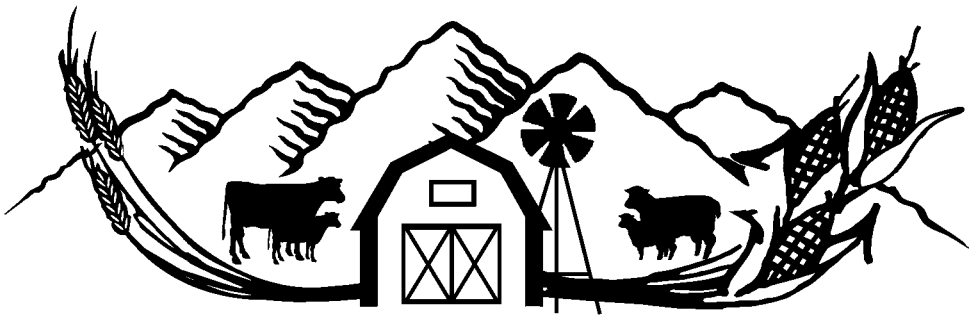

Risk and Resilience in Agriculture

Wrestling with Federal Environmental Laws Affecting Western Agriculture: A Selected Overview

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I. Introduction

Up until the 1970's states were mainly responsible for regulating the natural and environmental resources used by agriculture. This all changed when Congress enacted new and amended a number of existing laws to give federal agencies primary control over many of these resources. The impact on agriculture of some of these changes was immediately obvious. For example, amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) changed it from a law regulating labeling claims of manufacturers to one significantly restricting these chemicals' use. The effect of changes in other federal laws on agriculture was often less clear. For example, the 1972 Federal Water Pollution Control Act (later renamed the Clean Water Act (CWA)) established an elaborate permitting system for "point" dischargers of pollutants into the nation's waters while maintaining an essentially voluntary system for "nonpoint sources." It was not until federal courts interpreted the CWA to include many agricultural activities as "point sources"[1] and defined wetlands to be part of the "nation's waters"[2] that agriculture began to feel the full brunt of the amendments.

The purpose of this paper is to provide a general overview of selected federal environmental and natural resources laws affecting western agriculture. The paper outlines each federal law's general content. Particular attention is paid to three areas: water quality, wetlands, and wildlife. However, the paper only briefly touches on some of the issues these laws raise. Readers are urged, therefore, to contact their attorneys for answers to any specific questions they have regarding how these laws might affect their operations.

II. Selected Federal Environmental Laws Affecting Agriculture

The Clean Water Act (CWA) And Water Quality.

In 1972 Congress passed the Federal Water Pollution Control Act (FWPCA) (later renamed

the Clean Water Act (CWA)) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] Congress created two categories of dischargers under the CWA: point and nonpoint sources. Point sources consist of "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,...[or] concentrated animal feeding operation...from which pollutants are or may be discharged."[4] The CWA prohibits point sources from discharging pollutants into the nation's waters without first obtaining a permit through the National Permit Discharge Elimination System (NPDES).[5] NPDES permits require point source dischargers to satisfy both effluent standards, developed by the federal Environmental Protection Agency (the federal EPA) for particular industries and discharges, and water quality standards, fixed by each state and tied to the quality of the receiving waters.[6] The federal EPA is responsible for administering the NPDES. However, the governor of each state may petition the federal EPA for permission to administer its own permitting program.[7] If the governor is successful, then the state will assume responsible for issuing point source discharge permits in its jurisdiction.

Most agricultural activities are nonpoint sources under the CWA. This is because Congress excluded "agricultural stormwater discharges and return flow from irrigated agriculture" from the definition of point sources. However, Congress specifically named "concentrated animal feeding operations" (CAFOs) as point sources, thereby requiring them to obtain NPDES permits.[8] These permits prohibit CAFOs from discharging any effluent into navigable waters unless caused by a 25-year, 24-hour storm or as a result of a "chronic or catastrophic storm," provided the permit holder has a properly constructed and operated waste water facility.

To be a CAFO and subject to the permitting requirement, the agency administering the NPDES under the CWA must make two determinations. First, it must find the livestock operation qualifies as an "animal feeding operation" (AFO). An AFO is defined as a "lot or facility" where animals are "stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period" and where "crops, vegetation, forage growth or post-harvest residues" are not sustained over any portion of the lot or facility.[9] Under this definition, "dairy farms, stockyards, and auction houses where animals may not be fed, but are confined temporarily" may qualify to be AFOs.[10]

