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An Agricultural Law Research Publication

Farmland Owner's Guide to Solar Leasing

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The Ohio State University
College of Food, Agricultural, and Environmental Sciences

National Agricultural Law Center

USDA United States Department of Agriculture
National Agricultural Library

About this Guide

With funding from the **National Agricultural Library** at the United States Department of Agriculture, the **National Agricultural Law Center** partnered with the OSU Extension Agricultural & Resource Law Program in the College of Food, Agricultural & Environmental Sciences at **The Ohio State University** to produce this guide for agricultural landowners faced with decisions about leasing land for solar energy development.

The authors of the guide are **Peggy Kirk Hall**, Associate Professor in Agricultural and Resource Law and Director of the OSU Extension Agricultural and Resource Law Program; **Evin Bachelor**, Senior Research Associate and Law Fellow with the OSU Extension Agricultural and Resource Law Program; and **Eric Romich**, Associate Professor and Field Specialist in Energy Education for OSU Extension.

Special thanks and acknowledgements

We are grateful to **Ryan Conklin**, attorney with Wright & Moore Law Co., LPA in Delaware, Ohio, for providing extensive insights into solar leases from the perspective of a private practitioner, and to **Dr. Shannon Ferrell**, Associate Professor in Agricultural Law at Oklahoma State University, whose webinar on solar leasing for the National Agricultural Law Center served as a foundation for the guide.

Photo credits

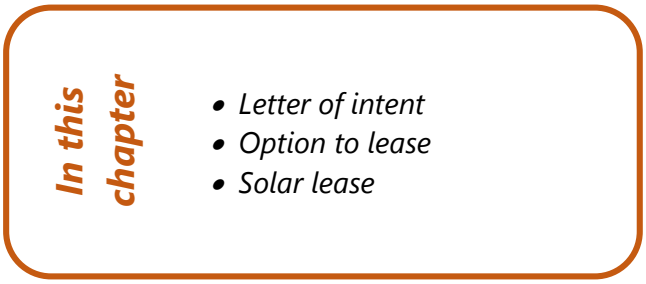
Thank you to Eric Romich and Ken Chamberlain of Ohio State University Extension for providing all photos for the guide, with the exception of the Creative Commons photograph on pages 1 and 30.

How to use this guide

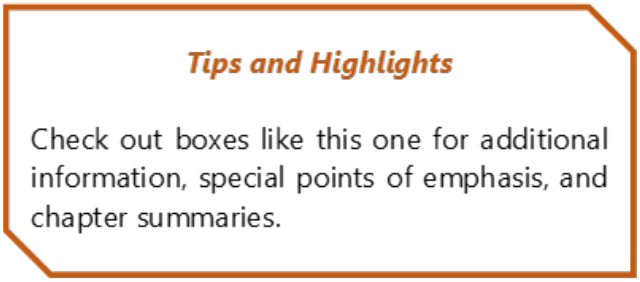
This guide aims to help farmland owners understand solar energy development and the solar energy leasing process. The guide includes specific information for **Ohio**, but other information about solar leasing in the guide is relevant for farmland owners in **any state**. However, we recommend that a farmland owner confer with an **in-state attorney** to clarify legal issues specific to the state.

The guide includes a lot of information, so we've developed several tools to help readers navigate and understand the material.

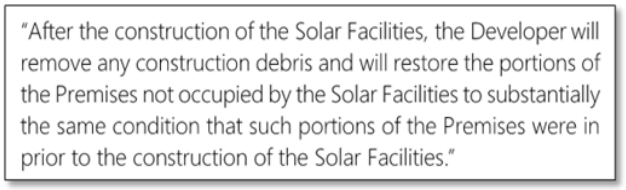
At the start of each chapter, a rounded box like the one on the right highlights the topics covered in the chapter. The content of these boxes matches the topics in the table of contents. As an additional navigation tool, this guide highlights key phrases in **bold.**



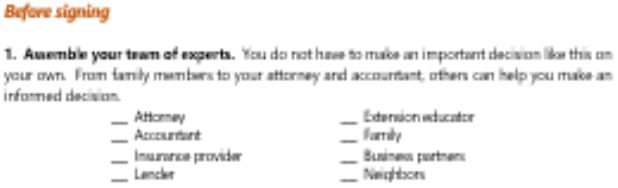
Sometimes there are points that just need a little extra explanation or emphasis. Boxes with angled edges like the one on the right provide additional information worth highlighting, special points of emphasis, and chapter summaries.



One goal of this guide is to familiarize and educate readers on the language and terms they will encounter in a solar lease. Be on the lookout for boxes like the one on the right that contain language taken from actual solar leases.


"After the construction of the Solar Facilities, the Developer will remove any construction debris and will restore the portions of the Premises not occupied by the Solar Facilities to substantially the same condition that such portions of the Premises were in prior to the construction of the Solar Facilities."

The final chapter of the guide organizes solar leasing issues into a **checklist tool** that reviews questions to ask and actions to take when thinking about solar energy development on the farm.


Before signing

1. Assemble your team of experts. You do not have to make an important decision like this on your own. From family members to your attorney and accountant, others can help you make an informed decision.

__ Attorney
__ Accountant
__ Insurance provider
__ Lender
__ Extension educator
__ Family
__ Business partners
__ Neighbors

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1 Solar Energy Development in Ohio

While solar energy production has a brief history in Ohio, "utility-scale" production is on the rise. A landowner can benefit from learning about the history and the current state of solar energy in Ohio, as well as how a project develops—from site selection to construction and finally, production.

1.1 History of solar energy production in Ohio

Over the past decade, Ohio has experienced considerable growth in photovoltaic (PV) solar development. In 2009, Ohio had 14 solar projects certified with the Public Utilities Commission of Ohio, growing to more than 2,697 projects representing 210 megawatts (MW) of capacity in June 2019. Prior to 2018, most solar projects in Ohio were small projects located on homes, farms, and businesses. In fact, of the 2,697 Ohio solar projects, the average system size was 78 kilowatts. Prior to 2019 there were only two

projects larger than 10 MWs, including the 28.7 MW DG AMP Solar Bowling Green project and the 12 MW Wyandot Solar Energy Generation Facility.

As of May 2019, nine large scale solar cases representing 1,325 MWs of potential capacity were submitted to the Ohio Power Siting Board; six have been approved and three are pending approval. While OPSB application approval does not guarantee a project will ultimately be built, Ohio's PV solar capacity would increase by 630 percent to a total of 1,535 MW if all nine projects currently under review with the OPSB are constructed. These nine projects would require a footprint of 16,500 acres of land to support the development.

1.2 "Utility-scale" solar energy development

Since 2012, the utility-scale solar sector has led the overall U.S. solar market in installed capacity. In 2017, the utility-scale sector accounted for nearly 60% of all new solar capacity additions. Based on past trends and future projections, utility-scale solar development will continue to thrive. But what does this mean? How can you determine if a solar project is a "utility-scale" project or not? Physically, there is very little difference between a large solar project installed on a farm and a utility-scale solar project. They often use the same racking components, inverters, and solar modules, making it difficult to differentiate the two based on visual appearance.

Companies and experts use different metrics to define "utility-scale" solar because the industry and regulators have yet to adopt a standard metric. Some classify utility-scale solar projects based on the structure of the electric offtake arrangement, while others base it on the size of the investment.

Two primary differences between commercial and residential solar projects and utility-scale solar projects are that utility-scale solar projects are typically greater than 5 MW and the electricity generated is interconnected to the electric distribution or transmission grid. Under a utility-scale solar model, either an electrical utility owns the project or an independent project owner enters into a power purchase agreement to sell electricity to wholesale utility buyers.

How much is a megawatt?

A megawatt equates to one million watts of electricity, and a megawatt hour measures the number of megawatts consumed in one hour.

An old trick of the hand said that one megawatt could power 1,000 homes; however, that number assumes that everything will operate at peak efficiency with no energy loss during transmission. Plus, the average home consumes more electricity than it used to.

The Solar Energy Industries Association calculates that one megawatt of solar powers between 150 and 210 homes on average in the United States; however, that number continues to increase with improved technology and more utility-scale production.

Utility-scale solar projects are no longer modern marvels limited to the sunny skies of Southwestern deserts, but instead are now commonly found in densely populated areas and the rural countryside of the upper Midwest and Northeast. The increasing development of utility-scale PV solar consumes massive tracts of land for development. According to the National Renewable Energy Laboratory report, the average total direct land requirements for PV solar projects greater than 20 MW is 7.5 acres per MW for fixed-tilt systems, 8.3 acres per MW for single axis tracking systems, and 8.1 acres per MW for dual axis tracking systems.

A study from the National Renewable Energy Laboratory titled "U.S. Renewable Energy Technical Potentials: A GIS-Based Analysis," estimates the technical potential of specific utility-scale PV solar development in the United States. This study estimates the potential energy generation based on solar resource availability and quality, technical system performance, topographic limitations, environmental, and land use constraints. These estimates do not consider social, policy, economic, or market constraints, and therefore do not reflect a level of generation that will actually be deployed. The study analyzed the potential for utility-scale PV solar development for both open spaces located within urban boundaries and rural areas located outside the urban zones.

Based on the estimates, Ohio ranked fifth in potential urban utility-scale solar land area with 294,055 acres yielding a generation potential of 86,496 gigawatt hours. When considering the potential rural utility-scale solar land area, Ohio ranked 26th with 12,332,535 developable acres yielding a generation potential of 3,626,182 gigawatt hours.

Table 1: State Ranking of Photovoltaic Solar Cumulative Capacity Installed Through February 2019

Rank	State	Net Summer Capacity (MWs)	Global Horizontal Irradiance** (kWh/m^2/day)
1	California	18,876	5.15
2	North Carolina	4,135	4.63
3	Arizona	3,231	5.78
4	Texas	2,448	4.96
5	New Jersey	2,240	4.17
6	Massachusetts	2,164	4.06
7	Nevada	2,027	5.35
8	Florida	1,623	4.91
9	New York	1,529	3.90
10	Utah	1,100	4.68
25	Ohio	208.3	4.03

** Global Horizontal Irradiance for this chart is based on the location of the state capital.

Sources: U.S. Energy Information Administration, Form EIA-860, 'Annual Electric Generator Report' and Form EIA-860M, 'Monthly Update to the Annual Electric Generator Report.'

Global Horizontal Irradiance is based on data from the National Renewable Energy Laboratory System Advisory Model typical meteorological year data developed using methods described in the technical notes.

1.3 Site selection: what do solar energy developers look for?

Many factors go into selecting a property as a potential utility-scale development project.

Three important factors are the potential amount of sun a site might receive, a property's proximity to transmission infrastructure, and physical qualities of the property.

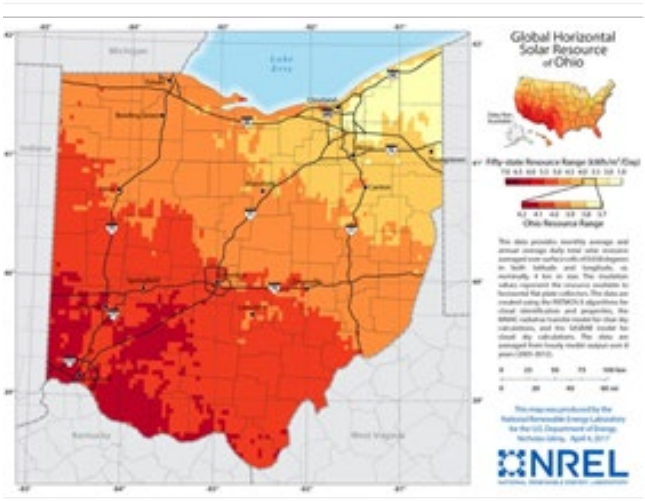
Examining a property's **solar potential** can help determine how much sun the solar modules in a development might receive. Ohio is not commonly associated with the long sunny days often linked to solar energy production because of its wet springs and cold snowy winters. However, as illustrated in Table 1, Ohio's solar resource is similar to many solar industry leaders on the east coast, including New Jersey, Massachusetts, and New York.

The **Global Horizontal Irradiance** (GHI) is a metric used by the PV solar industry to measure solar potential. It in essence describes the amount of energy that could be produced from the sun in a given spot if all of that energy were converted to electricity. It includes total solar radiation, which factors in both Direct Normal Irradiance and Diffuse Horizontal Irradiance per unit area that reaches a horizontal surface.

As a state, Ohio has a wide range of GHI, ranging from a kWh/m^2/day of 3.93 in Youngstown, to 4.05 in Bowling Green, 4.03 in Columbus, and 4.15 in Dayton. Based on the GHI resource data, the best location for utility-scale solar development in Ohio is in the southwest region of the state. Image 1 maps Ohio's GHI resource.

It is also critical that a site is in close **proximity to transmission**. The site should be near a suitable grid interconnection point

Image 1: Global Horizontal Irradiance Resource for Ohio



with adequate capacity and grid availability. Two simple questions must be addressed when structuring a utility-scale solar project: 1) who will buy the electricity, and 2) how will it be delivered? Interconnection into the electric grid provides a physical path to deliver the electricity generated by the solar project to the purchaser of the power. Interconnection represents a critical cost component of project development. To reduce project cost, developers will seek sites with low interconnection costs. Pre-application studies help developers strategically identify optimal grid interconnection locations, while dismissing problematic sites that require additional upgrades in grid infrastructure.

Ohio's transmission grid consists of 6,983 miles of high voltage transmission lines and 112 miles of low voltage transmission lines, providing developers ample interconnection opportunities. Ohio is located in the PJM Interconnection, a regional transmission organization that manages a competitive wholesale electricity market and a high-voltage electricity grid reaching more than 65

million people in Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. Access to the PJM Interconnection provides developers the opportunity to participate as a merchant power plant in an open market, or to engage individual businesses in direct power purchase agreements of renewable energy. A recent emerging trend is corporate customers directly procuring renewable energy from independent power producers as a cost savings strategy and to meet corporate sustainability goals. For example, in 2018, there were 75 new corporate renewable deals, supporting almost 7 gigawatts of new projects.

Several **physical qualities of the property** also affect selection of a solar development site. In addition to solar capacity and proximity to transmission, developers also look for locations that provide flat ground with slopes less than three percent, have minimal zoning, environmental, or permitting issues, do not have shading obstructions, and possess good drainage characteristics.

1.4 Incentives for solar energy development

Advances in technology and policy mandates that require the installation of PV solar have contributed to the reduction of system costs. For example, according to the National Renewable Energy Laboratory 2018 U.S. Solar Photovoltaic System Cost Benchmark report, the inflation-adjusted system cost for residential PV solar installations reached $2.70 per/DC-watt, while commercial projects were $1.83 per/DC-watt and utility-scale PV solar projects posted at $1.06 per/DC-watt. Specifically, comparing the declining system costs of inflation-adjusted utility-scale solar projects between Q1 2010 and Q1 2018 show a 77 percent decrease from $4.63 per/DC-watt to $1.06 per/DC-watt. Despite declining costs for PV solar, incentives are critically important to the cost-effectiveness of a project. Incentives come from four primary sources that include federal, state and local governments and utility companies.

The Federal **Business Energy Investment Tax Credit** (ITC) program was originally established in the Energy Policy Act of 2005. This incentive program is a cornerstone tool for renewable energy project development. In 2016, many solar project developers felt a sense of urgency to get projects under way, as the 30 percent ITC program was scheduled for elimination or drastic reductions after December 31, 2016. While the passage of the Consolidated Appropriations Act extended the ITC program, there is once again a sense of urgency to get projects completed in order to take advantage of higher tax credit levels. For projects that start construction by the end of 2019, the ITC program offers a 30 percent tax credit of the eligible construction and equipment costs allowing the project owner to obtain a dollar-for-dollar reduction in federal income tax liability. This tax credit can be carried back one year or carried forward 20 years to monetize the full value of the tax credit. Projects that start construction in 2020 are eligible for a 26 percent ITC credit, while projects that begin in 2021 may claim a 22 percent ITC credit. After 2021, the commercial ITC credit will drop to a

permanent 10 percent and the residential ITC program will expire.

A **renewable portfolio standard** (RPS) is a state policy that mandates a percentage of the state's overall electricity generation that must be produced from renewable energy. In many cases, the amount of renewable energy required will increase annually from the baseline or benchmark to reach an ultimate target set over a predetermined timeframe. As of 2019, 29 states and Washington, D.C. have established RPS mandates, and an additional eight states have voluntary RPS goals. Ohio passed Senate Bill (S.B.) 221 in the spring of 2008, which included the state's first RPS standards. The policy originally required utilities to generate 12.5% renewable energy by 2024. The legislation also included a solar carve out with specific targets of one-half percent solar energy generation by 2024. However, Ohio passed S.B. 310 in June 2014, which placed a two year freeze on progress toward the 12.5% mandate by 2024. As a result, the current RPS targets in Ohio are set at 12.5% renewable generation by 2026. The amendments in S.B. 310 also allowed renewable energy project owners in neighboring states to certify their projects with the Public Utilities Commission of Ohio and to allow the renewable electricity imported from these projects to contribute to Ohio's RPS determination.

To monitor compliance of state RPS standards, a system of credits known as **Renewable Energy Credits** (RECs) were developed to validate and track the amount of renewable energy generated during a compliance period. In Ohio, a REC represents the environmental properties associated with one MW-hour of electricity generated by a renewable energy facility certified by the Public Utilities Commission of Ohio. A **Solar Renewable Energy Credit** (SREC) is one MW-hour of electricity generated by a certified PV solar system, which counts towards compliance of a specific solar carve-out mandate. The Public Utilities Commission of Ohio monitors compliance annually to determine if utilities are in compliance with the RPS Standards. Utilities can meet their annual benchmark obligations by developing and owning a REC producing certified renewable energy facility or purchasing RECs from other qualified renewable energy projects.

