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ENVIRONMENTAL LAW UPDATE

Effect on Agriculture Mixed

Theodore A. Feitshans, Extension Attorney, Department of Agricultural and Resource Economics, NCSU

■ Congressional Actions

At the federal level, Congress passed a reauthorization of the Safe Drinking Water Act, which regulates public drinking water systems. The reauthorization tightened requirements and increased the number of substances for which operators of public water supply systems must test.

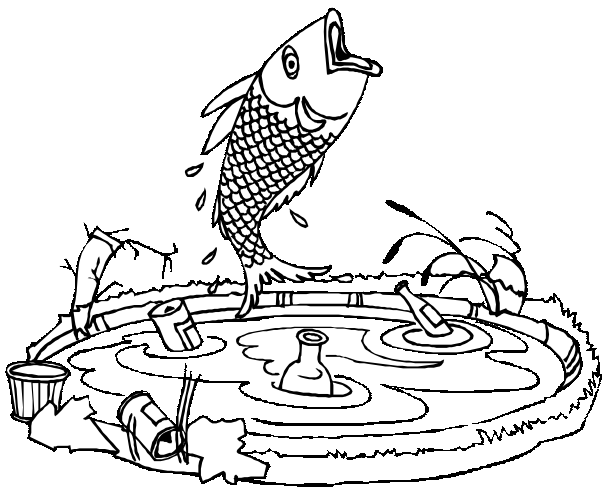
Congress amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) through a rider attached to the Omnibus Consolidated Appropriations Act [Pub. L. 104-208 (Sept. 30, 1996)]. The CERCLA amendments gave the banking industry something that it had long sought - clarification of the limited protection from cleanup liability that is provided by CERCLA's lender exclusion. Thus a lender engaged

in normal lending practices will no longer be subject to cleanup liability solely because it lent money that was secured by contaminated property. A very important implication of these amendments is, that together with a Clinton administration initiative, it will now be possible to develop many of the so-called brownfields that blight our major industrial areas. Brownfields are areas of contaminated soil that under prior standards could not be decontaminated to the point that they could be used. This change in the law should remove an important impediment to economic growth for some communities.

The Congress, also in 1996, enacted the Food Quality Protection Act that repealed the Delaney clause. The Delaney clause was first enacted in the nineteen fifties and prohibited the use of any man-made carcinogenic chemical that could be detected in any quantity in human food. Through the repeal of the Delaney clause the artificial distinction between man-made carcinogens and naturally occurring carcinogens was abolished. The Food Quality Protection Act requires that all potential carcinogens found in human food be evaluated using risk analysis.

The 1995 Omnibus Appropriations and Rescissions Act [Pub. L. 104-19] expanded salvage logging activities in the national forests. However, that legislation expired on December 31, 1996, and renewal does not appear likely.

Congress also gave itself a legislative veto over major regulations (\$100 million impact or greater). Every such regulation must now be laid before Congress for 60 days before it becomes effective. Congress may, during that period, pass a bill blocking the regulation (provided either that the President signs the bill or Congress enacts it over the President's veto).



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■ Federal Regulatory Actions

At a regulatory level, the U.S. Army Corps of Engineers has, effective February 11, 1997, substantially modified its nation-wide permits under section 404 of the Clean Water Act. Major changes were made to Nation-Wide Permit (NWP) 26: the acreage limits were reduced from a range of 1 to 10 acres to a range of 1/3 to 3 acres. Anyone who wishes to dredge or fill in excess of 3 acres of wetland must now apply for an individual permit. Anyone filling from 1/3 to 1 acre must now file a pre-construction notification, where none was required before. Anyone filling less than 1/3 acre must now self-report. The Corps decided against requiring a particular mitigation ratio but has indicated that most projects involving the filling of a 1/3 or more acres will require mitigation. (Mitigation, for those of you unfamiliar with wetland regulation, is the requirement that wetland destroyed be replaced with new or rehabilitated wetland elsewhere so that no net loss of wetland occur.) The Corps is also developing the means to permit regionalization of permits to allow for variations required by conditions unique to particular regions. A primary goal in making these changes has been to insure that only those activities with minimal adverse impact will occur under NWP 26. These changes reflect a determination by the Corps that there is no basis for determining that wetlands that are isolated or in headlands are any less valuable than more extensive wetlands. Indeed these wetlands may be critical for flood control and prevention of surface water degradation.

Also at the regulatory level, the EPA has proposed substantial tightening of air quality standards for ozone and particulates. If these regulations should be adopted as proposed, large areas of North Carolina would no longer be in compliance with air quality standards. Designation as a nonattainment area imposes substantial costs on state and local government and industry, and has the potential for limiting economic growth. EPA recently concluded public hearings on these proposed standards.

