

# **ENVIRONMENTAL POLICY: THE LEGISLATIVE AND REGULATORY AGENDA**

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*Long ago and far away in the imaginary land of Wal, there lived an elephant and a butterfly. One day they met, fell hopelessly in love and decided to get married and raise a family. Realizing an obvious problem or two with the match, they agreed the elephant would speak to the king in an effort to find a solution to their dilemma. Upon speaking to the king, the elephant was promptly referred to the owl for consultation. On hearing the elephant's story, the owl quickly responded with conviction. "The solution is simple," he said. "Become a butterfly!" Happy he had found a solution to the problem, the elephant returned to the jungle only to reappear before the owl a few weeks later. "You've given me some excellent advice," said the elephant. "But how do I become a butterfly?" "That's your problem," said the owl. "I just make policy. I don't implement it."*

As in the story, legislative solutions to environmental dilemmas frequently seem simple at first glance. Nearly twenty-five years after the first sweeping environmental policy legislation, we have finally realized, although the solution was easy enough, putting it into practice is altogether different. Like the owl in Wal, Congress only makes policy through legislation. Once policy is legislated it becomes the responsibility of the executive agencies to implement it through regulation. My presentation today will focus on environmental policy by addressing what I see as the key environmental issues shaping the legislative and regulatory agendas. I have been asked to provide you with my perspective, not as a Beltway insider, but as an agricultural lawyer, former plant nursery operator and environmentalist.

## **Historical Perspective**

To better appreciate the upcoming challenges inherent in making and implementing environmental policy within the agricultural sector, we have to look to the evolution of environmental policy. In short, we have to look to the past to better understand the future.

As an agricultural lawyer, I believe two historical events have profoundly served as a foundation for modern agricultural law and have had a significant impact on the framing of agricultural policy. These

events are the Great Depression and the establishment of the Environmental Protection Agency (EPA). The first event led to Congress's vesting the United States Department of Agriculture (USDA) with broad regulatory authority. The second removed some of that authority from USDA and gave it to the EPA. This regulatory shift in 1970, brought about largely as the result of increased awareness and interest in environmental issues, was followed by enactment of a number of environmental laws and corresponding regulations that conflicted with traditional agricultural practices and philosophies. This in turn fostered a "them agin' us" mind-set, pitting agriculturalists against environmentalists. The agricultural community became concerned about erosion of property rights and suspicious of the objectives of EPA's long-term regulatory agenda.

This mind-set is countered by the environmental community's suspicions that production philosophies and agriculture's quest for profits in the production of food and fiber overwhelmed environmental concerns. These opposing perspectives have been and will be responsible for much of the controversy surrounding a number of environmental issues facing today's 103rd Congress.

The following environmental areas are earmarked for discussion by the 103rd Congress: 1) reauthorization of the Clean Water Act (CWA), including nonpoint source pollution, citizen suits, and wetlands; 2) endangered species; and 3) pesticides. They are of interest to the agricultural sector, of interest to me, and have been addressed in several bills. Most notable among these bills is Baucus-Chafee (Senate Bill 1114), which focuses on reauthorization of the CWA. The bill, known as the "Water Pollution Prevention and Control Act of 1993," was introduced by Senator Baucus (D-MT), chair of the Environment and Public Works Committee, for himself and Senator Chafee (R-RI), and has widespread bipartisan support and appears to have the best chance of passage (Camia).

### **Nonpoint Source Pollution**

Nonpoint source (NPS) pollution is extremely difficult and costly to control. Complete abatement demands rethinking and retooling traditional agricultural production practices. NPS pollution has been the target for increasing regulatory attention over the past two decades.

Federal interest in NPS pollution was first extensively addressed by passage of the Federal Water Pollution Control Act (FWPCA) of 1972 (33 U.S.C. Sec. 1251-1387). The intent of this legislation was to restore and maintain the chemical, physical and biological integrity of the nation's waters (Harl, pp. 14- 11). To achieve this objective, the federal government developed a strategy to end pollution through the control of both point and nonpoint sources of pollution. Point sources (PS) were defined as clearly identifiable points of dis-

charge such as pipes and concentrated animal feedlots. Nonpoint sources, while not defined in the original legislation, have been defined to include discharge from diffuse areas such as runoff from farm and ranch land, mining operations and construction sites. Initially, the federal government's role in pollution control focused on PS pollution. The states, in cooperation with the federal government, were responsible for overseeing NPS pollution control (Harl).

