

Environmental Litigation and Toxic Torts Committee Newsletter

*A joint newsletter of the Environmental Litigation and Toxic Torts Committee
and the Agricultural Management Committee*

Vol. 14, No. 1

February 2013

CHAIR MESSAGE

Thomas P. Redick and Donald D. Anderson

As the chairs of Agricultural Management and Environmental Litigation and Toxic Torts (ELTT) Committees we want to welcome all of you and encourage participation in committee activities. Both committees are planning another active year with a steady stream of newsletters and interesting programming. This issue of our newsletter combines the interests of agriculture and litigation, which are among the highest profile issues in environmental law.

The Section had a very successful Fall Meeting in Austin, Texas, this past October, with programs on agriculture and a plenary session on the Clean Water Act. Continuing this focus on the Supreme Court's approach to the law of water pollution, our program vice chairs have already submitted program proposals for the 21st Fall Conference in Baltimore, Maryland. We encourage members to attend and enjoy interesting "CLE" content, and network with colleagues. We are committed to providing the information and assistance that our members need to be better lawyers. Our committees have always had solid member participation, with quality programs arising from member involvement. If you would like to be a part of program planning or committee activities, please let us or Agricultural Management Programs Vice Chairs Brandee Ketchum and Brandon Neuschafer or ELTT Program Vice Chair Rich Beaulieu know about your interest and ideas.

With the New Year here, it is time to make plans to get out to Salt Lake City in March for the 42nd Spring

Conference. SEER's annual conference on environmental law will once again touch upon climate change regulation and litigation, which has agricultural angles, and will have content relating to agriculture and water conservation and include programs on hydraulic fracturing and expanding litigation under the Resource Conservation and Recovery Act.

This newsletter opens with a case law update from Corey Parton. Chad Burchard writes on trace-back liability risks and the availability of recall insurance to manage those risks. Christopher W. Hayes discusses the impending Farm Bill and associated litigation issues. Deanne Miller and Roger Smith sum up EPA Enforcement activity under President Obama. Lastly, Katelyn Atwood looks at state legislatures' efforts to manage the legal implications of raw milk sales.

Our committees have new "social media" vice chairs, who will assist with making the best possible use of social media. ELTT's social media vice chair is David Scriven-Young. Agricultural Management has appointed Stan Benda and Devan Flahive as its social media co-vice chairs, and looks forward to creating specialized groups on LinkedIn. In keeping with the theme of this newsletter, the Agricultural Management Committee plans to create a group focusing on the laws relating to water pollution in agriculture.

If you want to get more involved in any of our committees' activities, including any topics that you

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Committee Newsletter
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*Lauran Sturm and
Brandee Ketchum, Editors*

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**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

February 26, 2013

**Key Environmental Issues in US EPA
Region 4**
Atlanta, GA

March 21-23, 2013

42nd Spring Conference
Grand America Hotel
Salt Lake City, UT

April 11-12, 2013

**ABA Petroleum Marketing Attorneys'
Meeting**
Ritz Carlton Hotel
Washington, DC

April 18, 2013

ABA Public Land Law Symposium
University of Montana Law School
Missoula, MT

April 19-21, 2013

ABA SEER Spring Council Meeting
The Resort at Paws Up
Greenough, MT

June 5-7, 2013

31st Annual Water Law Conference
Red Rock Resort
Las Vegas, NV

August 8-13, 2013

ABA Annual Meeting
San Francisco, CA

**For full details, please visit
www.ambar.org/EnvironCalendar**

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would like to write about in a future newsletter, please let us know (Agricultural Management—Tom Redick at thomasredick@netscape.net; ELTT—Don Anderson at ddanderson@mcguirewoods.com). Additional contact information for our committees is available on the committee Web sites.

Thomas P. Redick is chair of the Agricultural Management Committee and **Donald D. Anderson** is chair of the Environmental Litigation and Toxic Torts Committee.



AMBAR Section of Environment, Energy, and Resources

MARCH 21-23, 2013

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CASE LAW UPDATE

Corey V. Parton

NPDES and State Permits: *Commonwealth of Kentucky v. Sharp* (Unreported in S.W.3d, 2012 WL 1889307 (Ky. App. 2012))

The Kentucky Court of Appeals contemplated whether a group of farmers, who proposed building several concrete pits to store the waste of over 10,000 hogs, were required to obtain Kentucky state Pollutant Discharge Elimination System (KPDES) permits. The issue was presented to the court after neighboring residents decided to challenge the State Energy and Environment Cabinet’s (cabinet) decision that the farmers would not be required to obtain the permits. In an administrative hearing on the matter, the cabinet had made factual findings that the structures would produce large volumes of manure and would result in considerable potential for pollution, but would not actually directly discharge pollutants into state waters; thus, a permit was not necessary.

The court first upheld the cabinet’s factual finding that the farmers’ operations were not large enough to constitute concentrated animal feeding operations (CAFOs), which are required under Kentucky and federal law to obtain National Pollutant Discharge Elimination System (NPDES) permits, by relying on a substantial deference standard of review. *See also* U.S.C. § 1362 (14); 401 Ky. Admin. Reg. 5.002, .005 § 25(6) (Sept. 2012). The court then addressed whether the Kentucky statute governing KPDES permits nevertheless required the farmers to obtain permits due to the facilities’ high potential to discharge pollutants which could indirectly make their way into local waterways. *Sharp*, WL 1889307 at 9. According to the court, Kentucky law prohibits direct or indirect discharges of pollutants, and is therefore broader than its Clean Water Act (CWA) counterpart, which, on its face, applies to only direct discharges when made in accordance with the terms of a permit. Ky. Rev. Stat. § 224.70–110 (2012); *Sharp*, WL 1889307 at 6, 9.

However, Kentucky law also contains an express mandate that Kentucky permits may not impose limitations or conditions more stringent than would be required under the CWA. *Id.* § 224.16-050(4). The

court found the latter provision limited the former in holding that the Kentucky statute was confined to the scope of the CWA. Because the CWA does not require an NPDES permit for discharges that may only indirectly impact navigable waterways, the court found it was unnecessary for the farmers to acquire permits.

Conservation Easements: *Nature Conservancy, Inc. v. Sims* (680 F.3d 674 (6th Cir. 2012))

In *Nature Conservancy, Inc. v. Sims*, the Sixth Circuit U.S. Court of Appeals considered whether filling a sinkhole with materials from an excavated pond violated a conservation easement (easement) created with the stated purpose of assuring the property would be “retained forever substantially undisturbed in its natural condition(. . .)” *Id.* at 674. The easement, purchased by the Sims for a discount from Nature Conservancy, Inc., prohibited ditching, draining, filling, excavating, removing topsoil and other materials, and any changing of the land’s topography except in conjunction with specifically authorized activities, which included farming, fence installation, driveways, and landscaping. The easement reserved any rights not expressly prohibited to the landowner and provided that the landowner was not required to maintain the property as it existed on the date of the easement.

The court rejected the Sims’ argument that since creating ponds was authorized, and the easement did not provide for what should happen with dirt excavated pursuant thereto, an implied authorization to dispose of the dirt on the property existed. In doing so, the court, relying primarily on the easement’s stated purpose, broadly construed the prohibitions on filling and changing the topography and found the easement was violated.

The court noted its obligation “to read [the Easement] as a whole, and when possible, to embrace an interpretation that promotes harmony between (. . .) provisions.” *Sims*, 680 F.3d at 676. The court, however, essentially ignored the provision giving the landowner all the rights not expressly prohibited, and seemingly went out of its way to effectuate the easement’s conservation purpose.

