

ENR LAW NEWS

An update from the Minnesota State Bar Association's
Environmental and Natural Resources Law Section

Winter 2005

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Legal Issues Swirl From the Proposed Tire Burner Project in Preston, Minnesota

By James P. Peters

Legal issues continue to swirl regarding the proposed tire burner project in Preston, Minnesota. Citizens remain concerned that the project will emit excessive harmful particles from lack of complete combustion, including PCBs, dioxins and furans. After the Minnesota Pollution Control Agency (MPCA) decided that an environmental assessment worksheet (EAW) was complete, the Fillmore County District Court remanded the EAW back to MPCA for further analysis under the reasoning set forth in *City of Minneapolis v. Minnesota Pollution Control Agency (In re Proposed Metal Shredding Facility)*, 604 N.W.2d 140 (Minn. App. 2000).

The Tire Burner Project

Heartland Energy & Recycling, LLC proposes to construct an electrical generator facility that would burn 375 tons of tire-derived fuel (TDF) per day. Chipped tires constitute TDF. This amount of TDF equals about 100,000 tons per year. About 25 semi loads of tires would be delivered to Preston each day.

Heartland proposes to burn the TDF in an experimental fluidized bed boiler system that, while used in

other applications, has never been used to burn TDF commercially. The tire burner would also consume over 23 tons of limestone per day. In order to recover steel from the TDF, the tire burner proposes combusting the TDF at around 1,500 to 1,600°F, rather than at least 1,800°F. The tire burner sits in a 90 foot high building and will, as currently permitted, emit hundreds of tons of air pollutants per year through a 210 foot

dential development, and the local golf course. The tire burner is located 900 feet from the Pro Corn ethanol plant, which was the subject of federal enforcement in the fall of 2002 for violations of its own air permit issued by MPCA.

MPCA Environmental Review

In 2002 and 2003, MPCA handled an EAW worksheet on the tire burner project. MPCA received over 100 written comments, including the written request for an environmental impact statement (EIS) from the City of Preston. Heartland submitted extensive material to MPCA from its consultants on the expected operations of the tire burner. After considering the EAW for over 6 months, MPCA determined that the EAW on the tire burner was adequate on February 25, 2003 and declined to order an EIS.

A citizens group and individuals appealed the EAW decision to District Court under Minn. Stat. sec. 116D.04, subd. 10, seeking an order declaring that MPCA should require an EIS on the Heartland tire burner project. The City of Preston intervened in support of an EIS. Appellants noted that the State of Montana

"Within one-half mile of the tire burner are located an elementary and middle school, care center, inn, restaurant, many existing homes, a residential development, and the local golf course."

stack. The onsite bunker for TDF storage is nearly the size of a football field (12'H x 250"L x 90'W).

Within one-half mile of the tire burner are located an elementary and middle school, care center, inn, restaurant, many existing homes, a resi-

recently ordered an EIS on a tire burning facility. MPCA and Heartland appeared in response to the appeal, resulting in cross-motions on the administrative record regarding MPCA's decision not to require an EIS on the tire burner.

On February 17, 2004, the Fillmore County District Court issued an Order and Memorandum remanding the EAW back to MPCA for further analysis. The Order reserved jurisdiction in the District Court over the motions for an EIS pending a final decision by MPCA on the remand. The District Court held that remand is one option available to a district court when the court feels that there is a need for further review and consideration of whether an EIS is necessary. The District Court cited *City of Minneapolis v. Minnesota Pollution Control Agency (In re Proposed Metal Shredding Facility)*, 604 N.W.2d 140 (Minn. App. 2000), and *Reserve Mining Co v. Minnesota Pollution Control Agency*, 267 N.W.2d 720 (1978).

About two months after the remand, the Fillmore County District Court stopped construction of the tire burner while MPCA continued its analysis.

MPCA Air Permit

Believing that a contested case hearing was required and that the environmental review was not adequate, citizens also appealed the air permit granted by MPCA to Heartland for the tire burner. Such appeals are heard by the Minnesota Court of Appeals. Following the initial decision that the EAW was adequate, MPCA issued an air permit to Heartland in summer 2003. MPCA denied a contested case hearing request in July 2003 and issued an air permit to the tire burner, giving notice of that decision on August 5, 2003. An agency should grant a petition for a contested case hearing when (1) there is a disputed material issue of fact; (2) the agency has the jurisdiction to determine the disputed material issue of fact; and (3) there is a reasonable basis underlying the disputed material issue of fact or facts such that a contested case hearing would aid the agency in its final decision. Minn. R. 7000.1900 subp. 1; *In re Winona County Mun. Solid Waste Incinerator*, 442 N.W.2d 344, 346 (Minn. App.