Over time, federal emphasis shifted from PS to NPS control (Carriker, p. 13). This policy shift was largely manifested with passage of the Water Quality Act of 1987 (33 U.S.C. Sec. 1329). The change was due largely to federal success in controlling PS pollution. In addition, it became apparent the states had been unsuccessful in controlling NPS pollution and increased federal participation would be necessary to meet targeted water quality standards (Fentress, pp. 808-809).

The Baucus-Chafee bill goes even farther and would vest greater federal oversight in controlling NPS pollution. Nonpoint source pollution is one of the key elements of that proposed legislation (American Farm Bureau Federation). Key Baucus-Chafee provisions addressing NPS pollution amend CWA sections 302 and 319. Section 304 of the Baucus-Chafee bill, "Nonpoint Pollution Control," amends CWA Section 319 by calling for revision of NPS management plans. Under this revision, EPA is given significantly more control over the substance and format of these plans. This is accomplished by requiring that the EPA Administrator issue "guidance" in the preparation and implementation of CWA Section 319 plans (Krause and Porterfield, p. 9).

Agricultural interests see the amendment of CWA Section 302, "Comprehensive Watershed Management," and not 304, as the central NPS focus of Baucus-Chafee (Krause and Porterfield, p. 7). Their belief is based, in part, on the use of comprehensive watershed management plans as a means of "integrating water protection quality efforts under the Act with other natural resource protection efforts" (Senate Bill 1114, Sec. 321 (a)(1)(B)) and allowing for groundwater to be identified within a watershed management area. Both provisions would expand the scope of NPS oversight.

Some interests express concern with the language of Section 302 of the bill addressing "Activities of Federal Agencies." This new section would provide that "each activity of a Federal agency that affects land use, water quality, or the natural resources with a watershed planning unit for which a plan has been approved, be carried out in a manner that is consistent with the policies established in the plan." (Senate Bill 1114, Sec. 321 (h)(2)(A)). Since EPA must approve any watershed designation plan, and since federal agencies are required to act in accordance with that plan, critics argue this provision could place numerous federal activities under the control

of EPA. Federal activities likely to be affected would include timber, mining and other operations, issuance of permits, federal funding and other federal activities (Krause and Porterfield, p. 9).

Nonpoint source pollution control is also the focus of the Coastal Zone Management Act (CZMA) pursuant to the 1990 amendment (16 U.S.C. Sec. 1451 et seq.) of that act (Thunberg, p. 13). As amended, Section 6217 of the act authorizes the National Oceanic and Atmospheric Administration (NOAA) and the EPA to assist coastal states with an approved coastal zone management program to develop NPS control programs (U.S. Environmental Protection Agency, pp. 1-4). Erosion from cropland, confined animal facilities, application of nutrients and pesticides to cropland, grazing management and cropland irrigation have all been recognized as sources of agricultural NPS pollution affecting coastal waters (U.S. Environmental Protection Agency, p. 2-2). NPS pollution control under the Coastal Zone Management Act has raised questions regarding regulatory duplication between Section 319 plans under the CWA and 6217 plans under the CZMA. These questions could be addressed as part of the reauthorization process for the CWA.

Other questions raised by the agricultural sector regarding NPS oversight center on the lack of adequate resources necessary for effective implementation and the costs to the regulated community. Agricultural producers contend market realities have not been adequately considered by legislators and regulators in structuring NPS programs. They argue that because of their inability to increase product prices, they cannot meet added NPS program costs and remain in business.

Environmentalists counter this argument by noting that of the estimated 60 percent of existing water quality violations attributable to NPS pollution, agriculture is responsible for a significant proportion of those violations (Copeland, p. CRS-5). Since agriculture is a major part of the problem, they argue, agriculture should play a major part in its solution.

### **Citizen Suits**

With the exception of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. Sec. 136, et seq.), all major environmental laws contain citizen suit provisions. Under these provisions, when the federal government fails to act, private citizens can sue the administering agency to comply with its statutory, non-discretionary legislative mandates. That is, enforcement of the "shalls" not the "mays" of enacted legislation. Citizens may also sue the violator of the law.

Citizen suits are viewed by a number of environmentalists as necessary and effective tools for implementing environmental policy within the agricultural sector. Critics view these provisions as plac-

ing the citizen in the role of private attorney generals. Over the years, the CWA has been the focus of a number of citizen suits (Miller, p. 8).