In July 2019, the Ohio General Assembly passed House Bill (H.B.) 6 to promote electricity production from clean air resources that improve air quality in Ohio. The legislation repeals the existing RPS originally established in 2008 by S.B. 221 and. creates an electricity rate rider for all residential customers to establish a clean air fund. These funds will first be made available as subsidies for two nuclear power plants in Ohio and the remaining funds will establish a reduced emissions program for other technologies that attempt to reduce their emissions.

Ohio established **Alternative Energy Zone** legislation in 2010 in S.B. 232. The law authorizes counties to establish an Alternative Energy Zone and exempt qualified energy projects in the zone from paying the public utility tangible personal property tax and real property taxes. The utility-based taxes are replaced by a standardized **payment in lieu of taxes**

(PILOT) program which establishes a set annual fee based on the facilities' total nameplate capacity. The base PILOT fee is set automatically at $7,000 per MW of nameplate capacity for qualified solar projects. For all other non-solar qualified energy facilities, the PILOT fee is between $6,000 and $8,000 per MW and is based on the percentage of Ohio-based employees utilized during the construction period. The county may integrate an additional service payment not to exceed $9,000 per MW when combined with the base PILOT fee. The PILOT base fee is to be distributed to local governments and school districts in the same way as the tangible personal property taxes, while any additional service payment required by the county is to be deposited in the county general fund.

To qualify for the PILOT program, a renewable energy facility must apply to the Ohio Development Services Agency for status as a "qualified energy project" before December 31, 2020. For qualified energy projects greater than 5 MWs, the agency forwards the application to the county commissioners for approval and to each taxing unit in the impacted counties. In addition, the county can pass a local resolution to establish the entire county as an "alternative energy zone," which has the effect of pre-approving PILOT for any qualified energy projects located within the zone. If the county commissioners reject the application or fail to act within 30 days, the exemption application is automatically denied.

1.5 The solar energy project approval process

Ohio created the Ohio Power Siting Board (OPSB) in 1972 to guide the development of major energy infrastructure projects based on public need, environmental implications, land use considerations and economic benefits. Before constructing a major utility facility in Ohio, developers must acquire a certificate of environmental compatibility and public need from the OPSB. Major utility facilities under OPSB jurisdiction include electric generation facilities of 50 MWs or more, including solar; electric transmission lines and associated facilities of 100 kilovolts or more; economically significant wind farms with a generating capacity of 5 MW or more; and gas pipelines longer than 500 feet with an outside diameter greater than 9 inches designed for transporting gas at a maximum operating pressure in excess of 125 pounds per square inch.

The OPSB process is designed to inform and engage local residents in the review process. Legal notices of applications are published in local newspapers near the impacted area, and the notices list local libraries where residents may review a copy of the application. All case records are also available online.

Public participation is an important part of the OPSB project review process. There are various ways local residents can participate in the process and voice questions, concerns, or support. First, prior to filing an application to build a new facility, the developer must hold a public meeting to share project details, gather input, and hear concerns. Representatives from the OPSB attend the

pre-application meeting to discuss the siting and public participation process. Second, interested parties are encouraged to submit informal written comments to the OPSB, which are filed in the public comments section of the case record to inform the OPSB during its investigation. Third, the OPSB hosts a public hearing after making its recommendation. At the hearing, community members can provide sworn testimony or submit written statements to the case record. Finally, individuals, organizations, and governments may formally intervene in the case and participate as a party of record in the case proceedings.

To learn more about a utility-scale solar project in or near a community, visit the OPSB website at https://www.opsb.ohio.gov. Local residents can stay connected by reading case documents online, signing up to receive news releases and board meeting agendas, subscribing for case updates, reviewing the OPSB calendar for upcoming events, and following the OPSB on Facebook. In addition, the OPSB is available by phone at 866-270-OPSB (6772), and by email at contactOPSB@puco.ohio.gov.

1.6 Utility-scale solar energy development on your land

Once complete, a utility-scale solar project has minimal moving parts and no noise, smell, or emissions. For the most part, the system simply sits there and generates electricity. However, a great deal of activity takes place on the land prior to project completion. Initially, the developer needs to access the land to collect land use information and conduct feasibility studies. During the construction phase of a project, the site experiences disturbances such as site grading, soil erosion, soil compaction, damaged field tile, and noise. It is important to remember that the site becomes a major construction zone for a period of time, with heavy equipment used to grade access roads, dump trucks with stone to build laydown yards, flatbed trailers delivering equipment components to construct the arrays, trencher plows to lay cable, concrete trucks and cranes to set power enclosures, and hydraulic post drivers to set racking, as illustrated in the following photos. Such activities may disturb neighbors.

Once construction of a solar project is complete, ongoing operations and maintenance activities for the project occur. These activities include panel cleaning, thermograph testing for wire faults, inspecting combiner boxes, inverter maintenance, inspection of racking support, and spraying and mowing for vegetation control.

Resources and References

"A Solar CEO's 2019 Forecast: More Complexity, New Investors and Continued Growth," GREENTECH MEDIA (2019).

Anthony Lopez, B. Roberts, Donna Heimiller, Nathan Blair, & G. Porro, "U.S. Renewable Energy Technical Potentials: A GIS-Based Analysis," CONTRACT, 10.2172/1047328 (2012).

"Farmer's Guide to Going Solar," U.S. DEPT. OF ENERGY OFFICE OF ENERGY EFFICIENCY &RENEWABLE ENERGY, https://www.energy.gov/eere/solar/farmers-guide-going-solar.

L.M. Miller and D.W. Keith, "Observation-based solar and wind power capacity factors and power densities," ENVIRONMENTAL RESEARCH LETTERS, 13(10).

Mark Bolinger and Joachim Seel, "Utility-Scale Solar: Empirical Trends in Project Technology, Cost, Performance, and PPA Pricing in the United States" (2018 ed.).

"Ohio's Alternative Energy Portfolio Standard," PUBLIC UTILITIES COMMISSION OF OHIO, https://www.puco.ohio.gov.

"Power Siting Cases," *Ohio Power Siting Board*, PUBLIC UTILITIES COMMISSION OF OHIO, www.opsb.ohio.gov/opsb/.

V. Smil, "Power Density: The Key to Understanding Energy Sources and Uses," MIT Press (Cambridge, MA).

"What's in a Megawatt," SOLAR ENERGY INDUSTRIES ASSOCIATION, https://www.seia.org/initiatives/whats-megawatt.

In this chapter

- *Length of the commitment*
- *Who has legal interests in the land?*
- *Impacts on the farm and land*
- *Family matters*
- *Property taxes*
- *Government programs*
- *Liability and insurance*
- *Neighbor and community relations*
- *Who is the developer?*
- *Professionals who can help you*

2 Solar Energy on Your Land: Initial Considerations

Dedicating land to solar energy development is a long-term commitment that can have both positive and negative impacts on a farm and its owners. In this chapter, we review initial considerations that can help a landowner decide whether a solar lease is a good fit for the farm, the family, and the community.

To help determine if a solar lease is right for you, give careful thought to the many implications of solar energy development on your farm. How might solar leasing affect your land and how you use it, your farm business, your family and its plans for the future, and your neighbors and community? Consider also the many related legal issues such as other legal interests in the land, property taxes, government programs, and liability risk. Thinking through these initial issues should help you decide whether to lease your farm for solar development, and if you choose to do so, should help you plan for the future and avoid unexpected consequences.

2.1 Length of the commitment

A common first question we hear about solar leases is "how long do they last?" A solar energy project can exist on your land for a long time—as many as 20 years or more, with automatic extension periods of five to ten years. It's important to anticipate future events that could occur during this time period and ensure that the solar development won't conflict with or preclude anticipated needs or uses of the farmland. It's difficult and perhaps nearly impossible for a landowner to back out of a solar lease agreement, so be prepared to commit the land for the entire length of the solar lease agreement.

2.2 Who has legal interests in the land?

It may seem obvious that a landowner must have the legal right to grant a solar lease, but many legal rights held by others could interfere with a landowner's right to lease the land. When considering whether or not to enter into a solar lease, a landowner must determine what other types of legal interests in the land exist and should identify ways to address the interests.

For example, a lender could have provisions in an existing **mortgage** on the property that would prohibit the landowner from granting this type of legal interest to another party, or could require permission from the lender before doing so. Violation of such provisions could allow the lender to declare a default and demand payment of the mortgage balance. On the other hand, a solar energy developer might require the landowner to obtain a subordination agreement from the lender, which would ensure that the lender would not evict the developer if the landowner fails to pay the mortgage. A lender might or might not be willing to sign a subordination agreement.

A **farmland lease** is another legal interest that could conflict with the granting of a solar lease. A tenant or lessee of an existing farmland lease would have legal rights if a landowner would attempt to terminate the lease before the end of the lease period. A written farmland lease might address how to handle an early termination by the landowner. A common approach is to require the landowner to "buy out" the remainder of the lease by reimbursing the tenant for expenses and lost profits. As we explain in Chapter 4, a solar lease can contain provisions for reimbursement when construction of the development causes crop damages. This mechanism could allow the landowner to reimburse a tenant if the construction begins when a tenant's crop is still in the ground. A landowner should assess the potential of interfering with an existing farmland lease, and pay special attention to the costs of terminating a farm lease that still has many years remaining in the lease period.

Likewise, a **hunting lease** could be problematic for a landowner. As we discuss in Chapter 4, many solar leases do not allow hunting on or near the solar development site. If there is an existing hunting lease, a landowner may need to terminate or revise the lease in accordance with the solar lease. These actions might require a landowner to reimburse lease payments, improvements or

other benefits that were provided in exchange for the lease.

Mineral rights might also exist on the land. If someone holds a legal interest in oil, gas, coal or other minerals beneath the surface, those rights could be impacted by a solar development. For this reason, a solar developer will have concerns about leasing land if someone else holds the mineral rights, and might require a landowner to obtain a formal termination of the mineral estate. As with a farmland lease, this could require a buyout by the landowner. It's possible, however, that a solar developer would allow mineral rights to exist if development could occur without harm to the solar energy project.

Easements also grant legal interests in land to other parties, and a solar development could interfere with easement rights. Farmland often has many easements, such as easements for utilities, drainage, wetlands, conservation and farmland preservation. Easement language often prohibits any conflicting land uses on the easement property, which would give the easement holder a legal right to object to the solar lease or seek payment for easement violations and interferences. A landowner should determine the existence of all easements on the property and ensure that a solar lease would not conflict with existing easements.

A final legal interest in the property to consider is the interest of **joint owners, business entities or trusts**. All co-owners of the property must agree to a solar lease. If a business entity or trust holds title to the land, the business entity or trust must be the party that enters into the lease, in accordance with the entity's operating procedures or trust provisions. A solar lease must have the approval of all co-owners of the land or the business entity or trust that holds title to the land.

2.3 Impacts on the farm and land

A solar energy development can have tremendous **physical impacts** on the land, both during the solar project's lifetime and afterwards. We explained in Chapter 1 that the land will be a major construction site for a period of time. Heavy equipment may cause soil compaction. Installation of solar modules and trenches could disrupt subsurface and surface drainage systems, and subsurface drainage tiles beneath the development site could be inaccessible for future repairs. Since we have not previously experienced utility scale solar energy development projects in Ohio, it is difficult to know how long-term such physical impacts will be and how successfully the land can convert back to agricultural uses at the end of the solar lease period.

If a portion of a farm's land would be used for a solar development, what effects might there be on the **farm operation**? Financial benefit is one potential positive impact. Predictable annual payments can provide income and stability to a farm operation. A solar lease could also have negative impacts on a farming operation. Removing parcels of land from agricultural production will require a reconsideration of the components of the operation. With fewer acres, operating costs could increase on remaining parcels. The loss of grazing, forage, or manure application land could require a decrease in livestock numbers. The location of the development could interfere with access to sections of the farm, making it more difficult to engage in farming activities.

It is also possible that a solar development will affect a landowner's ability to **leverage equity** in the land. Committing the land to a long term physical development like a solar energy project can affect the land's value and its desirability to loan lenders. Analyzing how a solar lease would impact business or personal lending and liquidity needs would be a useful discussion to have with a lender.

What **other land uses** on the farm could be foreclosed, limited or required because of a solar energy development? Be aware that a solar lease will prohibit a landowner from interfering in any way with the development's access to sunlight. This restriction could prevent a landowner from constructing new buildings or making improvements, even planting trees. It could also require a landowner to trim back or cut down existing trees that block sunlight. A lease could also prohibit hunting in or around the project site.

The location of the solar development site could interfere with the landowner's access to woodlots and water bodies. Additional house lots on the farm may not be possible or desirable, and the view of those who live on the farm could change from farm fields to solar fields. A careful assessment of these impacts on the farm and the land could prevent unexpected limitations on how a landowner can use land that is subject to or near the solar development.

2.4 Family matters

Farms and farmland can be important components of a family's heritage and wealth, which raises the need to know how all family members could be affected by a solar lease. Would a solar lease prevent or hinder the next generation's ability to farm the land? Do all family members support removing the land from agricultural production? Are there current estate or farm transition plans in place that must be revised if the land is subject to a solar lease? How might the solar lease affect retirement or long-term health care needs? Asking these questions of family members, an attorney, and a financial planner may provide necessary clarity on critical issues.

2.5 Property taxes

The construction and operation of a solar energy facility on farmland will affect eligibility for Ohio's Current Agricultural Use Valuation (CAUV) program. The program allows land that is devoted exclusively to commercial agricultural use to be assessed at a lower value for property tax purposes. Because a solar energy development is not

"commercial agricultural use" according to Ohio Revised Code § 5713.30, the land would not qualify for the CAUV reduced tax assessment. Additionally, removing the land from the CAUV program initiates a "recoupment penalty." A landowner who converts all or any portion of a parcel of CAUV-qualifying land to a non-agricultural land use must pay an amount equal to the tax savings the landowner received on the converted land in the three previous tax years. A recoupment fee for land converted to solar energy development could be significant, and future property taxes on the land will rise due to the loss of CAUV eligibility. Note, however, that a solar lease can address whether the landowner or the solar developer pays for these additional property tax obligations.

2.6 Government programs

Yet another question to consider is how leasing farmland for solar energy development will affect eligibility for government programs such as the USDA's Conservation Reserve Program, Conservation Reserve Enhancement Program, and Environmental Quality Incentives Program. Placing a solar facility on lands that are under these types of USDA program contracts could violate the terms of the contracts and trigger penalties, loss of future payments, or reimbursement of past payments. A solar developer might be willing to address these financial losses for the landowner. Because solar development on farmland is still relatively new, the USDA does not have a formal policy on the compatibility of solar energy facilities with conservation program lands. This makes it imperative for a landowner who has land in such programs or plans to enroll land in the future to discuss the situation and implications with the appropriate agency personnel.

2.7 Liability and insurance

Does having a solar energy development on the farm pose additional liability risks for a farmland owner? What if someone visiting the farm suffers an injury at the solar facility? What if a curious neighbor child breaks into the site and is harmed? Or a hunter's stray shot breaks a solar panel? These questions raise issues not only of whether a landowner will be responsible for someone harmed at the project site, but whether the landowner will be liable to the developer for harm to the solar project. The answers to these questions will depend largely on the facts of the situation and the terms of the solar lease agreement.

Insurance and indemnity clauses are common in solar leases. An insurance clause might require both the landowner and the developer to maintain certain levels and types of liability insurance. An indemnification clause might attempt to shift liability for damages or injuries to the landowner if such harm was not the result of the developer's inaction, misconduct, or negligence, or could work the other way and shift liability for harm to or by trespassers to the solar developer. Because of such insurance provisions, it's important for a landowner to review liability risk and insurance needs with an insurance professional. Insurance providers have risk analysts who can estimate appropriate amounts of coverage in light of the lease.

These risk assessments are a helpful piece of information for a landowner debating whether or not to enter into a solar lease.

2.8 Neighbor and community relations

Changing land from farmland to a solar energy project can affect neighbors and the surrounding community. As with other forms of energy development, there will be neighbors and others who do not like solar energy or don't want to see solar modules in the landscape. Some may fear that the development will lower their property values or will not be removed at the end of the lease period. Neighbors will be subject to noise, dust, and truck traffic during a solar project's construction period. Nearby organic farms and home businesses may be particularly concerned about potential impacts on their lands and businesses. All of these issues may raise conflict in the community and between neighbors, particularly if the neighbors are the last to know about an impending solar project.

Remember that the solar project approval process described in Chapter 1 allows any interested party to review the solar project materials and submit written comments on the project to the Ohio Power Siting Board. A landowner who is considering a solar lease must be prepared for both positive and negative reactions from neighbors and the community, and such reactions could be made public through the regulatory process. The landowner may need a plan for determining how, when, or whether to notify the neighbors of the solar lease and whether or how to address neighbor concerns.

Zoning is an issue that neighbors and community members might raise as a means to limit utility scale solar energy production. However, Ohio law limits local zoning authority over "public utilities." Counties and townships have no authority to regulate:

> *"the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use or enlargement of any buildings or structures of any public utility* [...], *or the use of land by any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad for the operation of its business."* Ohio Revised Code §§ 303.211(A), 519.211(A).

Supplying electricity for light, heat or power purposes to consumers within the state qualifies as a "public utility" according to Ohio Revised Code § 4905.03(C).