Second, if the agency finds that a livestock operation qualifies as an AFO, it must determine if it meets certain size and/or discharge requirements. For example, the regulations provide that an AFO qualifies as a CAFO if it confines more than 1,000 animal units.[11] Thus an AFO with 1,000 slaughter and feeder cattle, 700 mature dairy cattle, or 2,500 swine each weighing over 25 kilograms (approximately 55 pounds) is a CAFO. Alternatively, the regulations provide that certain medium size AFOs--between 300 and 1,000 animal units--also qualify as CAFOs, provided they discharge pollutants into navigable waters either directly or indirectly through a man-made device.[12] For example, a feedlot with 300 feeders that discharges waste through a ditch into a stream or whose feedlot is crossed by this stream would qualify. Finally, small AFOs may also be classified as CAFOs if the administrating agency determines they represent "significant contributor[s] of pollution to the waters of the United States."[13] The fact an AFO may qualify, as a CAFO does not necessarily mean it is required to obtain a NPDES permit.[14] The regulations specifically provide that "no animal feeding operation is a concentrated animal feeding operation ... if [it] discharges only in the event of a 25-year,

24-hour storm event."[15] Thus even the largest AFO may avoid the permitting requirements of the CWA if it does a good job of managing its discharges.

Nonpoint sources generally are not subject to any permitting requirements under the CWA. However, federal courts have recently held that the CWA "requires [states] to identify waters that [fail to satisfy state water quality standards] after the application of (point-source) technological standards, to determine the total maximum [daily] loadings of pollutants [TMDL] that would bring these waters up to grade, and to incorporate allocations of these loadings into discharge permits and state water quality plans."[16] The TMDL limits under the CWA require states to include waste loadings from both point and nonpoint sources as well as a margin of error for uncertainty and future growth. Most states' proposed TMDL plans continue to rely almost exclusively on point source controls to meet state water quality standards. It is questionable, however, if such controls alone will do the job, particularly in certain western states where point source discharges are limited. Agriculturalists thus must pay close attention to see how the next round of TMDL plans in their state might affect nonpoint source discharges and their operations.

The Comprehensive Environmental Response, Compensation, And Liability Act (CERLA).

Congress passed CERCLA in 1980 and reauthorized it in 1986 through the Superfund Amendments and Reauthorization Act (SARA). CERCLA, among other things, requires "potentially responsible parties" (PRP) to pay for the cleanup of contaminated waste sites, either by financing the cleanups, cleaning up the sites themselves, or reimbursing the government or other PRPs for their share of the cleanup costs. PRP include current owners and operators of vessels or facilities where hazardous wastes were disposed, prior owners and operators of vessels or facilities, generators of the hazardous substances, and transporters of hazardous substances.[17] The term "facility" under CERCLA is broadly defined to include lands upon which hazardous substances were dumped or otherwise disposed. CERCLA imposes joint and several liability on such persons. Joint and several liability means that any PRPs--regardless of how small their contributions--may be fully liable for the cleanup costs.

CERCLA provides a defense for those who can show that the release was caused by the act or omission of a third party, other than their employees, agents, or persons with whom they have a contractual arrangement. The SARA amendments also provide a limited defense for innocent purchasers of contaminated sites if they can show that they did not know and had no reason to know that the disposal of hazardous substances occurred on the property.[18] Individuals purchasing property where hazardous substances may have been disposed should carry out an environmental audit before completing the transaction, lest they find themselves subject to huge cleanup costs under CERCLA sometime in the future.

The Endangered Species Act (ESA).

Congress first passed the Endangered Species Act in 1973. Congress found that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation" and that "other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction."[19] The ESA established as its purpose "to provide a means whereby the ecosystem upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of

the treaties and conventions [signed by the United States and dealing with the conservation of species facing extinction]."[20] The United States Supreme Court in 1978 called the ESA "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." [21] In speaking of its breadth in 1995, the Court said: "the [ESA] applie[s] to all land in the United States and to the Nation's territorial seas."[22] Our discussion will be limited to the ESA's operation with respect to the lands within the United States.

The ESA consists of several sections:

- Section 3 provides important definitions (including the definitions for "endangered" and "threatened species").

- Section 4 details the process used for listing covered species and their critical habitat and provides for the preparation of recovery plans. Listing and habitat decision for species within the continental United States are made by the United States Fish and Wildlife Service (USFWS).

- Section 7 imposes an obligation on federal agencies to insure that their actions will not "jeopardize" covered species or their critical habitat. It requires federal agencies, prior to acting, to prepare a "Biological Assessment" to determine whether a proposed action may affect a covered species. It further requires the agency to formally "consult" with the USFWS if a potential conflict exists. The USFWS will prepare a "Biological Opinion" outlining possible impacts and suggesting "reasonable and prudent alternatives" for the agency's proposed action. The agency may also seek an "incidental take" exemption from the USFWS, permitting it to "take" a covered species while carry out its activities. Federal agencies may also appeal under Section 7 to a cabinet-level committee, sometimes referred to as the "God-Squad", for permission to carry out the proposed activity. The committee is required to base its decision on a finding of necessity and lack of any reasonable alternatives.

