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Luncheon Address

GERALD TORRES*

First of all, I want to thank Dean Alfini, Sue Mellard and Guadalupe Luna for working very hard on putting this program together and arranging for me to come and speak with you today. When I looked at the list of people who would be on the program, I thought that perhaps you don't really appreciate how lucky you are. You've got people that I feel fortunate to have been associated with over the last 15 years I have been doing agricultural law and I think some of them are the true innovators and leaders. The people I know most well are Susan Schneider (who worked with me when she was a student at Minnesota and our names are actually forever linked on an article much to her chagrin; and I apologize for that Susan, but things are what they are), her husband, Chris Kelly, and my good friend Neil Hamilton. Neil Hamilton and I have been friends, well, since I got interested in agricultural law. I have always looked to him for leadership and guidance in the area. I think his talk this morning indicated just what kind of breadth of vision that he has, so I was really glad to see him on the program. I also was quite alarmed when I saw him on the program, and I was listening to him talk because he's talking and I'm looking at my notes and I'm thinking "Well, wait a minute, he's taking everything I was going to say." So now that you've heard his speech, I can just talk about the Twins or see how they are doing down in Spring Training. Actually, I'll talk a little about the structure of agriculture and what issues--the hot button issues--are emerging relating to agriculture and its regulations, and environmental regulations in particular.

As Neil pointed out to you, the question that forms the topic (or the topic that forms the question) to be addressed by today's symposium really was first posed as a national policy matter from the government in Bob Bergland's *A Time to Choose*. Many of you *will* recall that the book was prepared by the USDA, but I suspect many of you *will not* recall that book

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was prepared and released right at the end of the Carter Administration and it was withdrawn right at the beginning of the succeeding administration, so that it had a very short shelf life. It didn't get in many hands, but it got in enough hands and it has certainly circulated through the agricultural academic community and, I suspect, somewhat more broadly. But really, the main point of that study was that we are at a crossroads in American agriculture. I think what Professor Hamilton spoke about today was a further elaboration of just what the meaning of being at that intersection is.

One thing you'll note when you go through all the farm bills (farm *acts*, rather) is an undying devotion (in the preambles, anyway) to the family farm. Then what you try to do when you follow the sentiments that are outlined in the preamble is to try to follow those sentiments through the farm bill--all 2000 pages of them. And you look through it and you just say "Ok, where are the supports for the sentiments you find expressed in the introductory pieces?". What Professor Hamilton pointed out is you discover that many of the supports for family farming *aren't* there, but the image of the family farm remains front and center. The reason the image of the family farm remains front and center is, I think, because it defines for Americans in general and policy makers in particular, the central defining image of what a farm is. It also tells us something about our character as a people; summarized, of course, by relating back to the Yeoman family farming tradition. It was here that we have an independent producer living--making a living--from the land. Maintaining that person within our economic structure--or that economic *player* within our economic structure--is important both to the structure of our economy but also to who we are as a people, so that many people adopt that image to use it as an expression of the central structure of American agriculture. What Professor Hamilton pointed out is that while the image remains, it is increasingly subject to stresses that render it less and less definitive of American agriculture. The "time to choose" that Secretary Bergland was talking about was to ask whether or not we want to remain committed--not just to that *image*--but to the real men and women who make up the real concrete basis for that image. That, I think, is a central and important question.

The conclusion in *A Time to Choose* was that unless we self-consciously adopt policies that support family-owned production units as independent producers defined with criteria similar to what Professor Hamilton gave us; unless we move aggressively in that direction, the normal market forces--or the evolution of market forces as they exist--will drive us in another direction. The family farm policy had to confront both the tide of history, I suppose, but also the tide of economic market forces. What federal policy ought to be, then, was linked to those two insights. What we see as we look at the data and we bring it up now fourteen years later is that the processes that have led to the report really remain in place. When I look

at what happened in Minnesota, the one thing I discovered is that over the last ten years that I lived there, the number of farms continued to decrease and the average size has continued to grow. So what that means is that the more successful farmers are buying out the less successful farmers and the farm land is becoming more concentrated. That trend is replicated virtually throughout the country.

