the year after the receipt of payment if the producer can show that the crop that was lost to the drought would have been sold in the year following the drought. The Notice points out that if a producer makes the I.R.C. section 451(d) election, *all* disaster *and* insurance payments received for qualifying crops must be reported in the year following the drought. The Notice cites and apparently does not modify Rev. Rul. 74-145, 1974-1 C.B. 113, which seems to say that a producer is eligible to make the I.R.C. section 451(d) election if a substantial portion of income from the crops that were destroyed would have been reported in the following year. Rev. Rul. 74-145 goes on to say that if the producer elects to defer any payments received for destroyed crops, then *all* payments received for destroyed crops must be deferred whether or not income from the destroyed crop would have been reported in the following year. The national office of the I.R.S. has indicated that the position of Rev. Rev. 74-145 has been questioned and may be reconsidered in the future.

Notice 89-55 states that reimbursements for feed expenses under Title I of the Disaster Assistance Act do not have to be reported as income if the reimbursement was approved at the time of the feed purchase. However, the deduction for the feed purchased must be reduced by the amount of the reimbursement. *See* Rev. Rul. 79-263, 1979-2 C.B. 82.

Notice 89-55 also addresses the taxation of feed donated to producers or sold to producers below its fair market value under Title I of the Disaster Assistance Act. Producers must include in gross income the difference between the amount paid for the feed and its fair market value. However, the producers are also allowed to claim the fair market value of the feed as a deduction or as the basis in the feed, depending upon the accounting method they are allowed to use for feed expenses. *See* Rev. Rul. 73-13, 1973-1 C.B. 42. *– Philip E. Harris*

FmHA policies concerning bankruptcy challenged

Farmers Legal Action Group (FLAG) of Minnesota recently filed a Minnesota class action lawsuit challenging the FmHA debt restructuring regulations that apply to farmers who have received a discharge in bankruptcy. *Lee v. Yeutter*, No. 3-89-344 (D. Minn. filed May 30, 1989) was filed on behalf of all FmHA borrowers in Minnesota who have received a discharge and who still hold title to property secured to FmHA. Current FmHA regulations provide that these borrowers are ineligible for debt restructuring relief even though their property remains subject to an enforceable FmHA mortgage.

The lawsuit raises three challenges to FmHA policy. First, the complaint alleges that FmHA policy violates the Agricultural Credit Act of 1987 (the Act). According to the Act, FmHA must provide notice of, and an opportunity to be considered for, debt restructuring to borrowers who are 180 days or more delinquent. The Act defines borrowers to be persons with "outstanding obligations" to the Secretary of Agriculture. 7 U.S.C.A. § 1991(b)(1) (West 1988). FLAG's complaint alleges that this includes mortgage obligations, and thus, farmers with enforceable mortgages continue to be borrowers for purposes of the Act.

The lawsuit also alleges that FmHA policy violates the antidiscrimination provision of the bankruptcy code, 11 U.S.C. § 525. This section prohibits governmental entities from discriminating against people because they have filed for relief or received a discharge in bankruptcy. Because FmHA specifically excludes borrowers who have received a discharge from debt restructuring consideration, the complaint alleges discrimination in violation of section 525. *(Continued on page 2)*

The third claim is based upon the reaffirmation of debt requirement in the FmHA regulations. For borrowers in pending bankruptcies, the regulations state that the debtor must reaffirm his or her FmHA debt in order for FmHA to continue with them. This may be interpreted to require reaffirmation in order to obtain debt restructuring consideration. Under this interpretation, a debtor may reaffirm FmHA debt only to subsequently be denied restructuring. Even more puzzling, however, is the reaffirmation requirement contained in the regulations which apply to borrowers who have already received their discharge. FLAG's complaint alleges that this requirement is in direct conflict with section 524 of the bankruptcy code, the section stating that all reaffirmation agreements must be completed prior to discharge.

– Susan A. Schneider

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VOL. 6, NO. 10, WHOLE NO. 70 JULY 1989

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Agricultural Law Update is published by the American Agricultural Law Association. Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313.

Cucumber "sharefarmer" – employee or independent contractor?

The California Supreme Court's recent holding that "sharefarmer" cucumber harvesters are not independent contractors has far reaching implications for *all* California employers who utilize the services of "independent contractors" or otherwise classify persons as contractors rather than "employees" on the payroll.