- Section 9 outlines acts that are prohibited under the ESA including "tak[ing of] any such species within the United States or the territorial seas of the United States."[23] The term "taking" has been broadly interpreted under the ESA to include habitat destruction whether on public or private land.

- Section 10 allows private land owners to be exempted from Section 9 by obtaining an "incidental" take permit from the USFWS. As part of the process, the applicant must prepare and implement a habitat conservation plan (HCP), limiting how the property will be used.

- Section 11 establishes criminal and civil penalties for violations of the ESA and authorizes citizen suits for its enforcement.

"Endangered species" are defined under the ESA as "any species which is in danger of extinction throughout all or a significant portion of its range."[24] The Act further defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[25] The term "species" includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."[26] The Act specifically excludes from the definition of "endangered species" insects determined to be "pest[s] whose protection [under the ESA] would present an overwhelming and overriding risk to man."[27] In making its listing determination the USFWS may only take into consideration biological data. In contrast, in determining critical habitat, the USFWS may

also consider economic and other considerations along with biological factors.[28]

On June 17, 1999 the USFWS announced a new "Safe Harbor Policy" for nonfederal property owners who enter into agreements with it to manage habitat for listed species.[29] The USFWS will provide participating nonfederal property owners with technical assistance in preparing these plans. In exchange for implementing these plans, the nonfederal landowner will receive an "incidental take" permit and the USFWS will provide assurances that additional land, water, and/or natural resource use restrictions will not be imposed on them because of their voluntary conservation activities.

One method to avoid the listing of species under the ESA is for nonfederal landholders to adopt measures designed to protect and/or enhance habitat for "candidate" species. Nonfederal landholders in the past were often reluctant to carry out such activities for fear that a candidate species would later be listed and they would be punished because the species "colonized" their land. On June 17, 1999 the USFWS announced a policy for "Candidate Conservation Agreements with Assurances."[30] Under these agreements, nonfederal landholders may enter into a habitat conservation plan with the USFWS to implement conservation measures for proposed or candidate species or species likely to become proposed or candidate species in the near future. The USFWS would determine whether this agreement, combined with conservation measures on "other necessary property", would preclude the need to list the covered species. If the USFWS makes this determination, then the guidelines assure nonfederal property landholders that no additional conservation measures or additional land, water or resource restrictions will be required of them should the species become listed in the future. The USFWS will make the Candidate Conservation Agreements with Assurances decision on a case-by-case basis.

The Federal Insecticide, Fungicide, And Rodenticide Act (FIFRA).

The first version of FIFRA was passed in 1947. It dealt with proper labeling and efficacy claims made by manufacturers of these chemicals. Later amendments have focused on protecting human health and the environment. FIFRA, among other things, imposes limits on the use of "restricted use" chemicals and establishes a certification procedure for persons using them. The federal courts have held that FIFRA provides a limited safe harbor against state nuisance or negligence suits for applicators who follow labeling instructions.[31] On the other hand, some courts have found that failure to follow labelling requirements is negligence per se (in itself), making applicators liable for any damages caused by their spraying.[32]

Federal Land Policy And Management Act (FLPMA).

Congress passed FLPMA in 1976. FLPMA is considered the "organic" (or enabling) act of the Bureau of Land Management (BLM) in the Department of the Interior. It provides general rules governing BLM's public land management decisions. FLPMA requires the BLM to manage its lands for multiple use, sustained yield. It declares that the "public land" under its control will stay in federal hands, except when national interest requires otherwise. FLPMA outlines the process for public land disposal and exchange. It also details the rules and public grazers' "rights" with respect to grazing on BLM lands.

National Environmental Policy Act (NEPA).

NEPA was enacted in 1969. It was designed to encourage all federal agencies to consider potential environmental impacts when making decisions. NEPA has several aims. For example, NEPA established the Council on Environmental Quality (CEQ) to provide the

President with expert advice on national environmental policies and problems. More substantively, NEPA requires every federal agency to:

> *include in every recommendation or report on proposals for legislation and other major Federal action significantly affecting the quality of the human environment, a detailed statement by the responsible official on--*
> *(i) the environmental impact of the proposed action,*
> *(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,*
> *(iii) alternatives to the proposed action,*
> *(iv) the relationship between local short-term uses of man's environment and the maintenance of and enhancement of long-term productivity, and*
> *(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.*

This statement, called an Environmental Impact Statement (EIS), is to be circulated to appropriate federal, state, and local agencies and is to be made available to the public. Recent court and agency decisions have held that the reissuance of grazing permits on federal lands may be subject to NEPA's EIS requirements.[33] Federal agencies, considering actions that may have such impacts, first must prepare a somewhat briefer document called an "Environmental Assessment" (EA). If the action is determined not to have such an effect, the agency issues a FONSI (a "finding of no significant impact"). Otherwise it prepares a full blown EIS. NEPA does not require federal agencies to make a particular decision, only that they take proper account of environmental impacts and examine alternatives that might have lesser effects. Once a federal agency has fully disclosed this information, the courts will not overturn its decision unless it is shown to be arbitrary and capricious.[34]

National Forest Management Act (NFMA).

