

Agricultural Management Committee Newsletter

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MESSAGE FROM THE CHAIR

Brandon Neuschafer
Bryan Cave LLP

Welcome to the 2006-07 ABA term. This issue of the Agricultural Management Committee Newsletter returns to one of our favorite topics with a series of articles regarding concentrated animal feeding operations (CAFOs), with particular emphasis on liability issues, “right to farm” statutes and insurance availability.

Recent Section Fall Meetings in San Diego and Nashville featured panel discussions on CAFO litigation at the federal statutory level (CERCLA, EPCRA in Nashville) and San Diego’s “emerging torts” session this past fall. For this issue, we lead with Ellen Steen, Kirsten Nathanson, and Jessica Hall’s update on EPA’s latest proposal to bring its CAFO Clean Water Act rules into compliance with the Second Circuit’s landmark decision in *Waterkeeper Alliance v. EPA*. From that federal starting point, the newsletter goes to the states, with: (1) Thomas Head and Alexia Borden on Southeastern CAFO laws (analyzing Iowa law with a review of Alabama, Mississippi, Tennessee, and Georgia), (2) Beth Crocker’s summary of South Carolina’s new right to farm act, (3) Andrew Kok on Michigan CAFO regulation and litigation, (4) Jim Bradbury’s report on CAFO issues in Texas, and (5) Christine Zeman on anticipatory nuisance litigation in Illinois.

The newsletter also features a general update on agricultural case law of note by Amber S. Brady, including: fallout from the U.S. Supreme Court’s decision on pesticide preemption (*Bates v. Dow Agrosciences*) and its decision on Clean Water Act jurisdiction (*Rapanos/Carabell*), among other important cases.

We are pleased to welcome the committee’s newest vice chair, Shawna Bligh, who will serve as the committee’s vice chair for Technology. The committee welcomes new faces on occasion at the vice chair level, so if you are interested in contributing to committee activities and wish to consider a leadership position, please contact me or one of the vice chairs.

We look forward to seeing folks at upcoming meetings, including the 15th Section Fall Meeting in Pittsburgh, Sept. 26-30, 2007.

If you have an idea for a newsletter article, please contact editor and vice chair Tom Redick at tpr@geeclaw.com. Likewise, if you have an idea for an agricultural management program, please contact Daniel Krainin at dkrainin@bdlaw.com. Last but not least, please feel free to make better use of our committee’s list serve (ENVIRON-AGRI_MGMT@mail.abanet.org) for any questions you might have, or to share with other committee members significant agricultural management news.

Thank you for your membership in and support of the committee. We look forward to a productive and successful 2006-07 ABA term.

**Agricultural Management
Committee Newsletter
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Thomas P. Redick, Editor**

In this issue:

Message from the Chair
Brandon Neuschafer 1

EPA Weighs Competing Arguments—and Likely
Litigation—on Proposed CAFO Requirements
*Ellen Steen, Kirsten Nathanson and
Jessica Hall* 2

The “Right to Farm” in the Southeast—Does It
Go Too Far?
Alexia B. Borden and Thomas R. Head 8

South Carolina Adopts Amendments Preempting
Local Regulation for Agricultural Operations
Anne “Beth” Crocker 11

Recent CAFO Regulation and Litigation in
Michigan
Andrew Kok 12

Regulation though Litigation: CERCLA and
CAFOs
Jim D. Bradbury 15

Anticipatory Nuisance and CAFO Litigation in
Illinois: The Progeny of *Nickels v. Burnett*
Christine G. Zeman 17

Case Law Update—Post-*Bates* and *Rapanos*
Cases, Dormant Commerce Clause Invalidates
Nebraska Statute, USDA’s Temporary Injunction
Lifted
Amber S. Brady 19

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**EPA WEIGHS COMPETING ARGUMENTS—
AND LIKELY LITIGATION—
ON PROPOSED CAFO REQUIREMENTS**

**Ellen Steen
Kirsten Nathanson
Jessica Hall**

Introduction

Last summer the United States Environmental Protection Agency (EPA) issued a proposal to modify, once again, its Clean Water Act (CWA) National Pollution Discharge Elimination System (NPDES) regulations for concentrated animal feeding operations (CAFOs). *See* 71 Fed. Reg. 37,744-787 (June 30, 2006). Specifically, the proposed rule is intended to respond to the Second Circuit’s remand of portions of EPA’s controversial 2003 NPDES rules and effluent limitation guidelines (ELGs) for CAFOs. *See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005) (challenge to the rule published at 68 Fed. Reg. 7176-7274 (Feb. 12, 2003)—the “2003 Rule”). After the Second Circuit heard challenges to the 2003 Rule by both environmental and farm groups, it issued an opinion upholding the rule in many respects, but vacating and remanding several key provisions. This article provides a summary of the primary elements of the 2003 CAFO Rule, describes key changes in the current proposal, summarizes major concerns raised by farm and environmental groups in response to the proposal, and concludes with a look at what lies ahead.

The 2003 CAFO Rule and the *Waterkeeper* Decision

After years of study and debate, EPA’s 2003 CAFO Rule radically altered the way animal feeding operations (AFOs) had been addressed under the NPDES program for the prior three decades. Specifically, the 2003 Rule sought to dramatically expanded the number of CAFOs regulated under NPDES permits, by requiring that *all* CAFOs apply for permit coverage unless they could demonstrate that the operation had “no potential to discharge” to waters of the United States. *See* 40 C.F.R. § 122.23(d)

(2006). Previously, very few CAFOs sought permit coverage, largely because EPA's rules defined animal feeding operations to be CAFOs only if they discharged to waters of the United States other than in a twenty-five-year, twenty-four-hour storm event. *See* 40 C.F.R. Part 122 App. B (2002). Thus, operations that did not discharge, or that discharged only in extreme rainfall conditions, were not defined as "CAFOs" under the CWA and had little reason to consider seeking NPDES permit coverage.

The 2003 Rule also defined and limited the term "agricultural stormwater discharges"—which are statutorily exempt from NPDES permitting requirements—in the context of CAFO land application areas. *Id.* § 122.23(e); 33 U.S.C. § 1362(14). Under the Rule, land application area stormwater runoff would fall within the exemption only if it came from areas where animal waste "has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients . . . as specified in § 122.42(e)(1)(vi)-(ix)." 40 C.F.R. § 122.23(e) (2006). Where such practices are not in place, runoff of pollutants to waters of the United States from CAFO land application areas would not constitute "agricultural stormwater" and would be deemed a regulated CWA "discharge" from the CAFO. *See* 68 Fed. Reg. at 7197.

In terms of substantive requirements for permitted CAFOs, the 2003 Rule required that all CAFO NPDES permits include: (1) requirements to develop and implement a nutrient management plan (NMP), (2) record-keeping requirements, and (3) annual reporting of the number of animals in confinement and the amount of waste applied to land. 40 C.F.R. § 122.42(e). CAFO NMPs must include best management practices (BMPs) and procedures "necessary to implement applicable effluent limitations and standards." *Id.* Among other particulars, the NMP must, where applicable, ensure adequate storage of manure, litter, and process wastewater; identify protocols for testing of manure, litter, and process wastewater; and establish protocols for land application in accordance with "site specific nutrient management practices that ensure appropriate

agricultural utilization of the nutrients in the manure, litter, or process wastewater." *Id.* § 122.42(e)(1)(i)-(ix). The Rule also established effluent limitation guidelines (ELGs) that imposed additional specific permit conditions on "Large CAFOs" (defined on the basis of the number of animals confined, as specified at 40 C.F.R. § 122.23(a)(4)) in the dairy, beef, swine, poultry, and veal sectors. *See id.* § 412. Finally, the ELG required that newly constructed Large swine, poultry, and veal CAFOs achieve "no discharge" of manure, litter, or process wastewater from the production area, but defined the "no discharge" standard to be satisfied by operations meeting a 100-year, twenty-four-hour storm design standard (rather than the traditional twenty-five-year, twenty-four-hour standard applicable to other Large CAFOs). *Id.* § 412.46.

Waterkeeper Alliance and three other environmental advocacy groups filed litigation challenging the 2003 Rule as too limited, while various farm groups claimed that the Rule exceeded EPA's CWA authority. In response to these challenges, the Second Circuit affirmed several provisions of the Rule, such as EPA's recognition that stormwater discharges from CAFO land application areas are properly viewed as unregulated "agricultural stormwater discharges" (provided application is in compliance with EPA's newly articulated standards). *See* 399 F.3d at 509. The court also upheld the Rule's regulation of *non*-exempt land application area discharges from CAFOs, including "uncollected" runoff, as well as the Rule's establishment of ELGs based on the "best available technology economically achievable" (BAT). *Id.* at 511-12.

Other aspects of the Rule, however, did not survive judicial scrutiny. Perhaps most significantly, the court agreed with the farm groups' claim that EPA had exceeded its statutory authority in requiring all CAFOs to apply for NPDES permits unless they could demonstrate "no potential to discharge" to waters of the United States. The court held that the CWA regulates only the "actual" discharge of pollutants—not the mere "potential" to discharge—and vacated the Rule's broad "duty to apply" for NPDES permit coverage. *Id.* at 504.

The court also agreed with several claims of the environmental groups. Specifically, it found that the terms of NMPs for permitted CAFOs are “effluent limitations” and ruled that EPA must require that permitting authorities issuing NPDES permits to CAFOs: (1) review the terms of the NMPs; (2) provide for adequate public participation in the development, revision, and enforcement of the NMPs; and (3) include the terms of the NMP in the permit. *Id.* at 499-504.