1989); *In Re Hibbing Taconite Co.*, 431 N.W.2d 885, 887 (Minn. App. 1998).

The Minnesota Court of Appeals stayed consideration of the air permit appeal on April 27, 2004 pending further proceedings on the EAW in District Court.

Other Legal Issues

In addition to the environmental review and air permit legal issues, the tire burner Project and related parties have also been involved with legal issues regarding when a municipality (City of Preston) may properly issue a conditional use permit while environmental review is pending, when may a municipality revise zoning regulations, what projects should receive JOBZ status, and whether a project may recover damages for zoning decisions (a lawsuit by Heartland in U.S. District Court).

January 2005 Hearing

MPCA has not completed its work on the remanded EAW. MPCA classified the remand as a supplemental environmental assessment worksheet (SEAW) and scheduled a public hearing of its Citizen's Board in January 2005. During the public comment period on the

SEAW, MPCA received over 700 comment letters relating to the Heartland tire burner, including 433 form letters (pre-written letters signed by various citizens), 176 individually composed letters, 178 individually composed e-mails and a petition to the MPCA with about 4,500 signatures.

On January 25, 2005, the MPCA Citizens' Board voted 6-1 to require that Heartland complete an EIS on the tire burner on the grounds that the administrative record established that the project had the potential for significant environmental effects.

The Citizens' Board heard testimony for over 6 hours in support of the EIS from engineers, doctors, local government officials (county board, town board and city council), other officials, Citizen group representatives and individuals.

Jim Peters is a partner in the law firm of Peters & Peters, PLC, with offices in Alexandria. Mr. Peters practices in the areas of municipal law, land use, and environmental law. You can reach Mr. Peters with questions or comments at (320) 763-8458.

SAVE THE DATE!

ENVIRONMENTAL LAW INSTITUTE

April 21, 2005

**Minnesota CLE Conference Center
Seventh Street & Nicollet Mall
Third Floor City Center, Minneapolis**

MPCA Rulemaking Docket Summary

Are you looking for one place to keep up with rulemaking and regulatory decisions at the Pollution Control Agency?

If the answer is yes, then you're in luck! The Pollution Control Agency maintains a web page that tracks rulemaking processes and regulatory decisions occurring at the agency.

Visit the page at: <http://www.pca.state.mn.us/rulesregs/index.html>, then look within the right column for the Public Notices for Rule Changes link and the link for the MPCA Rulemaking Docket Summary.

Section Seeks Newsletter Contributions!!!

The Environmental and Natural Resources Section of the MSBA produces this quarterly newsletter as a service to our members.

We are constantly seeking submissions, which might include articles, updates on section activities, upcoming events of interest to the environmental law community, recent case law summaries, and more.

We are currently seeking submissions for our Spring issue. Submissions are due by March 1st, but advance notice of forthcoming submissions is appreciated.

Submissions or questions may be directed to Brian Pasko at brian@paskolaw.com or at 612-722-2757.

HCBA ENVIRONMENTAL LAW COMMITTEE SPEAKERS AND TOPICS FOR 2005 MEETINGS

HCBA Offices, 600 Nicollet Mall, Suite 390
(third floor of the City Center) in downtown Minneapolis

12:00 Noon (all sessions)

1.0 CLE

February 2	Speaker:	The Honorable James M. Rosenbaum, Chief Judge, U.S. District Court, District of Minnesota
	Topic:	Experts and Technology in Federal Court
March 2	Speaker:	Bill Koch, Assistant U.S. Attorney and Matt Lundeen, EPA Special Agent
	Topic:	Environmental Enforcement Update
April 6	Speaker:	Ron Nargang and Rachel Hampton, The Nature Conservancy
	Topic:	Developments in the World of Conservation
May 4	Speaker:	Professor Jamie Grodsky, University of Minnesota Law School
	Topic:	Genetics and Environmental Law: Redefining Public Health
June 1	Speaker:	Sheryl Corrigan, MPCA Commissioner
	Topic:	Comments from Minnesota Pollution Control Agency Commissioner Sheryl Corrigan

\$20 HCBA member (lunch included)

\$10 HCBA member (no lunch)

\$30 Non-HCBA member (lunch included)

\$20 Non-HCBA member (no lunch)

Free Law students (no lunch)

Registrations must be received at least 3 days prior to meeting if lunch is desired. Return registration to Hennepin County Bar Association; 600 Nicollet Mall, #390 Minneapolis MN 55402. Please make checks payable to Hennepin County Bar Association or HCBA. For any questions regarding registration, accessibility or for special accommodations, please call 612-752-6600.

