

## Three GAO reports

The United States General Accounting Office (GAO) recently issued three analyses warranting attention in the agricultural law community: U.S. Gen. Accounting Office, *Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices* (GAO/RCED-00-242, Sept. 2000); U.S. Gen. Accounting Office, *Sugar Program: Supporting Sugar Prices Has Increased Users' Costs While Benefiting Producers* (GAO/RCED-00-126, June 2000); and U.S. Gen. Accounting Office, *Farm Programs: Observations on Market Loss Assistant Payments* (GAO/RCED-00-177R, Correspondence to the Hon. Dan Glickman, June 30, 2000). These and other reports relating to agriculture and food can be found at [www.gao.gov](http://www.gao.gov).

In the first of these analyses, the GAO examined the ability of the USDA Grain Inspection, Packers and Stockyards Administration (GIPSA) to monitor and remedy unfair and anticompetitive practices in the livestock industry under the Packers and Stockyards Act. Its resulting report follows by nearly a decade an earlier report criticizing the USDA for its enforcement shortcomings. See U.S. Gen. Accounting Office, *Packers and Stockyards Administration: Oversight of Livestock Market Competitiveness Needs To Be Enhanced* (GAO/RCED-92-36, Oct. 1991). It follows numerous requests for more vigorous enforcement from private citizens, see, e.g., 62 Fed. Reg. 1845 (1997) (petition for rulemaking on packer livestock procurement practices), and the failure of GIPSA to successfully prosecute its unfair practices claim against IBP, an effort that ended in a total victory for IBP. See *In re IBP, Inc.*, P & S Docket No. D-95-0049 (1998); *IBP, Inc. v. Glickman*, 187 F.3d 974 (8th Cir. 1999).

In its September, 2000 report, the GAO concluded that "[t]wo principal factors detract from GIPSA's ability to investigate concerns about anticompetitive practices in the cattle and hog markets." *Packers and Stockyards Programs* at 5. The first is the absence of formal involvement between GIPSA economists and Office of General Counsel (OGC) attorneys in the planning and conducting of GIPSA investigations. This absence is compounded by a decrease in the number of OGC attorneys assigned to GIPSA cases from eight to five since 1998 because of budget restraints and the limited experience of the GIPSA economists. Second, the GAO found that "GIPSA's investigative methods were not designed for addressing complex anticompetitive practice concerns—they were designed for the trade practice and financial issues that the agency has emphasized for years." *Id.* at 6. The GAO recommended that GIPSA consult with the Department of Justice and Federal Trade Commission on the design of investigative program improvements, and it noted that the USDA concurred with its report in this respect. In addition to its discussion of these deficiencies, the report discusses the authority given to the USDA under the Packers and Stockyards Act to act against anticompetitive practices in the livestock industry, and it also reviews recent GIPSA investigations into possible anticompetitive practices in the industry.

In its report on the sugar program, the GAO concluded that the sugar program resulted in net losses to the national economy of about \$700 million in 1996 and about \$900 million in 1998. See *Sugar Program* at 22. The sugar program supports the price of domestic sugar through loans and tariff-rate import quotas that restrict the supply

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## Pennsylvania's experiences with conservation easements

This is the second of a two-part article that examines Pennsylvania's experience with its Purchase of Agricultural Conservation Easements (PACE) program, the Commonwealth's most visible farmland preservation program, placing the PACE program in the context of other farmland preservation methods before looking at some lessons from Pennsylvania's experience and future program directions.

### Farmland preservation techniques

Purchase of conservation easements for farmland preservation is sometimes referred to as a third generation preservation technique. Zoning is a first generation technique.

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- New water quality regulations raise questions about EPA influence over agricultural practices

of imported sugar that can be imported at a low tariff rate. As a result, domestic sugar in 1998 was priced at more than 10 cents per pound higher than the world price. In 1998, the program produced welfare gains to sugar beet and sugar cane producers and processors in excess of one billion dollars. However, losses to sweetener users and to the national economy resulting from production and consumption inefficiencies and transfers to foreign countries approached two billion dollars. Thus, the sugar program, while benefitting only from 8,000 to 12,000 sugar cane and sugar beet farmers, cost the national economy about \$900 million in 1998. Moreover, it contributed to an over-supply of domestic sugar this year. *Id.* at 6-22. As a result, the USDA spent \$54 million in June 2000 to purchase sugar in an effort to prop up the domestic sugar price. Because these purchases failed to markedly improve prices, the USDA is now implementing a sugar payment-in-kind program that is paying sugar beet producers up to \$20,000 per person to forego harvesting their sugar beet acreage. See generally

Bruce Ingersoll, *U.S. Offers to Give Government Sugar To Farmers Who Destroy Part of Crop*, Wall St. J., Aug. 3, 2000 at A6; FSA Notices SU-60 and SU-61.

In its report on market loss assistance (MLA) payments, the GAO found that farmers were both "over-paid" and "under-paid," depending on whether they actually produced the commodities for which the payments were made. Since 1998, Congress has authorized MLA payments for wheat, feed grains, cotton, and rice. See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, tit. XI, § 1111, 112 Stat. 2681, 2681-44-2681-45; Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-78, tit. VIII, § 802, 113 Stat. 1135, 1176; Agricultural Risk Protection Act of 2000, Pub. L. No. 106-224, tit. II, § 201(b), 114 Stat. 358, 398. These payments were ostensibly intended to help offset the declines in market prices for these commodities. The MLA payments, however, "followed" production flexibility contract (PFC) payments. In other words, MLA payments were paid only to persons who received PFC payments, and the MLA payments were paid in proportion to the PFC payments a farm received. In fiscal year 1998, MLA payments "supplemented" PFC payments by about 50%. In fiscal years 1999 and 2000, MLA payments pro-

vided a 100% "supplement" to PFC payments. In other words, in fiscal years 1999 and 2000, a farm that received \$40,000 in PFC payments also received \$40,000 in MLA payments.

