

DEPARTMENT OF AGRICULTURAL ECONOMICS

Environmental Laws Affecting Farmers and Ranchers

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Overview

The legal system has been charged with handling environmental problems practically since the beginning of recorded history. While different approaches have been utilized over time, presently, the United States attempts to handle environmental problems

largely through regulation of the use of natural resources. As a result, much of environmental law is statutory and regulatory, but common (judge-made) law is still important in the areas of nuisance, trespass and negligence.

Constitutional issues. Environmental law largely involves limitations on an individual's use of their private property. However, restrictions on land use may become so complete that, in effect, the restrictions amount to the government taking the property. The Fifth Amendment to United States Constitution limits the government's eminent domain (taking) power by requiring federal and state governments to pay for what is taken.

Similarly, state and local governments have an inherent power (police power) to protect the health, safety, welfare or morals of their people, and the reasonable exercise of this power does not violate the constitution. Historically, almost all legislation enacted pursuant to a state or local government's police power was presumed to be constitutional. Only recently has this analysis changed. Presently, the burden of proof in takings cases is upon governmental agencies. They must prove that the land use regulation at issue does not constitute a compensable taking. The test is one of "rough proportionality" between the benefits conferred and the property taken. In addition, courts no longer presume that environmental restrictions on land use are constitutional. Legislation and/or regulation impacting

private property rights is subjected to strict scrutiny. In addition, a federal law or regulation must be shown to substantially affect interstate commerce to be upheld as constitutional.

Federal Regulatory Approach - Air

Clean Air Act. The

1963 Clean Air Act amendments authorized the Department of Health, Education & Welfare (now Department of Health & Human Services) to intervene directly when air pollution threatened public health or welfare and the state was unable to control the pollution. Additional amendments were made in 1970, 1977, 1990, and 1993. The Clean Air Act presently does not have a large effect on farming and ranching operations, but if it is determined that odors can be controlled within the framework of the Act, first priority will probably be given to noxious industrial and urban odors.

Federal Regulatory Approach - Water

Water pollution is commonly divided into two categories: point source and nonpoint source. Point source water pollution is waste discharged into a water body from a specific and clearly discernable discharge point such as a pipe or ditch. Nonpoint source pollution, on the other hand, is the diffuse discharge of waste into a water body where the specific source cannot be located, as with sediment or certain agricultural chemicals. Most agricultural water pollution is nonpoint source pollution. However, runoff from an animal feedlot can be construed as point source pollution. The federal government regulates point source discharges while nonpoint source pollution is typically regulated by the states through water quality standards.

Soil erosion. The two major agencies within the United States Department of Agriculture that have substantial soil erosion responsibilities are the Natural Resource Conservation Service and the Farm Service Agency. In general, the federal soil conservation programs are limited to conservation incentives in the form of technical assistance and cost sharing. Many states also have soil erosion and sediment control statutes that require landowners to take certain actions designed to minimize soil erosion. In some states, the burden is placed upon local county commissioners to take action designed to minimize soil erosion.

Conservation Reserve Program. The Conservation Reserve Program (CRP) is a long-term land retirement program for marginally productive and erodible cropland. The CRP involves lease agreements between the government and the landowners under which the government makes an annual cash payment to the landowner (or landowner and tenant) for a minimum of ten years. Under current CRP rules, eligible cropland is defined as land that has been planted or considered planted to an agricultural commodity for two of the five most recent crop years and is capable of being planted to an agricultural commodity. Land coming out of the CRP must be farmed in accordance with a conservation plan to maintain eligibility for USDA farm program benefits.

Clean Water Act. The Clean Water Act (CWA) essentially eliminates the discharge of any pollutants into the nation's waters without a permit. The CWA targets point source pollution and regulates large-scale confined animal feeding operations (CAFOs). Irrigation return flows are not considered point sources.

