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• Goeringer, THE NATIONAL PORK PRODUCER’S COUNCIL’S CHALLENGE TO EPCRA IS NON-JUSTICIABLE. This article discusses a recent Federal District Court decision that the NPPC’s challenge of EPA regulations based on the intent of the EPA as expressed in the preamble to the regulations was not justiciable.

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• Feitshans, NEW NORTH CAROLINA LAW PLACES RESTRICTIONS ON CONDEMNATIONS OF LAND SUBJECT TO CONSERVATION EASEMENTS. Effective October 1, 2009, North Carolina has placed additional restrictions on the condemnation of land subject to a conservation easement.

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• Goeringer — COURT CONSIDERS CONSTITUTIONALITY OF STATE’S RIGHT-TO-FARM LAW. In Lindsey v. DeGroot, the Indiana Court of Appeals held that Indiana’s Right-to-Farm Act was not an unconstitutional taking.

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From the AALA Executive Director

New Update Format As you can already see, this issue presents a new format that brings new functionality to the e-mail version without adversely affecting the readability of the print version. The front page will now feature a short summary of all articles. The PDF version sent by e-mail also has embedded links in the summary which will take the reader directly to that article inside the newsletter. The bottom of each page also has a link to take you back to the top of the issue. If you are receiving the print version and would like the e-mail version, just send me an e-mail and I’ll switch you over. RobertA@aglaw-assn.org

The AALA board is seeking new members, including student members, for the Update Editorial Board, responsible for overseeing the Agricultural Law Update. Please contact Jesse Richardson, jessj@vt.edu.

Work continues on placing all the past issues of the Update on the AALA web site as well as past conference papers.

2010 Membership Renewals will be sent out in late November.

Robert P. Achenbach, AALA Executive Director
THE NATIONAL PORK PRODUCER’S COUNCIL’S CHALLENGE TO EPCRA IS NON-JUSTICIABLE
by L. Paul Goeringer*

In January 2009, the National Pork Producers Council (NPPC) and the Wisconsin Pork Association (WPA) filed a petition in the Court of Appeals for the District of Columbia Circuit challenging some of the EPA’s recent regulatory amendments. The regulations at issue were recently amended by the EPA and changed the reporting exemptions for animal waste under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA).

On February 6, 2009, the NPPC filed a similar suit raising the same issues in the Federal District Court for the Western District of Wisconsin. On May 26, 2009, the District Judge granted a motion to stay the suit before the district court in Wisconsin until the D.C. Circuit Court of Appeals ruled on a motion by the NPPC addressing whether the court of appeals had jurisdiction over the claims.

The NPPC recently moved the district court to lift the stay on proceedings related to the EPCRA regulation, 40 C.F.R. § 355.31(g), but not those related to the CERCLA regulation, 40 C.F.R. § 302.6(e)(3). The NPPC argued that the court of appeals had jurisdiction over the CERCLA claims only. Exclusive jurisdiction is granted to the court of appeals for “[r]eview of any regulation under” CERCLA. EPCRA has no similar provision granting the court of appeals exclusive jurisdiction over challenges to EPCRA regulations. The EPA argued that the NPPC’s EPCRA claims must also be decided by the court of appeals “because they are so intertwined with the challenge to § 302.6(e)(3) that is proceeding under § 9613(a).”

The NPPC had four challenges to § 355.31(g). Count I, at issue here, challenged “what plaintiffs believe is an implicit ‘premise’ in the rule, that the EPA is attempting to override a statutory provision in EPCRA that provides a reporting exemption any time a ‘hazardous chemical’ is used in ‘routine agricultural operations.’” The NPPC argued that the stay should be lifted on Count I for two reasons. First, Count I was not presented to the court of appeals, and second, the court of appeals would not rule on the issue of jurisdiction for at least a year. The EPA did agree that Count I was not a part of the proceedings before the court of appeals, but it argued that Count I was not justiciable. Because Count I was not properly before the court of appeals, the district judge turned to the EPA’s motion to dismiss Count I.