In *Borello & Sons, Inc. v. Department of Industrial Relations*, 256 Cal. Rptr. 543 (1989), the grower argued that "shareholder" harvesters were independent contractors because they managed their own labor, shared the profit or loss from the crop, and signed an agreement that they were not employees. The California Department of Industrial Relations rejected the employer's position, the court of appeal issued a decision in favor of the employer, and the Supreme Court reversed, holding the employer must provide the shareholders with workers' compensation insurance.

The requirements and protections of various state and federal laws apply only when an employer-employee relationship exists. For example, the employer is obligated to pay unemployment insurance tax, social security tax, minimum wages and overtime for each "employee" on the payroll, while "independent contractors" are not covered under these laws.

Under the common law and judicial decisions that have enumerated the various factors to be applied when determining whether an individual is an employee or independent contractor, the pivotal question has always been whether the employer controls or has the right to control the worker both as to the job done and the manner in which it is performed. In *Borello*, the Supreme Court held the "control of work" factor must be applied with "deference" to the "remedial" and "protective" purposes of the legislation. Does the provider of services (or supposed independent contractor) have the primary power over work safety? Is the alleged independent contractor "best situated" to distribute the risk and cost of injury as an expense of his own business? Has the provider of services independently chosen the burdens and benefits of self-employment?

The Supreme Court found that the sharefarmers fell within the "class" of individuals that the workers' compensation statute intended to protect, and, in addition, determined Borello had control over the sharefarmers' work and manner in which it was to be performed.

– Lewis P. Janowsky

"Justice" prevails, again

In a further order clarifying its April 28, 1989 decision granting summary judgment in favor of the partners of Red Mountain Farming Company, Red Mountain Farms Management Company, and the Aztec Partnership, the U.S. District Court in Phoenix declared on June 23, 1989, in the case of *Justice v. Lyng*, No. CIV 87-1569 PHX WPC, that each of the thirty-three partners of the three partnerships should be treated as a separate person for the 1986 ASCS program year and ordered the defendant Secretary of Agriculture to enter relief accordingly upon remand of the case to the agency.

Following the April decision and order [*see* Malasky, 5 Agric. L. Update 1 (May, 1989)], a dispute arose between the parties as to the nature and scope of the proceedings upon remand. The plaintiffs argued that the April decision specifically recognized that the Agency's determination was incorrect in every respect and, therefore, that they were entitled to a determination, upon remand, that they constituted thirty-three separate persons for 1986 program purposes. The Secretary of Agriculture, however, took the position that the Department must, upon remand, reopen the matter to conduct new hearings and make further findings of fact to determine whether or not the plaintiffs are entitled to thirty-three separate person determinations.

The district judge rejected the Secretary of Agriculture's position, and entered a further order specifically reversing the findings of the Secretary of Agriculture and remanding the matter to the Secretary "for further proceedings, consistent with this Order, to: (1) revise the findings and find that the general partners of Aztec, Farming, and Management Company, are 'separate persons' for purposes of the 1986 program year; and (2) to revise the findings [and find] that the farming agreement between the companies does not constitute a 'custom farming agreement.'"

– Alan R. Malasky

The Minnesota Groundwater Protection Act

After months of negotiation and compromise, in late May the Minnesota legislature passed a lengthy bill aimed at protection of the state's groundwater resource. The Minnesota Groundwater Protection Act marks the first coordinated effort to both prevent further degradation of the state's groundwater and to remedy existing groundwater pollution.

The act establishes non-degradation as the state groundwater protection goal, provides for the identification of "sensitive areas" where groundwater sources are at risk, and mandates development of best management practices for those areas. State agricultural interests made certain, however, that the act maintained a standards-based, largely voluntary framework. Consequently, state agencies are empowered to promote, rather than compel, participation in best management practices. Participation is encouraged by allowing a complete defense to groundwater degradation liability for landowners who adopt state-approved practices. Although the act authorizes the state Pollution Control Agency to promulgate water source protection requirements in the form of operation and maintenance procedures, use restrictions, and treatment requirements, these too are discretionary rather than mandatory and must take economic impact into account.