Programmatic NEPA Documents: *League of Wilderness Defenders v. U.S. Forest Service* (LEXIS 90574 (D. Or. 2012))

The U.S. District Court for the District of Oregon recently considered the adequacy of a U.S. Forest Service impact analysis pursuant to a proposed plan to control invasive plant species largely through the use of herbicides. The analysis mentioned impacts of the proposed activities and contained conclusions like: “given (. . .) the low rainfall available to transport herbicides off site, it is unlikely that treatments would have a cumulative effect . . .”; and “given the large percentage of sites where [herbicides] may be effective (. . .) cumulative impacts (. . .) cannot be ruled out.” *Id.* at 91–92. The court held the Forest Service could not simply describe the direct impacts of the proposed action and then generally conclude that there are no cumulative impacts. Instead, there must be quantified or detailed assessment of the combined environmental impacts.

Once it has performed the requisite analysis, the agency is free to decide that other values outweigh any environmental costs. The court agreed with the Forest Service’s argument that site-specific proposals that are part of a larger plan may “incorporate” the impact analysis done previously as part of a larger plan. In explaining, the court recognized that “[impacts analysis] at a regional/programmatic level will necessarily be more generalized and less contextual than (. . .) required for site-specific projects.” In the future, this language could assist an agency defending an impact analysis pursuant to a high-level proposal. The court was sure to clarify, however, that analysis is insufficient where it merely incorporates the former analysis in lieu of undertaking its own. This is especially so where the impacts analysis relied upon did not consider the specific cumulative effects of the proposed project. According to the court, reliance on these generalized impact analyses is necessarily insufficient, since “the very point of a cumulative impacts analysis is to draw attention to combined impacts that might otherwise be overlooked when considered separately.”

Corey Parton is a graduate of Virginia Tech University and Charlotte School of Law. He is currently preparing to take the North Carolina Bar Exam in February.

FOOD CONTAMINATION INSURANCE LITIGATION

Chad Burchard

The following cases address the availability of insurance coverage for the costs involved in recalling contaminated food.

Fresh Express, Inc. v. Beazley Syndicate 2623/623 at Lloyd's et al., 131 Cal. Rptr. 3d 129 (Cal. Ct. App. 2011)

On September 8, 2011, the Court of Appeal of California, Sixth District, reversed a trial court's award of \$12 million in damages to Fresh Express (FE) in a breach of contract suit against its insurers (collectively, "Beazley"), which had denied coverage to FE for losses suffered as a result of potential product contamination.

FE had purchased a "TotalRecall+" insurance policy from Beazley with a \$12 million liability limit per "Insured Event." Among the "Insured Events" covered was "accidental contamination," which the policy defined as an "[e]rror by [FE] in the manufacture, production, processing, preparation, assembly, blending, mixing, compounding, packaging or labeling . . . of any Insured Products . . . which causes [FE] to have reasonable cause to believe that the use or consumption of such Insured Products has led or would lead to . . . bodily injury, sickness, disease or death . . . manifesting itself . . . within 120 days of use or consumption . . ."

In mid-September 2006, the Food and Drug Administration (FDA) issued an announcement advising the public against consuming "bagged fresh spinach" because the product was believed to be linked to cases of E. coli infection. Prior to this announcement, the FDA had contacted FE, a major producer of bagged fresh spinach, and advised it to take steps toward a recall.

At the time, FE (which had no farms of its own) had policies in place intended to prevent it from acquiring contaminated produce. However, in reviewing its

records, FE found a few instances where it had made "spot purchases" of spinach in violation of its policies.

A few days later, FE filed a claim with Beazley under its TotalRecall+ policy. By the end of September, the FDA had traced the E. coli outbreak to a supplier from which FE had purchased no spinach. Beazley subsequently denied FE's claim and FE filed suit.

FE argued that its spot purchases were "errors" under the policy. The trial court agreed, finding that the "Insured Event" was the E. coli outbreak and that Beazley had breached in denying FE's claim.

However, the court of appeal found Beazley's arguments more persuasive, holding that as written the policy only reimbursed FE for losses incurred as a result of an "Insured Event" and that the only such event at issue was not the E. coli outbreak but "accidental contamination" as defined by the policy. Since the E. coli outbreak was not an "[e]rror by [FE]" it did not fall under the definition of an "accidental contamination" and thus any losses FE may have suffered as a result of the outbreak were outside the scope of the policy's coverage.

The trial court had also found that FE's losses were covered even under Beazley's reading of the policy because FE's errors in violating its company policies prevented it from obtaining an exemption from the FDA warning. Here too, the court of appeal reversed, holding that these errors did not cause FE's losses (they were the result of the E. coli outbreak and the FDA's warning) and that FE had not presented evidence to show that an exemption would have avoided them.

Little Lady Foods, Inc. v. Houston Casualty Company, 819 F. Supp. 2d 759 (N.D. Ill. 2011)

On September 22, 2011, the U.S. Court for the Northern District of Illinois granted summary judgment to Houston Casualty Company (HC), an insurance company, which had denied coverage to Little Lady Foods (LLF) for losses sustained in a temporary product shipment halt.

LLF was the holder of a “Malicious Product Tampering/Accidental Product Contamination” insurance policy, which it had bought from HC. The policy defined “Accidental Product Contamination” as including “any accidental or unintentional contamination . . . of [LLF’s products] . . . provided always that the consumption or use of [LLF’s contaminated products] has, within 120 days of such consumption or use, either resulted, or may likely result, in . . . physical symptoms of bodily injury, sickness or disease or death . . .”

In January 2010, LLF performed tests on one of its products, a burrito sold to convenience stores, which suggested the possible presence of harmful bacteria. LLF notified the U.S. Department of Agriculture and halted shipment of the product to its customers. LLF also notified HC of its test results and filed a claim for accidental product contamination under its policy. LLF conducted further tests for harmful bacteria, which came back negative. HC denied LLF’s claim and LLF filed suit for breach of contract.

HC’s basic argument was that the absence of any harmful bacteria meant that there was no “accidental product contamination” as defined by the policy. The court agreed, holding that LLF’s fear, based on its test results, of the possibility of harmful bacteria was irrelevant because in actuality there was no danger. The court commented that LLF was “essentially asking [it] to re-write the policy to require a likelihood that a product is contaminated rather than a likelihood that the contaminant it does contain is dangerous.”

Caudill Seed & Warehouse Co., Inc. v. Houston Casualty Company, 835 F. Supp. 2d 329 (W.D. Ky. 2011)

On December 20, 2011, the U.S. Court for the Western District of Kentucky granted partial summary judgment to Houston Casualty Company (HC), which had denied coverage to Caudill Seed & Warehouse (CS) for losses incurred in connection with certain product recalls.

CS had bought a “Malicious Product Tampering/Accidental Product Contamination” policy from HC, which defined “Accidental Product Contamination” as

including “any accidental or unintentional contamination . . . during the manufacture, blending, mixing, compounding, packaging, labeling, preparation, production or processing . . . of [CS’s products] (including their ingredients or components), or PUBLICITY implying such . . . provided always that the consumption or use of [CS’s contaminated products] has, within 120 days of such consumption or use, either resulted, or may likely result, in . . . physical symptoms of bodily injury, sickness or disease or death . . .”

In 2009, the FDA traced an outbreak of salmonella to peanut butter produced by a company that had also supplied CS with peanuts. The FDA notified CS and it promptly recalled many of its peanut products. Around the same time, the FDA tested some of CS’s alfalfa seeds (purchased from another supplier) and found they contained Salmonella. Publicity connected CS with the outbreak.

CS filed claims with HC under its policy to recover for the losses it suffered as a result of the peanut and alfalfa recalls. HC denied the first claim entirely and consented to pay only \$174,828.00 of the \$833,546.43 in losses CS claimed in connection with the second. CS sued for breach of contract. Regarding the first claim, the court sided with HC, holding that the policy only covered contamination that occurred during the manufacturing process. Since the peanuts would have already been contaminated when CS acquired them, CS’s losses were not covered.

