

ENVIRONMENTAL LAWS AFFECTING FARMERS AND RANCHERS

Roger A. McEowen*

The United States attempts to handle environmental problems primarily by regulating the use of natural resources. As a result, much of our environmental law is statutory and regulatory, although 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 his or her private property. Restrictions on land use that become very stringent may amount to the government "taking" the property. The Fifth Amendment to the 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. Now the burden of proof in takings cases is upon government 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 affecting private property rights is subjected to strict scrutiny. A federal law or regulation must be shown to "substantially affect" interstate commerce to be upheld as constitutional.

*Associate Professor of Agricultural Economics and Extension Specialist, Agricultural Law and Policy, Kansas State University, Manhattan, Kansas. Member of Kansas and Nebraska Bars

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 does not have a large effect on farming and ranching operations. 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 usually divided into two categories: point source and nonpoint source. Point source water pollution is waste discharged into a body of water 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 body of water from a nonspecific source, 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 U.S.D.A. that have substantial soil erosion responsibilities are the Natural Resource Conservation Service and the Farm Service Agency. In general, 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 state, local county

commissioners are required to take action to minimize soil erosion.

Clean Water Act

The Clean Water Act (CWA) prohibits 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 controlling point source pollution. No one may discharge a pollutant from a point source into the "navigable waters of the United States" without an EPA permit. While most agricultural pollution is nonpoint source, the NPDES does have a major effect on the cattle feeding business and other agricultural confinement operations. Thus, the Environmental Protection Agency (EPA) has issued effluent limitations and federal standards of performance for feedlots. In a 1994 landmark case, a large New York dairy operation with an extensive liquid manure spreading operation was a point source pollutant under the CWA because the farm itself 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 types 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 1 year of drainage, no penalty applies.

Wetland "takings" implications

Wetlands issues have given rise to numerous cases involving takings. The basic question is: How far can government regulation of wetlands go before such regulation constitutes a regulatory taking of the private property involved? A primary question is whether the denial of a CWA Section 404 permit constitutes a taking without just compensation in violation of the Fifth Amendment. 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 more than 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

Conservation Reserve Program

The Conservation Reserve Program (CRP) is a long-term land retirement program for marginally productive and erodible cropland. The CRP involves a lease agreement between the government and the landowner under which the government makes an annual cash payment to the landowner (or landowner and tenant) for a minimum of 10 years. Cropland eligible for CRP is that which has been planted or is considered to have been planted to an agricultural commodity for 2 of the 5 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.

HAZARDOUS WASTE

Comprehensive Environmental Response Compensation & Liability Act

The Comprehensive Environmental Response Compensation & Liability Act (CERCLA), which became law in late 1980, aimed to establish a comprehensive response and financing mechanism to control problems 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. If a person releases such hazardous materials he or she is liable for clean-up 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 the property serves 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 to limit the liability of lenders and fiduciaries managing property contained in a trust or estate.

Persons potentially responsible for paying clean-up 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 he was 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 have known at the time of purchase that a hazardous substance was on the property. In addition, the buyer, before the purchase, must have undertaken "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" when purchasing agricultural real estate.

Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) of 1976 subjects solid hazardous waste to federal regulation. 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. The original purpose of the pesticide exemption for farmers was to exempt them from RCRA liability for disposing of FDA-approved pesticides. It is critical, however, that farmers dispose of pesticides properly for the exemption to apply. Ranchers may not be able to claim the exemption, and the exemption may not cover fertilizers.

CHEMICALS

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

FIFRA takes a preventive approach 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 that could be harmful to the 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 working with most threatened or endangered species.

The ESA can substantially restrict agricultural activities because many of the protections 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 can be considered the "taking" of animals, an activity ESA prohibits. Recent federal cases have held that modification of an endangered species' habitat does constitute taking. Thus, 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 designed to tie federal rangeland management policy to ecosystem management. Before the regulations took effect, a group of cattle industry organizations challenged them 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, but most of the regulations were upheld by a federal appellate court in 1998.

Federal grazing permits and the Clean Water Act

Section 401 of the CWA requires state certification for anyone who applies 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, Section 401 has only applied to point source discharges such as from city sewage treatment 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 Section 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 Section 401 of the CWA.

In Texas, for additional information on this topic contact Wayne Hayenga, Professor and Extension Economist, The Texas A&M University System, College Station, Texas 77843-2124. Phone: (409) 845-2226, Fax: (409) 847-9374.

This publication is adapted from Roger A. McEwen and Neil E. Harl. 1998. *Principles of Agricultural Law*, Agricultural Law Press, Eugene, OR. Chapter 14.