In answer to the groundwater contamination risk created hy the state's many abandoned or inoperable wells, the act provides new fees and licensing provisions for well construction, requires that all wells be disclosed prior to the sale of property, and establishes a well-sealing grant program to help counties and individuals pay for sealing priority wells. Criminal penalties are provided for violation of the well provisions. However, it seems unlikely that such penalties will be imposed. A private cause of action is also provided landowners whose wells are contaminated.

The act amends certain of the state's existing pesticide and fertilizer laws, generally focusing on licensing and registration requirements. Pesticide distributors must begin accepting returned pesticide containers and surplus pesticides in July 1994 where county container and surplus disposal programs are not yet in place. Pesticide end-users are granted complete immunity from liability for agricultural chemical clean-up costs where chemicals are used in compliance with both label instructions and applicable state laws. An Agricultural Chemical Responsibility and Reimbursement Account is established to pay for all or part of the cost incurred by the state in responding to agricultural chemical incidents. The account will be funded by fees assessed for registration and use of pesticides and pesticide dealer and applicator licenses.

The Groundwater Protection Act provides a total of $17.1 million in funding, evenly distributed between allocations from the state's general fund and fees on pesticides and fertilizers, well construction, and water use.

– *Gerald Torres*

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks:

1. FmHA; Form 1980-27, "Contract of Guarantee;" proposed rule. 54 Fed. Reg. 24177.

2. FmHA; Drought and Disaster Guaranteed Loan Program; final rule; effective date 6/27/89. "Procedures for guaranteeing loans to rural businesses impacted by disasters of 1988." 54 Fed. Reg. 26946.

3. FmHA; Securing credit reports on initial farmer program applications; proposed rule; comments due 8/28/89. 54 Fed. Reg. 27387.

4. FCIC; Implementation of Disaster Assistance Act of 1988; final rule; effective date 10/1/89. 54 Fed. Reg. 24318.

5. PSA; Central filing system; state certification; Mississippi; 6/9/89. 54 Fed. Reg. 25488.

6. PSA; Central filing system; state certification; West Virginia; 6/20/89. 54 Fed. Reg. 27044.

7. CCC, ASCS; Federal claims collection; administrative offset; proposed rule. 54 Fed. Reg. 25718.

8. IRS; Treatment of partnership liabilities allocations attributable to nonrecourse liabilities; extension of time for submitting comments and request for a public hearing. 54 Fed. Reg. 25878.

– *Linda Grim McCormick*

AG LAW CONFERENCE CALENDAR

Land Use Institute – Planning, Regulation, Litigation, Eminent Domain and Compensation

August 14-18, 1989, Hyatt on Union Square, San Francisco.

Topics include: update on transfer of development rights, update on wetlands regulation, and update on hazardous materials and hazardous wastes.

Sponsored by ALI-ABA and the Florida Atlantic University/Florida International University Joint Center for Environmental and Urban Problems.

For more information, call 215-243-1630 or 1-800-CLE-NEWS.

Impact of Environmental Law on Real Estate and Other Commercial Transactions

Sept. 21-22, 1989, Hyatt on Union Square in San Francisco.

Topics include: Regulatory obstacles to development of real property; wetlands; disclosure of environmental liabilities to governmental agencies and third parties; and lender liability.

Sponsored by ALI-ABA.

For more information, call 215-243-1630 or 1-800-CLE-NEWS.

1989 Advanced Bankruptcy Seminar

September 21-22, 1989, Excelsior Hotel, Little Rock, AR.

Topics include: Drafting Ch. 11 and 12 bankruptcy reorganization plans; debtor in possession financing; recent bankruptcy decisions.

Sponsored by the Arkansas Institute for CLE, Arkansas Bar Association, and Debtor-Creditor Bar of Central Arkansas.

For more information, call 501-375-3957.

Fifth Annual Farm, Ranch & Agri-business Bankruptcy Institute

October 19-21, 1989, Lubbock Plaza Hotel, Lubbock, TX.

Topics include: Borrower's rights under the Ag Credit Act of 1987, tax considerations in ag bankruptcies, agricultural plans— drafting and confirmation, and ag financing and government program payments.

Sponsored by Texas Tech University School of Law and the West Texas Bankruptcy Bar Association.

For more information, call Robert Doty, 806-765-7491.

1989 AALA Annual Meeting and Conference

November 3-4, 1989, Nikko Hotel, San Francisco, CA.

Details and program in future issues.