Note that the Ohio Legislature has granted a slight exception to this zoning limitation by giving counties and townships authority to regulate the location of small wind farms, but a similar exception does not exist for solar projects. Therefore, a county or township can't "zone out" a solar energy development that supplies electricity for consumers.

These limitations should not be confused with Ohio's "agricultural exemption" from county and township zoning regulations. Many farmland owners are likely familiar with this exemption, which limits county and township zoning authority over agricultural land uses and structure. The agricultural exemption does not apply to farmland that will transition to a solar energy development.

2.9 Who is the developer?

A multi-decade lease sets up a long-term relationship between the landowner and developer. Knowing who is on the other side of that relationship can minimize future problems between the parties. Is the developer in a sound financial position? If not, payment issues might arise. Is this a new business, or does the developer have little experience with solar energy production? If not, the project might not go as planned. What reputation does the developer have with other parties, especially other landowners? Answering these questions requires a farmland owner to engage in "due diligence" on the solar development company. While learning as much as possible about the company may be a difficult task, it could help avoid entering into a problematic relationship.

Be aware that in some cases, the initial contact with a landowner is by a "landman" or a land broker who is assembling parcels for or to sell to a developer. Landowners should verify whether the party they're dealing with is a landman or a developer. If the person is a landman, try to determine whether a developer is also involved and whether the landman has full authority to negotiate on behalf of the developer.

2.10 Professionals who can help you

This chapter illustrates the complexity of making a decision about leasing farmland for utility scale solar energy production. While we've raised many issues to consider, other professionals that farmland owners work with might have additional issues of concern for particular situations. These professionals can provide valuable insight and guidance for the solar leasing process. We recommend assembling a team of professionals who can help you, which could include:

- Attorney who is familiar with solar leasing
- The farm business or family attorney, if different than the above attorney
- Accountant
- Financial planner
- Lender
- Insurance professional
- OSU Extension professionals in energy education, farm management, agronomy, community development, and agricultural law

Final words on initial considerations

As with everything in life, there is always more to learn and think about. This chapter explains the important legal and social implications of signing a solar lease, but it should serve as a foundation for further inquiry. Each farm and each family is unique. A farmland owner may have other considerations to make before deciding to commit to a long-term solar lease. If your gut tells you to think more about a particular issue, trust your judgment to inquire.

Who can help you learn about a solar energy developer?

The developer. Ask for the most recent financial and annual reports, a project portfolio, and names of landowners with whom the developer has done business.

The Ohio Secretary of State's online "Business Search" tool. A landowner can see whether the company is registered to do business in Ohio, find its address and agent for contact purposes, and learn whether the company is operating for-profit or as a non-profit. The website's "Uniform Commercial Code" tool lets a landowner see whether there are any financing statements filed by creditors of the company. Find this information at https://businesssearch.sos.state.oh.us.

The Better Business Bureau. This organization can help determine whether people have lodged complaints against a company.

Credit check services. Companies like Dun and Bradstreet can provide a credit check on a business or individual for a fee.

County Recorder's office. Check for names of other landowners with solar leases that have been recorded in the public records. While others under lease may not be able to discuss confidential information, they may be willing to talk about their working relationship with the company.

Attorneys who have worked on solar leases. They may know about a solar developer, its reputation, and its willingness to work with landowners.

The Ohio Power Siting Board. A search through this agency's online records will show if the developer has any other energy development projects in process.

The Solar Energy Industry Association. SEIA established a business code to promote transparency, good faith, and understanding in the solar energy industry. Check the code at https://www.seia.org, and ask the developer if it is a member of the association.

A general online search. Use Google or another search engine to find the developer's website, along with any news, articles or other information about the developer.

Resources

"Energize Ohio," *Community Development*, OHIO STATE UNIVERSITY EXTENSION, https://comdev.osu.edu/programs/economic-development/energy.

"State Programs," *Farm Service Agency: Ohio*, UNITED STATES DEPARTMENT OF AGRICULTURE, https://www.fsa.usda.gov/state-offices/Ohio/programs/index.

Ted Feitshans and Molly Brewer, "Threshold Issues for Landowner Solar Leasing," NORTH CAROLINA STATE UNIVERSITY EXTENSION, (Feb. 2, 2016),https://content.ces.ncsu.edu/threshold-issues-for-landowner-solar-leasing.

In this chapter

- *Letter of intent*
- *Option to lease*
- *Solar lease*

3 Common Legal Documents

Legal documents can feel long and hazy, but they do not have to be hard to understand. Fortunately, solar energy developers often use similar legal documents to enter into the solar leasing process with landowners. Their contents will vary from developer to developer, but their purpose is consistent, as we explain in this chapter.

Solar developers have many ways of making an initial contact with a landowner in an area that's under consideration for solar development. A landowner might receive a letter, for instance, stating that the developer is seeking land for a solar energy development project and providing a phone number to call to learn more about leasing land for the project. Or a developer might send out a post card announcing a local informational meeting about a potential solar development project. These types of initial contacts are primarily informational and don't involve legal documents that seek to obligate a landowner to a leasing situation.

At some point, however, a solar developer will send a legal document or set of documents that attempt to engage the landowner in a legal agreement. Some developers prefer to use a "letter of intent" as the first step in the leasing process, while some may skip the letter of intent and send a landowner an "option to lease." Others might combine an option to lease with the actual solar lease. Because these documents can be legally binding, it's critical for a landowner to understand the content and legal implications of the documents. We explain each below and highlight important issues for landowners.

3.1 Letter of intent

One document that a solar energy developer may use after identifying a potential site for development is a letter of intent, also referred to as a term sheet or preliminary agreement.

The purpose of this type of document is to "reserve" the property while giving the company time to investigate the site. The document can be a short and informal notification to the landowner of the company's interest in the property, or it might be a more detailed description of the project with proposed solar lease terms.

Although a letter of intent is preliminary, a landowner must review a letter of intent carefully because the document might lock in the developer's right to lease the property if it decides to proceed with a project. If so, the terms in the letter of intent, such as payment amounts and length of the term, would be the terms that would apply to the leasing situation. A letter of intent that is signed by a landowner and contains the essential terms of a lease or a confidentiality clause can be **legally binding** and enforceable by a developer. However, if the document contains language stating that it is for "informational purposes only" or is "not to be interpreted as a binding contract," then the letter of intent is not attempting to bind a landowner to a contract.

The document usually includes a **confidentiality clause** that prevents the landowner from negotiating with other solar energy companies and requires the landowner to keep all information about the project confidential. This type of clause might state:

> "Landowner agrees not to solicit or negotiate or permit its agents or employees to solicit or negotiate or furnish information to any other solar power entity concerning the construction and development of a solar project on the Landowner's property."

3.2 Option to lease

While a letter of intent may or may not be binding, an option to lease is a binding agreement by a landowner that grants rights to the developer. Like a letter of intent, an option provides the developer with time to do its due diligence and investigate the property, secure other land parcels, and obtain financing and government permits. An option to lease will likely contain many of the essential terms of the solar lease. In fact, many solar energy developers will attach the proposed lease to the option document. Others might include an option within the lease, which negates the need for a separate option to lease document.

Be aware that while an option is binding on a landowner, **an option does not bind the developer** to actually develop the project. It only binds the developer if the developer chooses to exercise the option and proceed with the project. However, the developer must provide "consideration," the legal term for compensation, to a landowner in order for the option to be legally enforceable. The typical way to do this is to make a lump sum **payment** to the landowner for signing the option, which may be referred to as a "bonus payment." The option may also include the amount of an annual payment the developer will make to the landowner during the option period, on a per acre basis.

It's important to understand the **length** of the option period. An option might be in place at least one year, but it could last for several years or more. Two to five years appears to be common.

A developer may allow a landowner to continue to use the land for **crop production or grazing** during the option period. If so, there must be language in the option that addresses how the landowner can use the property during the option period. There should also be provisions for **damages to crops or forage** if the developer exercises the option and begins construction of the project when crops are in the ground. The document should explain how and when the developer will notify the landowner if it intends to proceed with the lease, which might allow the landowner time to remove crops and livestock from the project area in order to prevent damages.

Critical junctures

Whenever a solar energy developer sends you something in writing that requests your signature and offers you money, you want to make sure that you understand exactly what that document says.

We call this a critical juncture because the act of signing the document will **bind you** to whatever provisions the solar energy developer included, and courts will enforce it.

So be on the lookout for:
- A written document
- Requesting your signature and
- Offering you money

3.3 Solar lease

The solar lease serves as the primary written legal agreement between the farmland owner and the solar energy developer. It contains the terms of payment, the lease duration, rights and obligations of both parties, tax and liability issues, and more. Solar leases are commercial leases, and courts assume that parties to a solar lease can negotiate and understand the terms of the lease. While the law regulates residential leases to protect consumers, the law does not provide the same level of protection for a commercial lease. As courts are apt to enforce the terms of a solar lease, it is imperative that a landowner fully negotiates and understands the lease provisions. We discuss these provisions in detail in the following chapter.

Resources

Wendy Walker, "Agricultural Solar Energy Development: Understanding Lease Agreements for Utility-Scale Installations," MICHIGAN STATE UNIVERSITY EXTENSION (2019).

Final words on common legal documents

Solar energy developers commonly use documents such as the Letter of Intent, Option to Purchase and Solar Lease to create agreements with a landowner. Don't worry about what a document is called as much as what it means for you. It is in a landowner's best interest to **carefully read each document**. Ask questions, do research, and gain a clear understanding of what the document contains and how it obligates you. Be aware that signing a written document that requests your signature and offers you money may bind you to a legal agreement. When you receive a document from a developer, talk with an attorney and the rest of your professional team before signing the document.

In this chapter

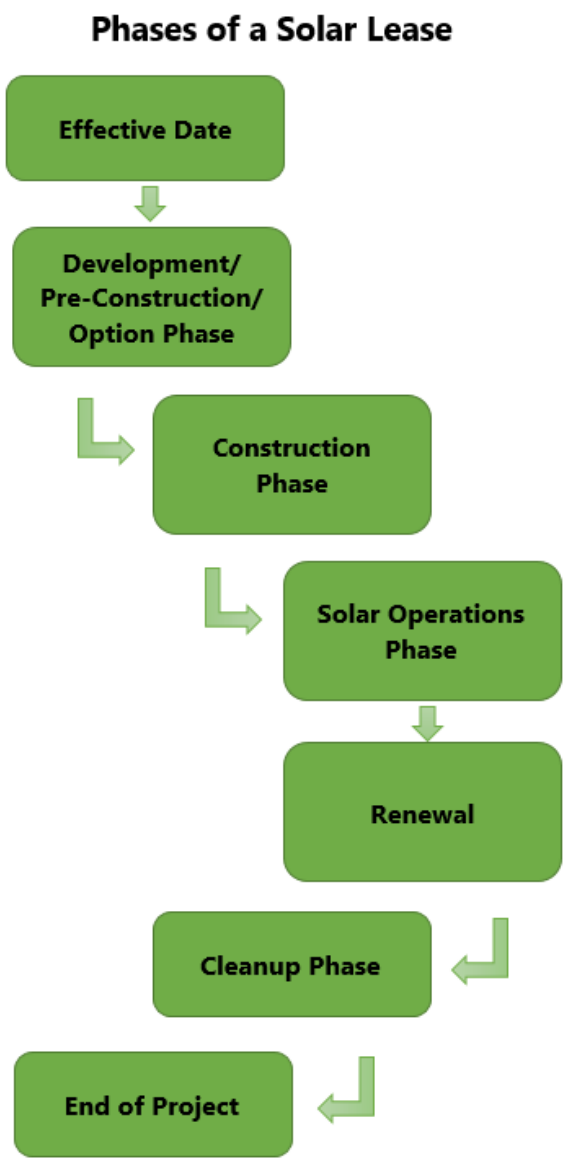
- *The life cycle of a solar lease*
- *Common solar lease terms*

4 The Solar Lease

The solar lease is a long-term legal agreement that will dictate the rights and obligations of the solar energy developer and landowner. A landowner who negotiates and fully understands the terms of a solar lease is more likely to be satisfied with the arrangement. We begin this chapter by explaining the life cycle of a solar lease, then discuss common solar lease terms and highlight leasing issues of importance to farmland owners.

4.1. The life cycle of a solar lease

A solar energy lease has a life: a beginning, an end, and defined phases in the middle. Each phase in the lease involves different activities that the developer will have a right to conduct on the property. A landowner's rights and restrictions might also vary during these different phases, as will the amount of the rental payments. For these reasons, it's important to understand the different phases of a solar lease, when each begins and ends, and the rights and obligations that accompany each phase. Before we examine solar lease terms let's take a closer look at the phases of a solar lease, which we've illustrated on the next page.



The beginning of the lease's life is known as the **effective date**, which is the date on which the parties have properly signed the agreed upon lease. From this point forward, the parties are bound by a legally binding contract. Upon the effective date, a solar lease typically enters into a **development or pre-construction phase**. If the parties had not already entered into an Option to Lease as explained in Chapter 3, then the lease might refer to this phase as the option period. During this phase, the solar energy developer is determining whether it will or can install a solar energy facility on the land. The developer will have rights to enter the property for surveys, feasibility studies, and other investigatory practices. The developer could also be working on project design, regulatory approval, securing financing, and similar activities. A landowner might have rights to continue farming the land during this phase, which may last for about two to five years. Typically, if the developer doesn't begin or give notice to begin construction of the project before the end of this phase, the lease will terminate.

The **construction phase** is the period of time when construction activities occur. This phase includes site clearing, construction and improvement of roads, installation of temporary structures, fencing, solar modules and transmission equipment, and any other activities necessary for installing the solar facility. The length of this phase might last from nine months to over a year, depending upon the size of the project.

The **solar operations phase** begins when the equipment is on the ground and solar energy is actively being produced. This phase can range from 15 to 30 years, which is intended to give a developer time to enter into long term power purchase agreements with energy buyers and maximize the anticipated useful life of the solar energy equipment.

A solar lease usually also contains a **renewal period** that would allow the developer to continue the project for an additional period of time without having to renegotiate the lease, likely five or ten years.

Once the solar operations phase has run its course, the **cleanup phase** begins. During this phase, the developer will remove the solar facility. A common amount of time for a cleanup phase is one year from the completion of the solar operations phase. The end of the cleanup phase also signals the end of the project.

4.2 Common solar lease terms

As we noted in chapter 3, while each solar energy developer's lease template may look different from others, the lease documents generally contain many similar provisions. This consistency allows us to explain what those leases contain and what to look out for.

The guide loosely organizes the topics in an order that seems fairly common in solar leases, but this does not mean that your lease will contain all of the terms and topics in this order, if at all. It may require a little digging and jumping around for you to determine whether something is or is not included in your lease.

In this chapter, we explain these common terms contained in many solar leases:

- The parties
- Description of the property
- Lease periods and payments
- Compensation for property damages
- Other compensation
- Easements
- Landowner obligations
- Property maintenance
- Termination
- Cleanup
- Miscellaneous legal clauses

Solar Power Purchase Agreement (PPA)

A solar power purchase agreement is a contract between an energy producer and a purchaser of energy. It outlines how much energy a purchaser will receive, how much the purchaser will pay for the electricity, and other important terms. Because a solar energy developer wants to ensure it has a purchaser of its energy, it often enters into a power purchase agreement that will last the same period of time as the solar operations phase.

The parties

A sometimes overlooked provision in a lease is the designation of the parties who are subject to the lease. The lease will refer to the solar energy developer as the lessee, tenant or company and the landowner as the "landlord," "lessor," or "owner." It's important that whoever holds the legal title to the property is the party designated in this way. If a husband and wife or other co-owners hold title to the property, both must approve and sign the lease. If a business entity holds the title, then the authorized representative must sign the lease on behalf of the business entity, but only after the entity has approved the lease according to its operating provisions. Likewise, if the land is held in a trust, the trustee must have the authority to enter into the lease according to the provisions of the trust and must sign the lease on behalf of the trust.

Description of the property

A solar lease must accurately describe the location and amount of property that is subject to the lease. While this may sound simple, inaccurate or vague descriptions can occur and can create uncertainty in the future. A landowner should review the description carefully before signing a lease to avoid being caught by surprise later when learning that the lease burdens more, less, or different land than the landowner thought.

One approach to describing the property is to include a **legal description** in the lease, often taken from the deed for the property. However, old legal descriptions may be outdated or may require revision if only a portion of the property is to be included in the lease. For these reasons, the parties may want a new **survey of the land**. In this case, the lease should state who will pay for the survey, what type of survey is acceptable, and when the survey must be completed. Many developers appear to prefer having a new legal survey of the lease property and will include this provision in the lease.

Another approach is to also include a **map or photograph** of the property that identifies the project's boundaries. This may be based upon the surveyor's work, a tax map, or an aerial photograph. This can be helpful because it shows clearly identifiable landmarks such as waterways or structures, allowing the landowner to visualize and verify the project boundaries.

Lease periods and payments

As we explained at the beginning of this chapter, the solar leasing arrangement has several distinct phases, referred to in the lease as periods or lease term. Note that not all leases use the same names for these periods, so a landowner might see different designations than the periods we describe. Less important than the name for a period is what occurs during the period, how long the period may last, and the amount of payment for the period. It is likely that the amount of the payments will vary for different periods of the lease. For example, the rental payment will likely be at its lowest value during an option period and at its highest amount when the facility is operating and producing energy. A landowner should also understand the entire length of time that the lease will be in place, determined by adding all of the periods together.

