Agriculture & Environmental Law Update Session

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The 2014 Farm Bill (Agricultural Act of 2014, P.L. 113-79)

What Is the Farm Bill?

The farm bill is an omnibus, multi-year piece of authorizing legislation that governs an array of agricultural and food programs. Although agricultural policies sometimes are created and changed by freestanding legislation or as part of other major laws, the farm bill provides a predictable opportunity for policymakers to comprehensively and periodically address agricultural and food issues.

The farm bill is typically renewed about every five years. Seventeen farm bills have been enacted since the 1930s (2014, 2008, 2002, 1996, 1990, 1985, 1981, 1977, 1973, 1970, 1965, 1956, 1954, 1949, 1948, 1938, and 1933). Farm bills traditionally have focused on farm commodity program support for a handful of staple commodities—corn, soybeans, wheat, cotton, rice, dairy, and sugar. Yet farm bills have become increasingly expansive in nature since 1973, with the inclusion of a nutrition title. Other prominent additions have been conservation, horticulture, and bioenergy programs.

The omnibus nature of the farm bill can create broad coalitions of support among sometimes conflicting interests for policies that individually might not survive the legislative process. This can stir fierce competition for funds. In recent years, more parties have become involved in the debate, including national farm groups, commodity associations, state organizations, and nutrition and public health officials, as well as advocacy groups representing conservation, recreation, rural development, faith-based interests, local food systems, and organic production.

> The farm bill provides an opportunity for Congress to comprehensively and periodically address agricultural and food issues, and is renewed about every five years.

The Agricultural Act of 2014 (P.L. 113-79, H.Rept. 113-333), referred to here as the "2014 farm bill," is the most recent omnibus farm bill. It was enacted in February 2014 and succeeded the Food, Conservation, and Energy Act of 2008 (P.L. 110-246, "2008 farm bill"). The 2014 farm bill contains 12 titles encompassing commodity price and income supports, farm credit, trade, agricultural conservation, research, rural development, energy, and foreign and domestic food programs, among others.

Provisions in the 2014 farm bill reshape the structure of farm commodity support, expand crop insurance coverage, consolidate conservation programs, reauthorize and revise nutrition assistance, and extend authority to appropriate funds for many U.S. Department of Agriculture (USDA) discretionary programs through FY2018. USDA reports that implementing the 2014 farm bill over the next few years will require about 150 rulemaking actions, and more than 40 studies and reports.

The 2014 Farm Bill (P.L. 113-79), by Title

- **Title I, Commodity Programs:** Provides support for major commodity crops, including wheat, corn, soybeans, peanuts, rice, dairy, and sugar, as well as disaster assistance.
- **Title II, Conservation:** Encourages environmental stewardship of farmlands and improved management through land retirement and/or working lands programs.
- **Title III, Trade:** Provides support for U.S. agricultural export programs and international food assistance programs.
- **Title IV, Nutrition:** Provides nutrition assistance for low-income households through programs including the Supplemental Nutrition Assistance Program (SNAP).
- **Title V, Credit:** Supports federal direct and guaranteed loans to farmers and ranchers.
- **Title VI, Rural Development:** Supports business and community programs and coordination activities with other local, state, and federal programs.
- **Title VII, Research, Extension, and Related Matters:** Supports agricultural research and extension programs.
- **Title VIII, Forestry:** Supports forestry management programs run by USDA's Forest Service.
- **Title IX, Energy:** Supports the development of farm and community renewable energy systems through various programs, including grants and loan guarantees.
- **Title X, Horticulture:** Supports the production of specialty crops—fruits, vegetables, tree nuts, and floriculture and ornamental products—through a range of initiatives.
- **Title XI, Crop Insurance:** Enhances coverage of the permanently authorized federal crop insurance program.
- **Title XII, Miscellaneous:** Other types of programs and assistance not covered in other bill titles, including provisions affecting livestock and poultry production.

Without a new farm bill or an extension, the authority for some farm programs would expire and some would cease to operate altogether unless reauthorized. Also, new activities under some old programs might not be initiated, for lack of either program authority or available funding. Nutrition assistance programs require periodic reauthorization if they are to continue. The farm commodity programs not only expire, but would revert to permanent law dating back to the 1940s. Many discretionary programs would not have statutory authority to receive appropriations in future years. Other programs have permanent authority and do not need to be reauthorized (e.g., crop insurance), but might be included to make changes for policy or budgetary goals.

What Is the Estimated Cost?

The farm bill authorizes programs in two spending categories: mandatory and discretionary. Mandatory programs generally operate as entitlements; the farm bill pays for them using multi-year budget estimates when the law is enacted. Discretionary programs are authorized for their scope, but are not funded in the farm bill; they are subject to appropriations. While both types of programs are important, mandatory programs often dominate the farm bill debate.

At enactment of the 2014 farm bill, the Congressional Budget Office (CBO) estimated that the total cost of mandatory programs (**Table 1**) would be $489 billion over the next five years (FY2014-FY2018).

The overwhelming share (99%) of estimated total net outlays is anticipated for four farm bill titles: nutrition, crop insurance, conservation, and farm commodity support (**Figure 1**). Of the projected net outlays, about 80% is for the Supplemental Nutrition Assistance Program (SNAP). Farm commodity support and crop insurance are expected to account for 13% of mandatory program costs, with another 6% of costs in USDA conservation programs. Programs in all other farm bill titles are expected to account for about 1% of all mandatory expenditures.

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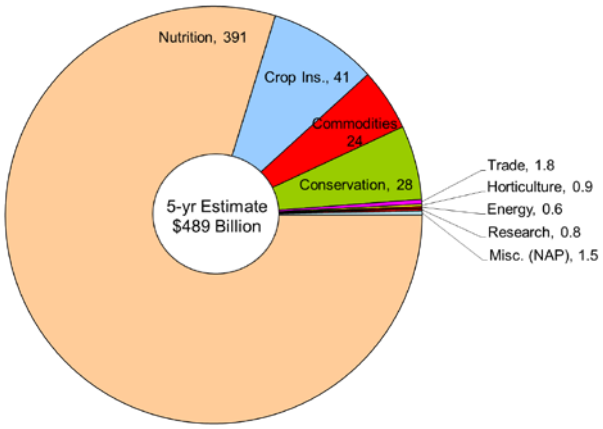
Figure 1. Share of Projected Outlays, 2014 Farm Bill
(billions of dollars, FY2014-FY2018)



Source: CRS, using CBO's 2014 farm bill cost estimates (http://www.cbo.gov/publication/45049). Shows five-year projected mandatory outlays, FY2014-FY2018, in billions of dollars by title.

Of the total estimated mandatory outlays, $391 billion is for nutrition assistance and $98 billion is mostly geared toward agriculture production (**Table 1**). Within the agriculture portion, crop insurance outlays are projected to be $41 billion over the next five years, conservation $28 billion, and farm commodity programs $24 billion. The trade title is projected to spend $1.8 billion over the next five years, horticulture $0.9 billion, research $0.8 billion, and bioenergy $0.6 billion.

If the 2008 farm bill had continued, CBO estimated that mandatory outlays would have been $494 billion for the five-year period FY2014-FY2018. Including changes in revenues, the five-year net impact of the 2014 farm bill on the deficit is an estimated change of -$5.3 billion (-1.1%) over five years. (On a ten-year basis, the score is -$16.6 billion, with ten-year projected outlays of $956.4 billion.)

The net reduction in expected outlays is the result of some titles receiving more funding, while other titles provide offsets. The titles for farm commodity subsidies, nutrition, and conservation provide budgetary savings. The titles for crop insurance, research, bioenergy, horticulture, rural development, trade, forestry, and miscellaneous items receive additional funding.

Table 1. 2014 Farm Bill Budget, by Title (P.L. 113-79)
(millions of dollars, FY2014-FY2018)

	2014 Farm Bill Titles	CBO baseline FY2014-FY2018	CBO Score (chg. to baseline)	Projected Outlays (Baseline + Score)	Share
I	Commodities	29,888	-6,332	23,556	4.8%
II	Conservation	28,373	-208	28,165	5.8%
III	Trade	1,718	+64	1,782	0.4%
IV	Nutrition	393,930	-3,280	390,650	79.9%
V	Credit	-1,011	+0	-1,011	-0.2%
VI	Rural Dev.	13	+205	218	0.04%
VII	Research	111	+689	800	0.2%
VIII	Forestry	3	+5	8	<0.1%
IX	Energy	84	+541	625	0.1%
X	Horticulture	536	+338	874	0.2%
XI	Crop Ins.	39,592	+1,828	41,420	8.5%
XII	Misc. (NAP)	705	+839	1,544	0.3%
Total, Direct Spending		**493,941**	**-5,310**	**488,631**	**100%**

Source: CRS, using the CBO baseline and 2014 farm bill cost estimates (http://www.cbo.gov/publication/45049); CBO, "May 2013 Baseline for the 2008 Farm Bill Programs and Provisions, by Title," unpublished, May 2013; and "Updated Budget Projections: Fiscal Years 2013 to 2023," May 14, 2013 (http://cbo.gov/publication/44172). Reflects mandatory outlays in millions of dollars (FY2014-FY2018).

For more information, see CRS Report R43076, *The 2014 Farm Bill (P.L. 113-79): Summary and Side-by-Side*; CRS Report R22131, *What Is the Farm Bill?*; and CRS Report R42484, *Budget Issues Shaping the 2014 Farm Bill*. Additional CRS reports include CRS Report R41433, *Expiring Farm Bill Programs Without a Budget Baseline*; and CRS Report R42442, *Expiration and Extension of the 2008 Farm Bill*.

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Farm Safety Net Programs: Background and Issues

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Summary

The U.S. Department of Agriculture (USDA) operates several programs that supplement the income of farmers and ranchers in times of low farm prices and natural disasters. Federal crop insurance, farm programs, and disaster assistance are collectively called the farm safety net.

Federal crop insurance is often referred to as the centerpiece of the farm safety net because of its cost and broad scope for addressing natural disasters. The program is permanently authorized and makes available subsidized insurance for more than 130 commodities (ranging from apples to wheat) to help farmers manage risks associated with a loss in yield or revenue. Program cost is projected by the Congressional Budget Office to total $8.8 billion per year over the next decade. Producers pay a portion of the premium which increases as the level of coverage rises. The federal government pays the rest of the premium—62%, on average, in 2014—and covers the cost of selling and servicing the policies.

Farm commodity programs historically represented the heart of U.S. farm policy by virtue of their long history (dating back to the 1930s). Price and income support is based primarily on statutorily fixed prices and not market prices (as in crop insurance), which can be quite low in some years. For crop years 2014-2018, the Agricultural Act of 2014 (2014 farm bill, P.L. 113-79) established minimum prices via the marketing loan program for approximately two dozen commodities, including corn, soybeans, wheat, rice, and peanuts. In addition, producers with production histories for covered crops have a one-time choice between *Price Loss Coverage (PLC) payments* and *Agriculture Risk Coverage (ARC) payments*. Costs were projected in March 2015 at about $4 billion per year over the next decade. Programs are free for producers.

Agricultural disaster assistance is permanently authorized for livestock and orchards. Under the 2014 farm bill, nearly all parts of the U.S. farm sector are now covered by either a disaster program or federal crop insurance, which is expected to reduce calls for ad hoc assistance. As of May 2015, producer payments had totaled more than $5 billion for losses in FY2012-FY2015.

Compared with the previous farm bill, the 2014 farm bill was enacted with more crop insurance options and higher reference prices designed to trigger payments more often than under previous law. Funding was accomplished by eliminating direct payments that had been made annually since 1996 but played no role in managing farm risk because they did not vary with farm prices.

Several facets of the current farm safety net might be of interest to the 114th Congress. An initial focus could be on USDA's implementation of the farm safety net provisions. Issues could include the delayed payment schedule, which could expose cashflow problems, and the pending "actively engaged" rule that could affect program eligibility for some producers.

With ongoing concern for budget deficits and federal spending, Congress also might be interested in reviewing the effectiveness of the revised safety net and actual costs, which are expected to be higher than earlier projections due to lower farm prices. Farm safety net proponents say the current suite of programs has been designed for such situations and is needed to adequately protect producers and the overall agriculture sector. Critics believe that a simplified approach might be more effective and less expensive, with funds used instead for broad societal gains, such as investment in agricultural research or transportation infrastructure. The Administration has proposed trimming crop insurance subsidies, arguing that the safety net could remain effective.

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Overview

Congress has devised a variety of programs operated by the U.S. Department of Agriculture (USDA) to support farm income and help farmers and ranchers manage production or price risk. The programs essentially supplement farm incomes in times of low farm prices and natural disasters, and they are collectively called the farm safety net. The three main components are (1) permanently authorized federal crop insurance, (2) farm commodity price and income support programs for crop years 2014-2018, and (3) permanently authorized agricultural disaster programs. Additional support is provided through emergency loans and USDA discretionary assistance. The suite of programs is designed to allow for maximum farmer choice and flexibility.

Most farmers and ranchers are eligible for at least one of these federal programs. Some commodities are supported by only one method; others receive support through a combination of program tools. Within the farm safety net, federal crop insurance is most extensive, as policies are available for much of U.S. agriculture, including grains, fruits and vegetables, pasture, nursery crops, and livestock gross margins. About two dozen of these crops (e.g., corn, soybeans, wheat) are eligible for both crop insurance and farm commodity programs, including minimum statutory prices. Sugar and dairy have their own programs, while disaster programs support livestock producers. The federal cost for the farm safety net was projected in March 2015 to average about $13.5 billion per year for FY2015-FY2024 (**Table 1**).

Table 1. Farm Support by Commodity

Commodity	Federal Crop Insurance	Farm Commodity Programs	Disaster Assistance
Feed grains (corn, sorghum, barley, oats), peanut, pulses (dry peas, lentils, chickpeas), rice, soybeans, other oilseeds, wheat	Yield or revenue guarantees based on historical yields and *same-year market* prices, plus county yield or revenue guarantee for some crops (Suppl. Coverage Option—SCO)	Price Loss Coverage (PLC) and Ag. Risk Coverage (ARC) - price or revenue guarantee based on historical yields and *minimum prices* (or 5-year *historical* prices); nonrecourse loans with *min. prices*	—
Upland cotton	Same as above, plus county revenue guarantee (Stacked Income Protection Plan—STAX)	Transition payments in 2014 (and 2015 if STAX is not available); nonrecourse loans with *minimum prices*	—
Sugar	Yield guarantees based on same-year market prices	Import quotas, nonrecourse loans with *minimum prices*, and marketing allotments	—
Fruits, vegetables, & nursery	Yield or revenue guarantees, & other products, incl. whole farm	—	Payment for loss of fruit trees and vines (assets)
Livestock & poultry	Insurance for livestock prices, gross margins, & pasture/forage	—	Payment for loss of animals, forage, & feed
Dairy	Insurance for livestock prices, gross margins, & pasture/forage	Margin Protection Program (milk price minus feed costs)	Payment for loss of animals, forage, & feed
Projected ave. annual cost	$8.8 billion	$4.2 billion	$0.5 billion

Source: CRS Report IF00025, Overview of Farm Safety Net Programs (In Focus); costs from CBO.

Notes: Nonrecourse loans (for cash flow and low-price protection) also are available for extra-long staple cotton, wool, mohair, and honey. Emergency loans in disaster-declared counties are not commodity-specific. Uses CBO estimates for FY2015-FY2024 as of March 2015; projections are sensitive to market changes.

Federal Crop Insurance[1]

Federal crop insurance often is referred to as the centerpiece of the farm safety net because of its broad scope and cost. The program makes available subsidized insurance for more than 130 commodities to help farmers manage financial risks associated with a loss in yield or crop revenue. Insurable causes of loss include adverse weather such as drought and excess rain. A distinguishing feature is that guarantees are based on market prices and not on statutory minimums, as provided in farm commodity programs. Program cost was projected by the Congressional Budget Office (CBO) in March 2015 to total $8.8 billion per year during FY2015-FY2024, about twice the level of farm commodity programs.

Insurable commodities include major field crops such as wheat, corn, soybeans, cotton, peanuts, and rice, as well as many specialty crops (including fruit, tree nut, vegetable, and nursery crops), pasture, rangeland, forage crops, and livestock (prices and operating margins). Policies cover more than 250 million acres nationwide. For major crops, three-fourths or more of U.S. planted acreage is insured under the federal crop insurance program. Producers who grow a crop not covered by crop insurance can purchase coverage through the Noninsured Crop Disaster Assistance Program (NAP).

The program is permanently authorized by the Federal Crop Insurance Act, as amended (7 U.S.C. §1501 et seq.). The Federal Crop Insurance Corporation (FCIC) was created as a wholly owned government corporation in 1938 to carry out the program. The program is a partnership between U.S. Department of Agriculture's Risk Management Agency (RMA) and private industry. RMA approves and supports products, develops and approves the premium rates, administers premium subsidies, reimburses private companies for their administrative and operating costs (i.e., delivery costs for selling and servicing the policies), and reinsures company losses. Producer premium subsidies account for three-fourths of total federal crop insurance costs.

Farmers annually purchase about 1.2 million policies, with many producers purchasing multiple policies depending on the number of crops grown and other factors. Policies protect against individual farm losses in yield, crop revenue, or whole farm revenue. Area-wide policies are available for some crops, whereby an indemnity is paid when there is an overall loss over a broad geographic area (e.g., county). For some policies, the revenue guarantee can increase if the harvest price is higher than the expected price calculated in the springtime prior to planting, thereby increasing the point at which indemnities are triggered.

In practice, the producer selects a coverage level and absorbs the initial loss through the deductible. For example, a coverage level of 70% has a 30% deductible (for a total equal to 100% of the expected value prior to planting the crop); in this case an indemnity is made for losses exceeding 30%. The producer pays a portion of the premium, and the federal government pays the rest of the premium—62%, on average, in 2014—plus covers the cost of selling and servicing the policies. This differs from farm commodity programs (see "Farm Commodity Programs," below), which require no participation fees. Also unlike farm commodity programs, crop insurance has no subsidy limits, and participants can be eligible regardless of income levels.

[1] For more information, see CRS Report R40532, *Federal Crop Insurance: Background,* and CRS Report R43494, *Crop Insurance Provisions in the 2014 Farm Bill (P.L. 113-79).*

Farm Commodity Programs[2]

USDA farm commodity programs historically represented the heart of U.S. farm policy, by virtue of their long history (dating back to the 1930s) and because price and income support is based primarily on statutorily fixed prices and not market prices (as in crop insurance), which can be quite low in some years. Program costs were projected in March 2015 by CBO at about $4.2 billion per year over FY2015-FY2024. Funding is provided through the Commodity Credit Corporation (CCC), USDA's program financing mechanism. USDA's Farm Service Agency (FSA) delivers CCC-funded commodity program benefits through a network of local ("county") offices overseen by committees of elected farmers.

The statutory authority underpinning USDA-CCC programs is provided mainly by three permanent laws: the Agricultural Adjustment Act of 1938 (P.L. 75-430), the Agricultural Act of 1949 (P.L. 81-439), and the CCC Charter Act of 1948 (P.L. 80-806). Congress frequently alters or suspends provisions of these laws through omnibus, multi-year farm bills. The most recent omnibus farm law is the Agricultural Act of 2014 (P.L. 113-79). This law is effective for the 2014-2018 crop years. To reduce the deficit and pay for changes to federal crop insurance and farm commodity programs, Congress eliminated fixed decoupled or "direct" payments that had been in place since the 1996 farm bill and were not triggered by declining prices or a farm loss.

The 2014 farm bill requires USDA to offer farm commodity support, including minimum prices, for wheat, feed grains (corn, sorghum, barley, oats), cotton (upland and extra-long staple—ELS), rice, soybeans, other oilseeds (sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, and sesame seed), peanuts, refined beet and raw cane sugar, wool, mohair, honey, dry peas, lentils, and chickpeas. The mix of supported crops reflects historical policy goals and compromises. The most recent additions were pulse crops (dry peas, lentils, chickpeas) in 2002.

Covered Commodities: Wheat, Feed Grains, Rice, Peanuts, Soybeans, Other Oilseeds, Dry Peas, Lentils, and Chickpeas. For each "covered commodity" in the 2014 farm bill, eligible producers (those with past production histories for these crops) had a one-time choice in early 2015 between *Price Loss Coverage (PLC) payments* and *Agriculture Risk Coverage (ARC) payments*, depending on their preference for protection against a decline in either (a) crop prices or (b) crop revenue.[3] PLC payments make up the difference between the crop's average market price and its statutory "reference price" (see **Table 2**), while ARC payments make up the difference between a county revenue guarantee (based on five-year average crop prices or statutory minimums) and actual crop revenue. Payments to a producer are paid on 85% of the farm's acreage history (i.e., "base"). Rather than selecting between PLC and the county ARC guarantee for each covered commodity, a farmer can select a farm-level "individual" ARC guarantee, which combines all covered crops into a single, whole-farm revenue guarantee. Payment is based on 65% of acreage history. In response to a trade dispute with Brazil, upland cotton is no longer a covered commodity, with support now provided by a new crop insurance policy called the Stacked Income Protection Plan (STAX) in addition to marketing assistance loans (see below).

[2] For more information, see CRS Report R43448, *Farm Commodity Provisions in the 2014 Farm Bill (P.L. 113-79).*

[3] 7 C.F.R. §1412; Commodity Credit Corporation and USDA Farm Service Agency, "Agriculture Risk Coverage and Price," 79 *Federal Register* 57703-57721, September 26, 2014. For program purposes, producers/landowners could reallocate base acres and update yields between September 29, 2014, and February 27, 2015. They could make the PLC/ARC program choice between November 17, 2014, and March 31, 2015.

