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# Top ten agricultural law developments in 2004

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# Ag Decision Maker



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### Top ten agricultural law developments in 2004

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(second in a series)

#### 5. Agricultural check-offs.

2004 was another busy year in the courts concerning agricultural check-offs. On February 24, the United States Court of Appeals for the Third Circuit held the Dairy check-off (mandatory 15 cent/hundredweight of milk sold) unconstitutional on First Amendment free-speech grounds. The court determined that the Dairy Act that authorizes the check-off constituted private speech and was, therefore, subject to scrutiny under the First Amendment. The court noted that the Secretary of Agriculture, under the Dairy Act, acted only in a supervisory role and that the government described the dairy check-off as a non-governmental program financed and directed by dairy farmers. Thus, the check-off was private speech.

On the free-speech issue, the court noted that the Dairy Act is a stand-alone law that was not passed as part of a scheme of greater economic regulation of the dairy industry. Dairy producers, the court noted, are not bound together and required by law to market their products according to cooperative rules for purposes other than advertising or speech. Thus, compelled funding of generic advertising is a violation of the free-speech rights of those who object to the promotion of milk as a generic product. *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), rev'g, 252 F. Supp. 2d 126 (M.D. Pa. 2003).

On May 24, the U.S. Supreme Court (upon request by the U.S. Solicitor General) granted certiorari on a limited basis in a case from the United States Court of Appeals for the Eighth Circuit involving the constitutionality of the beef check-off. The case involves

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**Livestock Enterprise Budgets** – B1-21 (23 pages)

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**Feeder Cattle Basis** – B2-43 (1 page)

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plaintiffs who were livestock producers subject to an assessment of one dollar per head of cattle to be used by the USDA and the Cattlemen’s Beef Board for promotion of the beef industry, as provided by the Beef Promotion and Research Act (7 U.S.C. §2901 et seq.). The plaintiffs challenged the law as an unconstitutional violation of the First Amendment. The plaintiffs objected to the assessment because it paid for advertising beef products, such as steak, which is not the product (live cattle) that the plaintiffs sold. The trial court held that (based on prior U.S. Supreme Court precedent) the assessment violated the First Amendment. The Eighth Circuit affirmed, check-off did not constitute government speech. Oral arguments were heard in the Supreme Court on December 8. *Livestock Marketing Association v. United States Department of Agriculture*, 355 F.3d 711 (8th Cir. 2003), cert. granted sub. nom., *Veneman v. Livestock Marketing Assoc.*, 124 S. Ct. 2389 (2004).

While the beef check-off case will be the first time that the U.S. Supreme Court has addressed the free speech issue in the context of an agricultural check-off, two Circuit Courts of Appeal have dealt with the matter. The U.S. Court of Appeals for the Third Circuit, in *United States v. Frame*, 885 F.2d 119 (3d Cir. 1989), while upholding the beef check-off as constitutional (the rationale of the court on this point is no longer valid due to a later U.S. Supreme Court opinion), rejected the USDA’s argument that the beef check-off was government speech. As noted above, the Eighth Circuit has also held that the beef check-off does not constitute government speech.

For a check-off to constitute government speech, the government must exercise sufficient control over the content of the

check-off to be deemed ultimately responsible for the message, the source of the check-off assessments must come from a large, non-discrete group, and the central purpose of the check-off must be identified as the government’s. The beef check-off likely clears only the first hurdle. The source of funding for the beef check-off comes from a discrete identifiable source (cattle producers) rather than a large, non-discrete group, and the check-off has as its central purpose that of being a “self-help” program designed to improve markets for beef. That central purpose has been articulated clearly by the Congress in the legislative history of the Act, and readily admitted to publicly by the current president of the National Cattlemen’s Beef Association.

**6. Key eminent domain case reaches the Supreme Court.**

In recent years, a significant question has arisen as to whether the government’s eminent domain power can be exercised either by or on behalf of private parties to take private homes, land and businesses for commercial development. The argument is that the resulting “economic development” increases jobs and tax revenue in the area and that this satisfies the Fifth Amendment’s “public use” requirement. In late September, the U.S. Supreme Court agreed to hear a case from Connecticut on the issue. In *Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500 (2004), cert. granted, 125 S. Ct. 27 (2004), the City transferred its eminent domain power to a private company who then exercised it to take several homes that were in the path of their plans for the development of private businesses. The company argued that the taking was for a “public purpose” because the businesses would increase tax revenue from the subject area. The Connecticut Supreme Court agreed. In 2003, the Arizona Supreme

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Court reached an opposite conclusion, and in 2004 the Michigan Supreme court, in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), ruled that the exercise of the eminent domain power is proper only if (1) the private entities involved are public utilities that operate highways, railroads, canals, power lines, gas pipelines, and other instrumentalities of commerce; (2) the property remains under the supervision or control of a governmental entity; or (3) the public concern is accomplished by the condemnation itself (i.e., blighted housing has become a threat to public health and safety).

It goes without saying that the U.S. Supreme Court’s opinion in the Connecticut case is of primary significance to private landowners (urban as well as rural) throughout the United States. An opinion is expected by the end of June, 2005.

**7. Second federal court holds that CERCLA reporting requirements apply to agricultural confinement operations.**

With respect to releases of “hazardous” substances, the federal Comprehensive Environmental Response Compensation & Liability Act (CERCLA) provides that any person in charge of a “facility” from which a hazardous substance has been released in a reportable quantity must immediately notify the National Response Center (a comparable state-level requirement also applies under the Emergency Planning and Community Right to Know Act). Releases that exceed 100 pounds per day must be reported. A key question of major importance to agriculture is whether large-scale livestock/poultry confinement operations constitute a single “facility,” or whether each confinement structure on a farm is a separate facility. In 2003, a federal district

court in Kentucky held that a vertically integrated firm was an “operator” of the farms at issue pursuant to production contracts with the farm owners, and that each farm was a single “facility” for the reporting rule. In late 2004, the United States Court of Appeals for the Tenth Circuit held that the statutory definition of “facility” unambiguously included any site or area where a hazardous substance has been disposed of. The case involved the defendant’s operation of two hog farms in western Oklahoma comprised of eight confinement buildings housing 25,000 hogs that utilized a common waste management system. The plaintiff claimed that the defendant knew of the ammonia emissions from the hog operations and failed to report them as required under CERCLA. CERCLA classifies ammonia as a hazardous substance, but the defendant claimed that that hog farms consisted of numerous “facilities” such as lagoons, barns, and land application areas, and that each barn, lagoon, and land application area was a separate “facility” for CERCLA reporting purposes. As such, the defendant argued, no single “facility” exceeded the reporting requirements under CERCLA. *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693 (W.D. Ky. 2003); *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167 (10th Cir. 2004).

The rulings make it more likely that large-scale confinement operations will be subject to the reporting requirements of CERCLA.

*\*This series will conclude in next month’s newsletter.*