The court remanded several aspects of the 2003 Rule based on inadequacies in the agency’s record explanation. In particular, the court remanded the agency’s identification of the Best Conventional Pollutant Control Technology (BCT) (which was the same set of technologies identified as BAT), finding that EPA did not make an affirmative finding that the technologies in fact represent the best conventional pollutant control technology for reducing pathogens—specifically, fecal coliform. *Id.* at 519. On the issue of New Source Performance Standards (NSPS), the court held that EPA had not provided adequate notice or support in the record for authorizing compliance through the 100-year storm standard. *Id.* at 520-21. Finally, the court agreed with the environmental groups that EPA had “not sufficiently justified its decision not to promulgate” water quality-based effluent limitations (WQBELs) for CAFO discharges other than unregulated agricultural stormwater discharges. It therefore directed EPA “to clarify the statutory and evidentiary basis” for not promulgating national WQBELs for such discharges and to “clarify whether States may develop [WQBELs] on their own.” *Id.* at 523-24.

Key Changes in the Proposed Rule

Duty to Apply

EPA’s proposed rule responds to the *Waterkeeper* decision in part by replacing the 2003 Rule’s broad “duty to apply” with a requirement that CAFOs that “discharge or propose to discharge” seek coverage under an NPDES permit. 71 Fed. Reg. at 37,748. EPA explains that this is the same “duty to apply” that already applies to all point sources pursuant to 40

C.F.R. § 122.21(a) and that, as with other types of operations, “[g]enerally . . . it would be the CAFO’s responsibility to decide whether or not to seek permit coverage based on whether they discharge or propose to discharge.” *Id.* at 37,749. The proposal would require that operators of CAFOs that “discharge or propose to discharge” seek permit coverage and submit an NMP by July 31, 2007. *Id.* at 37,757.

The proposed rule also suggests that EPA may further narrow the agricultural stormwater exemption for CAFOs—which would have the effect of expanding the “duty to apply”—even though EPA states that it is not proposing any change in the scope of the exemption. As indicated above, the 2003 Rule (in one of the provisions *upheld* by the *Waterkeeper* court), essentially requires compliance with “site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients . . . as specified in § 122.42(e)(1)(vi)-(ix)” in order for CAFO land application areas to qualify for the agricultural stormwater exemption. *See* 40 C.F.R. § 122.23(e) (2006). EPA’s more recent preamble discussion, however, explains that the agency is considering requiring “explicitly” that Large CAFOs that are not permitted (because they do not discharge or propose to discharge) comply with technical standards for land application established by the director (*i.e.*, by the EPA regional administrator or the State permitting authority) in order for runoff from their fields to be considered agricultural stormwater. 71 Fed. Reg. at 37,750.

Nutrient Management Plans

EPA’s proposed rule includes several changes in response to the Second Circuit’s decision on NMPs. First, it proposes a process for ensuring the receipt and review of NMPs by the permitting authority before permit coverage is granted under an individual or general permit. *Id.* at 37,751. As part of its individual permit application or Notice of Intent (NOI) to be covered under a general permit, each CAFO applicant must submit an NMP developed in accordance with the provisions of 40 C.F.R. § 22.42(e)(1) and 40 C.F.R. § 412(c)(1), and the permitting authority must review the NMP to ensure that it meets applicable requirements. EPA’s proposed rule also introduces a

model NMP template to be used as a potential “tool” by CAFO applicants and to facilitate NMP review by the permitting authority. *Id.* at 37,752.

Second, the proposed rule would establish procedures for public participation in NMP development. *Id.* Because the NMP would be part of each CAFO’s permit application, it would automatically be subject to existing regulations requiring public participation, including the requirements for public notice and opportunity for comment and request of a public hearing. For applicants seeking general permit coverage, EPA proposes new procedures that would allow for the incorporation of site-specific NMPs into CAFO general permits and provide an opportunity for public review of a CAFO’s NOI (which would include the entire NMP), along with an opportunity for comment and a public hearing (if warranted) before the CAFO receives permit coverage. *Id.*

Third, the proposal would require that any individual or general permit issued to a CAFO must contain the actual terms of the NMP as enforceable elements of the permit. *Id.* at 37,753. The proposed rule takes care to distinguish between the NMP’s “terms,” which must be incorporated into the NPDES permit, and “background information” included in an NMP (e.g., assumptions, data, calculations, etc.). Only an NMP’s “terms,” and not the entire NMP, would become part of the NPDES permit terms and conditions under EPA’s proposal.

Fourth, EPA proposes a process for NMP modification, in the event that a permitted CAFO changes its nutrient management or farming practices during a permit’s five-year term. Modification procedures would include: (1) formal public notice and comment procedures that the permitting authority would be required to follow for “substantial” changes to an NMP; (2) a requirement that, whenever a CAFO makes any kind of change to its NMP, the owner or operator would provide the Director with the revised NMP and identify the changes from the previous version submitted to the permitting authority; and (3) a requirement that the director review changes to ensure that the NMP still meets applicable requirements. *Id.* The proposal would give discretion for the director to

temporarily allow a CAFO to implement “substantial” changes for up to 180 days before completion of public review and permitting authority approval, so long as the proposed change will not result in increased runoff of manure, litter, or process wastewater. *Id.* at 37,756.

New Source Performance Standards for Swine, Poultry, and Veal Facilities

In response to the court’s remand concerning the requirements for “new source” CAFOs, EPA proposes to delete the provision of the 2003 Rule allowing new swine, poultry, and veal operations to meet the “no discharge” standard through the use of containment structures designed and operated to meet a 100-year, twenty-four-hour storm standard. *Id.* at 37,760. EPA also proposes, however, an “alternative compliance option” for facilities that employ open manure storage structures. This option would authorize the director to establish “no discharge” best management practice effluent limitations for CAFOs that are able to demonstrate, through a rigorous modeling analysis, that they have designed an open containment system that will comply with the “no discharge” requirement. *Id.* New source swine, poultry, and veal CAFOs that operate in compliance with the specified site-specific design, construction, operation, and maintenance components of such a system would be deemed in compliance with the “no discharge” requirement, even in the event of an unavoidable discharge. *Id.* at 37,760-63. EPA explains that this option is intended to encourage new source CAFOs to implement innovative technologies, such as “anaerobic digesters, multi-cell treatment lagoons, and nitrification and/or denitrification technologies,” rather than forcing the use of entirely closed containment systems. *Id.* at 37,760.

Response to Other Issues on Remand

Water Quality-Based Effluent Limitations

EPA’s proposed rule responds to the *Waterkeeper* decision by offering clarification on how the 2003 Rule addressed WQBELs. EPA explains that the 2003 Rule was intended only to affirm that where precipitation-related discharges from land application areas have

qualified as exempt “agricultural stormwater,” WQBELs are not available as further restrictions on those unregulated discharges. *Id.* at 37,758. WQBELs can be included in permits as necessary with respect to non-precipitation-related land application discharges (e.g., dry-weather spills) and with respect to production area discharges. As EPA makes clear, “[w]ater quality-based effluent limits are available to the permit writer to limit any non-precipitation related (i.e., dry-weather) discharges that occur at land application areas to levels that are more stringent than the technology-based limitations (effluent guidelines), and EPA never intended to indicate otherwise.” *Id.* Moreover, “WQBELs can be applied by permit writers in appropriate cases to further limit discharges from CAFO production areas . . . because the effluent guidelines do not, by themselves, prohibit all ‘regulatable’ discharges from the production area.” *Id.* The proposal also clarifies that “[s]tates can include WQBELs as necessary with respect to non-precipitation-related land application discharges and with respect to production area discharges.” *Id.* at 37,759.

BCT for Pathogens

In response to the Second Circuit’s remand concerning the selection of BCT for pathogens, EPA’s proposal makes a specific finding that the BCT-based ELGs adopted in the 2003 CAFO Rule do, in fact, represent the best conventional pollutant control technology for the removal of pathogens, including fecal coliform. *Id.* at 37,764. In making this determination, EPA assesses certain BAT/BPT technology options that were previously rejected in the 2003 Rule, recognizing that they may provide for greater reduction of pathogens, as well as additional candidate technologies. EPA subjects each of the technologies to a two-part cost reasonableness test, comprised of the “POTW” and the “industry-cost test.” *Id.* It also assesses the technology options under a specific test to address fecal coliform. *Id.*

Summary of Major Comments

Both environmental and industry groups offered extensive comments on EPA’s proposed rule. The

following points briefly highlight some of the major comments on both sides.

Comments from farmers and farm groups expressed concern that EPA would continue to impose overly broad NPDES permitting requirements and urged EPA to ensure adequate flexibility for permitted CAFOs to modify their operations and NMPs as needed. Joint comments submitted by the National Pork Producers Council, United Egg Producers, American Farm Bureau Federation, National Council of Farmer Cooperatives, and National Corn Growers Association, for example, offered the following responses to EPA’s proposed rule. *See* Comments on Proposed Post-*Waterkeeper* CAFO NPDES Regulations, Document ID EPA-HQ-OW-2005-0037-0590 (Aug. 29, 2006), *available at* <http://www.regulations.gov/fdmspublic/component/main> (site visited Feb. 9, 2007).

- EPA’s proposed “duty to apply” for CAFOs that “discharge or propose to discharge” must be limited to CAFOs with on-going discharges or operators who specifically *plan* to discharge—and, pursuant to *Waterkeeper*, cannot impose permitting requirements on CAFOs with a mere risk of accidental discharges. *Id.* at 12-13.
- The proposed “duty to apply” is unlawful because the CWA does not authorize any affirmative obligation to seek NPDES permit coverage (but only establishes liability for unlawful discharges that occur) and does not authorize separate liability for the “failure to apply” for permit coverage. *Id.* at 6-10.
- EPA’s proposed permit application deadlines are irrational and unlawful. EPA should clarify that the deadline applies only to CAFOs that “discharge or propose to discharge” *as of the date of the deadline* (July 31, 2007). EPA should also clarify whether CAFO operators who do not submit an application by July 31, 2007, may submit an application after that date. EPA should extend the proposed application deadline to allow time for states to revise their programs and for CAFO operators to decide whether to apply for a permit and to

prepare their application materials. *Id.* at 21-24.