To receive PFC payments, however, an eligible person does not have to produce wheat, feed grains, cotton, or rice. In fact, no commercial crop need be planted on PFC acreage. See, e.g., 7 C.F.R. § 1412.401(c). Nonetheless, MLA payments for wheat, feed grains, cotton, and rice were directed to the farms owned or operated by these persons irrespective of their actual plantings. As a result, according to the GAO, in 1999 "about 27 percent of the \$4.5 billion in ad hoc MLA payments included in our analyses went to farms that would not have received this assistance if the payments had been based on current-year plantings." *Observations on Market Loss Assistance Payments* at 2. Specifically, the GAO found that "about 893,000 farms received about \$1.22 billion more than they would have received" had MLA payments been based on current-year plantings. *Id.* On the other hand, in the same year "about 400,000 farms adversely affected by falling prices would have received about an additional \$300 million in MLA plantings if the payments had been based on that year's plantings." *Id.*

-Christopher R. Kelley, Asst. Prof. of Law, University of Arkansas, Of Counsel, Vann Law Firm, Camilla, GA

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AALA Editor.....Linda Grim McCormick  
 Rt. 2, Box 292A, 2816 C.R. 163  
 Alvin, TX 77511  
 Phone: (281) 388-0155  
 FAX: (281) 388-0155  
 E-mail: lgrmccormick@teacher.esc4.com

Contributing Editors: Christopher R. Kelley, University of Arkansas, Fayetteville, AR; Timothy W. Kelsey, The Pennsylvania State University; Stanford M. Lembeck, The Pennsylvania State University; Anne Hazlett, Agricultural Law Program, University of Arkansas, Fayetteville, AR; Barclay R. Rogers, Agricultural Law Program, University of Arkansas, Fayetteville, AR.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

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**PENNSYLVANIA/Cont. from p. 1**

It treats agriculture as a community land use and controls disruption of farming by non-farm development.

A special type of zoning, referred to as agricultural protection zoning, can be very effective at preserving agricultural land. Agricultural protection zoning views agriculture as a fully developed use, so its intent is to protect productive agricultural land from further development. Zoning is a relatively low cost preservation technique (from a local government perspective) because the major costs are in preparing and administering the ordinance.

Second generation preservation techniques include preferential taxation of farmland, agricultural districting, and right-to-farm laws. Preferential taxation generally taxes agricultural land at its use value (instead of higher market value) to provide a tax incentive to encourage farmers to stay in farming. Agricultural Security Areas (Act 43 of 1981) confer special benefits to farm landowners, and also makes them eligible to participate in PACE. The right-to-farm law (Act 133 of 1982) helps farmers in nuisance conflicts.

Purchase of conservation easements—sometimes called purchase of development rights—and transfer of development rights (TDR), are third generation preservation techniques. They involve the transfer of a valuable property right, and substantial sums of money. Purchase of conservation easements is a public investment strategy for

preserving agriculture. Compared to the previously described preservation techniques, these are long term and permanent ways of preserving agricultural land.

Pennsylvania has a full array of first, second, and third generation agricultural preservation techniques. Each technique does something different and operates at a different government level. For example, agricultural zoning is a municipal activity, as is the creation of agricultural security areas. Preferential tax assessment occurs at the county level. The purchase of conservation easement program is a joint county-state, and sometimes municipal, effort. Municipalities have recently been authorized to participate financially in the program and be an owner of the easement in proportion to the funds they supply. Most important to remember, however, is that the conservation easement purchase program is voluntary. While there is much productive farmland in strategically important locations, only farmland that is voluntarily offered can be purchased. In many respects this is a program strength, but ultimately the success of PACE is controlled by landowner decisions whether or not to participate.

**Lessons from Pennsylvania**

As of March 23, 2000, Pennsylvania's program had purchased conservation easements on 1,260 farms, for a total of 156,289 acres. Purchases have been made in 42 of the 50 counties with approved programs, at a total

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cost of \$303,179,889 (average price of \$1,939.85 per acre). The acreage saved constitutes about 4.8% of farmland in agricultural security areas (the area eligible for purchases), and 2.2% of Pennsylvania's total agricultural land.

With the depletion of the original \$100 million voter-approved 1987 bond issue, the program in recent years has been funded annually with \$20-22 million from cigarette taxes. For the 2000 program year, the threshold funding amount is increased significantly to \$45 million, well above the \$28 million threshold for 1999. State funding is supplemented with participating counties' funds, amounts that have been quite variable. In 1999, county appropriations for easement purchases were \$9.5 million; for 2000 the county allocations total \$24 million. This year's funding level will allow a significant increase in easement purchases.

Pennsylvania farmers continue to show a very strong interest in participating in the program. Lancaster County currently has 150 approved farms awaiting sale, with hundreds more in the pipeline. Lehigh County has 65 parcels in process, 13 of which are ready for state action and 6 awaiting landowner approval of the purchase price. Adams County's 1998 round of applications includes 107 farms with 13,000 acres. However, only 20% of these applications, totaling 2,500 acres, can be funded with its available allocation of funds. Other counties are in similar circumstances.