If a separate option to lease doesn't already exist, a lease will include an **option period**. This is the amount of time the developer has for determining whether the project will move forward. The option should contain provisions for how the developer must notify the landowner that the project will not proceed. Once a developer gives such notice, both the option period and the lease itself comes to an end. Some developers pay a lump sum amount for the option period, some pay a "bonus" or lump sum plus an additional annual rental payment, and some might pay only an annual rental amount.

Take a look at this example of option provisions in a solar lease:

> "Option Term: Five (5) years. Developer shall have the right to terminate the option.
> Initial Consideration: Within fifteen (15) days of execution of the Option, developer shall pay to owner $X as initial consideration.
> Option Payments: $X per acre per year shall be paid to Owner on an annual basis during the term of the Option."

A lease will also describe the **development or construction period**. This phase of the lease typically begins once the developer announces that the project will proceed, commonly referred to as "exercising the option." Some leases refer to one development period and include construction activities and one rental amount throughout the period, while others might separate the development and construction periods into two distinct terms with different time periods and payments for each. Here's an example from a solar lease that designates a development period:

> "Development Period: The period commencing at the end of the Option Period and expiring on the date three (3) years thereafter.
> Development Period Payments: $XX/acre/year."

The **solar operations period** is the longest period of time in the lease and probably the period that receives the most attention from a landowner as it represents a significant revenue stream over a long period of time A lease usually describes this period as the time during which energy is being produced at the site. The rental amount is typically highest during this period, and will likely include an adjustment for inflation because the period may last for 20 years or more. The inflation adjustment may be tied to a measure like the Consumer Price Index, or may be a fixed rate to provide more certainty for the developer's project costs. Here is an example of an operations period provision:

> "Operations Period. The solar operations phase of the Project will be for a period of thirty (30) years from the date when at least one solar generating facility is installed and operational on the Premises.
> Operations Rent. During the Operations Period, an annual payment equal to the sum of $XXX per acre of land within the Solar Project Area and $XX per acre of Property outside of the Solar Project Area. The Operations Rent shall be adjusted upward annually by two and one-half percent (2.5%) each year (the "Inflation Adjustment Factor")."

A lease's **renewal** clause allows the developer to extend the lease for an additional amount of time. Renewals are at the option of the developer, and renewal automatically occurs if a developer provides notice of the renewal to the landowner. Certain lease terms could be renegotiable in a renewal situation, such as rental payment. The period for a renewal term varies among solar leases from about

five to 20 years. Some leases include one set period of several years or more, and some allow up to two or three renewal periods. A renewal provision might read:

> "Developer will have the right at its option to extend the solar operations phase for up to two additional periods of five years. To exercise its option, Developer must deliver a written extension notice to the Owner at least six months prior to the expiration of the solar operations phase. Developer will have no right to extend the lease term beyond its two additional periods."

Finally, a lease may contain a **cleanup period**, which gives the solar energy developer a set period of time to remove the equipment and restore the land. The typical time allotted for cleanup is around 12 months, depending upon the project size. More on cleanup later.

Adding all of the periods in the lease term together will clarify the **total length** of the leasing arrangement. In the above examples, the option period could last for up to five years, the development period would last for three years, the solar operations period would be in place for 30 years, and there is a possibility of two five-year renewals. The total period of time that the land could be subject to the lease would be 48 years.

Compensation for property damages

A lease should also include other payments that compensate a landowner for damages that occur to the landowner's property over the lifetime of the lease. Of particular importance to farmland owners is the possibility of damage to the farm's **drainage system**. Moving equipment, building roads and laydown yards, installing cable trenches, installing posts, and other similar construction activities could interfere with or damage both subsurface drainage tiles and surface drainage ways. A lease should specify how a developer will address these situations, either by compensating the landowner or repairing the problem. Compensation measures could address both the drainage infrastructure and harm to crops or property due to a drainage interference. If a developer is to make repairs, a lease may include guidelines for the repairs. To avoid the possibility of harm to drainage infrastructure, a lease might require a landowner to provide a map to the developer showing all drainage improvements on the property.

Compensation for **crop damage** is another unique issue of concern for farmland owners, as this example illustrates:

> "During initial construction, Developer shall pay Owner for damages to crops on a per acre basis (prorated for fractional portions of an acre), for any and all portions of the Premises that are taken out of commercial crop production during the construction of the Solar Facilities and any and all crops that are removed or damaged as a direct result of Developer's construction and operations."

Harm to crops first arise if a developer decides to begin construction activities when crops are still in the ground. Damages to crops might also inadvertently occur when maintenance and similar activities are carried

out throughout the lease period. In these situations, a lease can require a developer to compensate the landowner for crop losses. It's important, however, that the lease address how to determine the value of an unharvested crop. Common factors to consider are the location, average yield in the area, and predicted price that would have been paid for the crop. Each lease may use a slightly different calculation, or at least involve different definition for such factors. Here's an example of a crop damages calculation provision:

> "Crop damage will equal the amount of damaged acres (based upon Owner's reasonable estimate as agreed upon by Developer's representative) multiplied by the average yield in the county where the property is located multiplied by Price multiplied by 1.1.
>
> The average yield in the county where the property is located shall be based on the average yield for the latest three years in the county as published by the National Agricultural Statistics Service.
>
> The price shall be based on the respective commodity's futures price for December delivery with the Chicago Board of Trade as of the close of the 15th day of the month during which the damage occurs."

In the above example, crop damages equal Acres X Average county yield X Price X Multiplier of 1.1. The farmland owner should understand these term, and what they mean for crop damage payments.

For example, *acres* refers to the volume of land affected by the developer's activity and taken out of agricultural production. In the example, acreage is based on a reasonable estimate by the landowner and the developer has the right to challenge this acreage estimate.

The *average crop yield* for the county refers to the expected volume per acre of crop that would have been produced had this crop made it to harvest. It's common to follow an approach like the example and average the yield over several years. A lease will also identify a data source for yields, such as the National Agricultural Statistics Services.

The *price* for the crop is likely to cause the most confusion for farmland owners. The simplest method is to use an objective benchmark such as a market commodity price for a set day in the month during which the damage occurs. The *price* is not determined by the market value of the crop on the day it was damaged, but by the market value on the specified day in the month the damage occurred.

A crop damages calculation might also include a multiplier that serves as a bonus payment to compensate the farmland owner beyond the calculated fair market value of the lost crop alone. The multiplier recognizes that the crop could have been worth more in reality, or may serve as an act of good faith, or an apology for the landowner's loss of sweat equity in the crop.

Other compensation

Some solar energy developers will offer to cover **expert expenses** incurred by the farmland owner in conferring with an attorney, accountant, or other advisor about the solar lease. The total amount covered by the developer may be capped at a certain dollar amount, so the landowner will want to ensure that the cap provides enough funds to seek adequate counsel for an informed decision.

A lease can also provide compensation for removing the land from a **differential property tax assessment program** such as Ohio's Current Agricultural Use Valuation program. This provision should cover the entire amount of the "recoupment fee" that the landowner must pay for converting the land and removing it from the program. Likewise, a lease can reimburse the landowner for any **conservation program** penalties resulting from the withdrawal of lands from government programs. We discuss these issues in more detail in Chapter 2 of this guide.

Easements

An **easement** is a legal right to use the property of another. A typical solar lease includes multiple easements that grant the developer different rights to use different parts of the property for different purposes. It's important for a landowner to know which type of easement exists on which part of the property, and the time period or extent of each easement.

Most solar energy leases contain the following types of easements:

- Construction easement
- Access easement
- Transmission easement
- "Nuisance" easement
- Solar easement
- Catch-all easement

A **construction easement** provides the solar energy developer with the right to access the land for the purposes of preparing the ground for development and installing the solar equipment. In addition to constructing the solar panel system, construction activities are also necessary for temporary and permanent access roads, "laydown areas" used for staging the equipment until it is installed, and areas for office trailers, parking, and employee activities. Since such activities involve heavy machinery and gravel yards, landowners should consider the location and impact of the construction activities that are granted by the construction easement. Negotiation might be necessary, especially if the landowner has future plans for construction areas.

An **access easement** grants the developer the right to cross the landowner's property to

> "Owner grants an easement over, across, and on the Premises for ingress to and egress from the Solar Facilities by means of any existing roads and lanes, or by such route or routes as the Developer may construct from time to time at its discretion. Such right will include the right to improve existing roads or lanes, or to build new roads."

access the solar energy facility. Here's an example:

This provision allows the solar energy developer a number of important rights. It grants a right to use existing roads, lanes, and access points on the property and also lets the developer improve those paths. The example doesn't define the extent of such "improvements," so a landowner may want clarification on this issue. We can assume that improvements could include laying down gravel, installing drainage ways, constructing a bridge, or other measures "reasonably necessary" for access. The easement also allows a developer to create a new road or lane on the property. Sometimes this provision will include language that gives the developer sole discretion in determining the new routes. If there are areas that a landowner does not want to be developed as new roads or lanes or if the landowner wants to have a voice in the location of the roads, the landowner must negotiate such terms so that they are included in the lease.

In addition to getting its people and equipment to and from the solar facility, a developer needs to get its power to the grid. A **transmission easement** grants the developer the right to install equipment and power lines for transmission purposes. This easement can include the installation of power lines, poles, or channels above, on, or beneath other parts of the landowner's property that are beyond the solar project location, as determined by the developer. The easement also allows the developer to access the transmission areas for the duration of the project and make repairs or improvements over time. As with the other easements, a landowner must negotiate any exceptions or parameters to these rights before signing the lease. A transmission easement provision may look like this:

> "Owner grants an exclusive easement on, over, and across the Property for one or more line or lines of poles and/or towers, with such wires and cables as from time to time are suspended therefrom, and/or overhand and/or underground wires and cables, for the transmission and/or collection of electrical energy and/or for communications purposes, along with all necessary and proper foundations, footings, towers, poles, cross arms, guy lines and anchors and other appliances and fixtures for use in connection with said towers, wires, and cables."

The development, construction and operation of a solar facility can create annoyances or inconveniences to landowners, such as noise, dust, traffic, vibrations of the earth, and sun glare. In anticipation of these potential impacts, solar lease agreements will include a **nuisance easement**. This easement prevents the landowner from bringing a nuisance claim against the developer. Note that the easement does not apply to neighbors who may believe that the activities create a nuisance since the neighbors are not a party to the contract and are not bound by its terms. Here's a typical nuisance easement:

> "Owner grants an easement and waives any claim arising in nuisance for conditions common to solar energy projects, such as construction activities, maintenance activities, noise originating from equipment, reflective glare, and other nuisances."

A solar facility needs one crucial component: access to the sun. The all-important **solar easement** ensures that the solar facilities can receive sunlight without interference from the landowner, as this example illustrates:

> "Owner hereby grants and conveys to Company an exclusive easement on, over and across the Premises for the open and unobstructed access to the sun to any Solar Facilities on any of the Project Properties and to ensure adequate exposure of the Solar Facilities to the sun."

This provision may apply to all the land owned by the landowner, regardless of proximity to the solar energy facility. It might also specifically prohibit the landowner from placing any new trees, buildings and other improvements on the property in a way that the developer believes will interfere with solar access.

Be aware that a solar lease agreement might also include a **catch-all easement** that aims to maximize the developer's right to use the land. These provisions are often broad and vague, which could be problematic for a landowner.

Landowner obligations

The lease is not all about the solar energy developer. The farmland owner also has obligations and rights under the lease agreement. Some of these are for the benefit of the solar energy developer, but many benefit the farmland owner. Four common lease terms obligate the landowner to act, or not act, in a certain manner. While each may only be a sentence or two long, they include important restrictions on what a landowner can or cannot do in regards to the leasing arrangement.

A **non-interference** provision is a promise by the landowner not to interfere with the solar energy developer's rights and easements. A broad non-interference provision will state that a landowner cannot impede the solar energy developer's ability to construct, operate, and do anything it is allowed to do under the agreement.

An **exclusivity provision** guarantees the developer's right to sole possession of the lease property. An exclusivity provision might also prohibit the landowner from allowing other solar developments on the landowner's premises, such as this example:

> "Owner shall in no event construct or allow others to construct any solar energy facility or similar project on the Premises."

A **quiet enjoyment provision** allows the solar energy developer to peacefully enjoy all of its rights under the agreement and may explicitly state that the landowner promises

not to hinder or interrupt the solar energy developer's rights or allow any other party to do so for the duration of the lease agreement. Such a provision can force the landowner to defend the developer's rights in the property against any other parties.

We mentioned **confidentiality clauses** in Chapter 2 when we explained the Option to Lease document. A solar lease will also usually include a confidentiality provision that prohibits the landowner from sharing certain information contained in the lease. Many confidentiality provisions begin by protecting the financial and payment terms of the lease, which keeps one landowner from knowing how much another landowner will receive for a solar lease. A confidentiality clause might also cover methods and technology that the solar energy developer believes is its proprietary information. Take this example of a confidentiality clause:

> "Owner shall maintain in the strictest confidence all information pertaining to the financial terms and payments under this Lease, Developer's site or product design, methods of operation, methods of construction, power production, and other such information deemed proprietary by the Developer."

A confidentiality provision also usually includes termination and expiration language that continues confidentiality beyond the lease period. Take this example:

> "The provisions of this confidentiality clause shall survive the termination or expiration of this Lease."

This example does not stipulate how long beyond the end of the lease that the confidentiality clause will last. In such a case courts usually conclude that the clause lasts for "a reasonable time."

Many leases also address **owner improvements**, and what happens when an owner's improvements interfere with the project's open access to the sun. Often lease agreements will allow existing structures and trees to remain, but either require developer permission for future improvements or impose certain criteria that the landowner must follow to build a new structure nearby. Landowners may be able to negotiate for an improvement term that requires the solar energy developer to consent to an owner's request so long as the improvement does not negatively impact the solar facility's access to sun. Farmland owners who want to protect certain structures or guarantee the ability to add structures in the future want to read these provisions carefully to ensure that the farmland owner's needs are addressed.

Once the solar energy development has been constructed, landowners will retain the right to use the access easements granted to the solar energy developer. However, the landowner cannot interfere with the solar energy developer's use of the easement path.

Property maintenance

A solar lease should address who will maintain the property in and around the solar project site. Often, the solar energy developer will be responsible for mowing, removing weeds, keeping brush under control, and maintaining access points.

Developers prefer to keep this responsibility so that only its personnel will be near the project site. However, the lack of clear standards for property maintenance in a lease could become a point of contention.

Consider **noxious weeds**. In Ohio, noxious weeds are invasive or harmful plants designated by the Ohio Department of Agriculture to pose a risk to humans, ecosystems, or agricultural crops and livestock. Landowners have a legal duty to destroy noxious weeds located on their property after proper notification by the township. Failure to remove noxious weeds can result in government action and assessment of the costs of the removal on the landowner's property taxes. This type of problem could be avoided if the lease explains which party bears the responsibility to maintain the property. The lease can spell out who is responsible for **mowing the grass and weeds**, which is typically the developer, and outline what happens when the party responsible does not meet its obligations.

Some developers have interest in alternative solutions for maintaining the vegetation around a solar project site. A lease might allow the landowner to **plant crops** that are compatible to the site and will not interfere with the panels, such as alfalfa and clover. A lease might also allow **sheep** to graze among the solar panels. Unlike goats, which try to climb onto solar panels, and cows, which run into or rub up against the panels, sheep pose no risk of harm to a solar energy site.

Another option that might appear in a lease is to create **pollinator habitats** in the solar project area. This type of arrangement can

address who is responsible for planting and maintaining the habitat, and what to do if or when noxious weeds grow within the pollinator habitat area.

Termination

It's possible that a solar lease will not make it to the end of its natural life and one or more parties will find it necessary to **terminate the agreement**. Any thorough legal document or contract will outline when parties may permissibly terminate the agreement early, and what happens when they do. Solar leases commonly grant the developer the right to terminate the lease upon written notice to the landowner, with the notice taking effect a month or so after. On the other hand, farmland owners often may only terminate the solar lease in the event that the solar energy developer commits a material default of the lease, such as habitual non-payment of rent.

Cleanup

A solar lease will likely address two types of cleanup situations: post-construction and

post-project cleanup. **Post-construction cleanup** addresses the solar energy developer's duty to restore the land once the solar panels and all other equipment have been installed. Here's an example:

> "After the construction of the Solar Facilities, the Developer will remove any construction debris and will restore the portions of the Premises not occupied by the Solar Facilities to substantially the same condition that such portions of the Premises were in prior to the construction of the Solar Facilities."

A provision like this requires the solar energy developer to put the property in "substantially the same condition" as before construction began. This could require leveling of land, removal of construction materials, or reinstalling a fence that had to be removed. A landowner who wants the land restored in a certain manner after the solar panels have been installed should specify what he or she expects. This could include taking pictures of the land before construction.

Post-project cleanup deals with the solar energy developer's duty to restore the land once the lease has ended, whether due to expiration, termination, or otherwise. The clause should outline when and how the developer will remove all of the solar facility from the landowner's property. Take a look at this post-project cleanup clause:

> "At the end of the Term, including upon any termination of the Lease, the Developer will remove all of its Solar Facilities within twelve months from the date the Term expires or the Lease terminates."

The example gives the developer a set time frame to remove its solar panels and equipment from the property: A lease might pair this type of clause with an express easement that grants the solar energy developer a right to continue to access the land during the cleanup time frame. A lease should lay out what happens if the solar energy company fails to remove its equipment. For example, a lease might grant the landowner permission to clear the equipment and seek reimbursement from the solar energy developer for the cost of removing the equipment.