The National Pollution Discharge Elimination System (NPDES) is the chief mechanism for control of point source pollution. No one may discharge a pollutant from a point source into the "navigable waters of the United States" without an Environmental Protection Agency (EPA) permit. While most agricultural pollution is nonpoint source pollution, the NPDES does have a major effect on the cattle feeding business and other agricultural confinement operations. Thus, the EPA has issued effluent limitations and federal standards of performance for feedlots. In a 1994 landmark case, a large New York dairy operation with extensive liquid manure spreading operations was a point source pollutant under the CWA because the farm fell within the definition of a CAFO.

Wetlands. Section 404 of the Clean Water Act makes illegal the discharging of dredge or fill material into the "navigable waters of the United States" without obtaining a permit from the Secretary of the Army acting through the Corps of Engineers (COE). Over time, the COE has increased its jurisdiction over wetlands through the drafting of expansive regulations. Today, the COE and the EPA claim jurisdiction over isolated wetlands and wetlands not adjacent to "waters of the United States" if a link exists between the water body and interstate commerce. This interpretation has generally been upheld by the courts until recently.

Swampbuster. The conservation compliance provisions of the 1985 Farm Bill introduced the concept of swampbuster. The original concept was that any person who in any crop year produced an agricultural commodity on converted wetlands would be ineligible for federal agricultural subsidies with regard to that commodity. Under Swampbuster, three types of wetlands are completely protected - natural wetlands, abandoned wetlands and wetlands converted to crop production after December 23, 1985. Agricultural production on these type of wetlands triggers ineligibility for farm program benefits. Likewise, the cultivation of farmed wetlands triggers ineligibility for federal farm programs, but prior converted cropland is not protected and can be farmed. Under the 1996 Farm Bill, a farmed wetland located in a cropped field can be drained without sacrificing farm program benefit eligibility if another wetland is created elsewhere. In addition, the 1996 legislation provides a good faith exemption to producers who inadvertently drain a wetland. If the wetland is restored within one year of drainage, no penalty applies.

Wetland "takings" implications. Wetlands issues have given rise to numerous cases concerning takings implications with the basic question being how far governmental regulation of wetlands can go before such regulation constitutes a regulatory taking of the private property involved. A primary question is whether the denial of a CWA § 404 permit constitutes a taking without just compensation in violation of the Fifth Amendment. In situations where the denial of a permit results in the deprivation of all economically feasible use of the property subject to the permit, courts have found an unconstitutional taking to have occurred.

Safe Drinking Water Act. The Safe Drinking Water Act (SDWA) is designed to protect public drinking water supplies from contamination by setting maximum contaminant levels. The SDWA considers

farms and ranches as public water supplies if they have over 15 service connections or regularly serve a minimum of 25 year-round residents over a period of at least 60 days a year. Thus, large farming and ranching operations may be subject to the SDWA requirements such as testing for certain chemicals.

Surface Mining Control and Reclamation Act. The Surface Mining Control and Reclamation Act (SMCRA) was established in 1977 to address the problem of environmental damage caused by surface coal mining.

Federal Regulatory Approach - Land Hazardous Waste

Comprehensive Environmental Response Compensation & Liability Act. The Comprehensive Environmental Response Compensation & Liability Act (CERCLA), which became law in late 1980, set as a goal the initiation and establishment of a comprehensive response and financing mechanism to abate and control problems associated with abandoned and inactive hazardous waste disposal sites. While it may seem that CERCLA's application to agriculture is slight, such is not the case. The EPA has defined "hazardous substance" to include things commonly found on farms and ranches such as tires, batteries, farm chemicals, pesticides and used oil. CERCLA holds persons responsible for releases of hazardous material liable for cleanup and restitution costs. Liability is strict, joint and several, and can be applied retroactively to those having no continuing control over the hazardous substance.

An exemption from CERCLA liability is provided for secured creditors whose only interest in the contaminated property is that of the property serving as collateral for a loan the lender has advanced to the party operating the premises. However, the exemption does not apply if the lender becomes too involved in the daily management or operation of the polluted facility. Legislative changes were made in 1996 to the lender liability rule designed to limit the liability of lenders and fiduciaries managing property contained in a trust or estate.

