

Food Law Is the Next Great Area for Environmental Litigation

PLASTICS. That was the signature word in the iconic 1960s movie *The Graduate*. “I just want to say one word to you. Just one word,” a neighbor declared to the film’s hero in advising the recent college graduate of the bright future that awaited him in the business.

FOOD is what that same neighbor might say to a law school graduate today interested in environmental law. The boom days of hazardous waste litigation (ironically much of it related to plastics) are long gone. Environmental issues related to food production are, by contrast, very much on the rise.

Environmental litigation reflects this expanding dimension of environmental law. The most recent Supreme Court case arising under the National Environmental Policy Act, *Monsanto v. Geertson Seed Farm*, decided in 2010, was very much a food case.

After the federal Animal Plant Health Inspection Service deregulated the sale of genetically modified alfalfa seeds, organic farmers sued on the ground that APHIS had violated NEPA by failing to first prepare an environmental impact statement. Although the Supreme Court ultimately agreed with the agency that the lower court’s injunctive relief was unduly broad, the Court neither questioned that the government had violated NEPA nor disturbed the trial court’s vacating the deregulation order.

Decades ago, federal reporters were filled with identically named cases such as “*Natural Resources Defense Council v. EPA*.” Today, one is likely to stumble instead across a case captioned “*NRDC v. Food and Drug Administration*.” The Second Circuit’s 2014 ruling with just that name is emblematic of this programmatic shift.

In *NRDC v. FDA*, the environmental organization challenged FDA’s re-

fusal to hold a hearing prior to allowing drug manufacturers to sell antibiotics for use in animal feed, because of the dangers posed by such antibiotics in the food supply. The trial court agreed with NRDC that the Federal Food, Drug, and Cosmetic Act required an agency hearing, but the Second Circuit reversed.

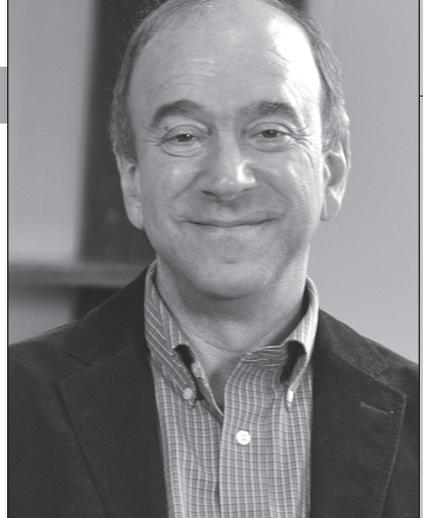
The appellate panel ruled that the statute did not mandate a hearing notwithstanding scientific findings demonstrating the dangers of antibiotics in animal feed. And, the panel distinguished FDA’s regulatory obligations from those of EPA at issue in *Massachusetts v. EPA*, the global warming case, concluding that FDA possessed discretion not to regulate that EPA lacked.

More cases are plainly in the food environmental litigation pipeline. For example, this past November, FDA announced “the first approval for a genetically engineered animal intended for food, AquAdvantage Salmon.”

FDA declined petitions from Earthjustice and Food and Water Watch that it first prepare an environmental impact statement. In addition to NEPA, the FDA’s action also raises

at the very least the specter of a challenge based on the Endangered Species Act. Section 7 imposes procedural requirements and substantive prohibitions on any federal agency actions that might jeopardize the continued existence of an endangered or threatened species. An environmental challenge to FDA’s action is a virtual certainty.

And, these are just a few examples in the vast array of environmental law issues arising within the broad umbrella of food. Longstanding water pollution controversies relating to food production, including wetlands destruction, pesticide and fertilizer contaminated runoff, and animal feedlot water pollution, have been joined by increased



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attention to air pollution from agricultural activities. Even more significantly, systematic thinking about food and the environment has broadened environmental law’s focus to the dangers presented by toxic chemicals to agricultural workers and to those who consume contaminated food.

Climate activists naturally favor sustainable and less wasteful food production. Local, sustainable agriculture reduces the need for energy-consuming transportation and can promote local employment opportunities. Reducing the amount of wasted food has enormous potential to decrease pollution while providing otherwise discarded food to economically disadvantaged communities. In this manner, “food justice” becomes an exciting and promising area for environmental justice.

Once the exclusive province of a few midwestern schools, typically dubbed “agricultural law,” law schools nationwide are responding to a generation of “foodie” law students. For example, Vermont boasts of a degree in food law; Pace has a joint food law initiative with NRDC; UCLA has an exciting program for Food Law and Policy Studies; and even my own Harvard Law School has an active food law program, including a food law clinic.

So, next time you see a student interested in environmental law, consider making the following declaration: “I just want to say one word to you. Just one word. Food.” Or at least tell them to watch *The Graduate*. It is still a great movie. •