Sponsored by American Agricultural Law Association.

Statutory regulation of hazardous chemicals on the farm

by James B. Wadley and Anita Settle

INTRODUCTION

Chemicals play a major role in most contemporary agricultural production. They are found in fertilizers; herbicides; insecticides, fungicides and other pesticides; hormone implants; and fuels, solvents, and other chemicals for the use or maintenance of farm equipment. Many of these chemicals are sufficiently dangerous that they are considered toxic or hazardous. Recent studies of pesticide levels in ground water and of carcinogens in corn, apples, tomatoes, and peaches have raised much concern that the use of such chemicals on the farm can have devastating effects off the farm.

Until relatively recently, the law addressed these concerns as primarily a question of civil liability between the chemical user and the individual harmed.[1] Over the years, several federal statutes have been enacted that specifically focus on hazardous or toxic chemicals. Although these statutes have not had a serious impact on many agricultural producers, many are concerned that a framework has been erected that could at some future date be used to restrict farm use of these chemicals. There is also a growing fear that regulation might go beyond that authorized by these statutes and perhaps link participation in governmental farm programs to aspects of the chemical use problem. This article looks generally at the impact the present major hazardous and toxic chemical statutes have on the on-farm use of such chemicals in crop production.

HISTORY OF HAZARDOUS CHEMICAL STATUES

Until recently, the major thrust of governmental regulation of hazardous chemicals has been expressed through licensing procedures that were either imposed on the manufacturer[2] or on the chemical applicator.[3] The major reason for this approach seems to have been the view that the party at greatest risk was the actual chemical user who most likely would be harmed as a result of mislabeling or misapplication of the chemicals. It appears to have been comfortably assumed that if a particular chemical was properly registered, labeled, and applied, there was little risk of harm to anyone else.

In recent years, however, many of these chemicals have been discovered to be inherently dangerous or at least capable of long-term or far reaching adverse impacts, with the resulting perception that their mere *presence* on the premises, rather than *mislabeling* or *misapplication*, poses considerable risks to society at large. As a result, in addition to regulation of the manufacture and application of the chemicals, the law addresses such additional concerns as the manner in which the chemicals are stored, how they are transported, how the residues and empty containers are discarded,[4] how the public should be informed of the composition of chemicals kept on the premises,[5] and whether the chemicals are likely to be present in such places as public water supplies.[6]

The federal acts that address hazardous and toxic chemicals may be classified as acts (1) that focus primarily on the existence or availability of certain chemicals (which are considered hazardous by nature), (2) that focus on specific impacts flowing from chemical use (impacts that are deemed harmful by virtue of where that impact is felt, how high the level of use, whether they are in underground storage tanks, etc.) and (3) that require the public disclosure of the presence or composition of such chemicals.

STATUTES THAT AFFECT AVAILABILITY OF FARM CHEMICALS

FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act)

The federal government has regulated insecticides since 1910. It was not until the adoption of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[7] in 1947 that a comprehensive approach to the hazards of such chemicals was undertaken. This act was designed to broaden the federal control over the sale, distribution, and interstate shipment of pesticides. Since its inception, the regulatory approach focused on the manufacturing and distribution stages of production and has relied heavily on registration and proper labeling as the primary regulatory devices.

In 1972, Congress adopted the Environmental Pesticide Control Act, which made major changes in how registration was handled and injected the consideration of "unreasonable adverse impacts on the environment" into the registration process. Since 1972, registered pesticides are considered available for either "general" or "restricted" use. If the use is restricted, the chemical can be applied only by someone who has received special training and has been certified to use that chemical.

The major impact of this act, of course, is on the availability for use of chemicals that act as insecticides, fungicides, and rodenticides in the course of the farm operation. On the negative side, if assessing the "adverse impacts" costs too much, the manufacturer might decide it is not worth it and will cease to make some useful chemicals for which there is low demand. On the other hand, the act does not directly address the misuse of these chemicals except in the context of their application, which, under the act states are authorized to certify.[8]

The use by individuals (including farmers) of a particular chemical may be suspended pending cancellation of the registration if the Environmental Protection Agency determines that there is an unreasonable adverse effect on the environment or that an unreasonable hazard is posed to an endangered or threatened species. As a result, the presence of dangerous pesticide residues in water supplies may result in the suspension or cancellation of the registration of the chemical and terminate its future availability to farmers generally. The individual farmer, however, is not likely to be directly punished in the process for the use that resulted in the cancellation. The farmer may be exposed to liability for civil damages and criminal fines for the unauthorized or uncertified application or resale of restricted chemicals, though even here the farmer will not likely be individually punished under this act for any pollution resulting from the chemical use.