Most federal forests are managed by the United States Forest Service located within the United States Department of Agriculture. The Forest Service derives the majority of its powers and responsibilities from three federal laws. First, Congress passed the Organic Act of 1897, establishing the Forest Service and requiring that it manage the nation's forests for production rather than preservation. Second, in 1960 Congress enacted the Multiple-Use, Sustainable Yield Act, broadening the Forest Service's charge to include not only timber production but also "outdoor recreation, range, watershed, and wildlife and fish purposes."[35] Third, the National Forest Management Act of 1976 made planning a pre-requisite over Forest Service Activities.

The NFMA requires the Forest Service to prepare Land and Resource Management Plans (LRMPs) to govern site-specific decisions regarding, among other things, grazing and timbering decisions. The LRMPs consist of an inventory of all renewable resources, a classification of the "suitable" use of forestlands, a calculation for suitable timberland of the "allowable cut," and an identification of "hazards" to the resource. The LRMP must take into account existing regulations, presidential policy statements regarding the nation's forests, multiple-use principles, and any draft and final EISs for the forest.[36] The NFMA requires the Forest Service to "[p]rovide for diversity of plants and animal communities."[37] The LRMPs are subject to EIS requirements under NEPA (see above). Failure to follow the LRMP or NEPA requirements is grounds to overturn a Forest Service decision. Ranchers, grazing livestock on the nation's forest, should know and participate in the development of any LRMP, EIS, or other planning decision by the Forest Service that might affect their operation.

Swampbuster, Section 404 Of The Clean Water Act (Cwa) And Other Federal Wetland Protection Provisions.

A number of federal laws provide protection for the nation's wetlands. Several involve voluntary carrot-like programs, with state or private landowners receiving cost-share and/or cash payments in exchange for agreements to acquire, restore, or retain wetlands on their property. For example, the Migratory Bird Conservation Act of 1929, authorizes the acquisition of wildlife refuges including wetlands. The Migratory Bird Hunting and Conservation Stamp Act of 1934 and later the Wetlands Act of 1961 appropriated money for these acquisitions. Currently agricultural producers can enroll marginal agricultural lands and naturally occurring wetlands in the USDA's Wetland Reserve and Water Bank Programs and receive cash payments.

The federal government first began to apply a stick (regulatory) approach to wetlands drainage in the 1970s as a result of Section 404 of the CWA. Section 404 prohibits the "discharge of dredged or fill materials" into "navigable waters" without a permit from the Corps of Engineers. Federal courts (and thereafter the Corps and federal EPA) broadly interpreted the term "navigable waters" to include wetlands "adjacent" to navigable waters and their tributaries.[38] They also included in this definition certain intrastate (isolated) waters and their adjacent wetlands[39] if their "use, degradation, or destruction could affect interstate or foreign commerce."

Section 404 of the CWA is clearly a stick. The Corps and federal EPA may ask courts to stop section 404 violations and restore affected wetlands and may seek civil penalties of up to $25,000 per day per violation against violators.[40] The government may also criminally prosecute section 404 violators for negligent or knowing actions.[41]

Congress also imposed a carrot-and-stick approach to wetland preservation when it adopted "Swampbuster" provisions in reauthorizing the farm bill under the Food Security Act (F.S.A.) of 1985, amended in 1990, and significantly modified by the Federal Agriculture Improvement and Reform Act (F.A.I.R.) of 1996.[42] F.S.A., among other things, reauthorized farm loan and deficiency payments for program participants. However, its Swampbuster provisions, modified by the 1990 amendments, made a persons who "...in any crop year produces an agricultural commodity on converted wetland"[43] or "in any crop year beginning after November 28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland"[44] ineligible for loan and other farm program payments. Swampbuster thus does not directly impact agriculturalists who do not participate in the farm program.

Both section 404 of the CWA and Swampbuster under the current farm bill exempt certain farming and ranching activities from their application. For example, the CWA provides:[45]

(1) E*xcept as provided in paragraph of this subsection, the discharge of dredged or fill material--*

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and

transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(E) for the purpose of construction or maintenance of farm roads or forest roads...where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic enforcement will be otherwise minimized;

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Note that the exemptions in paragraph (1) apply only to existing uses. Under subsection (2), discharges designed to bring an area "into a use to which it was not previously subject" and that "impair" flow or circulation or "reduce" the water's reach are still subject to the Corps' permitting requirements under section 404.