Now there are other trends. Biotechnology certainly has made the possibility of concentration in the meat production industry more feasible, not just in beef and poultry, but in pork as well. If you read the newspapers, the controversy over the Bovine Growth Hormone reflects concern over who benefits from the increased use of BGH; and *that* is as much part of the underlying controversy as the food safety issue. The fact that that controversy has achieved a certain salience in contemporary policy debate, I think reflects our own--and by "our" I mean the American people's--uncertainty over our commitment to policies that will save the family farm or policies that will let the market forces proceed as they have.

It's important to remember that many Americans (I am tempted to say "most" but I don't have the data in front of me, and someone will call me a liar if I say "most", so I'll say "many" Americans) aren't too far removed from the farm. I mean they can trace it back to a parent or grandparent. When I used to look at the people who were applying to law school at the University of Minnesota, one line on the law school application was "Occupation of Parents". For many years, that chief occupation was "farmer". During that ten-year period that I was there that shifted and "farmer" fell out as the leading occupational enterprise of the parents, but I would wager that if you trace it back and push it a little harder, you'd find grandparents who could be listed on that line. So there is, I think, an ambivalence in American society as a whole because of our commitment to the free-market (in which the United States has been a paragon in the world), but also our commitment to the idea of a family-owned enterprise producing the food and fiber for the American people. It's *that* ambivalence that has led to the controversies that Professor Hamilton outlined.

He also noted--and I think importantly--that many of the strategies that existed in the past are no longer effective. One thing you discover when you look at the states is that through the midwest from North Dakota down to Missouri, you find states there with anti-corporate farming statutes, basically statutes that prevent corporations from owning farmland. That was a response in the thirties to the purchase of farmland by banks during the Depression, but they remain on the books; and they've had both good and bad effects. The perverse effect, of course, was to drive out equity financing from farmland when we needed it in the eighties, but it reflected a commitment to keeping the farms in family hands. Now what Professor

Hamilton says is a truth emerged--an economic truth--and that is that you don't need to own the farm, but in fact owning the farm is a liability; and if you want to shift the risk of farm ownership out of--and still get the benefits of--owning the farm, then you need to look at other forms of concentration and vertical integration. So we see that process which is new and at work.

Against that background, we have a new generation of environmental regulation proposed and at work. Two things emerged in the last few years: (1) the increasing recognition that the reasons for what I call agricultural exceptionalism in the enforcement of environmental statutes no longer made much sense; and (2) that agriculture (normal production agriculture) was a source of many environmental problems. So those two insights have combined to produce some movement towards regulating farming (the farming enterprise) environmentally. Now if you look at the environmental statutes, one thing you discover by and large is true is that you discover exceptions for production agriculture. That is, the farms would normally be regulated through the farm bills, not through the environmental statutes. So even the last farm bill that you saw was what I thought was an amendment to FIFRA (although the bill is very clear that it wasn't an amendment to FIFRA) but it was a way to pull the pesticide regulation out of, or rather to make sure that pesticide regulation and application was governed by the farm bill in USDA rather than EPA. There is also a "community right to know" provision under the Act administered by the EPA, but the farm bill also pulled that out and put it in the hands of USDA. What is really going on is that the ambivalence and struggle we see reflected in the newspapers and dialogue is also reflected in the agencies. We have agencies trying to insure that they keep within them (or within their grasp) their traditional areas of jurisdiction. So that even as environmental regulation of agriculture increases, one way you see it is through the tension that is produced between EPA and USDA concerning production agriculture--*not* concerning things like management of the forest service and forest service lands, but concerning production agriculture. The resolution of that tension, I think, is going to ultimately result in the new regulation (I don't know when) of the environmental consequences of farming.