TSCA (Toxic Substances Control Act)

The Toxic Substances Control Act was enacted to insure that as much as possible is known about chemicals posing serious risks to the environment before they are manufactured, distributed, or used. It is under the auspices of this statute that polychlorinated biphenyls (PCB's) and asbestos in public buildings are regulated. Also covered are chemicals used in the manufacturing of pesticides (as defined under FIFRA).

Under the act, the Administrator of

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the EPA can order testing of existing and newly developed chemicals if there is a basis for concern that they pose unreasonable risks to the environment. This is most likely to occur if the Administrator finds that there is insufficient data and experience from which the impact on the environment can be predicted. Like FIFRA, this act may affect the availability of chemicals that might be of use in the course of farming operations. It also insures that they are adequately labeled. On the other hand, the Administrator may also prohibit or regulate the commercial use and disposal of residues and order the seizure of imminently hazardous chemical substances or mixtures if he deems them to present "an unreasonable risk of injury to health or the environment."[9] These impacts obviously affect individual farmers only indirectly. If the farmer's use poses unreasonable risks, the Administrator may prohibit or limit the manufacture, distribution, or manner of use of the particular chemical, but the act is not likely to impose direct liability on the farmer for any pollution consequences that may flow from the actual use of the chemicals. It is possible, however, for the Administrator to take action against a chemical user by seizing the chemical or enjoining use or disposition of the chemical if the activity poses an imminent hazard to health or the environment.[10]

STATUTES THAT DEAL WITH POLLUTION CAUSED BY FARM CHEMICAL USE

CWA (Clean Water Act)

The Clean Water Act, also known as the Federal Water Pollution Control Act (FWPCA), more directly addresses the pollution consequences of farm chemical use. The regulatory approach of this act is to trace pollution to its "source" and then impose restrictions on the source that are designed to eliminate or "filter out" the harmful discharges.

The act classifies sources of pollution as "point sources" or "nonpoint sources." "Point sources" are those to which specific discharges may be traced and the point of pollution discharge thereby identified and regulated. The regulations include larger confined animal feeding units as point sources. The statute requires that point sources secure a National Pollution Discharge Elimination System (NPDES) permit before pollutants may be discharged into the "waters of the United States."

Most pollution from agricultural activities cannot be precisely traced and is therefore typically considered to be "nonpoint source" pollution. Under section 208 of the Clean Water Act, states are required to identify water quality problems caused by nonpoint pollution sources and develop a management plan to correct these problems. Under this approach, states have settled on the use of "best management practices" (BMP's) as the control technology to be used to deal with this type of pollution. The BMP's that farmers are to adopt, of course, are undefined in the statute, which defers such detailing to the states.[11]

The statute uses "conservation practices" as the suggested approach.[12] Under this approach, farmers are encouraged to voluntarily implement BMP's. The statute authorizes the use of cost-sharing contracts to accomplish this.[13] One problem with this approach has been that many farmers have been unwilling to implement any practice that would increase the costs of farming unless there is a direct return benefit. Many BMP's do not generate such a return. As a result, in 1987, Congress mandated that the states do an "Assessment of Nonpoint Source Pollution" to review the development and implementation of pollution control mechanisms in their states.[14] Interim reports suggest that states may be beginning to consider stronger measures of "encouragement" to enlist farmer participation.[15]

It should be noted that other state statutes may require more than just using BMP's to control or prevent farm-based pollution. One state, for example, makes it unlawful to "discard or store any pesticide or pesticide container in such a manner as to cause injury to humans, vegetation, crops, livestock, wildlife, pollinating insects or waterways and wildlife therein."[16]

SDWA (Safe Drinking Water Act)

The Safe Drinking Water Act[17] authorizes the establishment of maximum contamination levels for public water systems, including those that rely on groundwater sources. These levels are set at a level at which no known or anticipated adverse effects on human health will occur and which allows for an adequate margin of safety. The act requires the adoption of feasible treatment techniques that will insure that the required levels are achieved. These techniques are determined by considering the quality of source waters, protection afforded by watershed management, treatment practices, and other relevant factors. States, for the most part, have the primary enforcement burden and do so through their own rules and regulations.