An important provision for the landowner in regards to cleanup is a requirement for a developer to **escrow** funds as security to cover the cost of cleanup. The funds can be placed into an escrow account or an investment grade security. The landowner would likely only receive the funds if the solar energy developer fails to remove its equipment as scheduled.

Also in the landowner's best interest would be standards for **restoring the land** after removal of the equipment. If the solar energy developer installed foundations to support the solar panels or other equipment, will they be removed? Will they be removed entirely, or only to a certain depth? Did the construction affect drainage tiles? Does the landowner want the solar energy developer to leave improvements such as gates and fences or roads? These are all important issues that a lease can address, with pictures and descriptions of the property to provide guidance.

Miscellaneous legal clauses

As with any legal document, a solar lease will include common "boilerplate" terms. A **warranty of title** clause is a promise by the landowner that he or she is the true owner of the property and has the right to encumber the property. This clause should include an exception for previously existing encumbrances that are recorded or disclosed by the landowner, which would prevent a developer from terminating the lease by claiming that a landowner does not have clean title to the property.

A **hazardous materials** clause requires the farmland owner to certify that the land is in compliance with all applicable environmental laws and regulations, and that the landowner will continue to comply with all required environmental laws through the duration of the lease. As a companion duty, the developer also promises to comply with all environmental laws once it takes possession of the property. These companion promises relate to an often included indemnity provision that requires the party at fault to take responsibility for any financial, restoration, or other penalties.

Indemnity clauses aim to place legal liability on the party that has possession and control of a condition that causes harm. A solar lease will place liability for harm resulting from the solar project on the developer, while maintaining the property owner's liability if a person is harmed on other property areas and conditions that under the landowner's control.

A **condemnation** or eminent domain clause addresses what happens if the government to seizes some or all of the property its use. The clause should address whether a developer has to stop paying rent, and how to divide a condemnation award. The developer may attempt to claim all of a condemnation award as compensation for its improvements, loss of revenue, relocation costs, and lost value of its project. A more equitable split of a condemnation award would address both the developer's investment and the value of the real estate taken from the landowner.

Force majeure is common in many legal documents and addresses uncontrollable and unforeseeable acts of God. In the solar leasing context, a force majeure provision may allow the solar energy developer to suspend rental payments when an act of God prevents it from operating on the property or complying with any provision in the lease. The clause might also lengthen the term of the lease by the amount of time that the solar energy developer could not operate. This would mean that the solar energy developer would not pay rent during its down time and the lease term would automatically extend by the amount of the down time.

Lender protections frequently arise in solar leases, and are not usually negotiable. A developer's lenders may require guarantees that their financial investments in the project will be protected. Such clauses in the lease assure that the developer's lenders can recoup investments if there is a default by foreclosure or some other legal means.

Arbitration is a popular clause in many legal documents today. Arbitration is an out of court process that relies on one or more arbitrators to serve as decision makers for a dispute between two parties. An arbitration decision is binding on the parties and is enforceable in court. Be aware that some arbitration clauses prohibit a party from appealing the arbitration decision to a court of law, meaning that the landowner does not have another chance at resolving the problem. Look for a clause that does allow for an appeal and also requires mutual consent by the parties to use a particular arbitrator or arbitration service, which gives the landowner a say in who will be making a decision.

A **jury trial waiver** would prevent a landowner from requesting a trial by jury if a dispute arises with the solar energy developer. These clauses operate on the premise that a jury is swayed by emotional arguments, favors local residents, and has more discretion than a judge in applying the law, factors that tend to benefit a landowner more than a company. For these reasons, a developer may seek to have the landowner waive the right to a jury trial and have a judge make a decision. Landowner attorneys commonly seek to remove this clause and keep a jury trial as an option in the event of a dispute that goes to a court of law.

A **damages waiver** is an attempt to avoid compensating for any harm that results from a party's actions. In the solar leasing context, a damages waiver would run contrary to other provisions discussed earlier for damages to property, drainage, and crops, so should not be included in a solar lease.

Choice of law and choice of venue clauses are in many legal documents to provide predictability about where a dispute will be heard. If a legal dispute arises, these clauses pre-determine the location and state law that will apply to resolving the dispute. Such clauses are common when the parties are from different states. A landowner in a solar leasing situation will want to ensure that the disputes would be heard in the state where the leased property exists.

Attorney fee clauses take on a number of shapes and sizes, but are meant to shift the costs of litigating a dispute on one party or another. Beware of a solar lease that requires a farmland owner to pay the legal fees of the developer if any disputes result in legal action.

Resources

"Farmers' Guide to Solar and Wind Energy in Minnesota," FARMERS' LEGAL ACTION GROUP, INC. (2019) http://www.flaginc.org/wp-content/uploads/2019/04/Farmers%E2%80%99-Guide-to-Solar-and-Wind-Energy-in-Minnesota-April-2019.pdf.

Shannon Ferrell, "Solar Leasing for Agricultural Lands," National Agricultural Law Center (April 4, 2018) [webinar] https://nationalaglawcenter.org/consortium/webinars/solarleasing/.

Shannon Ferrell, "Understanding Solar Energy Agreements," NATIONAL AGRICULTURAL LAW CENTER (2019).

"Guide to Land Leases for Solar," SOLAR ENERGY INDUSTRIES ASSOCIATION (2016).

Solar Power Purchase Agreements," *Green Power Partnership*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/greenpower/solar-power-purchase-agreements.

Final words on the solar lease

A solar lease details the relationship between the solar energy developer and the landowner. Just as every relationship and piece of property is unique, each lease will be unique. This chapter examines a number of terms commonly included in a solar lease, but a lease may contain additional terms or may not include all of the terms covered here.

Understanding a lease document may take time, patience, and a willingness to ask questions. Consulting an attorney with experience in agriculture or solar energy leasing would be a wise step.

On a final note, entering into a solar lease means entering into a long-term relationship with a solar energy developer. A good working relationship requires good communication, and also a good understanding of the parameters of the relationship. The lease provides those parameters.

5 The Farmland Owner's Solar Leasing Checklist

Entering into a long-term lease agreement for your land is a big decision. Whether you're just starting to think about solar leasing on your land or already have a lease waiting for your signature on your kitchen table, the best time to make sure that a solar lease is in your best interest is now.

The following checklist condenses the information from this guide to help you remember things to do, issues to consider, people to consult, and questions to ask before and after signing a lease. The checklist is not an exclusive list, but is a starting point to help you get organized as you consider whether and how to lease your farmland for solar energy development.

1. Assemble your team of experts. You do not have to make an important decision like this on your own. From family members to your attorney and accountant, others can help you make an informed decision. Include the following in your team:

___ Attorney
___ Accountant
___ Insurance provider
___ Lender
___ Extension educator
___ Family
___ Business partners
___ Neighbors

2. Research the solar energy developer. It's always a good idea to know who you're dealing with in a business transaction. Research the developer who's contacted you about a solar lease. Does the developer have a good reputation with other leasing landowners, the Better Business Bureau, Public Utilities Commission, and Attorney General? Does it have other solar energy projects pending or in existence, and any problems with existing projects? Your own research and your team of experts can help you answer these questions.

3. Talk to your family. A solar lease can take a lot of land for a long period of time. Consider the following questions to make sure that you understand what this lease would do to your land, your family, and your plans for the future.

- How would the land and farm operation be impacted by this lease?
- What are the family's long term goals for the farm, and does this lease interfere with or support those goals?
- How does the family feel about not being able to use the land for a long period of time?
- How does the family feel about seeing and living with a large scale solar development on the farm?

4. Seek out Extension experts. OSU Extension and other state Extension organizations have expertise that can help guide you in the decision making process. Check out OSU Extension's Energize Ohio website, https://comdev.osu.edu/programs/economic-development/ energy for information about solar energy. A few questions Extension experts might help with include:

- Is there any data on rental values and crop damage payments in my area for solar leases?
- Are you familiar with this solar energy developer or its reputation?
- Can you connect me with other landowners in the area who have or are considering solar leasing?

5. Read all documents carefully and with professional assistance. The documents a solar developer gives to you can be legally binding once you sign them. Don't sign anything you don't understand. Make sure your team of professionals know about these documents, and let them help you review them.

6. Consider the terms of the solar lease. On the first read through, you don't have to understand everything in the lease. Note anything you don't understand so that you can ask questions and gain a clear understanding of what the lease proposes. Specific terms in the lease to review include these:

___ Accurate description of the property and parties
___ The term of each lease period, when each period begins and ends, and the total length of the lease
___ Whether renewal is permitted, how to renew, and length of renewal periods
___ Rental payments, inflation adjustments, and how each will be calculated
___ Whether farming and similar activities can continue prior to construction of the facility
___ Who pays for penalties for withdrawal of land from CAUV and government programs and termination of farmland leases
___ How to deal with existing mortgages
___ How damages to crops, improvements and drainage will be addressed
___ The types and extent of easements granted
___ Obligations of the landowner, such as non-interference and confidentiality requirements
___ Post-construction clean up obligations
___ Limitations on owner improvements such as new buildings, fences and tree plantings
___ Responsibility for maintaining vegetation, weeds, access points, driveways and fences
___ What happens if either party terminates early
___ Cleanup and restoration of the property at lease end, including funds for cleanup
___ Landowner's hunting and recreation rights
___ Potential interferences with mineral rights
___ Indemnity and insurance provisions
___ How conflicts will be resolved, including arbitration and waiver of jury trial clauses
___ How weather and acts of God affect obligations
___ Handling of proceeds from eminent domain actions
___ Payment of attorney fees if disputes arise

7. Meet the solar energy developer. Entering into a solar lease means entering into a long term business relationship with a solar energy developer. It's important to determine early on what kind of business relationship you would have and to review important lease provisions with the developer. The following questions can help.

- How long has your company operated in Ohio?
- How many similar projects have you completed?
- Can you refer me to other landowners that your company has partnered with?
- What is your timeline for this project?
- Do you intend to sell the solar facility after it's constructed?
- Will your company cover my expenses to have an attorney review the lease?
- What ingress and egress paths will be needed for construction and post-construction?
- How frequently will your agent(s) be on site?

- What will my land look like after the project has ended and been cleaned up?
- What are your procedures for cleanup?
- How do you handle property maintenance, and are there opportunities for grazing or haying on the site?
- What happens if or when your company causes damage to my crops?
- What happens if or when your company causes damage to my drainage tile?
- Will you notify me and neighbors when construction will begin?
- Do you take precautions to protect nearby lands from harm during construction, such as organic farms and home businesses?
- How can I contact your company?
- How quickly can I expect a response to a question or concern?
- Will you add verbal promises to the written lease?

8. Review the lease with your attorney. An attorney can ensure that you understand the lease. An attorney with experience in advising agricultural clients may have additional insights into provisions farmland owners should negotiate to include in their leases, such as crop damages and land use rights.

- How many solar energy leases have you reviewed?
- How much do you charge to review and negotiate the lease?
- Are you familiar with this solar energy developer or its reputation?
- Can you answer these specific questions I have about the lease provisions?
- What protections for me, my family and my farm are missing from the lease?
- How does this lease affect my estate plan and farm transition plan?
- How does this lease affect my long-term health care plan or options for health care?
- How does this lease affect my property taxes, government programs, and existing farm leases?

9. Check in with your accountant. Your accountant is your numbers expert who can analyze financial implications and consequences. Ask the following questions:

- What will the lease pay me for rental, and are the damages compensations calculated fairly?
- What are the tax consequences of signing this lease?

10. Consult with your insurance provider. Leases almost always include provisions about how much liability insurance each party must carry. Ask your insurance provider to determine whether you need additional coverage, and how much that will cost.

- Do I have the type of liability coverage that this lease requires me to have?
- What type and level of coverage do you recommend for this situation?

11. Talk with your neighbors. Neighbors will be impacted by the construction and long-term existence of a utility-scale solar development in the neighborhood. Some neighbors, such as organic farmers or home-based businesses, may have needs for special protections. Others may

react negatively to a proposed solar development. Knowing your neighbor's views and concerns can help you determine whether and how to proceed with a solar lease.

12. Review the survey or aerial maps provided by the solar energy developer or its surveyor. It's important to know what land would be affected by a proposed lease. If a survey has not been conducted, then you may need to contact a surveyor to obtain an accurate understanding of the land that would be affected by the lease.

13. Ensure that you have good title. Solar energy developers prefer to lease property that is free and clear of third party burdens such as liens and similar legal interests. Conduct a search of your property records online or at your county land records office to ensure that no surprise encumbrances have been recorded.

14. Re-read your documents. By now you should have a firm grasp of what your lease and other documents say, what signing the documents would mean for you, your family, farm, and community. If you read something again and have more questions, be sure to find an answer before signing.

If you do sign a lease

Your efforts don't end with signing a solar lease, as you've now begun a long term business relationship. Below are a few suggestions for next steps to take after entering into a solar lease. We recommend that you continue working with your professional team to identify other long-term needs for your leasing situation.

1. Store all documents and agreements in a secure location. Maintain both a hard copy and a digital copy of all documents associated with the solar lease.

2. Set up accounts and procedures for rental payments. Keep records to ensure that you receive all payments due under the lease.

3. Document any instances of property damage or other violations of the lease agreement. If the developer or its agent causes unauthorized damage, document when and how the damage occurred and the extent of the damage. Photographs or videos serve as important pieces of evidence.

4. Track your option period. If the developer doesn't notify your or begin construction by the end of the option period, the lease likely terminates. Know when the option period ends and you'll know if the lease continues or terminates.

5. Contact the developer for any permissions as required in the lease. Your lease may have included provisions requiring that you seek permission when engaging in certain activities like hunting, building structures, or planting trees near the project site. If permission is required under the lease, engaging in that activity without such permission would constitute a breach of contract.

6. Follow the dispute procedures in the lease. If you have a dispute about the lease, make sure that you refer to the lease to ascertain how you are to handle a dispute. If you don't follow the procedures outlined in the lease, you could lose certain rights to continue to dispute the issue.

KeyCite Yellow Flag
Proposed Legislation

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 115. Agricultural Commodity Policy and Programs
Subchapter I. Commodity Policy

7 U.S.C.A. § 9011

§ 9011. Definitions

Currentness

In this subchapter and subchapter II:

(1) Actual crop revenue

The term "actual crop revenue", with respect to a covered commodity for a crop year, means the amount determined by the Secretary under section 9017(b) of this title.

(2) Agriculture risk coverage

The term "agriculture risk coverage" means coverage provided under section 9017 of this title.

(3) Agriculture risk coverage guarantee

The term "agriculture risk coverage guarantee", with respect to a covered commodity for a crop year, means the amount determined by the Secretary under section 9017(c) of this title.

(4) Base acres

(A) In general

The term "base acres", with respect to a covered commodity on a farm, means the number of acres in effect under sections 8702 and 8751 of this title, as adjusted pursuant to sections 8711, 8718, and 8752 of this title, as in effect on September 30, 2013, subject to any reallocation, adjustment, or reduction under section 9012 of this title.

(B) Inclusion of generic base acres

The term "base acres" includes any generic base acres planted to a covered commodity as determined in section 9014(b) of this title.

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(5) County coverage

The term "county coverage" means agriculture risk coverage selected under section 9015(b)(1) of this title to be obtained at the county level.

(6) Covered commodity

(A) In general

The term "covered commodity" means wheat, oats, and barley (including wheat, oats, and barley used for haying and grazing), corn, grain sorghum, long grain rice, medium grain rice, pulse crops, soybeans, other oilseeds, and peanuts.

(B) Inclusion

Effective beginning with the 2018 crop year, the term "covered commodity" includes seed cotton.

(7) Effective price

The term "effective price", with respect to a covered commodity for a crop year, means the price calculated by the Secretary under section 9016(b) of this title to determine whether price loss coverage payments are required to be provided for that crop year.

(8) Effective reference price

The term "effective reference price", with respect to a covered commodity for a crop year, means the lesser of the following:

(A) An amount equal to 115 percent of the reference price for such covered commodity.

(B) An amount equal to the greater of--

(i) the reference price for such covered commodity; or

(ii) 85 percent of the average of the marketing year average price of the covered commodity for the most recent 5 crop years, excluding each of the crop years with the highest and lowest marketing year average price.

(9) Extra long staple cotton

The term "extra long staple cotton" means cotton that--

(A) is produced from pure strain varieties of the Barbadense species or any hybrid of the species, or other similar types of extra long staple cotton, designated by the Secretary, having characteristics needed for various end uses for which United

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States upland cotton is not suitable and grown in irrigated cotton-growing regions of the United States designated by the Secretary or other areas designated by the Secretary as suitable for the production of the varieties or types; and

(B) is ginned on a roller-type gin or, if authorized by the Secretary, ginned on another type gin for experimental purposes.

(10) Generic base acres

The term "generic base acres" means the number of base acres for cotton in effect under section 8702 of this title, as adjusted pursuant to section 8711 of this title, as in effect on September 30, 2013, subject to any adjustment or reduction under section 9012 of this title.

(11) Individual coverage

The term "individual coverage" means agriculture risk coverage selected under section 9015(b)(2) of this title to be obtained at the farm level.

(12) Medium grain rice

The term "medium grain rice" includes short grain rice and temperate japonica rice.

(13) Other oilseed

The term "other oilseed" means a crop of sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, sesame seed, or any oilseed designated by the Secretary.

(14) Payment acres

The term "payment acres", with respect to the provision of price loss coverage payments and agriculture risk coverage payments, means the number of acres determined for a farm under section 9014 of this title.