In addressing the second claim, the court held that CS was not entitled to reimbursement for public relations consulting fees incurred as a result of the recall but denied summary judgment on the questions of CS’s right to reimbursement for the value of the recalled alfalfa seed and the amount of its reasonable legal fees and labor costs covered by the policy.

Chad Burchard is contracts manager at the U.S. Soybean Export Counsel.

THE 2012 FARM BILL: RESTRUCTURING LAND CONSERVATION INITIATIVES IN TODAY'S STRESSED ECONOMIC CLIMATE

Christopher W. Hayes

Overview

On June 21, 2012, the U.S. Senate passed its proposed version of the Agriculture Reform, Food and Jobs Act of 2012, also known as the Senate's 2012 Farm Bill. Agriculture Reform, Food and Jobs Act of 2012, S. 3240, 112th Cong. (2012). For months, the U.S. House of Representatives debated various versions of the bill in an effort to reach a compromise. Without any success in reaching an agreement, the 2008 Farm Bill ultimately expired on September 30, 2012. After months of failed negotiations, it was the imminent threat of rising dairy prices combined with an 11th hour compromise to avoid plunging over the "fiscal cliff" that was enough to force Congress to reach an agreement. Congress's efforts resulted in a one-year extension of select provisions of the Food, Conservation, and Energy Act of 2008, also known as the 2008 Farm Bill, while other provisions of the 2008 Farm Bill still have not been renewed or revised. Although no one is certain as to what changes lie ahead, it is reasonable to expect that any future amendments to the 2008 Farm Bill will impact various environmental issues, which were first addressed in the Senate's original 2012 version.

Both the Senate's versions and the House Agriculture Committee's version of the 2012 Farm Bill sought to amend a number of major programs administered by the U.S. Department of Agriculture (USDA), including initiatives addressing farm income support, food and nutrition, land conservation, trade promotion, rural development, research, forestry, energy, horticulture, and crop insurance. With an emphasis on reducing federal spending at a time when the federal deficit remains high, the biggest changes by the Senate's proposed version came by eliminating direct payments to farmers and bolstering reliance on crop insurance. However, the recent 2013 Farm Bill extension continues existing payments to large farming operations, while trimming funds for energy,

environmental, and organic farming programs. Although bipartisan discussions centered on controversial issues such as food stamp spending and the number of beneficiaries receiving financial assistance under the existing program, it was the Senate's original 2012 Farm Bill reform measures that touched on environmental and natural resource issues including land conservation, soil erosion and water quality concerns, wildlife and habitat management, and wetlands preservation. For the most part, these issues were not addressed in the recent Farm Bill extension.

With 2012 being a milestone year in the federal Farm Bill's five-year reauthorization cycle, the bill's conservation provisions have undergone rigorous debate in Congress regarding funding, program effectiveness, project implementation, and geographic emphasis. Since first being included in the 1985 Farm Bill, the Conservation title has played an important role in natural resources management. Currently, over 20 conservation initiatives and agricultural programs are administered by the USDA, and mostly by the Natural Resources Conservation Service (NRCS).

With respect to environmental conservation and land stewardship practices in the Senate's proposed 2012 Farm Bill version, the 23 related programs existing under the 2008 Farm Bill were slated to be reorganized and consolidated into four distinct program functions. These new functional categories included *Working Lands*, the *Conservation Reserve Program*, *Regional Partnerships*, and *Easements*. Although select provisions of the 2008 Farm Bill were recently extended, Congress continues to face challenges in hammering out the remaining details, many of which focus on the environment and resource conservation. Because the Senate's 2012 version will likely serve as the foundation for any future Farm Bill discussions by Congress, this article discusses the key components of the Senate's version of the 2012 Farm Bill, and highlights significant changes concerning environmental management.

I. Working Lands

Working Lands programs provide funding and technical expertise to farmers and ranchers to develop

conservation management initiatives and to implement natural resource protection practices on their agricultural lands. *Working Lands* programs encourage private land to continue to be used for agricultural and farming use, while implementing various conservation measures on the land to protect valuable natural resources. Under the Senate's proposed 2012 Farm Bill, *Working Lands* programs include the Environmental Quality Incentives Program, the Conservation Stewardship Program, and Conservation Innovation Grants.

A. Environmental Quality Incentives Program

One of the significant provisions of the Senate's 2012 Farm Bill is the continued viability of the Environmental Quality Incentives Program (EQIP). This voluntary program administered by the NRCS allows agricultural producers and ranchers to enter into multiyear contracts, which provide landowners and farmers with technical and financial assistance to develop and implement conservation management plans to promote a higher quality environment. In addition, EQIP provides guidance to agricultural producers to help navigate and comply with federal and state environmental regulations. Under the Senate's version of the 2012 Farm Bill, the existing Wildlife Habitat Incentives Program (WHIP) would be merged into EQIP. Consequently, the total allocated funding for all wildlife conservation programs would have been capped at five percent of the EQIP's total funding. However, the EQIP payment limitation for individual producer contracts would have increased from \$300,000 to \$450,000.

B. Conservation Stewardship Program

The Conservation Stewardship Program (CSP) serves as an assistance program that augments farmers' and ranchers' income by providing payments for increased operational performance and environmental benefits at working farms. This voluntary program encourages farmers to undertake conservation activities in order to manage and improve the soil, water, and other natural resources in connection with the agricultural lands. Under the CSP, the higher the operational performance obtained, the higher the payment received by the producer.

Under both the House and Senate versions, the 2012 Farm Bill would have reduced federal funding to the CSP by 10 to 17 percent (\$1.9 billion to 3.1 billion). Additionally, under the House provisions of the farm aid disaster bill, an additional \$289 million would have been diverted from the CSP to augment farm disaster relief. Many farmland conservation groups criticized the House's proposed supplemental disaster relief funding offset, arguing that reductions in the CSP program would only diminish the quality of farms' natural resources and conservation measures that make farms more resilient to the impacts of natural disasters, thus further exacerbating the impacts of unpredictable farming catastrophes.

C. Conservation Innovation Grants

Another voluntary mechanism included in the Senate's proposed 2012 Farm Bill was the Conservation Innovation Grant (CIG). These competitive grants were intended to encourage environmental conservation and natural resource protection by awarding federal funds to public and private entities for the development of innovative conservation measures related to natural resource protection. For example, in fiscal year 2013, the NRCS was to make available CIG funds through the creation of an Adaptation to Drought Funding category. *See* U.S. DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICE, CONSERVATION INNOVATION GRANTS FISCAL YEAR (FY) 2013 ADAPTATION TO DROUGHT ANNOUNCEMENT FOR PROGRAM FUNDING, CATALOG OF FEDERAL DOMESTIC ASSISTANCE (CFDA) NUMBER 10.912. In general, the CIG would have enabled the award of federal funds to public and private entities for designing innovative approaches to solve natural resources problems.

The Senate's version of the 2012 Farm Bill highlights two significant changes in the CIG. First, the Senate's version eliminates an existing carve out for conservation initiatives that address air quality associated with farming operations. Second, the Senate's version requires the USDA to report CIG project results to Congress. This includes routine reporting obligations on incorporating project findings into the USDA's ongoing conservation efforts.

II. Conservation Reserve Program

The Conservation Reserve Program (CRP) is another voluntary program that may be continued in the future. The CRP is designed to aid farmers in strategically utilizing environmentally sensitive lands to achieve conservation benefits. Administered by the USDA's Farm Services Agency (FSA), the CRP is considered to be one of the largest land retirement programs that reimburses the property owner for removing land from agricultural production for up to ten years. Farmers enrolled in the CRP initiative will grow sustainable resource-conserving crops to both reduce soil erosion and improve water quality in environmentally sensitive areas. In return, participating farmers are provided with rental payments and cost-share assistance through federal contracts.