Table 2. Reference Prices and Loan Rates in the 2014 Farm Bill

Crop	Reference Price	Loan Rate	Crop	Reference Price	Loan Rate
Wheat, $/bu	5.50	2.94	Peanuts, $/ton	535	355
Corn, $/bu	3.70	1.95	Peas, dry, $/cwt	11.00	5.40
Sorghum, $/bu	3.95	1.95	Lentils, $/cwt	19.97	11.28
Barley, $/bu	4.95	1.95	Sm.chickpeas, $/cwt	19.04	7.43
Oats, $/bu	2.40	1.39	Lg.chickpeas, $/cwt	21.54	11.28
Upland Cotton, $/lb	n.a.	0.45 to 0.52	Wool, graded, $/lb	n.a.	1.15
ELS Cotton, $/lb	n.a.	0.7977	Wool, nongraded	n.a.	0.40
Rice, long grain $/cwt	14.00	6.50	Mohair $/lb	n.a.	4.20
Rice, med. grain $/cwt	14.00; 16.10 for temperate *japonica*	6.50	Honey, $/lb	n.a.	0.69
Soybeans, $/bu	8.40	5.00	Sugar, raw cane, $/lb	n.a.	0.1875
Minor oilseeds, $/lb	0.2015	0.1009	Sugar, refined beet, $/lb	n.a.	0.2409

Source: CRS from 2014 farm bill (P.L. 113-79).

Notes: n.a. = not applicable. Crops with reference prices are called "covered commodities." Minor oilseeds include sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, and sesame seed.

Unlike federal crop insurance, producers do not pay to participate in these programs. Payment recipients can plant any combination of crops on their land, but conservation rules must be followed. The **Appendix** contains graphical illustrations and numeric examples of PLC and ARC.

Producers, regardless of whether they receive the above payments, also are eligible for *nonrecourse marketing assistance loans* and *loan deficiency payments*, which provide cash flow and additional price protection at statutory minimum prices. (See **Table 2** for loan rates.) To qualify, a farmer pledges the stored crop as collateral. Nonrecourse loans generally must be repaid with interest within nine months or else the producer forfeits the pledged commodity to the government, which has "no recourse" other than to accept it in lieu of money. However, two features are intended to help avert forfeitures and subsequent buildup of CCC-owned surpluses. First, the "marketing loan" feature enables the farmer to repay the loan at a USDA-calculated rate approximating market prices. If that repayment rate is below the loan rate, the farmer captures the difference as a subsidy (marketing loan gain). Loan deficiency payments (equal to marketing loan gains) also are available to eligible producers who choose not to take out a crop loan.

Upland Cotton, ELS Cotton, Wool, Mohair, Honey. These commodities are not eligible for PLC/ARC payments, but producers can receive nonrecourse marketing assistance loans and (except for ELS cotton) loan deficiency payments.

Payment Limits and Adjusted Gross Income Eligibility. Farm commodity program benefits (except for "gains" from loan forfeitures) are subject to a combined payment limit of $125,000 per person, with an additional separate limit of $125,000 for peanuts. Also, the income limit per person for program eligibility is $900,000 of adjusted gross income (three-year average). The dollar amounts double for a married couple. Finally, persons must be "actively engaged" in farming. With benefits from forfeited loans not counted against the payment limit, potential payments for PLC/ARC have generated concerns that loans for peanuts and other crops could be forfeited, resulting in government stock build-up, if producers approach the $125,000 limit.

Sugar. A combination of import quotas, nonrecourse loans, and marketing allotments (to limit sales by processors) is intended to support prices at 18.75¢/lb. (raw cane) and 24.09¢/lb. (refined beet), and at no net cost to the government. A sugar-to-ethanol (feedstock flexibility) backstop is available if allotments and import quotas fail to keep market prices above guaranteed levels.[4]

Milk. Dairy producers are eligible for the Margin Protection Program (MPP), which makes payments when the national margin (average farm price of milk minus an average feed cost ration) falls below a producer-selected margin ranging from $4.00 per hundredweight (cwt.) to $8.00/cwt. Participating producers pay premiums for margin coverage above $4.00/cwt. To assist small farms, lower premiums are charged for the first 4 million pounds of annual output (approximately 170 cows), while higher premiums are charged on amounts above 4 million lbs. A 25% discount on premiums is available for 2015 on coverages below $8.00/cwt.[5]

Agricultural Disaster Assistance[6]

The 2014 farm bill permanently authorized three disaster programs for livestock and one for orchards and vineyards. Nearly all parts of the U.S. farm sector now are covered by either a disaster program or federal crop insurance, which is expected to reduce calls for ad hoc federal assistance. CBO estimates annual outlays at about $500 million per year for FY2015-FY2024. The programs are retroactive, and producer payments as of May 2015 totaled more than $5 billion for losses in FY2012-FY2015. The programs are:

1. **Livestock Indemnity Program (LIP)**, which provides payments to eligible livestock owners and contract growers at a rate of 75% of market value for livestock deaths in excess of normal mortality caused by adverse weather;
2. **Livestock Forage Disaster Program (LFP)**, which makes payments to eligible livestock producers who have suffered grazing losses on drought-affected pasture or grazing land, or on rangeland managed by a federal agency due to fire;
3. **Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP)**, which provides payments (capped at $20 million per year) to producers of livestock, honey bees, and farm-raised fish as compensation for losses due to disease, adverse weather, and feed or water shortages; and
4. **Tree Assistance Program (TAP)**, which makes payments to orchardists/nursery tree growers for losses in excess of 15% to replant trees, bushes, and vines damaged by natural disasters.

The programs do not require a disaster declaration, and producers do not pay a fee to participate. For individual producers, combined payments under all programs except TAP may not exceed $125,000 per year. For TAP, a separate limit of $125,000 per year applies. Also, to be eligible for a payment, a producer's total adjusted gross income cannot exceed $900,000. Separately, for all types of farms and ranches, when a county has been declared a disaster area by either the President or the Secretary of Agriculture, producers in that county may become eligible for low-interest emergency disaster (EM) loans. USDA also has several programs that help producers repair damaged land following natural disasters.

[4] CRS Report R42535, *Sugar Program: The Basics.*

[5] CRS Report R43465, *Dairy Provisions in the 2014 Farm Bill (P.L. 113-79).*

[6] CRS Report RS21212, *Agricultural Disaster Assistance*; and CRS Report R42854, *Emergency Assistance for Agricultural Land Rehabilitation.*

USDA Discretionary Support

In addition to the explicitly required assistance described above, federal law has long given USDA the discretion to offer support for virtually any farm commodity. For example, USDA made direct payments to hog producers in 1999 during a period of historically low prices, and to fruit, vegetable, and nursery plant growers affected by Florida hurricanes in 2004 and 2005. The most recent emergency farm assistance extended under discretionary authority was in 2010, when USDA made farm payments for weather-related and other losses to producers of upland cotton, rice, soybeans, poultry, and aquaculture. Authority and funding for these various activities can come from CCC (under the CCC Charter Act) and Section 32 (of P.L. 74-320, a 1935 law).

Section 32 permanently appropriates the equivalent of 30% of annual customs receipts to support the farm sector through a variety of activities. Most of this appropriation (now about $8 billion per year) is transferred directly to USDA's child nutrition account to fund school feeding and other programs. Much of the remainder provides USDA with a source of discretionary funds, which in addition to the direct payments above also pays for "emergency removals" of surplus agricultural commodities, disaster relief, or other unanticipated needs. USDA annually purchases hundreds of millions of dollars in meats, poultry, fruits, and vegetables under Section 32. Importantly, in annual appropriations acts since FY2012, Congress has restricted some of USDA's authority by prohibiting the use of appropriated funds to pay for salaries and expenses needed to operate a farm disaster program under either funding source.[7]

Historical Policy Discussion

When commodity programs and the federal crop insurance program were first authorized in the 1930s, most of the country's then 6.8 million farms were diversified and small (by today's standards). There was a perceived need to address the severe economic problems faced by this large segment of rural-based society, where about 25% of the U.S. population resided. Moreover, it was argued, stabilizing the agricultural sector—through guaranteed minimum farm prices, income payments to producers, and/or various supply management techniques—would help to ensure an abundant supply of food and fiber at reasonable prices in the future.

Over the last half century, while farm size and incomes have increased, the perennial challenge of price and income variability has remained, especially as increased globalization exposed U.S. agricultural markets to international events. As a result, policy makers have focused increasingly on risk management rather than traditional price support and supply control. Both Congress and the Administration sought, for many decades, to steer price and income support programs onto a more "market-oriented" course, so that the private market rather than the government would provide economic rewards for production agriculture. And since 1980, to reduce the potential for ad hoc disaster assistance and provide producers with risk management tools, the federal crop insurance program has been enhanced for producers multiple times by increasing subsidy rates and broadening coverage.

Most recently, Congress passed the 2014 farm bill with additional crop insurance options and higher farm program guarantees (reference prices) designed to trigger payments more often than under previous law. Funding was accomplished by eliminating direct payments that had been made annually to eligible producers and farmland owners since 1996 but played no role in managing farm risk because they did not vary with farm prices. Also, as part of the trend toward

[7] For more information, see CRS Report RL34081, *Farm and Food Support Under USDA's Section 32 Program*.

risk management, the 2014 farm bill's new dairy program and Agriculture Risk Coverage have insurance-like features that reimburse farmers when a loss is triggered.

Supporters of the farm safety net contend that the authorized programs protect against price and market volatility, and provide needed support and/or stability to farmers who otherwise would see plunging incomes and land values due to unfavorable and unpredictable yields. Critics have long argued that U.S. commodity-based policies are outdated and transfer too much risk from private businesses (farms) to the federal government, waste taxpayers' money, and may be detrimental to society in general, particularly if policies encourage farming on environmentally sensitive land.

Prospective Issues

Several facets of the current farm safety net might be of interest to the 114th Congress, including USDA's implementation of the farm safety net provisions of the 2014 farm bill. Also, potential efforts to find budgetary savings could direct attention to government expenditures on commodity programs and subsidy levels for federal crop insurance. Finally, as programs are activated through the five-year life of the 2014 farm bill, Congress might have interest in the overall design of the farm safety net, including the appropriate level of federal farm support and how to best deliver it.

Implementation

After enactment of the 2014 farm bill in February 2014, USDA immediately began implementing the farm safety net provisions. In April 2014, the disaster programs were some of the first 2014 farm bill programs to be implemented. USDA began issuing disaster payments for 2012 and 2013 losses shortly thereafter. Later in 2014, regulations were published for new commodity programs and crop insurance changes.[8]

The farm program signup involved a series of decisions for farmers in early 2015. The first was the decision for base and program yields. Owners of farms had a one-time opportunity to (1) maintain the farm's 2013 base acres of covered commodities through 2018 or (2) reallocate base acres among those covered commodities planted on the farm at any time during the 2009-2012 crop years. In addition, participants could update their program payment yields (equal to 90% of the 2008-2012 average yield for the farm). The second decision was for the program choice, whereby farm owners and operators had a one-time opportunity to select between PLC, ARC-County Coverage, and ARC-Individual. The final step was for producers to enroll their farms by signing a contract (summer 2015).

In late 2014 and early 2015, USDA's Farm Service Agency and the Cooperative Extension System (including land grant universities), had provided farmers with information for making farm program decisions.[9] Farmers could use decisions tools (developed with funding from the 2014 farm bill) to sift through the program choices, which required collection of farm data and analysis including projections for farm prices through 2018. Farmers considered their options based on maximizing potential government payments and/or protecting again low revenue or prices over the five-year period covered by the farm bill. With a choice of several options (farmers could pick PLC for one crop and ARC-County for another crop, or ARC-Individual for a

[8] The department summarizes activities related to 2014 farm bill implementation at http://www.usda.gov/wps/portal/usda/usdahome?contentid=progress-2014-farm-bill.html.

[9] For more information, see USDA/Farm Service Agency, http://www.fsa.usda.gov/FSA/webapp?area=home&subject=arpl&topic=landing.

guarantee that combines all crops), producers were able to tailor the program to their individual farms. However, upfront decisions were required, and some farmers may not be happy with their choice in the future if their program does not activate during difficult financial times and the alternative does.

Nationwide, ARC-County Coverage was elected by 96% of soybean farms, 91% of corn farms, and 66% of wheat farms. Over 90% of rice and peanut farms elected PLC. Few farms, regardless of the commodity mix, elected ARC-Individual.[10]

Timing of Farm Program Payments

Under the 2014 farm bill, farm program payments are delivered about one year (or more) after farmers harvest the crop. For example, any payments associated with corn planted in spring of 2014 and harvested in fall 2014 are not made until October 2015 at the earliest (i.e., FY2016). The delay in payments helped reduce the "budget score" of the farm bill by shifting one year of payments outside the 10-year budget scoring window.

This timing of program payments is significantly later than under the 2008 farm bill when partial payments were made available prior to planting (except for winter wheat), with the remainder delivered shortly after harvest. The old schedule helped farmers with cashflow needs, including paying for their production costs (e.g., seed, fertilizer). Some policy observers and lenders are concerned that farmers might have a cashflow during low-price years. Bankers may need to fill the gaps with additional loans and cropping decisions might be affected (e.g., farmers shift to crops with lower input costs). As an alternative, farmers might make greater use of the marketing assistance loan program, which was reauthorized by the 2014 farm bill and is designed to help with farm cashflow by using crops as collateral for a loan.

"Actively Engaged" Rule

To be eligible for payments, persons must be "actively engaged" in farming. Actively engaged, in general, is defined as making a significant contribution of (i) capital, equipment or land, and (ii) personal labor or active personal management. Also, profits are to be commensurate with the level of contributions, and contributions must be at risk. Legal entities can be actively engaged if members collectively contribute personal labor or active personal management. Special classes allow landowners to be considered actively engaged if they receive income based on the farm's operating results, without providing labor or management. Both spouses are considered actively engaged if only one meets the qualification, allowing payment limits to be doubled.

The 2014 farm bill instructs USDA to write regulations that define "significant contribution of active personal management" to more clearly and objectively implement existing law. The regulation is to apply beginning with the 2015 crop year, and entities made solely of family members are to be exempt from the new regulation. This enacted provision differs from earlier Senate-passed and House-passed versions of the 2014 farm bill, which would have deleted "active personal management" and effectively required personal labor in the farming operation. Under the 2014 farm bill, USDA is required to consider different limits for varying types of farming operations, based on considerations of size, nature, and management requirements of different farming types; changes in the nature of active personal management due to advancements in farming practices; and the impact of this regulation on the long-term viability of farming operations.

[10] For more information, see http://www.fsa.usda.gov/programs-and-services/arcplc_program/index.

USDA issued a proposed rule in March 2015, and the comment period ended May 26, 2015. The proposed rule limits farm payments to individuals who may be designated as farm managers but are not actively engaged in farm management. Under the proposed rule, non-family joint ventures and general partnerships must document that their managers are making significant contributions to the farming operation, defined as 500 hours of substantial management work per year, or 25% of the critical management time necessary for the success of the farming operation. Issuance of the final rule is pending.[11]

Implementing SCO and STAX for Upland Cotton

For a typical federal crop insurance policy, an indemnity is triggered when the farm yield (or revenue) is below the policy guarantee, and the size of the indemnity is determined in part by the amount of coverage purchased by the producer. As provided under the 2014 farm bill, and to help cover the deductible (out-of-pocket or "shallow" loss) absorbed by the farmer on the underlying policy, farmers can now purchase a second policy on the same acreage, called Supplemental Coverage Option (SCO). The SCO indemnity is triggered when there is a county-level loss in yield or revenue (not an individual farm loss). A similar policy was made available for upland cotton called Stacked Income Protection (STAX), which is a revenue-based, area-wide crop insurance policy that may be purchased as a stand-alone policy for primary coverage or purchased in tandem with an underlying policy.[12] Premiums are subsidized at 65% for SCO and 80% for STAX.

Beginning with the 2015 crop year, SCO is available in select counties for spring barley, corn, soybeans, wheat, sorghum, cotton, and rice.[13] Beginning with the 2016 crop year, USDA expects to make greater use of crop insurance data to expand SCO coverage into select counties for alfalfa seed, canola, cultivated wild rice, dry peas, forage production, grass seed, mint, oats, onions, and rye. SCO is also expected to be available in 2016 for almonds, apples, blueberries, grapes, peaches, potatoes, prunes, safflower, tomatoes, and walnuts. USDA plans to extend coverage in the 2017 crop year to grapefruit, lemons, mandarins/tangerines, oranges, and tangelos.

Farmers who normally purchase relatively low levels of coverage (which are more affordable) might be most attracted to SCO, as it could help cover a larger portion of the farmer's out-of-pocket loss (deductible). Proponents argue that these farmers are usually in the higher risk areas and need additional assistance through SCO to deal with the additional risk. Critics argue that these policies provide an excessive amount of support for crops in risky areas or can indemnify producers when there is no farm loss. Separately, a concern for some farm policy makers is that because the policies are triggered by area-wide losses and not farm losses, farmers may not be adequately covered if they suffer a loss on their farm but there was not a sufficient loss at the county level to trigger an indemnity. These issues might capture the attention of policy makers after producers have some experience with these policies.

[11] For more information, see http://www.fsa.usda.gov/programs-and-services/payment-eligibility/actively_engaged/index.

[12] STAX was sought by U.S. cotton producers in an attempt to resolve a long-running trade dispute with Brazil that requires changing the U.S. cotton support program so it does not distort international markets.

[13] USDA, Risk Management Agency, *Supplemental Coverage Option for Federal Crop Insurance*, October 2014, http://www.rma.usda.gov/news/currentissues/farmbill/2014NationalSupplementalCoverageOption.pdf. See also CRS Report R43494, *Crop Insurance Provisions in the 2014 Farm Bill (P.L. 113-79).*

Actual Production History (APH) for Crop Insurance

In recent years, a particular crop insurance concern of producers affected by prolonged drought in the Southern Plains has been the inclusion of poor yields used to establish an individual's insurance guarantee, which is based on 4 to 10 years of historical farm yields and called actual production history (APH). To address this, the 2014 farm bill allows a producer to exclude years with low yields from his or her APH calculation when the average county yield is less than 50% of the 10-year county average. The farm bill manager's report directed USDA to implement the provision for 2015 crops. Given program complexity and significant data requirements, USDA first indicated that it would not do so until 2016, prompting some Members to press for an earlier rollout. On October 21, 2014, USDA announced it would implement the provision for crops planted in spring 2015 (but not wheat planted in fall 2014). Some Members had pushed for extending benefits retroactively to wheat planted in fall 2014, which USDA declined to do.

Additional Crop Insurance Provisions

The 2014 farm bill enacted several provisions to address specific concerns for fruit and vegetable producers, including whole farm insurance. In November 2014, USDA announced the availability of a revised Whole-Farm Revenue Protection plan of insurance, which offers higher levels of coverage and other features designed to enhance the safety net for fruit and vegetable producers and others with limited availability of traditional federal crop insurance products. The 114th Congress is expected to monitor the experiences of these producers during 2015.

Members also will likely await the results of number of studies required by the farm bill to explore potential products for additional commodities. The 2014 farm bill directs FCIC to study a variety of topics that could lead to additional insurance policies for animal agriculture. FCIC is required to enter into contracts to conduct research and development on policies for the margin between the market value of catfish and input costs and poultry business interruption insurance for poultry growers, including losses due to bankruptcy of an integrator (owner-processor). FCIC also is required to contract for separate studies on insuring swine producers and poultry producers for a catastrophic event.

More information on other provisions in the 2014 farm bill is available in CRS Report R43494, *Crop Insurance Provisions in the 2014 Farm Bill (P.L. 113-79).*

Agricultural Disaster Payments

Given significant drought conditions in parts of the Great Plains in recent years, the Livestock Forage Program (LFP), as modified in the 2014 farm bill to provide retroactive payments for losses back to FY2012, has delivered to date the largest amount of farm safety net payments. Program payments totaled $3.0 billion in FY2014 and are projected by CBO to total $2.5 billion in FY2015. There is no program cap on LFP payments. Smaller amounts have been delivered to other disaster programs: the Livestock Indemnity Program ($55 million in FY2015) and Tree Assistance Program ($8 million in FY2015). For the Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP), annual payments are capped at $20 million, and individual farm payments for both FY2012 and FY2013 were adjusted downward in order for the total to fit under the cap. At the time of farm bill enactment, the CBO score for total disaster payments expected in FY2014 and FY2015 was $1.3 billion.

With relatively large LFP outlays under the 2014 farm bill, Congress might be interested in the payment process for LFP. USDA's Office of Inspector General (OIG) reviewed the program under the 2008 farm bill, and in December 2014 found that the Farm Service Agency (FSA) had made

administrative errors when processing certain LFP applications, resulting in improper payments for some applications.[14] The OIG identified areas needing attention, including improved guidance for local FSA offices when calculating and making payments and improved internal reviews for producer eligibility and payment accuracy.

Government Outlays and Policy Issues

With ongoing congressional concern for budget deficits and federal spending, the combined cost of farm programs, crop insurance, and disaster programs is expected to garner the attention of policy makers who want to reduce federal spending in the 114th Congress. Several additional aspects of the farm safety net might be examined, including "generic" base acres and crop insurance subsidies.

Potential for Higher Farm Program Outlays

Record corn and soybean yields in 2014 have put downward pressure on farm prices, pushing government outlays for the farm commodity programs for 2014 crops above earlier expectations. In March 2015, CBO estimated the cost of PLC/ARC for FY2016 (associated with crops harvested in 2014) at $4.0 billion, up from $3.8 billion that was calculated in January 2014 based on stronger market assumptions. USDA expects even higher FY2016 outlays, estimated at $7.3 billion. The five-year program costs could rise substantially as well, if the price of corn remains below $4 per bushel through 2018. Corn generates the greatest outlays among program crops, and its price correlates with other crop prices. To offset the projected higher farm program costs, the Administration proposed in its FY2016 budget a reduction in crop insurance subsidies (see "Crop Insurance Subsidies" below).