Swampbuster also exempts certain agricultural activities from its reach. With respect to agricultural production on converted wetlands, Swampbuster specifically exempts certain farming or ranching activities, provided the conversion started prior to December 23, 1995. It also exempts farming or ranching activities occurring on wet areas created by water delivery and irrigation systems; on artificial lakes or ponds created on nonwetlands and used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond; and on wetland temporarily or incidentally created as a result of adjacent development activity.[46] Additionally, Swampbuster permits agricultural production on an existing wetland (farmed wetland) if the "owner or operator...uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic."[47]

Swampbuster's rules against conversion of wetlands also do not apply to conversions of artificial (nonwetland) lakes or ponds, used for a variety of agricultural and nonagricultural purposes (see above); wetland temporarily or incidentally created as a result of adjacent development activity; or re-converted wetland, so long as the Natural Resources Conservation Service (NRCS) within the U.S. Department of Agriculture determines that the wetlands originally had been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985 and were allowed to return to wetland status as a result of a voluntary restoration, enhancement, or creation action subsequent to that determination.[48]

The recent farm bill, F.A.I.R., has significantly changed several of the other exemptions contained in the original Swampbuster provisions. For example, F.A.I.R.'s "good faith" exemption has been broadened, allowing the USDA to "waive a person's ineligibility...for program loans, payments, and benefits as the result of the conversion of a wetland subsequent to November 28, 1990, or the production of an agricultural commodity on a converted wetland, if the Secretary determines that the person has

acted in good faith and without intent to violate this subchapter."[49] The amendments require the Secretary to give qualifying applicants "a reasonable period, but not to exceed 1 year, during which to implement the measures and practices necessary to be considered to actively restoring the subject wetland." Similarly F.A.I.R. Act specifically exempts farm program participants from ineligibility under Swampbuster if they establish that their actions in connection with "all similar" actions "will have a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife."[50] The Act instructs the Secretary of Agriculture to create by regulation "categorical minimal effect exemptions on a regional basis" to assist persons in avoiding a violation of the ineligibility provisions of Swampbuster.[51] The F.A.I.R Act also exempts from farm program ineligibility participants who mitigate the loss of "the wetland and the wetland values, acreage, and functions...through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland."[52] The restoration, enhancement, or creation must be based upon a wetland conservation plan, must be located within the "same general area of the local watershed as the converted wetland," and must be established subject to a wetland easement designed to preserve the restored, enhanced, or new wetlands for as long as the converted wetland "remains in agricultural use or is not returned to its original wetland classification." The wetland conservation plan may not be financed at the expense of the federal government. The earlier F.S.A. mitigation provisions requiring that the mitigation occur on prior converted croplands have been dropped.

The 1996 F.A.I.R. Act permits participants who had previously converted or produced agricultural commodities on converted wetlands to re-establish eligibility by "fully restor[ing] the characteristics of the converted wetland to its prior wetland state or...otherwise mitigat[ing] for the loss of wetland values."[53] Earlier restoration provisions under the F.S.A. required restoration of "the" previously converted wetland--a virtual impossibility if the participant no longer held it. The new restoration provisions require only that "the restoration, enhancement, or creation of wetland values [occur] in the same general area of the local watershed as the converted wetland."

In 1994 the Corps, USDA, Department of the Interior, and federal EPA signed a Memorandum of Agreement (MOA) making the Soil Conservation Service ((SCS) now NRCS) the lead federal agency for wetland determination questions on "agricultural lands."[54] The MOA also gives the SCS/NRCS authority to make wetland determinations on narrow bands or pockets of nonagricultural lands immediately adjacent to or interspersed among agricultural lands. It also permits the SCS/NRCS, in coordination with the Corps or federal EPA, to make wetland delineation's for nonagricultural lands if requested to do so by USDA program participants. The MOA provides that delineation decisions involving "agricultural lands," will be based upon procedures outlined in the National Food Security Act Manual, Third Edition (NFSAM). For nonagricultural lands, SCS/NRCS is to base its decisions on the 1987 Corps Wetland Delineation Manual, along with current national Corps guidance documents. The MOA further provides that any revisions or amendments to these manuals affecting covered wetland delineation's must be agreed to by the signatory agencies. Additionally, it stipulates that any final written wetland delineation by the SCS/NRCS will be adhered to and be effective for five years, unless new information warrants otherwise. Copies of the manuals will normally be available from the local SCS/NRCS office or

from the library at the state agricultural university.

