

The National Agricultural Law Center



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Water Quality Protection: Market or Mandate?

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Poultry Litter and Water Quality in the Ozark Mountains: Allegory for and Prelude to the National Debate Over How Best to Address Water Pollution Throughout the United States, 2 J. Food L. & Pol'y 157 (Fall 2006)

Background

- *State of Oklahoma v. Tyson Foods, Inc.* (filed June 13, 2005)
- *Arkansas v. Oklahoma*, 503 U.S. 91 (1992)
- *The City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263 (N.D. Okla. 2003), *vacated pursuant to settlement* on July 13, 2003

Background: *State of Oklahoma*

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
 - “Superfund”
- Resource Conservation & Recovery Act (RCRA)
 - *Coon v. Willet Dairy*
- Clean Water Act: the dog that never barks

Background: Clean Water Act

- Federal Water Pollution Control Act of 1948
 - state-initiated regulation of water quality with minimal federal oversight
- Clean Water Act of 1972
 - “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters”

Background: Clean Water Act

- Two types of pollution: point source and nonpoint source
- “Point source” (“any discernable, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit, well . . . concentrated animal feeding operation . . . from which pollutants may be discharged.”)
 - NPDES permit

Background: Clean Water Act

- “nonpoint source” not defined in CWA
 - CWA allows states to address nonpoint source pollution, and authorizes federal grant and cost-share funds to assist states in addressing nonpoint source pollution concerns
- “In short, no federal . . . policy exists to stimulate effective nonpoint source water pollution controls.”
(Robert W. Adler, 23 Harv. Envtl. L. Rev. 203)

Background: Clean Water Act

- Water quality improved since 1972, primarily attributed to point source regulation
- Nonpoint source pollution has become larger part of water quality picture
- Nonpoint source pollution is derived from many, many sources – agricultural and non-agricultural

Background: Nonpoint Source Pollution

- EPA: nonpoint source pollution is “the main reason that approximately 40% of . . . surveyed rivers, lakes, and estuaries are not clean enough to meet basic uses such as fishing or swimming.”
- EPA: of all types of nonpoint source pollution, agriculture is “the leading source of water quality impacts to surveyed rivers and lakes . . . [and] the third largest source of impairments to surveyed estuaries”

Nonpoint Source Pollution & Ag

- Nonpoint source pollution must be effectively addressed if significant water quality improvements are to occur during the coming decades
- Agriculture must be addressed in order effectively address overall nonpoint source equation
- But, how: Market or Mandate?

Fundamental Questions

- Does the CWA address nonpoint source pollution in a manner that is effective enough to compel water quality improvements to occur over the next three decades that are substantially similar to the improvements that occurred over the past three decades?

(cont'd)

Fundamental Questions

- Should the CWA remain the primary means for addressing nonpoint source pollution from agriculture?
- If the CWA is perceived by some individuals as an ineffective means for addressing their concerns over the impact that agricultural nonpoint source pollution can have on water quality, by what means may those persons attempt to address their concerns?

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Market or Mandate?

- Mandate could be statutory enactment, regulatory action(s), court ruling(s)
- Market paradigm offers many possibilities
 - “Sustainability”
 - Ecosystem Services
 - Water quality trading
 - Federal conservation programs**

Conservation Programs

- There will likely be a continued and increasing emphasis on using market-oriented programs as a more prominent component of overall U.S. agricultural and environmental policies:
 - Domestic and international legal and policy pressures
 - Increasing degree of pluralism in agriculture policy debate

Conservation Programs

Two basic categories:

- Land retirement
- Working lands

U.S. Farm Policy

- Since 1933, Congress has provided various forms of price and income support payments to producers of specified commodities (not including cattle, hogs, poultry, or other livestock) -- the “Farm Bill”
- These programs have formed “the heart of U.S. farm policy, by virtue of their long history and cost.”
- Domestic and international pressures are causing changes in these programs

World Trade Organization

- Historical roots of WTO are in post-World War II era
- “Uruguay Round” of Multilateral Trade Negotiations was very significant – produced the “Agreement on Agriculture”
- The Agreement called for reduction in domestic support for agriculture (and to eliminate nontrade tariff barriers, and eliminate export subsidies)

Agreement on Ag: Domestic Support

- Three Boxes:

1. Amber box = trade distorting, which WTO has concluded includes U.S. domestic support**

2. Green box = non-trade distorting, and includes conservation program payments

3. Blue box

Comments/Conclusions

- Water quality: role of CWA?
- Philosophical and cultural views of agriculture are vary greatly, but are increasingly important
- Role of consumer is becoming increasingly important
- Agriculture will be addressed in policymaking

“This time, like all times, is a very good one, if we but know what to do with it.”