The Senate's version of the 2012 Farm Bill continued the ongoing CRP, with emphasis on removing erodible lands from agricultural production so as to enhance water quality and protect soil. However, through a multi-year step-down approach, the CRP may reduce the existing cap for participating lands from 32 million acres to 25 million acres. Over the next few years, as existing contracts expire, producers may re-enroll in the CRP. However, during the re-enrollment process, more highly erodible and sensitive areas will receive priority during the evaluation process. In conjunction with the CRP, the proposed 2012 Farm Bill also retained the Transition Incentives Program (TIP), which was also included in the 2008 Farm Bill. This program allows new farmers and ranchers to acquire agricultural lands from retiring farmers in order to continue crop production, but allows the retiring farmers to continue to receive CRP payments in the final two years of their contracts.

III. Regional Partnerships

Under the Senate's proposed 2012 Farm Bill, several existing programs dealing with region-specific conservation efforts would be consolidated into the Regional Conservation Partnership Program (RCPP). Previous programs that would likely comprise the RCPP include the Agriculture Water Enhancement Program, the Chesapeake Bay Program, the Great Lakes Program, and the Cooperative Conservation

Partnership Initiative. Like the CIG function, RCPP projects would be selected through a competitive process with an emphasis on improving soil quality, water quality, and wildlife habitat. The proposed RCPP would provide special five-year conservation funding to farmers and ranchers who implement erosion control measures and nutrient management activities in critical conservation areas. In cooperation with non-agricultural entities such as municipal storm water agencies, farmers and ranchers could choose to enter into partnership agreements to implement these conservation measures. The farmers would have the option of receiving up to a five-year funding commitment. In addition, the partnering municipal storm water agencies could receive funding from the USDA, along with the benefit of working with upstream producers to reduce nutrient loading, an increasing problem that often leads to costly treatment upgrades at municipal plants.

IV. Easements

Under the existing 2008 Farm Bill, several conservation easement programs existed. Pursuant to the Senate's proposed 2012 Farm Bill, these programs would have been streamlined into a single program with the goal of long-term land protection. The new Agricultural Conservation Easement Program would focus on two initiatives: the first to address agricultural land easements, while the second to address wetlands easements. The Agricultural Land Easements portion of the program would focus on preventing development within agricultural corridors and grazing lands. Similarly, the Wetland Easements portion of the program would focus on protecting, restoring, and enhancing wetlands and aquatic wildlife habitat.

Conclusion

As history has taught us, it is not uncommon for existing Farm Bills to be extended, nor is it uncommon for new Farm Bills to be passed well after their previous versions have expired. Although select provisions of the expired 2008 Farm Bill were agreed upon in Washington, it is apparent that the Senate's 2012 Farm Bill version will be looked to as a starting point in 2013 in an effort to further streamline and consolidate many existing programs, from nutrition to

financial assistance, to research, to conservation and natural resources protection. With President Obama entering his second presidential administration, and the nation becoming more and more concerned about a growing federal deficit, the question remains as to whether environmental considerations will continue to be an integral part of Farm Bill legislation as they have been in the past.

Christopher Hayes is an environmental attorney at Waller Lansden Dortch & Davis in Nashville, Tennessee.

Call for Nominations



ABA Section of Environment,
Energy, and Resources

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THE OBAMA ADMINISTRATION AND EPA ENFORCEMENT: A LOOK BACK, A LOOK FORWARD

Deanne L. Miller and Roger K. Smith

I. Introduction

In 2009, President Obama and his Administrator of the Environmental Protection Agency (EPA), Lisa Jackson, entered office rather famously pledging that under their watch “the environmental cop will be back on the beat.” Three years later, have President Obama and Administrator Jackson lived up to their pledge? How different has the Obama EPA been with regard to enforcement from its predecessor? These are the questions that this article seeks to answer.

II. The Environmental Protection Agency and the Obama Administration

A. Enforcement: Looking Back

During the Bush administration, the EPA’s budget had hovered at approximately \$8 billion dollars per year. ROBERT ESWORDY ET AL., CONG. RES. SERV., R41149, ENVIRONMENTAL PROTECTION AGENCY: APPROPRIATIONS FOR FY 2011, at 30–31 (2010), *available at* <http://www.nationalaglawcenter.org/assets/crs/R41149.pdf>. In 2009, the Obama administration added to the already budgeted amount of \$7 billion an additional \$7 billion as part of the “economic stimulus package.” For fiscal year (FY) 2010, the Obama administration requested \$10.29 billion for the EPA, \$586 million of which was set aside for the EPA’s Enforcement and Compliance Assurance program (an increase of \$24 million over the FY 2009 request). For FY 2011, the Obama administration reduced the EPA’s budget slightly, bringing it down from \$10.29 billion to \$10.02 billion. One area that did not see a decrease in funding for FY 2011 was Enforcement and Compliance; its budget was increased from \$586 million to \$619 million. These figures are taken from the “Compliance and Environmental Stewardship” line item under the “Environmental Programs and Management” account. *See* OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2010 AND FISCAL YEAR 2011, *available at* <http://www.ombr.gov>

www.gpo.gov/fdsys/browse/collectionGPO.action?collectionCode=BUDGET.

For FY 2012, the Obama administration proposed a sharp decrease in spending for the EPA, reducing overall funding to \$8.97 billion. The House Republicans, however, sought even deeper cuts in the EPA's funding for FY 2012, proposing a budget of just \$7.1 billion in H.R. 2584. John McArdle, *Jackson Summons Top Aides for Budget Pow-Wow as GOP Sharpens Knife*, N.Y. TIMES (July 19, 2011), <http://www.nytimes.com/gwire/2011/07/19/19greenwire-jackson-summons-top-aides-for-budget-pow-wow-as-1668.html>. Funding for enforcement, however, was slated to increase by \$27.5 million. *Id.*

1. How Has All This New Money Been Spent?

On January 14, 2009, in a prepared statement for her confirmation hearing, Administrator Jackson identified “five key objectives: reducing greenhouse gas emissions; reducing other air pollutants; addressing toxic chemicals; cleaning up hazardous-waste sites; and protecting water.” A little over a year later, Catherine McCabe, one of the EPA's enforcement administrators, put things a little more starkly to an audience of lawyers. According to Ms. McCabe, the EPA's primary “enforcement goal” is to “[a]ggressively go after pollution problems that make a difference in communities”; this goal is to be accomplished by “[v]igorous civil and criminal enforcement that targets the most serious water, air and chemical hazards.” Catherine McCabe, Principal Deputy Assistant Administrator of the EPA Office of Enforcement and Compliance Assurance, American Bar Association 39th Annual Conference of Environmental Law: EPA Enforcement Goals (March 18–20, 2010) (emphasis added).