High demand for the program makes it easier for counties to negotiate less-than-market-value deals, known as "bargain sales," but it may also increase farmer frustration with the program. Lack of available funding sometimes makes purchasing seriously threatened farms difficult.

The conservation easement program is growing— it is expected to soon pass Maryland's development rights purchase program that began in 1977— and will become the nation's leader for this type of farmland preservation. Although PACE continues to receive strong farmer, citizen, and political support, and is widely regarded as being highly successful, attention must be given to several critical policy issues

#### *Is the "best" farmland being bought?*

The PACE program is based on two fundamental premises. First, its primary interest is in buying the best farmland in terms of soil productivity. In this context, "best" can be determined objectively and scientifically, whereas other indicators are more subjective. Second, since soil quality varies considerably throughout the Commonwealth, the "best" farmland is relative to each county in the program. This second premise is what allows PACE to be a statewide program.

The base criteria for purchase established in 1989 when the program began is still used, namely that 50% or more of the farmland offered for sale must be in soil capability classes I through IV and, further, that 50% or more of the land must be in cropland, grazing, or pastureland. Several years ago, the standard statewide dollar amount used

as the measure of farm productivity was eliminated, and in its stead a more flexible set of criteria was created, which each county could adjust to effectively deal with its particular preservation issues.

Currently, each farm receives a priority ranking for purchase, using a two-part scoring procedure: land evaluation of the soils on the farm and site assessment of key features affecting the farm parcel. The flexibility comes in the site assessment, which must include three considerations:

(1) Development potential—factors that identify the extent to which development pressures are likely to cause conversion of agricultural land to non-agricultural uses;

(2) Farmland potential—factors that measure the potential agricultural productivity or farming practices on the farm;

(3) Clustering potential—factors that measure the importance of preserving blocks of farmland that support commercial agriculture and help shield farming against conflicts with incompatible land uses.

Using criteria such as these, a county can place different degrees of importance on each of the site assessment factors. This allows local agricultural preservation priorities to be addressed in the selection of key farm parcels for easement purchase. The improved scoring criteria makes the program more sensitive to local preservation needs.

#### *Does Pennsylvania's program really protect agriculture?*

PACE protects farmland, but the most important question is whether it preserves farming in Pennsylvania, which is an implied goal of the program. There has always been a concern that buying conservation easements would merely encourage farmers to leave farming. This does not seem to be the case, however. We learned in both the 1994 and 1998 surveys that, for the most part, participating farmers were just as active in the farm after the sale as before. We also found that easement sellers were putting sale proceeds back into the farm operation to make them more viable. In both survey years the major (40% or more) uses of proceeds were quite consistent. After first taking care of family financial planning, major uses of proceeds went to reducing mortgage debt and operating loans, buying another farm or more land, machinery and so forth. Rather than being a "buy-out," conservation easement sales appear to be a strengthening force supporting agriculture.

#### *Is a critical mass of farmland being purchased to keep agriculture viable?*

Isolated preserved parcels of land surrounded by urban or suburban development do not sustain viable agriculture and do little to maintain the Commonwealth's farmland base. A sufficient number of farms must remain in a community to keep farm input suppliers, shippers, processors, and other farm-related business services available to farms in that vicinity. Clustering easements has the potential to create the critical mass of farms necessary to keep such farms in business. The amount of protected land nec-

essary to do this, however, is unclear, but research efforts to determine this are currently on-going.

It obviously takes time for a sufficient number of farmers selling easements in a geographic area to create such a critical mass, but it is happening in many counties. For example, East Donegal Township in Lancaster County has had 58 farm easements purchased on a total 4,800 acres, which is 44% of the total 10,900 acres in the agricultural security area; Franklin and Mt. Pleasant townships in Adams County each have over 1,000 eased farm acres; there is significant clustering in Lynn, Lower Milford, Heidelberg and Weisenberg townships in Lehigh County. Time being the critical element in clustering, counties that have participated in the PACE program since its inception lead in clustering, but over time others will show comparable clustering results. Adams, Berks, Chester, Lancaster, Lehigh and York counties have preserved from 10,000 to over 20,000 acres of farmland.

#### *Is PACE directed to where it will do the most "good"?*

A related concern is which masses of farmland are necessary to keep agriculture viable in Pennsylvania, and thus most need protection. Eight of Pennsylvania's top ten agricultural counties are located in the southeastern and south central area of the state, where much of the state's development is occurring. In the first three years of Pennsylvania's program, 75% of the easement purchases were made in these counties. Now, with over forty other counties participating in the state program, funding is spread over more counties, so the percent of purchases in these eight leading agricultural counties has dropped to only about 50% of the total.

#### *Future program needs*

PACE deals with one farm at a time, not an entire community, area, or industry. It demands constant attention and refinement if it is to achieve its purpose.

#### *Program Funding*

The backlog of farmers wanting to sell easements far exceeds the amount of money available to purchase easements. The comparatively slow pace of purchases (compared to the number of interested sellers) creates the possibility that farmer, local government, and community enthusiasm and interest in the program will wane. Selling for non-farm development provides immediate financial gains.