The 1996 F.A.I.R Act also attempts to clarify who has authority under Swampbuster. First, earlier Swampbuster language gave the federal Fish and Wildlife Service virtual veto power over the SCS/NRCS's delineation and mitigation plan decisions. New language under the F.A.I.R. Act provides that "[t]echnical determinations, the development of restoration and mitigation plans, and monitoring activities under [Swampbuster] shall be made by the National Resources Conservation Service."[55] Second, the F.A.I.R. Act recognizes that some landowners may have already established mitigation plans when they obtained a Section 404 dredged and fill permit under the CWA. The statute now exempts participants from ineligibility under Swampbuster provided "[t]he action was authorized by a permit issued under [section 404 of the CWA] and the wetland values, acreage, and functions of the converted wetland were adequately mitigated for the purposes of [Swampbuster]."[56]

Wilderness Act Of 1964.

The Wilderness Act of 1964 creates both a wilderness system and a process for establishing wilderness areas on federal lands. The Act does not create a separate federal agency to manage wilderness areas. Instead it requires federal agencies controlling designated wilderness areas to "preserve" the areas and manage them "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness" while continuing to recognize "existing private rights."[57]

The Wilderness Act defines a "wilderness area" as:[58]

> *...an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.*

The agencies, courts, and Congress have treated the definition of wilderness areas pragmatically, rejecting any claim that wilderness areas must be completely untouched by humans. The federal agencies give varying weight to the four factors listed above: the extent of man's "imprint"; the "opportunities for solitude"; the areas size, location, and "praticab[ility]" for preservation, and any special "ecological, geological or other features of scientific, educational, scenic, or historic value." Interested persons can examine the handbooks and manuals of each federal land management agency to learn how it goes about classifying the land under its control for purposes of the Wilderness Act.[59]

Federal wilderness areas are established in two ways. First, Congress directly created more than ten million acres of wilderness areas when it enacted the Wilderness Act in 1964. Second, federal agencies also nominate particular lands under their control for wildlife area designation. The Wilderness Act, for example, instructed the

United States Forest Service and the Department of the Interior, respectively, to study "primitive" areas in the national forests and "roadless areas of at least 5,000 or more acres within national parks and wildlife refuges" as potential candidates for wilderness designation.[60] FLPMA further required the Secretary of the Interior to study for wilderness designation all BLM roadless parcels of at least 5,000 acres. The Federal Land Policy and Management Act of 1976 (FLPMA) outlines a process for the BLM to inventory and evaluate lands under its control for wilderness area designation under the Wilderness Act.[61] Congress, however, has final responsibility in determining which federal lands will be designated wilderness areas under the Wilderness Act and what activities will permitted.[62]

The Wilderness Act prohibits many commercial enterprises in wilderness areas including commercial logging; the establishment of permanent and temporary roads, structures, and installations; and the use of motorized vehicles. The Act permits logging to control insect infestations; commercial packing, guiding, and river running activities; and hunting and fishing. It also authorizes continued grazing, if established prior to September 3, 1964,[63] and certain mineral leasing activities within wilderness areas in the national forests.[64] Both of these activities are subject to reasonable regulations imposed by the Secretary of Agriculture.

III. State Environmental Laws Affecting Western Agriculture

While we have emphasized the federal government's recent domination of environmental law, it is important to realize that many states have played an active role in establishing and implementing both the federal and their own environmental rules (e.g., see the role of states in developing state water quality standards, operating NPDES systems, and preparing nonpoint source plans under the CWA described above). A number of state legislature are considering legislation designed to regulate large animal confinement feeding operations. Moreover, many local governments continue to regulate certain agricultural activities through their statutorily created zoning and land use planning powers. Similarly, state courts continue to hear nuisance cases against agricultural enterprises (often livestock confinement operations), brought by nonfarm neighbors, complaining of unreasonable noise, odors, and dust.[65]

All states have responded to these latter challenges by passing some form of "right-to-farm" statutes, protecting agriculturalists from certain nuisance actions.[66] Farmers and ranchers should check with their attorneys to determine how their state's right-to-farm law protects them. A 1998 Iowa Supreme Court decision has put state "right-to-farm" statutes into question.[67] The Iowa Supreme Court held that Iowa's right-to-farm statute amounted "to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution...."[68] The court concluded that the right-to-farm law prevented adjoining landowners from exercising their rights to enjoy their property, thereby imposing an "easement" on it. The granting of this easement, the court said, amounted to a taking of their property. Agriculturalists should keep their eyes open for other court challenges to existing right-to-farm statutes.