(15) Payment yield

The term "payment yield", for a farm for a covered commodity--

(A) means the yield used to make payments pursuant to section 8714 or 8754 of this title, as in effect on September 30, 2013; or

(B) means the yield established under section 9013 of this title.

(16) Price loss coverage

The term "price loss coverage" means coverage provided under section 9016 of this title.

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(17) Producer

(A) In general

The term "producer" means an owner, operator, landlord, tenant, or sharecropper that shares in the risk of producing a crop and is entitled to share in the crop available for marketing from the farm, or would have shared had the crop been produced.

(B) Hybrid seed

In determining whether a grower of hybrid seed is a producer, the Secretary shall--

(i) not take into consideration the existence of a hybrid seed contract; and

(ii) ensure that program requirements do not adversely affect the ability of the grower to receive a payment under this chapter.

(18) Pulse crop

The term "pulse crop" means dry peas, lentils, small chickpeas, and large chickpeas.

(19) Reference price

The term "reference price", with respect to a covered commodity for a crop year, means the following:

(A) For wheat, $5.50 per bushel.

(B) For corn, $3.70 per bushel.

(C) For grain sorghum, $3.95 per bushel.

(D) For barley, $4.95 per bushel.

(E) For oats, $2.40 per bushel.

(F) For long grain rice, $14.00 per hundredweight.

(G) For medium grain rice, $14.00 per hundredweight.

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(H) For soybeans, $8.40 per bushel.

(I) For other oilseeds, $20.15 per hundredweight.

(J) For peanuts, $535.00 per ton.

(K) For dry peas, $11.00 per hundredweight.

(L) For lentils, $19.97 per hundredweight.

(M) For small chickpeas, $19.04 per hundredweight.

(N) For large chickpeas, $21.54 per hundredweight.

(O) For seed cotton, $0.367 per pound.

(20) Secretary

The term “Secretary” means the Secretary of Agriculture.

(21) Seed cotton

The term “seed cotton” means unginned upland cotton that includes both lint and seed.

(22) State

The term “State” means--

(A) a State;

(B) the District of Columbia;

(C) the Commonwealth of Puerto Rico; and

(D) any other territory or possession of the United States.

(23) Temperate japonica rice

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The term "temperate japonica rice" means rice that is grown in high altitudes or temperate regions of high latitudes with cooler climate conditions, in the Western United States, as determined by the Secretary, for the purpose of--

(A) the reallocation of base acres under section 9012 of this title;

(B) the establishment of a reference price (as required under section 9016(g) of this title) and an effective price pursuant to section 9016 of this title; and

(C) the determination of the actual crop revenue and agriculture risk coverage guarantee pursuant to section 9017 of this title.

(24) Transitional yield

The term "transitional yield" has the meaning given the term in section 1502(b) of this title.

(25) United States

The term "United States", when used in a geographical sense, means all of the States.

(26) United States Premium Factor

The term "United States Premium Factor" means the percentage by which the difference in the United States loan schedule premiums for Strict Middling (SM) 1 ⅛ -inch upland cotton and for Middling (M) 1 $^{3}/_{32}$ -inch upland cotton exceeds the difference in the applicable premiums for comparable international qualities.

CREDIT(S)

(Pub.L. 113-79, Title I, § 1111, Feb. 7, 2014, 128 Stat. 659; Pub.L. 115-123, Div. F, § 60101(a)(1) to (3), Feb. 9, 2018, 132 Stat. 308; Pub.L. 115-334, Title I, § 1101, Dec. 20, 2018, 132 Stat. 4500.)

7 U.S.C.A. § 9011, 7 USCA § 9011
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Proposed Legislation

United States Code Annotated
Title 7. Agriculture (Refs & Annos)
Chapter 115. Agricultural Commodity Policy and Programs
Subchapter I. Commodity Policy

7 U.S.C.A. § 9012

§ 9012. Base acres

Currentness

(a) Retention or 1-time reallocation of base acres

(1) Election required

(A) Notice of election opportunity

As soon as practicable after February 7, 2014, the Secretary shall provide notice to the owners of a farm regarding their opportunity to make an election, in the manner provided in this subsection--

(i) to retain base acres, including any generic base acres, as provided in paragraph (2); or

(ii) in lieu of retaining base acres, to reallocate base acres, other than any generic base acres, as provided in paragraph (3).

(B) Content of notice

The notice under subparagraph (A) shall include the following:

(i) Information that the opportunity of an owner to make the election is being provided only once.

(ii) Information regarding the manner in which the owner must make the election and the manner of notifying the Secretary of the election.

(iii) Information regarding the deadline before which the owner must notify the Secretary of the election to be in effect beginning with the 2014 crop year.

(C) Effect of failure to make election

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If the owner of a farm fails to make the election under this subsection, or fails to timely notify the Secretary of the election as required by subparagraph (B)(iii), the owner shall be deemed to have elected to retain base acres, including generic base acres, as provided in paragraph (2).

(2) Retention of base acres

(A) Election to retain

For the purpose of applying this subchapter to a covered commodity, the Secretary shall give an owner of a farm an opportunity to elect to retain all of the base acres for each covered commodity on the farm.

(B) Treatment of generic base acres

Generic base acres are automatically retained.

(3) Reallocation of base acres

(A) Election to reallocate

For the purpose of applying this subchapter to covered commodities, the Secretary shall give an owner of a farm an opportunity to elect to reallocate all of the base acres for covered commodities on the farm, as in effect on September 30, 2013, among those covered commodities planted on the farm at any time during the 2009 through 2012 crop years.

(B) Reallocation formula

The reallocation of base acres among covered commodities on a farm shall be in proportion to the ratio of--

(i) the 4-year average of--

(I) the acreage planted on the farm to each covered commodity for harvest, grazing, haying, silage, or other similar purposes for the 2009 through 2012 crop years; and

(II) any acreage on the farm that the producers were prevented from planting during the 2009 through 2012 crop years to that covered commodity because of drought, flood, or other natural disaster, or other condition beyond the control of the producers, as determined by the Secretary; to

(ii) the 4-year average of--

(I) the acreage planted on the farm to all covered commodities for harvest, grazing, haying, silage, or other similar purposes for such crop years; and

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(II) any acreage on the farm that the producers were prevented from planting during such crop years to covered commodities because of drought, flood, or other natural disaster, or other condition beyond the control of the producers, as determined by the Secretary.

(C) Treatment of generic base acres

Generic base acres are retained and may not be reallocated under this paragraph.

(D) Inclusion of all 4 years in average

For the purpose of determining a 4-year acreage average under subparagraph (B) for a farm, the Secretary shall not exclude any crop year in which a covered commodity was not planted.

(E) Treatment of multiple planting or prevented planting

For the purpose of determining under subparagraph (B) the acreage on a farm that producers planted or were prevented from planting during the 2009 through 2012 crop years to covered commodities, if the acreage that was planted or prevented from being planted was devoted to another covered commodity in the same crop year (other than a covered commodity produced under an established practice of double cropping), the owner may elect the commodity to be used for that crop year in determining the 4-year average, but may not include both the initial commodity and the subsequent commodity.

(F) Limitation

The reallocation of base acres among covered commodities on a farm under this paragraph may not result in a total number of base acres (including generic base acres) for the farm in excess of the number of base acres in effect for the farm on September 30, 2013.

(4) Application of election to all covered commodities

The election made under this subsection, or deemed to be made under paragraph (1)(C), with respect to a farm shall apply to all of the covered commodities on the farm.

(b) Adjustment of base acres

(1) In general

Notwithstanding the election made under subsection (a), the Secretary shall provide for an adjustment, as appropriate, in the base acres for covered commodities for a farm and any generic base acres for the farm whenever any of the following circumstances occur:

(A) A conservation reserve contract entered into under section 1231 of the Food Security Act of 1985 (16 U.S.C. 3831) with respect to the farm expires or is voluntarily terminated.

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(B) Cropland is released from coverage under a conservation reserve contract by the Secretary.

(C) The producer has eligible oilseed acreage as the result of the Secretary designating additional oilseeds, which shall be determined in the same manner as eligible oilseed acreage under section 8711(a)(1)(D) of this title.

(2) Special conservation reserve acreage payment rules

For the crop year in which a base acres adjustment under subparagraph (A) or (B) of paragraph (1) is first made, the owner of the farm shall elect to receive price loss coverage or agriculture risk coverage with respect to the acreage added to the farm under this subsection or a prorated payment under the conservation reserve contract, but not both.

(c) Prevention of excess base acres

(1) Required reduction

Notwithstanding the election made under subsection (a), if the sum of the base acres for a farm, including generic base acres, and the acreage described in paragraph (2) exceeds the actual cropland acreage of the farm, the Secretary shall reduce the base acres for 1 or more covered commodities or generic base acres for the farm so that the sum of the base acres, including generic base acres, and the acreage described in paragraph (2) does not exceed the actual cropland acreage of the farm.

(2) Other acreage

For purposes of paragraph (1), the Secretary shall include the following:

(A) Any acreage on the farm enrolled in--

(i) the conservation reserve program established under subchapter B of chapter 1 of subtitle D of title XII of the Food Security Act of 1985 (16 U.S.C. 3831 et seq.); or

(ii) a wetland reserve easement under section 1265C of the Food Security Act of 1985 (16 U.S.C. 3865c).

(B) Any other acreage on the farm enrolled in a Federal conservation program for which payments are made in exchange for not producing an agricultural commodity on the acreage.

(C) If the Secretary designates additional oilseeds, any eligible oilseed acreage, which shall be determined in the same manner as eligible oilseed acreage under subsection (b)(1)(C).

(3) Selection of acres

The Secretary shall give the owner of the farm the opportunity to select the base acres for a covered commodity or generic base acres for the farm against which the reduction required by paragraph (1) will be made.

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(4) Exception for double-cropped acreage

In applying paragraph (1), the Secretary shall make an exception in the case of double cropping, as determined by the Secretary.

(d) Reduction in base acres

(1) Reduction at option of owner

(A) In general

The owner of a farm may reduce, at any time, the base acres for any covered commodity or generic base acres for the farm.

(B) Effect of reduction

A reduction under subparagraph (A) shall be permanent and made in a manner prescribed by the Secretary.

(2) Required action by Secretary

(A) In general

The Secretary shall proportionately reduce base acres, including any generic base acres, on a farm for land that has been subdivided and developed for multiple residential units or other nonfarming uses if the size of the tracts and the density of the subdivision is such that the land is unlikely to return to the previous agricultural use, unless the producers on the farm demonstrate that the land--

(i) remains devoted to commercial agricultural production; or

(ii) is likely to be returned to the previous agricultural use.

(B) Requirement

The Secretary shall establish procedures to identify land described in subparagraph (A).

(3) Treatment of base acres on farms entirely planted to grass or pasture

(A) In general

In the case of a farm on which all of the cropland was planted to grass or pasture (including cropland that was idle or fallow), as determined by the Secretary, during the period beginning on January 1, 2009, and ending on December 31,

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2017, the Secretary shall maintain all base acres and payment yields for the covered commodities on the farm, except that no payment shall be made with respect to those base acres under section 9016 or 9017 of this title for the 2019 through 2023 crop years.

(B) Ineligibility

The producers on a farm for which all of the base acres are maintained under subparagraph (A) shall be ineligible for the option to change the election applicable to the producers on the farm under section 9015(h) of this title.

(4) Prohibition on reconstitution of farm

The Secretary shall ensure that producers on a farm do not reconstitute the farm to void or change the treatment of base acres under this section.

CREDIT(S)

(Pub.L. 113-79, Title I, § 1112, Feb. 7, 2014, 128 Stat. 661; Pub.L. 115-334, Title I, § 1102, Dec. 20, 2018, 132 Stat. 4501.)

7 U.S.C.A. § 9012, 7 USCA § 9012
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Title 7. Agriculture (Refs & Annos)
Chapter 115. Agricultural Commodity Policy and Programs
Subchapter I. Commodity Policy

7 U.S.C.A. § 9013

§ 9013. Payment yields

Currentness

(a) Establishment and purpose

For the purpose of making price loss coverage payments under section 9016 of this title, the Secretary shall provide for the establishment of a yield for each farm for any designated oilseed for which a payment yield was not established under section 8712 of this title in accordance with this section.

(b) Payment yields for designated oilseeds

(1) Determination of average yield

In the case of oilseeds designated before December 20, 2018, the Secretary shall determine the average yield per planted acre for the designated oilseed on a farm for the 1998 through 2001 crop years, excluding any crop year in which the acreage planted to the designated oilseed was zero.

(2) Adjustment for payment yield

(A) In general

The payment yield for a farm for an oilseed designated before December 20, 2018, shall be equal to the product of the following:

(i) The average yield for the designated oilseed determined under paragraph (1).

(ii) The ratio resulting from dividing the national average yield for the designated oilseed for the 1981 through 1985 crops by the national average yield for the designated oilseed for the 1998 through 2001 crops.

(B) No national average yield information available

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To the extent that national average yield information for an oilseed designated before December 20, 2018, is not available, the Secretary shall use such information as the Secretary determines to be fair and equitable to establish a national average yield under this section.

(3) Use of county average yield

If the yield per planted acre for a crop of an oilseed designated before December 20, 2018, for a farm for any of the 1998 through 2001 crop years was less than 75 percent of the county yield for that designated oilseed, the Secretary shall assign a yield for that crop year equal to 75 percent of the county yield for the purpose of determining the average under paragraph (1).

(4) Treatment of oilseeds designated after certain date

In the case of oilseeds designated on or after December 20, 2018, the payment yield shall be equal to 90 percent of the average of the yield per planted acre for the most recent 5 crop years, as determined by the Secretary, excluding any crop year in which the acreage planted to the covered commodity was zero.

(c) Effect of lack of payment yield

(1) Establishment by Secretary

In the case of a covered commodity on a farm for which base acres have been established or that is planted on generic base acres, if no payment yield is otherwise established for the covered commodity on the farm, the Secretary shall establish an appropriate payment yield for the covered commodity on the farm under paragraph (2).

(2) Use of similarly situated farms

To establish an appropriate payment yield for a covered commodity on a farm as required by paragraph (1), the Secretary shall take into consideration the farm program payment yields applicable to that covered commodity for similarly situated farms. The use of such data in an appeal, by the Secretary or by the producer, shall not be subject to any other provision of law.

(d) Single opportunity to update yields

(1) Election to update

At the sole discretion of the owner of a farm, the owner of a farm shall have a 1-time opportunity to update, on a covered-commodity-by-covered-commodity basis, the payment yield that would otherwise be used in calculating any price loss coverage payment for each covered commodity on the farm for which the election is made.

(2) Method of updating yields for covered commodities

If the owner of a farm elects to update yields under paragraph (1), the payment yield for a covered commodity on the farm, for the purpose of calculating price loss coverage payments only, shall be equal to the product obtained by multiplying--

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(A) 90 percent;

(B) the average of the yield per planted acre for the crop of covered commodities on the farm for the 2013 through 2017 crop years, as determined by the Secretary, excluding any crop year in which the acreage planted to the covered commodity was zero; and

(C) subject to paragraph (3), the ratio obtained by dividing--

(i) the average of the 2008 through 2012 national average yield per planted acre for the covered commodity, as determined by the Secretary; by

(ii) the average of the 2013 through 2017 national average yield per planted acre for the covered commodity, as determined by the Secretary.

(3) Limitation

In no case shall the ratio obtained under paragraph (2)(C) be less than 90 percent or greater than 100 percent.

(4) Use of county average yield

For the purposes of determining the average yield per planted acre under paragraph (2)(B), if the yield per planted acre for a crop of a covered commodity for a farm for any of the crop years described in that subparagraph was less than 75 percent of the average of county yields for those crop years for that commodity, the Secretary shall assign a yield for that crop year equal to 75 percent of the average of the 2013 through 2017 county yield for the covered commodity.

(5) Upland cotton conversion

In the case of seed cotton, for purposes of determining the average of the yield per planted acre under this subsection, the average yield for seed cotton per planted acre shall be equal to 2.4 times the average yield for upland cotton per planted acre.

(6) Time for election

An election under this subsection shall be made at a time and manner so as to be in effect beginning with the 2020 crop year, as determined by the Secretary.

(e) Payment yield for seed cotton

(1) Payment yield

Subject to paragraph (2), the payment yield for seed cotton for a farm shall be equal to 2.4 times the payment yield for upland cotton for the farm established under section 8714(e)(3) of this title (as in effect on September 30, 2013).

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(2) Update

At the sole discretion of the owner of a farm with a yield for upland cotton described in paragraph (1), the owner of the farm shall have a 1-time opportunity to update the payment yield for upland cotton for the farm, as provided in subsection (d), for the purpose of calculating the payment yield for seed cotton under paragraph (1).

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(Pub.L. 113-79, Title I, § 1113, Feb. 7, 2014, 128 Stat. 664; Pub.L. 115-123, Div. F, § 60101(a)(4), Feb. 9, 2018, 132 Stat. 308; Pub.L. 115-334, Title I, § 1103, Dec. 20, 2018, 132 Stat. 4501.)

7 U.S.C.A. § 9013, 7 USCA § 9013
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Title 7. Agriculture (Refs & Annos)
Chapter 115. Agricultural Commodity Policy and Programs
Subchapter I. Commodity Policy

7 U.S.C.A. § 9014

§ 9014. Payment acres

Currentness

(a) Determination of payment acres

(1) General rule

For the purpose of price loss coverage and agriculture risk coverage when county coverage has been selected under section 9015(b)(1) of this title, but subject to subsection (e), the payment acres for each covered commodity on a farm shall be equal to 85 percent of the base acres for the covered commodity on the farm.