Lower expected farm prices are significant for program outlays because the 2014 farm bill increased program payment triggers (reference prices) for covered commodities (see list in **Table 2**). The additional price protection will trigger payments (generating outlays) more quickly than under the 2008 farm bill, but farm programs were designed to provide financial cover for producers until crop prices rebound and incomes rise. Proponents of farm spending also point out that weak prices likely will have the opposite effect for federal crop insurance (i.e., reducing prospective outlays) because policy premiums (and the premium subsidy) typically decline in tandem with falling farm prices (lower prices means lower liability and premiums).

A broader policy concern is that prospective payments could help maintain overall crop production when low prices would otherwise discourage farmers from planting or applying additional inputs. Larger supplies could intensify the price pressure and further increase government costs. Several program features, however, are designed to minimize any adverse production effect. The first is that farm payments are made only on historical base acreage and not current year plantings (except for generic base—see below). In other words, farmers would receive the payment, if triggered by low prices or revenue, regardless of how much acreage is planted. Moreover, payment is made only on a portion of base (85% in the case of PLC and ARC-County and 65% for ARC-Individual). Finally, the ARC formula limits the potential production effects if farm prices were to remain low for several years. That is, the ARC guarantee declines as older, higher prices (from recent years) fall out of the five-year moving average guarantee, at least

[14] USDA Office of Inspector General, *Farm Service Agency Livestock Forage Program*, Audit Report 03702-0001-32, December 2014, http://www.usda.gov/oig/webdocs/03702-0001-32.pdf.

until farm prices decline to the reference price, which serves as the minimum price in the ARC guarantee. In contrast, the PLC guarantee is the reference price, which remains fixed in statute.

The fixed nature of the reference prices has potential to lock in farm payments for an extended period of time if, for particular crops, the average farm price remains below the reference price. For example, the average farm price for peanuts is projected by CBO to average between $0.2039 per pound and $0.2150 per pound for crop years 2014-2018, compared with a reference price of $0.2675 per pound. Farm program outlays for peanuts are expected to be triggered each year of the farm bill, with outlays projected by CBO to exceed $200 million per year. USDA expects significantly higher peanut outlays.

"Generic" Base Acres

As mentioned above, to reduce the potential for excess production and subsequent market distortions, the 2014 farm bill continues to "decouple" farm payments from actual plantings by instead making PLC/ARC payments on a farm's historical "base acres." Each farm has crop-specific bases equal to historical planted acreage on that farm. Also, as part of a package to address a long-term trade dispute, the 2014 farm bill excluded upland cotton from PLC/ARC and renamed upland cotton base (totaling 17.5 million acres) as "generic" base. Generic base becomes eligible for program payments if a covered crop is planted on the farm. Thus, generic base is an exception to the broad decoupling of plantings and farm program payments. (The precursor to ARC, called "ACRE," also tied government payments to same-year plantings.)

The domestic and trade policy concern is that farmers with generic base might pursue potential farm program payments by planting certain covered crops in low-price years (see "WTO Trade Concerns" below). For example, producers with generic base might have an economic incentive to plant additional peanuts if the combination of expected payments and market returns is greater for peanuts than for alternative crops. For a discussion of potential planting incentives on generic base acres and associated government costs, see CRS Report R44156, *U.S. Peanut Program and Issues*. **Table A-3** contains an example of Price Loss Coverage (PLC) payments for peanuts, with generic base attributed to peanuts.

Crop Insurance Subsidies

To offset higher farm program outlays given lower expected farm prices, the Administration's FY2016 budget proposed two changes to the federal crop insurance program, which would reduce outlays by a combined $16 billion over 10 years.[15] The first proposal would reduce premium subsidies by 10 percentage points for policies providing revenue protection with "harvest price coverage" (crops include wheat, corn, soybeans and others with guarantees set by USDA using the futures market). The current subsidy ranges between 38% and 80%, depending upon the coverage (deductible) purchased by the producer. The guarantee for this type of coverage increases if harvest-time price is higher than the initial guarantee established prior to planting. The Administration and others argue that such "up-side" price protection does not need to be subsidized by the government. The second proposal would change "prevented planting coverage," which indemnifies producers when crops cannot be planted for weather reasons. The changes include adjusted payment rates and lower yield guarantees.

[15] USDA, *FY2016 Budget Summary and Annual Performance Plan*, February 2015, http://www.obpa.usda.gov/budsum/fy16budsum.pdf.

Leaders of the House and Senate Agriculture Committees criticized the Administration's proposal. House Agriculture Committee Chairman Mike Conaway said the cuts "would jeopardize the ability of producers to insure their crops in a climate of collapsing crop prices, major crop losses, and falling farm income."[16] Senate Agriculture Committee Chairman Pat Roberts said the proposal "ignores the concerns of the nation's farmers and ranchers."[17]

For more information, see CRS Report R43951, *Proposals to Reduce Premium Subsidies for Federal Crop Insurance*.

WTO Trade Concerns

The enacted 2014 farm bill (P.L. 113-79) could result in potential compliance issues for U.S. farm policy with the rules and spending limits for domestic support programs that the United States agreed to as part of the World Trade Organization's (WTO's) Uruguay Round Agreement on Agriculture. In general, the act's new farm safety net shifts support away from classification under the WTO's green/amber boxes and toward the blue/amber boxes, indicating a potentially more market-distorting U.S. farm policy regime. The most notable safety net change is the elimination of the $5-billion-per-year direct payment program, which was decoupled from producer planting decisions and was notified as a minimally trade-distorting green box outlay. Direct payments were replaced by programs that are partially coupled (PLC and ARC) or fully coupled (SCO and STAX), meaning that they could potentially have a significant impact on producer planting decisions, depending on market conditions. Because the United States plays such a prominent role in most international markets for agricultural products, any distortion resulting from U.S. policy would be both visible and vulnerable to challenge under WTO rules. For more, see CRS Report R43817, *2014 Farm Bill Provisions and WTO Compliance.*

Design of Overall Farm Safety Net

Challenges for farm policy makers over the years have included the complexity of the farm safety net, the development of programs with similar but not identical objectives and payment mechanisms, and the potential for different programs to make payments for the same loss.[18] For example, the current farm safety net for "covered" commodities has several variations of "counter-cyclical-style" payments, including marketing loan benefits, traditional price payments (PLC), and revenue payments (ARC-County Coverage). All three focus to some extent on price declines. Farmers can also add "revenue protection" crop insurance for individual farm yield (and revenue) risk, but without minimum prices used in farm programs. (See **Figure A-3** for the interaction of crop insurance and farm programs.) Proponents say the options are necessary because "one program doesn't fit all producers and regions," while others believe that a simplified approach might be more effective and less expensive, with savings used for purposes that generate broad societal gains, such as agricultural research or transportation infrastructure.

[16] Mike Conaway, "Chairman Conaway Responds to President Obama's FY2016 Budget Proposal," press release, February 2, 2015, http://agriculture.house.gov/press-release/chairman-conaway-responds-president-obama%E2%80%99s-FY2016-budget-proposal.

[17] Senator Pat Roberts, "Senate Ag Committee Chairman Roberts Responds to President's Budget Proposal," press release, February 2, 2015, http://www.ag.senate.gov/newsroom/press/release/senate-ag-committee-chairman-roberts-responds-to-presidents-budget-proposal.

[18] For background and analysis on program overlap, see Erik J. O'Donoghue et al., *Identifying Overlap in the Farm Safety Net*, USDA Economic Research Service, Economic Information Bulletin Number 87, November 2011, http://www.ers.usda.gov/media/149262/eib87_1_.pdf.

Appendix. Farm Commodity Program Examples

The 2014 farm bill (P.L. 113-79) established commodity programs that make farm payments when either annual crop prices or revenues are below statutory reference prices or historical revenue guarantees. Producers have a one-time choice:

- For each covered crop on each farm,
  - Price Loss Coverage (PLC), or
  - Agriculture Risk Coverage-County (ARC-CO)
- Or, for all covered crops on each farm,
  - Agriculture Risk Coverage-Individual (ARC-Individual)

PLC is illustrated in **Figure A-1** and ARC-CO is illustrated in **Figure A-2**.

Hypothetical numeric examples in the following tables illustrate several types of farms and how farm commodity programs might trigger payments given 2014 farm bill parameters.

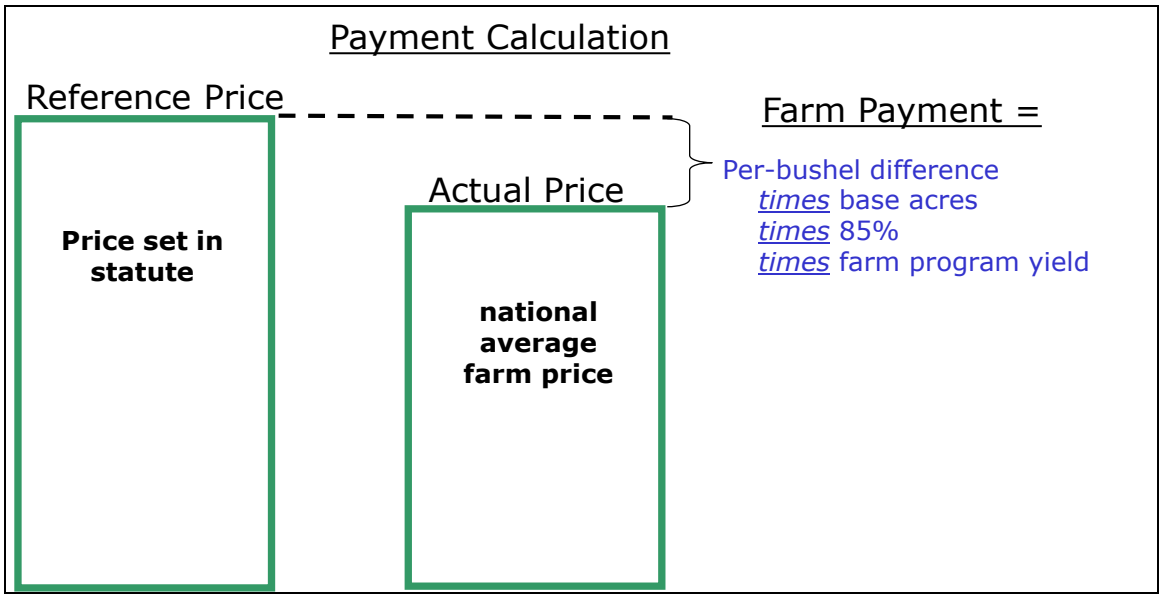
- **Table A-1**: Corn/Soybean farmer selects PLC for corn and ARC for soybeans
- **Table A-2**: Wheat/Lentil farmer selects ARC-Individual for the entire farm
- **Table A-3**: Peanut/Cotton farmer selects PLC for peanuts, with generic base (formerly upland cotton base) attributed to same-year peanut planted acreage

In addition to farm commodity programs, producers who purchase federally subsidized crop insurance may also be eligible for an indemnity if price and yield conditions specified in the policy are triggered. The 2014 farm bill made available a second federal crop insurance policy called the Supplemental Coverage Option (SCO) to cover part of the deductible on the underlying policy. (Note: SCO cannot be purchased for commodities enrolled in ARC.) For farm examples of crop insurance, see CRS Report R40532, *Federal Crop Insurance: Background.*

Figure A-3 illustrates the interaction between crop insurance and farm programs. The bar on the left depicts the expected revenue (prior to planting) under a typical crop insurance revenue policy with a 30% deductible (the farmer absorbs the first 30% of the loss). If the farmer selects PLC, an SCO policy can be purchased to cover part of the deductible (see PLC column). If a farm loss occurs, an initial indemnity is triggered under the farmer's individual crop insurance policy (depicted by the green box). A second indemnity from SCO would be paid (blue box) if there is also a loss at the county level. Overall, the farmer incurs a loss of approximately 14% (white box at top). A *separate PLC payment* (not shown) is made if the farm price is below the reference price. In contrast, if ARC is selected rather than PLC (see ARC column), the farm is not eligible for SCO and only an ARC payment (red box) and insurance indemnity (green box) would be made if triggered.

Figure A-1. Price Loss Coverage (PLC)

(makes payment when national average farm price drops below the reference price)

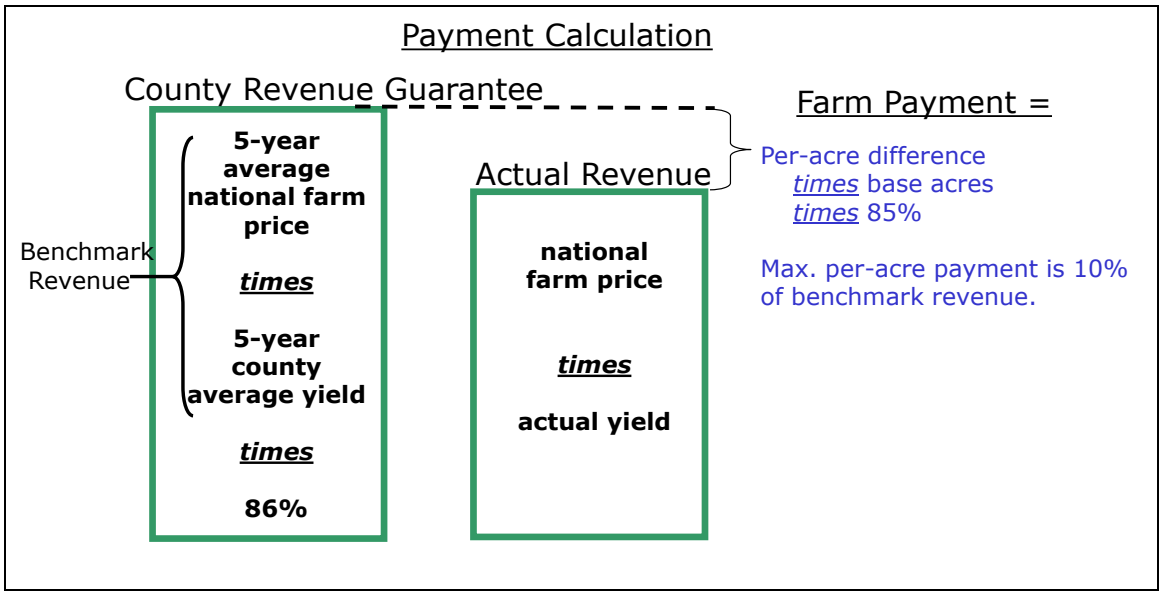


Source: CRS.

Notes: In a declining market, the per-bushel payment rate increases until the farm price drops below the loan rate. At this point, benefits under the Marketing Assistance Loan Program may become available.

Figure A-2. Agriculture Risk Coverage (ARC)–County Coverage

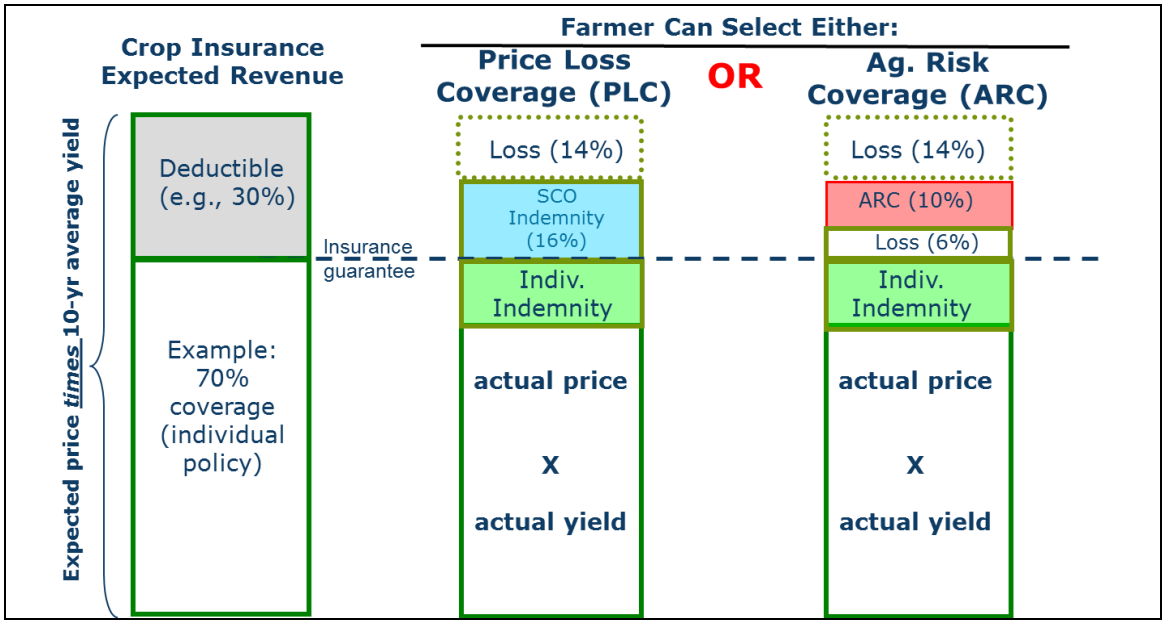
(payment when actual county-wide revenue drops below 86% of historical revenue ["shallow loss"])



Source: CRS.

Notes: Five-year averages exclude high and low years. Instead of an ARC county guarantee on a crop-by-crop basis, farmers can select a farm-level guarantee for all covered crops on a farm. Payment acreage is reduced to 65% of base acres, and a single, whole farm guarantee (and payment) is calculated as a weighted average for all crops (i.e., not on a crop-by-crop basis).

Figure A-3. Crop Insurance and Farm Commodity Programs



Source: CRS.

Notes: Does not show PLC payment, which is made when the average farm price is less than the reference prices set in the farm bill. Program selection deadline: March 31, 2015.

Table A-1. Hypothetical Corn/Soybean Farm in 2014

(farmer selects Price Loss Coverage (PLC) for corn and Ag. Risk Coverage (ARC) for soybeans)

Step 1.	Step 2.	Step 3.	Step 4.
Data	**Payment Formula**	**Calculation**	**Payment**
Price Loss Coverage (PLC) for corn: *payment occurs when actual farm price ($3.40/bu.) is below reference price ($3.70/bu.)*			
Corn Reference Price = $3.70/bu. 2014 Actual Price = $3.40/bu. Farm Base = 500 acres Farm Program Yield = 100 bu./acre	**Payment =** (Reference Price - Actual Price) x Base Acres x 85% acreage factor x Program Yield	**Payment =** ($3.70/bu. - $3.40/bu.) x 500 acres x 85% x 100 bushels/acre = $12,750	**Corn payment =** $12,750
Agriculture Risk Coverage – County (ARC) for soybeans: *payment occurs when actual county revenue ($/acre) is below guarantee*			
Soybeans **County yield** bu./acre / **Nat'l price** per bu. 2009 *36* *$9.59* 2010 38 $11.30 2011 40 $12.50 2012 42 *$14.40* 2013 *44* $13.00 Data in *italics* are not used in calculation.	**Benchmark Revenue =** 5-year "Olympic" average county yield x 5-year "Olympic" average national price The "Olympic" averages exclude the high and the low years (in *italics* at left).	**Average yield and price calculations** Average yield = (38 + 40 + 42) / 3 = 40 bu./acre Average price = ($11.30 + $12.50 +$13.00) / 3 = $12.27/bu. **Benchmark Revenue =** $40 bu./acre x $12.27/bu. = $491/acre	
	Revenue Guarantee = Benchmark Revenue x 86% guarantee factor	**Revenue Guarantee =** $491/acre x 86% = **$422**/acre	
2014 county yield = 40 bu./ac 2014 nat'l price = $10.00 /bu.	**2014 Actual Revenue =** county yield x national price	**2014 Actual Revenue =** 40 bu./acre x $10.00/bu. = **$400**/acre	
Farm Base (soybeans) = 500 acres	**Payment =** (Revenue Guarantee - Actual Revenue) x Base Acres x 85% acreage factor	**Payment =** (**$422**/acre - **$400**/acre) x 500 acres x 85% = $9,350	**Soybean payment =** $9,350
Total farm payment = PLC for corn + ARC for soybeans			$22,100

Source: CRS, based on statutory provisions of P.L. 113-79, hypothetical data (county yields, farm program yields, and farm bases), and USDA crop prices (2014 "actual" prices are forecast as of October 10, 2014).

Notes: Statutory parameters include the reference price, the payment acreage factor (85%), and the guarantee factor for "shallow losses" (86%). Payments do not depend which crop is actually planted and are scheduled to be made in October 2015 after final 2014-crop price and yield data become available. In ARC, reference prices serve as minimums; maximum payment is 10% of the benchmark revenue. In both PLC and ARC, the loan rate is used if higher than actual price. Higher prices or yields might not trigger a farm payment for 2014 crops.