To have a strong program, a stable, growing, dedicated funding source is vital. Neither current committed funds nor cigarette taxes may be enough, or provide sufficient revenue growth, to be satisfactory in the long run. Alternative revenue sources, or different funding approaches, must be looked to as ways to keep purchases moving through the system at an accelerated pace. The urgency is to preserve as much farmland now, before development occurs and the cost of purchas-

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# District Courts rules non-point sources are included in listing of impaired waterways, calculation of total maximum daily loads

By Anne Hazlett and Barclay R. Rogers

For some time, agriculture has been labeled as the leading source of water quality impairment in the nation's rivers and streams. EPA, *Nonpoint Source Pollution Fact Sheet*, (1999), at <http://www.epa.gov/OWOW/NPS/facts/point1.htm>. Nevertheless, regulators at both the state and federal levels have been operating under great uncertainty with respect to the limits of the federal government's authority to controlling agricultural practices. A recent decision by the Northern District of California in *Pronsolino v. Marcus*, 91 F.Supp.2d 1337 (N.D. Cal. 2000), may provide some answers to these looming questions.

In a case of first impression, Judge William Alsup determined that EPA has the authority under § 303(d) to determine "total maximum daily loads" ("TMDLs") for rivers and waters that are polluted by logging and agricultural runoff or other nonpoint sources. Specifically, the court held that pollution from nonpoint sources such as timber and farming operations is relevant in developing the substandard waters list required by § 303(d) and that a river or stream polluted only by such sources could be listed and a TMDL subsequently prepared. At present, this matter is on appeal to the Ninth Circuit. If affirmed, the decision could have a far-reaching impact on the federal government's ability to control nonpoint source pollution from agriculture and, hence, affect land management practices on the farm.

## Statutory and regulatory background

Section 303 of the Clean Water Act requires each state to develop a "continuing planning process" to protect all waters within its boundaries, a process that is subject to EPA approval. 33 U.S.C. § 1313(e). As a part of this process, states must identify those waters within its boundaries for which effluent limitations on point sources are not stringent enough to implement a particular water quality standard. 33 U.S.C. § 1313(d)(1)(A). Each state then has to establish a priority ranking of such waters that takes into account the severity of the pollution and the waters' designated uses. *Id.*

Once the prioritization is complete, the states are required to calculate a TMDL for each pollutant that the agency deems suitable for such a calculation. 33 U.S.C. § 1313(d)(1)(C). After § 303(d) was enacted,

EPA identified "all" pollutants as suitable for inclusion in the TMDL process. 43 Fed. Reg. 60662 (Dec. 28, 1978). A TMDL is defined in 7 C.F.R. § 130.3(i) as: "The sum of the individual [waste load allocations] for point sources and [load allocation] for nonpoint sources and natural background."<sup>1</sup> In laymen's terms, a TMDL is the total amount of a pollutant that may be discharged into a waterbody and have the water still maintain water quality standards. Once this amount is determined, the TMDL process contemplates an allocation of this load to individual contributors.

## Guido and Betty Pronsolino

Plaintiffs Guido and Betty Pronsolino own forested land on the Garcia River, which runs along the Northern California coast in Mendocino County. 91 F.Supp.2d at 1338. They harvest timber from this property. *Id.* When they applied for a permit to harvest timber, the California Department of Forestry ("CDF") imposed several restrictions that were designed to reduce soil erosion into the Garcia.<sup>2</sup> *Id.* For example, the Pronsolinos were required to leave certain large conifer trees standing.<sup>3</sup> *Id.* The Pronsolinos' forester estimated that compliance with such restrictions would cost upwards of \$750,000. *Id.* at 1340. In light of this burden, the Pronsolinos sought to challenge these restrictions. In so doing, they argued that CDF was imposing these restrictions to implement a TMDL set by EPA for the Garcia River. *Id.* at 1338.

Since 1992, the Garcia River has been listed on California's § 303(d) list as impaired for sediment. *Id.* at 1339. This impairment is significant because excessive sedimentation has caused a reduction in the quality and amount of instream habitat for cold-water fish such as coho salmon and steelhead trout. *Id.* When the state failed to develop a TMDL for the Garcia as well as sixteen other North Coast waters, a group of fisherman and environmental interests brought suit against EPA. *Id.* That case ended in a consent decree in March of 1997 requiring that TMDLs be promulgated by the state, or by EPA if the state failed to complete the TMDL, for all of these waterways. *Id.* California subsequently missed the deadline for completing the TMDL, and EPA took over the process. *Id.*

When the Pronsolinos believed that CDF was putting restrictions on their timber harvest permit in order to implement the TMDL established by EPA, they sued EPA under the federal Administrative Procedure Act, 5 U.S.C. § 701, contending that the agency did not have the authority to impose a TMDL on a waterbody like the Garcia where the only causes of pollution

are nonpoint sources such as timber-harvest and agricultural runoff. *Id.* at 1338. Also joining their action were the Mendocino County Farm Bureau, the California Farm Bureau Federation, and the American Farm Bureau Federation.

Both parties filed motions for summary judgment. In their motion, the plaintiffs argued specifically that the Garcia River should not have been listed as impaired because § 303(d) did not provide authority to list a waterbody where the water was polluted only by nonpoint sources and, therefore, no TMDL should have been prepared. *Id.* at 1346. In contrast, EPA contended that it was entitled to judgment as a matter of law because its interpretation of § 303(d) was reasonable and therefore lawful under *Chevron Inc. v. Natural Resources Defense Council*, 467 U.S. 387 (1984). Def.'s Reply Brief at 1. On March 30, 2000, the court granted summary judgment in favor of the agency.

## The court's analysis

In finding for the agency, the court first analyzed the general question of whether Congress intended the TMDL process to include control of nonpoint sources of pollution. Having determined that it did, the court then addressed the more specific issue of the extent to which states are to consider nonpoint sources in assembling the § 303(d) list.

