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The Dickinson
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Developments Impacting Food & Agricultural Law in Pennsylvania

INSIDE THIS ISSUE:

**Invasive Species—
Emerald Ash Borer**

**Zoning —
Horse Stable**

**Farm Bill —
Trade Title**

**Natural Gas
Legislation**

**"Raised Without
Antibiotics" Claim**

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EMERALD ASH BORER (EAB) IDENTIFIED IN MERCER COUNTY; EAB QUARANTINE AREA TO BE EXPANDED

On June 26, 2008, the Pennsylvania Department of Agriculture (PDA) announced that the Emerald Ash Borer (EAB), *Agrilus planipennis* Fairmaire, has been found in Mercer County. EAB is native to Asia and was first identified in the United States in July 2002. Since that time, this invasive wood-boring beetle has killed more than 20 million ash trees, and its continued spread threatens all ash trees throughout North America. The presence of EAB in Pennsylvania was confirmed in the summer of 2007.



Photo by David Cappaert, Michigan State University, Bugwood.org

Under the authority of the Plant Pest Act, 3 P.S. §§ 258.1-258.27, PDA issued an Order of Quarantine on June 27, 2007, to restrict the movement of certain forest products from a four-county area in Western Pennsylvania (Allegheny, Beaver, Butler, and Lawrence Counties). Individuals and businesses are prohibited from removing all ash products, as well as all hardwood firewood, from this quarantine area unless an appropriate compliance agreement is in place. In light of the most recent discovery, PDA has indicated that the quarantine area will be expanded to include Mercer County. The terms of the state quarantine order are distinct from the restrictions of the Federal EAB Quarantine, 7 C.F.R. § 301.53, which has been promulgated under the authority of the Plant Protection Act of 2000, 7 U.S.C. §§ 7701-7758. For more information on this topic, please visit <http://paemeraldashborer.psu.edu/>.

COMMONWEALTH COURT AFFIRMS GRANT OF SPECIAL EXCEPTION TO CHESTER COUNTY HORSE STABLE

In *Tennyson v. Zoning Hearing Board of West Bradford Township*, No. 1045 C.D. 2006, 2008 WL 2415271 (Pa. Commw. June 17, 2008), the Commonwealth Court affirmed the decision of the Court of Common Pleas of Chester County to permit the operation of a stable and accessory facilities in a R-1 Residential District. The zoning applicant proposed to construct a 7,776-square-foot stable, a 16,000-square-foot indoor riding ring, and two outdoor riding rings. The facilities were intended to be used for the boarding of horses, riding lessons, a summer day-camp, and an annual horse show.

A neighboring landowner challenged the Zoning Hearing Board's grant of special exception on several grounds. One argument raised by the objecting neighbor was that the indoor riding arena could not be considered to be an accessory use because it was planned to be much larger in size than the stable. Rejecting this argument, the Commonwealth Court ruled that "[t]he size of the structure does not dictate the status as primary or accessory." *Tennyson*, 2008 WL 2415271, at *5. The court further found that the facts "support[ed] the conclusion that an indoor riding arena [was] a use 'subordinate' and 'customarily incidental' to a stable." *Id.* As the court also rejected all other contentions raised by the neighbor, the grant of special exception to the stable owner was affirmed.

Trade Title Becomes Law as Congress Again Passes Farm Bill Over Presidential Veto

Following an administrative error where the 34-page Trade Title was omitted from the remainder of the legislation, Congress again passed the Food, Conservation, and Energy Act of 2008 (H.R. 6124) over President Bush's veto on June 18, 2008. Congress previously passed the Farm Bill, without the Trade Title, as H.R. 2419 on May 22, 2008. Rather than addressing the Trade Title separately, Congress chose to pass the Farm Bill as a whole. Accordingly, Congress passed H.R. 6124 with identical language to that contained in H.R. 2419. H.R. 6124 has become Public Law 110-246, which replaces the previously passed Public Law 110-234.

The Trade Title provides for international food assistance, promotes the expansion of U.S. export opportunities, and reforms programs for export credit guarantees. It also provides \$84 million in funding to the McGovern-Dole International Food for Education and Child Nutrition Program, which has been established to supply food and educational assistance to children in developing nations. For further details about the Trade Title or other provisions in the Farm Bill, please visit <http://agriculture.house.gov/inside/FarmBill.html>

Legislation Introduced to Amend Oil and Gas Conservation Law in Light of Marcellus Development

On June 4, 2008, Rep. Sandra Major (R-Susquehanna/Wayne/Wyoming) introduced House Bill 2453 to amend the Oil and Gas Conservation Law (OGC Law), 58 P.S. §§ 401-19. The bill would extend the protections provided through the OGC Law to activity in the Marcellus shale formation. Currently, the OGC Law does not apply to drilling activity conducted above the Onondaga horizon. Because the Marcellus shale formation is located above the Onondaga horizon, the OGC Law has no application to Marcellus wells at the present time.

The proposed legislation would subject Marcellus wells to unitization requirements for well spacing and would require well operators to demonstrate that any horizontal drilling is conducted under leased land. The bill also adds a definition of "lease," clarifies the definition of "royalties," and prohibits production costs from being taken out of royalty payments. The bill has been referred to the House Committee on Environmental Resources and Energy for further consideration.

"Raised Without Antibiotics" Claim of Tyson Foods Continues to be Litigated

The marketing campaign of Tyson Foods (Tyson) to promote the antibiotic-free status of its chickens has been the subject of a panoply of litigation. The various lawsuits revolve around Tyson's use of ionophores in its chicken feed and its practice of injecting antibiotic vaccinations in chicks prior to hatch. USDA initially approved the use of a "raised without antibiotics" label by Tyson, then negotiated with Tyson to modify the label to "raised without antibiotics that impact human antibiotic resistance." Upon learning of the pre-hatch injections, however, USDA rescinded its approval for the modified label. On June 11, 2008, Tyson filed suit against USDA in the U.S. District Court for the District of Columbia at No. 1:08-cv-01000, but Tyson voluntarily dismissed its claims on June 20, 2008. On that same date, Tyson settled litigation that had been filed against it by Perdue Farms and Sanderson Farms in the U.S. District Court for the District of Maryland at No. 1:08-cv-00210. Tyson now faces several lawsuits filed by consumers in courts throughout the nation.

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ABOUT THE AGRICULTURAL LAW RESOURCE & REFERENCE CENTER

The Agricultural Law Resource and Reference Center is a collaboration between The Pennsylvania State University's Dickinson School of Law and College of Agricultural Sciences. Funded in part by the Pennsylvania Department of Agriculture, the Center is designed to provide the highest quality educational programs, information, and materials to those involved or interested in agricultural law and policy.

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