Environmental Case Law Summaries

By Lindsey Skoviera, Carolyn V. Wolski, and Christopher M. McGlincey

Minnesota Court of Appeals

In the Matter of the Wetland Conservation Act, No. A04-314 (Minn. Ct. App. Dec. 14, 2004) (unpublished).
(Summary by Lindsey Skoviera.)

On December 14, 2004, the Minnesota Court of Appeals affirmed the approval of a wetland replacement plan by the Minnesota Board of Water and Soil Resources (BWSR). BWSR had approved the wetland replacement plan brought by the Minnesota Department of Transportation (MnDOT) pursuant to a road construction project that requires acquiring and filling a wetland on property owned by realtors, Dan and John Zander. Realtors objected to MnDOT's plan, arguing that the plan violated the Minnesota Environmental Rights Act (MERA) and the state's wetland replacement plan. BWSR dismissed the Realtor's petition to disapprove the wetland replacement plan, finding the Realtor's petition meritless and brought for dilatory purposes. The court upheld the decisions of BWSR, concluding that: (1) the plan complied with the Wetlands Conservation Act (WCA) as codified in Minn. Stat. §§ 103G.221-.2372 (2002), (2) MnDOT properly considered a feasible alternative route that would not materially and adversely affect the environment, as required by MERA, and (3) substantial evidence supported the decisions of BWSR and MnDOT.

The WCA prohibits the draining and filling of any wetland without the creation of a replacement wetland with "at least equal public value." Minn. Stat. § 103G.222, subd. 1(a); Minn. R. 8420.0100 (2003). WCA requires any local government unit (LGU) to prepare a wetland replacement plan when the LGU seeks to drain or fill a wetland. LGUs include state agencies, such as MnDOT. The wetland replacement plan must comply with five sequencing principles used to mitigate the potential harm imposed by the wetland loss. The first sequencing principle, which also ranks highest in priority, is whether there are any feasible and prudent alternatives to avoid impacting the wetland. If there are no feasible and prudent alternatives, the LGU must then consider the remaining four sequencing principles.

The court concluded that MnDOT

lacked a feasible and prudent alternative to its proposed road construction project. Each of the alternatives posed greater environmental harm and increased inconvenience to the community. The court also concluded that MnDOT properly assessed the project's likelihood to impact threaten or endangered species pursuant to the goal of avoiding impacting the wetland. Realtors argued that an expert they retained could link the wetland located on their property with Sullivan's milkweed, a threatened species. The court, however, concluded that MnDOT complied with WCA because MnDOT's investigation was adequate and the Realtor's evidence was speculative and contradicted by clear evidence.

The court found that Realtors' MERA claim was separate and inapplicable to this appeal. MERA establishes a private right of action for Minnesota residents to challenge "any conduct which materially adversely affects or is likely to materially adversely affect the environment. . ." Minn. Stat. §§ 116B.02, subd. 5.03, subd. 1 (2002). A MERA action is raised at the district court and seeks declaratory or equitable relief. Minn. Stat. § 116B.03, subd. 1. Because the Realtors failed to raise a MERA action in district court, they were precluded from including it in this appeal. For this reason, the court did not reach issues under MERA.

Lastly, Realtors argued that the BWSR decision was not supported by substantial evidence and that the BWSR acted arbitrarily and capriciously in approving the wetland replacement plan. The court will find that an agency decision is supported by substantial evidence when the entire record demonstrates reasoned decision making regardless of whether the reviewing court would have reached a different conclusion. *Cable Communications Bd. v. Nor-west Cable Communications P'ship*, 356 N.W.2d 658, 668-69 (Minn. 1984). The court concluded that based on the investigation conducted by MnDOT pursuant to the WCA, substantial evidence supported MnDOT's and BWSR's actions. The court also concluded that because a rational connection existed between the record and the approval of MnDOT's plan, BWSR did not act arbitrarily and capriciously in approving the wetland replacement plan.

For these reasons, the court affirmed

BWSR's approval of MnDOT's wetland replacement plan.

District of Minnesota

American Rivers, Inc. v. United States Army Corps of Engineers, No. 04-3188 (D. Minn. Dec. 10, 2004). (Summary by Lindsey Skoviera.)