## Whether the TMDL process includes nonpoint sources

The court found that Congress intended the TMDL process to include nonpoint sources based on the language, structure, and purpose of § 303(d) as enacted in the 1972 legislation, now known, together with its subsequent amendments, as the Clean Water Act. Before turning to § 303, the court first reviewed the history of events that led up to the enactment of the 1972 statute. The court wrote that under the 1965 Water Quality Act, which preceded the 1972 Act, the primary responsibility for control of water pollution rested with the states. 91 F.Supp.2d at 1340. The 1965 Act required each state to develop comprehensive water quality standards for interstate waters that stated a desirable condition of the water. *Id.* at 1341. Reasonable discharges were inherently permitted under these standards. *Id.* However, in 1966, the Supreme Court held in *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), that under the Refuge Act of 1899, 30 Stat. 1152, all discharges of foreign substances and pollutants were illegal without a permit. 91 F.Supp.2d at 1341. It was this conflict between the absolute prohibition and reasonable discharge approaches that led to the development of the 1972 legislation. *Id.*

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Anne Hazlett is a graduate student in the Agricultural Law LL.M. program at the University of Arkansas.

Barclay R. Rogers is a graduate student in the Agricultural Law LL.M. program at the University of Arkansas.

In addition to the history of water pollution control prior to 1972, the court further prefaced its examination of § 303 with a discussion regarding the comprehensive nature of the legislation. There, the court began with the premise that the Supreme Court has consistently referred to the 1972 Act as intended "to establish an all-encompassing program of water pollution regulation" and "to establish a comprehensive long-range policy for the elimination of water pollution." *Id.* It then stated that the 1972 Act envisioned a "partnership" between the states and the federal government and that such an arrangement would be fueled by a shared objective "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id.* (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)). To carry out this partnership, the 1972 Act created the National Pollution Discharge Elimination System ("NPDES"), which imposed effluent limitations on all point sources under a technology-based strategy. 91 F.Supp.2d at 1341. It also carried forward the preexisting regime of water-quality standards and even extended that regime to all navigable waters in the United States. *Id.* at 1341-42.

Taking this background, the court turned to an in-depth analysis of § 303 as well as various other provisions in the 1972 Act that related to the control of nonpoint source pollution including § 102(a), § 104(n) and (p), § 201, § 208, § 304 and § 305. *Id.* at 1342-46. With respect to § 303, the court first stated that subsection (a) required the states to adopt water-quality standards and to carry forth those already adopted. *Id.* at 1343. Under the statute, standards were to be set for all navigable waters including interstate and intrastate waters. *Id.* Further, the court noted that the Supreme Court has said that water-quality standards were meant by Congress to be "comprehensive." *Id.* (citing *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994)). In reviewing subsection (a), the court found it significant that in the process of setting standards Congress did not exempt any rivers or waters. 91 F.Supp.2d at 1343. Nor did it draw any distinction between point and nonpoint sources. *Id.* Rather, the standards-setting process of § 303 plainly applied to waters polluted by point sources as well as nonpoint sources. *Id.* "The goal was to set standards for all navigable waterways in America, balanced and tailored to accommodate the various needs of each, including, explicitly, the need for protection of fish and wildlife." *Id.*

Second, the court set forth the language of § 303(d)(1)(A) which provided:

Each state shall identify those waters within its boundaries for which the effluent limitations required by Section 301(b)(1)(A) and 301(b)(1)(B) are not stringent enough to implement any wa-

ter quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

From this provision, the court concluded that the structure of § 303(d) was as follows: The states were required to assess the expected beneficial impact of the imposition of the best effluent reduction that technology could supply. *Id.* If those reductions alone would bring a water into compliance with the applicable water quality standards, then that was the end of the matter. *Id.* If not, however, then § 303(d)(1) required the waterway to "join the list of unfinished business." *Id.* That list had to be prioritized by the states. *Id.* The states were then required under § 303(d)(1)(D) to calculate a TMDL for each listed water. *Id.* Such calculations had to be included in the state's continuing planning process required by § 303(e). *Id.* at 1345.

Third, the court concluded that the purpose of § 303(d) was to serve as an "inter-section" between the old water-quality standards approach and the new technology-based strategy, which was the main innovation of the 1972 Act. *Id.* at 1343. Given these factors, the court held that TMDLs were required for "all listed rivers and waters." *Id.* at 1344. Stated differently, no river or water was immune from the process.

#### **Whether states are required to consider nonpoint sources in assembling the § 303(d) list**

After considering the general construction of the 1972 Act relating to nonpoint source pollution, the court addressed the particular issue presented by the case: "the extent to which nonpoint sources of pollution were to count in assembling the substandard-waters list required by Section 303(d) and in preparing the corresponding TMDLs." *Id.* at 1346. On this point, the plaintiffs argued that the § 303(d) list and corresponding TMDL process was limited under the language of the statute to waters affected by point sources and did not include waters impaired solely by nonpoint sources. *Id.* Therefore, EPA's listing of the Garcia River was unlawful. *Id.*