Most of the act, of course, is targeted toward operators of public water supply systems in order to compel them to maintain a system that delivers safe drinking water. In such an approach, individual farmers are not directly affected. However, under the act,[18] states are required to develop a plan to protect wellhead areas (which means the surface and subsurface surrounding a water well or wellfield which supplies public drinking water through which contaminants are likely to move toward and reach the water well or wellfield). In these areas, the state is to insure that the wells are protected from contamination. As part of such a plan, a state may consider action designed to eliminate the source of the contamination – which might be seepage of farm chemicals into the groundwater. Such an action obviously could affect the individual farm chemical user.

Similarly, individuals can be prosecuted for "tampering" with public water systems, which is defined as the introduction of a contaminant into the water system with intent to harm persons.[19] In most cases, it is unlikely that seepage of pesticide of fertilizer residues into the water supply will be considered done with intent to cause harm.

SWDA (Solid Waste Disposal Act)

The Solid Waste Disposal Act (SWDA), as recently amended by the Recourse Conservation and Recovery Act (RCRA),[20] is the primary federal legislation dealing with the disposition of waste products. These products are classified as either "conventional" or "hazardous." The regulatory approach here is first to identify specific contaminants and then to identify those who engage in specific activities involving those contaminants, such as the generation of wastes, handling, treatment, storage, transportation of wastes, operation of dump sites and landfills, and so forth. Those engaged in the identified activities are the ones primarily regulated by the act and by plans promulgated under the act. Excluded from this act are activities or substances covered by either the Clean Drinking Water Act or

(Continued on next page)

the Federal Water Pollution Control Act. Thus, if the farm is the source of contaminants entering the water supplies, it is likely to be covered by those acts and excluded from this act. On the other hand, farmers may store, use, and dispose of hazardous chemicals on the farm and thereby possibly be considered to be engaged in activities addressed by the Solid Waste Act. As a result, this act is likely to reach many farm chemicals as well as such activities as the disposal of unused quantities of covered chemicals and their containers. By express provision of the regulations, however, farmers will be considered exempt from the act if they dispose of the wastes in the prescribed manner.[21] This requires that the farmer triple rinse the emptied hazardous chemical container, dispose of the residue on his or her own farm, and do so in a manner consistent with the disposal directions on the label.

Of perhaps greater immediate impact is the fact that this act also regulates underground storage tanks. This aspect of the statute undoubtedly will affect many farmers. A tank is considered to be an underground storage tank (UST) if more than ten percent of its volume (including piping) is below grade. Excluded are certain small tanks including septic tanks, home heating oil tanks, tanks in basements, and tanks that hold less than 110 gallons. UST's of 1,100 gallons or larger will generally have to be registered. Without registering, the farmer cannot use state funds for cleanup in the event of a spill. If the tank is installed after December 23, 1988, the installation must be properly certified, and the tank must have proper overflow and spill prevention protection, corrosion protection, and leak detection.

CERCLA (Comprehensive Environmental Response, Compensation and Liability Act)

This statute[22] is primarily concerned with the cleaning up of inactive or abandoned toxic or hazardous chemical dumpsites. It is popularly called the Superfund Act because massive amounts of federal monies have been appropriated for this purpose where the cost of cleanup cannot be passed back to the original contaminator.

A farmer might be affected by this act because the legislation considers the *presence* of the hazardous chemicals to be the problem rather than the *act of disposition*. Therefore, mere ownership of the land or dump site is enough to bring an individual under the act even though that owner had nothing to do with putting the chemicals there. It is possible, though not highly likely, that an individual purchasing land for farming purposes, would inadvertently buy an abandoned chemical waste dump. It is perhaps more likely that the farmer might lease land to someone else as such a site. If either should occur, the farmer landowner may be fully liable for the cleanup costs and would not be able to pass that on to a third party (in this case, whoever actually put the chemicals there) unless the landowner can show no knowledge of the prior use, that the third party is the sole cause of the problem, and that the owner made a commercially reasonable site assessment that did not disclose the waste prior to the purchase.