- EPA’s comment that for Large CAFOs to meet the agricultural stormwater exemption, they must comply not only with the criteria spelled out in the 2003 CAFO Rule, *but also* with “technical criteria” established by the director, has no support in the regulations and would constitute an unlawful delegation of power to the states. *Id.* at 45-47.
- EPA should clarify that it may impose land application-related permit conditions only if a CAFO *seeks* coverage for land application discharges. *Id.* at 48 -50. Similarly, EPA should clarify that NMP “terms” included in a permit must relate to the specific “discharge” for which permit coverage is sought (i.e., NMP terms concerning land application may not be included in a permit that governs only production-area discharges). *Id.* at 57-58.
- EPA should further streamline the process for agency review and public participation on a permitted CAFO’s NMP. Moreover, EPA should specify clear deadlines for the CAFO, the public, and the agency when submitting and reviewing changes to NMPs. *Id.* at 60, 51, 54-55, 64-66.

Environmental groups maintain that EPA’s proposal goes too far in narrowing NPDES permitting requirements for CAFOs—farther than the *Waterkeeper* ruling mandates—and otherwise falls short of CWA mandates. Joint comments submitted by Natural Resources Defense Council, Sierra Club, and Waterkeeper Alliance, for example, offered the following responses to EPA’s Proposal. *See* Comments on the Revised NPDES Permit Regulations and Effluent Limitation Guidelines for CAFOs in Response to *Waterkeeper* Decision, Document ID EPA-HQ-OW-2005-0037-0597 (Aug. 29, 2006).

- EPA’s proposal unlawfully reverses course from the approach of the 2003 Rule by allowing CAFO operators themselves to decide whether to seek NPDES permit coverage, while the *Waterkeeper* ruling leaves open several options for requiring permit

coverage for many CAFOs. *Id.* at 11.

- EPA should establish a regulatory presumption that Large CAFOs actually discharge and should, on that basis, require permits from all Large CAFOs. *Id.* at 7.
- EPA should deem CAFOs with conditions that “predictably lead to discharges”—such as designs to contain only wastewater and rainfall up to a twenty-five-year, twenty-four-hour storm event, tiled fields, uncorrected past discharges, etc.—to be “proposed” dischargers and, on that basis, should require permits for such CAFOs. *Id.* at 7-8.
- EPA should require detailed factual information about the operations of non-discharging CAFOs who, under the *Waterkeeper* ruling, cannot be required to obtain permit coverage. *Id.* at 8.
- EPA’s interpretation of the agricultural stormwater exemption unlawfully fails to require that Large CAFOs obtain NPDES permits in order to qualify for the agricultural stormwater exemption for runoff from land application areas. *Id.* at 14.
- EPA must ensure that all requirements of a CAFO’s NMP (not just certain designated “terms”) are incorporated into the CAFO’s permit. *Id.* at 17-18.
- EPA must eliminate the proposed “alternative compliance option” for new source swine, poultry, and veal operations and instead impose a true “no discharge” requirement on these operations. *Id.* at 40-43.
- EPA’s economic analysis for establishing BCT for the CAFO industry is fatally flawed by “numerous and substantial errors in its analytical methodology and calculation” and is based on incorrect legal standards. EPA must correct its analysis and identify one or more candidate BCT technologies that will achieve greater reductions of fecal coliform. *Id.* at 43-54.

What Lies Ahead

EPA expects to take final action on the proposed rule by June 2007—and CAFO operators will quickly face

THE “RIGHT TO FARM” IN THE SOUTHEAST—DOES IT GO TOO FAR?

Alexia B. Borden
Thomas R. Head, III

important decisions concerning whether and how to seek NPDES permit coverage for discharges from their production areas and/or land application areas. Given the more limited “duty to apply” likely to appear in the final rule, this basic decision—which will shape the regulatory obligations of the CAFO for years if not forever—will not be clear-cut for many operations. The decision calls for careful consideration of the benefits and burdens of permit coverage, as well as site-specific factors and operational history that may shed light on the risk of a regulated discharge from production areas and from land application areas. What is certain is that, for CAFOs not already operating under an NPDES permit, a decision will be required; and operators would be well advised to begin the process—if possible—now, rather than after publication of the final rule.

One other thing seems reasonably certain. Given the controversy that has long surrounded the CWA regulation of CAFOs, as well as the legal arguments articulated in various comments on both sides of this most recent rulemaking, it is reasonable to predict that another round of litigation will follow EPA’s publication of the final rule. That litigation would, as did the *Waterkeeper* challenge to the 2003 Rule, take place directly in federal appellate court pursuant to CWA § 509(b), 33 U.S.C. § 1369(b). If multiple petitions are filed in different courts of appeals within ten days after the rule’s issuance, venue will be determined based on random selection from among those courts under the rules for multidistrict litigation. *See* 28 U.S.C. § 2112. Only the outcome of that litigation will determine whether this rule will truly set the framework for the federal regulation of CAFOs in the coming years or whether, on some issues, EPA must again go back to the drawing board.

Ellen Steen is a partner, Kirsten Nathanson is counsel and Jessica Hall is an associate with the Environment & Natural Resources practice at Crowell & Moring LLP. Crowell & Moring represented the National Pork Producers Council in the Waterkeeper litigation discussed above and prepared comments on the 2003 Rule and the 2006 proposed rule on behalf of several national trade associations.

Beginning in the 1970s, states increasingly began to recognize the potential conflicts posed by the encroachment of so-called urban sprawl into rural, traditionally agricultural, areas. A primary concern in those days was that an influx of suburbanites and other “flatlanders” into these areas could set off a wave of costly nuisance lawsuits once they were faced with the odor, noise, dust, and other sometimes unpleasant, but unavoidable, side-effects of “life on the farm.” In order to protect farms and other economically valuable agricultural enterprises from the perceived threats posed by encroaching urbanization, states began to enact anti-nuisance legislation, commonly referred to as “Right to Farm” (RTF) laws. Today, all 50 states have adopted some type of RTF legislation. Although the precise wording of these laws varies from state to state, the purpose behind RTF provisions is to protect agricultural operations from nuisance liability. Most RTF laws do not provide absolute immunity, but rather apply some form of a “coming to the nuisance” concept—precluding nuisance liability for pre-existing activities based on changes in the use of neighboring land.

When RTF laws were first established, most agricultural operations were small, family-operated farms. The last decade or so, however, has witnessed a consolidation of many smaller farming operations into much larger enterprises, commonly known by their regulatory designation “Concentrated Animal Feeding Operations,” or simply “CAFOs.” One obvious characteristic of CAFOs is that they concentrate large numbers of animals and huge amounts of animal waste in relatively small areas. Although family farms still account for close to 90 percent of all farms in the United States, non-family, “corporate” farms account for almost 75 percent of the value of production (and the majority of animal waste). *See* Structure and Finance of U.S. Farms: 2005 Family Farm Report at 36 (USDA, 2005), available at <http://www.ers.usda.gov/publications/EIB12/EIB12h.pdf> (site visited Feb. 9, 2007). This transformation from small, family farms

to large corporate, or “factory,” farms has left some questioning the efficacy of, and in a few cases the constitutionality of, RTF laws.

Recent Constitutional Challenges to RTF Laws

The Fifth Amendment to the United States Constitution—specifically, the “takings clause”—provides simply “nor shall private property be taken for public use without just compensation.” The foundation of regulatory takings jurisprudence is commonly attributed to Justice Holmes’ eloquent, if not very practical, statement that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Since 1922, the United States Supreme Court has created a number of fact-based standards that must be weighed against the specific circumstances of each case. Although it is beyond the scope of this article to discuss these various tests in any detail, suffice it to say that in recent years the question of whether some states’ RTF laws “go to far” has been raised with increasing frequency.

The Iowa Supreme Court, for example, has declared two of that state’s RTF laws unconstitutional on takings grounds. The first decision came in 1998, in *Bormann v. Board of Supervisors in and for Kossuth County, Iowa*, 584 N.W.2d 309 (Iowa 1998), when the Iowa Supreme Court declared Iowa’s agricultural land preservation statute unconstitutional. That statute provided blanket immunity from nuisance suits for property designated as an “agricultural area.” Specifically the statute provided:

A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation.

IOWA CODE § 352.11(1)(a). The immunity provided in the statute did not apply to a nuisance resulting from a violation of federal laws or from the negligent operation of the farm. *See* IOWA CODE § 352.11(1)(b). The Iowa Supreme Court analyzed the statute in light of the Fifth and Fourteenth Amendments to the U.S.

Constitution, and Article I, section 18 of the Iowa Constitution, in order to determine whether the nuisance protection afforded “agricultural areas” constituted a taking of neighboring property for public use without compensation. *Bormann*, 584 N.W.2d at 315. The court ultimately found that the designation as an “agricultural area” gave applicants the right to maintain a nuisance and this right created a property right in the nature of an easement. *Id.* at 321. According to the court: “The easements entitle the applicants to do acts on their property, which were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution.” *Id.* The court struck down the law, concluding that the Iowa Legislature “exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation.” *Id.*

More recently, the Iowa Supreme Court held that the statutory grant of nuisance immunity to animal feeding operations under a separate RTF statute was unconstitutional under the Iowa Constitution on similar grounds. *See Gacke v. Pork XTRA, LLC*, 684 N.W.2d 168 (Iowa 2004). At issue in *Gacke* was the constitutionality of Iowa Code section 657.11(2), which provided nuisance protection to animal feeding operations. That section stated, in pertinent part:

An animal feeding operation . . . shall not be found to be a public or private nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person’s comfortable use and enjoyment of the person’s life or property under any other cause of action.

Similar to the negligence exception in the statute at issue in *Bormann*, the statute at issue in *Gacke* also provided that its immunity would not apply upon proof that the animal feeding operation “unreasonably” interfered with a person’s use and enjoyment of his property, or failed to use “prudent generally accepted management practices reasonable for the operation.” *Gacke*, 684 N.W.2d at 173. Nevertheless, the court held that, just as the negligence exception to immunity

did not preclude the finding of a taking under *Bormann*, “the reasonable-and-prudent-management-practices exception” contained in section 657.11(2) did not prevent a finding that the nuisance immunity provided by that section constituted a taking under the Iowa Constitution.