The Baucus-Chafee bill expands the scope of the CWA's citizen suit provision (Senate Bill 1114). It does so by permitting citizens to sue for past violations. Currently, the CWA only allows suits brought for violations ongoing at the time of suit. While this provision is viewed favorably by environmentalists, agricultural interests see it as moving the citizen suit provision from a corrective position to a punitive one (Krause and Porterfield, p. 13). Critics of the provision are also concerned its incorporation within the CWA will serve as a template for inclusion within other environmental laws such as the Endangered Species Act (ESA) (Krause and Porterfield, p. 13).

### **Wetlands**

Estimates by the Fish and Wildlife Service (FWS) place wetland loss since the nation's settlement at greater than 115 million acres, with some 290,000 acres lost annually (Zinn and Copeland, p. CRS-1). Currently, no single piece of law collectively addresses wetlands protection (Zinn and Copeland, p. CRS-1). Recently, however, separate comprehensive wetland legislation has been introduced for tie-in within Baucus-Chafee. The bill (Senate Bill 1304), known also as the "Wetlands Conservation and Regulatory Improvements Act," is the second attempt in as many years to address wetlands protection. The major provisions of the bill include improving the efficiency, consistency and fairness of wetlands regulations; easing federal wetlands compliance requirements for farmers and ranchers; establishing a better working relationship between state and federal governments; and increasing the emphasis on wetlands protection and restoration nationwide.

This bill provides incentives for both agricultural and environmental interests. In addition to simplifying agricultural compliance with wetlands protection efforts, it also exempts some 53 million acres of previously converted croplands from CWA compliance (Kirby). The incentives favored by environmentalists include making wetlands protection and restoration a goal of the CWA and directing federal agencies and the states to establish a "National Wetlands Restoration Strategy."

Some provisions of the bill do not fare well with either agricultural or environmental interests. On the agricultural side, property rights are an issue. Some argue the added costs of implementation could result in a "taking" of farm and ranch lands, in violation of Fifth and Fourteenth Amendment rights (Eckel, p. 10). On the environmental side, wetlands delineation is one issue. A number of environmental interests are displeased with the bill's provision calling for the use of the 1987 *Corps of Engineers Wetlands Delineation Manual*. The man-

ual was revised in 1989, but the revision created such confusion and controversy in delineating wetlands, that Congress authorized the National Academy of Sciences to conduct a wetlands study designed to develop new delineation guidelines (Zinn and Copeland, p. CRS-4). Until that review is completed, the 1987 manual is in effect. The 1989 revision expanded the definition of wetlands, thereby increasing the amount of land so designated (Eckel, p. 7). Shelving the 1989 revision in favor of the 1987 manual significantly reduced the amount of land designated as wetlands.

Another issue in the proposed bill which has generated concern among environmentalists is the mitigation provision. They argue that mitigation, the replacement of wetlands in kind, allows the continued destruction of wetlands (Zinn and Copeland, p. CRS-7). This contention is based on the fact that the mitigation process is not based on good science and experience which demonstrates that mitigation failures outnumber successes.

### **Endangered Species**

Environmentalists consider the Endangered Species Act (ESA) the most important piece of legislation preventing the extinction of plants and animals (Corn, "Summary"). As defined by the ESA, an endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range" (16 U.S.C. Sec. 1532 (6)), while a threatened species is "any species likely to become endangered within the foreseeable future throughout a significant portion of its range" (16 U.S.C. Sec. 1532 (20)).

Currently, several bills have been introduced to reauthorize and amend the 1973 Endangered Species Act. Key provisions of bills proposed by Representatives Tauzin of Louisiana and Fields of Texas are designed to provide for a five- year reauthorization; ensure the scientific integrity of the process to list threatened and endangered species; ensure balanced consideration of all impacts of listing decisions; and provide that private landowners and other non-federal parties are not compelled to comply with more stringent procedures and standards than are federal agencies. The major provisions of a bill introduced by Senator Baucus encourage earlier, more comprehensive species conservation; improve efforts to recover species by speeding up the development of recovery plans; and create incentives for private landowners to protect endangered species.

Even with the incentives provided by these bills, opposition is expected from several sectors. On the agricultural side, the issue of property rights is again raised by farm and ranch concerns. They argue that, amended or not, the ESA creates serious economic consequences for agriculture, with insufficient compensation provided to property owners by the government (Corn, "Summary"). Supporters of reauthorization favor strengthening the ESA through in-

creased funding and accelerating the recovery of listed species for which no action has been taken (*Kiplinger Agriculture Letter*).