Section 107(i) of the act expressly exempts the application of pesticide products that are registered under FIFRA from the response cost and damage recovery sections of CERCLA. This means that even if the pesticides may be considered hazardous chemicals, their application will not cause the farm to be considered a "superfund" site nor expose the farmer to the cost of cleanup. On the other hand, this provision of the act does not exempt the farmer from liability under other state or federal laws, including the common law, for damages, injury, or loss to others resulting from the use of the pesticides or from any remedial action that is taken because of the pesticide use.

EPCRTKA (Emergency Planning and Community Right-to-Know Act)

This act[23] is the most recent legislation involving hazardous chemicals. Its objectives are to identify where hazardous chemicals are being generated or stored, to require local jurisdictions to anticipate a potential discharge of those chemicals into the environment, and to develop a plan to deal with that emergency. The Administrator of EPA publishes a list of hazardous chemicals covered by the act and establishes minimum amount levels that can be held, used, or stored without having to be reported. Any facility (which could include a large farm operation or co-op) that has present any chemical on the list in amounts greater than that minimum amount is subject to the act.

Local emergency planning committees are to be created under the act and are to be charged with developing plans for the jurisdiction on how to deal with emergency releases of those chemicals. One of the tasks of the committee is to identify the facilities subject to the act. Once the facility is identified, it must designate someone internally to serve as the coordinator with the committee.

Of greater importance are the notification requirements. Facilities covered by the act must notify the EPA of any release of the listed chemicals. They must also make available to the local planning committee and the public (on request) material safety data sheets (MSDS), which describe the contents of the hazardous chemicals held or used on the premises.

Facilities subject to the Occupational Safety and Health Act (OSHA) (which may include farms that hire one or more persons, excluding family members, and which are engaged in a business affecting interstate commerce) also have to generate emergency and hazardous chemical inventory forms that list the identified chemicals at the facility. This list must be submitted to the appropriate local emergency planning committee, to the state emergency response committee, and to the fire department with jurisdiction over the facility. Some of this information must be made available to the public on request by the state committee. Failure to comply with these requirements subjects the violator to civil and criminal penalties.

CONCLUSION

Farmers have been, and for the most part continue to be, only minimally regulated as primary sources of water pollution. For the most part, regulation has been left to the states, even under the federal acts. Where direct regulation occurs, it tends to focus on the acceptability of particular farm management practices. This appears to stem from a deep seated perception that the use of chemicals in the course of farming operations is not only necessary to the economic well-being of the farmer but is socially desirable because it has resulted in the production of abundant crops. Recent concerns over the increasing presence of hazardous chemicals in groundwater supplies and in farm products, however, may call for a different balancing of public interests and may suggest that elimination of health threatening contamination is more important than relatively cheap and abundant foods supplies. This, of course, would signal greater efforts to regulate farmers as "sources" of that pollution or to eliminate the offending chemicals. The statutes outlined above present an existing framework in which some of that could occur (for example, through underground storage tank regulations) though what is perhaps more likely is additional legislation specifically targeting farm chemical use. The seriousness of the public concern over the problem is sufficient to suggest the need for considerable caution on the part of farmers as they make their chemical use decisions and perhaps to suggest to the industry as a whole that a greater effort be made to focus on the issue of chemicals safety as it relates to crop production.

(Continued on next page)