On December 10, 2004, the Minnesota District Court granted defendants', U.S. Army Corps of Engineers (Corps) and U.S. Fish and Wildlife Service (FWS) summary judgment motion, denied plaintiff American Rivers' summary judgment motion, and dismissed without prejudice plaintiff's complaint. American Rivers contested the Corps' compliance with a 2003 amended biological opinion (BiOp) that directs the Corps' management of the Missouri River. The FWS issued a biological opinion, detailing the environmental impact of Corps' action on species within the action area. *See* 16 U.S.C. § 1536(a)(2) & (3). If the FWS concludes that the Corps' proposed action will adversely affect a particular species, the Corps must find a reasonable and prudent alternative ("RPA") to the proposed action. *Id.*

The FWS concluded that several species would be harmed by the Corps' proposed action contained in the amended 2003 BiOp, thereby requiring the Corps to implement an RPA. The resulting RPA included implementing low flow modifications and an artificial habitat construction. American Rivers argued that the Corps' actions in executing the RPA during the summer of 2004 violated the Endangered Species Act ("ESA"). American Rivers also argued that the FWS' approval of the RPA was arbitrary and capricious, in violation of the Administrative Procedures Act ("APA") 5 U.S.C. § 701 *et seq.* The defendants asserted that they complied with the amended 2003 BiOp, the ESA, and the APA. The defendants also contended that American Rivers failed to give the requisite notice of intent to sue, and that the allegations by American Rivers were moot.

The court agreed with the defendants, finding that American Rivers failed to comply with the notice requirement contained in the citizen suit provisions of ESA requiring that plaintiffs send written notice of the specific, alleged violation to

both the defendant and the Secretary of the Interior at least sixty days prior to initiating suit. *See* 16 U.S.C. 1540 (g)(2) (A)(i). The court found that although American Rivers filed notice of its intent to sue in January 2004, the alleged violations contained in that notice were different from the alleged violations complained of in this instance.

The court also agreed with the defendant's mootness claim. The court found that because the Corps reduced the flow of the Missouri River shortly after American Rivers filed its complaint, the plaintiffs failed to articulate any specific injury. Thus, the court refused to reach the merits of case. The court did find that the defendant's interpretation of the RPA did qualify as an exception to the mootness doctrine, but because the plaintiffs are appealing the validity of the 2003 amended BiOp, the court refused to hear plaintiff's claim.

For these reasons, the court found that it lacked jurisdiction to decide American Rivers' claims against the Corps, and that the claim against the FWS relating to the implementation of the RPA involved in this case was moot.

Sierra Club v. Bosworth, No. 03-3572 (D. Minn. Jan. 14, 2005) (Summary by Lindsey Skoviera.)

The Sierra Club and Defenders of Wildlife (Defenders) brought suit against the United States Forest Service (Forest Service) alleging that the Forest Service's decision to allow timber sales in an area known as the Big Grass Project, which is located adjacent to the Boundary Waters Canoe Area Wilderness (BWCAW), violated the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Superior National Forest Land and Resource Management Plan (1986 Forest Plan), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA).

NEPA requires federal agencies to prepare an Environmental Assessment (EA) to determine whether the proposed project constitutes a major federal action that would have a significant impact on the quality of the human environment, necessitating an Environmental Impact Statement (EIS). 40 C.F.R. § 1508.9. Plaintiffs challenging an agency decision not to conduct an EIS need only show "that there is a substantial possibility that the action may have a significant impact on the environment, not that it clearly will have such an impact" *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 18 (2d Cir.

1997). In this case, the Forest Service concluded that the proposed timber sale was not a major federal action requiring an EIS.

The court found that the EA failed to properly analyze the effects of the proposed timber sales in the Project area. The court noted that the Forest Service should have studied whether the timber sales would have significantly affected the project area according to the analysis outlined in 40 C.F.R. § 1508.27(a) & (b). The Forest Service failed to take the requisite "hard look" at how the project's roads would affect the BWCAW and at how recreational visitors would be affected by other aspects of the project.

In addition to failing to analyze the significant impacts of the proposed Project, the court determined that the Forest Service failed to properly analyze the cumulative impacts of the project. Cumulative impacts are actions that are "individually minor, but collectively significant ... taking place over a period of time." 40 C.F.R. § 1508.7. Plaintiffs challenged, and the court found that, the data provided by the Forest Service of only 23 timber sales over 30 years failed to adequately analyze the cumulative environmental impacts required under NEPA.

Plaintiffs also challenged the Forest Service's cumulative effects analysis of ongoing harvest activities near the project area. Defendants argued for the court to dismiss Plaintiff's argument because it was not raised in the administrative proceedings. The court found that NEPA does not require issue exhaustion and that the public comment period does not mirror adversarial proceedings requiring issue exhaustion. The court agreed with plaintiffs, finding the record inadequately analyzed the cumulative impacts of ongoing harvest activities.

For these reasons, the court granted plaintiff's summary judgment motion regarding the Forest Service's failure to prepare an EIS.