2. How Well Has This Money Been Spent?

When the first 18 months of the Obama administration are compared with the first 18 months of President George W. Bush's first term, the EPA has been significantly more dogged or, to use Ms. McCabe's term, “vigorous” in its enforcement efforts. For example, using only case statistics as a benchmark, the Obama administration opened and closed more cases

brought under the Clean Air Act. In its first 18 months, the Obama administration opened 795 cases and closed 99 percent of them, while the Bush administration opened 658 and closed only 86 percent of them. Enforcement & Compliance History Online, U.S. Environmental Protection Agency, <http://www.epa.gov/echo/index.html>. Similarly, with regard to cases brought under the Clean Water Act, while both administrations opened approximately 1300 cases each, the Obama administration was more successful in completing cases, closing 95 percent of its cases while the Bush administration closed only 87 percent of its cases. *Id.*

The most dramatic difference is found with regard to waste management. In its first 18 months, the Obama EPA opened 709 cases under the Resource Conservation and Recovery Act (RCRA), a significantly higher number than the 473 cases opened under the Bush administration. *Id.* The Obama administration also completed 96 percent of those cases, while the Bush administration completed only 78 percent of its cases. *Id.*

Moreover, the EPA under the Obama administration took less time to complete actions under the Clean Air Act, the Clean Water Act, and RCRA. On average, it took the Obama administration between five and nine days to complete a case, while the Bush administration took between 26 and 37 days to complete a case. *Id.*

Not only is the EPA under the Obama administration opening more cases, closing more cases, and closing them more quickly, it is also issuing penalties for serious violations at a generally higher rate than in the past. However, the size of the penalties has tended to be smaller under the Obama administration than under the Bush administration. For example, in its first 18 months, the Obama administration levied penalties in 65 percent of the cases brought under the Clean Air Act. *Id.*; see also “The Obama Approach to Public Protection: Enforcement,” OMB WATCH 24–29 (2010), <http://www.ombwatch.org/files/regs/obamamidtermenforcementreport.pdf>. In comparison, with the Bush administration's first 18 months, penalties were levied in only 30 percent of the cases brought under the Clean Air Act. It should be noted, however,

that the average penalty during the first 18 months of the Bush administration was higher (\$28,666) than the average penalty during the same period for the Obama administration (\$15,688). *Id.*

3. Change or Continuity?

While the Obama administration might be more aggressive than its predecessor when the comparison is between the first years of each administration, a slightly different picture emerges when one compares the last two years of the Bush administration with the first two years of the Obama administration. During the last two years of the Bush administration, 372 cases were completed and, adjusting inflation to FY 2009 dollars, \$131.6 million in penalties were levied. OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL ENFORCEMENT TRENDS (NETS) REPORT, F-1 (2011), available at <http://www.epa.gov/compliance/resources/reports/nets/nets.pdf>. During the first two years of the Obama administration, 401 cases were concluded and, again adjusting to FY 2009 dollars, \$163.1 million in penalties were levied. These numbers suggest that the real difference between the Obama

administration and its predecessor is more one of degree and emphasis, than any kind of revolutionary change. Indeed, when one looks behind these total numbers to the programmatic subtotals, one is again struck by the similarities rather than the differences between the Bush EPA in its last two years and the Obama EPA in its first two years.

Numbers, however, don't tell the whole story. Indeed, the real story about the Obama administration and the EPA may be found in a whole new field of environmental regulation and enforcement—greenhouse gases (GHG).

4. GHG: A New Enforcement Arena?

Mobile Sources of GHGs

In April 2009, just four months after President Obama took office, the EPA issued a proposed finding that six specific GHGs may endanger public health or welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886 (proposed Apr. 24, 2009).

Fiscal Year	Civil Judicial Penalties (in \$M Inflation adjusted to FY 2010 Dollars)	Number of Civil Judicial Conclusions
2007 (Bush)		
CAA	\$7.9	30
CERCLA	\$0.4	106
CWA	\$6.6	28
RCRA	\$5.2	6
2008 (Bush)		
CAA	\$8.5	25
CERCLA	\$0.8	119
CWA	\$6.0	30
RCRA	\$10.6	5
2009 (Obama)		
CAA	\$6.1	38
CERCLA	\$0.5	112
CWA	\$6.9	30
RCRA	\$7.7	8
2010 (Obama)		
CAA	\$6.1	39
CERCLA	\$0.7	100
CWA	\$6.3	27
RCRA	\$7.6	12

Id. at E-7b, F-3d. In short, a case can be made that there is a fair amount of continuity between the later years of the Bush administration and the early years of the Obama administration.

The proposed “endangerment finding” of April 2009 was followed in a matter of weeks by an announcement that the Obama administration had reached agreement with nine auto manufacturers and with the state of California (which had developed its own GHG emission standards for motor vehicles), as well as with other interested parties, regarding the major outlines of a joint greenhouse gas/fuel economy rulemaking. As announced by the President on May 19, 2009, the EPA and the National Highway Traffic Safety Administration (which administers fuel economy standards for cars and trucks) would integrate corporate average fuel economy (CAFE) standards for new cars and light trucks (collectively known as “light-duty motor vehicles”) with national greenhouse gas emission standards to be issued by EPA. The objective of the joint standards is to achieve GHG reduction levels similar to those adopted by California, which harmonized its own standards with those of the EPA as part of the agreement. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49,454, 49,460 (Sept. 28, 2009) (to be codified at 49 C.F.R. pts. 531, 533, 537, 538).

The proposed endangerment finding was subsequently finalized in December 2009. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). Although generally referred to as simply “the endangerment finding,” the EPA Administrator actually finalized two separate findings: a finding that six greenhouse gases endanger public health and welfare, and a separate “cause or contribute” finding that the combined emissions of greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution that endangers public health and welfare. The endangerment finding has been challenged by approximately 80 other parties, including the Chamber of Commerce. *See Coalition for Responsible Regulation, et al. v. EPA*, Case No. 09-1322 (D.C. Cir.). In April 2010, one year after the endangerment finding was first proposed, the EPA used its existing authority under Section 202 of the Clean Air Act to set the first national GHG emission standards, the standards which will control emissions from new light-duty motor vehicles beginning in model year 2012.

“EPA and NHTSA Finalize Historic National Program to Reduce Greenhouse Gases and Improve Fuel Economy for Cars and Trucks, EPA Office of Transportation and Air Quality” (2010), *available at* <http://www.epa.gov/otaq/climate/regulations/420f10014.pdf>; *see also* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

Emboldened by the endangerment finding, certain private organizations have sued the EPA in an attempt to compel it to issue endangerment findings for other mobile sources of GHGs. For example, the Center for Biological Diversity, Center for Food Safety, Friends of the Earth, International Center for Technology Assessment, and Oceana sued EPA in 2010 claiming the agency had failed to respond to their petitions for making an endangerment finding for GHG emissions from aircraft, marine vessels, and other non-road engines. On July 5, 2011, the District Court for the District of Columbia granted, in part, the EPA’s motion to dismiss. *Center for Biological Diversity v. EPA*, 794 F. Supp. 2d 151 (D.D.C. 2011). Judge Henry H. Kennedy Jr. dismissed the portions of the lawsuit involving the endangerment findings for marine vessels and other non-road engines, citing EPA discretion. However, Judge Kennedy did not dismiss that part of the lawsuit dealing with aircraft greenhouse emissions. In its ruling, the court stated that the endangerment finding for aircraft emissions is a “compulsory” and “mandatory” step under Section 231 of the Clean Air Act, 42 U.S.C. § 7401 et seq. *Id.* at 160–61.

a. Stationary Sources of GHGs

The new GHG regulations affect stationary sources of air pollution in two different ways. First, effective January 2, 2011, new or modified major stationary sources will have to undergo new source review (NSR) with respect to their GHGs in addition to any other pollutants subject to regulation under the Clean Air Act that are emitted by the source. This review will require affected sources to install Best Available Control Technology (BACT) to address their GHG emissions. Second, all major sources of GHGs (existing and new) will have to obtain permits under Title V of the Clean Air Act (or have existing permits modified to include their GHG requirements). In

addition, because stationary sources, particularly coal-fired power plants, are the largest sources of greenhouse gas emissions, the EPA is likely to find itself compelled to issue endangerment findings under other parts of the act, resulting in new source performance standards for stationary sources or emission standards under other sections of the act. *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010); *see also* FINAL RULE: PREVENTION OF SIGNIFICANT DETERIORATION AND TITLE V GREENHOUSE GAS TAILORING RULE, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/nsr/documents/20100413fs.pdf>.

b. Procedural Setbacks and Hurdles to More GHC Regulation?