IV. Summary And Conclusions

The Iowa Supreme Court case illustrates the somewhat unsettled nature of both state and federal environmental laws. On the one hand, the United States Supreme Court has shown increasing willingness to examine whether state and federal environmental and land use laws have crossed the line from proper regulation to regulatory takings.[69] Similarly, a number of

bills introduced before the 105th Congress this past term have sought to weaken several federal environmental laws.[70] Indeed, Congress also has examined several "takings" bills, designed to compensate landowners for losses in value caused by allegedly excessive environmental regulations.[71] Still, federal courts for the most part continue to uphold federal laws and regulations that carry out national environmental objectives and do not physically invade private property or eliminate any economic value from their remaining uses. Additionally, none of the bills designed to weaken current federal environmental have passed.

One commentator recently suggested that Congress's reauthorization of Swampbuster under the F.A.I.R. Act indicates a continued commitment on the part of both Republicans and Democrats to federal conservation practices.[72] Unfortunately we lack a crystal ball to predict what direction federal environmental law affecting agriculture will go in the future. Thus the paper's recommendations are quite simple. First, agriculturalists should learn as much as they can about those federal (and state) environmental regulations that may affect their enterprises. Second, agriculturalists should do an environmental audit of their operations to determine whether any of their activities may conflict with federal and state environmental laws. Third, farmers and ranchers should take advantage of any exemptions or safe harbors these statutes provide (e.g., exemptions from wetland provisions for certain farming and ranching enterprises; the safe harbor from damage suits for those who follow FIFRA labeling requirements; the two new safe harbors recently provided landowners under the ESA). Finally farmers and ranchers or their representatives should actively participate in the development of nonpoint source plans under the CWA, EIS preparation under NEPA, and other planning efforts of federal agencies that may impact their operations. Only in these ways can agriculturalists wrestle their way through the thicket that is federal environmental law.

ENDNOTES

[1] Natural Resources Defense Council, Inc. v. Train, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd sub nom.* Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977).

[2] Natural Resource Defense Council, Inc. v. Calloway, 392 F.Supp. 685 (D.C.Cir. 1977), interpreting 33 U.S.C. § 1344. Federal courts have broadly interpreted which wetlands are covered. See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (adjacent wetlands covered); Southern Pines Associates by Goldmeier. v. United States, 912 F.2d 713 (4th Cir. 1990) (nonadjacent wetlands covered); United States v. Southern Inv. Co., 876 F.2d 606 (8th Cir. 1989) (artificially created wetlands covered).

[3] 33 U.S.C. § 1251(a).

[4] 33 U.S.C. § 1364(14).

[5] 33 U.S.C. § 1311(a).

[6] 33 U.S.C. § 1342.

[7] 33 U.S.C. § 1342(b).

[8] The law currently provides:

> *"The term 'point source' mean any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."*

Id.. See also 33 U.S.C. § 1314 (f).

[9] 40 C.F.R. § 122.23(b)(1).

[10] *Id.*.

[11] If an animal feeding operation contains more numbers of animals than specified in the following categories

the animal feeding operation qualifies as a CAFO:

(1) 1,000 slaughter and feeder cattle,
(2) 700 mature dairy cattle (whether milked or dry cows),
(3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),
(4) 500 horses,
(5) 10,000 sheep or lambs,
(6) 55,000 turkeys,
(7) 100,000 laying hens or broilers (if the facility has continuous overflow watering),
(8) 30,000 laying hens or broilers (if the facility has a liquid manure system),
(9) 5,000 ducks, or
(10) 1,000 animal units.

40 C.F.R. pt. 122, app. B(a).

The term animal unit means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0. *Id.*, pt. 122, app. B.

[12] To qualify as a medium sized CAFO the animal feeding operation must confine at least:

(1) 300 slaughter and feeder cattle,
(2) 200 mature dairy cattle (whether milked or dry cows),
(3) 750 swine each weighing over 25 kilograms (approximately 55 pounds),
(4) 150 horses,
(5) 3,000 sheep or lambs,
(6) 16,500 turkeys,
(7) 30,000 laying hens or broilers (if the facility has continuous overflow watering),
(8) 9,000 laying hens or broilers (if the facility has a liquid manure system),
(9) 1,500 ducks, or
(10) 300 animal units.

and either one of the following conditions are [sic] met: pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar man-made device; or pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

40 C.F.R. pt. 122, app. B(b).

[13] 40 C.F.R. § 122.23(c)(1).

[14] Jeff L. Todd, Comment--"Environmental Law: The Clean Water Act--Understanding when a Concentrated Animal Feeding Operation Should Obtain an NPDES Permit," 49 Okla. L. Rev. 481, 487 (Fall 1996).

[15] 40 C.F.R. pt. 122, app. B.

[16] Houck, Oliver A., "TMDLS III: A New Framework for the Clean Water Act's Ambient Standards Program," 28 Envtl. L. Rep. 10415, 10415 (August 1998).

[17] 42 U.S.C. § 9607(a).

[18] 42 U.S.C. § 9601(35)(a)(i).

[19] 16 U.S.C.A. § 1531(a)(1), (2).