In addressing this argument, the court first turned to the text of § 303(d)(1)(A). It then rejected the plaintiffs' contention for four primary reasons. First, the court reasoned that the plaintiffs' interpretation of the statute would render the listing provision inconsistent with the statutorily-defined role of a TMDL. *Id.* While acknowledging that the TMDL process could be used to address only point source contributions, the court stated that it was not so limited by the statute. *Id.* Under the statute, the expressly contemplated use of a TMDL determination was its "incorporation" into each state's "continuing plan-

ning process" required by § 303(e). *Id.* And, since the "continuing planning process" was the nonpoint source "side of the equation," the court concluded that TMDLs naturally fit within the generally accepted approach to nonpoint source pollution control. *Id.* Additionally, the court noted that TMDLs were required to be calculated at levels sufficient to "implement" water quality standards. Thus, nonpoint sources must be included in the TMDL process because "[i]t would seem impossible to [implement water quality standards] without taking any nonpoint sources into account." *Id.*

Second, the court found that the plaintiffs' interpretation was inconsistent with the general structure and logic of § 303. Specifically, the court stated that § 303 requires the state to set water quality standards for all navigable waters and § 303(d) requires the state to list all waters for which effluent limitations would not be sufficient to meet these standards. *Id.* at 1347. It then explained that excluding nonpoint sources from the listing process would contradict this approach:

Since all rivers and waters regardless of pollution sources were included in the universe for which water-quality standards were required, all of them—again regardless of source of pollution—were included in the universe for which listing and TMDLs were required—save and excluding only those for which effluent limitations would be sufficient to achieve compliance with standards [footnote omitted].

*Id.*

Third, the court determined that the fact that § 303(d) lacked any specific references to nonpoint sources was insignificant because such references would be unnecessary in light of the comprehensive nature of the 1972 legislation. *Id.* In the court's words, the "reason seems obvious." *Id.* The court characterized the § 303(d) list as a "list of unfinished business" that would follow the implementation of the effluent limitation approach for point sources. *Id.* It then stated that the exclusion of nonpoint sources from the TMDL process would have left a "chasm in the otherwise 'comprehensive' statutory scheme" and that doing so would have "crippled" the continuing planning process under § 303(e). *Id.* The TMDL provided the necessary "intermediate step" in that it produced "engineering data" that the states could use to "allocate the burden of cleanup between point and nonpoint contributions of the same pollutant." *Id.*

Fourth, the court concluded that case law from the Ninth Circuit supports the inclusion of nonpoint sources in the listing process. Citing *Trustees for Alaska v. Environmental Protection Agency*, 749 F.2d 549 (9th Cir.1984), and *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842 (9th Cir.1987), the court considered Ninth Circuit precedent that distinguishes between point and

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nonpoint source control approaches within the Clean Water Act. 91 F.Supp.2d at 1348. It then turned to the Ninth Circuit's decisions in *Alaska Center for the Environment v. Browner*, 20 F.3d 981 (9th Cir.1994), and *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517 (9th Cir.1995). The court interpreted these opinions as holding that waterbodies affected by nonpoint sources are included in the TMDL process. 91 F.Supp.2d at 1348-49. In so doing, it noted that while these cases did not concern waters affected exclusively by nonpoint sources, the Ninth Circuit has not indicated that this should affect the analysis. *Id.*

After discussing the language of the statute and caselaw relating to this question, the court examined the legislative history of § 303(d). On this point, the plaintiffs argued that a House committee report contained multiple references to effluent limitations in the context of TMDLs and that, despite its reference to the significant contribution of nonpoint source pollution to water quality problems, it did not indicate that nonpoint sources were to be included in the TMDL process. *Id.* at 1349-50 (quoting H.R.Rep. No. 92-911, at 105-06 (1972)). Contrary to the plaintiffs' interpretation, the court stated that Congress' discussion of nonpoint sources as a "major contribution" to water quality impairments indicated that Congress "recognize[d] that mitigation of nonpoint-source pollution would also be required to meet [water quality] standards." 91 F.Supp.2d at 1350.

Finally, the court addressed plaintiffs' argument that § 319, which was enacted after § 303(d) and is expressly concerned with the control of nonpoint source pollution through statewide nonpoint source management plans, would have been superfluous if nonpoint sources were included in § 303(d). While acknowledging that § 319 and § 303(d) "covered some of the same general ground," the court rejected the notion that the enactment of § 319 evidences that Congress did not intend the § 303(d) process to apply to nonpoint sources for three reasons. *Id.* at 1352-53. First, although both § 303(d) and § 319(a)(1) require states to list waters failing to meet water quality standards, the court concluded that, while these reports "may partially overlap," they are not duplicative lists. *Id.* at 1352. While nonpoint source control may be found generally under § 319, TMDLs were an "important ingredient" for both the § 319 and § 303(e) plans. *Id.* at 1353. Second, the court pointed out that—contrary to the plaintiffs' assertions—the 1972 Act did contemplate nonpoint source control. *Id.* Thus, characterizing § 319 as a first step towards nonpoint source pollution control is inaccurate. *Id.* Third, on previous occasions, the Ninth Circuit has rejected a similar attempt to infer congressional intent

through subsequent amendments. *Id.*

In sum, the court held that § 303(d) includes waterways that are impaired by nonpoint source pollution. More precisely, the court concluded that rivers and streams that are impaired solely by nonpoint sources such as agricultural runoff could be listed on a state's substandard waters list and subsequently subjected to a TMDL calculation. Accordingly, EPA's listing of the Garcia River in this case was not unlawful.

### Open questions

The precise effect of Judge Alsup's decision on agricultural practices is uncertain for two reasons. First, as stated previously, the plaintiffs have appealed the court's decision to the Ninth Circuit. Second, while Judge Alsup clearly believes that nonpoint source pollution is included in the § 303(d) process, it remains unclear what exactly EPA can force a state to do with a TMDL once it is calculated.