In September 2011, however, the Obama administration's effort to regulate GHGs was thrown into doubt when the EPA's Inspector General (IG) issued a report calling into question the scientific assessment upon which the endangerment finding was based. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF INSPECTOR GENERAL, 11-P-0702, PROCEDURAL REVIEW OF EPA'S GREENHOUSE GASES ENDANGERMENT FINDING DATA QUALITY PROCESSES (2011), *available at* <http://www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf>. According to the IG report, the EPA failed to follow the Office of Management and Budget's (OMB) peer review procedures for a "highly influential scientific assessment," which is defined as an assessment that could have an impact of more than \$500 million in one year and is "novel, controversial, or precedent setting." In particular, the document was reviewed by a 12-member panel that included an EPA employee, violating rules on neutrality. The report also found that the EPA did not make the review results public, as required, or certify whether it complied with internal or OMB requirements. In a statement accompanying the report, the IG emphasized that his office "did not assess whether the scientific information and data supported the endangerment finding."

Although the basis for the Obama administration's activism with regarding to GHGs has been called somewhat into question by the report of the EPA's IG, it must be remembered that the catalyst for this

activism pre-dates the Obama administration and rests with a 2007 decision by the U.S. Supreme Court, *Massachusetts v. EPA*, 549 U.S. 497 (2007).

In 1998, during the Clinton administration, EPA General Counsel Jonathan Cannon concluded in a memorandum to the agency's Administrator that greenhouse gases were air pollutants within the Clean Air Act's definition of the term, and therefore could be regulated under the Clean Air Act. On October 20, 1999, relying on the Cannon memorandum as well as the statute itself, a group of 19 organizations petitioned EPA to regulate greenhouse gas emissions from new motor vehicles under Section 202 of the Clean Air Act. Section 202 gives the EPA administrator broad authority to set "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles" if in her judgment they cause or contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare."

On August 28, 2003, the EPA under the Bush administration denied the petition on the basis of a new general counsel memorandum dated the same day, in which it concluded that the Clean Air Act does not grant the EPA authority to regulate carbon dioxide and other GHG emissions based on their climate change impacts. The denial was challenged by Massachusetts, 11 other states, and various other petitioners in a case that ultimately reached the Supreme Court. In an April 2, 2007, decision, the Court found by a 5-4 vote that the EPA does have authority to regulate greenhouse gas emissions, since the emissions are clearly air pollutants under the Clean Air Act's definition of that term. The Court's majority concluded that EPA must, therefore, decide whether emissions of these pollutants from new motor vehicles contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. When it makes such a finding of endangerment, the act requires the agency to establish standards for emissions of the pollutants. In the nearly two years following the Court's decision, the Bush administration's EPA did not respond to the original petition or make a finding regarding endangerment, thereby setting the stage for the Obama administration's "endangerment finding" in April 2009.

In the wake of *Massachusetts v. EPA*, a number of different groups have commenced lawsuits seeking to use the common law of public nuisance to compel companies to reduce their GHG emissions. In *State of Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009), the plaintiffs—a group consisting of several states and the city of New York—alleged that GHG emissions from power plants owned by the defendant companies pose a threat to the general public and therefore constitute a public nuisance. The suit sought to hold the defendants jointly and severally liable for contributing to a public nuisance and requested an injunction requiring each of the defendants to abate the nuisance by instituting a declining emission cap. The district court granted defendants’ motion to dismiss the case, concluding that the complaint raised nonjusticiable political questions that were beyond the limits of the court’s jurisdiction. *State of Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005). The Second Circuit reversed and remanded the case back to the district court after finding that the facts did not differ significantly from other complex public nuisance cases decided in the past and that judicial resolution would not contradict prior decisions made by the other branches of government. *American Electric Power Co.*, 582 F.3d at 392–93. Defendants appealed to the U.S. Supreme Court, which granted a writ of certiorari in December 2010 in *American Electric Power v. Connecticut*, 131 S. Ct. 813 (2010).

A few months after the Second Circuit’s decision in *Connecticut v. American Electric*, the Fifth Circuit reached a similar conclusion in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh’g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *on reh’g en banc*, 607 F.3d 1049 (5th Cir. 2010). The plaintiffs in *Comer* filed a class action against a group of energy, fossil fuel, and chemical companies alleging that GHG emissions from their facilities contributed to global warming which, in turn, caused a rise in sea levels that contributed to the damage to their property caused by Hurricane Katrina. The district court dismissed the lawsuit after concluding that the Mississippians had no standing to bring the lawsuit and that the suit posed nonjusticiable political questions.

On appeal, the Fifth Circuit concluded that plaintiffs’ claims easily satisfied Mississippi’s liberal standing requirements. The court went on to find that the public nuisance, trespass, and negligence claims raised by plaintiffs did not present any specific question that was exclusively committed by law to the legislative or executive branch. *Comer*, 585 F.3d at 864–68. According to the Court:

There is no federal constitutional or statutory provision making such a commitment, and the defendants do not point to any provision that has that effect. The most that the defendants legitimately could argue is that in the future Congress may enact laws, or federal agencies may adopt regulations, so as to comprehensively govern greenhouse gas emissions and that such laws or regulations might preempt certain aspects of state common law tort claims. *Id.* at 870.

In so holding, the *Comer* court effectively authorized climate change-related nuisance and trespass claims against major GHG emitters by private property owners seeking damages. Although the Fifth Circuit granted a rehearing by the full court, new circumstances arose that caused the disqualification and recusal of one of nine judges on the panel. As a result, the court could not assemble the necessary quorum, leading the appellate court to dismiss the appeal and let stand the district court’s decision dismissing the action on standing and nonjusticiable political question grounds. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).

A California district court faced with similar allegations that defendants’ GHG emissions gave rise to a cause of action for public nuisance reached a similar conclusion as the *Comer* district court in a pair of recent cases. In the first case, the state of California sued several leading automakers in federal court, alleging that carbon dioxide emissions from vehicles manufactured by the defendants created a public nuisance in violation of federal common law and the California Civil Code relating to public nuisance. The court in *California v. General Motors Corp.*, Case No. 06-5755, 2007 WL 2726871 (N.D. Cal. 2007) dismissed the case after concluding that it raised a nonjusticiable political question.

More recently, the same California district court dismissed a cause of action brought by an Eskimo village and city against various oil, energy, and utility companies for federal common law public nuisance based on allegations that GHG emissions contributed to global warming which caused the melting of arctic sea ice that protected the village from erosion. In *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), the District Court for the Northern District of California reviewed the various factors to be considered in determining whether a case involves a nonjusticiable political question and concluded that while the issue of whether emissions of GHGs from defendants' activities contributed to global warming was not relegated exclusively to the political branches of government, the court lacked the judicially discoverable and manageable standards needed to guide it in reaching its decision, effectively rejecting the Second Circuit's decision in *Connecticut v. American Electric Power Co.*, discussed above. The court went on to find that resolving the case would require it to make the type of initial policy determinations that are better suited to the legislature. See also *Center for Biological Diversity v. Department of the Interior*, 563 F.3d 466, 476–79 (D.C. Cir. 2009) (finding procedural standing for a citizen group's climate change claims, which challenged a government leasing plan for offshore oil and gas development, but limiting, in what may be dicta, the finding of standing in *Massachusetts v. EPA* to only those instances where a sovereign entity sues to protect its own particular harmed interests and not to protect a generalized harm that is widely shared).

B. Enforcement: Looking Ahead

On September 30, 2010, the EPA released its fiscal year (FY) 2011–2015 strategic plan. EPA Strategic Plan for FY 2011–2015, available at <http://www.epa.gov/planandbudget/strategicplan.html>. Under the Government Performance and Results Act (GPRA) (P.L. 103-62), federal agencies are held accountable for using resources wisely and achieving program results. Specifically, the GPRA requires agencies to develop strategic plans that include a mission statement and establish long-term goals, objectives, and strategic measures over a five-year time horizon. The Plan identifies five strategic goals to guide the agency's work over the course of the next five years: (1)

“Taking Action on Climate Change and Improving Air Quality”; (2) “Protecting America’s Waters”; (3) “Cleaning Up Communities and Advancing Sustainable Development”; (4) “Ensuring the Safety of Chemicals and Preventing Pollution”; and (5) “Enforcing Environmental Laws.”