The NPPC’s argument in Count I relied on the exemptions to the reporting requirements in 42 U.S.C. § 11021(e). The NPPC argued that a controversy existed based on the language used in the preamble of the rule. Owners and operators of farms, like all other facilities, are required to report the release of hazardous substances into the environment in accordance with CERCLA section 103 and EPCRA section 304 when it meets or exceeds the [reportable quantity] of the hazardous substance.” The quoted language, the NPPC argued, showed intent by the EPA to disregard the statutory language that provided reporting exemptions for “routine agricultural operations.”

The district judge agreed with the EPA that no justiciable controversy existed for the court to decide. The judge explained that justiciable claims do not exist “when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts.” The court further explained that it is rare for a preamble of a rule to create a justiciable controversy.

The district judge concluded that this case was not an exception to the rule and that the NPPC had presented no evidence that the EPA planned to disregard the statutory language. The NPPC did not allege that the EPA was changing policy and now including farms in the definition of “facilities.” Finally, the sentence in the preamble relied on by the NPPC did not suggest the view “that farms are not subject to reporting requirements because farms engage in ‘routine agricultural operations’ within the meaning of the exemption under Section 11021(e)(5).” The judge found that the sentence suggested the opposite: “Owners and operators of farms... are required to report the release of hazardous substances into the environment in accordance with... EPCRA section 304.”

According to the judge, a member of the NPPC may be “required to report because it releases hazardous chemicals as part of something other than routine agricultural operations.” But the judge had to dismiss Count I because the NPPC failed “to identify anything in the preamble that would increase the likelihood that any one of them will be charged with violating a reporting requirement.” Because the remaining counts II through IV were currently before the D.C. Circuit Court of Appeals, the judge closed the case administratively to be reopened if the court of appeals declined jurisdiction.

Endnotes

5 See id. at *3.
7 See id.
8 Id. (citing 42 U.S.C. § 9613(a)).
9 See id.
10 Id.
11 See Nat’l Pork Producers Council, 2009 WL 2213481, at *1. Section 355.31(g) exempts releases into the air of hazardous substances from animal waste at farms when fewer than a certain number of livestock are confined there for certain categories of livestock.

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four challenges brought by the NPPC are: Count I - the carve-out for larger farmers in the final rule violates EPCRA exemption for routine agricultural operations; Count II - EPA’s justification for the carve-out is not supported by EPCRA; Count III – The reporting requirement is not supported by the administrative record because information needed to make reporting decisions is lacking; and Count IV – The reporting requirement is not supported by the administrative record because data on farm emissions is lacking. See Complaint at 8 – 14, Nat’l Pork Producers Council v. Jackson, No. 09-cv-73-sic, 2009 WL 959371 (W.D. Wis. Feb. 6, 2009).

13 See id. at *2.
14 See id. The parties had agreed that oral arguments before the D.C. Circuit Court of Appeals would occur in spring 2010 with a decision to follow three to nine months later. See id. at *1.
15 See id.
16 See id. at *2.
17 See Nat’l Pork Producers Council, 2009 WL 2213481, at *2. “Under § 11021(e)(5), the definition of ‘hazardous chemical’ does not include ‘[a]ny substance to the extent it is used in routine agricultural operations.’” Id. at *2 (quoting 42 U.S.C. § 11021(e)(5)).
18 See id. at *3.
19 Id. (citing 73 Fed. Reg. 76,951 (Dec. 18, 2008)).
20 See id. at *3.
21 See id. at *2.
22 Nat’l Pork Producers Council, 2009 WL 2213481, at *2 (quoting Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992)).
23 See id. at *3 (citing Natural Res. Def. Council v. EPA, 559 F.3d 561, 564-65 (D.C. Cir. 2009)).
24 See id.
25 See id.
26 Id.
28 Id. at *4.
29 Id.
30 See id. at *4.

AGRICULTURAL LAW BIBLIOGRAPHY — 2nd and 3rd Quarter 2009
by Drew L. Kershen*

Administrative Law


Todd, Smith & Buettner, Indemnified, Eventually: Insured Farmers Resort to Litigation to Obtain Proper GRIP Payments, 26 Agric. L. Update 1-3 (6-2009).

Agricultural Law: Attorney Roles and Educational Programs


Animals — Animal Rights

Cupp, Moving Beyond Animal Rights: A


Bankruptcy Farmers

Schweizer, Is a Farmer’s Potential Obligations to USDA under the Guaranteed Loan Program Subject to a Discharge in Bankruptcy?, 26 Agric. L. Update 1, 3-5 (6-2009).