While Iowa case law is obviously not binding on other states, these cases have left some in other states questioning the constitutional validity of their own RTF laws. When challenged, other states’ RTF provisions have generally been upheld, primarily based on the distinction that they have allowed at least some time period in which a suit may be filed after a farm begins operations, whereas the Iowa statutes created immediate immunity from nuisance claims. *See, e.g., Overgard v. Rock County Bd. of Commr’s*, 2003 WL 21744235 (D. Minn. July 25, 2003); *Moon v. N. Idaho Farmer Ass’n*, 2003 WL 2164506 (D. Idaho June 4, 2003); *Horne v. Haladay*, 728 A.2d. 954 (Pa. Sup. 1999).

RTF Laws in the Southeast

Unlike the blanket nuisance immunity granted by the statutes declared unconstitutional in Iowa, RTF provisions in Southeastern states have limits that are likely to save them from constitutional infirmity. Nevertheless, these statutes do vary in their level of protection to farming operations. For example, a majority of these statutes limit their application to nuisances created by “changed conditions” in the vicinity of the farming operation. *See*, ALA. CODE § 6-5-127(a); FLA. STAT. ANN. § 823.12(4)(b); GA. CODE ANN. § 41-1-7(c); N.C.G.S. § 106-701(a); S.C. CODE § 46-45-70. The statutes that do this essentially codify the common law “coming to the nuisance” defense. Most of these same statutes also apply only when the farming operation has been in existence for some period of time—usually one year. *See* ALA. CODE § 6-5-127(a); FLA. STAT. ANN. § 823.12(4)(b); GA. CODE ANN. § 41-1-7(c); N.C.G.S. § 106-701(a). On the other hand, Mississippi provides an absolute defense to nuisance claims for agricultural operations in existence for one year or more without regard to changed conditions, essentially providing a one-year statute of limitations on nuisance claims. *See* Miss.

CODE § 95-3-29(1). Similarly, Tennessee provides a “rebuttable presumption” that existing farms (and “new types of farm operations” in existence for one year or more) are not nuisances without regard to changed conditions. *See* TENN. CODE ANN. § 43-26-103(a) and (b). With respect to specifically defined “feedlots, dairy farms, and poultry production houses,” Tennessee provides an absolute defense to nuisance claims, provided the operation is in compliance with state environmental and zoning laws. *See* TENN. CODE ANN. § 44-18-102.

Other differences also exist among Southeastern states’ RTF provisions. For example, Alabama and Georgia provide nuisance protection to activities beyond those traditionally deemed “agricultural.” In 2004, the Georgia Legislature rewrote its statute to protect forest products production and processing plants in operation for one year or more. *See* Ga. S.B. 511 (2003), *codified at* Laws 2004, Act 566, § 1, GA. CODE ANN. § 41-1-7. Alabama goes the farthest by protecting agricultural, manufacturing, and industrial operations from nuisance claims. *See* ALA. CODE § 6-5-127(a).

Perhaps the most significant difference among Southeastern RTF laws is how they treat the issue of facility expansion. Most are silent on the subject. Mississippi and Florida, however, specifically provide that certain expansions of operations restart the one-year limitations period. *See* MISS. CODE ANN. § 95-3-29(2)(b) (date of expansion of physical facilities deemed a separate date of operation); FLA. STAT. ANN. § 823.14(3)(d) (date of expansion of operation beyond original boundaries deemed separate date of operation; expansion of operations within original boundaries has no effect on date of operation). In contrast, Georgia is unique among Southeastern states in providing that expansion of operations or facilities—within or beyond the original boundaries—does not affect a previously established date of operation. *See* GA. CODE ANN. § 41-1-7(d). In other words, in Georgia, if people move into an area while an agricultural operation is relatively small and then several years later the operation expands, regardless of size, nuisance claims would be time-barred since the one-year statute of limitations would have run before the expansion.

SOUTH CAROLINA ADOPTS AMENDMENTS PREEMPTING LOCAL REGULATION FOR AGRICULTURAL OPERATIONS

Anne “Beth” Crocker

If one were looking for similarities between the Iowa RTF laws that were struck down and Southeastern RTF provisions, the aspect of the Georgia law allowing expanding operations to use a previously established date of operations is arguably the most likely candidate. However, there are at least two notable differences between the Georgia law and those struck down in Iowa. The most obvious distinction is that state law determines what is a property right, and the Iowa court found that, under Iowa law, the right to maintain a nuisance is a property interest in the nature of an easement. *See Bormann*, 584 N.W.2d at 315. It is questionable whether a court faced with a similar challenge to the Georgia law would make the same finding. Secondly, the Georgia law was passed after *Bormann* was decided, with the clear intent to preserve important state agricultural and forest resources and facilities for production and distribution of food and other agricultural and forest products. These stated considerations may be enough to enact legislation that potentially burdens neighboring landowners with activities that may, under normal circumstances, create a nuisance.

In summary, although it is possible a court could find any of our Southeastern states’ RTF provisions unconstitutional on the grounds that they authorize a taking of private property without just compensation, such a finding is unlikely. Unlike the statutes at issue in the Iowa cases, the RTF provisions in Southeastern states generally do not confer the blanket, absolute immunity from nuisance claims that characterized the Iowa statutes. Rather, similar to state RTF laws upheld in other cases, most of the RTF provisions in the Southeast merely codify the common law “coming to the nuisance” doctrine and/or effectively amount to statutes of limitations that would prevent a court from finding that neighboring landowners have been deprived of any property rights.

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South Carolina recently amended its Right to Farm law, which precludes nuisance liability for certain agricultural facilities and operations. S.C. CODE ANN. §§ 46-45-10 et al. (2006 Supp.). The amendments enhance existing nuisance protections by prohibiting local ordinances establishing setback distances and other licensing and permitting requirements more stringent than state regulations established by the South Carolina Department of Health and Environmental Control (DHEC). South Carolina’s nuisance protections do not apply to claims arising from the “negligent, illegal, or improper” operation of an agricultural facility. S.C. CODE ANN. § 46-45-70 (2006 Supp.). Thus, the recent amendments clarify and ensure the availability of nuisance protection for facilities that are acting in compliance with DHEC regulations and standards. *See* S.C. CODE ANN. § 46-45-70 (2006 Supp.).

After the adoption of these amendments, counties no longer have authority to enact general ordinances requiring setback distances greater than the state regulations; all county ordinances must be identical to the DHEC regulations. *See* S.C. CODE ANN. § 46-45-60(a) (2006 Supp.). The amendments also provide that previously enacted ordinances requiring greater setback distances or other ordinances regulating the operation of an agricultural facility are void upon the effective date of the amendments, which was May 30, 2006. *See id.*

An agricultural facility is defined as “any land, building, structure, pond, impoundment appurtenance, machinery, or equipment which is used for the commercial production or processing of crops, trees, livestock, animals, poultry, honeybee products, livestock products, poultry products, or products which are used in commercial aquaculture.” S.C. CODE ANN. § 46-45-20(a) (2006 Supp.). The new preemption provisions do not apply to agricultural

facilities located within the corporate limits of a city or to new swine operations and new slaughterhouse facilities. *See* S.C. CODE ANN. § 46-45-60 (a) (2006 Supp.). Such operations thus still may be subjected to ordinances requiring greater setback distances or other requirements more stringent than those established by the state regulations. *See id.* Furthermore, the amendments do not restrict county authority to enact or determine whether an agricultural use is permitted under the county’s land use and zoning authority. *See id.* In addition, DHEC may also set additional setback distances on a case-by-case basis, taking into consideration the factors set forth in its current regulations. *See id.*

Through these amendments, the legislature clarified that the State has sole authority to regulate agricultural operations and sought to provide greater stability for one of its top industries by encouraging the continued operation and expansion of agricultural facilities throughout the state. *See* S.C. CODE ANN. § 46-45-10(5) (2006 Supp.). The requirement for uniformity in setback distances, as well as other permitting and licensing requirements, is intended to establish a complete and integrated regulatory plan for agricultural facilities and operations throughout South Carolina. *See id.*

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The Agricultural Management Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the editor Tom Redick at 866/444-7529 or omasredick@netscape.net.

RECENT CAFO REGULATION AND LITIGATION IN MICHIGAN

Andrew Kok

There are approximately 200 concentrated animal feeding operations (CAFOs) in the State of Michigan at this time. That number continues to grow, as does opposition to CAFOs by environmental groups. This article examines the recent history of CAFO regulation in Michigan, as well as the current status of litigation over how the state will regulate CAFOs in the future.

Political Background

In the past 10 years, Michigan has swung dramatically from a “hands off” approach to CAFO regulation, to intensive regulation more recently. This shift primarily reflects the change in the governorship of the State. Former Gov. John Engler, a Republican, came from a farming community and attended Michigan State University, which is the epicenter of Michigan’s agricultural education system. Gov. Engler was very politically connected with the farming community. He was also a free-market Republican, generally adverse to increased regulations. As a famous example, Gov. Engler sued the United States Environmental Protection Agency (EPA) in the 1990’s to halt the vehicle testing requirements that EPA was demanding to achieve ozone attainment in the state. Gov. Engler was successful in stopping EPA at the last moment, even though the state had already adopted all of the regulations necessary to implement the vehicle testing and had already built the testing centers.

Gov. Jennifer Granholm, a Democrat, was first elected in 2002 and was recently re-elected. In 2002, she defeated Republican Dick Posthumus, a farmer and state legislator. Gov. Granholm is supported heavily by the urban portions of the state—Detroit, Grand Rapids, Lansing, and other cities. She is endorsed by many of the environmental groups in the state as well as most of the labor unions. For the most part, Gov. Granholm’s administration has allied itself with EPA in its regulatory efforts and has publicized its efforts to increase enforcement against environmental violations. Michigan Farm Bureau endorsed

Gov. Granholm's opponent in both of her elections and has complained that the Michigan Department of Environmental Quality (MDEQ) is over-regulating farms under her administration.

The differences between the Engler and Granholm administrations has significantly affected how large farms in Michigan are viewed and regulated.