When the Plan is compared with Administrator Jackson's 2009 written statement for her confirmation hearing, the most striking difference is the elevation of enforcement to one of the agency's five top priorities. An even more striking contrast may be found by comparing the EPA's strategic plan for FY 2006–2011 with its successor. In the plan for FY 2006–2011, the goal was not “enforcement” per se, but rather encouraging “compliance and environmental stewardship” through a combination of enforcement and the promotion of “partnerships” with the public, private actors, state and local governments, and tribes. See EPA Strategic Plan for FY 2006–2011, at 130–45 (2006), available at <http://nepis.epa.gov/Adobe/PDF/P1001IPK.PDF>.

Of particular note in the strategic plan for FY 2011–2015 is an emphasis on criminal enforcement as a means of “enhancing strategic deterrence.” Strategic Plan for FY 2011–2015, at 55. Specifically, by 2015, the EPA aims to “increase the percentage of criminal cases having the most significant health, environmental, and deterrence impacts to 50 percent (FY 2010 baseline: 36 percent)” and to “maintain 75 percent of criminal cases with an individual defendant.” *Id.* The logic behind this strategy appears to be that, because prison time cannot be passed along to consumers as a cost of doing business, criminal cases are a strong deterrent to noncompliance with environmental protection laws.

If the EPA is in fact committed to increasing the number of criminal cases, this would represent a rather significant change. For example, in FY 2009, 387 criminal cases were opened—a 21 percent increase over the number of criminal cases opened in FY 2008. In FY 2010, the EPA opened slightly fewer criminal cases than in the previous fiscal year (346), but 289 defendants were charged, the most in the last five years. FISCAL YEAR 2010 ENFORCEMENT & COMPLIANCE ANNUAL RESULTS, U.S. ENVIRONMENTAL

PROTECTION AGENCY, at 6 (2010), <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2010/fy2010results.pdf>.

Although fewer criminal cases were opened in FY 2010, the EPA appears to be committed to increasing that number over the course of the next five years. Less than a week before the strategic plan for FY 2011–2015 was issued, Cynthia Giles, the agency’s assistant administrator for enforcement and compliance, announced that the EPA had submitted a budget request for 200 special agents for its Criminal Investigation Division (CID). The 1990 Pollution Prosecution Act (P.L. 101-593) requires the CID to hire and maintain 200 criminal investigators. However, according to the *New York Times*, the EPA has not met this staffing requirement since 2003. See Gabriel Nelson, *Criminal Enforcement Roster Will Swell Next Week, EPA Division Chief Vows*, N.Y. TIMES (Sept. 24, 2010), <http://www.nytimes.com/gwire/2010/09/24/24greenwire-criminal-enforcement-roster-will-swell-next-we-51330.html>.

Although the EPA’s strategic plan for FY 2011–2015 was written before voters went to the polls in the 2010 mid-term elections, it was released at a time when the likely results of that election were becoming apparent. As a result, it seems that, at least for the short run, we can expect to see more of the same with regard to

both the opening and closing of cases—administrative, civil, and criminal. This short-run trend, however, is nothing new, but rather the extension of a much longer trend.

The combination of a slightly more assertive EPA under the Obama administration and the surprisingly mixed and sometimes troubling results from various courts in the aftermath of *Massachusetts v. EPA* strongly suggests that GHG regulation and enforcement litigation will proceed, if at all, in fits and starts. In short, it appears that the more things change, the more they stay the same. The flip side of enforcement actions brought by the EPA is actions brought against the agency. Here, too, recent studies have found “no discernible trend” over a 16-year period between 1995 and 2010 in environmental cases brought against the EPA. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME (2011), available at <http://www.gao.gov/new.items/d11650.pdf>.

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Enforcement Actions	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Administrative Compliance Orders	1,807	1,916	1,438	1,247	1,390	1,588	1,302
Final Administrative Penalty Orders	2,248	2,273	4,624	2,256	2,084	1,916	1,530
Civil Cases Referred to DoJ	268	259	286	278	280	277	233
Civil Actions Concluded	176	157	173	180	192	201	200
Criminal	422	372	305	340	319	387	346

OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL ENFORCEMENT TRENDS (NETS) REPORT (2010), available at <http://www.epa.gov/compliance/data/results/nets.html>; and FISCAL YEAR 2010 ENFORCEMENT & COMPLIANCE ANNUAL RESULTS, U.S. ENVIRONMENTAL PROTECTION AGENCY, at 6 (2010) <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2010/fy2010results.pdf>.

RAW MILK: THE CDC'S CALL FOR REGULATION AND CURRENT STATE STATUTES

Katelyn Atwood

I. CDC's Call for Regulation

Raw milk is a hot topic in state legislatures this year. In July, the Centers for Disease Control and Prevention (CDC) sent a letter to state legislatures across the country asking them to consider strengthening raw milk regulations. *See* Gretchen Goetz, *CDC Asks States to Consider Further Raw Milk Regulation* (July 19, 2012), <http://www.foodsafetynews.com/2012/07/cdc-asks-states-to-consider-further-raw-milk-regulation/>. The CDC's call for tighter regulation is not without cause; raw dairy contains *E. coli*, salmonella, and campylobacter, bacteria that can cause severe infections and are especially dangerous to children and the elderly. *Id.*

The CDC letter comes in the wake of a study published on the CDC's Web site analyzing illnesses associated with dairy products. *See* Adam J. Langer et al., *Nonpasteurized Dairy Products, Disease Outbreaks, and State Laws—United States, 1993–2006*, 18 *EMERGING INFECTIOUS DISEASES* 3, 385–91 (Mar. 2012), available at <http://www.cdc.gov/foodsafety/rawmilk/nonpasteurized-outbreaks.html>. From 1993 to 2006, scientists found that 1571 cases of illness, 202 hospitalizations, and two deaths were linked to nonpasteurized or raw dairy products. *Id.* at 385. Of the 121 total disease outbreaks caused by pasteurized and nonpasteurized dairy, 73 outbreaks (60%) were linked to raw dairy. *Id.* at 386. After excluding two outbreaks because they occurred in “multiple states with differing laws,” 55 of 71 outbreaks (77%) linked to raw dairy occurred in states allowing raw milk sales. *Id.* at 387.

In light of these data, scientists concluded that labeling and warning signs were not enough: “[s]tates that restricted sale of nonpasteurized products had fewer outbreaks and illnesses; stronger restrictions and enforcement should be considered.” *Id.* The study also acknowledges that “[p]asteurization is the most reliable and feasible way to render dairy products safe for consumption.” *Id.* at 385.

The rise in the popularity of raw milk carries with it significant litigation potential; individual consumers may seek litigation recourse from negative health consequences as a result of inadequately regulated raw milk. Implementation of a state's raw milk laws requires manpower and litigation support for enforcement of permitting operations. Within this tumultuous landscape, state legislatures have chosen to regulate raw dairy in a variety of ways. This article will first provide an overview of pending and existing state raw milk legislation, and then analyze whether this commodity should be regulated. I recommend that a permitting process should be implemented at the state level, as well as conspicuous labels and signs at point of sale for raw dairy products. Further, cow and goat shares, or private individuals consenting to share an animal's milk, add a touch of self-governance that works well in combination with permits. Therefore, licensing and oversight, not restriction, are the best course here.

