STAFF PAPER SERIES

DIR 76-2
SP-20

December, 1976

LEGAL FACTS OF LIFE FOR THE TEXAS PRODUCER

by

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Departmental Information Report

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LEGAL FACTS OF LIFE FOR THE TEXAS PRODUCER*

--Donald R. Levi

The assigned topic is a timely one. Texas producers have progressed from a period in which they could essentially operate completely free of outside intervention to the present period in which many of their daily activities are influenced, in some cases significantly, by state and federal laws and regulations. Realistically, the prospect is for such outside "intervention" to increase in the future.

There are a multitude of legal areas in which this is occurring, including

---OSHA

---Unemployment insurance compensation for ag workers

---Certification of private & commercial pesticide applicators

---Water pollution standards

---Air pollution standards

---Land-use restrictions

Federal and state legislation enacted in each of these areas was, at least ideally, in response to perceived choices of our society as a whole. But many believe the legislative perceptions were not the product of our entire society, but rather were in response to small but vocal minorities. Whether this is in fact the case is immaterial, at least for the time being, because we must live with and conform to these regulations until such time as Congress and/or the regulating authorities see fit to repeal and/or revise them.

But it is constructive to analyze the basic theory which led to this kind

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*Paper delivered at 3rd Annual Houston Agribusiness Seminar, October 28, 1976, Houston, Texas.

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of restrictive legislation. In the final analysis, all restrictive legislation affecting producers--OSHA, licensing of pesticide applicators, land-use laws--can be classified as "public protection legislation". The basic idea behind public protection legislation is that many members of the public are adversely affected by the activities of farmers, ranchers, and other private and public operations. In addition, the affected parties have no effective legal remedy to combat these adverse effects. For example, a landowner living a substantial distance downstream from a water polluter may be adversely affected by such pollution, yet the legal expenses of obtaining compensation from the polluter may exceed the amount of damages due him. Thus, while clearly adversely affected, he has no effective legal remedy, even though the law is on his side.

In a similar fashion, social theorists tell us that laborers may live and work under dangerous and unhealthful circumstances, yet may not protest to their employers because of a fear that they will lose their job--perhaps the only job for which they are educationally and/or vocationally qualified. Thus, goes the argument, they have no effective way of improving their living and working conditions except by governmental regulation.

But there is an obvious problem with the governmental regulatory approach. It assumes we know exactly what kinds and what levels of regulatory standards will solve the problem being attacked. In many instances this is not the case. If standards are set too low, the social problem will not be alleviated. On the other hand, standards set too high are an excessive economic burden on producers and employers, many of whom are personally concerned and making an honest attempt to avoid treating their employees and neighbors unfairly. In addition, on some occasions too high standards have worsened general economic conditions in the country. And the cost of monitoring compliance with regulatory standards also may be excessive.

Moreover, restrictive standards impact different producers in different ways. In some cases new producers just entering the business are able to construct their facilities so as to meet regulatory standards with only a minimal or reasonable increase in construction costs. Yet these same standards may be economically unrealistic to those already in the business because their facilities and/or location may be such that it is extremely expensive to change them. It should be recognized that these producers made their initial investment on the implicit assumption that the regulations in effect at the time they entered the business would continue. Thus, they see the introduction of new standards as patently unfair, particularly where the long run effect is to cause them to lose money and/or go out of business.

Historically, we have shown sympathy for existing producers by inserting a "grandfather clause" in new restrictive legislation, or perhaps by permitting them to amortize out and recover their investment before it became necessary to fully comply with all regulatory standards. If new restrictive legislation does not contain such grandfather clauses or "phasing in" allowances, this implicitly tells us that the legislating body believes the social problem being attacked is of greater concern than is the continued economic security of existing producers. Also, another implicit result of this type legislation is that it causes a redistribution of both income and wealth among the members of society. Perhaps this is the most important reason that such legislation is often highly controversial.

In theory, setting regulatory standards can be an effective way of achieving desirable social objectives, especially where the social benefits derived are large and the private costs inflicted on producers are reasonably low. But here it is essential that those developing regulatory standards set them at logical and reasonable levels from the standpoint of <u>both</u> parties involved. However,

we are all aware of instances in which regulatory and pollution tolerance levels appear to have been set arbitrarily rather than on the basis of research designed to identify the economically optimal regulatory level. In a very real sense, the arbitrary setting of regulatory levels implicitly tells us that the regulating body believes the social problem being attacked is so severe that our society cannot afford to wait until the research can be done. In some cases this may be true; in some others it may not be.

Thus, the argument being advanced is that regulatory bodies should take a reasonable and logical approach to the development of new producer restrictive legislation. Those productively employed in the private sector use a simple economic principle to assist them with decision making. In the language of economists, MR=MC is the decision criterion. That is, so long as we can have the necessary capital, we will continue to add inputs so long as the revenue generated exceeds their costs. In a similar fashion, governmental bodies could use some basic economic principles to good advantage. They should recognize that there are both costs and benefits associated with the promulgation of new regulations. They should not continue to promulgate regulations when the direct and indirect costs will exceed the direct and indirect benefits of their implementation. While economic theory is clear on this principle, measuring such costs and benefits clearly is a difficult task. But in some cases minimal analysis is sufficient to disclose the relationship between marginal costs and benefits. The point is that such regulations should not be promulgated without considering both the benefits and costs involved.

Now a word about the future. There does appear to be cause for concern about continuing regulatory intervention further affecting daily activities of Texas producers. This cause for concern revolves around three recent sets of restrictive regulations.

The first is the so-called Forest Practices Act. Basically, it is designed

to minimize soil erosion by restricting the practice of clear cutting timber. Logically this makes some sense in mountainous topography, but it is more questionable where timber is harvested from relatively flat land. Some believe this act is the first step toward a farming and/or ranching practices act.

Other steps have been taken in this direction. For example, federal legislation requires certification of both commercial and private pesticide applicators, effective Ocotber 21, 1977. The Governor has designated the Texas Department of Agriculture as the certifying agency. While specific regulations have not yet been issued, it is clear that these regulations will directly affect the activities of many producers.

Finally, the Corps of Engineers now has substantial authority to regulate site development fills for recreational, residential, commercial, industrial and other uses. In addition, they can require permits for several kinds of farm practices, such as damming of major streams, diking, and the discharge of dredged or fill materials in wetland areas. A 1975 case successfully challenged their authority to extend their permitting requirements beyond navigable waters. Thus, at least for the present, permits are <u>not</u> required for normal farming practices, such as plowing, cultivating, seeding, and harvesting. Nor does it extend to farm and ranch conservation practices such as terracing, land levelling, and construction of check dams in minor watercourses.

Moreover, many believe that the Forest Practices Act, the pesticide applicators' certification requirement, and the Corps of Engineers' section 404 permitting authority, all combine to suggest that additional regulation of farming practices may well be on the horizon. For example, it is not too difficult to envision a Fertilizer Practices Act designed to avoid nitrate and phosphate pollution (particularly in areas where the quality of irrigation return flows are important). Some believe that normal farming practices will also be regulated in the future.

In short, the outlook is for more regulation of producers' activities. Hopefully these will occur only if an analysis of costs and benefits shows them to be beneficial. This puts the burden on agricultural producers to communicate their concerns to our elected representatives, and to push for further research to assist in making any new regulations realistic.