Regulatory Background

During Gov. Engler's administration, environmental groups began to press for increased regulation of discharges from CAFOs, based on EPA's then-current CAFO regulations (dating from the 1970s) and the Clean Water Act (CWA) statutory definition of a CAFO as a point source. In response to this pressure, in 1998 a coalition of agricultural, environmental, and conservation groups established the Michigan Agricultural Environmental Assurance Program (MAEAP) as a voluntary, proactive approach to reducing environmental impacts related to agriculture. *Michigan Agricultural Environmental Assurance Program, available at <http://www.maeap.org> (site visited Feb. 9, 2007).*

The MAEAP requires that participating farmers go through training on environmental issues, prepare environmental management plans, manage manure spreading in a way that is agronomically and environmentally appropriate (adopting and complying with a comprehensive nutrient management plan or CNMP), and adopt appropriate practices for storage and handling of pesticides, chemicals, fuel, manure, etc. The MAEAP auditor evaluates each farm and, if the farm passes the audit, certifies the farm as MAEAP compliant. MI CAFO rules collected at http://www.michigan.gov/deq/0,1607,7-135-3313_3682_3713-96774--,00.html (site visited Feb. 9, 2007).

Under the MAEAP, a compliant farm does not need to obtain a National Pollutant Discharge Elimination System (NPDES) discharge permit unless such a farm had a discharge resulting in a violation of the MDEQ's water quality standards. *See, e.g.,* General CAFO Permit MGI019000: (Permit issued by the DEQ for Large CAFOs, effective Nov. 18, 2005 through April

2010) available at <http://www.deq.state.mi.us/documents/deq-water-npdes-generalpermit-MIG019000.pdf>. (site visited Feb. 9, 2007). From a legal standpoint, the Engler administration and the agricultural community believed that the state's "zero discharge" policy for CAFOs effectively rendered CAFO NPDES permits unnecessary.

Environmental groups disagreed and asserted that the state was not taking appropriate enforcement action against CAFOs where discharges had occurred. In November 1999, Sierra Club, the Michigan Environmental Council, the Michigan Land Use Institute, and two individuals petitioned EPA to withdraw Michigan's authorization to administer the NPDES program on the basis of the state's allegedly inadequate regulation of CAFO discharges. EPA investigated and, in September 2000, issued a preliminary report stating that Michigan's program was "seriously lacking in several respects." EPA held that the MDEQ must conduct more CAFO inspections, improve enforcement regarding discharges, and adopt procedures for CAFOs to apply for NPDES permits, among other things.

On Jan. 13, 2002, one day before EPA was to issue a final report assessing the state's CAFO program, the state agreed to issue NPDES permits for CAFOs. The state plan did allow the option of enrolling in the MAEAP program as an alternative to NPDES permitting for non-discharging CAFOs. http://www.michigan.gov/deq/0,1607,7-135-3313_3682_3713-10200--,00.html. The plan was developed under a regulatory innovation agreement through a joint project of EPA and the Environmental Council of the States (ECOS), "Alternative Permitting Approach for Concentrated Animal Feeding Operations (CAFOs) Project," December 2002. (The ECOS Agreement expires in December 2007, at which point EPA and the MDEQ will evaluate whether to continue the program or not. The significance of this decision will depend in large part on what happens with the federal regulation of CAFOs—if CAFOs without discharges are not regulated, and Michigan follows suit, there will be no "exemption" benefit for farmers to having this program.)

However, since the ECOS Agreement only applied to existing CAFOs, on Feb. 27, 2004, the MDEQ issued a Final Determination setting forth permitting requirements for new CAFOs, including a requirement for individual permits for new double-sized CAFO (those housing more than twice the threshold number of a “large” CAFO). MAC R 323.2196.

During this same period, EPA was developing revised CWA NPDES regulations for CAFOs, which were ultimately promulgated in February 2003. *See* 68 Fed. Reg. 7176 (Feb. 12, 2003). The rules provided that all large CAFOs require an NPDES permit for any discharge or *potential* discharge. As a result, the State of Michigan adopted new requirements for all CAFOs to obtain NPDES permits, even if the CAFO had not had a discharge. EPA’s broad duty for all large CAFOs to seek permit coverage regardless of the absence of an actual discharge was vacated by the Second Circuit in *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). There may be implications—for the broad state permitting requirement based on the Second Circuit’s invalidation of this *federal* requirement. If the state permit requirement remains in place for CAFOs that have no actual discharge, then arguably that is only a *state* requirement, not a federally enforceable requirement and not a federally enforceable permit. *See* EPA Approval Letter dated July 1, 2005 (http://www.deq.state.mi.us/documents/deq-water-npdes-CAFO-EPA_Approval.pdf)(approving Michigan’s CAFO Rule implementing regulations at R 323.2196(5)(b) Mich. Adm. Code).

Sierra Club Litigation

As a result of the 2003 EPA CAFO rule and Michigan’s subsequent adoption of its own broad permitting requirements, the MDEQ issued its first two individual CAFO permits in 2004. At approximately the same time, the MDEQ issued a general permit fairly similar in substance to the individual permits, and several smaller CAFOs obtained coverage under the general permit.

The issuance of these permits was a rancorous process. The MDEQ accepted public comment and

held public hearings on the permits prior to issuance, and large crowds turned out to comment both positively and negatively on the issuance of the permits. In the end, the permits were issued to all of the applicants, and the farms were populated with animals.

Sierra Club filed an administrative appeal challenging both of the individual permits that had been issued, as well as the general permit. (Red Arrow Dairy LLC NPDES No. MI0057562; Jake Zwemmer-Z Star LLC NPDES No. MI0057567; Sierra Club, Mackinac Chapter, Petitioner, Michigan Department of Environmental Quality Office of Administrative, Filed Aug. 10, 2004.) Sierra Club made several claims:

1. The permits were invalid because the MDEQ did not review and approve of the applicants’ CNMPs as required by the CWA;
2. The permits violated the CWA because they did not require public access to the permittees’ CNMPs; and
3. The permits were invalid because the permittees would be transferring some manure to third-party farms that were not subject to the permits and therefore would not be required to comply with the CWA.

Rather than ruling on the merits of Sierra Club’s challenges, the administrative law judge (ALJ) ruled that the appropriate administrative procedure was for Sierra Club to request a Declaratory Ruling from the MDEQ on the general permit. The ALJ held the individual permit challenges in abeyance pending the outcome of the Declaratory Ruling, and Sierra Club requested the Declaratory Ruling.

In the meantime, the Second Circuit issued its decision on EPA’s 2003 CAFO rules. Because the *Waterkeeper* court appeared to support some of the Sierra Club’s arguments, the MDEQ moved somewhat in Sierra Club’s direction in its Declaratory Ruling. The MDEQ director issued a Declaratory Ruling on June 15, 2005, stating that:

1. The MDEQ disagreed that CNMPs must be reviewed and approved by the MDEQ or the public prior to permit issuance;

2. Nevertheless, the MDEQ would require permit applicants in the future to identify all land where manure would be spread, so that members of the public and the MDEQ could evaluate watershed impacts from the CAFO;
3. Furthermore, the MDEQ would require that CNMPs be filed with the agency and thus made available to the public through the Freedom of Information Act.

At this point, Sierra Club has appealed to the Michigan Court of Appeals, which has agreed to hear the appeal. Briefs by Sierra Club and the MDEQ are currently being drafted.

Conclusion

It appears that Sierra Club is investing significant energy to ensure that CAFOs are strictly regulated by the State of Michigan. If Sierra Club is successful in its challenge to the Declaratory Ruling, it would appear that the MDEQ would need to re-issue the general permit and potentially the individual permits with changes. It remains to be seen how EPA's re-issued CAFO permit regulations will affect the court of appeals decision or any subsequent re-issuance of these particular permits.

Most observers agree that the biggest potential change would be a requirement that CAFO permit applicants include, as part of their permit applications, their actual CNMPs. This poses a challenge, since CNMPs are typically very large documents that identify each field where manure will be applied, what crop is grown on each field, the chemistry of the soils on each field, and how manure will be applied on each field. Farmers and the MDEQ have previously believed that the CNMP is an ever-changing plan, always changing to reflect different crops, different spreading techniques, etc. Concern from the farmers and the MDEQ is that if the CNMP is considered part of the permit application, could a change in crop use of a field require a permit modification, with new public hearings and full due process? Farmers are also concerned that providing this level of oversight to anti-farm groups will simply give those groups that much more opportunity to negatively comment during the permitting process

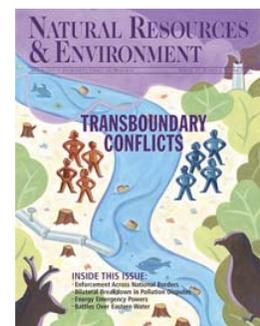
(about slopes, crops, soil chemistry, manure application techniques, etc.) as well as more opportunities to allege non-compliance. Farmers are concerned that the anti-farm groups will monitor every field identified in the CNMP with hopes of finding discharges and violations.

This litigation has at least several more months to go before final resolution, even if it is not appealed to the Michigan Supreme Court. Farmers, the MDEQ, environmental groups, and other citizens will have to wait and see how this chapter in the Michigan CAFO saga ends.

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REGULATION THROUGH LITIGATION: CERCLA and CAFOS

Jim D. Bradbury

In 2004, the City of Waco filed suit against fourteen concentrated animal feeding operations (CAFO) dairies in federal court in Waco, Texas. *City of Waco v. Schouten*, No. W-04-CA-118 (W.D. Tex. Apr. 29, 2004) (Complaint). The City's allegations mirrored the allegations made by the City of Tulsa in an earlier case filed against poultry industry defendants. *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (opinion vacated). Though other claims were asserted, the essential feature of both complaints was the use of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to allege that agricultural producers had "arranged" to transport and store animal wastes in the waterways of the state. This same theory now forms a part of the Oklahoma attorney general's allegations against various poultry industry defendants in a suit pending in Oklahoma. See generally *Oklahoma ex rel. W.A. Drew Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-TCK-SAJ (N.D. Okla. 2005). The Waco suit was resolved early this year by a global settlement among the City and all remaining defendants. *City of Waco v. Schouten*, No. W-04-CA-118 (W.D. Tex. Jan. 11, 2006) (Settlement Agreement). The settlement was accomplished after many days of negotiations led by U.S. Magistrate Judge Jeffrey C. Manske and Southern Methodist University environmental law professor Jeffrey M. Gaba.