II. Pending and Existing Raw Milk Legislation

A. Existing Legislation

Arizona: Statutes allow for retail sale of raw milk if clearly labeled and offered separately from pasteurized milk. *Ariz. Rev. Stat. § 3-606.*

Arkansas: Only raw goats' milk may be sold directly from producer to consumer. *Ark. Code Ann. § 20-59-248.*

California: *Cal. Food & Agric. Code § 35891* mandates that cows and goats producing raw milk for sale shall be inspected at least once in two months, and dairies must score at least a 90 percent on a “dairy farm scorecard.” California regulations require that raw milk must have a warning sign on display, or if the milk is sold directly from the producer, the milk may have a label attached to the bottle. *Cal. Code Regs. tit. 17, § 11380.*

Connecticut: Only registered producers may sell raw milk, but raw dairy may be produced for personal consumption without registration. *C.G.S.A. § 22-129.* Food service establishments may only serve pasteurized milk. *C.G.S.A. § 22-193.*

Idaho: Permits “cow share” programs where consumers can buy into a cow and receive their milk directly from a producer. Idaho ADC 02.04.13.050. However, retail raw milk sellers must obtain a permit and conform to bacterial limits. ID ADC 02.04.13.060.

Indiana: HB 1129, passed on June 7, 2012, states that raw milk is to be labeled as “not fit for human consumption.” However, the law requires the Indiana State Board for Animal Health (the Board) to “conduct a study of the issue of farmers selling unpasteurized milk to consumers.” The study was completed on November 1, 2012, and the report will be available on the Board’s Web site after December 1, 2012. *See* <http://www.in.gov/boah/index.htm>. HB 1129 requires the Board to present its findings to the governor, and to the legislative council in electronic format, and must make copies available to the public. *See* <http://www.in.gov/legislative/bills/2012/EH/EH1129.1.html>. The Board did conduct a virtual public hearing regarding the legalization of raw milk, and the public was allowed to submit comments until September 1, 2012. *See* <http://www.in.gov/boah/index.htm>.

Kansas: Allows for permit-based sales as long as the sale is not advertised other than by a sign at the farm, and milk must be labeled as raw. Kan. Stat. Ann. §§ 65-771(w), 65-778.

Massachusetts: Mass. Gen. Laws 94 § 13.330 allows for on-farm sales only. Containers must be labeled, and milk must be sold within 5 days. 330 CMR 27.08.

Nevada: Nev. Rev. Stat. § 584.207-08 mandates the sale of only “certified” raw milk. County raw milk commissions determine certification standards prior to raw milk sales. Nev. Admin. Code § 584.2021, .2031.

New Hampshire: HB 1402 allows farms with less than “a maximum annual gross sales of \$10,000” to sell raw milk without a license. *See* <http://www.nhliberty.org/bills/view/2012/HB1402>.

New York: All milk producers must obtain a permit, and may only sell directly to consumers. Producers

must post a warning sign indicating that the milk is not subject to pasteurization. N.Y. Agric. & Mkts. § 71-n, 1 NYCRR pt. 2.3.

Maine: 7 Me. Rev. Stat. Ann. § 2902-B allows producers to sell raw milk directly to an “end use consumer” without a license so long as the product is clearly labeled stating the product is “not pasteurized” and is “produced and packaged on a farm that is not licensed or inspected.” Farms are required to post a sign at the point of sale warning that milk is not pasteurized and not recommended for persons “with lowered resistance to disease[.]” *Id.*

Mississippi: Only farms with fewer than 9 goats can sell raw milk from the point of production, and sales may not be advertised. Miss. Code Ann. § 75-31-65.

Oklahoma: Only producer to consumer sales are allowed. Okla. Stat. tit. 2, § 7-406.

Oregon: Farms with fewer than 3 cows, 9 sheep, or 9 goats may sell raw milk directly from the farm only if the sale is not advertised. Or. Rev. Stat. § 621.012. The retail sale of raw milk must be appropriately labeled. Or. Rev. Stat. §§ 621.116, 621.117.

South Dakota: Farms must obtain a permit and label the product as “raw milk.” S.D. Codified Laws § 39-6-3.

Tennessee: Tenn. Code Ann. § 53-3-119 allows for sharing agreements of “any hoofed mammal” for the owner’s personal consumption.

Texas: Raw milk may be sold directly to the consumer at the point of production with a permit. 25 Tex. Admin. Code § 217.32.

Utah: Utah Code Ann. 4-3-14(2) provides for permit-based raw milk sales from the farm directly to consumers and not for resale. Farmers must abide by building, sanitary, testing, and labeling requirements. Utah Admin. Code r. 70-330-3-7.

Vermont: 6 Vt. Stat. Ann. § 2775-78 allows the sale of raw milk directly from a farm to consumer, and the

farm can only sell 40 gallons per day. Raw milk must be labeled. S 105, known as the “Dairy Class” law, allows for classes on how to safely make yogurt, cheese, and butter from raw milk. *See* <http://www.leg.state.vt.us/docs/2012/BILLS/INTRO/S-105.pdf>.

Washington: State statutes permit cow shares if they obtain a permit from the Washington State Department of Agriculture. *See* Washington State Department of Agriculture, *The Truth About Raw Milk Sales* (Aug. 2006), www.agr.wa.gov/FoodAnimal/Dairy/docs/rawmilktruth.pdf.

B. Pending Regulation

New Jersey: AB 518 was introduced in January, and would establish a raw-milk permitting system. Permits would allow producers to sell only directly to consumers, and require sellers to affix a label and post a sign denoting raw milk at the point of sale. *See* <http://www.njleg.state.nj.us/bills/BillView.asp>.

Wisconsin: Recently defeated SB 108 would have allowed the sale of raw dairy products by certain dairy farms. Wisconsin state prosecutors have recently charged Loganville dairy farmer Vernon Hershberger with operating a retail food establishment without a license and operating a dairy farm as a milk producer without a license for selling milk to members of a private buying club. *See* FTCLDF to Represent Hershberger (Aug. 28, 2012), http://www.farmtoconsumer.org/news_wp/?p=1273. Hershberger’s trial is set for five days in Sauk County Circuit Court in January 2013. *Id.* This trial will be a litmus test for how other dairy-rich Midwestern states will regulate raw milk and prosecute violations of those regulations.

Washington: Currently in a holding pattern in the Agriculture & Rural Economic Development Committee, SB 5648 would allow the sale of raw milk products on farms that have no more than 2 cows, 9 goats, or 9 sheep. *See* <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5648>.

III. Is Raw Milk a Choice or a Deadly Substance?

While scientists are discussing the dangerous bacteria content of raw milk, some farmers and consumers insist it is nutritious and safe. Ultimately, whether to consume raw milk is a choice; even in states where raw milk sales are illegal, roughly a quarter of the disease outbreaks related to raw dairy occurred there. *See Nonpasteurized Dairy Products*, at 385. These consumers were going to drink raw milk whether their state had legislative infrastructure in place for raw dairy or not. Plus, states that allow raw milk sales house the majority of the U.S. population—California, New York, and Texas—which explains why the majority of raw milk disease outbreaks occurred in these states.

Luckily, solutions have presented themselves in the state landscape. Cow shares seemed to decrease the number of raw milk outbreaks; of the nine raw milk disease outbreaks for which a source was reported, only one was associated with cow share. *See Nonpasteurized Dairy Products*, at 388. This form of self-governance may ease the regulatory burden. If a consumer is monetarily invested in an animal, that consumer may take greater interest in the sanitary conditions by which their milk is produced, which can put pressure on producers to maintain high sanitary standards without the need for government intervention. Labeling and signage at the point of sale puts the consumer on notice and allows an informed choice. By all accounts, raw milk consumption is not likely to decrease in the United States. States can and should take action to allow consumers a choice within a safe and informed environment.

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