Let me just talk a little bit about what's going on. I am going to shift gears a little bit and I hope that against that background we can think about what is actually taking place--what things are actually being proposed--because there are really three or four areas that are of particular salience in the environmental regulation of agriculture. But I think this underlying ambivalence and struggle with data is what's really going on. I think that ambivalence produces tension; and the tension is producing policy. Where we see it go, I think, is anybody's guess in the next decade, but we can talk

about wetlands, food safety and non-point-source pollution.

The main news, as you all know, for farmers is that the new wetlands policy adopted by this administration takes the jurisdiction away from the Corps and EPA, and puts it in the hands of SCS for making the wetlands delineations on farmland. The idea behind that was that by giving it over to SCS, it is put in the hands of people who actually are on the ground and know farmers and do most of the work out on the farm land (farm country, anyway), and are also making the determinations for eligibility in the Swampbuster Act. The idea was to get Swampbuster and the 404 program on an equal footing. By doing that, you then rationalize the wetlands enforcement policy generally. The 404 exemptions for already-converted farmland are now memorialized by now what's called the Tulloch rule. All of you are probably familiar with that. It's a rule that is implemented based on the settlement of a case called *North Carolina Wildlife Federation v. Tulloch*; and that case basically excluded from the definition of what is the United State's prior-converted farmland as defined under Swampbuster. With the exception of cropland that is inundated more than fourteen consecutive days a year, it falls under the category of farmed wetland (rather than converted wetland) and thus remains subject to wetland jurisdiction. The section 404 exemptions are all unchanged, although discussion suggests that the 404 exemption ought to have a bright line related to water quality rather than activity on the land. I think that debate is still unsettled and will move in the direction of protecting water quality rather than the activity, but that prior-converted wetlands will continue to be exempted because it's no longer wetland--it no longer performs the function of wetlands. What you want to do is to protect those wetlands that *are* performing the ecological function of wetlands. The other thing that is going to happen is that the 404 permit procedure under the Clean Water Act is going to be streamlined, so an effort will be made to make the process quicker, the appeals process quicker, and allow for a third party appeal. At least that is what the Senate wants. The Administration is opposed to that.

In food safety, the main news, as you all know, was the elimination of the Delaney Clause (or the attempt to eliminate the Delaney Clause). The Delaney Clause requires the federal government to ban from processed food any substance that is found to cause cancer in animals. It is a very rigid standard and has no exceptions. There are no *de minimis* exceptions for levels of risk. What the EPA has discovered (or what many people discovered) is that the rigidity of that standard captures more than it ought to capture, and that the regulation of pesticide ought to be based on a risk analysis rather than on a *per se* rule. The administration has proposed eliminating the Delaney Clause, streamlining the other procedures for food safety to ensure that the food supply that we all eat is safe, but that

pesticides and various other chemical amendments that need to be added to the food are allowed to be used. That is going to require one amendment to the Food, Drug & Cosmetic Act and it will base the regulation on a "reasonable certainty of no harm" as opposed to the bright line "any amount" and will also trigger a review of current tolerances to ensure that the current tolerances that are allowed by the Food, Drug & Cosmetic Act are tied to risk.

FIFRA will also be amended. The amendments will call for sunseting of some registrations and will allow for a phase-down/phase-out and label change provision that gives the EPA some intermediate step between the suspension and cancellation where they decided to cancel (or where they determined there is a risk) so they can begin to phase out and phase down prior to the cancellation proceeding. There has also been the development of integrated pest-management goals and there is an effort to implement integrated pest-management plans on up to 75% of the total crop land by the year 2,000. The EPA is also seeking the authority to suspend registrations of pesticides in cases of imminent hazard before instituting the cancellation proceeding and to strengthen the enforcement provisions, including making the enforcement provisions in FIFRA resemble those of other environmental statutes. So the move is to turn FIFRA from what was essentially a consumer protection act for users of chemicals into an environmental statute. What you are going to see, then, is the regulation of pesticides for environmental protection as well as for farmer protection--and that's the movement that's afoot. Also, something that will probably pass (and I know you are going to talk about NAFTA after lunch) is the "circle of poison" provision. Some people said that NAFTA will prevent the implementation of the "circle of poison" provision. The "circle of poison" provision basically makes enforceable under U.S. law prohibitions on the export of pesticides that have been canceled in the United States on the theory that if we allow them to be exported to countries that will use more produce that it eventually comes back in the United States. All you are doing is getting the poison that we say is too hazardous to use in this country, but recycled second-hand through the food we eat. Whether NAFTA will prevent that certain legislation is, I think, open to reasonable debate. My view is that it's not an impediment. Luckily, I'm going to be gone this afternoon so I don't have to argue that point--but I would be prepared to argue it.