(2) Effect of individual coverage

In the case of agriculture risk coverage when individual coverage has been selected under section 9015(b)(2) of this title, but subject to subsection (e), the payment acres for a farm shall be equal to 65 percent of the base acres for all of the covered commodities on the farm.

(b) Treatment of generic base acres

(1) In general

In the case of generic base acres, price loss coverage payments and agriculture risk coverage payments are made only with respect to generic base acres planted to a covered commodity for the crop year.

(2) Attribution

With respect to a farm containing generic base acres, for the purpose of applying paragraphs (1) and (2) of subsection (a), generic base acres on the farm are attributed to a covered commodity in the following manner:

(A) If a single covered commodity is planted and the total acreage planted exceeds the generic base acres on the farm, the generic base acres are attributed to that covered commodity in an amount equal to the total number of generic base acres.

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(B) If multiple covered commodities are planted and the total number of acres planted to all covered commodities on the farm exceeds the generic base acres on the farm, the generic base acres are attributed to each of the covered commodities on the farm on a pro rata basis to reflect the ratio of--

(i) the acreage planted to a covered commodity on the farm; to

(ii) the total acreage planted to all covered commodities on the farm.

(C) If the total number of acres planted to all covered commodities on the farm does not exceed the generic base acres on the farm, the number of acres planted to a covered commodity is attributed to that covered commodity.

(3) Treated as additional acreage

When generic base acres are planted to a covered commodity or acreage planted to a covered commodity is attributed to generic base acres, the generic base acres are in addition to other base acres on the farm.

(4) Seed cotton

(A) In general

Not later than 90 days after February 9, 2018, the Secretary shall require the owner of a farm to allocate all generic base acres on the farm under subparagraph (B) or (C), or both.

(B) No recent history of covered commodities

In the case of a farm on which no covered commodities (including seed cotton) were planted or were prevented from being planted at any time during the 2009 through 2016 crop years, the owner of such farm shall allocate generic base acres on the farm to unassigned crop base for which no payments may be made under section 9016 or 9017 of this title.

(C) Recent history of covered commodities

In the case of a farm not described in subparagraph (B), the owner of such farm shall allocate generic base acres on the farm--

(i) subject to subparagraph (D), to seed cotton base acres in a quantity equal to the greater of--

(I) 80 percent of the generic base acres on the farm; or

(II) the average number of seed cotton acres planted or prevented from being planted on the farm during the 2009 through 2012 crop years (not to exceed the total generic base acres on the farm); or

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(ii) to base acres for covered commodities (including seed cotton), by applying subparagraphs (B), (D), (E), and (F) of section 9012(a)(3) of this title.

(D) Treatment of residual generic base acres

In the case of a farm on which generic base acres are allocated under subparagraph (C)(i), the residual generic base acres shall be allocated to unassigned crop base for which no payments may be made under section 9016 or 9017 of this title.

(E) Effect of failure to allocate

In the case of a farm not described in subparagraph (B) for which the owner of the farm fails to make an election under subparagraph (C), the owner of the farm shall be deemed to have elected to allocate all generic base acres in accordance with subparagraph (C)(i).

(c) Exclusion

The quantity of payment acres determined under subsection (a) may not include any crop subsequently planted during the same crop year on the same land for which the first crop is eligible for price loss coverage payments or agriculture risk coverage payments, unless the crop was approved for double cropping in the county, as determined by the Secretary.

(d) Effect of minimal payment acres

(1) Prohibition on payments

Notwithstanding any other provision of this chapter, a producer on a farm may not receive price loss coverage payments or agriculture risk coverage payments if the sum of the base acres on the farm is 10 acres or less, as determined by the Secretary, unless the sum of the base acres on the farm, when combined with the base acres of other farms in which the producer has an interest, is more than 10 acres.

(2) Exceptions

Paragraph (1) does not apply to a producer that is--

(A) a socially disadvantaged farmer or rancher (as defined in section 2003(e) of this title);

(B) a limited resource farmer or rancher, as defined by the Secretary;

(C) a beginning farmer or rancher (as defined in subsection (a) of section 2279 of this title); or

(D) a veteran farmer or rancher (as defined in subsection (a) of section 2279 of this title).

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(e) Effect of planting fruits and vegetables

(1) Reduction required

In the manner provided in this subsection, payment acres on a farm shall be reduced in any crop year in which fruits, vegetables (other than mung beans and pulse crops), or wild rice have been planted on base acres on a farm.

(2) Price loss coverage and county coverage

In the case of price loss coverage payments and agricultural risk coverage payments using county coverage, the reduction under paragraph (1) shall be the amount equal to the base acres planted to crops referred to in such paragraph in excess of 15 percent of base acres.

(3) Individual coverage

In the case of agricultural risk coverage payments using individual coverage, the reduction under paragraph (1) shall be the amount equal to the base acres planted to crops referred to in such paragraph in excess of 35 percent of base acres.

(4) Reduction exceptions

No reduction to payment acres shall be made under this subsection if--

(A) cover crops or crops referred to in paragraph (1) are grown solely for conservation purposes and not harvested for use or sale, as determined by the Secretary; or

(B) in any region in which there is a history of double-cropping covered commodities with crops referred to in paragraph (1) and such crops were so double-cropped on the base acres, as determined by the Secretary.

(5) Effect of reduction

For each crop year for which fruits, vegetables (other than mung beans and pulse crops), or wild rice are planted to base acres on a farm for which a reduction in payment acres is made under this subsection, the Secretary shall consider such base acres to be planted, or prevented from being planted, to a covered commodity for purposes of any adjustment or reduction of base acres for the farm under section 9012 of this title.

(f) Unassigned crop base

The Secretary shall maintain information on generic base acres on a farm allocated as unassigned crop base under subsection (b)(4).

CREDIT(S)

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(Pub.L. 113-79, Title I, § 1114, Feb. 7, 2014, 128 Stat. 666; Pub.L. 115-123, Div. F, § 60101(a)(5), (6), (11), Feb. 9, 2018, 132 Stat. 308, 309, 311; Pub.L. 115-334, Title I, § 1104, Dec. 20, 2018, 132 Stat. 4502.)

7 U.S.C.A. § 9014, 7 USCA § 9014
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Title 16. Conservation
Chapter 58. Erodible Land and Wetland Conservation and Reserve Program
Subchapter III. Wetland Conservation (Refs & Annos)

16 U.S.C.A. § 3821

§ 3821. Program ineligibility

Currentness

(a) Production on converted wetland

Except as provided in this subchapter and notwithstanding any other provision of law, any person who in any crop year produces an agricultural commodity on converted wetland, as determined by the Secretary, shall be--

(1) in violation of this section; and

(2) ineligible for loans or payments in an amount determined by the Secretary to be proportionate to the severity of the violation.

(b) Ineligibility for certain loans and payments

If a person is determined to have committed a violation under subsection (a) during a crop year, the Secretary shall determine which of, and the amount of, the following loans and payments for which the person shall be ineligible:

(1) Contract payments under a production flexibility contract, marketing assistance loans, and any type of price support or payment made available under the Agricultural Market Transition Act, the Commodity Credit Corporation Charter Act (15 U.S.C. 714 et seq.), or any other Act.

(2) A loan made or guaranteed under the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) or any other provision of law administered by the Consolidated Farm Service Agency, if the Secretary determines that the proceeds of the loan will be used for a purpose that will contribute to conversion of a wetland (other than as provided in this subchapter) to produce an agricultural commodity.

(3) During the crop year:

(A) A payment made pursuant to a contract entered into under the environmental quality incentives program under subpart A of part IV of subchapter IV.

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(B) A payment under any other provision of subchapter IV.

(C) A payment under section 2201 or 2202 of this title.

(D) A payment, loan, or other assistance under section 1003 or 1006a of this title.

(c) Ineligibility for crop insurance premium assistance

(1) Requirements

(A) In general

If a person is determined to have committed a violation under subsection (a) or (d) during a crop year, the person shall be ineligible to receive any payment of any portion of premium paid by the Federal Crop Insurance Corporation for a plan or policy of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.) pursuant to this subsection.

(B) Applicability

Ineligibility under this subsection shall--

(i) only apply to reinsurance years subsequent to the date of a final determination of a violation, including all administrative appeals; and

(ii) not apply to the existing reinsurance year or any reinsurance year prior to the date of the final determination.

(2) Conversions

(A) In general

Notwithstanding paragraph (1), ineligibility for crop insurance premium assistance shall apply in accordance with this paragraph.

(B) New conversions

In the case of a wetland that the Secretary determines was converted after February 7, 2014--

(i) the person shall be ineligible to receive crop insurance premium subsidies in subsequent reinsurance years unless the Secretary determines that an exemption pursuant to section 3822 of this title applies; or

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(ii) for any violation that the Secretary determines impacts less than 5 acres of an entire farm, the person may pay a contribution in an amount equal to 150 percent of the cost of mitigation, as determined by the Secretary, to the fund described in section 3841(f) of this title for wetland restoration in lieu of ineligibility to receive crop insurance premium assistance.

(C) Prior conversions

In the case of a wetland that the Secretary determines was converted prior to February 7, 2014, ineligibility under this subsection shall not apply.

(D) Conversions and new policies or plans of insurance

In the case of an agricultural commodity for which an individual policy or plan of insurance is available for the first time to the person after February 7, 2014--

(i) ineligibility shall apply only to conversions that take place after the date on which the policy or plan of insurance first becomes available to the person; and

(ii) the person shall take such steps as the Secretary determines appropriate to mitigate any prior conversion in a timely manner but not to exceed 2 reinsurance years.

(3) Limitations

(A) Mitigation required

Except as otherwise provided in this paragraph, a person subject to a final determination, including all administrative appeals, of a violation described in subsection (d) shall have 1 reinsurance year to initiate a mitigation plan to remedy the violation, as determined by the Secretary, before becoming ineligible under this subsection in the following reinsurance year to receive any payment of any portion of the premium paid by the Federal Crop Insurance Corporation for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.).

(B) Persons covered for the first time

Notwithstanding the requirements of paragraph (1), in the case of a person that is subject to this subsection for the first time solely due to the amendment made by section 2611(b) of the Agricultural Act of 2014, the person shall have 2 reinsurance years after the reinsurance year in which a final determination is made, including all administrative appeals, of a violation described in this subsection to take such steps as the Secretary determines appropriate to remedy or mitigate the violation in accordance with this subsection.

(C) Good faith

If the Secretary determines that a person subject to a final determination, including all administrative appeals, of a violation described in this subsection acted in good faith and without intent to commit a violation described in this subsection as

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described in section 3822(h) of this title, the person shall have 2 reinsurance years to take such steps as the Secretary determines appropriate to remedy or mitigate the violation in accordance with this subsection.

(D) Tenant relief

(i) In general

If a tenant is determined to be ineligible for payments and other benefits under this subsection, the Secretary may limit the ineligibility only to the farm that is the basis for the ineligibility determination if the tenant has established, to the satisfaction of the Secretary that--

(I) the tenant has made a good faith effort to meet the requirements of this section, including enlisting the assistance of the Secretary to obtain a reasonable plan for restoration or mitigation for the farm;

(II) the landlord on the farm refuses to comply with the plan on the farm; and

(III) the Secretary determines that the lack of compliance is not a part of a scheme or device to avoid the compliance.

(ii) Report

The Secretary shall submit to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate an annual report concerning the ineligibility determinations limited during the previous 12-month period under this subparagraph.

(E) Certificate of compliance

(i) In general

Beginning with the first full reinsurance year immediately following February 7, 2014, all persons seeking eligibility for the payment of a portion of the premium paid by the Federal Crop Insurance Corporation for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.) shall provide certification of compliance with this section as determined by the Secretary.

(ii) Timely evaluation

The Secretary shall evaluate the certification in a timely manner and--

(I) a person who has properly complied with certification shall be held harmless with regard to eligibility during the period of evaluation; and

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(II) if the Secretary fails to evaluate the certification in a timely manner and the person is subsequently found to be in violation of this subsection, ineligibility shall not apply to the person for that violation.

(iii) Equitable contribution

(I) In general

If a person fails to notify the Secretary as required and is subsequently found to be in violation of this subsection, the Secretary shall--

(aa) determine the amount of an equitable contribution to conservation by the person for the violation; and

(bb) deposit the contribution in the fund described in section 3841(f) of this title.

(II) Limitation

The contribution shall not exceed the total of the portion of the premium paid by the Federal Crop Insurance Corporation for a policy or plan of insurance for all years the person is determined to have been in violation subsequent to the date on which certification was first required under this subparagraph.

(4) Duties of the Secretary

(A) In general

In carrying out this subsection, the Secretary shall use existing processes and procedures for certifying compliance.

(B) Responsibility

The Secretary, acting through the agencies of the Department of Agriculture, shall be solely responsible for determining whether a producer is eligible to receive crop insurance premium subsidies in accordance with this subsection.

(C) Limitation

The Secretary shall ensure that no agent, approved insurance provider, or employee or contractor of an agency or approved insurance provider, bears responsibility or liability for the eligibility of an insured producer under this subsection, other than in cases of misrepresentation, fraud, or scheme and device.

(d) Wetland conversion

(1) In general

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Except as provided in section 3822 of this title and notwithstanding any other provision of law, any person who in any crop year beginning after November 28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall be ineligible for those payments, loans, or programs specified in subsection (b) for that crop year and all subsequent crop years.

(2) Duty of the Secretary

No person shall become ineligible under paragraph (1) if the Secretary determines that an exemption under section 3822(b) of this title applies to that person.

(e) Prior loans

This section shall not apply to a loan described in subsection (b) made before December 23, 1985.

(f) Wetland

The Secretary shall have, and shall not delegate to any private person or entity, authority to determine whether a person has complied with this subchapter.

CREDIT(S)

(Pub.L. 99-198, Title XII, § 1221, Dec. 23, 1985, 99 Stat. 1507; Pub.L. 101-624, Title XIV, § 1421(b), Nov. 28, 1990, 104 Stat. 3572; Pub.L. 102-237, Title II, § 204(3), Dec. 13, 1991, 105 Stat. 1855; Pub.L. 102-552, Title III, § 308(a), Oct. 28, 1992, 106 Stat. 4116; Pub.L. 104-127, Title III, § 321, Apr. 4, 1996, 110 Stat. 986; Pub.L. 107-171, Title II, § 2002(b), May 13, 2002, 116 Stat. 233; Pub.L. 113-79, Title II, § 2611(b), Feb. 7, 2014, 128 Stat. 763; Pub.L. 115-334, Title II, §§ 2101, 2301(d)(1)(B), Dec. 20, 2018, 132 Stat. 4530, 4553.)

Notes of Decisions (22)

16 U.S.C.A. § 3821, 16 USCA § 3821
Current through P.L. 119-5. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 16. Conservation
Chapter 58. Erodible Land and Wetland Conservation and Reserve Program
Subchapter III. Wetland Conservation (Refs & Annos)

16 U.S.C.A. § 3822

§ 3822. Delineation of wetlands; exemptions

Currentness

(a) Delineation by Secretary

(1) In general

Subject to subsection (b) and paragraph (6), the Secretary shall delineate, determine, and certify all wetlands located on subject land on a farm.

(2) Wetland delineation maps

The Secretary shall delineate wetlands on wetland delineation maps. On the request of a person, the Secretary shall make a reasonable effort to make an on-site wetland determination prior to delineation.

(3) Certification

On providing notice to affected persons, the Secretary shall--

(A) certify whether a map is sufficient for the purpose of making a determination of ineligibility for program benefits under section 3821 of this title; and

(B) provide an opportunity to appeal the certification prior to the certification becoming final.

(4) Duration of certification

A final certification made under paragraph (3) shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary.

(5) Review of mapping on appeal

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In the case of an appeal of the Secretary's certification, the Secretary shall review and certify the accuracy of the mapping of all land subject to the appeal to ensure that the subject land has been accurately delineated. Prior to rendering a decision on the appeal, the Secretary shall conduct an on-site inspection of the subject land on a farm.

(6) Reliance on prior certified delineation

No person shall be adversely affected because of having taken an action based on a previous certified wetland delineation by the Secretary. The delineation shall not be subject to a subsequent wetland certification or delineation by the Secretary, unless requested by the person under paragraph (4).

(b) Exemptions

No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances:

(1) As the result of the production of an agricultural commodity on the following lands:

(A) A converted wetland if the conversion of the wetland was commenced before December 23, 1985.

(B) Land that is a nontidal drainage or irrigation ditch excavated in upland.

(C) A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation.

(D) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(E) Land that is an artificial lake or pond created by excavating or diking land (that is not a wetland) to collect and retain water and that is used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond.

(F) A wetland that is temporarily or incidentally created as a result of adjacent development activity.

(G) A converted wetland if the original conversion of the wetland was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of--

(i) the lack of maintenance of drainage, dikes, levees, or similar structures;

(ii) a lack of management of the lands containing the wetland; or

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(iii) circumstances beyond the control of the person.

(H) A converted wetland, if--

(i) the converted wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(2) For the conversion of the following:

(A) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water and that is used primarily for livestock watering, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, rice production, or as a settling pond.

(B) A wetland that is temporarily or incidentally created as a result of adjacent development activity.

(C) A wetland on which the owner or operator of a farm or ranch uses normal cropping or ranching practices to produce an agricultural commodity in a manner that is consistent for the area where the production is possible as a result of a natural condition, such as drought, and is without action by the producer that destroys a natural wetland characteristic.

(D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of--

(i) the lack of maintenance of drainage, dikes, levees, or similar structures;

(ii) a lack of management of the lands containing the wetland; or

(iii) circumstances beyond the control of the person.