### Appeal

On September 25, 2000, the plaintiffs filed their opening brief with the Court of Appeals. While a discussion of the merits of the appeal is somewhat premature because EPA has yet to respond to the plaintiffs' contentions, the arguments are presented to provide insight into the district court's decision. In their brief, the plaintiffs argue that the district court's ruling is erroneous on several grounds. First, the plaintiffs contend that the text and structure of the Clean Water Act demonstrate that § 303(d)(1) does not apply to waters impaired solely by nonpoint sources. Pl.'s App. Brief at 17. Specifically, they maintain that § 303(d)(1)(A) plainly states that the listing process is applicable only to a limited class of substandard waters, namely those that are receiving discharges controlled by effluent limitations. *Id.* at 18-20, 23-34. In addition, Congress' use of §§ 303(d)(3), 208 and 319 to control nonpoint source pollution makes it clear that § 303(d)(1) does not apply to rivers and streams where the exclusive source of impairment is nonpoint sources. *Id.* at 26.

Second, the plaintiffs assert that the legislative and administrative histories of § 303(d)(1) confirm that neither Congress nor the agency intended this provision to apply to waters impaired solely by nonpoint sources. *Id.* at 34-50. The Congressional reports and debates make no suggestion that § 303(d)(1) would apply to nonpoint sources and Congress has subsequently amended the Clean Water Act without indicating that TMDLs were to be used as a means of nonpoint source pollution control. *Id.* at 34-35, 39-40. Further, EPA did not apply or seek to apply § 303(d)(1) to waterways impaired by nonpoint source pollution for nearly two decades after § 303 was enacted. *Id.* at 41.

Third, the plaintiffs argue that the holding of the district court conflicts with Ninth

Circuit caselaw that supports the view that § 303(d)(1) does not apply to waters impaired solely by nonpoint source pollution. *Id.* at 51-53 (citing *Oregon Natural Desert Ass'n v. Donbeck*, 172 F.3d 1092 (9th Cir. 1998); *Natural Resources Defense Council v. EPA*, 915 F.2d 1314 (9th Cir. 1990); *Oregon Natural Resources Council v. USFS*, 834 F.2d 842 (9th Cir. 1987)). And, finally the plaintiffs contend that the plain meaning of § 303(d)(1) comports with the Clean Water Act's comprehensive purpose. *Id.* at 55. They maintain that while Congress sought a comprehensive solution in 1972 to water pollution problems, it chose to use separate tools to address different problems: federal control of point source pollution through the NPDES program and state control of nonpoint source pollution through § 208 waste management plans and § 319 grants. *Id.* at 57.

### Federal regulation of land use practices

Even if the district court's decision is affirmed on appeal, perhaps an even more critical question remains: once a water is listed as impaired and the TMDL is calculated, what measures can EPA employ to ensure that such allocations are in fact implemented? The impact of a TMDL will be felt on the farm not through a water quality calculation but by its actual implementation. Thus, arguably the key issue for agriculture in this debate is not limited to whether nonpoint source pollution is included in the TMDL process. It encompasses the additional question of the extent to which, if nonpoint sources are included, EPA can leverage the states into actually mandating the use of specific land use practices designed to achieve the TMDL calculation.

On this question, Judge Alsup took the position that Congress did not authorize EPA to regulate state land use practices. 91 F.Supp.2d at 1355. With the agency conceding this point, the court stated that unlike EPA's authority to revise individual NPDES permits issued by states for point sources, EPA has no authority to review land-use restrictions placed on timber harvest permits by CDF or other agricultural practices that are permitted. *Id.* In the court's opinion, the role of a TMDL is to assist the states in gathering information by identifying the load necessary to implement the water-quality standards. *Id.* In this capacity, a TMDL is limited to an engineering calculation. *Id.* On this point, Judge Alsup explained:

Under the Act, California must 'incorporate' the TMDL in its planning. Nothing, however requires that the TMDL be uncritically and mechanically passed through to every relevant parcel of land. California is free to select whatever, if any, land-management practices it feels will achieve the load reductions called for by the TMDL. California is also free to moderate or to modify the TMDL

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reductions, or even refuse to implement them, in light of countervailing state interests. Although such steps might provoke EPA to withhold federal environmental grant money, California is free to run the risk.

¶ On one hand, this language may be heralded as a victory for proponents of state control over land use decisions. On the other hand, however, this discussion is arguably dicta in that the central argument before the court was whether the listing of the Garcia River was unlawful, not whether EPA was forcing CDF to implement the calculation through the Pronsolinos' harvest permit.

Since the district court's decision, EPA has amended the TMDL regulations. Notwithstanding the agency's previous

concessions that it lacks the authority to regulate land use practices, an open question remains as to how far EPA can go through its new rules to force a state to actually implement a TMDL calculation in its water quality planning process. Next month, these authors will examine the new TMDL regulations. The article will focus specifically on EPA's ability to influence certain land management practices within agriculture.

<sup>1</sup> Under the new TMDL regulations which were not in effect at the time *Pronsolino* was decided, a TMDL is defined as a "written quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant." 65 Fed. Reg. 43662 (July 13, 2000).