NFMA and the 1986 Forest Plan require the Forest Service to monitor Management Indicator Species (MIS) and Viability Indicator Species (VIS). The court described MIS as "represent[ing] all of the community types and habitat conditions that Forest Service management activities may affect." VIS are species that are federally listed under the ESA. Plaintiffs argued that the Forest Service violated NFMA by failing to monitor or provide for population data for MIS and VIS. The court found that NFMA encourages population data, but does not require it. The Forest Service

analysis of the habitat data was sufficient because it included a summary table of wildlife population trends, including the MIS and VIS species, and properly analyzed any impacts to MIS and VIS species.

As such, the court granted defendant's summary judgment motion concerning the alleged MIS and VIS violations.

U.S. Supreme Court

***Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004).** (Summary by Carolyn V. Wolski and Christopher M. McGlincey.)

On Dec. 13, 2004, the U.S. Supreme Court sent shock waves through the environmental bar with its long-awaited decision on contribution actions under section 113 of CERCLA (the Comprehensive Environmental Response, Compensation and Liability Act). In a 7-2 decision, the Court reversed the Fifth Circuit and held that section 113 does not allow a contribution action unless the would-be plaintiff has either (a) itself been sued under CERCLA's section 106 or section 107, or (b) entered into a settlement with the federal or state government to undertake or pay for response action.

Cooper Industries owned and operated four aircraft-maintenance sites in Texas until selling them to Aviall Services in 1981. Some years later, Aviall discovered that its operations and those of Cooper had resulted in contamination of all four sites. The Texas Natural Resource Conservation Commission threatened enforcement action against Aviall unless it cleaned up the sites. Aviall spent some \$5 million on the cleanups, and in 1997 brought suit against Cooper, seeking contribution under section 113(f)(1).

The district court awarded summary judgment to Cooper, holding that section 113 relief was unavailable to Aviall because it had not been sued under section 106 or section 107. The full Fifth Circuit reversed, relying principally on the last sentence of section 113(f)(1): "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."

The Supreme Court reversed the Fifth Circuit. The decision, written by Justice Clarence Thomas, takes a strict-constructionist view of CERCLA's language. The Court said the issue is very clearly decided by the first sentence of

See Case Summaries on page 9.

Environmental Trends in Agriculture Law

By: Gary L. Hansen

The following is an update on significant environmental issues, statutes, and regulatory programs impacting agriculture.

EPA's National Agriculture Compliance Assistance Center Provides Guidance for Producers

The Environmental Protection Agency (EPA) contributes to educating and assisting the agricultural sector through its national Agriculture Compliance Assistance Center (Ag Center). The purpose of the Ag Center is to provide information about approaches to compliance with environmental regulations on an agriculturally sound basis. The Ag Center seeks to improve compliance by helping the agricultural community identify flexible, commonsense ways to reduce the cost of meeting environmental requirements.

The Ag Center offers consolidated information about compliance requirements, pollution prevention, and technical assistance resources. Information is available on a variety of topics, including: pesticides, animal waste management, groundwater and surface water, tanks/containment, and solid/hazardous waste.

The Ag Center also supports regional and state regulatory agencies in their effort to provide compliance assistance to local agricultural communities.

Information can be accessed by telephone (1-888-663-2155) or through the Ag Center's Internet home page at <http://www.epa.gov/agriculture/index.html>.

EPA's Pesticide Program Addresses Soybean Rust Threat

Since November 10, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service has confirmed that soybean rust – an aggressive and harmful plant disease in soybeans – has been discovered in Louisiana, Alabama, Arkansas, Florida, Georgia, Mississippi, Missouri, South Carolina, and Tennessee. Soybean rust is caused by a fungus that spreads by spores that can be carried by the wind. It is believed that spores were carried to the southeastern United States from South America during the 2004 hurricane season. The EPA, along with the USDA and state departments of agriculture, has been planning for such an event, and the EPA has approved several fungicides for soybean growers.

Detection of soybean rust late in the year, after the harvest season, should give growers some lead time for planning an integrated control strategy for the disease in the 2005 growing season. A list of available pesticides can be accessed at http://www.epa.gov/oppfead1/cb/csb_page/updates/soybean_rust.htm.

The EPA will provide updates if additional new products clear the pesticide registration process.

USDA Announces Funding for Voluntary Conservation Programs

The U.S. Department of Agriculture announced in October the release of \$1.6 billion in funding for FY 2005 conservation programs for working lands. Funded programs include the Conservation Reserve Program, Environmental Quality Incentives Program, and Wetlands Reserve Program. These programs are intended to contribute to achieving environmental, societal, financial, and technical benefits including:

- Sustaining and improving agricultural productivity.
- Improving water supplies by making them cleaner, safer, and more dependable.
- Reducing damages caused by floods and other natural disasters.
- Enhancing natural resource bases that support continuing economic development, recreation, and other purposes.