Energy Issues


Note, Environmental Perspectives on Siting Wind Farms: Is Greater Federal

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Rinker, How to Assist Farmers and Ranchers to Negotiate a Wind Lease on their Property, 26 Agric. L. Update 5-7 (6-2009).


Environmental Issues


Equine Law


Farm Labor

Aliens

Student Article, Immigration Reform and Agriculture: What We Really Want, What We Really Need, and What Will Happen If They Leave?, 10 Barry L. Rev. 63-79 (2008).

Farm Policy and Legislative Analysis

Domestic


Food and Drug Law


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Hunger & Food Security Issues


International Trade


Gonzalez, Deconstructing the Mythology of Free Trade: Critical Reflections on...


Note, Pour Some Sugar in Me: How Importing and Supporting Sugarcane Ethanol Production Will Not Only Make Friends, but Save America from an Addiction of Foreign Oil or Why the United States Should Remove the Tariff on Sugarcane Ethanol, 14 Drake J. Agric. L. 199-220 (2009).


Land Reform


Land Use Regulation
Land Use Planning and Farmland Preservation Techniques

Soil Erosion

Livestock and Packers & Stockyards


Marketing Boards, Marketing Orders, Marketing Promotion, & Marketing Quotas
Zwagerman, Checking Out the Checkoff: An Overview and Where We Are Now that the Legal Battles Have Quitted, 14 Drake J. Agric. L. 149-173 (2009).

Patents and Other Intellectual Property Rights in Agriculture


La Viña, Kho & Benavidez, Farmers' Rights in International Law, Searcie Rev. 1-20 (5-2009).


Pesticides, Herbicides, Insecticides, Fungicides, Fertilizers


Rural Development


Sustainable & Organic Farming
Dougherty, Michael L., Brewing Justice: Fair Trade Coffee, Sustainability and...
NEW NORTH CAROLINA LAW PLACES RESTRICTIONS ON CONDEMNATIONS OF LAND SUBJECT TO CONSERVATION EASEMENTS
by Theodore Feitshans*

Effective October 1, 2009, North Carolina has placed additional restrictions on the condemnation of land subject to a conservation easement. Session Law 2009-439.

SENATE BILL 600 applies to public condemnors. S.L. 2009-439 requires that the complaint “include a statement that alleges that there is no prudent and feasible alternative to condemnation of the property encumbered by the conservation easement.” The holder of the conservation easement may contest that the condemnor adequately considered alternatives. If, after discovery, the holder of the conservation easement has identified at least one alternative, the burden of persuasion shifts to the condemnor. If the condemnor does not prevail in the action, the holder of the conservation easement is entitled to costs, disbursements, and expenses (except for attorney fees). S.L. 2009-439 is not applicable to the N.C. Department of Transportation or the N.C. Turnpike Authority if alternatives to the proposed property were considered prior to initiation of the action and either a review under the State Environmental Policy Act (SEPA) or the National Environmental Policy Act (NEPA) was conducted. Vesting of title in the condemnor is delayed until requirements of the statute are met. Compensation is to be determined based upon the value of the property unencumbered by the conservation easement. The compensation is then to be allocated between the holder of the conservation easement and the landowner.
COURT CONSIDERS CONSTITUTIONALITY OF STATE’S
RIGHT-TO-FARM LAW

by L. Paul Goeringer *

In Lindsey v. DeGroot, the Indiana Court of Appeals held that Indiana’s Right-to-Farm Act was not an unconstitutional taking.1 The court further found that the Right to Farm Act applied and barred the Lindseys’ nuisance claims.2 Finally, the Lindseys presented no evidence to support their trespass claim, criminal mischief claim, and intentional infliction of emotional distress claim. The court affirmed the granting of summary judgment by the trial court.3

In 1998, the Lindseys purchased rural property in an area near other agricultural operations and constructed a home on their property.4 In 2001, DeGroot bought an operational hog farm with the intent of turning the property into a dairy.5 After construction of new barns, the DeGroots’ dairy began operation on July 24, 2002.6 The DeGroots were allegedly in violation of the Indiana Department of Environmental Management’s (IDEM) dairy regulations, although none of the alleged violations were proven.7