Table A-2. Hypothetical Wheat/Lentil Farm in 2014

(farmer selects *Agriculture Risk Coverage-Individual* for entire farm—wheat and lentils)

Step 1. Data	Step 2. Payment Formula	Step 3. Calculation	Step 4. Payment
Agriculture Risk Coverage – Individual (ARC): *payment occurs when actual whole-farm revenue ($/acre) is below whole-farm guarantee*			
2014 total plantings = 600 acres Wheat = 500 acres Lentils = 100 acres	**2014 Planting Shares:** **Wheat:** (2014 **wheat** plantings / 2014 total plantings) **Lentils:** (2014 **lentil** plantings / 2014 total plantings)	**2014 Planting Shares:** **Wheat:** 500 ac. / (500 ac. + 100 ac.) = 83% **Lentils:** 100 ac. / (500 ac. + 100 ac.) = 17%	
Wheat Farm yield bu./acre x Nat'l price per bu. = Rev. $/ac. 2009 36 x $5.50* = *$198* 2010 38 x $5.70 = $217 2011 40 x $7.24 = $290 2012 42 x $7.77 = *$326* 2013 44 x $6.87 = $302	**Average Revenue Calculations:** The "Olympic" averages exclude the high and the low revenue years (in *italics* at left)	**Average Revenue Calculations:** **Wheat:** ($217/ac. + $290/ac. + $302/ac.) / 3 = $270/ac. **Lentils:** ($334/ac. + $275/ac. + $312/ac.) / 3 = $307/ac.	
Lentils Farm yield cwt./acre x Nat'l price per cwt. = Rev. $/ac. 2009 14 x $26.80 = *$375* 2010 13 x $25.70 = $334 2011 11 x $25.00 = $275 2012 12 x $20.70 = *$248* 2013 15 x $20.80 = $312 Data in *italics* are not used in calculation; *reference price of $5.50 serves as a minimum price for wheat.	**Benchmark Revenue =** 5-year "Olympic" average revenue for **wheat** x wheat 2014 planting share + 5-year "Olympic" average revenue for **lentils** x lentil 2014 planting share	**Benchmark Revenue =** **Wheat:** $270/ac. x 83% = $224/ac. **Lentils:** $307/ac. x 17% = $52/ac. **Total Benchmark revenue =** $224/ac. + $52/ac.= $276/ac.	
	Revenue Guarantee = Benchmark Revenue x 86% guarantee factor	**Revenue Guarantee =** $276 / acre x 86% = **$ 237 / acre**	
2014 Actual Crop Revenue Data Farm prod. x Nat'l price = Revenue Wheat:18,000 bu. x $5.90 = $106,200 Lentils: 1,400 cwt. x $19.00 = $26,600	**2014 Actual Revenue =** Sum of crop revenues divided by total 2014 planted area	**2014 Actual Revenue =** ($106,200 + $26,600) / 600 acres = **$221**/ac.	
Total Farm Base = 600 acres In this case, base acres = total planted acres	**Payment =** (Revenue Guar. - Actual Revenue) x Base Acres x 65% acreage factor	**Payment =** (**$237**/acre - **$221**/acre) x 600 acres x 65% = $6,240	**Farm payment =** $6,240
Total farm payment			$6,240

Source: CRS, based on statutory provisions of P.L. 113-79, hypothetical data (acreage and yields), and USDA crop prices (2014 "actual" prices are forecast as of October 10, 2014).

Notes: Statutory parameters include the reference price, the guarantee ("shallow loss") factor (86%), and the payment acreage factor (65%). Payments are scheduled to be made in October 2015 after final 2014-crop price and yield data become available. Reference prices serve as minimums; maximum payment is 10% of benchmark revenue. Higher actual prices or yields might not trigger farm payment for 2014 crops.

Table A-3. Hypothetical Peanut/Cotton Farm in 2014

(farmer selects *Price Loss Coverage (PLC)* for peanuts, with *Generic Base* attributed to peanuts)

Step 1.	Step 2.	Step 3.	Step 4.
Data	**Payment Formula**	**Calculation**	**Payment**
Price Loss Coverage (PLC) for peanuts: *payment occurs when actual farm price ($400/ton) is below reference price ($535/ton)*			
Reference Price = $535/ton 2014 Actual Price = $400/ton Peanut Base = 200 acres Farm Program Yield = 1.5 tons/acre 2014 Total Plantings = 300 acres of peanuts Note: payments do not depend on same-year plantings.	**Payment =** (Reference Price – Actual Price) x Base Acres x 85% acreage factor x Program Yield	**Peanut Payment =** ($535/ton - $400/ton) x 200 acres x 85% x 1.5 ton/acre = $34,425	**Peanut payment =** $34,425
Generic Base = 100 acres (formerly Upland Cotton Base) Note: payments on Generic Base depend on same-year plantings of covered crops.	For plantings on Generic Base: Payment = same formula as above but Generic Base acres are attributed to a particular covered commodity in proportion to actual plantings for that crop year. In this case, all Generic Base (100 acres) are attributed to peanuts because no other covered commodity was planted in 2014.	Payment on Generic Base = ($535/ton - $400/ton) x 100 acres x 85% x 1.5 ton/acre = $17,213	**Payment on Generic Base =** $17,213
Total farm payment = PLC for peanuts + PLC for Generic Base (planted/attributed to peanuts)			$51,638

Source: CRS, based on statutory provisions of P.L. 113-79, hypothetical data (acreage and yields), and USDA crop prices (2014 "actual" prices are forecast as of October 10, 2014).

Notes: Statutory parameters include the reference price and the payment acreage factor (85%). For each crop year, generic base acres are attributed to (i.e., temporarily designated as) base acres to a particular covered commodity base in proportion to that covered crop's share of total plantings of all covered commodities in that year. The loan rate is used in the payment calculation if it is higher than the actual price.

Upland cotton is no longer a covered commodity and not eligible for PLC/ARC payments (marketing assistance loans remain available). Instead it is eligible for a new crop insurance policy called Stacked Income Protection or STAX (see CRS Report R43494, *Crop Insurance Provisions in the 2014 Farm Bill (P.L. 113-79)*). Transition payments are made for upland cotton for the 2014 crop year, and for 2015 if STAX is not available.

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853 F.3d 527
United States Court of Appeals,
District of Columbia Circuit.

WATERKEEPER ALLIANCE, et al., Petitioners
v.
ENVIRONMENTAL PROTECTION AGENCY, Respondent
U.S. Poultry and Egg Association, et al., Intervenors

No. 09-1017
|
Consolidated with 09-1104
|
Argued December 12, 2016
|
Decided April 11, 2017

Synopsis

Background: Environmental and agricultural organizations petitioned for review of Environmental Protection Agency's (EPA) rule generally exempting farms from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Emergency Planning and Community Right-to-Know Act (EPCRA) notification requirements for air releases of hazardous substances from animal wastes. Association of poultry producers intervened as respondents.

Holdings: The Court of Appeals, No. 09-1017, Williams, Senior Circuit Judge, held that:

[1] environmental organizations sufficiently alleged injury in fact required for informational standing;

[2] CERCLA and EPCRA were not ambiguous as to whether EPA could create new exemptions to notification requirements for release of hazardous substances; and

[3] EPA could not use de minimis power to create exemption to CERCLA and EPCRA notification requirements.

Petition granted.

Brown, Circuit Judge, filed concurring opinion.

West Headnotes (16)

[1] Administrative Law and Procedure
Implied powers

Agencies have implied de minimis authority to create certain categorical exceptions to a statute when the burdens of regulation yield a gain of trivial or no value.

Cases that cite this headnote

[2] Administrative Law and Procedure
Jurisdiction

Absent a specific statutory provision assigning review to the Court of Appeals, a challenge to agency action must go first to district court.

Cases that cite this headnote

[3] Environmental Law
Notice and reporting requirements; listing

Challenges under Emergency Planning and Community Right-to-Know Act (EPCRA) must ordinarily be brought in district court. 42 U.S.C.A. § 11004.

Cases that cite this headnote

[4] Administrative Law and Procedure
Jurisdiction

Where a single agency action relies on multiple statutory bases, Court of Appeals commonly examines the entire agency action in a comprehensive and coherent fashion so long as at least one of the statutes provides for Court of Appeals' direct review.

Cases that cite this headnote

[5] Administrative Law and Procedure

Persons aggrieved or affected

A plaintiff suffers an injury in fact as required to establish standing when agency action cuts him off from information which must be publicly disclosed pursuant to a statute.

Cases that cite this headnote

[6] Federal Civil Procedure

In general;injury or interest

For standing purposes, a federal court assumes the merits in favor of the plaintiff.

Cases that cite this headnote

[7] Administrative Law and Procedure

Persons aggrieved or affected

To establish injury in fact based on agency action that cuts a plaintiff off from information which must be publicly disclosed pursuant to a statute, as required to have informational standing to challenge the agency action, a plaintiff must assert a view of the law under which the defendant or an entity it regulates is obligated to disclose certain information that the plaintiff has a right to obtain.

Cases that cite this headnote

[8] Environmental Law

Organizations, associations, and other groups

Environmental organization sufficiently alleged injury in fact as required to have informational standing to challenge Environmental Protection Agency (EPA) rule generally exempting farms from notification requirements for air releases of hazardous substances from animal wastes under CERCLA and Emergency Planning and Community Right-to-Know Act (EPCRA), based on agency action cutting organization off from information which must be publicly disclosed, even though CERCLA did not require public disclosure; organization alleged that EPA's unlawful CERCLA exemption reduced information that was required to be publicly disclosed under EPCRA, and that, as result, organization and others who sought that information no longer had statutory right to access it. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 103, 42 U.S.C.A. § 9603; 42 U.S.C.A. § 11004.

Cases that cite this headnote

[9] Administrative Law and Procedure

Deference to agency in general

Court of Appeals reviews an agency's final rule for reasonableness under *Chevron*, under which a reasonable agency interpretation of a statute prevails.

Cases that cite this headnote

[10] Administrative Law and Procedure

Erroneous construction;conflict with statute

If Congress has directly spoken to an issue then any agency interpretation of a statute contradicting what Congress has said is unreasonable.

Cases that cite this headnote

[11] Administrative Law and Procedure

Environment and health

Environmental Law

Notice and reporting requirements; listing

Existence of provisions setting forth exemptions to CERCLA disclosure requirements, and provisions giving the Environmental Protection Agency (EPA) authority to set reportable quantities, did not create ambiguity as to whether EPA

could create new exemptions to CERCLA and Emergency Planning and Community Right-to-Know Act (EPCRA) notification requirements for release of hazardous substances, as would support finding that EPA's rule creating exemption for air releases of hazardous substances from animal waste for farms was reasonable interpretation of CERCLA and EPCRA; statutory exemptions were paired with sweeping reporting mandates requiring notification of any release of a hazardous substance in quantities greater than the reportable quantities authorized under the statutes, and statutes did not contain any language of delegation. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 103, 42 U.S.C.A. § 9603(a); 42 U.S.C.A. § 11044(a).

Cases that cite this headnote

[12] Administrative Law and Procedure
Construction

The canon of expressio unius est exclusio alterius is an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.

Cases that cite this headnote

[13] Administrative Law and Procedure
Statutory basis and limitation

Agencies are bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.

Cases that cite this headnote

[14] Statutes
Relation to plain, literal, or clear meaning;ambiguity

The de minimis doctrine is an expression of courts' reluctance to apply the literal terms of a statute to mandate pointless expenditures of effort, and is thus a cousin of the doctrine permitting courts to avoid absurd results in the face of a statute's seemingly plain meaning.

Cases that cite this headnote

[15] Administrative Law and Procedure
Statutory basis and limitation

An agency cannot use de minimis doctrine to create an exception to a statutory requirement where application of the literal terms of the statute would provide benefits in the sense of furthering the regulatory objectives but the agency concludes that the acknowledged benefits are exceeded by the costs.

Cases that cite this headnote

[16] Environmental Law
Notice and reporting requirements; listing

Environmental Protection Agency (EPA) could not use de minimis power to create exemption to CERCLA and Emergency Planning and Community Right-to-Know Act (EPCRA) notification requirements for release of hazardous substances, which exempted farms from disclosure requirements for air releases of hazardous substances from animal wastes; application of literal terms of the statutes, which required notification of releases of hazardous substances, provided benefits that furthered regulatory objectives. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 103, 42 U.S.C.A. § 9603(a); 42 U.S.C.A. § 11044(a).

Cases that cite this headnote

***529** On Petitions for Review of Final Regulation Issued by the U.S. Environmental Protection Agency

Attorneys and Law Firms

Jonathan J. Smith, Marietta, GA, argued the cause for petitioners Waterkeeper Alliance, et al. With him on the briefs was Eve C. Gartner, New York, NY.

David Y. Chung argued the cause for petitioner National Pork Producers Council. With him on the briefs were Richard E. Schwartz, Washington, DC, and Sherrie A. Armstrong. Ellen Steen entered an appearance.

Daniel H. Lutz, Orrville, OH, and Hope M. Babcock were on the brief for amici curiae American Lung Association and American Thoracic Society in support of petitioners Waterkeeper Alliance, et al.

Jonathan Skinner-Thompson and Erica M. Zilioli, Attorneys, U.S. Department of Justice, argued the causes for respondent. With them on the brief was John C. Cruden, Assistant Attorney General. Sue S. Chen and Cynthia J. Morris, Attorneys, U.S. Department of Justice, entered appearances.

Eve C. Gartner and Jonathan J. Smith were on the brief for intervenors-respondents Waterkeeper Alliance, et al.

Richard E. Schwartz and David Y. Chung, Washington, DC, were on the brief for intervenor-respondent U.S. Poultry and Egg Association. Sherrie A. Armstrong and James T. Banks, Washington, DC, entered appearances.

Before: Brown and Srinivasan, Circuit Judges, and Williams, Senior Circuit Judge.

Opinion

Concurring opinion filed by Circuit Judge Brown.

Williams, Senior Circuit Judge:

Anyone with a pet knows firsthand that raising animals means dealing with animal waste. But many of us may not realize that as the waste breaks down, it emits serious pollutants—most notably ammonia and hydrogen ***530** sulfide. While those emissions are miniscule for pet owners, they can be quite substantial for farms that have hundreds or thousands of animals.

Two provisions of federal law—sections of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA")—require parties to notify authorities when large quantities of hazardous materials (such as ammonia or hydrogen sulfide) are released into the environment. See 42 U.S.C. § 9603 (CERCLA); *id.* § 11004 (EPCRA). On learning of such a release, the EPA has broad powers to take remedial actions or order further monitoring or investigation of the situation. See *id.* § 9604.

In 2008 the EPA issued a final rule that generally exempts farms from CERCLA and EPCRA reporting requirements for air releases from animal waste. ("Air releases" refer only to emissions made into the air, rather than into water or soil.) The EPA reasoned that those "reports are unnecessary because, in most cases, a federal response is impractical and unlikely." CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,956/1 (Dec. 18, 2008) ("*Final Rule*"). In a change from the proposed rule, the EPA somewhat limited the exemption. Commenters had expressed a "desire to receive information regarding releases from large concentrated animal feeding operations," known as "CAFOs," which generally house thousands or even tens of thousands of animals. In response, the EPA retained the reporting requirement for CAFOs under EPCRA, which, as we'll see in more detail later, has a public-disclosure requirement that's missing from the relevant CERCLA provisions. See *id.* at 76,950/2; see also *id.* at 76,952/1-2, 76,953/3; (CAFO thresholds).

[1] A number of environmental groups objected, claiming that the *Final Rule* ran afoul of the underlying statutes (and was therefore outside the EPA's delegated authority). The dispute brings into play our longtime recognition that agencies have "implied *de minimis* authority to create even certain categorical exceptions to a statute 'when the burdens of regulation yield a gain of trivial or no value.' " *Public Citizen v. FTC*, 869 F.2d 1541, 1556 (D.C. Cir. 1989) (quoting *Alabama Power v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979)). Although the EPA never

explicitly invokes the *de minimis* exception, its analysis tracks the exception's logic. And intervenor U.S. Poultry and Egg Association specifically pointed to the agency's *de minimis* power as a reason to uphold the *Final Rule*. It thus poses the question whether the record adequately supports the EPA's conclusion that these animal-waste reports are truly "unnecessary." 73 Fed. Reg. at 76,956/1. By contrast, the environmental petitioners' argument, when framed in the language of *Alabama Power*, is essentially that the reports "provide benefits, in the sense of furthering the regulatory objectives." 636 F.2d at 361. In light of the record, we find that those reports aren't nearly as useless as the EPA makes them out to be. (We do not address the potential questions of whether the reports' costs outweigh their benefits and whether the exact statutory language (discussed below) authorizes an exception for measures failing a cost/benefit analysis; the EPA makes no claim for such a reading of the statute.) We therefore grant Waterkeeper's petition and vacate the *Final Rule*.

* * *

Congress has long sought to ensure that federal, state, and local authorities can adequately respond when hazardous chemicals ***531** threaten public safety or the environment. CERCLA gives federal authorities (generally the EPA) broad power to investigate and respond to actual or threatened releases of hazardous substances. See 42 U.S.C. § 9604. And since the EPA can't respond to releases it doesn't know about, § 103 of CERCLA requires parties to immediately notify the National Response Center ("NRC") of any release of a hazardous substance over a threshold set by the EPA—known in regulatory speak as the "reportable quantity." See *id.* § 9603; *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1306 (D.C. Cir. 1991). The NRC, which is staffed by the U.S. Coast Guard and "acts as the single [federal] point of contact for all pollution incident reporting," 40 C.F.R. § 300.125(a), must "convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State," 42 U.S.C. § 9603(a). After receiving a report from the NRC, the EPA determines if a response is appropriate. See 40 C.F.R. § 300.130(c).

EPCRA has a parallel reporting mandate, except that it requires the relevant parties to notify state and local (rather than federal) authorities whenever covered pollutants (which it refers to as "extremely hazardous substances") are released into the environment. See 42 U.S.C. § 11004; see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

The parties here focus on two of the hazardous substances emitted by animal waste as it decomposes—ammonia and hydrogen sulfide. (There are other such substances (e.g., nitrous oxide, methane, volatile organic compounds), see 73 Fed. Reg. at 76,950/2-3; see also NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: CURRENT KNOWLEDGE, FUTURE NEEDS 50-56 (2003) ("National Research Council Report"), but we need not address them.) The EPA has classified ammonia and hydrogen sulfide as both CERCLA "hazardous substances" and EPCRA "extremely hazardous substances"; the EPA set the reportable quantity for each at 100 pounds per day. See 40 C.F.R. § 302.4(a) (CERCLA); *id.* pt. 355 App. A (EPCRA). None of the parties contends that the daily emissions of commercial farms fall below that threshold.

There appears to have been no clear resolution of the best way to measure these releases, which after all do not come conveniently out of a smokestack. See National Research Council Report at 2, 99-101; *Draft Air Emissions Estimating Methodologies for Animal Feeding Operations*, EPA, https://www.epa.gov/afos-air/draft-air-emissions-estimating-methodologies-animal-feeding-operations (last visited Mar. 24, 2017). The statute accommodates the problem a bit by providing for annual notice of so-called "continuous release[s]," 42 U.S.C. § 9603(f)(2), i.e., releases that are "continuous and stable in quantity and rate," 40 C.F.R. § 302.8(a), subject to a requirement of special notification for a "statistically significant increase in the quantity ... above that previously reported," 42 U.S.C. § 9603(f)(2), which the EPA has defined as an increase "above the upper bound of the reported normal range," 40 C.F.R. § 302.8(b).

In December 2007, the EPA proposed exempting farms from CERCLA and EPCRA reporting of air releases from animal waste. See CERCLA/EPRCRA Administrative

Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste, 72 Fed. Reg. 73,700 (proposed Dec. 28, 2007) ("*Proposed Rule* "). The EPA noted that it had never taken response action based on notifications of air releases from animal waste. *Id.* at 73,704/2. ***532** Nor could the Agency "foresee a situation where [it] would take any future response action as a result of such notification[s] ... because in all instances the source (animal waste) and nature (to the air over a broad area) are such that on-going releases makes an emergency response unnecessary, impractical and unlikely." *Id.* The EPA specifically requested comments "on whether there might be a situation where a response would be triggered by such a notification of the release of hazardous substances to the air from animal waste at farms, and if so, what an appropriate response would be." *Id.* at 73,704/3-73,705/1.

The EPA finalized that proposed exemption on December 18, 2008. 73 Fed. Reg. at 76,948. So far as CERCLA authority is concerned, the *Final Rule* (like the *Proposed Rule*) exempts all farms from reporting air releases from animal waste. None of the public comments changed the EPA's view that those reports "are unnecessary because, in most cases, a federal response is impractical and unlikely (*i.e.*, [the EPA] would not respond to them since there is no reasonable approach for the response)." *Id.* at 76,956/1. But public comments seeking information about emissions from the largest farms (so-called CAFOs), led the EPA to carve CAFOs out of its EPCRA exemption. *Id.* at 76,952/3-76,953/1. (A CAFO is a farm that "stables or confines" more than a certain (relatively large) number of animals—for example, more than 1,000 cattle, 10,000 sheep, or 55,000 turkeys. *Id.* at 76,959-60.) The *Final Rule* thus requires CAFOs to continue reporting air emissions under EPCRA, but not under CERCLA; other farms are exempt from both.

Environmental and agricultural groups challenged the *Final Rule*. The environmentalists—the Waterkeeper Alliance, the Sierra Club, the Humane Society of the United States, the Environmental Integrity Project, and the Center for Food Safety (for ease of reference we'll call them "Waterkeeper")—principally argue that CERCLA and EPCRA don't permit the EPA to grant reporting exemptions, but instead require reports of any and all releases over the reportable quantity. The *Final Rule* is, in Waterkeeper's view, arbitrary to boot because it treats air releases from animal waste at farms more favorably than those from other sources (like a leaky ammonia tank) or other locations (like animal waste at zoos, circuses or slaughterhouses). The National Pork Producers Council, on the other hand, argues that the *Final Rule*'s CAFO carve-out can't stand because it was based on a factor, the public's desire for information, which the Council argues is irrelevant to the statutory purpose of facilitating emergency response. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

* * *

[2] We start with a jurisdictional issue posed by the two statutes' unusual relationship. Absent a specific statutory provision assigning review to the court of appeals, a challenge to agency action must go first to district court. See *Int'l Brotherhood of Teamsters v. Peña*, 17 F.3d 1478, 1481 (D.C. Cir. 1994). But in CERCLA Congress gave this court direct (and exclusive) jurisdiction over CERCLA rules. See 42 U.S.C. § 9613(a). Thus the congressional allocation of jurisdiction is no bar to our hearing the CERCLA-based challenges to the *Final Rule*.

[3] **[4]** The *Final Rule*, however, wasn't limited to CERCLA; it relied on EPCRA too. EPCRA has no judicial review provision and therefore challenges under it must ordinarily be brought in district court. See ***533** *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 47 (D.C. Cir. 2000). But where, as here, a single agency action relies on multiple statutory bases, it would be a wasteful exaltation of form over substance to require piecemeal challenges in various courts. We thus commonly examine the entire agency action in a "comprehensive and coherent fashion" so long as at least one of the statutes provides for our direct review. *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1195 (D.C. Cir. 1995); contra *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 723 (D.C. Cir. 2016) (finding we lacked jurisdiction where the statute providing essential authority, as acknowledged by the parties, did not provide for direct appellate review). Since CERCLA does precisely that, jurisdiction doesn't seem a problem.