<sup>2</sup> CDF imposed similar requirements on land use permits obtained by Mendocino County Farm Bureau

members Larry Mailliard and Bill Barr. 91 F.Supp.2d at 1340. They estimate their compliance costs at \$10,602,000 and \$962,000 respectively. ¶

<sup>3</sup> The conditions required that the Pronsolinos: (a) inventory controllable sediment sources from all roads, landings, skid trails and agricultural facilities by June 1, 2002; (b) mitigate 90% of controllable sediment volume at "road related" inventoried sites by June 1, 2012; (c) prevent sediment loading caused by road construction; (d) retain five conifer trees greater than 32 inches in diameter at breast height ("d.b.h.") per 100 feet of all Class I and Class II watercourses (if the site lacks enough trees to comply, the five largest trees per 100 feet must be retained); (e) harvest only during dry, rainless periods between May 1 and October 15; (f) refrain from constructing or using skid trails on slopes greater than 40% within 200 feet of a watercourse; and (g) forbear removing trees from certain unstable areas which have a potential to deliver sediment to a watercourse. ¶ at 1338, n. 2.

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the funds to purchase a conservation easement are committed at the time of purchase; the full dollar amount of the easement is encumbered up-front. Once a county's annual allocation is committed, it must wait for the next funding cycle to buy more easements. The longer interested farmers must wait for PACE, the greater the likelihood they will accept alternative opportunities to sell.

One way limited funds have been stretched is by placing a cap on the per-acre maximum dollar amount of an easement. This is instituted at the state level, and many counties have followed suit by instituting their own, usually lower, caps. In order for farmers to participate in the program and sell their easements, a relatively high percentage of recent sales are so-called "bargain sales;" that is, the seller accepted less than 100% of the easement value. Some of this loss may be returned to farmers in the form of a tax benefit.

Another way of stretching limited funds will soon be possible. In 1999, Act 15 authorized long term installment purchase agreements (IPA) as an alternative payoff method to acquiring conservation easements. Long term installment purchases can "leverage" annual program funds by deferring the principal payout until the end of the contract period. During the installment contract period the seller would receive an annual income stream, and taxes on the outstanding principal are deferred. The IPA contract could be sold or liquidated before the end of the term, and it could be transferred to heirs. In effect, such long term installment contracts may net the seller more than a cash sale.

This financing method uses general obligation bonds, which are relatively inexpensive to purchase at the time of easement sale and cost a fraction of the face value of the easement. The easement seller receives annual interest payments, and then gets a lump sum when the bond matures. Basically, IPA shifts the financing burden from the "front end," when the sale is made, to the lifetime of the installment contract.

IPA has several potential advantages for the program. For the same amount of annual authorized funding, the amount of farmland that could be eased would be greatly increased. The long-term income stream potential may help attract younger farmers to PACE. Paying for easements over time, instead of up front, should make limited program dollars go farther and reduce the frustration of farmers who must wait their turn to sell easements. How farmers will accept this new arrangement is unclear, but county program scoring could be adjusted to reward farmers who take advantage of it.

### Protecting eased farmland

Even though farm easements are purchased, the value of the easements can be destroyed if they are not protected from nearby non-farm development. Neighboring eased farmland is desired by residential development because it provides permanent open space and buffering to homes. The citizens of the Commonwealth create this amenity through their tax dollars, but homes that benefit from it may, at some time, begin complaining about farm noises, odors, and traffic, thereby causing distress and inconvenience to farming operations. In extreme situations farms may be forced to cease operations, thereby defeating the purpose of purchasing the farm easements.

Effective agricultural zoning should be an important part of an overall agricultural land preservation program. Such zoning helps protect the public investment when easements are purchased. However, zoning is not a required program element at the state level, and effective agricultural zoning is not in place in most localities. Protecting the public's investment through effective agricultural zoning should be a state and county requirement for participation in the easement purchase program.

### Concentrating purchases

The Commonwealth's most valuable farmland is in the southeast and south central regions, which is the area most severely threatened by urban development. For the PACE program to really be successful, it

must aggressively deal with protecting this region. To merely amass large quantities of eased farm acres, but not protect the valuable farm region in southeastern Pennsylvania, will be an empty victory.

To some extent the state formula for distributing program funds addresses this need since it uses, in part, real estate activity as a factor. Even so, consideration should be given to strengthening the targeting of funds to the Commonwealth's most vulnerable farmlands.

### The agricultural industry

PACE protects the land from development but does nothing to help the farm business itself survive. More direct attention to the participating farm operations themselves is important in the long run, if only to insure that the farms themselves remain economically viable. Some suggest directly linking program participation with farm management assistance as a way of helping farm operations on the preserved land stay in business. Protected land must be part of an integrated approach to farm and farmland preservation, complemented by other business assistance and preservation techniques. Purchase of conservation easements must be part of a balanced, comprehensive program of preservation, not a stand alone program. Other preservation techniques, such as zoning and agricultural security areas, complement PACE by helping farms remain viable.

Though Pennsylvania's program has been active since 1989, it is an evolving one. Significant refinements, particularly in evaluating eligible farm parcels, have been made since the program's inception. The scale of participation and the speed at which the program is operating is beyond the expectations of the originators of PACE. While by most measures PACE can be judged a success, it is still too early to tell whether the land saved in Pennsylvania will translate into preserving agriculture in the Commonwealth.

— Timothy W. Kelsey and Stanford M. Lembeck, *The Pennsylvania State Univ.*

## ***Distinguished Service Award***

"The AALA has honored me greatly by giving me the Distinguished Service Award for the year 2000. Each member of the AALA has honored me immensely by their friendship and their caring about agricultural law. I am grateful to the AALA and its members for the Award and for allowing me to participate so fully and joyfully in agricultural law.

-Drew L. Kershen, Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law,  
Norman, Oklahoma