Finally, agriculture remains the largest single source of non-point-source pollution. Everyone knows this, of course, not in terms of toxicity but in terms of volume. So that the effort, then, to change the approach to non-point-source pollution is premised basically on several principles: First, to integrate non-source pollution into water shed management--comprehensive water shed planning; second, to continue to focus on

voluntary targeted approaches but supplemented with enforceable requirements that can (if the voluntary targets aren't met) establish clear expectations and technical baselines, focus water quality programs on entire ecosystems, stress pollution prevention, and ensure that federal agencies will help implement non-point-source control through their stewardship of federal lands. The federal government will be held to a high standard so that the way we use federal land will not contribute to non-point-source pollution. It's hard for us to tell private land owners "you've got to do 'X'" if the federal government is not willing to do it on its own land. So those are the principles that will guide non-point-source pollution regulation.

There is a lot more detail I didn't go into in all these topics but what they do reflect, I think, is the underlying ambivalence that was described by Professor Hamilton and which I hope I described in my talk. Now we know that farming isn't (as one group put it) all sunshine and fresh air; that the production of food and fiber in the United States carries with it (like every other industrial enterprise carries with it) certain environmental costs. The question is how do we ensure that those costs are internalized where they ought to be internalized or paid for by the public when they ought to be paid for by the public. The answer to that question, I think, largely goes to the underlying question of what is the kind of enterprise that is producing the environmental harms. If, in fact, it is an industrial-style enterprise, then the excuses for what I call agricultural exceptionalism become harder to justify despite the continuing image of the family farmer. It is like wrapping yourself in the flag--it only works for so long. If, in fact, we unwrap the image, you find that the image is distorted. So if we move down the road of industrial agriculture described by Professor Hamilton, the reasons for treating farmers differently, I think, become less compelling. This doesn't mean that the practical problems become easier to solve, but the policy reasons become less compelling if we continue to move down the road of protecting the family-owned enterprise. Then the reasons for adjusting or modifying the environmental enforcement to insure that the costs reflect that policy (that is, the *distribution* costs reflect that policy) present an entirely different range of policy options.

So we really are--as it seems we always are in agriculture--at a crossroads. And here we ask which way we are going to go. We have people clamoring on one side for environmental protection, and people clamoring on the other side to protect the family farm. My view is that if we are going to do one--protect the family farm--then the way we protect the environment has got to fit that model. We have got to pull those together and make them both work as consistent and coherent policy. If, however, we decide to say that protecting the family farm is *not* a priority, then it seems to me that the way we formulate the issues on the other hand

are going to be markedly different. That policy debate is at work. It's afoot, and we really need to be involved in it. That's why this symposium is really, really important.

I want to thank all of you for being here and contributing to the debate, because in a democracy, the only way decisions get made meaningfully is for every person who has an interest in an issue to raise their voice and be heard, and that means *all* the parties who have an interest whether from farm workers to family farmers to chemical suppliers to buyers of the commodities--all participants in that farm economy and consumers as well. The voices need to be heard because if you believe in democracy, what you believe in (it seems to me) is a process. You also believe in results, but you can't expect to get the results you want all the time. What you want is for every voice that ought to be heard to be heard, and I encourage you to participate in the debate. Your presence here indicates that you are willing and able to do so and I want to thank you for being here. Thank you.