ESA reauthorization will be a challenge for the 103rd Congress. Field issues related to such endangered species as the Northern Spotted Owl have deeply polarized many factions subject to the act and have, in turn, generated considerable debate about the act's future. Reauthorized or not, Congress will probably appropriate the funds necessary for continued implementation of the current law (Corn, p. CRS-2).

## Pesticides

No one environmental policy issue surfaces with such consistent regularity as that of pesticides. Issues related to pesticide use and impact weave through nearly every major piece of environmental legislation. Some of these issues include ground and surface water contamination, endangered species, food safety, hazardous waste disposal and cleanup.

Once again, pesticides have dominated the popular press with the recent National Academy of Sciences Study, "Pesticides in the Diet Of Infants and Children." The study was designed to determine "whether there are adequate protections for infants and children in the pesticide risk assessment process" (*Chemically Speaking*, July, 1993, p. 1). The conclusion was that the risk assessment process needs improvement, specifically in the form of better data (*Chemically Speaking*, July, 1993, p. 2). EPA Administrator Browner responded by calling for more pesticide regulatory oversight. What follows are two pesticide issues currently under consideration by Congress. They are food safety and minor use registration.

*Food Safety* — A number of scientists and public health officials agree that microbial contamination of foods, not pesticides, pose the greatest food safety threat to the public (Vogt, p. CRS-6). The public sees it differently. In one study, 79 percent of consumers surveyed see pesticides as the most serious food health threat (Vogt, p. CRS-3). The pesticide-food safety issue has recently surfaced in the courts, prompting EPA and Congressional action (*Chemically Speaking*, Feb. 1993).

The U. S. Court of Appeals for the Ninth Circuit has ruled the EPA must adhere to Delaney Clause provisions of the Federal Food Drug and Cosmetic Act (FFDCA) (7 U.S.C. Sec. 138 et seq.). The Delaney Clause, also referred to as the Food Additive Amendment of 1958, is found in Section 409 of the FFDCA. Delaney sets a zero risk standard for carcinogenic residues. Under the ruling, the EPA can no longer allow carcinogenic pesticides to accumulate in processed foods (*Pesticide & Toxic Chemical News*, June, 1993). For years, the EPA interpreted Delaney as containing an exception for

pesticides posing a trivial or *de minimis* risk (*Chemically Speaking*, July, 1992, p. 1).

The Ninth Circuit Court's action is of significant interest to agricultural producers. Of the 300 pesticides registered for application to foods, some 67 have been found to induce cancer in laboratory studies (*Chemical Regulation Reporter*, July 10, 1992). The EPA acknowledges that some 35 chemicals and a number of uses will be impacted by the Ninth Circuit's ruling (*Chemical Regulation Reporter*, July 10, 1992).

Supporters of Congressional moves to change Delaney argue the EPA is being forced to adhere to a law based on 1950s technology. When implemented in 1958, residues could not be detected with then-existing technology. Now, however, science has advanced to the point at which residues can be detected at concentrations of one part per billion. This is equivalent to a pinch of salt in 10,000 tons of potato chips (Nesheim). There is no way, producers argue, that a crop could be produced without any residues being detected in the processed product. Strict adherence to the Delaney standard would be devastating. Opponents counter that Delaney should be strictly enforced. To not do so would jeopardize public health.

Members of Congress have introduced several bills proposing changes in the application of Delaney. These bills generally provide for a "negligible risk" standard in establishing tolerances for both raw and processed commodities (Vogt, p. CRS-3). Under Section 408 of the FFDCFA, the EPA is allowed to weigh the benefits of pesticide use and set less stringent tolerances for carcinogenic residues on raw agricultural commodities. Subsequently, EPA has pursued a policy of setting different standards for carcinogenic pesticide residues in processed and raw foods (*Chemical Regulation Reporter*, July 10, 1992). The emphasis of the currently proposed bills appears to be that of setting identical standards for both raw and processed commodities. Because of the health and production arguments for and against Congressional action on Delaney, this is one environmental issue with little if any ground for compromise.

*Minor-Use Pesticide Registration* — In general, all pesticides must be registered by EPA. The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), together with rules promulgated by EPA set forth the requirements for pesticide registration (USDA Economic Research Service, p. 37). These requirements are quite complex and need not be elaborated on here other than to point out that EPA will not register a pesticide unless it is satisfied its use, as specified by the label, will not cause undue harm to humans or the environment. Pesticides must be reregistered periodically and EPA must make the same kind of judgment on a reregistration that it does on an original registration. Registration is the cornerstone of FIFRA and is costly.