A complete list of programs and additional information can be found on the Natural Resources Conservation Service Website at <http://www.nrcs.usda.gov/programs>.

“The U.S. Department of Agriculture announced in October the release of \$1.6 billion in funding for FY 2005 conservation programs for working lands. Funded programs include the Conservation Reserve Program, Environmental Quality Incentives Program, and Wetlands Reserve Program.”

Carbon Credits Can Benefit Agricultural Producers and Soil Quality

Over the past century, carbon dioxide levels have risen significantly. The reasons for this increase – whether a natural cycle or due to emissions from human activities – have been the subject of considerable debate. It is generally agreed, though, that human activities account for part of the increase.

The agricultural sector can help reduce the level of carbon dioxide in the atmosphere by adopting conservation practices that capture and store carbon dioxide in soil and vegetation. This is the process of “carbon sequestration.” Producers who implement practices on their farms that promote carbon sequestration can benefit by selling carbon credits.

As explained in *Integrated Crop Management*, published by the Iowa State University Department of Entomology, the concept of carbon credits involves buying carbon units, most often in tons, through a middle entity that aggregates contracts from producers who meet sequestration criteria through

adoption of a wide range of conservation practices. The carbon units are then sold to a buyer in the industrial sector who needs to offset carbon dioxide released into the atmosphere from manufacturing activities. Industrial consumers of fossil fuels are assigned carbon dioxide emission limits. As modernizing physical facilities and purchasing new equipment or building new plants may be too costly, these consumers are allowed to pay others to store carbon in exchange for the right to release carbon dioxide into the atmosphere in excess of their limits.

Conservation practices that can mitigate atmospheric carbon dioxide include:

- Diverting carbon dioxide to storage in plant material.
- Reducing organic mineralization by restricting conditions that accelerate the oxidation of soil organic matter and lead to the release of carbon dioxide. This can be achieved by minimizing tillage activities.
- Reducing soil erosion to help prevent carbon in the soil from being exposed.

Implementing farming practices that result in any of these sequestration methods can earn carbon credits. Such practices include no-till, vegetated buffers, withdrawal of cropland from production, reforestation, management of timberland, and abatement of methane from livestock waste.

An additional benefit of these practices is that carbon sequestration could help to enhance soil quality. Soil organic matter can improve soil structure and physical and chemical properties. Organic matter benefits can include promotion of beneficial soil organisms, binding of pesticides, suppression of disease organisms, and improved crop health and vigor as soil biological activity and diversity increase.

The carbon sequestration market provides producers an opportunity to improve their bottom line as well as environmental quality and long-term sustainability. Producers who are considering entering this market should become familiar with market issues before executing any agreements.

More information about carbon sequestration is available on the Soil Management page of the Iowa State University Agronomy Website at <http://extension.agron.iastate.edu>.

Congressional Research Service Publishes Report on Agroterrorism

Potential terrorist attacks against agricultural targets are the subject of a report published in August by the Congressional Research Service (CRS). The CRS explains that agroterrorism is a subset of bioterrorism and is defined as the deliberate introduction of an animal or plant disease with the goal of generating fear, causing economic losses, and/or undermining stability. Results of an agroterrorist attack may include major economic crises in the agricultural and food industries, loss of confidence in government, and possibly human casualties.

Congress has held hearings on agroterrorism, enacted laws with agroterrorism-related provisions, and authorized related appropriations. The executive branch has implemented the laws, issued presidential directives, and created liaison and coordination offices. The CRS report, "Agroterrorism:

Threats and Preparedness," summarizes these efforts, identifies potential economic consequences of an agroterrorist incident, outlines a strategy for countering the threat of agroterrorism, and addresses issues for additional congressional consideration. The report can be accessed at <http://www.fas.org/irp/crs/RL32521.pdf>.

CAFOs Are Subject to Air Emission Requirements

In February 2003, the EPA adopted new regulations applicable to concentrated animal feeding operations (CAFOs). These regulations significantly expanded application of effluent flow and emissions limitations to CAFOs. A significant area of regulation that is of concern to CAFO operators is air emissions.

Recent court decisions and regulatory enforcement actions have confirmed that certain pollutants emitted by CAFOs are regulated by the Clean Air Act (CAA) and other federal environmental laws. Examples of air pollutants emitted by CAFOs include ammonia, hydrogen sulfide, methane, nitrous oxide, particulate matter, and volatile organic compounds (VOCs). Some of these pollutants are associated with detrimental environmental effects (e.g., methane and nitrous oxide with global warming), and others with adverse health and environmental impacts (e.g., ammonia and hydrogen sulfide). These pollutants are emitted primarily from buildings and other structures confining animals, and from animal waste storage areas.