The City of Waco's suit was preceded by a lengthy and involved administrative rulemaking that took place before the Texas Commission on Environmental Quality (TCEQ). 29 Tex. Reg. 6652 (2004) (codified as an amendment to 30 TEX. ADMIN. CODE §§ 321.31-.47). The City of Waco was an active participant in this process, submitting written comments and technical information to persuade the TCEQ to adopt more strict regulations on dairies in Erath County, Texas. 29 Tex. Reg. 6652 (2004) (codified as an amendment to 30 TEX. ADMIN. CODE §§ 321.31-.47). The TCEQ did accept many of the City of

Waco's suggestions for changes and in Spring 2004 announced new stricter rules to be imposed upon the dairies as new permits were granted. 29 Tex. Reg. 6652 (2004) (codified as an amendment to 30 TEX. ADMIN. CODE §§ 321.31-.47). Before the new State of Texas Rules were final, the City of Waco filed its suit against fourteen dairies. The lawsuit sought to impose the proposed rules that the TCEQ had rejected and alleged that the fourteen individual dairy farms should be held jointly and severally liable for the capital costs of the City's new multi-million dollar water treatment plant.

The use of CERCLA in this manner is a newly devised litigation shortcut to avoid the thorough and sometimes disappointing results of statewide environmental regulation. Citing the multiple settlements, the City of Waco declared that the lawsuit was "highly effective" in a June 2, 2006 letter from the City of Waco to the U.S. Senate Committee on Environment and Public Works. In the end, the City expended nearly \$3 million dollars of taxpayer money to fund the lawsuit. J.B. Smith, *What Did Waco Get for Its \$3.1 Million Fight Against the Dairies?*, WACO TRIBUNE, Feb. 5, 2006. The City of Waco's suit amounted to a private rulemaking under the threat of CERCLA litigation. As a condition to dismissal, the City demanded that each dairy sign what amounted to a private permit enforceable by the City of Waco, which included detailed operational control over the dairies such as limitations on waste field application. *City of Waco v. Schouten*, No. W-04-CA-118 (W.D. Tex. Jan. 11, 2006) (Settlement Agreement).

There is a grave threat posed by the boundless use of CERCLA as a class action device by governmental entities that have given up on state regulatory authority. CERCLA is being utilized by the City of Waco and others to push EPA and state regulators for additional permit requirements outside of the administrative process. Small operators have to pay a terrible price.

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**ANTICIPATORY NUISANCE AND CAFO
LITIGATION IN ILLINOIS: THE PROGENY
OF *NICKELS V. BURNETT***

**Christine G. Zeman
Hodge Dwyer Zeman**

Anticipatory nuisance actions seeking to restrain livestock management facilities approved by the Illinois Department of Agriculture (IDOA) are alive and well in Illinois, due in part to a unique ruling on appeal of a preliminary injunction enjoining the construction of such a farm. *Nickels v. Burnett*, 343 Ill. App. 3d 654, 798 N.E.2d 817 (2d Dist. 2003). *Nickels* is significant for the court's application of anticipatory nuisance law to confinement operations that have not yet been built, and for its holding in dictum regarding preemption.

In *Nickels*, citizens and neighbors of a proposed 8,000-head swine farm sued in state court to enjoin the construction and operation of the Burnett's approved, but not yet built, livestock management facility that met the requirements of the Illinois Livestock Management Facilities Act (LMFA), 510 ILCS 77/1, *et. seq.* and regulations adopted under that act, according to the authorization to construct issued by the Illinois Department of Agriculture just three days before plaintiffs filed suit. Despite meeting the LMFA's rigorous setback provisions and other requirements designed to minimize the impact of the farm on one's neighbors and the environment, plaintiffs sued under common law and statutory provisions, contending that the proposed operation would be a public and private nuisance. The defendants, Jim and Christine Burnett, owned and farmed other property in the area; the department was not named a defendant in the suit.

Plaintiffs moved for a preliminary injunction to halt construction, supporting their motion with affidavits of a state-university professor with a degree in anthropology, two medical-professionals, and a local realtor, which the court characterized as "extensive evidence" demonstrating that the proposed facility would cause substantial harm and significant loss of value to plaintiffs' property, and that such harms were "substantially certain to occur." *Nickels*, 343 Ill. App. 3d at 663, 798 N.E.2d at 826.

Defendants did not challenge the allegations nor deny the claims, and filed no counteraffidavits. Instead, the Burnetts filed a motion to dismiss, contending that plaintiffs had failed to exhaust administrative remedies, in not having appealed the department's authorization through a writ of certiorari, and that the trial court's order violated the separation-of-powers doctrine.

The court rejected both bases for dismissal, noting that the suit was filed under common law, not under the LMFA, and thus plaintiffs had no obligation to challenge the department's approval. Further, and more importantly to the current spate of similar suits, the court construed the defendants' arguments as attempting to make one of preemption, instead. The court acknowledged that the LMFA creates a comprehensive scheme regulating the construction and operation of livestock management facilities, but found that it created no remedy, public or private, for its violation, suggesting that the LMFA is "nothing more than a dead letter" and "is largely chimerical." *Nickels*, 343 Ill. App. 3d at 661, 798 N.E.2d at 824. The court also noted that the LMFA did not preempt provisions of the Illinois Environmental Protection Act, which the court found would otherwise control the construction and operation of such facilities, and that that act specifically preserved common law remedies. *Id.* Without having had the preemption issue briefed, the *Nickels* court ruled that despite its comprehensive scheme to regulate livestock management facilities, the LMFA does not preempt common law nuisance actions.

Regarding the argument that the action was premature, the court noted that the argument had "surface appeal" because the facility had not yet been constructed and no hogs yet lodged. *Nickels*, 343 Ill. App. 3d at 663, 798 N.E.2d at 825. But the court deemed it "well-settled" that a plaintiff may seek to enjoin activity that is highly probable of leading to substantial future harm. Citing *Wilsonville vs. SCA Services, Inc.*, 86 Ill. 2d 1, 426 N.E.2d 824 (1981), the court, in upholding the injunction against the proposed facility, noted that defendants had failed to challenge the allegations in the motion for preliminary injunction and "chose not to controvert" the evidence. *Id.*

Anecdotal information suggests that the named plaintiff is a retired state supreme court justice from the appellate district in which the suit was filed, and that the family of plaintiffs' counsel was involved in an earlier anticipatory nuisance suit against an out-of-state dairyman, who chose another location, upon learning of the extent of community opposition to his proposed dairy, as demonstrated by the suit.

Anticipatory or prospective nuisance has long been recognized as a viable cause of action for injunctive relief, where, according to Professor Prosser, it is highly probable that an activity will create a nuisance. If the possibility of harm is "merely uncertain or contingent" then a plaintiff may have to wait until after the nuisance has occurred to obtain his or her remedy. Prosser, Torts sec. 90, at 603 (4th ed. 1971); *Wilsonville* 86 Ill.2d at 11. In Illinois, anticipatory nuisance has served as the basis to restrain the threat of environmental harm since at least 1966, in a case in which the plaintiff sought to enjoin construction of a dam and the resulting discharge of sewage into a waterway which flowed past his property. *Fink v. Board of Trustees*, 71 Ill. App. 2d 276 (1966).

In *Wilsonville*, on which the *Nickels* court relied, a small downstate municipality sued under common law to enjoin the continued operation of a permitted hazardous waste landfill, constructed just outside the main street of the village, for the prospective subsidence, explosive reactions, or migration that the trial and appellate courts and the Illinois Supreme Court deemed highly probable would result. In *Wilsonville*, the hazardous waste landfill was already permitted, constructed, and operational, and thus the evidence of prospective harm was based on an actual existing facility, unlike in *Nickels*.

Since *Nickels*, counsel there has filed at least four similar suits in four different Illinois counties to enjoin construction and operation of livestock facilities authorized by the IDOA under the LMFA, all of which are currently pending and are generally in the motion and discovery phases. *See, e.g., Warner, et al. v. Precession Pork, LLC*, No. 4-CH-12 (Lee County Circuit Court); *Pierson, et al. v. Bible Pork, Inc.*, 5-MR-19 (Clay County Circuit Court). Such suits are

often preceded by counsel's involvement or assistance to community opponents at the public hearing required to be held under the LMFA before the IDOA, where such hearing is requested by the county board or the municipality in which the livestock management facility is proposed to be built. Some of these suits have also been preceded by substantial negative publicity and by notice to the producer that suit will follow, if the producer does not withdraw his application filed with the IDOA. Such assistance and notice of suit may have led other producers to withdraw their applications for authorization to construct, or to have led investors in such facilities to withdraw their financial backing, if anecdotal information is believed.

In the two anticipatory nuisance suits filed since *Nickels* cited above, plaintiffs have not requested injunctive relief or damages, instead seeking a jury trial to find and then declare the facility a nuisance under Illinois' declaratory judgment law. In the case in which this author represents the producer, where the claim for a declaration alone was unsuccessfully challenged, plaintiffs' counsel acknowledged at hearing that plaintiffs intend to decide after the jury finds the facility either a public or private nuisance, whether some plaintiffs would then seek damages or injunctive relief or both.

Such anticipatory nuisance suits are costly and threaten a robust livestock industry in Illinois, as well as the stated purpose of the LMFA to promote same. Interestingly, though, it appears that similar suits have been considered against other not-yet-established nor well-understood environmental facilities in the state, including wind farms and ethanol plants. The pending suits against swine facilities authorized by IDOA, and any appeals, may determine the continued viability of such litigation, or perhaps whether the legislature amends the LMFA to state more clearly its intent regarding preemption of such anticipatory common law actions.