[20] 16 U.S.C.A. § 1532(b).

[21] Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978).

[22] Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, ___U.S.___, 115 S.Ct. 2407, 2413 (1995) (citation omitted).

[23] 16 U.S.C.A. § 1538(a)(1(B).

[24] 16 U.S.C.A. § 1532(6).

[25] 16 U.S.C.A. § 1532(20).

[26] 16 U.S.C.A. § 1532(16).

[27] 16 U.S.C.A. § 1532(6).

[28] 16 U.S.C.A. § 1533(b)(2).

[29] "Announcement of Final Safe Harbor Policy," 64 FR 32717 (1999). This policy and the policy that follows were jointly announced by the federal Fish

and Wildlife Service and the National Marine Fisheries Service in their individual capacities under the ESA. Since we are focusing exclusively on listing and enforcement actions within the United States, we will refer only to the actions of the USFWS.

[30] "Announcement of Final Policy for Candidate Conservation Agreements with Assurances," 64 Fed. Reg. 32726 (1999).

[31] Papas v. Upjohn, 926 F.2d 1019 (11th Cir. 1991). For a summary of the case law in this area see Jenkins v. Amchem Products, 256 Kan. 602, 886 P. 2d 869 (1994).

[32] Bennett v. Larsen Company, 118 Wis. 2nd 681, 348 N.W. 2d 540 (1984).

[33] Joseph M. Feller, "The Comb Wash Case: The Rule of Law Comes to the Public Rangelands," 17 Pub. Land & Resources L. Rev. 25 (1996).

[34] Robertson v. Methow Valley Citizens' Council, 490 U.S. 332 (1989).

[35] 16 U.S.C. § 528.

[36] See generally 16 U.S.C. § 1604.

[37] 16 U.S.C. § 1604(g)(3).

[38] 33 C.F.R. § 328.3(b).

[39] 33 C.F.R. § 328.3.

[40] 33 U.S.C. § 1319(d).

[41] 33 U.S.C. § 1319(c).

[42] Jason Perdion, Comment, "Protecting Wetlands through the Clean Water Act and the 1985 and 1990 Farm Bills: A Winning Trio," 28 U. Tol. L. Rev. 867 (Summer 1997); Daryn McBeth, "Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's 'Swampbuster' Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996," 21 Harv. Envtl. L. Rev. 201 (1997).

[43] 16 U.S.C.A. § 3821.

[44] 16 U.S.C. § 3821(c).

[45] 33 U.S.C.A. § 1344(f).

[46] 16 U.S.C.A. § 3822(b)(1).

[47] 16 U.S.C.A. § 3822(b)(1)(D).

[48] 16 U.S.C.A. § 3822(b)(2).

[49] 16 U.S.C.A. § 3822(h).

[50] 16 U.S.C.A. § 3822(f)(1).

[51] 16 U.S.C.A. § 3822(d).

[52] 16 U.S.C.A. § 3822(f)(2).

[53] 16 U.S.C.A. § 3822(i).

[54] "Memorandum of Agreement Concerning Wetlands Determinations on Agricultural Lands," 59 Fed. Reg. 2920 (1994).

[55] 16 U.S.C.A. § 3822(j).

[56] 16 U.S.C.A. § 3822(f)(4).

[57] 16 U.S.C. §1133(b), (c).

[58] 16 U.S.C. § 1131(c).

[59] See for example U.S. Department of Agriculture, Forest Service, Forest Service Manual, ch. 2320.6 (1990); Forest Service Management Handbook, ch. 7.11 (1992).

[60] 16 U.S.C. § 1132(b), (c).

[61] 43 U.S.C. § 1701.

[62] 16 U.S.C. § 1131(a).

[63] 16 U.S.C. § 1133(d)(4).

[64] 16 U.S.C. § 1133(d)(3).

[65] H.W. Hannah, "Farming in the Face of Progress," 11-Oct Prob. & Prop. 8 (September/October 1997).

[66] Neil D. Hamilton, "Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May be Ineffective," 3 Drake J. Agric. L. 103 (Spring 1998).

[67] Bormann v. Board of Supervisors in and For Cossuth County, 584 N.W. 2d 309

(Iowa 1998).

[68.] *Id.*, at 321.

[69.] Lucas v. South Carolina Control Comm., 112 S.Ct. 2886 (1992) (State Beachfront Management Act prevented development in certain coastal areas. The court held that the Act denied the owners "all economically beneficial or productive use" of the land and therefore constituted a "taking" of their property without compensation.)

[70.] Gregory S. Wetstone, Sharon Buccino, Nathan Daschle, "Damage Report Environment and the 105th Congress," SD47 ALI-ABA 31 (February 10, 1999).

[71.] *Id.*, at 35-36.

[72.] *Id.*.