Minor-use pesticides are defined as low-volume, low-profit pesticides applied to a variety of crops such as vegetables, fruits, ornamentals, nuts and other specialty crops (*Chemical Regulation Reporter*, March 6, 1992). These pesticides do not provide sufficient economic incentive to support reregistration and many manufacturers are refusing to reregister them (*Chemical Regulation Reporter*, March 6, 1992). Agricultural interests are concerned that losing the use of these products will prohibit the production of numerous minor crops and devastate producers in the process. The revenues generated from the sale of minor-use crops are substantial. EPA estimates that of the \$70 billion in agricultural sales in 1990, minor crop sales accounted for some \$30 billion (*Chemical Regulation Reporter*, June 11, 1993). Some states, such as Florida, would be devastated by such losses since all crops grown in Florida, including citrus, are minor crops.

To address agricultural concerns, the federal government has encouraged the retention of minor-use pesticides by establishing the ongoing USDA administered "IR-4" program. This program enables the USDA to assist in collecting data for the support of minor-use products (Womach, p. CRS-4). The end result aids in defraying reregistration costs for minor-use registrants.

A coalition of farmers and farm organizations known as the "Minor Crop Farm Alliance" (MCFA), has successfully initiated legislation known as the "Minor Crop Pesticide Crop Protection Act of 1993" (Womach p. CRS-4). Sponsored by Representative de la Garza (D-TX) in the House and Senator Inouye (D-HI) in the Senate, the bill provides a series of incentives for registrants. One such incentive speeds up the registration process (Womach, p. CRS-4). Chance of passage looks good for several reasons. First, crop protection alternatives are not being developed quickly enough to mitigate the loss of minor-use products. Second, the loss of minor-use products may result in the use of less environmentally friendly pesticides and increasing off-label uses. Finally, minor-use pesticides can play a beneficial role in Integrated Pest Management (IPM) programs.

### **Pesticide Reduction: A Policy Alternative?**

The Clinton administration appears committed to FIFRA reform and, according to Administrator Browner, will demonstrate that commitment in the fall of 1993 (*Pesticide & Toxic Chemical News*, July 14, 1993, p. 18). Currently, pesticide use is a necessary activity for crop production. Nevertheless, this activity has, and will continue to have, detrimental impacts on the environment. This is clearly reflected in the number of environmental laws and corresponding regulations addressing pesticide use and impact. To reduce the negative impacts, there must ultimately be a reduction in pesticide use.

Lowering the grade standards for fruits and vegetables has been suggested as one approach to reducing the amount of pesticide use in agriculture. This approach is based on the premise that many pesticides are used to meet the cosmetic requirements of the grade standards. This premise has recently been the subject of an EPA study conducted by Leonard Gianessi, a fellow with Resources for the Future (*Pesticide & Toxic Chemical News*, Nov. 4, 1992). In his study, Gianessi concluded most producers use pesticides to control pest problems, not for the cosmetic benefit fostered by the federal grade standards. He concludes changing the standards to permit more surface damage would not significantly decrease the amount of pesticide use on fruits and vegetables.

Nevertheless, critics of the standards still contend that because of the standards, growers are required to apply more pesticides. Gianessi notes federal standards “already have significant allowances for surface damage.” While the EPA study proves a credible argument, questions still remain regarding the efficacy of lowering the standards. Gianessi also notes that policymakers need to decide “to what extent they want to continue funding research, or doing consumer surveys . . .” He adds that policymakers “must decide whether the administrative costs of changing the standards are worth it.”

### **Extension Opportunities**

In closing, I have some additional comments about the educational opportunities the environmental regulatory agenda holds for extension. Because of environmental law and regulation, the level of knowledge of law that served our parents only a few decades ago is inadequate today. People in agriculture have reached a point at which knowing environmental law is just as important in the successful management of an agricultural operation as knowing business law and economics. Here lies the challenge and the opportunity for extension.

The extension network can provide the balanced education necessary for its clientele to effectively and responsibly operate within this imposing body of environmental law and regulation and the policymaking process. I am not advocating the training of lay lawyers. I am advocating education designed to meet the challenges inherent in implementing a policy that is acceptable to both agricultural and environmental interests.

#### **NOTES**

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