Hold your horses, responds the EPA. It argues that while of course we *could* hear a consolidated CERCLA/EPCRA challenge, Waterkeeper lacks standing to challenge the

CERCLA portions of the *Final Rule* because while both statutes require reporting, CERCLA (unlike EPCRA) has no requirement of *disclosure*. Thus, in the EPA's view, the CERCLA portion of the rule inflicts no informational injury on Waterkeeper. We disagree.

[5] **[6]** **[7]** A plaintiff suffers an "injury in fact" when agency action cuts him off from "information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998). Given the longstanding rule that for standing purposes we assume the merits in favor of the plaintiff, *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), the upshot of *Akins* is that the plaintiff must assert "a view of the law under which the defendant (or an entity it regulates) is obligated to disclose certain information that the plaintiff has a right to obtain," *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 659 F.3d 13, 22-23 (D.C. Cir. 2011). On this line of analysis, the question is whether a reporting mandate under CERCLA triggers a requirement of public disclosure. If so, exempting a release from the mandate extinguishes the corresponding disclosure.

[8] Because CERCLA itself doesn't require disclosure, the EPA argues there can't be an injury. But due to the complex interplay between CERCLA and EPCRA, the EPA's allegedly unlawful CERCLA exemption reduces the information that must be publicly disclosed under EPCRA. As a result Waterkeeper (and others) who previously sought that information no longer have a statutory right to access it. For the purpose of standing, that's injury enough.

In drafting the EPCRA reporting requirements, Congress expressly tied them to CERCLA's. Repeatedly referring back to CERCLA, Congress set two of the three notification provisions in its new state-targeted measure (EPCRA) to require reports whenever the "release [also] requires a notification under section 103(a) of CERCLA," 42 U.S.C. §§ 11004(a)(1), (a)(3). In other words, a release that triggers the CERCLA duty also automatically trips the EPCRA reporting requirements in subsections (1) and (3) of § 11004(a). And under subsection (2), the remaining notice provision, even a release that "is not subject to the notification requirements under section 103(a) of CERCLA" requires EPCRA reporting when it "occurs in a manner which would require notification under section 103(a) of CERCLA." *Id.* § 11004(a)(2). Thus all of EPCRA's reporting mandates are piggybacked on the CERCLA mandates in one form or another. And once EPCRA reporting is required, EPCRA goes on to mandate that the information from those reports be disclosed to the general public. See 42 U.S.C. § 11044(a); see also ***534** *Ctr. for Biological Diversity, Inc. v. BP Am. Production Co.*, 704 F.3d 413, 429 (5th Cir. 2013). (Of course § 11044(a) only requires disclosure of EPCRA "followup emergency notice[s]," but that's a meaningless technicality since § 11004(c) requires those "followup emergency notice[s]" to "set[ ] forth" the information from the initial notices that preceded them.) Though slightly roundabout, a CERCLA reporting mandate does, in fact, trigger a public disclosure requirement.

The *Final Rule*, by cutting back on CERCLA reporting requirements, had the automatic effect of cutting back on EPCRA reporting and disclosure requirements. It thus deprives Waterkeeper of information, the public disclosure of which would otherwise be required by EPCRA. Because we find informational standing exists on this basis, we need not reach Waterkeeper's remaining theories of injury and instead proceed to the merits.

* * *

[9] **[10]** We review the *Final Rule* for reasonableness under the familiar standard of *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), "which ... means (within its domain) that a 'reasonable agency interpretation prevails.' " *Northern Natural Gas Co. v. FERC*, 700 F.3d 11, 14 (D.C. Cir. 2012) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n. 4, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009)). Of course, "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." *Entergy*, 556 U.S. at 218 n.4, 129 S.Ct. 1498.

[11] Rather than identifying particular text that's ambiguous, the EPA points to provisions setting forth *unrelated* exemptions and ones giving the EPA authority to set reportable quantities. It says that these "collectively create ambiguity" as to whether the EPA can create *new* exemptions like those in the *Final Rule*. Resp't

Br. at 34. That conclusion doesn't follow from the premise. Consider the statutory exemptions that the EPA relies upon. No report is required for releases of engine exhaust, certain nuclear material, the normal application of fertilizer, or those that expose persons *solely* within a workplace (i.e., those that don't escape into the broader environment). 42 U.S.C. § 9601(22). CERCLA similarly exempts from reporting the application of federally-registered pesticides, releases authorized under a federal environmental statute or ones that are already reported to the NRC under the Solid Waste Disposal Act. *Id.* §§ 9603(a), (e), (f)(1). And as we saw earlier it adjusts the reporting requirements for so-called "continuous release [s]," *id.* § 9603(f)(2), i.e., those releases that are "continuous and stable in quantity and rate," 40 C.F.R. § 302.8(a).

[12] To be sure, the fact that Congress thought to write certain exceptions into the statutes doesn't necessarily mean it meant to bar all others. The canon of *expressio unius est exclusio alterius* is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). Had Congress done nothing more than place certain exemptions in these statutes we might have reasonably concluded that the EPA had discretion to fashion other exemptions consistent with the statutory purposes. Indeed we did precisely that in *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, where we held that statutory provisions barring an agency from supporting certain types of litigation (school desegregation and abortion) didn't preclude the agency from creating an additional bar precluding ***535** redistricting litigation. 940 F.2d 685, 694 (D.C. Cir. 1991). But here Congress paired those specific exemptions with a sweeping reporting mandate. It made clear that the statutes require notification of "*any* release ... of a hazardous substance ... in quantities equal to or greater than" the reportable quantities authorized under § 9602. 42 U.S.C. § 9603(a) (emphasis added) (CERCLA); see also *id.* §§ 11004(a)(1), (a)(3) (EPCRA report required when release requires notice under CERCLA). Read together those statutory provisions set forth a straightforward reporting requirement for any non-exempt release (over the reportable quantity). See *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006). Conspicuously missing is any language of delegation, such as that reports be "as appropriate," "effective," "economical," or made "under circumstances to be determined by the EPA."

That brings us to the next set of provisions—permitting the EPA to set reportable quantities and adopt necessary regulations. Admittedly Congress gave the EPA broad authority to designate *additional* hazardous substances and establish reportable quantities. See 42 U.S.C. § 9602(a) (CERCLA); see also *id.* § 11002(a) (similar authority under EPCRA). And both statutes provide the EPA with general rulemaking authority "to promulgate any regulations necessary to carry out the[ir] provisions." *Id.* § 9615 (CERCLA); see also *id.* § 11048 (EPCRA). But those general grants of rulemaking authority don't tell us much about whether the specific rule in question passes muster.

[13] While none of those provisions even hints at the type of reporting exemption the EPA adopted in the *Final Rule*, the EPA extracts from them a notion that Congress meant to "avoid[ ] duplication of effort ... and minimiz[e] the burden on both regulated entities and government response agencies." Resp't Br. at 33. Perhaps. But as we've long made clear, "[a]gencies are ... 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.' " *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139-40 (D.C. Cir. 2006) (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)). We have no doubt that a desire for efficiency motivated some of the exceptions Congress provided, but those concerns don't give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble. See *Util. Air Regulatory Grp. v. EPA*, —— U.S. ——, 134 S.Ct. 2427, 2446, 189 L.Ed.2d 372 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

[14] **[15]** Agencies are not, however, "helpless slaves to literalism." *Public Citizen v. Young*, 831 F.2d 1108, 1112 (D.C. Cir. 1987). The *de minimis* doctrine is an expression of courts' reluctance "to apply the literal terms of a statute to mandate pointless expenditures of effort," and is thus a "cousin" of the doctrine permitting courts to avoid absurd

results in the face of a statute's seemingly plain meaning. *Alabama Power*, 636 F.2d at 360 & n.89. But that *de minimis* power is strictly limited; an agency can't use it to create an exception where application of the literal terms would "provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs." *Id.* at 360-61.

[16] The EPA purported to find an absence of regulatory benefit. It asserted that the animal-waste "reports are unnecessary because, *in most cases*, a federal ***536** response is impractical and unlikely." 73 Fed. Reg. at 76.956/1 (emphasis added). The qualification suggests that at least some circumstances would call for a response. Other portions of the *Final Rule*, however, seem to reject that notion and instead state simply that the EPA could "not foresee a situation where the Agency would initiate a response action as a result of such notification." *Id.* at 76,953/2.

But commenters in the rulemaking claimed to foresee just such situations. They put before the EPA a good deal of information, not refuted by the EPA, suggesting scenarios where the reports could be quite helpful in fulfilling the statutes' goals. Specifically, commenters explained that "when [manure] pits are agitated for pumping," hydrogen sulfide, methane, and ammonia "are rapidly released from the manure and may reach toxic levels or displace oxygen, increasing the risk to humans and livestock." 73 Fed. Reg. at 76,957/2; see also *Manure Gas Dangers*, FARM SAFETY ASS'N, http://nasdonline.org/static_content/documents/48/d001616.pdf (last visited Mar. 24, 2017). That risk isn't just theoretical; people have become seriously ill and even died as a result of pit agitation. See K.J. Donham, *Community & Occupational Health Concerns in Pork Production: A Review*, 88 J. ANIM. SCI. 102, 107 (2010), available at https://www.animalsciencepublications.org/publications/jas/pdfs/88/13/E102 (cited by Amici Br. at 12 & n.55). (One might reasonably then ask why bother agitating at all. The answer—at least according to the EPA—is that it's necessary to maintain storage in liquid manure storage systems. See *NPDES Permit Writers' Manual for Concentrated Animal Feeding Operations* 5-15, EPA (Feb. 2012), https://www.epa.gov/sites/production/files/201510/documents/cafo_permitmanual_entire.pdf.) The EPA didn't dispute that "various pit pumping techniques may cause emissions to exceed reportable quantities" (truly an understatement), but dismissed the comments by simply noting "it is unclear what response the commenter had in mind." Joint App'x at 626. The *Final Rule* added that "based on the EPA's experience, the Agency would *rarely* respond to such scenarios." 73 Fed. Reg. at 76,957/3 (emphasis added). Although we (like the EPA) don't know what particular response the commenter had in mind, the EPA suggested at oral argument that one option might be requiring "some sort of change in the farm's ... waste management system [to] eliminate the risk." Oral Arg. Tr. at 32:13-14. That hardly sounds "impractical." And as we'll see in a minute, such responses appear to be within the EPA's remedial powers.

Commenters also pointed to the role of information in enabling responses by local officials. The National Association of Clean Air Agencies ("Clean Air Agencies") (which represents hundreds of air pollution control agencies) submitted Congressional testimony from an Iowa regulator saying that the *Final Rule* "prevent[s] local, state and federal emergency responders from having critical information about potentially dangerous releases" and limits the ability of federal or state authorities to take action through "investigations or clean-up[s]" or "issuing abatement orders." *Human Health, Water Quality, and Other Impacts of the Confined Animal Feeding Operation Industry: Hearing Before the S. Env't & Pub. Works Comm.*, 110th Cong. 1 (2007) (statement of Catharine Fitzsimmons, Chief of the Air Quality Bureau of the Iowa Dep't of Natural Resources). Likewise, the National Association of SARA Title III Program Officials ("SARA Title III Officials") (which is made up of members of local and state emergency planning commissions) discussed how emergency commissions could use those ***537** reports when responding to citizen complaints or genuine emergencies. It explained:

> The 911 call that comes in from a member of the public in the dark of night reporting a foul or chemical odor rarely contains information on the source. The responders are forced to guess at that source as they ga[u]ge

> their response. "Immediate" release reporting by facilities under EPCRA provides crucial information to those responders. Without such information responders are forced to blindly drive through an area not knowing what they are looking for —is it a vehicle accident, a facility release or something worse will be the question in their minds.

Comment Letter from Timothy R. Gablehouse, Pres., Nat'l Ass'n of SARA Title III Program Officials, to Superfund Docket, U.S. EPA at 2 (Mar. 27, 2008). Then-Oklahoma Attorney General Drew Edmondson also invoked the benefits of alerting local agencies. Comment Letter from W.A. Drew Edmondson, Okla. Att'y Gen., to Superfund Docket, U.S. EPA at 3 (Mar. 27, 2008).

Whatever the EPA's past experience in responding to mandated information may have been, it plainly has broad authority to respond. CERCLA authorizes both removal and remedial actions. See 42 U.S.C. § 9604(a)(1); see also *Montrose Chem. Corp. of California v. EPA*, 132 F.3d 90, 92 n.3 (D.C. Cir. 1998). "Removal" includes both cleanup of hazardous substances from the environment and broad authority to institute monitoring, investigative and preventative activities designed to evaluate and minimize the impact of possible releases. See 42 U.S.C. §§ 9601(23), 9604(b)(1) (authorizing "investigations, monitoring, surveys, testing, and other information gathering"). "Remedial actions" are ones designed to permanently prevent or minimize the risk of a release. See *id.* § 9601(24). They can range from enormously invasive measures (like permanently relocating residents) to relatively minor ones (like digging protective trenches or requiring covers). See *id.*

Thus the comments undermine the EPA's primary justification for the *Final Rule*—namely, that notifications of animal-waste-related releases serve no regulatory purpose because it would be "impractical or unlikely" to respond to such a release. 73 Fed. Reg. at 76,950/1. It's not at all clear why it would be impractical for the EPA to investigate or issue abatement orders (as suggested by the Clean Air Agencies) in cases where pumping techniques or other actions lead to toxic levels of hazardous substances such as hydrogen sulfide. And the SARA Title III Officials provide at least one way that local or state authorities might use the CERCLA release reports —to narrow an investigation when they get a phone call reporting a suspicious smell or similarly vague news of possibly hazardous leaks.

The record therefore suggests the potentiality of some real benefits. Of course it's possible that these are outweighed by the costs, which the EPA estimates as substantial. See 73 Fed. Reg. at 76,958/1 (estimating that, over ten years, the *Final Rule* would save farms more than a million hours and more than $60 million in compliance costs and cut out roughly 160,000 hours and $8 million in government costs related to those reports). But as we have noted, such facts (assuming their correctness) are not enough to support application of the *de minimis* exception.

* * *

Because the EPA's action here can't be justified either as a reasonable interpretation of any statutory ambiguity or implementation of a *de minimis* exception, we grant Waterkeeper's petition and vacate ***538** the *Final Rule*. That necessarily moots Pork Producers' challenge to the CAFO carve-out; we therefore dismiss their petition.

So ordered.

Brown, Circuit Judge, concurring:
I join in the Panel Opinion because "the *Final Rule* ran afoul of the underlying statutes (and was therefore outside the EPA's delegated authority)." Op. 530. To reach this result, the court dances around the familiar *Chevron* two-step with the following formulation: "Of course, 'if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.' " Op. 534 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009)). I assume this reasoning casts no aspersions on the first step of *Chevron*. *But see United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 132 S.Ct. 1836, 1846 n.1, 182 L.Ed.2d 746 (2012) (Scalia, J., concurring in part and concurring in the judgment).

Entergy Corp. merely establishes an agency's *un*reasonable statutory interpretation is outside the scope of any statutory ambiguity. The decision does *not* comment on the situation in which a court might find an agency's interpretation reasonable *without* satisfying *Chevron* Step One, *i.e.*, without a *judicial* determination that the "traditional tools" of interpretation identify a statutory ambiguity that, in turn, authorizes agency action on the "precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 n.9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

This case extends no further than what *Entergy Corp.* established. As the Panel acknowledges, EPA set forth *no* statutory ambiguity authorizing its *Final Rule*. Op. 534. Under Step One, this ends the matter. *See, e.g.*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) (holding "an agency literally has no power to act ... unless and until Congress confers power upon it"). Step One would decompose if EPA's premise here were accepted: An agency can take "unrelated" statutory provisions that, in its view, "collectively create ambiguity," and command deference because a court finds the agency's interpretation "reasonable" at Step Two. *See* Op. 534.

Chevron's "reasonableness" inquiry could (and should) be governed by statutory text, but Step Two jurisprudence reveals statutory text need not play much of a role at all—let alone a dispositive one. *See, e.g.*, Stephen G. Breyer, et al., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 359 (7th ed. 2011) ("The weight of scholarly opinion endorses an equation of step two with arbitrary and capricious review." Such review is "not an inquiry into congressional instructions, but an assessment of whether the agency's decision is reasonable on the merits and not, in the [Supreme] Court's words, arbitrary or capricious in substance."). This is why Step One is so critical. For all its potential for manipulation, it is *Chevron* Step One where "[t]he court's task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria.... [T]he judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean." Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27–28 (1983); *see also* Gerald L. Neuman, *Law Review Articles that Backfire*, 21 U. MICH. J.L. REFORM 697, 711–12 (1988) ("Monaghan's thesis reappeared, without citation, as the core of Justice Stevens's new approach ***539** to statutory interpretation in [*Chevron*].").

Truncating the *Chevron* two-step into a one-step "reasonableness" inquiry lets the judiciary leave its statutory escort to blow on an agency's dice. "It isn't fair. It isn't nice." FRANK SINATRA, *Luck Be A Lady*, *on* SINATRA '65: THE SINGER TODAY (Reprise Records 1965). In fact, some advocates of a one-step reasonableness approach appeal to the judiciary's fear of commitment—promising that courts can avoid "ascertain[ing] whether the statute has a single, clear meaning before deciding whether the agency's interpretation is reasonable." *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 605 (2009). Congress is out of the picture altogether. When all that matters is aligning judicial and administrative views of reasonableness, and reasonableness at Step Two need not be primarily or solely determined by the "traditional tools" of statutory interpretation, there is no incentive to petition the legislature for statutory clarity. Agencies are free to experiment with various interpretations, and courts are free to avoid determining the meaning of statutes. *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 618–19 (2009).

An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name. If a court could purport fealty to *Chevron* while subjugating statutory clarity to agency "reasonableness," textualism will be trivialized. "For whatever the *agency* may be doing under *Chevron*, the problem remains that *courts* are not fulfilling their duty to interpret the law." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152–53 (10th Cir. 2016) (Gorsuch, J., concurring).

I join in the Panel Opinion because it does not extend to the situation in which an agency's statutory interpretation is found to be "reasonable" without a court first determining the statutory bounds of agency authority. But if *Chevron*'s two-step inquiry can be collapsed into one "reasonableness" inquiry no different than current Step

Two jurisprudence, there is yet another reason to question *Chevron*'s consistency with "the judicial department['s]" "emphatic[ ]" "province and duty ... to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

All Citations

853 F.3d 527

United States Senate
WASHINGTON, DC 20510

May 25, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Pruitt:

In light of the recent D.C. Circuit decision in *Waterkeeper v. EPA*, the EPA should take immediate action to prevent the waste of federal, state, and local resources designated for emergency response programs. Therefore, we urge you to challenge the D.C. Circuit decision and to provide America's farmers and ranchers with regulatory relief through agency directive and rulemaking.

As you know, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 in response to serious environmental and health risks posed by industrial pollution. CERCLA has two primary objectives: to give the federal government the tools necessary for prompt response to problems resulting from hazardous waste disposal and to hold polluters financially responsible for cleanup. The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) was enacted to ensure proper notice to relevant authorities in cases of accidental spills, chemical plant explosions, and release of hazardous chemicals from sinking ships or train derailments. Congress never imagined the normal odors and emissions (including low-level concentrations of ammonia and hydrogen sulfide) of livestock, poultry, and egg production would somehow be captured.

In 2008, EPA finalized a rule to clarify the exemption of farms from CERCLA and EPCRA reporting requirements. This rule provided that all Animal Feeding Operations (AFOs) and Concentrated Animal Feeding Operations (CAFOs) were exempt from CERCLA, and only large CAFOs were required to report under EPCRA. However, in its April ruling, the Court of Appeals for the D.C. Circuit found that exemption to be inconsistent with statutory requirements, thereby requiring submission of these senseless reports from agricultural operations. We implore you to continue fighting for American agriculture, by challenging the panel decision by the D.C. Circuit.

Left unchecked, when expanded reporting requirements go into effect on June 2, 2017, up to 100,000 farms and ranches across the country will face enormous uncertainty and potential liability if they do not submit an emissions report. These reports have the potential to significantly overburden the National Response Center (NRC), which received a mere 24,193 reports in 2016. And unlike the reports received last year, which averaged about 66 per day, the National Response Center would potentially receive tens of thousands of reports within a matter of a few days. Not only will these unnecessary agricultural reports shut down and congest a necessarily fast-moving response process, but they will actually prevent the NRC and local first

responders from efficiently addressing real emergencies. Required reporting from agricultural operations directly impedes the purpose of the statute.

In addition, we strongly support any action you take to protect both the integrity of the NRC and local emergency planning units, while also protecting the wellbeing of America's farmers and ranchers. This includes clarifying the applicability of the agricultural exemptions contained within both CERCLA and EPCRA, as well as tailoring reportable quantities to an appropriate level for livestock and poultry operations. If the EPA cannot address this problem in the courts or on its own, we encourage you to come to Congress to find a solution.