Persons potentially responsible for payment of cleanup costs under CERCLA can raise certain statutory defenses. Perhaps the most important defense for farmers and ranchers is the "innocent purchaser" defense. This defense may apply if a farmer or rancher did not know they were buying a contaminated site. To use the defense, the real estate must have been purchased after the disposal or placement of the hazardous

substance, and the purchaser must not know or have had no reason to know at the time of purchase that a hazardous substance existed on the property. In addition, the buyer, before the purchase, must undertake "all appropriate inquiry" into the previous ownership and uses of the property in an effort to minimize the liability. Common sense steps can be taken to satisfy the "appropriate inquiry obligation" upon purchasing agricultural real estate.

Resource Conservation and Recovery Act. The Resource Conservation and Recovery Act (RCRA) of 1976 subjects hazardous material to federal regulation if it is solid waste. Dump sites located on farms and ranches may be subject to the permitting requirements of RCRA. While RCRA contains a pesticide exemption for farmers, the scope of the exemption is unclear presently. The original purpose of the pesticide exemption for farmers was to exempt farmers from RCRA liability for disposal of FDA-approved pesticides. It is critical, however, that farmers dispose of pesticides properly for the exemption to apply. It is noted that ranchers may not be able to avail themselves of the exemption, and the exemption may not cover fertilizers.

Chemicals

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). FIFRA takes a preventative approach with respect to air, water and land pollution. The Act is administered by the EPA and requires registration of all pesticides intended to prevent, destroy, repel or mitigate certain pests. FIFRA also regulates pesticide use and requires certification of pesticide applicators.

Toxic Substances Control Act (TSCA). The TSCA was enacted in 1976 to regulate the use of industrial chemicals. However, the Act is a catchall for the control of all chemicals which potentially could be harmful to environment and, specifically, to the public water supply.

Plants, Fish and Wildlife

Endangered Species Act. The Endangered Species Act (ESA) establishes a regulatory framework for the protection and recovery of endangered and threatened species of plants, fish, and wildlife. The U.S. Fish and Wildlife Service (USFWS), within the Department of the Interior, is the lead administrative agency for most threatened or endangered species.

The ESA has the potential to restrict substantially agricultural activities because many of the protections provided for threatened and endangered species under

the Act extend to individual members of the species when they are on private land. An important issue for farmers and ranchers is whether habitat modification caused by routine farming or ranching activities is included with the definition of the term “take” which is a prohibited activity under the ESA. Recent federal cases have held that modification of an endangered species’ habitat because of farming practices constitutes harm of an endangered species resulting in a “taking” of the endangered species in violation of the ESA. Thus, there appears to be no question remaining that the ESA authorizes the federal government to regulate private property to protect endangered species of fish and wildlife.

Livestock

The federal government regulates much of the ranching activity that occurs in the western United States. In 1995, the Interior Department proposed new regulations that were designed to tie federal rangeland management policy with ecosystem management.

Before the regulations were scheduled to take effect, a group of cattle industry organizations challenged the regulations in court as being in violation of the Taylor Grazing Act. In 1996, a federal district court set aside a major portion of the 1995 regulations.

Federal grazing permits and the Clean Water Act. Section 401 of the CWA requires state certification for any applicant applying for a federal license or permit for any activity that may result in a discharge of pollutants into the navigable waters of the United States. Historically, § 401 has only applied to point source discharges such as from city sewage treatments plants or factories. Hence, the USFWS policy is to issue grazing permits without requiring the permittee to first obtain state certification that the grazing will not violate state water quality standards. The pollution, if any, caused by livestock grazing is believed to be a nonpoint source pollutant not subject to § 401 of the CWA. In mid-1998, the Ninth Circuit Court of Appeals reversed a lower court, and ruled that cattle are not point source pollutants subject to § 401 of the CWA.

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