STATUTORY . . . / CONTINUED FROM PAGE 6

1. This concern has been recently addressed in this column. *See* Centner, *Liability Rules for Groundwater Pesticide Contamination,* 6 Agric. L. Update 4-6 (May 1989).
2. *See, e.g.,* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y.
3. This is, for the most part, state level regulation, authorized under 7 U.S.C. §§ 136b and 136v. *See, e.g.,* Kan. Stat. Ann. § 2- 2438a et seq. Misapplication can also be the basis for civil liability to those harmed by the application or use.
4. *See, e.g.,* Toxic Substances Control Act, 15 U.S.C. §§ 2601- 2654; Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6991i; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.
5. Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001-11050.
6. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387; Safe Drinking Water Act (Public Health Service Act) 42 U.S.C. §§ 300f-300j-11.
7. 7 U.S.C. §§ 136-136y.
8. 7 U.S.C. § 136h.
9. 15 U.S.C. § 2605.
10. 15 U.S.C. § 2605.
11. The regulations, 40 C.F.R. § 35.1521-4(c), define BMP's as "those methods, measures, or practices to prevent or reduce water pollution and include but are not limited to structural and non-structural controls, and operation and maintenance procedures. BMP's can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters."
12. 33 U.S.C. § 1288(j)(2).
13. 33 U.S.C. § 1288(j)(1).
14. *See* 33 U.S.C. § 319.
15. *See, e.g.,* Kansas Department of Health and Environment, Bureau of Water Protection, Kansas Nonpoint Source Assessment, Interim Report, Draft Mar. 4, 1988.
16. Kan. Stat. Ann. § 2-2453(b).
17. 42 U.S.C. §§ 300f-300j-11.
18. 42 U.S.C. § 300h-7.
19. 42 U.S.C. § 300i-1.
20. 42 U.S.C. §§ 6901-6991.
21. 40 C.F.R. § 262.51.
22. 42 U.S.C. §§ 9601-9675.
23. 42 U.S.C. §§ 11001-11050.

STATE ROUNDUP

MINNESOTA. *Mandamus to protect ag preserve.* When land is part of an agricultural preserve created pursuant to the Metropolitan Agricultural Preserves Act, the use rights of the landowner may be strictly limited to those activities directly associated with the agricultural use.

In the case of *Madson v. Overby,* 425 N.W.2d 270 (Minn. App. 1988), the landowner entered into a restrictive covenant with the City of Elmo Lake in 1983, placing his land into an agricultural preserve. The land had been at all times zoned agricultural. In 1985, the landowner constructed a large metal building on his property and began advertising "low cost storage." In 1986, following an amendment of the zoning provisions of the municipal code of Elmo Lake, the landowner was granted a conditional use permit to conduct his storage business.

A resident of Elmo Lake then filed a suit in mandamus to require the city to enforce the provisions of the Metropolitan Agricultural Preserves Act. The court held that the city was required to enforce the provisions of the Act, notwithstanding the grant of the conditional use permit. According to the court of appeals, the city could not allow the storage business to be maintained in the ag-preserve unless it could demonstrate that it was a small on-farm use normally associated with farming. Importantly, the court rejected the argument that the statute allows an inconsistent use by the landowner to automatically take land out of the ag-preserve.

– *Gerald Torres*

OKLAHOMA. *Distribution formats for centralized notification system master lists.* Beginning July 1, 1989, the Secretary of State may distribute the centralized notification system (CNS) master list on farm product liens through electronic data or machine readable formats. Fees for the new distribution formats cannot exceed the Secretary of State's cost for the distribution format. 1989 Okla. Laws H.B. 1434 (approved Apr. 21, 1989) *codified as* Okla. Stat. tit. 28, § 111(9) (Supp. 1989). Prior to July 1, the Secretary of State could use only computer printout or microfiche formats to distribute the list. The practical aspect of the 1989 law is that the Secretary of State can now distribute the CNS master list to CNS registrants on computer disks for registrants' personal computers.

– *Drew L. Kershen*

MINNESOTA. *No unconstitutional taking in bankruptcy proceeding.* Plaintiffs in *Dahlke v. Doering,* 94 Bankr. 569 (D. Minn. 1989) sold their farm by contract for deed to buyers who subsequently defaulted on their payments and filed for Chapter 12 bankruptcy. The bankruptcy court reduced the face value of the contract from $124,000, the outstanding balance, to $75,000, the farm's fair market value. Plaintiffs argued that this constituted a taking in violation of the Fifth Amendment.

Relying on previous cases in which the Supreme Court upheld the Frazier-Lemke Act against Fifth Amendment challenges, the district court held that a reduction in the value of a secured interest pursuant to a Chapter 12 plan is not an unconstitutional taking. "Congress is entitled to fashion debtor relief in ways that may ultimately impinge upon secured creditors' claims," the court concluded. "[W]hile this power may work a consequent hardship upon creditors, it is not unconstitutional as a violation of the Fifth Amendment."

Plaintiffs also argued that Chapter 12, enacted in 1986, should be applied only prospectively, and, therefore, not to the 1978 sale of their farm. The court concluded that Congress clearly intended Chapter 12 to apply to all of a family farmer's debts, not just those incurred after enactment, and hence applied to defendant's debt on the contract for deed.

– *Gerald Torres*

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agricultural update

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