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CASE LAW UPDATE—POST-BATES AND RAPANOS CASES, DORMANT COMMERCE CLAUSE INVALIDATES NEBRASKA STATUTE, USDA'S TEMPORARY INJUNCTION LIFTED

Amber S. Brady

This Case Law Update profiles two cases that follow the recent United States Supreme Court decision in *Bates v. Dow AgriSciences, LLC*, 544 U.S. 431 (2005), where the Court set the boundaries of Federal Insecticide, Fungicide, and Rodenticide Act's (FIFRA's) pesticide labeling and packaging preemptive scope. This update also profiles four cases that highlight the emerging lower courts' interpretations of the Supreme Court's 4-4-1 decision in *Rapanos v. United States*, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006). The next case in this Case Law Update profiles a decision where a state statute in Nebraska was struck down on dormant commerce clause grounds. The final case in this update reports on the lifting of a temporary injunction against U.S Department of Agriculture (USDA).

Cases from Circuits Expanding *Bates v. DowAgriSciences, LLC*

Wuebeker v. Wilbur-Ellis Co., 418 F.3d 883 (8th Cir. 2005)

Mr. Wuebeker filed suit against Wilbur-Ellis, after he used Wilbur-Ellis's pesticide, Agrox Premiere, as a hopper box treatment and became seriously ill. *Wuebeker*, 418 F.3d at 885. Mr. Wuebeker asserted claims of defective design, breach of implied warranty of fitness for a particular use, breach of implied warranty of merchantability, and recklessness, based on Mr. Wuebeker's contention that because Agrox Premiere is the same color as the soil, it is a defective product as users are unable to tell if the pesticide is on their skin. *Id.*

Wilbur-Ellis filed a motion for summary judgment, asserting that FIFRA preempted the state law claims asserted, and the district court granted the motion. *Id.* The Eighth Circuit reversed. The court held, following

Bates, that FIFRA only preempts claims based on legal rules that require manufacturers to label or package their pesticides in certain ways, and the plaintiff's claims did not require Wilbur-Ellis to label or package Agrox Premiere in any particular way. *Id.* at 886. Thus, the plaintiff's claims were not preempted. *Id.*

The court reasoned that Mr. Wuebeker's claims for defective design, breach of implied warranty of fitness for a particular use, breach of implied warranty of merchantability, and recklessness, like the plaintiff's claims in *Bates* of defective design, defective manufacture, negligent testing, breach of express warranty, and violation of Texas Deceptive Trade Practices Act (DTPA), did not *require* anything in the way of pesticide labeling or packaging. *Id.* at 886-87.

Therefore, just as the *Bates* decision hinged on the nature of the plaintiff's claims, the *Wuebeker* decision is based on the particular claims the plaintiffs asserted. *Id.* at 887. Because the court determined that the plaintiff's claims, as pleaded, in *Wuebeker* were based on rules and requirements related to the *design* of the pesticide, rather than requirements related to the *packaging* or the *labeling* of the pesticide, Agrox Premiere, FIFRA did not preempt the state law claims. *Id.*

Mortellite v. Novartis Crop Protection, Inc., 460 F.3d 483 (3d Cir. 2006)

The facts giving rise to this lawsuit are very similar to the factual background in *Bates*. Here, blueberry farmers complained of damages to their crop allegedly caused by a new, unrevealed ingredient in an insecticide product that Novartis released in 1997. *Mortellite*, 460 F.3d at 486-87. The farmers alleged that the new insecticide, when mixed with a fungicide before application to the blueberry plants (in the same manner that the previous insecticide had been mixed with a fungicide), caused systemic injury to the blueberry plants, as well as plant death. *Id.* at 487. The *Mortellite* plaintiffs asserted claims of strict products liability, negligence, negligent misrepresentation, fraud, breach of express warranty, and breach of the New Jersey Consumer Fraud Act. *Mortellite*, 460 F.3d at

487. The district court granted the defendants' motion for summary judgment and held that FIFRA preempted the farmers' state law claims. *Id.* at 488. The Third Circuit reversed. *Id.* at 489. And, "[e]xtending [the *Bates*] reasoning to the case at hand," the court concluded that "FIFRA does not preempt claims based on theories of strict liability, negligent testing, and breach of express warranty." *Id.* at 490. The court reasoned that these common law state causes of action "plainly do not impose labeling requirements;" thus, the claims did not conflict with, and were not preempted by FIFRA. *Id.* The court's analysis followed *Bates*, focusing on the nature of the causes of action that were plead, and whether those particular causes of action were based on *requirements* that a pesticide/insecticide manufacturer package or label its products in a certain way. *See id.*

The court evaluated the plaintiff's causes of action in groups. First, the court looked at the strict liability, negligent testing, and breach of express warranty claims. *Id.* The court held that while the plaintiffs' success on these claims might induce the defendants to change its label, none of the causes of action contained an express requirement to change the label on packaging; thus, these claims were not preempted by FIFRA. *Id.*

Next, the court was faced with determining what effect, if any, FIFRA had on the plaintiffs' claims for negligent misrepresentation, fraud, and breach of the New Jersey Consumer Fraud Act. These claims were based on defendants' oral and written representations made while marketing the insecticide. Regarding the oral representations, the court applied the principle announced in *Bates* that "because FIFRA defines labeling as "'all labels and all other *written*, printed, or graphic matter' that accompany a pesticide," claims based on oral representations would not fall within the preemptive scope of FIFRA. *Id.* However, the written representations required application of different principles. *Id.* at 490-91. The court explained that under *Bates*, if the written misrepresentations can be characterized as "labels" or "labeling" under FIFRA, then the claims related to those misrepresentations would be preempted by FIFRA. *Id.* at 491. The court then remanded these claims to the district court for a

determination of whether the defendants' written representations fell within the FIFRA "label" definition. *Id.*

Finally, the court addressed the plaintiffs' failure to warn claim, and whether the claim was preempted by FIFRA. First, the court noted that unlike the other claims in the lawsuit, this claim did involve a labeling requirement. *Id.* Nevertheless, the court held that it had not received sufficient briefing from the parties to determine whether the plaintiffs' failure to warn claims would impose, additional, or different, labeling requirements on the defendant's product. *Id.* As a result, the court also remanded this issue to the district court. *Id.*

Cases Interpreting *Rapanos v. United States*

N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006)

Plaintiff, Northern California River Watch (River Watch), filed this action against the City of Healdsburg, alleging that River Watch had violated the Clean Water Act (CWA) by discharging Healdsburg waste treatment plant sewage into a body of water known as Basalt Pond, without first obtaining a National Pollutant Discharge Elimination System (NPDES) permit. *Healdsburg*, 457 F.3d at 1025.

The Ninth Circuit was faced with determining whether Basalt Pond, a body of water containing wetlands, was subject to the CWA, and in turn, whether Healdsburg needed to obtain a NPDES permit to discharge into the pond. *Id.* The court described Basalt Pond as a rock quarry pit with fifty-eight acres of surface water, lying along the west side of the undisputed "navigable" Russian River. *Id.* at 1026. The court explained that, under Justice Kennedy's analysis in *Rapanos*, for the pond to be subject to the CWA, there must be a "significant nexus" to the navigable Russian River. *Id.* at 1029-30.

The court found, with limited analysis, that the pond's connection to the river was significant enough to constitute a "significant nexus." According to the court,

the pond "significantly affects the physical, biological and chemical integrity of the Russian River." *Id.* at 1031. The "critical fact" impacting this decision was that the pond's waters and the river were separated only by a porous man-made levee, so that the waters from the pond seeped directly into the adjacent river. *Id.* at 1030. Additional physical connection factors that led to the court to conclude that a significant nexus did exist between the river and the pond included an actual surface connection between the river and the pond when the river overflows the levee, as well as the commingling of the waters through "several hydrological connections... [which] affect the physical integrity of the water." *Id.* As a result, the court held that the Basalt Pond was subject to the CWA, and Healdsburg had violated the CWA by discharging water into the pond without an NPDES permit. *Id.* at 1033.

United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006)

This case was in front of the Seventh Circuit for the second time. The initial lawsuit alleged that Gerke Excavating had violated the CWA by discharging pollutants into navigable waters of the United States without first obtaining an NPDES permit. *Gerke*, 464 F.3d at 723. The U.S. District Court for the Western District of Wisconsin and the Seventh Circuit Court of Appeals held that Gerke Excavating had violated the CWA. *Id.* (citing *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005)). Gerke Excavating filed a petition for certiorari to the U.S. Supreme Court, and the Supreme Court granted the petition and remanded the case back to the Seventh Circuit for further consideration of the lawsuit, in light of its recent *Rapanos* decision. *Id.* at 724.

The Seventh Circuit analyzed the recent *Rapanos* decision, and in a similar manner to the Ninth Circuit's *Healdsburg* opinion, held that Justice Kennedy's "significant nexus" test is the new standard to apply when faced with the issue of whether wetlands that are close to a navigable water of the United States are subject to CWA. *Id.* at 724-25. However, the Seventh Circuit held that in order to apply this new standard, additional fact finding by the district court was

necessary. Thus, the court remanded the case back to the district court to conduct such proceedings as necessary to apply the *Rapanos* standard. *Id.* at 725.

United States v. Johnson, 467 F.3d 56 (1st Cir. 2006)

This case also presents a situation where the circuit court was faced with a lawsuit for the second time, in light of the *Rapanos* decision. The United States initially filed a civil action against cranberry farmers in Massachusetts, on the basis that the farmers violated the CWA by discharging pollutants into waters covered by CWA without an NPDES permit. *Johnson*, 467 F.3d at 58. The district court and the First Circuit both held that the three sites at issue were all subject to the CWA, and the farmers had violated the CWA by discharging without a permit. *Id.* (citing *United States v. Johnson*, 437 F.3d 157, 162 (1st Cir. 2006)). Both parties filed subsequent motions to alter the First Circuit's panel decision, in light of *Rapanos*. *Id.* at 60. The First Circuit held that the lawsuit should be remanded to the district court for application of the *Rapanos* principles. *Id.* However, in doing so, the First Circuit diverged from the post-*Rapanos* decisions in the Ninth and Seventh Circuits, and held that "the United States may assert jurisdiction over the target sites if it meets *either* Justice Kennedy's legal standard *or* that of the plurality." *Id.* (emphasis added).