Sincerely,

JOHN CORNYN
United States Senator

JOHN BARRASSO, M.D.
United States Senator

ROY BLUNT
United States Senator

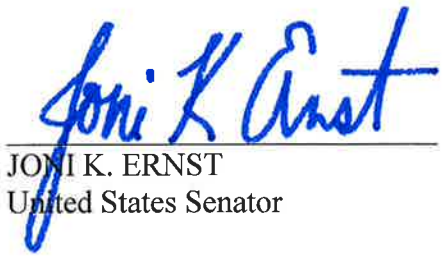
JOHN BOOZMAN
United States Senator

TOM COTTON
United States Senator

MIKE CRAPO
United States Senator

TED CRUZ
United States Senator

MIKE ENZI
United States Senator



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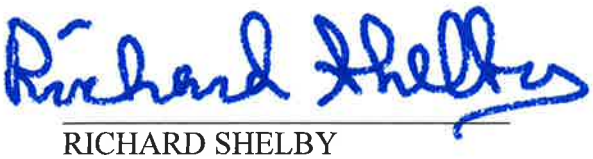

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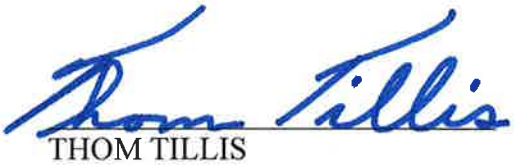

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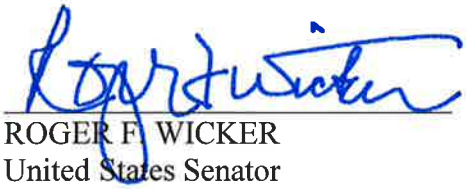
United States Senator



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MIKE LEE
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United States Senator

CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms

Final Rule

Please note:
This regulation *does not* create any new regulatory requirements or reporting deadlines.

The final rule, "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms," is an *exemption* from the existing notification requirements in the 1984 final rule on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) notification requirements. The exemption became effective on January 20, 2009. The final rule *exempts* all farms that release hazardous substances from animal waste to the air that meet or exceed their reportable quantity (RQ) from reporting under CERCLA section 103. The final rule also *exempts* farms that release hazardous substances from animal waste to the air that meet or exceed their RQ from reporting under the Emergency Planning and Community Right to Know Act (EPCRA) section 304 if they stable or confine *fewer* than the following number of animal species:

1. 700 mature dairy cows, whether milked or dry
2. 1,000 veal calves
3. 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs
4. 2,500 swine each weighing 55 pounds or more
5. 10,000 swine each weighing less than 55 pounds
6. 500 horses
7. 10,000 sheep or lambs
8. 55,000 turkeys
9. 30,000 laying hens or broilers, if the farm uses a liquid manure handling system
10. 125,000 chickens (other than laying hens), if the farm uses other than liquid manure handling system
11. 82,000 laying hens, if the farm uses other than a liquid manure handling system
12. 30,000 ducks (if the farm uses other than a liquid manure handling system)
13. 5,000 ducks (if the farm uses a liquid manure handling system)

For purposes of this rule:

Animal Waste means manure (feces, urine, and other excrement produced by livestock), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other typical materials found with animal waste.

Farm means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year.

Note: For the purposes of this rule, EPA considers animals that reside primarily outside of an enclosed structure (i.e., a barn or a feed lot) and graze on pastures, not to be stabled or confined.

Those farms that stable or confine greater than the number of animal species identified above are still required to submit the appropriate reports to State and local officials pursuant to EPCRA section 304 if they release hazardous substances to the air that meet or exceed their RQ. That is, the reporting requirement under EPCRA section 304 in this rule does not create a new regulatory requirement.

Farms that *are required* to report their air releases of hazardous substances from animal waste under EPCRA should follow the requirements at 40 CFR 355.32, "Which emergency release notification requirements apply to continuous releases?" For these notifications you are *not* required to call the National Response Center. Your initial telephone notification should be directed to the community emergency coordinator for the Local Emergency Planning Committee (LEPC) for any area likely to be affected by the release and to the State Emergency Response Commission (SERC) of any State likely to be affected by the release. You will then submit the written notification to those LEPCs and SERCs as appropriate.

Finally, the exemption created by the rule does not impact EPA's authority to respond to citizen complaints or requests for assistance from State or local government agencies to investigate and respond to those releases of hazardous substances from farms. Nor does this rule limit any of the Agency's other authorities under CERCLA (e.g., liability) or EPCRA.

Background

CERCLA section 103 notification requirements call for immediate notification to the National Response Center (NRC) when the person in charge of a facility has knowledge of a release of a hazardous substance equal to or greater than the RQ established by EPA for that substance.

EPCRA section 304 emergency notification requirements call for notification to be given to the community emergency coordinator for each LEPC for any area likely to be affected by the release, and the SERC of any State likely to be affected by the release. Through this notification, State and local officials can assess whether a response action to the release is appropriate. EPCRA section 304 notification requirements apply only to releases that have the potential for off-site exposure and that are from facilities that produce, use, or store a "hazardous chemical," as defined by regulations promulgated under the Occupational Safety and Health Act of 1970 (OSHA) (29 CFR 1910.1200(c)) and by section 311 of EPCRA.

You Are Not Required to Report If:

- You have reported continuous releases in the past and your continuous release report is up to date and on file with the appropriate SERC and LEPC; or
- Your releases are less than the RQ.

Moreover, EPA does not expect farms participating in the Agency's Animal Feeding Operation Air Compliance Agreement (70 *Fed. Reg.* 4958), and that are in compliance with the terms of the Agreement, to report at this time.

For continuous release reporting, to establish the continuity and stability of the release, you may use:

- Prior release data;
- Knowledge of operating procedures; or
- Best professional judgment.

Look for Updates

As the Agency receives additional questions that are generally applicable to a wide audience, we will update this fact sheet on the web with those questions and answers.

EPA is working on developing emission estimating methodologies based in part on the data collected in the National Air Emissions Monitoring Study, which is scheduled for completion at the end of 2009 with the final report to be complete in 2011. For more information on the Air Compliance Agreement and the Air Emissions Monitoring Study, please visit: http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr.html.

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter J. Superfund, Emergency Planning, and Community Right–to–Know Programs
Part 302. Designation, Reportable Quantities, and Notification (Refs & Annos)

40 C.F.R. § 302.8

§ 302.8 Continuous releases.

Currentness

(a) Except as provided in paragraph (c) of this section, no notification is required for any release of a hazardous substance that is, pursuant to the definitions in paragraph (b) of this section, continuous and stable in quantity and rate.

(b) Definitions. The following definitions apply to notification of continuous releases:

Continuous. A continuous release is a release that occurs without interruption or abatement or that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes.

Normal range. The normal range of a release is all releases (in pounds or kilograms) of a hazardous substance reported or occurring over any 24–hour period under normal operating conditions during the preceding year. Only releases that are both continuous and stable in quantity and rate may be included in the normal range.

Routine. A routine release is a release that occurs during normal operating procedures or processes.

Stable in quantity and rate. A release that is stable in quantity and rate is a release that is predictable and regular in amount and rate of emission.

Statistically significant increase. A statistically significant increase in a release is an increase in the quantity of the hazardous substance released above the upper bound of the reported normal range of the release.

(c) Notification. The following notifications shall be given for any release qualifying for reduced reporting under this section:

(1) Initial telephone notification;

(2) Initial written notification within 30 days of the initial telephone notification;

(3) Follow-up notification within 30 days of the first anniversary date of the initial written notification;

(4) Notification of a change in the composition or source(s) of the release or in the other information submitted in the initial written notification of the release under paragraph (c)(2) of this section or the follow-up notification under paragraph (c)(3) of this section; and

(5) Notification at such times as an increase in the quantity of the hazardous substance being released during any 24–hour period represents a statistically significant increase as defined in paragraph (b) of this section.

(d) Initial telephone notification. Prior to making an initial telephone notification of a continuous release, the person in charge of a facility or vessel must establish a sound basis for qualifying the release for reporting under CERCLA section 103(f)(2) by:

(1) Using release data, engineering estimates, knowledge of operating procedures, or best professional judgment to establish the continuity and stability of the release;

(2) Reporting the release to the National Response Center for a period sufficient to establish the continuity and stability of the release; or

(3) When a person in charge of the facility or vessel believes that a basis has been established to qualify the release for reduced reporting under this section, initial notification to the National Response Center shall be made by telephone. The person in charge must identify the notification as an initial continuous release notification report and provide the following information:

(i) The name and location of the facility or vessel; and

(ii) The name(s) and identity(ies) of the hazardous substance(s) being released.

(e) Initial written notification. Initial written notification of a continuous release shall be made to the appropriate EPA Regional Office for the geographical area where the releasing facility or vessel is located. (Note: In addition to the requirements of this part, releases of CERCLA hazardous substances are also subject to the provisions of SARA title III section 304, and EPA's implementing regulations codified at 40 CFR part 355, which require initial telephone and written notifications of continuous releases to be submitted to the appropriate State emergency response commission and local emergency planning committee.)

(1) Initial written notification to the appropriate EPA Regional Office shall occur within 30 days of the initial telephone notification to the National Response Center, and shall include, for each release for which reduced reporting as a continuous release is claimed, the following information:

(i) The name of the facility or vessel; the location, including the latitude and longitude; the case number assigned by the National Response Center or the Environmental Protection Agency; the Dun and Bradstreet number of the

facility, if available; the port of registration of the vessel; the name and telephone number of the person in charge of the facility or vessel.

(ii) The population density within a one-mile radius of the facility or vessel, described in terms of the following ranges: 0–50 persons, 51–100 persons, 101–500 persons, 501–1,000 persons, more than 1,000 persons.

(iii) The identity and location of sensitive populations and ecosystems within a one-mile radius of the facility or vessel (e.g., elementary schools, hospitals, retirement communities, or wetlands).

(iv) For each hazardous substance release claimed to qualify for reporting under CERCLA section 103(f)(2), the following information must be supplied:

(A) The name/identity of the hazardous substance; the Chemical Abstracts Service Registry Number for the substance (if available); and if the substance being released is a mixture, the components of the mixture and their approximate concentrations and quantities, by weight.

(B) The upper and lower bounds of the normal range of the release (in pounds or kilograms) over the previous year.

(C) The source(s) of the release (e.g., valves, pump seals, storage tank vents, stacks). If the release is from a stack, the stack height (in feet or meters).

(D) The frequency of the release and the fraction of the release from each release source and the specific period over which it occurs.

(E) A brief statement describing the basis for stating that the release is continuous and stable in quantity and rate.

(F) An estimate of the total annual amount that was released in the previous year (in pounds or kilograms).

(G) The environmental medium(a) affected by the release:

(1) If surface water, the name of the surface water body;

(2) If a stream, the stream order or average flowrate (in cubic feet/second) and designated use;

(3) If a lake, the surface area (in acres) and average depth (in feet or meters);

(4) If on or under ground, the location of public water supply wells within two miles.

(H) A signed statement that the hazardous substance release(s) described is (are) continuous and stable in quantity and rate under the definitions in paragraph (b) of this section and that all reported information is accurate and current to the best knowledge of the person in charge.

(f) Follow-up notification. Within 30 days of the first anniversary date of the initial written notification, the person in charge of the facility or vessel shall evaluate each hazardous substance release reported to verify and update the information submitted in the initial written notification. The follow-up notification shall include the following information:

(1) The name of the facility or vessel; the location, including the latitude and longitude; the case number assigned by the National Response Center or the Environmental Protection Agency; the Dun and Bradstreet number of the facility, if available; the port of registration of the vessel; the name and telephone number of the person in charge of the facility or vessel.

(2) The population density within a one-mile radius of the facility or vessel, described in terms of the following ranges: 0–50 persons, 51–100 persons, 101–500 persons, 501–1,000 persons, more than 1,000 persons.

(3) The identity and location of sensitive populations and ecosystems within a one-mile radius of the facility or vessel (e.g., elementary schools, hospitals, retirement communities, or wetlands).

(4) For each hazardous substance release claimed to qualify for reporting under CERCLA section 103(f)(2), the following information shall be supplied:

(i) The name/identity of the hazardous substance; the Chemical Abstracts Service Registry Number for the substance (if available); and if the substance being released is a mixture, the components of the mixture and their approximate concentrations and quantities, by weight.

(ii) The upper and lower bounds of the normal range of the release (in pounds or kilograms) over the previous year.

(iii) The source(s) of the release (e.g., valves, pump seals, storage tank vents, stacks). If the release is from a stack, the stack height (in feet or meters).

(iv) The frequency of the release and the fraction of the release from each release source and the specific period over which it occurs.

(v) A brief statement describing the basis for stating that the release is continuous and stable in quantity and rate.

(vi) An estimate of the total annual amount that was released in the previous year (in pounds or kilograms).

(vii) The environmental medium(a) affected by the release:

(A) If surface water, the name of the surface water body;

(B) If a stream, the stream order or average flowrate (in cubic feet/second) and designated use;

(C) If a lake, the surface area (in acres) and average depth (in feet or meters);

(D) If on or under ground, the location of public water supply wells within two miles.

(viii) A signed statement that the hazardous substance release(s) is (are) continuous and stable in quantity and rate under the definitions in paragraph (b) of this section and that all reported information is accurate and current to the best knowledge of the person in charge.

(g) Notification of changes in the release. If there is a change in the release, notification of the change, not otherwise reported, shall be provided in the following manner:

(1) Change in source or composition. If there is any change in the composition or source(s) of the release, the release is a new release and must be qualified for reporting under this section by the submission of initial telephone notification and initial written notification in accordance with paragraphs (c)(1) and (2) of this section as soon as there is a sufficient basis for asserting that the release is continuous and stable in quantity and rate;

(2) Change in the normal range. If there is a change in the release such that the quantity of the release exceeds the upper bound of the reported normal range, the release must be reported as a statistically significant increase in the release. If a change will result in a number of releases that exceed the upper bound of the normal range, the person in charge of a facility or vessel may modify the normal range by:

(i) Reporting at least one statistically significant increase report as required under paragraph (c)(7) of this section and, at the same time, informing the National Response Center of the change in the normal range; and

(ii) Submitting, within 30 days of the telephone notification, written notification to the appropriate EPA Regional Office describing the new normal range, the reason for the change, and the basis for stating that the release in the increased amount is continuous and stable in quantity and rate under the definitions in paragraph (b) of this section.

(3) Changes in other reported information. If there is a change in any information submitted in the initial written notification or the followup notification other than a change in the source, composition, or quantity of the release, the person in charge of the facility or vessel shall provide written notification of the change to the EPA Region for the geographical area where the facility or vessel is located, within 30 days of determining that the information submitted previously is no longer valid. Notification shall include the reason for the change, and the basis for stating that the release is continuous and stable under the changed conditions.

(4) Notification of changes shall include the case number assigned by the National Response Center or the Environmental Protection Agency and also the signed certification statement required at (c)(2)(xi) of this section.

(h) Notification of a statistically significant increase in a release. Notification of a statistically significant increase in a release shall be made to the National Response Center as soon as the person in charge of the facility or vessel has knowledge of the increase. The release must be identified as a statistically significant increase in a continuous release. A determination of whether an increase is a "statistically significant increase" shall be made based upon calculations or estimation procedures that will identify releases that exceed the upper bound of the reported normal range.

(i) Annual evaluation of releases. Each hazardous substance release shall be evaluated annually to determine if changes have occurred in the information submitted in the initial written notification, the followup notification, and/or in a previous change notification.

(j) Use of the SARA Title III section 313 form. In lieu of an initial written report or a followup report, owners or operators of facilities subject to the requirements of SARA title III section 313 may submit to the appropriate EPA Regional Office for the geographical area where the facility is located, a copy of the Toxic Release Inventory form submitted under SARA Title III section 313 the previous July 1, provided that the following information is added:

(1) The population density within a one-mile radius of the facility or vessel, described in terms of the following ranges: 0–50 persons, 51–100 persons, 101–500 persons, 501–1,000 persons, more than 1,000 persons.

(2) The identity and location of sensitive populations and ecosystems within a one-mile radius of the facility or vessel (e.g., elementary schools, hospitals, retirement communities, or wetlands).

(3) For each hazardous substance release claimed to qualify for reporting under CERCLA section 103(f)(2), the following information must be supplied:

(i) The upper and lower bounds of the normal range of the release (in pounds or kilograms) over the previous year.

(ii) The frequency of the release and the fraction of the release from each release source and the specific period over which it occurs.

(iii) A brief statement describing the basis for stating that the release is continuous and stable in quantity and rate.

(iv) A signed statement that the hazardous substance release(s) is(are) continuous and stable in quantity and rate under the definitions in paragraph (b) of this section and that all reported information is accurate and current to the best knowledge of the person in charge.

(k) Documentation supporting notification. Where necessary to satisfy the requirements of this section, the person in charge may rely on recent release data, engineering estimates, the operating history of the facility or vessel, or other relevant information to support notification. All supporting documents, materials, and other information shall be kept on file at the facility, or in the case of a vessel, at an office within the United States in either a port of call, a place of regular berthing, or the headquarters of the business operating the vessel. Supporting materials shall be kept on file for a period of one year and shall substantiate the reported normal range of releases, the basis for stating that the release is continuous and stable in quantity and rate, and the other information in the initial written report, the followup report, and the annual evaluations required under paragraphs (e), (f), and (i), respectively. Such information shall be made available to EPA upon request as necessary to enforce the requirements of this section.

(l) Multiple concurrent releases. Multiple concurrent releases of the same substance occurring at various locations with respect to contiguous plants or installations upon contiguous grounds that are under common ownership or control may be considered separately or added together in determining whether such releases constitute a continuous release or a statistically significant increase under the definitions in paragraph (b) of this section; whichever approach is elected for purposes of determining whether a release is continuous also must be used to determine a statistically significant increase in the release.

(m) Penalties for failure to comply. The reduced reporting requirements provided for under this section shall apply only so long as the person in charge complies fully with all requirements of paragraph (c) of this section. Failure to comply with respect to any release from the facility or vessel shall subject the person in charge to all of the reporting requirements of § 302.6 for each such release, to the penalties under § 302.7, and to any other applicable penalties provided for by law.

Credits
[55 FR 30185, July 24, 1990; 67 FR 45357, July 9, 2002]

SOURCE: 50 FR 13474, April 4, 1985; 54 FR 33425, 33448, Aug. 14, 1989; 54 FR 53062, Dec. 27, 1989; 55 FR 30185, July 24, 1990; 80 FR 37123, June 29, 2015, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

Current through May 11, 2017; 82 FR 21951.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 103. Comprehensive Environmental Response, Compensation, and Liability (Refs & Annos)
Subchapter I. Hazardous Substances Releases, Liability, Compensation (Refs & Annos)

42 U.S.C.A. § 9603

§ 9603. Notification requirements respecting released substances

Currentness

(a) Notice to National Response Center upon release from vessel or offshore or onshore facility by person in charge; conveyance of notice by Center

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

(b) Penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Any person--

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release,

in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(c) Notice to Administrator of EPA of existence of storage, etc., facility by owner or operator; exception; time, manner, and form of notice; penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances (as defined in section 9601(14)(C) of this title) are or have been stored, treated, or disposed of shall, unless such facility has a permit issued under, or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility. The Administrator may prescribe in greater detail the manner and form of the notice and the information included. The Administrator shall notify the affected State agency, or any department designated by the Governor to receive such notice, of the existence of such facility. Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 9607 of this title: *Provided, however*, That notification under this subsection is not required for any facility which would be reportable hereunder solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(d) Recordkeeping requirements; promulgation of rules and regulations by Administrator of EPA; penalties for violations; waiver of retention requirements

(1) The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to--

(A) the location, title, or condition of a facility, and

(B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility;

the records which shall be retained by any person required to provide the notification of a facility set out in subsection (c) of this section. Such specification shall be in accordance with the provisions of this subsection.

(2) Beginning with December 11, 1980, for fifty years thereafter or for fifty years after the date of establishment of a record (whichever is later), or at any such earlier time as a waiver if obtained under paragraph (3) of this subsection, it shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph (1) of this subsection. Any person who violates

this paragraph shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

(3) At any time prior to the date which occurs fifty years after December 11, 1980, any person identified under paragraph (1) of this subsection may apply to the Administrator of the Environmental Protection Agency for a waiver of the provisions of the first sentence of paragraph (2) of this subsection. The Administrator is authorized to grant such waiver if, in his discretion, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this chapter. The Administrator shall promulgate rules and regulations regarding such a waiver so as to inform parties of the proper application procedure and conditions for approval of such a waiver.

(4) Notwithstanding the provisions of this subsection, the Administrator of the Environmental Protection Agency may in his discretion require any such person to retain any record identified pursuant to paragraph (1) of this subsection for such a time period in excess of the period specified in paragraph (2) of this subsection as the Administrator determines to be necessary to protect the public health or welfare.

(e) Applicability to registered pesticide product

This section shall not apply to the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.] or to the handling and storage of such a pesticide product by an agricultural producer.

(f) Exemptions from notice and penalty provisions for substances reported under other Federal law or is in continuous release, etc.

No notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance--

(1) which is required to be reported (or specifically exempted from a requirement for reporting) under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] or regulations thereunder and which has been reported to the National Response Center, or

(2) which is a continuous release, stable in quantity and rate, and is--

(A) from a facility for which notification has been given under subsection (c) of this section, or

(B) a release of which notification has been given under subsections (a) and (b) of this section for a period sufficient to establish the continuity, quantity, and regularity of such release:

Provided, That notification in accordance with subsections (a) and (b) of this paragraph shall be given for releases subject to this paragraph annually, or at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring.

CREDIT(S)

(Pub.L. 96-510, Title I, § 103, Dec. 11, 1980, 94 Stat. 2772; Pub.L. 96-561, Title II, § 238(b), Dec. 22, 1980, 94 Stat. 3300; Pub.L. 99-499, Title I, §§ 103, 109(a)(1), (2), Oct. 17, 1986, 100 Stat. 1617, 1632, 1633; Pub.L. 104-208, Title I, § 101(a) [Title II, § 211(b)], Sept. 30, 1996, 110 Stat. 3009-41.)

42 U.S.C.A. § 9603, 42 USCA § 9603
Current through P.L. 115-30. Title 26 current through 115-32

State of Arkansas *As Engrossed: H3/3/17 S3/14/17*
91st General Assembly **A Bill**
Regular Session, 2017 HOUSE BILL 1665

By: Representatives Vaught, Ballinger, Bentley, Boyd, Brown, Cavenaugh, Coleman, Davis, C. Douglas, Drown, Eubanks, Fortner, Gates, M. Gray, G. Hodges, Hollowell, Lundstrum, Maddox, McNair, Pilkington, Richmond, Rye, B. Smith, Sullivan
By: Senator G. Stubblefield

For An Act To Be Entitled

AN ACT TO CREATE A CAUSE OF ACTION FOR UNAUTHORIZED ACCESS TO ANOTHER PERSON'S PROPERTY; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE A CAUSE OF ACTION FOR UNAUTHORIZED ACCESS TO ANOTHER PERSON'S PROPERTY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 16, Chapter 118, is amended to add an additional section to read as follows:

16-118-113. Civil cause of action for unauthorized access to property.

