Legal Threats to Animal Agriculture

NIAA Annual Conference
Wednesday, March 28, 2012
Denver, Colorado

Gary H. Baise
OFW Law
Washington, DC
“It is not my intention to do away with government. It is rather, to make it work – work with us, not over us; to stand by our side, not ride on our back. Government can and must provide opportunity, not smother it; foster productivity, not stifle it.”
Five Trends in Agriculture

1. Opposition to mono-culture
2. Opposition to CAFOs
3. Opposition to international trade
4. Opposition to GMOs
5. Criminalization of CAFO runoff
Internet Data Mining RFP

- USDA seeks contractor for internet surveillance

- Surveillance/data mining for individuals involved in animal welfare or horse protection

- USDA seeks animal care personnel to monitor, collect and manage data on internet sites
USDA vendor shall monitor internet for:

- Sales of animals for pets
- Sales of animals exhibited to public
- Animals used for research, teaching, testing & experimenting
- Horseshows & animal auctions
PM$^{10}$ – Farm Dust

- Present standard is 150 ug/m$^3 = 24$ hours
- EPA suggested 65ug/m$^3$ to 85 ug/m$^3$ in November, 2011
- EPA forced to reverse proposal
- Impact on Midwestern and Western tillage practices
- PM$^{10}$ – farm dust = 10 microns
- 1 grain of sand = 90 microns
American Farm Bureau Federation v. EPA, Feb. 24, 2009

Challenge to EPA retention of PM$_{10}$ indicator for coarse PM

Appeals Court allows EPA to regulate rural dust – Court chose to disregard lack of scientific support
GMOs & National Environmental Policy Act (NEPA)

- APHIS – regulates GE plants for experimental testing & commercial production

- Bentgrass & Bluegrass case (ICTA v. Johnson)

- NEPA – EIS statement required

- Fear of gene flow, enhanced weediness & increased use of other herbicides
Alfalfa

- Organic & commercial growers

- Challenged APHIS’ deregulating GE (Roundup Ready) alfalfa
  - EA prepared
  - APHIS found no significant impact & no plant pest risk
  - Geerston – need EIS
Monsanto v. Geerston Seed Farm

- Monsanto filed appeal in U.S. Supreme Court – won
- USDA–APHIS prepared Environmental Impact Statement (EIS)
- Center for Food Safety filed suit in California
- December 5, 2011 U.S. District Court ruled in USDA’s favor
- Center for Food Safety will appeal to 9th Circuit Court of Appeals in San Francisco
Clean Water Act

- Florida Wildlife Federation, Inc. v Jackson
  U.S. District Court, ND of Florida, 2009
  - Ag storm water runoff exemption
  - Environmentalists sue EPA – Consent Decree
  - AFBF and ag groups sue over Consent Order
    - CWA allows water quality standards to address pollutants
Farmers will be required to control nutrients in rainwater runoff – environmental groups

Consent Decree requires “numeric water quality criteria for nutrients”

Florida Ag Commissioner – “will shut down Florida agriculture”

Chesapeake Bay & Mississippi Watershed next
Clean Water Act

- March, 2012 – Everglades Foundation Report
- Agriculture industry
  - Responsible for 76% of phosphorus pollution in FL
  - Pay only 24% of cost removal
  - Farmer removal cost $47.00 per pound vs taxpayer funded cost $350.00 per pound
Clean Water Act

- New court decision February 18, 2012
  - Controls nutrient levels
  - Nutrient numeric criteria – controls over-enrichment
  - EPA – January 14, 2010 proposed rule for Florida
    - 22,000 comments & 13 public meetings
  - March 6, 2012 – Rule takes effect
Clean Water Act

- Law suits
  - 5 environmental organizations
  - 13 Florida state organizations
  - 25 trade and farm groups
  - Florida Attorney General

- Court opinion – 86 pages
Clean Water Act

Result

- State designated “uses” for its waters
- State sets water quality criteria or standard for the uses
  - Protect drinking water use
  - Fish and Wildlife use
  - Recreational use
  - Agricultural and industrial use
Florida had narrative standard

- “nutrient concentrations should not cause imbalance in natural populations of aquatic flora or fauna”

- EPA said 40% of Florida water failed to meet standard
Clean Water Act

- **Numeric Nutrient Numbers**

- **Lake Criteria**
  - Classifies lakes according to color & alkalinity
    - Lakes with color greater than “40 Platinum cobalt units” – color scale
      - Index to evaluate pollution levels in water
      - It is specific to the color yellow
Clean Water Act

- Numeric Nutrient Numbers
  - Alkalinity of more than 20 mg/L CaCO$_3$
  - EPA – strong association of color & alkalinity with nitrogen & phosphorus
  - Chlorophyll–a is set at 0.020 mg/L
Clean Water Act

- **Stream Criteria**
  - Court overruled EPA
  - Based on models & field studies
  - EPA chose streams minimally disturbed by P & N loadings
Clean Water Act

- All streams must be at 90% of the best streams
  - Violations if exceed 1 in 3 years
- Arbitrary & capricious
Clean Water Act – Criminal

- Farmers going to jail
- EPA National Enforcement Initiative
- Clean Water Act being violated by farmers
  - June, 2011 – nation’s 4th largest dairy co-op pleaded guilty
    - Discharged ammonia solution into creek & killed fish
March, 2011 – Idaho dairy farmer guilty of negligent misdemeanor for water runoff into canal

- U.S. Attorney – discharge was negligent discharge or mistake
- Open pipe – cap taken off pipe
- Potential $100,000 fine & 1 year of supervised release
- August, 2011 – 60 days jail time, $12,000 fine
Clean Water Act – Criminal

- July 11, 2011 – North Carolina hog producer guilty of discharging hog manure from lagoons into a local creek
  - News story doubted discharge into a water of the state
  - Stream was dry & no waste moved into a state water
Clean Water Act – Criminal

- February 13, 2012
  - CEO – 6 months in prison & 6 months home confinement
  - Freedman Farms – $1.5 million in fines
    - $500,000 criminal fine
    - $925,000 restitution fine
    - $ 75,000 to Southern Environmental Enforcement Network (SEEN)
Clean Water Act – Criminal

- 2011 – Indiana mint farmer discharging heated process water into roadside ditch
  - Water at facility reaches 160–190 degrees
  - Ditch alleged to be a water of the United States under the Clean Water Act
  - Neighbor’s dog jumped into ditch and was scalded to death
Clean Water Act – Criminal

- Sentenced:
  - 2 years probation
  - 8 months home detention
  - EPA – $20,000 fine
  - IDEM – $40,040 fine
Clean Water Act – Recent Decisions

- October 20, 2011 – *Rose Acre Farm v. North Carolina DNER*
  - Clean Water Act permit challenged
    - Required control of air emissions from fans
    - Ammonia, litter, feathers, and dust discharged
    - DNER required permit BMPs
      - Control feed to laying hens
      - Control recordkeeping system
      - Control migratory birds on property
Rainwater carries pollutants from fans to ground and drain to storm water pond

State claims NPDES permit required

Appeal filed
Beef Products, Inc.

- McDonalds, Burger King, Safeway & Walmart stop purchase of lean finely textured beef ("LFTB")
  - Supplements 70% of ground beef in America
  - 1.5 million cows needed to replace
  - 10–15 lbs. of lean beef from each carcass
  - Ammonium hydroxide kills pathogens in LFTB
Beef Products, Inc.

- USDA coined phrase “pink slime”
- 3,000 people in 3 plants out of a job
Thank you