The First Circuit explained its departure from the Ninth and Seventh Circuits' reasoning, by analyzing *Marks v. United States*, the opinion the Ninth and Seventh Circuits relied upon, in determining that Justice Kennedy's opinion was the "narrowest ground" of the *Rapanos* opinion, and thus, was the controlling standard for determining CWA jurisdiction. *Id.* at 62-64. The First Circuit articulated its concern with applying the "narrowest grounds" approach, as used in *Marks*, to post-*Rapanos* cases. The court explained that "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other." *Id.* at 64. The court went on to explain that "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit

jurisdiction." *Id.* In the court's view, by adhering to Justice Kennedy's standard as the single controlling test, there could be circumstances in which a site would be within CWA jurisdiction due to application of the "significant nexus" test, but that same site would not be considered to be within CWA jurisdiction, according to the plurality opinion of the other four justices of the Supreme Court. *Id.* That is, Justice Kennedy's opinion would extend CWA jurisdiction to sites that were not a "subset" of those sites to which the plurality would confer CWA jurisdiction. As a result, the First Circuit determined that a site should be within CWA jurisdiction if it satisfied either the plurality's standard or Justice Kennedy's standard in *Rapanos*. *Id.* at 66.

The court supported its position of adhering to both standards, ironically, by relying on the instructions of Justice Stevens' dissent in *Rapanos*. *Id.* According to the court, "[f]ollowing Justice Stevens's instruction [to find CWA jurisdiction where either test is satisfied] ensures that the lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding." *Id.* at 64. That is, "[i]f Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction." *Id.* The court explained that this was a "common sense approach" that had been followed by other circuits in applying fragmented Supreme Court opinions. *Id.* As a result, the court vacated its earlier decision and remanded the case to the district court for further proceedings. *Id.* at 66. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006).

This lawsuit was filed by the United States, due to a Chevron oil spill that occurred after a pipeline failed from alleged external corrosion in central West Texas in August 2000. *Chevron Pipe Line Co.*, 437 F. Supp. 2d at 607. The United States sought to impose civil fines upon Chevron related to the spill, alleging that the oil had spilled into a tributary of Ennis Creek, and the oil then migrated to Ennis Creek, Rough Creek, the Double Mountain Fork of the Brazos River, and the ultimately into the Brazos River. *Id.* at 607-08.

Chevron argued that at the time of the spill, the tributary and Ennis Creek were dry, and thus, those areas did not fall within CWA jurisdiction. *Id.* at 608.

Thus, the court was faced with determining whether the CWA applied to the tributary and Ennis Creek, where the oil spill occurred. In its analysis, the court reviewed and summarized the plurality and Justice Kennedy's opinions in *Rapanos*; yet, the district court did not adhere to either test. Rather, the district court criticized the Supreme Court for "fail[ing] to reach a consensus... as to the jurisdictional boundary of the CWA." *Id.* at 613. Then, the court announced it would instead "look to the prior reasoning in this circuit" in determining whether the CWA applied to the lawsuit. *Id.* The Fifth Circuit test, as articulated in *In re Needham* and *Rice v. Harken Exploration Co.*, is "whether... the site of the farthest traverse of the spill is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 614 (citing *In re Needham*, 354 F.3d 340, 346 (5th Cir. 2003) and *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001)).

The court went on to hold that the United States had not presented sufficient evidence to determine if the tributary, creeks, and rivers had sufficient flow at the time of the spill, and thus, whether any oil from the spill had actually reached "navigable waters of the United States." *Id.* at 614-15. As a result, the Texas district court granted summary judgment for Chevron. *Id.* at 615.

Dormant Commerce Clause Invalidates State Statute

Jones v. Gale, — F.3d —, No. 06-1308 (8th Cir. 2006), 2006 WL 3614846

In 1982, Nebraska voters approved and adopted constitutional amendment Initiative 300, prohibiting corporations or syndicates from acquiring an interest in "real estate used for farming or ranching in [Nebraska]" or from "engag[ing] in farming or ranching," with certain exceptions. *Jones*, at *1. One of those exceptions was a "family farm or ranch corporation." That is, a family farm or ranch

corporation, a "corporation engaged in farming or ranching or the ownership of agricultural land," with the majority of the voting stock held by family members, and at least one family member either residing on, or actively engaged in the day to day labor and management of, the farm or ranch in Nebraska, could operate free and clear of the prohibition. *Id.*; NEB. CONST. art. XII, § 8.

Plaintiffs in *Jones* filed this lawsuit, claiming that because they were non-resident farmers, they were unable to form corporate entities for their Nebraska operations and thus, they suffered economic losses. *Id.* at *2-3. The plaintiffs asserted NEB. CONST. art. XII, § 8 violated the dormant commerce clause. *Id.* at *4. On Dec. 13, 2006, the Eighth Circuit agreed. Following its recent decision in *South Dakota Farm Bureau, Inc. v. Hazeltine*, the court held that NEB. CONST. art. XII, § 8 was unconstitutional, as it violated the dormant commerce clause. *Id.* at *7; see *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003). Dormant commerce clause analyses can involve laws that are deemed to be either discriminatory on its face, have a discriminatory purpose, or have a discriminatory effect. *Id.* at *4. Here, the court held that that NEB. CONST. art. XII, § 8 was discriminatory on its face, *and* the constitutional amendment had a discriminatory intent. *Id.* at *4.

In its facial discrimination analysis, the court reasoned that because NEB. CONST. art. XII, § 8 prohibited corporations from farming in Nebraska *unless* the corporation was a "family farm corporation," with at least one family member residing on the Nebraska farm and/or engaging in the day-to-day activities on the Nebraska farm, NEB. CONST. art. XII, § 8 "favor[ed] Nebraska residents" and was therefore facially discriminatory. In short, the court held that the amendment afforded differential treatment of in-state and out-of-state economic interests "that benefit[ted] the former and burden[ed] the latter." *Id.* at *6 (citing *Hazeltine*, 340 F.3d at 593). This is impermissible under the dormant commerce clause. *Id.*

The court's discriminatory intent analysis focused on the title of the initial Initiative 300 1982 ballot title, which told voters that Initiative 300 would "prohibit []

ownership of Nebraska farm or ranch land by any corporation which is not a Nebraska family farm or corporation.” *Id.* at *6. The court interpreted this title as an indication that “the manifest purpose of Initiative 300... was to differentiate, or discriminate, between family farm corporations located in Nebraska as opposed to those elsewhere.” *Id.* The court went on to add that while it was “unnecessary to discuss in detail” Initiative 300’s history preceding its adoption, the TV ads that ran before the election, “[l]et’s send a message to those rich out-of-state corporations. Our land’s not for sale, and neither is our vote. Vote for Initiative 300,” made it “clear beyond cavil” that Initiative 300 was spurred by an “animus against out-of-state corporations.” *Id.*

The State of Nebraska was unable to satisfy its burden and demonstrate that the amendment that passed as a result of Initiative 300 advanced a legitimate local interest, without discriminating against non-resident farm corporations and partnerships. *Id.* at *7. Therefore, the Eighth Circuit held that Nebraska’s prohibition against farming or ranching by corporations violated the dormant commerce clause. *Id.*

USDA’s Temporary Injunction Lifted

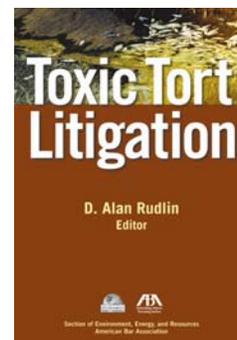
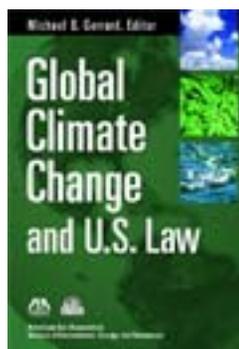
Ranchers Cattleman Action Legal Fund United Stockgrowers of America v. USDA, 415 F.3d 1078 (9th Cir. 2005)

In *Ranchers Cattleman Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture*, the Ninth Circuit Court of Appeals reversed a temporary injunction that had precluded implementation of a USDA Final Rule, which allowed limited ruminant imports from Canada. *R-CALF*, 415 F.3d at 1084. USDA policy bars the importation of live ruminant animals and any ruminant products from any country with known cases of bovine spongiform encephalopathy (BSE). *Id.* at 1085. On May 20, 2003, a cow in Alberta, Canada, was diagnosed with BSE, and Canada was added to the list of no-import countries. *See id.* at 1089; 9 C.F.R. § 93.401; 94.18 (2003). USDA soon began taking steps to re-open the Canadian border to resume importation of Canadian ruminants and ruminant

products. *Id.* at 1089. On Jan. 4, 2005, USDA published a Final Rule to re-open the U.S.-Canadian border to both (1) live ruminant animals less than thirty months, and (2) ruminant products from Canadian cattle of all ages. *Id.* at 1089-90. Six days later, R-CALF filed this lawsuit, seeking to enjoin the implementation of the Rule. *Id.* at 1090. The district court issued a preliminary injunction, barring implementation of the Rule on the basis that the Rule was arbitrary and capricious under the Administrative Procedure Act. *Id.* USDA appealed, and the Ninth Circuit reversed. *Id.* at 1093. The Ninth Circuit Court held that a temporary injunction was unwarranted in the lawsuit, because, in the court’s opinion, R-CALF was not likely to succeed based on the merits of its action, and the court held that R-CALF did not demonstrate irreparable harm by implementation of the Rule. *Id.* As a result, the district court’s preliminary injunction was lifted. *Id.* at 1105.

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