(a) As used in this section:

(1) "Commercial property" means:

(A) A business property;

(B) Agricultural or timber production operations, including buildings and all outdoor areas that are not open to the public; and

(C) Residential property used for business purposes; and

(2) "Nonpublic area" means an area not accessible to or not intended to be accessed by the general public.

(b) A person who knowingly gains access to a nonpublic area of a

commercial property and engages in an act that exceeds the person's authority to enter the nonpublic area is liable to the owner or operator of the commercial property for any damages sustained by the owner or operator.

(c) An act that exceeds a person's authority to enter a nonpublic area of commercial property includes an employee who knowingly enters a nonpublic area of commercial property for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and without authorization subsequently:

(1) Captures or removes the employer's data, paper, records, or any other documents and uses the information contained on or in the employer's data, paper, records, or any other documents in a manner that damages the employer;

(2) Records images or sound occurring within an employer's commercial property and uses the recording in a manner that damages the employer;

(3) Places on the commercial property an unattended camera or electronic surveillance device and uses the unattended camera or electronic surveillance device to record images or data for an unlawful purpose;

(4) Conspires in an organized theft of items belonging to the employer; or

(5) Commits an act that substantially interferes with the ownership or possession of the commercial property.

(d) A person who knowingly directs or assists another person to violate this section is jointly liable.

(e) A court may award to a prevailing party in an action brought under this section one (1) or more of the following remedies:

(1) Equitable relief;

(2) Compensatory damages;

(3) Costs and fees, including reasonable attorney's fees; and

(4) In a case where compensatory damages cannot be quantified, a court may award additional damages as otherwise allowed by state or federal law in an amount not to exceed five thousand dollars ($5,000) for each day, or a portion of a day, that a defendant has acted in violation of subsection (b) of this section, and that in the court's discretion are commensurate with the harm caused to the plaintiff by the defendant's conduct in violation of this section.

(f) This section does not:

(1) Diminish the protections provided to employees under state or federal law; or

(2) Limit any other remedy available at common law or provided by law.

(g) This section does not apply to a state agency, a state-funded institution of higher education, a law enforcement officer engaged in a lawful investigation of commercial property or of the owner or operator of the commercial property, or a healthcare provider or medical services provider.

/s/Vaught

Shale Gas in the Spotlight: EPA Releases its Final Report on Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States

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December 22, 2016

After years of study, on December 13, 2016, the U.S. Environmental Protection Agency (EPA) finally released its final report on Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States. Despite much attention on the changes to some of the specific language used, this long-awaited final report largely conforms with the preliminary findings set out in the EPA's draft assessment, dated June 2015, that hydraulic fracturing activities have some potential to impact drinking water resources, but that impacts to date have been relatively isolated rather than pervasive.

Changes have been made in the final report, in comparison with the draft assessment, including providing further clarification relating to the major findings, adding other chemicals to the chemicals listed in the draft assessment, and better identifying gaps in data and uncertainties in scientific knowledge. Notably, EPA also reconsidered the language of its conclusion in the draft assessment that the agency "did not find evidence that these mechanisms have led to widespread, systemic impacts on drinking water resources in the United States."[1] EPA excluded this sentence in its final report explaining that "contrary to what the sentence implied, uncertainties prevent EPA from estimating the national frequency of impacts on drinking water resources from activities in the hydraulic fracturing water cycle."[2]

The final report is structured in a similar manner to the draft assessment, focusing on five stages in the hydraulic fracturing water cycle: i) water acquisition; ii) chemical mixing; iii) well injection; iv) produced water handling; and v) wastewater disposal and reuse. For each stage, EPA evaluated the potential for impacts on drinking water resources and factors that affect the frequency or severity of impacts. In addition, EPA stated that only relevant scientific literature, available data and public comments were used in assessing the relationship between hydraulic fracturing and drinking water resources.

Concerning the stage of water acquisition, EPA found that groundwater withdrawals may have a considerable impact on the quality of drinking water resources, especially in regions with low water availability due to high water demand and/or changing seasonal and annual weather patterns. EPA explained that groundwater generally recharges quite slowly; thus any impacts on water resources could last decades.

For the chemical mixing stage, although the concentration of additives used in hydraulic fracturing is deemed small, EPA pointed out that the delivered quantities of fracturing fluid at the well site are generally large; as a consequence, fracturing fluid management can present a problem if not handled well. EPA concluded that spills are mainly caused by equipment failure, human error or storage facility impairment. In addition to specifying that the potential for impacts on water resources largely depends on

[1] U.S. ENVT'L PROT. AGENCY, ASSESSMENT OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING FOR OIL AND GAS ON DRINKING WATER RESOURCES 32 (2015).
[2] *Why Did EPA Remove 'No Evidence of Widespread, Systemic Impacts' from the Assessment?*, U.S. ENVT'L PROT. AGENCY, https://www.epa.gov/hfstudy/questions-and-answers-about-epas-hydraulic-fracturing-drinking-water-assessment#widespread (last visited Mar. 22, 2017).

the hydraulic fracturing-related spill characteristics, transport methods and spill response operations, EPA noted the lack of site-specific studies to identify the factors establishing frequency and severity of impacts from the chemical mixing stage of the hydraulic fracturing water cycle. EPA, however, determined that "impacts on groundwater resources have the potential to be more severe than impacts on surface water resources because it takes longer to naturally reduce the concentration of chemicals in groundwater and because it is generally difficult to remove chemicals from groundwater resources."[3]

As for the well injection stage, EPA sets out the mechanical integrity of wells as a significant factor influencing the frequency and severity of impacts on drinking water resources and, more specifically refers to inadequate well casing and cementing as well as improper well plugging and abandonment. According to the report, another important factor concerns the underground injection of fracturing fluids creating fractures that could establish a pathway to aquifers. Interestingly, mostly due to poor data availability, EPA declared it was "unable to determine with certainty whether fractures created during hydraulic fracturing have reached underground drinking water resources."[4] EPA, however, determined that experience has shown it is unlikely that "hydraulic fracturing fluids would reach an overlying drinking water resource if . . . the vertical separation distance between the targeted rock formation and the drinking water resource is large and . . . there are no open pathways."[5]

With regard to produced water handling, EPA explained that produced water spills have great potential to impact drinking water sources. Based on available site-specific studies, EPA found that local geology, fluid flow path and chemical composition of produced water are factors affecting the frequency and severity of impacts. Furthermore, EPA added that "large volume spills are more likely to travel further from the site of the spill, potentially to groundwater or surface water resources . . . leading to long-term groundwater contamination."[6]

Wastewater disposal and reuse is considered the last stage of the hydraulic fracturing water cycle. According to EPA, wastewater from hydraulic fracturing operations is usually injected into Class II wells[7] but also could be managed through evaporation ponds and percolating pits depending upon the geographic region where the wastewater is generated. EPA underscored that wastewater disposal has the potential to create impacts on water resources because fracturing fluids can end up either in surface or groundwater. EPA, however, mentioned that the risk of contamination is higher for underground aquifers because of the slow groundwater flow speed but noted that soil and sediment properties are also factors to consider. [8]

EPA dedicated a whole section of its report to explain the data gaps and uncertainties during the course of its assessment. EPA admitted lacking important information on data regarding the location of drinking water resources, water withdrawals, hydraulically fractured oil and gas production wells, and hydraulic

[3] U.S. ENVT'L PROT. AGENCY, EXECUTIVE SUMMARY, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES 22 (2016).
[4] *Id.* at 27.
[5] *Id.*
[6] *Id.* at 33.
[7] *See Underground Injection Control*, U.S. ENVT'L PROT. AGENCY (stating "Class II wells are used only to inject fluids associated with oil and natural gas production."), https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells (last visited Mar. 22, 2017).
[8] U.S. ENVT'L PROT. AGENCY, EXECUTIVE SUMMARY, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES 37 (2016).

fracturing wastewater management practices as well as information on chemicals in the hydraulic fracturing water cycle. As a result, EPA emphasized the need for further research highlighting the fact that "the uncertainties and data gaps identified throughout this report can be used to identify future efforts to further [the] understanding of the potential for activities in the hydraulic fracturing water cycle to impact drinking water resources and the factors that affect the frequency and severity of those impacts."[9]

In its concluding observations, EPA commented that "evaluating the potential for activities in the hydraulic fracturing water cycle to impact drinking water resources will need to keep pace with emerging technologies and new scientific studies." The agency finally contended that "this report provides a foundation for these efforts, while helping to reduce current vulnerabilities to drinking water resources."[10]

[9] *Id.* at 41.
[10] *Id.* at 42.

NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD

Public Law 114–216
114th Congress

An Act

July 29, 2016
[S. 764]

To reauthorize and amend the National Sea Grant College Program Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD.

The Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.) is amended by adding at the end the following:

''Subtitle E—National Bioengineered Food Disclosure Standard

7 USC 1639.

''SEC. 291. DEFINITIONS.

''In this subtitle:

''(1) BIOENGINEERING.—The term 'bioengineering', and any similar term, as determined by the Secretary, with respect to a food, refers to a food—

''(A) that contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques; and

''(B) for which the modification could not otherwise be obtained through conventional breeding or found in nature.

''(2) FOOD.—The term 'food' means a food (as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321)) that is intended for human consumption.

''(3) SECRETARY.—The term 'Secretary' means the Secretary of Agriculture.

7 USC 1639a.

''SEC. 292. APPLICABILITY.

''(a) IN GENERAL.—This subtitle shall apply to any claim in a disclosure that a food bears that indicates that the food is a bioengineered food.

''(b) APPLICATION OF DEFINITION.—The definition of the term 'bioengineering' under section 291 shall not affect any other definition, program, rule, or regulation of the Federal Government.

''(c) APPLICATION TO FOODS.—This subtitle shall apply only to a food subject to—

''(1) the labeling requirements under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); or

''(2) the labeling requirements under the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products

Inspection Act (21 U.S.C. 451 et seq.), or the Egg Products Inspection Act (21 U.S.C. 1031 et seq.) only if—

''(A) the most predominant ingredient of the food would independently be subject to the labeling requirements under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); or

''(B)(i) the most predominant ingredient of the food is broth, stock, water, or a similar solution; and

''(ii) the second-most predominant ingredient of the food would independently be subject to the labeling requirements under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.).

''SEC. 293. ESTABLISHMENT OF NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD. 7 USC 1639b.

''(a) ESTABLISHMENT OF MANDATORY STANDARD.—Not later than 2 years after the date of enactment of this subtitle, the Secretary shall— Deadline.

''(1) establish a national mandatory bioengineered food disclosure standard with respect to any bioengineered food and any food that may be bioengineered; and

''(2) establish such requirements and procedures as the Secretary determines necessary to carry out the standard. Requirements. Procedures.

''(b) REGULATIONS.—

''(1) IN GENERAL.—A food may bear a disclosure that the food is bioengineered only in accordance with regulations promulgated by the Secretary in accordance with this subtitle.

''(2) REQUIREMENTS.—A regulation promulgated by the Secretary in carrying out this subtitle shall—

''(A) prohibit a food derived from an animal to be considered a bioengineered food solely because the animal consumed feed produced from, containing, or consisting of a bioengineered substance;

''(B) determine the amounts of a bioengineered substance that may be present in food, as appropriate, in order for the food to be a bioengineered food; Determination.

''(C) establish a process for requesting and granting a determination by the Secretary regarding other factors and conditions under which a food is considered a bioengineered food;

''(D) in accordance with subsection (d), require that the form of a food disclosure under this section be a text, symbol, or electronic or digital link, but excluding Internet website Uniform Resource Locators not embedded in the link, with the disclosure option to be selected by the food manufacturer;

''(E) provide alternative reasonable disclosure options for food contained in small or very small packages;

''(F) in the case of small food manufacturers, provide—

''(i) an implementation date that is not earlier than 1 year after the implementation date for regulations promulgated in accordance with this section; and Implementation date. Time period.

''(ii) on-package disclosure options, in addition to those available under subparagraph (D), to be selected by the small food manufacturer, that consist of—

''(I) a telephone number accompanied by appropriate language to indicate that the phone

number provides access to additional information; and

Web site.

''(II) an Internet website maintained by the small food manufacturer in a manner consistent with subsection (d), as appropriate; and

''(G) exclude—

''(i) food served in a restaurant or similar retail food establishment; and

''(ii) very small food manufacturers.

''(3) SAFETY.—For the purpose of regulations promulgated and food disclosures made pursuant to paragraph (2), a bioengineered food that has successfully completed the pre-market Federal regulatory review process shall not be treated as safer than, or not as safe as, a non-bioengineered counterpart of the food solely because the food is bioengineered or produced or developed with the use of bioengineering.

''(c) STUDY OF ELECTRONIC OR DIGITAL LINK DISCLOSURE.—

Deadline.

''(1) IN GENERAL.—Not later than 1 year after the date of enactment of this subtitle, the Secretary shall conduct a study to identify potential technological challenges that may impact whether consumers would have access to the bioengineering disclosure through electronic or digital disclosure methods.

''(2) PUBLIC COMMENTS.—In conducting the study under paragraph (1), the Secretary shall solicit and consider comments from the public.

''(3) FACTORS.—The study conducted under paragraph (1) shall consider whether consumer access to the bioengineering disclosure through electronic or digital disclosure methods under this subtitle would be affected by the following factors:

''(A) The availability of wireless Internet or cellular networks.

''(B) The availability of landline telephones in stores.

''(C) Challenges facing small retailers and rural retailers.

''(D) The efforts that retailers and other entities have taken to address potential technology and infrastructure challenges.

''(E) The costs and benefits of installing in retail stores electronic or digital link scanners or other evolving technology that provide bioengineering disclosure information.

Determination.
Consultation.

''(4) ADDITIONAL DISCLOSURE OPTIONS.—If the Secretary determines in the study conducted under paragraph (1) that consumers, while shopping, would not have sufficient access to the bioengineering disclosure through electronic or digital disclosure methods, the Secretary, after consultation with food retailers and manufacturers, shall provide additional and comparable options to access the bioengineering disclosure.

''(d) DISCLOSURE.—In promulgating regulations under this section, the Secretary shall ensure that—

''(1) on-package language accompanies—

''(A) the electronic or digital link disclosure, indicating that the electronic or digital link will provide access to an Internet website or other landing page by stating only 'Scan here for more food information', or equivalent language that only reflects technological changes; or

Inspection Act (21 U.S.C. 451 et seq.), or the Egg Products the telephone number will provide access to additional information by stating only 'Call for more food information.';

''(2) the electronic or digital link will provide access to the bioengineering disclosure located, in a consistent and conspicuous manner, on the first product information page that appears for the product on a mobile device, Internet website, or other landing page, which shall exclude marketing and promotional information;

''(3)(A) the electronic or digital link disclosure may not collect, analyze, or sell any personally identifiable information about consumers or the devices of consumers; but

''(B) if information described in subparagraph (A) must be collected to carry out the purposes of this subtitle, that information shall be deleted immediately and not used for any other purpose;

''(4) the electronic or digital link disclosure also includes a telephone number that provides access to the bioengineering disclosure; and

''(5) the electronic or digital link disclosure is of sufficient size to be easily and effectively scanned or read by a digital device.

''(e) STATE FOOD LABELING STANDARDS.—Notwithstanding section 295, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce any requirement relating to the labeling or disclosure of whether a food is bioengineered or was developed or produced using bioengineering for a food that is the subject of the national bioengineered food disclosure standard under this section that is not identical to the mandatory disclosure requirement under that standard.

''(f) CONSISTENCY WITH CERTAIN LAWS.—The Secretary shall consider establishing consistency between—

''(1) the national bioengineered food disclosure standard established under this section; and

''(2) the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.) and any rules or regulations implementing that Act.

''(g) ENFORCEMENT.—

''(1) PROHIBITED ACT.—It shall be a prohibited act for a person to knowingly fail to make a disclosure as required under this section.

''(2) RECORDKEEPING.—Each person subject to the mandatory disclosure requirement under this section shall maintain, and make available to the Secretary, on request, such records as the Secretary determines to be customary or reasonable in the food industry, by regulation, to establish compliance with this section.

''(3) EXAMINATION AND AUDIT.—

''(A) IN GENERAL.—The Secretary may conduct an examination, audit, or similar activity with respect to any records required under paragraph (2).

''(B) NOTICE AND HEARING.—A person subject to an examination, audit, or similar activity under subparagraph (A) shall be provided notice and opportunity for a hearing on the results of any examination, audit, or similar activity.

''(C) AUDIT RESULTS.—After the notice and opportunity for a hearing under subparagraph (B), the Secretary shall make public the summary of any examination, audit, or similar activity under subparagraph (A).

''(4) RECALL AUTHORITY.—The Secretary shall have no authority to recall any food subject to this subtitle on the basis of whether the food bears a disclosure that the food is bioengineered.

7 USC 1639c.

''SEC. 294. SAVINGS PROVISIONS.

Applicability.

''(a) TRADE.—This subtitle shall be applied in a manner consistent with United States obligations under international agreements.

''(b) OTHER AUTHORITIES.—Nothing in this subtitle—

''(1) affects the authority of the Secretary of Health and Human Services or creates any rights or obligations for any person under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); or

''(2) affects the authority of the Secretary of the Treasury or creates any rights or obligations for any person under the Federal Alcohol Administration Act (27 U.S.C. 201 et seq.).

''(c) OTHER.—A food may not be considered to be 'not bioengineered', 'non-GMO', or any other similar claim describing the absence of bioengineering in the food solely because the food is not required to bear a disclosure that the food is bioengineered under this subtitle.

''Subtitle F—Labeling of Certain Food

7 USC 1639i.

''SEC. 295. FEDERAL PREEMPTION.

''(a) DEFINITION OF FOOD.—In this subtitle, the term 'food' has the meaning given the term in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).

''(b) FEDERAL PREEMPTION.—No State or a political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food or seed in interstate commerce any requirement relating to the labeling of whether a food (including food served in a restaurant or similar establishment) or seed is genetically engineered (which shall include such other similar terms as determined by the Secretary of Agriculture) or was developed or produced using genetic engineering, including any requirement for claims that a food or seed is or contains an ingredient that was developed or produced using genetic engineering.

7 USC 1639j.

''SEC. 296. EXCLUSION FROM FEDERAL PREEMPTION.

''Nothing in this subtitle, subtitle E, or any regulation, rule, or requirement promulgated in accordance with this subtitle or subtitle E shall be construed to preempt any remedy created by a State or Federal statutory or common law right.''.

Claims.
7 USC 6524.

SEC. 2. ORGANICALLY PRODUCED FOOD.

In the case of a food certified under the national organic program established under the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.), the certification shall be considered sufficient to make a claim regarding the absence of bioengineering in the

food, such as ''not bioengineered'', ''non-GMO'', or another similar claim.

Approved July 29, 2016.

LEGISLATIVE HISTORY—S. 764:

SENATE REPORTS: No. 114–90 (Comm. on Commerce, Science, and Transportation).

CONGRESSIONAL RECORD:
Vol. 161 (2015): July 28, considered and passed Senate.
Sept. 18, considered and passed House, amended, pursuant to H. Res. 421.
Vol. 162 (2016): Mar. 14–16, June 29, July 6, 7, Senate considered and concurred in House amendment with an amendment.
July 14, House concurred in Senate amendment.

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Selected Recent Industrial Hemp / Cannabis Developments (May 26, 2017)

Written by Ross H. Pifer, Penn State Center for Agricultural and Shale Law www.pennstateaglaw.com

Colorado Law Protects Hemp Farmers Who Use Federal Water

On May 22, 2017, *The Journal* reported that Colorado Governor John Hickenlooper has "sign[ed] a bill protecting hemp farmers who use water stored in federal reservoirs." According to the report, "Colorado legalized growing hemp in 2014, but it is still banned at the federal level, creating complications when water from a federal project is used to water it." As a result, Colorado law makers passed SB 117, entitled *Recognize Industrial Hemp Agricultural Product for Agricultural Water Right*, which permits Colorado water right holders the right to use the water "on hemp if the person is registered by the state to grow hemp for commercial, or research purposes."

South Carolina Legalizes Industrial Hemp

On May 20, 2017, *The State* reported that South Carolina has passed legislation legalizing the growing of industrial hemp. According to the report, "Soon, perhaps this summer, the S.C. Department of Agriculture and the State Law Enforcement Division will issue 20 licenses to grow crops on up to 20 acres as a pilot program." The report stated that to receive a license, a grower must: (1) pass a State Law Enforcement Division background check; (2) work with an in-state research university to develop and market the products; and (3) have a contracted buyer for the hemp.

First Medical Marijuana Cultivation License Awarded in Maryland

On May 18, 2017, *Marijuana Business Daily* reported that "[t]he Maryland Medical Cannabis Commission gave final approval to the first company to win a cultivation license under the state's MMJ program." According to the report, "[t]he announcement…comes nine months after the state revealed 15 preliminary license winners, underscoring the slow rollout of Maryland's medical cannabis program." The report stated that the other 14 preliminary license "winners are still undergoing background checks, completing facility buildouts, and obtaining local zoning approval, according to a news release from the commission."

Washington State Governor Signs Organic Marijuana and Industrial Hemp Legislation

On May 17, 2017, *Reuters* reported that Washington Governor Jay Inslee has "signed a bill that paves the way for the state to create what is believed to be the first system in the United States to certify marijuana as organic." According to the report, the new legislation "creates a voluntary program for the certification and regulation of organic marijuana products" which is "to be administered by the Washington agriculture department." Additionally, the report stated that "[w]hile it is legal for adults to smoke marijuana in Washington, it is not legal to grow industrial hemp." As a result, the new legislation will now provide "for the study of a method to allow hemp to be grown and used for industrial purposes."