On the north border of the Lindseys’ property, the DeGroots owned farmland that they regularly planted with crops.8 A grass strip that ran along the boundary was claimed by the Lindseys to be on their property.9 Because of these allegations, the DeGroots hired a licensed surveyor to determine the boundary.10 The surveyor determined that the Lindseys owned the southern half and the northern half was owned by the DeGroots.11 Although the Lindseys did not agree with the survey, they never conducted their own survey.12

In December 2003, the Lindseys filed suit against the DeGroots seeking to enjoin them from spreading effluent on the DeGroots’ neighboring property and for “nuisance, negligence, trespass, criminal mischief, and intentional infliction of emotional distress.”13 In April 2008, the trial court granted summary judgment in favor of the DeGroots and held that the Indiana Right-to-Farm Act was constitutional as applied in this case, that it barred the nuisance claims, and that no material issues of fact existed regarding the trespass, criminal mischief, and intentional infliction of emotional distress claims.14 The Lindseys filed this appeal.15

On appeal, the Lindseys argued Indiana’s Right-to-Farm Act was an unconstitutional taking and cited precedent from other states to guide the court.16 The court, after examining other states’ decisions regarding the constitutionality of similar right to farm laws, found that Indiana’s version was not an unconstitutional taking.17 The Iowa Supreme Court had considered its right to farm law, and it found “that the right to maintain a nuisance is an easement” and that “easements are property interests subject to the just compensation requirements of both the federal and Iowa constitutions . . . .”18

Next the court turned to prior decisions in Idaho and Texas that upheld the constitutionality of their states’ laws.19 The Idaho Supreme Court rejected the holding of the Iowa Supreme Court, finding “no direct authority in Idaho holding that the right to maintain a nuisance is an easement”, and concluded Idaho’s right-to-farm law was not an unconstitutional taking.20 The Texas Court of Appeals also rejected claims that the Texas Right to Farm law was an unconstitutional taking.21

The Indiana court concluded, “we have found nothing to suggest that Indiana has adopted the seemingly unique Iowa holding that the right to maintain a nuisance is an easement.”22 The court rejected the Lindseys’ argument to extend the Iowa court’s holding to Indiana.23

The Lindseys also argued that the dairy’s operation fell within the three exceptions to the one-year statute of limitations found in the Act.24 The Act contained a one-year statute of limitations, beginning at the time of operation of the farm, with some exceptions.25 The Lindseys brought their action eighteen months after the dairy began operation, and was barred by the statute of limitations.26 The court then looked to see whether the actions fell within one of the three exceptions to the one-year limitations period.27 The court found:

the Act applies and bars the Lindseys’ nuisance suit unless there has been a significant change in the type of operation, the operation would have been a nuisance at the time the operation began in its current locality, or the nuisance results from the negligent operation of the agricultural operation.28

As for the first and second exceptions, the court found that the Lindseys never alleged before the trial court that there had been a significant change in operation or that the dairy would have been a nuisance when it began its operation in that locality.29 The court found that the Lindseys had waived these claims on appeal, and then turned to the third exception.30

The Lindseys argued that the dairy was negligently operated because of violations of the IDEM’s regulations.31 According to the court, the Lindseys would need to show the DeGroots’ “statutory violations were the proximate cause of the Lindseys’ claimed injury.”32 The IDEM’s injunctions were granted for manure spills and runoff that occurred one mile from the Lindseys’ property and to protect against possible groundwater contamination.33

Regarding the testimony of the Lindseys about alleged violations in 2002 that interfered with their use and enjoyment of their property, the court found the Lindseys had presented no evidence of loss of use and enjoyment of their property because of the negligent operation of the dairy.34 The Lindseys presented no evidence that these violations were the proximate cause of their claimed injuries; they failed to demonstrate a genuine issue of material fact; and the court affirmed the decision that their nuisance claims were barred.35

As to the claims of trespass and criminal mischief, the Lindseys presented no evidence to support these claims, and the court affirmed summary judgment on these claims.36 Finally, on the issue of intentional infliction of emotional distress, the court found “nothing in the record which would support a reasonable inference that DeGroot Dairy intended to cause emotional distress

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