The CAA regulates emissions from discrete locations at stationary sources. The Act regulates "criteria pollutants" and hazardous air pollutants. Courts have found that the primary pollutants emitted by CAFOs are regulated by the CAA either directly (e.g., hydrogen sulfide because it is specifically listed as a hazardous air pollutant) or indirectly (e.g., VOCs and particulate matter because they are precursors of criteria pollutants).

As a result of these interpretations, CAFOs meeting certain emission threshold criteria must obtain preconstruction and operating permits and meet other regulatory requirements as stationary sources. In addition, CAFOs are subject to the release notification requirements of CERCLA and EPCRA if they release a "reportable quantity" of a regulated hazardous pollutant without a permit.

CAFO operators and their legal counsel must be aware of the statutes and regulations that have been held applicable to concentrated animal feeding operations. Knowledge and compliance will help them to avert legal and potentially substantial financial liability.

Gary Hansen is Risk Management Officer at AgriBank, FCB where he is responsible for statutory and regulatory interpretation and formulation of lending policies, standards, and risk management strategies, including environmental risk management. He serves as vice-chair of the Minnesota State Bar Association's Environmental and Natural Resources Law section. Mr. Hansen can be reached for questions or comments at (651) 282-8406.

Over Fifty Attend Section's Fall CLE

By Thaddeus R. Lightfoot

On November 9, 2004, the Section held a seminar entitled *What's Hot Now: An Environmental Update from State Government*. Over fifty participants attended the seminar held in the offices of Fredrikson & Byron, which offered their space at no charge to the Section. Five state government officials from Minnesota's environmental regulatory agencies outlined strategic priorities and offered insights on a variety of programs affecting the regulated community. Speakers at the seminar were Ann Seha, Assistant Commissioner of the Minnesota Pollution Control Agency; Brad Moore, Assistant Commissioner of the Minnesota Department of Natural Resources; Ron Harnack, Executive Director of the Minnesota Board of Water and Soil Resources; Gregg Downing, Principal Planner for Environmental Review with the Minnesota Environmental Quality Board; and Paul Strandberg, Project Manager of the Agriculture Department with the Minnesota Department of Agriculture. Section Council members Thad Lightfoot and Bill Hefner organized and co-chaired the seminar.

Ann Seha's presentation focused upon MPCA's impaired waters program, air quality developments, and permitting issues. Ann explained that although MPCA has assessed only fourteen percent of Minnesota's lakes and only eight percent of Minnesota's rivers and streams, the agency has found that forty percent of those waters assessed do not meet water quality standards set to protect human health, aquatic life, and recreational value. These so-called "impaired" waters are in every corner of the state. In total, MPCA has listed 1,890 impaired lakes, rivers, and streams, has completed a total maximum daily load (TMDL) for four water bodies, and is preparing TMDLs for five additional water bodies. A TMDL establishes the maximum allowable pollutant loading for a water body to meet water quality standards and allocates that load among pollution contributors. Ann also discussed air quality issues, including most notably MPCA's implementation of the recent federal new source review reforms under



the Clean Air Act. Finally, Ann noted that MPCA has made a concerted effort to reduce its backlog in issuing Clean Water Act discharge permits and air quality construction permits.

Brad Moore offered his thoughts on the state of Minnesota's forest resources. He stated that forestland in Minnesota has appreciated in value by approximately one percent per month over the last ten years. Many timber companies are now selling this valuable land to timber investment trusts. Brad also observed that foreign ownership of wood products companies with facilities in Minnesota is increasing. As a result, the decision to expand these Minnesota facilities is based not just on regional or national factors, but also on international considerations. Environmental review for building or expanding wood products facilities in Minnesota tends to be lengthy. According to Brad, the length of environmental review often places the state at a competitive disadvantage when multinational wood products corporations are weighing the decision to expand in Minnesota as opposed to other parts of the world. Finally, Brad discussed the 1995 Generic Environmental Impact Statement on Timber Harvesting, and

stated that the University of Minnesota is currently analyzing whether the document needs to be updated.

Ron Harnack discussed the ongoing efforts of the Minnesota Board of Water and Soil Resources (BWSR) to implement the Wetland Conservation Act of 1991. He noted that the Minnesota Routine Assessment Methodology for Evaluating Wetland Functions, which BWSR revised in 2004, is available on the agency's website at <http://www.bwsr.state.mn.us>. The methodology allows BWSR to assess the value and function of a wetland. Ron also outlined efforts by the Minnesota Department of Natural Resources, the United States Army Corps of Engineers, and BWSR to streamline permit applications. Finally, Ron announced that one of BWSR's top goals is to update the 1997 Minnesota Wetlands Conservation Plan over the next two years. The Wetlands Conservation Plan, completed in 1997, was a four-year, multi-agency effort to recognize and apply regional differences in wetlands policies, simplify the wetlands permitting system, and give resource agencies a common set of statewide strategies for conservation of wetlands.