California Court Orders Return of Funds Seized from Marijuana Business

On May 8, 2017, the Institute for Justice announced that a San Diego County Superior Court has ordered the San Diego District Attorney (DA) to return funds seized from family members' bank accounts following a raid on a legal marijuana business. According to the announcement, "[a]lthough no one has been charged with any crime, the DA used civil forfeiture laws to seize more than $55,000 from James [Slatic's] personal bank account, more than $34,000 from his wife, Annette, and more than $5,600 each from their teenage daughters Lily and Penny, who had saved the money for college." The announcement stated that the court "ruled that the District Attorney had no grounds to hold the funds since it had not pursued any criminal charges or forfeiture for more than 12 months."

West Virginia Governor Signs Medical Cannabis and Industrial Hemp Legislation

Recently, West Virginia Governor Jim Justice signed into law separate legislation regarding Medical Cannabis and Industrial Hemp. On April 19, 2017, Governor Justice signed the Medical Cannabis Act which provides seriously ill patients access to medical cannabis (Senate Bill 386). According to a press release from Governor Justice, as a result of the legislation, "West Virginia is now the 29th state to allow the medical use of cannabis." On April 25, 2017, Governor Justice signed House Bill 2453 which amended West Virginia's Industrial Hemp Development Act. Accordingly, the new legislation expands "the list of persons the Commissioner of Agriculture may license to grow or cultivate industrial hemp."

Industrial Hemp: Pennsylvania Authorizes 16 Research Projects

On March 16, 2017, the Pennsylvania Department of Agriculture (PDA) announced the approval of "16 research proposals that seek to demonstrate the value and viability of industrial hemp cultivation in the state." According to PDA, "[t]he projects were approved under the new Industrial Hemp Research Pilot Program, which the department launched in December after Governor Tom Wolf and the General Assembly enacted Act 92 of 2016." Included among the approved projects was Penn State University's proposal "to compare six varieties under different growing conditions (planting dates, seed densities, tillage regimens and nitrogen levels); track plant height, yield, disease and insect impact to develop draft production recommendations for PA."

Medical Marijuana: PDH Publishes Amendments to Temporary Regulations

On January 14, 2017, the Pennsylvania Department of Health (PDH) published notice in the Pennsylvania Bulletin regarding amendments to the temporary regulations under the Medical Marijuana Act relating to general provisions; and growers/processors (47 Pa.B. 199). According to PDH, "Interested persons are invited to submit written comments, suggestions or objections regarding the amendments to the temporary regulations to John J. Collins, Office of Medical Marijuana, Department of Health, Room 628, Health and Welfare Building, 625 Forster Street, Harrisburg, PA 17120, (717) 787-4366, RA-DHMedMarijuana@pa.gov."

PA Announces Application Dates for Medical Marijuana Program

On December 21, 2016, Pennsylvania Department of Health (PDH) issued a press release announcing the Medical Marijuana Program permit application dates for growers, processors, and dispensaries. According to PDH, permit applications will be made available beginning January 17, 2017, and will be accepted from February 20, 2017 until March 20, 2017. PDH stated that there will 12 permits issued for growers/processors and 27 permits issued for dispensaries.

Industrial Hemp: PA Opens Application Process for Pilot Research Projects

On December 1, 2016, the Pennsylvania Department of Agriculture (PDA) announced the release of the application and guidelines for persons and institutions of higher learning interested in conducting industrial hemp pilot research projects. According to PDA, a maximum of 30 projects will be selected for the 2017 growing season and the deadline for application is January 6, 2017. PDA stated that only "products or uses that would use hemp fiber or seed for industrial purposes" will be approved.

Industrial Hemp: Notice Published for Federal Statement of Principles

On August 12, 2016, the United States Department of Agriculture (USDA), the United States Drug Enforcement Administration (DEA), and the United States Food and Drug Administration (FDA) published notice in the Federal Register that the three agencies have "developed a Statement of Principles on Industrial Hemp to inform the public how Federal law applies to activities associated with industrial hemp that is grown and cultivated in accordance with Section 7606 of the Agricultural Act of 2014" (81FR 53395). According to the Federal Register notice, because the "Statement of Principles does not establish any binding legal requirements…[i]t is, therefore, exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b)."

Shale Law in the Spotlight: Use of the Congressional Review Act to Alter Energy and Environmental Policy in the Early Days of the Trump Administration

Written by Chloe J. Marie & Ross H. Pifer, Penn State Center for Agricultural and Shale Law (www.pennstateshalelaw.com)

February 23, 2017

During his presidential campaign and since taking office, President Donald Trump has repeatedly expressed concern about the "burdensome regulations on [the U.S.] energy industry."[1] He has vowed to "eliminat[e] harmful and unnecessary policies," which are inconsistent with his energy agenda.[2] Working with Congress, President Trump already has used the Congressional Review Act as a method to alter existing energy and environmental policies since he assumed office.

Congress has within its general powers the ability to overturn federal agency rules in conformity with the 1996 Congressional Review Act (CRA).[3] Under the CRA, Members of Congress have sixty "days of continuous session" to introduce a joint resolution of disapproval from the date the rule is received by Congress and published in the Federal Register. If both the House of Representatives and the Senate pass the joint resolution, the President may sign or veto the disapproval joint resolution. Prior to the recent change in Presidential administrations, only one regulation ever had been struck down using the CRA. In March of 2001, President George W. Bush signed into law the repeal of workplace ergonomic rules promulgated by the Clinton Administration's Occupational Safety and Health Administration in the Department of Labor.

In an interesting report released in November 2016, the Congressional Research Service explained that "perhaps the most widely cited reason why the CRA has been used to overturn only one rule is that a President is generally expected to veto a joint resolution of disapproval attempting to overturn a rule proposed by his own Administration."[4] As an illustration of this point, President Obama vetoed a total of five joint resolutions during his time in office. The authors of the CRS report go on to state that "[d]uring a transition following the inauguration of a new President, however, the CRA is more likely to be used successfully."[5]

In this context, on February 16, 2017, President Trump signed into law a joint resolution — H.J. Res. 38 — disapproving the Stream Protection Rule promulgated by the Interior Department's Office of Surface Mining Reclamation and Enforcement and published in the Federal Register on December 20, 2016.[6] This joint resolution was introduced by U.S. Congressman Bill Johnson, on January 30, 2017, in the U.S. House of Representatives. In justifying such nullification, the Trump administration explained that the Stream Protection Rule "would establish onerous requirements for coal mining operations, and impose significant compliance burdens on America's coal production."[7] In addition, the administration posited that the rule "also duplicates existing protections in the Clean Water Act and is unnecessary given the other Federal and State Regulations already in place."[8]

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[1] *An America First Energy Plan*, WHITEHOUSE.GOV, https://www.whitehouse.gov/america-first-energy (last visited Mar. 22, 2017).
[2] *Id.*
[3] 5 U.S.C. § 801.
[4] CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 4 (2016).
[5] *Id.* at 5.
[6] Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016).
[7] Statement of Administration Policy, H.J. Res. 38, (Feb. 1, 2017).
[8] *Id.*

The Stream Protection Rule was to become effective on January 19, 2017, and its stated purpose was to "better protect water supplies, surface water and groundwater quality, streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations and provide mine operators with a regulatory framework to avoid water pollution and the long-term costs associated with water treatment."[9]

In addition, on February 14, 2017, President Trump signed another joint resolution of disapproval into law — H.J. Res. 41 — disapproving the Securities and Exchange Commission's rule on "disclosure of payments by resource extraction issuers." This rule imposed upon resource extraction issuers to report annually any payment made to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. The Commission's rule was published in the Federal Register in July 2016 and took effect on September 26, 2016. In disapproving the rule, the Trump administration pointed out that it "would impose unreasonable compliance costs on American energy companies that are not justified by quantifiable benefits."[10] Moreover, its administration underlined the fact that "American businesses could face a competitive disadvantage in cases where their foreign competitors are not subject to similar rules."

H.J. Res. 38 and 41 could be the first of many joint resolutions of disapproval to come in the early days of the Trump administration in matters of energy and the environment. On January 30, 2017, another joint resolution — H.J. Res. 36 — was introduced, seeking to disapprove the "Waste Prevention, Production Subject to Royalties, and Resource Conservation" rule that was published in the Federal Register by the Interior Department's Bureau of Land Management (BLM) on November 18, 2016. The U.S. House of Representatives passed this joint resolution on February 3, 2017, and it is awaiting action in the Senate. The BLM rule was scheduled to become effective on January 17, 2017.

Significant federal regulatory activity took place during the final months of the Obama administration — actions including those related to the Climate Action Plan, Waters of the United States Rule, BLM Hydraulic Fracturing Rule, Clean Power Plan, and the Venting and Flaring Rule among others. Stay tuned to see if Congress and the Trump Administration take action, including through the use of the CRA, to roll-back any of these regulatory activities related to energy and the environment.

[9] Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016).
[10] Statement of Administration Policy, H.J. Res. 41, (Feb. 1, 2017).

Who Should be in Charge?: The Ongoing Saga of Catfish Inspections

Alexandra Chase

Catfish is ubiquitous in southern cuisine. It's a rare restaurant in the South that doesn't offer Southern fried catfish, served up with hush puppies, fries, and coleslaw. Traditionally, this Southern staple came from farms in only a few Southern states. Catfish devotees, however, may be surprised to learn that the majority of catfish consumed in the United States today is imported from Asia. This influx of imported catfish has lowered prices and negatively impacted the profitability of domestic producers.

As imports of catfish have increased, so have concerns over contamination risks. In 2008, in response to growing pressure from the U.S. catfish industry and consumer safety groups, Congress passed legislation transferring catfish inspection duties from the Food and Drug Administration (FDA) to the U.S. Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS).

Background

Catfish is almost exclusively a farm-raised product. Catfish farming represents 57% of aquaculture production in the United States.[i] Commercial catfish farming started to grow in the 1960s when profit margins for cotton, rice, and soybeans decreased and southern farmers began replacing income from staple crops with catfish ponds. Even though foreign competition has resulted in a decline of the domestic catfish industry in the last few decades, catfish still remains a valuable agricultural product. The sales of domestic catfish growers, predominately located in Alabama, Arkansas, Mississippi, and Texas, exceeded $380 million in 2016.[ii]

Domestic catfish production, however, faces stiff competition from foreign imports which have steadily increased in recent decades. In the early 2000s, the United States and Vietnam resumed formal trade relations, and Vietnam increased the exportation of several native species of catfish from the family *Pangasiidae* known as *basa*, *swai*, and *tra*. Between 2003 and 2012, U.S. catfish imports increased from 5.5 million pounds to over 238 million pounds.[iii] The lower prices of imported catfish fillets gave Asian catfish farmers a competitive advantage over domestic producers. For instance, in 2012 the market price of frozen catfish fillets imported from Vietnam was around $1.50 a pound and U.S. produced frozen fillets were over $3.50 a pound, while U.S. catfish farmers received less than a dollar per pound. By 2012, 78% of all frozen catfish fillets sold in the U.S. were imported.[iv]

Many countries exporting catfish to the U.S. lack the environmental, animal welfare, and public health protections present in the United States. Fish farms in China, Vietnam, and other countries are often located in areas where water supplies are at risk of contamination from pesticides, human and animal sewage, and industrial waste. Crowded conditions in ponds contribute to the spread of disease. Many of the chemicals and antibiotics used by fish farmers to treat ponds and sick animals are banned for use in the United States on animals produced for human consumption.

In 1995, the FDA adopted regulations requiring processors of fish and fishery products to adhere to Hazard Analysis Critical Control Point (HACCP) principles.[v] Importers must take steps to verify that the imported fish or fishery products are

processed under conditions equivalent to those required of domestic producers.[vi] According to FDA regulations, imported products lacking the required assurances regarding processing conditions are considered adulterated and will be denied entry into the United States.[vii]

To ensure the safety of imported seafood products, the FDA conducts inspection of foreign seafood processors, domestic importers, and collects samples upon entry.[viii] Given the incredible volume of imported food coming into the United States, it would be impossible for the FDA or any other agency to inspect and test every shipment. That said, the FDA physically inspects and samples a very small percentage of imported seafood products. In 2009, the FDA sampled only 1% of imported seafood products for drug residue.[ix] Critics cited this low inspection rate as one of the major reasons for the transfer of catfish inspections duties to the USDA.

USDA Inspections

As a result of the 2008 and 2014 Farm Bills, the FSIS now inspects fish from the order *Siluriformes* under the Federal Meat Inspection Act.[x] The catfish inspection program became effective on March 1, 2016, with implementation phased in over an 18-month transition period. Full program implementation is expected by September 1, 2017.

The regulations establish both a domestic and foreign inspection program. Foreign countries seeking catfish importation must prove that their "laws, regulatory administration, evaluation system, and standards are equivalent" to USDA standards, subject to FSIS onsite visits.[xi] To date, ten countries have started the equivalency process – Bangladesh, China, Dominican Republic, El Salvador, Guyana, India, Jamaica, Nigeria, Thailand, and Vietnam.[xii]

Rejections and Recalls

Since FSIS took over inspections on April 15, 2016, the number of catfish imports that have been rejected, rerouted, or recalled has increased. While several rejections were for paperwork anomalies, the majority of rejected imported catfish or catfish products were for serious food safety violations. Serious catfish food safety violations that occurred were "problems with the product's labels … fail[ed] physical inspection for defects and adulteration or laboratory analysis for chemical/drug residues or pathogens."[xiii]

In the past year, FSIS has issued two domestic recalls for illegal chemical contaminants and one recall for an imported catfish product that bypassed inspection procedures. On July 14, 2016, FSIS issued a product recall of 21,521 pounds of catfish products from a Louisiana facility for illegal chemical contaminants and 1,650 pounds of imported products that bypassed inspection procedures in California.[xiv] On March 24, 2017, FSIS issued a product recall of 1,695 pounds of catfish products from a Mississippi facility because the catfish products contained illegal chemical contaminants.[xv]

Conclusion

Although the USDA program has had marked success in stopping contaminated catfish from reaching consumers, the program's future is uncertain. In May of 2016, the Senate passed a resolution to return catfish inspections to the FDA. Senators John McCain, Jeanne Shaheen, and Kelly Ayotte argued that the USDA program is expensive and an example of duplicative regulation.[xvi] New data may allay the Senate's concerns as the

USDA catfish inspection program costs relatively little by federal standards, just $1.1 million annually.[xvii] The FDA has also completed the transfer of program authority to the USDA. Transferring the authority back would also be expensive and potentially waste agency resources. The House of Representatives has not scheduled a vote on the Senate's resolution.

Alexandra Chase is the Ocean and Coastal Law Fellow with the National Sea Grant Law Center at the University of Mississippi School of Law.

Endnotes

[i] ANDRE F. MILLER AND HAROLD F. UPTON, CONG. RESEARCH SERV., R44177, U.S. CATFISH INDUSTRY AND FOREIGN TRADE: A FACT SHEET 1 (2015).
[ii] National Agricultural Statistics Service, U.S. Department of Agriculture, Catfish Production (Feb. 3, 2017), available at http://usda.mannlib.cornell.edu/usda/current/CatfProd/CatfProd-02-03-2017.pdf
[iii] Miller at 3.
[iv] Terry Hanson and Dave Sites, 2012 U.S. Catfish Database (Mar. 2013). http://www.aces.edu/dept/fisheries/aquaculture/catfish-database/2012-catfish/2012-catfish-database1.pdf
[v] U.S. Food and Drug Administration, Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products, Final Rule, 60 FED. REG. 65096 (Dec. 18, 1995) (codified at 21 C.F.R. Parts 124 and 1240).
[vi] 21 C.F.R. § 123.12(a).
[vii] *Id.* § 123.12(d).
[viii] U.S. FDA, Enhanced Aquaculture and Seafood Inspection – Report to Congress, Nov. 20, 2008, available at
[ix] Dianne Feinstein, et al., United States Senator, to Gene L. Dodaro, Comptroller General (April 25, 2017) (on file with Senator Dianne Feinstein).
[x] P.L. 113-79, §12106.
Agricultural Act of 2014, 21 U.S.C. §§ 601(w), 606, 625 (2014).
[xi] Martin at 14.
[xii] FSIS Equivalence Status Chart https://www.fsis.usda.gov/wps/wcm/connect/2514b05f-82b2-4c1a-a7f2-fdf4610d4d8e/Equivalence-Status-Chart.pdf?MOD=AJPERES (last visited May 12, 2017).
[xiii] USDA Rejections of Imported Meat, Poultry, Egg Products and Catfish (August 2016), https://www.foodandwaterwatch.org/sites/default/files/fsis_import_rejections_summary.pdf (last visited May 12, 2017).
[xiv] USDA, NEWS RELEASE 06016, HARING CATFISH, INC. RECALLS SILURIFORMES FISH PRODUCTS DUE TO POSSIBLE ADULTERATION (July 14, 2016).
[xv] USDA, NEWS RELEASE 032-2017, LAKES FARM RAISED CATFISH, INC. RECALLS SILURIFORMES FISH PRODUCTS DUE TO POSSIBLE ADULTERATION (Mar. 24, 2017).
[xvi] Press Release, Senator John McCain (May 25, 2016) (available at https://www.mccain.senate.gov/public/index.cfm/2016/5/senate-passes-mccain-shaheen-ayotte-resolution-disapproving-wasteful-catfish-inspection-program).
[xvii] Rick Crawford, et al., Member of Congress, to Paul D. Ryan & Nancy Pelosi, H.R. Speaker & Minority Leader (May 26, 2016) (on file with Congressman Rick Crawford).

Mississippi v. Tennessee

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Mississippi v. Tennessee

Although the U.S. Supreme Court has developed a common law framework for resolving disputes over interstate water resources, the Court has never resolved a dispute over groundwater resources. Mississippi v. Tennessee, a case over the use of groundwater by the City of Memphis near the MS- TN border, is the first case of its kind.

The states of Mississippi and Tennessee have very different theories for the case. Tennessee is claiming the water is an interstate resource, and thus, the Court needs to determine how much water each state is entitled to use. Mississippi is treating the water in the aquifer as Mississippi property, not as an interstate resource, and is asking for damages for the water Tennessee has taken.

An initial issue is whether the aquifer will be treated as an interstate resource, and there will be a hearing on this issue later this year.

Equitable Apportionment

Disputes over interstate water bodies are treated differently under water law. When two or more states disagree on how to share water resources between them, federal rules apply. Interstate water disputes are common, and sometimes states can negotiate agreements as to how to share water resources that cross state borders, such as the Great Lakes Compact. But when states can't reach an agreement among themselves, the disputes can only be resolved by the Court, as the Court has original jurisdiction in all cases in which a state is a party.

The Court has developed common law to resolve disputes over the allocation and pollution of interstate rivers through the doctrine of equitable apportionment. When apportioning water, the Court is not bound by the laws of the individual states.

The Court has stated that equitable apportionment is a flexible doctrine, and it will consider all relevant factors of a case so that a just result is reached. The doctrine's basis is that each state is entitled to "equality of right," not equal amounts of water. In previous cases, the Court has given factors that will inform its decision. A major factor the Court has considered is the benefit to one state versus the present harm to the other one. Also, many of these factors deal with characteristics of surface water, not groundwater, so the question remains how these factors would apply to groundwater.

In suits between states, the Court serves as a trial court and appoints a Special Master (often not an expert in water law) to run a trial-like process. The Special Master hears the parties' initial motions and evaluates the evidence. The Special Master then makes findings of fact, conclusions of law, and recommends a decision for the Court. The Court then decides whether or not to follow the Special Master's recommendation. The Special Master process can take years to complete.

The Lawsuit

In the current lawsuit, Mississippi is concerned with the City of Memphis pumping groundwater close to the MS-TN border. When you pump large amounts of groundwater, it creates what is known as a cone of depression. The pumping changes the flow of water, causing more water to flow your way and lowering the water table of your neighbor, forcing them to need a deeper well. Mississippi claims the City's pumping has taken billions of gallons of water out of Mississippi, and that the water belongs to Mississippi.

Mississippi has challenged this use before by suing the City of Memphis for monetary damages. In 2009, the 5th Circuit Court of Appeals dismissed Mississippi's lawsuit ruling that Mississippi had framed its case incorrectly. The court determined that the aquifer was an interstate resource, so Tennessee, which was not named in the suit, was a necessary party and exclusive jurisdiction belonged to the Supreme Court. The Court denied cert in that case, citing an equitable apportionment case in doing so.

Despite denying to hear the previous case, the Court allowed Mississippi to file this new lawsuit. In the case, the states have widely varying arguments. Tennessee argues that the framework the Court has developed for surface water should apply to the underground aquifer that both states use. Under that doctrine, neither state has any right to the water until the Court apportions the water.

Mississippi argues that the water is state property, claiming it owns the groundwater within the state and Tennessee needs to pay for the water it has taken. Thus, Mississippi has not asked for the water to be apportioned, but rather, has asked for monetary damages (not less than $615 million).

The Special Master for the lawsuit is the Hon. Eugene E. Siler of the Court of Appeals for the 6th Circuit. The initial issue in the case is whether the Special Master determines that this should treated as an interstate water dispute (which could potentially dismiss the lawsuit, with no apportionment).

After considering each state's initial filings in the case, the Special Master issued a Memorandum of Decision in August 2016 that ordered an initial hearing on whether the aquifer was an interstate resource. In the Memorandum, the Special Master noted that he did not think that Mississippi had made its case in its initial pleadings. In an October 2016 Case Management Order, the Special Master set July 30, 2017 as the deadline for discovery for the hearing, and the parties need to submit a plan for the hearing by August 31, 2017.

The docket sheet for the Special Master can be found at: http://www.ca6.uscourts.gov/special-master. The docket for the case has not been updated since the October 2016 Case Management Order.