At the regulatory level, the EPA has developed a new audit policy which is designed to avoid penalizing companies that conduct environmental audits and

take steps promptly to correct any violations revealed by those audits. Prior law discouraged self-policing because the results of such activities could be used by EPA as the basis for assessing penalties. This new policy is consistent with EPA's overall efforts to develop a more cooperative approach in its interactions with industry. However, there remain serious disincentives to self-policing; there is no prohibition on the use of the information reported to EPA, by state and local enforcement authorities. In addition, the information reported to EPA could be used in a private lawsuit.

A further joint effort of EPA and the U.S. Department of Agriculture (USDA) is also of particular interest to those involved in agriculture. EPA and USDA have jointly created the Agricultural Compliance Assistance Center (AG Center). The AG Center is designed to provide one-stop shopping for information about environmental regulation of agriculture. It is available through the World Wide Web.

■ International Initiatives

The Clinton administration has also proposed a major initiative to further limit the production of greenhouse gases. A key component of this initiative consists of negotiating binding international agreements. If such agreements are adopted, they could result in a wide range of restrictions on activities ranging from fossil fuel consumption to the production of cattle (which incidentally are a source of methane, a greenhouse gas).



Mixed Effects on Agriculture

■ Judicial Rulings

In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, (*Sweet Home*) regulation of wildlife habitat under the Endangered Species Act (ESA) withstood a Supreme Court challenge. In that case, the power of the U.S. Fish and Wildlife Service to regulate the habitat of an endangered species was affirmed. While this case represented a disappointment to opponents of the ESA in its current form, *Sweet Home*, nonetheless, represents a continuation of the existing trend in the federal courts, and the Supreme Court in particular, toward judicial conservatism and away from judicial activism. *Sweet Home* stands for the proposition that the Supreme Court will continue to uphold the broad delegations of authority to agencies that Congress has made, not only in the ESA, but in many environmental statutes. Paradoxically this judicial restraint will likely result in tighter environmental regulation because it will result in confirmation of the broad powers that Congress has delegated to regulatory agencies

■ State and Local Actions

Moving to the state level, the General Assembly, in its 1996 session, demonstrated that it is willing to enact fairly dramatic tightening of environmental

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laws applicable to North Carolina. In Senate Bill 1217, ratified in June 1996, the General Assembly enacted a program of comprehensive regulation of the livestock industry. New hog farms must meet tighter siting and setback requirements. A private cause of action was created for affected neighboring land owners to ensure compliance. Over no more than the next five years most commercial livestock farms will be moved from a deemed permitted basis to coverage under a general nondischarge permit. Existing

requirements for waste management plans were tightened, and mandatory reporting of certain violations was required. All operators of covered livestock operations that make land application of animal waste must obtain training and certification in order to remain in business.

Also at the state level, one of the major areas that we can expect to see additional regulation is in the protection of water quality. Significant portions of rivers and streams in North Carolina do not currently support their designated uses. Roughly one quarter of the nitrogen (N) loading in the Neuse River is estimated to come from point sources of water pollution. These sources are already highly regulated through the system of National Pollutant Discharge Elimination System (NPDES) permits. Although improvements in technology and more restrictive regulation can be expected to provide some gains, increased population and industrialization in the state can be expected to provide countervailing pressure. Thus much of any gain to be achieved will inevitably come from nonpoint sources. This will place particular pressure on agriculture since, compared to other nonpoint sources such as individual homeowners, there are relatively few actors to be regulated and those actors can be readily identified.

Much of that which we can expect to see has already been proposed. The Neuse River Nutrient Sensitive Waters (NSW) Management Strategy is, at the state level, the most prominent (as well as controversial) example of new environmental regulation that may be expected. Mandatory nonpoint source control measures such as riparian buffers, water control structures, and best management practices are almost certainly among the measures that may be part of nonpoint source regulation of agriculture. Those in other river basins should take little comfort in knowing that such regulations are not currently proposed for their basins. Surface water quality problems are varied, but pervasive, and will likely lead to a more restrictive type of regulation as government seeks to meet the public's demand for a cleaner environment.

To these new state requirements, several county health boards in the coastal plain and piedmont have adopted rules that provide for comprehensive regula-

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tion of animal agriculture within their borders. The number of counties considering such rules has increased.

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**NORTH CAROLINA
COOPERATIVE EXTENSION SERVICE
NORTH CAROLINA STATE UNIVERSITY
AGRICULTURAL AND RESOURCE ECONOMICS
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