Gregg Downing emphasized that the

Minnesota Environmental Quality Board (EQB) is contemplating a number of technical changes to Minnesota's environmental review rules, as well as certain major process revisions that would require statutory changes. These changes include identifying a possible third form of environmental review that is more comprehensive than an environmental assessment worksheet (EAW) but not as rigorous or time-consuming as an environmental impact statement (EIS). In addition, EQB is evaluating whether it should have greater oversight with respect to environmental review decisions made by responsible governmental units such as cities and counties. According to Gregg, EQB is also contemplating the possibility of changing the venue for challenges to environmental review decisions. The Minnesota Environmental Policy Act currently requires parties to bring such challenges in district court, but the EQB may suggest that the statute be amended to eliminate district court jurisdiction and to require that the challenges be filed in the court of appeals. Gregg also explained that EQB is evaluating the alternative urban areawide review ("AUAR") process. Although the process was designed to address urban development, it is increasingly used as a planning tool in suburban areas. For example, Gregg stated that the AUAR process recently worked well in analyzing the environmental effects of lakeshore development in Cook County. EQB is considering modifications to the process so that an AUAR could be used to assess groups of proposed projects, such as feedlots or aggregate mining facilities, on a county-wide basis.

Paul Strandberg stressed the Minnesota Department of Agriculture's involvement in the cleanup of agricultural chemicals. He noted that by statute, the Department of Agriculture was responsible for remediation of contamination caused by agricultural chemicals such as arsenic and other wood-treating compounds. As an example, Paul discussed the Department of Agriculture's efforts, in conjunction with the United States Environmental Protection Agency, in the cleanup of arsenic contamination in the Phillips neighborhood of Minneapolis. He also emphasized that the Department of Agriculture's involvement in addressing the consequences of urban sprawl and the resulting loss of farmland.

The Section thanks the speakers and all those who attended the fall seminar. Be sure to mark your calendar for April 21, 2005, when the Section will offer its next continuing legal education program.

That seminar will be the Section's first annual daylong Environmental Law Institute, and will be held at the Minnesota CLE Conference Center, Seventh Street and Nicollet Mall, Third Floor City Center, Minneapolis. The Section anticipates requesting 6.0 CLE credits for the Environmental Law Institute. Watch your e-mail for more details.

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section 113(f)(1), which reads: "Any person may seek contribution from any other person who is liable or potentially liable. . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title."

Justice Thomas reasoned, "There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions." As for the last sentence of section 113(f)(1), which the Fifth Circuit had relied on, Justice Thomas said it merely instructs that if someone has a right to contribution under some other law or theory, section 113 does not prohibit them from exercising that right.

The dissent, written by Justice Ginsburg and joined by Justice Stevens, would have found that Aviall has an *implied* right of contribution under CERCLA's section 107. However, because that issue had not been raised or briefed below, the Court declined to decide whether any right of contribution exists under section 107.

The decision is controversial, in part because it may lead to a situation that was acknowledged by the Court: a party who voluntarily undertakes a cleanup may not have any means of obtaining contribution from others who contributed to the problem. Such an outcome is contrary to CERCLA's "polluters pay" policy and could result in Congressional action to give more certainty to CERCLA contribution rights.

In the short term, additional litigation in two areas seems likely. First, litigation can be expected to focus on what constitutes an "action" under section 113

(f)(1), or a "settlement" with the government under section 113(f)(3), sufficient to trigger the settling PRP's right to sue another PRP. For example, the Court did not decide whether a CERCLA section 106 order constitutes a "civil action" that gives rise to a contribution claim under section 113. One outcome of the Court's failure to address this question may be an increase in requests by PRPs for administrative orders of consent in an attempt to satisfy section 113(f)(3)'s requirement that a person must "resolve[] its liability to the United States or a State" before it may seek contribution from a non-settling PRP. Such a phenomenon could significantly burden the resources of the Environmental Protection Agency and responsible state agencies.

Second, other litigants will likely focus on the question of what, if any, right of cost recovery (whether styled as a contribution claim or otherwise) exists under CERCLA's section 107.

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NOTICE: The Minnesota State Bar Association's Environmental and Natural Resources Law section presents the foregoing case summaries of relevant court decisions as a service to our members. As these summaries are only interpretations of a court's decision, Attorneys should read the full opinions and perform appropriate analysis before applying them in practice.

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