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(E) A wetland, if--

(i) the wetland was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.

(c) On-site inspection requirement

(1) In general

No program loans, payments, or benefits shall be withheld from a person under this subchapter unless the Secretary has conducted an on-site visit of the subject land, which, except as provided in paragraph (2), shall be conducted in the presence of the affected person.

(2) Exception

The Secretary may conduct an on-site visit under paragraph (1) without the affected person present if the Secretary has made a reasonable effort to include the presence of the affected person at the on-site visit.

(d) Identification of minimal effect exemptions

For purposes of applying the minimal effect exemption under subsection (f)(1), the Secretary shall identify by regulation categorical minimal effect exemptions on a regional basis to assist persons in avoiding a violation of the ineligibility provisions of section 3821 of this title. The Secretary shall ensure that employees of the Department of Agriculture who administer this subchapter receive appropriate training to properly apply the minimal effect exemptions determined by the Secretary.

(e) Nonwetlands

The Secretary shall exempt from the ineligibility provisions of section 3821 of this title any action by a person upon lands in any case in which the Secretary determines that any one of the following does not apply with respect to such lands:

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(1) Such lands have a predominance of hydric soils.

(2) Such lands are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions.

(3) Such lands, under normal circumstances, support a prevalence of such vegetation.

(f) Minimal effect; mitigation

The Secretary shall exempt a person from the ineligibility provisions of section 3821 of this title for any action associated with the production of an agricultural commodity on a converted wetland, or the conversion of a wetland, if 1 or more of the following conditions apply, as determined by the Secretary:

(1) The action, individually and in connection with all other similar actions authorized by the Secretary in the area, will have a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife.

(2) The wetland and the wetland values, acreage, and functions are mitigated by the person through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, and the restoration, enhancement, or creation is--

(A) in accordance with a wetland conservation plan;

(B) in advance of, or concurrent with, the action;

(C) not at the expense of the Federal Government;

(D) in the case of enhancement or restoration of wetlands, on not greater than a 1-for-1 acreage basis unless more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion to be mitigated;

(E) in the case of creation of wetlands, on greater than a 1-for-1 acreage basis if more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion that is mitigated;

(F) on lands in the same general area of the local watershed as the converted wetland; and

(G) with respect to the restored, enhanced, or created wetland, made subject to an easement that--

(i) is recorded on public land records;

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(ii) remains in force for as long as the converted wetland for which the restoration, enhancement, or creation to be mitigated remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

(iii) prohibits making alterations to the restored, enhanced, or created wetland that lower the wetland's functions and values.

(3) The wetland was converted after December 23, 1985, but before November 28, 1990, and the wetland values, acreage, and functions are mitigated by the producer through the requirements of subparagraphs (A), (B), (C), (D), (F), and (G) of paragraph (2).

(4) The action was authorized by a permit issued under section 1344 of Title 33 and the wetland values, acreage, and functions of the converted wetland were adequately mitigated for the purposes of this subchapter.

(g) Mitigation appeals

A person shall be afforded the right to appeal, under section 3843 of this title, the imposition of a mitigation agreement requiring greater than one-to-one acreage mitigation to which the person is subject.

(h) Good faith exemption

(1) Exemption described

The Secretary may waive a person's ineligibility under section 3821 of this title for program loans, payments, and benefits as the result of the conversion of a wetland subsequent to November 28, 1990, or the production of an agricultural commodity on a converted wetland, if the Secretary determines that the person has acted in good faith and without intent to violate this subchapter.

(2) Eligible reviewers

A determination of the Secretary, or a designee of the Secretary, under paragraph (1) shall be reviewed by the applicable--

(A) State Executive Director, with the technical concurrence of the State Conservationist; or

(B) district director, with the technical concurrence of the area conservationist.

(3) Period for compliance

The Secretary shall provide a person who the Secretary determines has acted in good faith and without intent to violate this subchapter with a reasonable period, but not to exceed 1 year, during which to implement the measures and practices necessary to be considered to be actively restoring the subject wetland.

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(i) Restoration

Any person who is determined to be ineligible for program benefits under section 3821 of this title for any crop year shall not be ineligible for such program benefits under such section for any subsequent crop year if, prior to the beginning of such subsequent crop year, the person has fully restored the characteristics of the converted wetland to its prior wetland state or has otherwise mitigated for the loss of wetland values, as determined by the Secretary, through the restoration, enhancement, or creation of wetland values in the same general area of the local watershed as the converted wetland.

(j) Determinations; restoration and mitigation plans; monitoring activities

Technical determinations, the development of restoration and mitigation plans, and monitoring activities under this section shall be made by the Natural Resources Conservation Service.

(k) Mitigation banking

(1) Mitigation banking program

(A) In general

Using authorities available to the Secretary, the Secretary shall operate a program or work with third parties to establish mitigation banks to assist persons in complying with the provisions of this section while mitigating any loss of wetland values and functions.

(B) Authorization of appropriations

There is authorized to be appropriated to the Secretary to carry out this paragraph $5,000,000 for each of fiscal years 2019 through 2023.

(2) Applicability

Subsection (f)(2)(C) shall not apply to this subsection.

(3) Policy and criteria

The Secretary shall develop the appropriate policy and criteria that will allow willing persons to access existing mitigation banks, under this section or any other authority, that will serve the purposes of this section without requiring the Secretary to hold an easement, in whole or in part, in a mitigation bank.

CREDIT(S)

(Pub.L. 99-198, Title XII, § 1222, Dec. 23, 1985, 99 Stat. 1508; Pub.L. 101-624, Title XIV, § 1422, Nov. 28, 1990, 104 Stat. 3573; Pub.L. 104-127, Title III, § 322, Apr. 4, 1996, 110 Stat. 987; Pub.L. 110-234, Title II, § 2003, May 22, 2008, 122 Stat.

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1028; Pub.L. 110-246, § 4(a), Title II, § 2003, June 18, 2008, 122 Stat. 1664, 1756; Pub.L. 113-79, Title II, § 2609, Feb. 7, 2014, 128 Stat. 761; Pub.L. 115-334, Title II, §§ 2102, 2103, 2821(b), Dec. 20, 2018, 132 Stat. 4530, 4602.)

Notes of Decisions (32)

16 U.S.C.A. § 3822, 16 USCA § 3822
Current through P.L. 119-5. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 16. Conservation
Chapter 58. Erodible Land and Wetland Conservation and Reserve Program
Subchapter III. Wetland Conservation (Refs & Annos)

16 U.S.C.A. § 3823

§ 3823. Affiliated persons

Currentness

If a person is affected by a reduction in benefits under section 3821 of this title and the affected person is affiliated with other persons for the purpose of receiving the benefits, the benefits of each affiliated person shall be reduced under section 3821 of this title in proportion to the interest held by the affiliated person.

CREDIT(S)

(Pub.L. 99-198, Title XII, § 1223, as added Pub.L. 104-127, Title III, § 324, Apr. 4, 1996, 110 Stat. 992.)

16 U.S.C.A. § 3823, 16 USCA § 3823
Current through P.L. 119-5. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 16. Conservation
Chapter 58. Erodible Land and Wetland Conservation and Reserve Program
Subchapter III. Wetland Conservation (Refs & Annos)

16 U.S.C.A. § 3824

§ 3824. Fairness of compliance

Currentness

If the actions of an unrelated person or public entity, outside the control of, and without the prior approval of, the landowner or tenant result in a change in the characteristics of cropland that would cause the land to be determined to be a wetland, the affected land shall not be considered to be wetland for purposes of this subchapter.

CREDIT(S)

(Pub.L. 99-198, Title XII, § 1224, as added Pub.L. 101-624, Title XIV, § 1424, Nov. 28, 1990, 104 Stat. 3576.)

Notes of Decisions (1)

16 U.S.C.A. § 3824, 16 USCA § 3824
Current through P.L. 119-5. Some statute sections may be more current, see credits for details.

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Proposed Legislation

West's Louisiana Statutes Annotated
Louisiana Revised Statutes
Title 30. Minerals, Oil, and Gas and Environmental Quality (Refs & Annos)
Subtitle I. Minerals, Oil, and Gas (Refs & Annos)
Chapter 12-a. Research and Development (Refs & Annos)

LSA-R.S. 30:1154

§ 1154. Regulations governing solar power generation facilities; solar leases

Currentness

A. The secretary shall develop and adopt, in cooperation with affected utility, agricultural, and solar industries; landowners; and consumer representatives and after one or more public hearings, regulations governing solar power generation facilities and property leases for the exploration, development, and production of solar energy. The regulations shall be designed to encourage the development and use of solar energy and to provide maximum information to the public concerning solar devices and solar power generation facilities. The regulations may include all of the following:

(1) Standards for testing, inspection, certification, sizing, capacity, and installation of solar devices, including spacing between installations and setbacks.

(2) Provisions for the enforcement of the standards.

(3) Accreditation of laboratories to test and certify solar devices.

(4) Requirements for on-site inspection of solar devices, including specifying methods for inspection, to determine compliance or noncompliance with the standards.

(5) Requirements for submission of any data resulting from the testing and inspection of solar devices.

(6) Prohibitions on the sale of solar devices that do not meet minimum requirements for safety, capacity, and durability as established by the secretary.

(7) Dissemination of the results of the testing, inspection, and certification program to the public.

(8) Minimum requirements for property leases for the exploration, development, and production of solar energy, including but not limited to acreage, access, and maintenance of the property during the lease, decommissioning, and final site closure upon termination of the lease, and placement of this program within the department. The rules provided for in this Paragraph shall be

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promulgated by the secretary, but not implemented until the secretary identifies funding through fees, federal grants, or other sources.

(9)(a) Requirements for a permit to construct or operate a solar power generation facility shall include a bond or other acceptable financial security in an amount determined by the secretary to ensure proper site closure. Any bond shall be executed by the permittee and a corporate surety licensed to do business in the state. The bond or other instrument shall be payable to the Department of Energy and Natural Resources, except the secretary may accept any financial security provided to the landowner or lessor for facilities exempted from permit fees pursuant to Paragraph (D)(3) of this Section. Any bond or other instrument shall ensure the following:

(i) Substantial compliance with this Section and any rule or regulation promulgated pursuant to this Section.

(ii) Compliance with any permit issued or enforced pursuant to this Section.

(iii) Compliance, as determined by a court of competent jurisdiction, with provisions of the property lease for the exploration, development, and production of solar energy on which the facility is located and that the violation would require closure of the facility. The department shall notify the lessor of any enforcement action against a permittee or upon a claim against the bond or other instrument.

(b) In determining the adequacy of the amount or other specific requirements of the bond or other financial security, the secretary shall consider the following:

(i) The assets, debts, and compliance history of the applicant or permittee.

(ii) The condition and capacity of the facilities to be covered by such security.

(iii) The estimated cost of site closure and remediation that includes the estimated cost of removing the solar power generation facility and associated infrastructure from the property and restoring the property to as near as reasonably possible to the condition of the property prior to the commencement of construction of the facility. The secretary may consider only the salvage value of the facility and associated infrastructure in determining the estimated cost of site closure and remediation if the materials are available in decommissioning during a bankruptcy of the facility owner or operator. The secretary shall adjust the estimated cost based upon any updated decommissioning plan submitted pursuant to Paragraph (D)(2) of this Section. Any increase in the amount of financial security required shall be secured by the permit holder within thirty days of notification of the increase.

(c) Subparagraphs (a) and (b) of this Paragraph shall not apply to the following solar power generation facilities that are owned by an electric utility provider regulated by the Public Service Commission or the council of the city of New Orleans:

(i) Facilities located on land owned by the electric utility provider and the provider is capable of demonstrating a decommissioning plan to the regulator.

(ii) Facilities located on land leased by the electric utility provider and that meet both of the following conditions:

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(aa) The regulated electric utility provider guarantees to the landowner or lessor that the regulated electric utility provider will pay the cost of the decommissioning plan provided for in Paragraph (D)(2) of this Section and the guarantee is acceptable to the secretary.

(bb) The lease between the landowner or lessor and the regulated electric utility provider provides for site decommissioning at the end of the facility's life, at the termination of the lease, as determined by a court of competent jurisdiction, and upon other circumstance that requires closure of the facility.

(d) If a solar power generation facility is sold or otherwise transferred, the secretary shall not release the bond or other financial security of the seller or transferor until the buyer or transferee provides a bond or other acceptable financial security in accordance with the provisions of this Section.

B. The secretary shall give due consideration to the effects of the regulations on the cost of purchasing, installing, operating, and maintaining solar devices in a solar power generation facility and shall reassess and amend the regulations as often as deemed necessary considering their effect upon the benefits and disadvantages to the widespread adoption of solar energy systems and the need to encourage creativity and innovative adaptations of solar energy.

C. Under no circumstances may the secretary preclude any person from developing, installing, or operating a solar device on his own property for residential use or collect any fee for such use.

D. (1) No person shall construct or operate a solar power generation facility that has a footprint of ten or more acres without holding a permit issued pursuant to the rules and regulations provided for in this Section. A permit issued pursuant to this Subsection shall only pertain to the implementation of the decommissioning plan as provided in Paragraph (2) of this Subsection, and financial security required pursuant to Paragraph (A)(9) of this Section. In addition to other requirements for the issuance of a permit, the department shall collect the following fees:

(a) An application fee not to exceed fifteen dollars per acre of the solar power generation facility footprint.

(b) An application processing fee not to exceed five hundred dollars for the entire project.

(c) An annual monitoring and maintenance fee beginning the year after issuance of the permit and every year thereafter not to exceed fifteen dollars per acre of the facility footprint.

(d) Notwithstanding the provisions of this Paragraph, no applicant or permit holder shall be charged a fee that exceeds the department's budgeted costs of implementing and administering the provisions of this Section for the fiscal year in which the fee is charged.

(2) Any application for a permit shall include a decommissioning plan for the facility that plans for closure at the end of life of the facility as well as closure in the event of a disaster making operation of the power generation facility impossible. The

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decommissioning plan shall be updated every five years after the initial submission. All submitted plans shall be reviewed for sufficiency by the department and approved by the secretary.

(3) Any solar power generation facility that is certified by the Public Service Commission or the council of the city of New Orleans on or before August 2, 2022, shall be exempt from the fees provided for in this Section, shall register with the department by January 1, 2023, and shall comply with the requirements of this Section and any rules and regulations promulgated pursuant to this Section by June 30, 2024.

(4) All of the monies collected from the fees provided for in this Subsection shall be deposited in the Mineral and Energy Operation Fund.

E. For purposes of this Section, the following terms shall have the meanings ascribed to them in this Subsection, unless the context or use clearly indicates otherwise:

(1) “Salvage value” means the actual or estimated scrap value of the raw materials once removed from the facility and ready for sale.

(2) “Solar device” means a solar energy collector or solar energy system that provides for the collection of solar energy or the subsequent use of that energy as thermal, mechanical, or electrical energy.

(3) “Solar power generation facility” means one or more solar devices and any facility or equipment used to support the operation of the solar devices, including any underground or above-ground electrical transmission or communications line located within the footprint of the facility, an electric transformer, a battery storage facility, an energy storage facility, telecommunications equipment, a road, a meteorological tower, or a maintenance yard.

F. Any violation of any regulation adopted by the secretary pursuant to this Section may be enjoined in the manner prescribed by law.

Credits

Added by Acts 1978, No. 542, § 1. Amended by Acts 1983, No. 705, § 2, eff. Sept. 1, 1983; Acts 2021, No. 301, § 1; Acts 2022, No. 555, § 1, eff. Aug. 2, 2022; Acts 2023, No. 150, § 5, eff. Jan. 10, 2024.

LSA-R.S. 30:1154, LA R.S. 30:1154

The Constitution, Revised Statutes and Codes are current through the 2024 First Extraordinary, Second Extraordinary, Regular, and Third Extraordinary Sessions.

End of Document

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Subpart A – Introduction

Subpart A – Introduction

510.0 General Information

A. Introduction

This section sets forth the purposes and objectives of the Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) provisions.

B. Legislated Authorities

(1) Legislative authorities for the policy and procedures contained in this manual are as follows:
(i) Public Law 99–198, Title XII, The Food Security Act of 1985.
(ii) Public Law 101–624, Title XII, The Food, Agriculture, Conservation, and Trade Act of 1990.
(iii) Public Law 104–127, Title III, The Federal Agriculture Improvement and Reform Act of 1996.
(iv) Public Law 107–171, Title II, The Farm Security and Rural Investment Act of 2002.
(v) Public Law 110-234, Title II, The Food, Conservation, and Energy Act of 2008.
(vi) Public Law 113-79, Title II, The Agricultural Act of 2014.
(2) These authorities were codified in 16 U.S.C. 3801 through 3824.

C. Contents of the Manual

(1) This manual contains U. States Department of Agriculture (USDA) and Natural Resources Conservation Service (NRCS) policy and operating procedures for implementing Federal Regulation 7 CFR Part 12, including:
(i) Interim rules published:
- June 27, 1986
- September 6, 1996

(ii) Final rules published:
- September 17, 1987
- February 11, 1988
- April 23, 1991
- April 24, 2015

(2) The procedures in this manual provide NRCS policy for implementation of the following:
(i) HELC
(ii) WC

D. Related Programs

The following programs have been authorized by the Food Security Act of 1985, as amended:

(i) Conservation Security Program (CSP)
(ii) Conservation Stewardship Program (CStP)
(iii) Conservation Reserve Program (CRP)
(iv) Environmental Quality Incentives Program (EQIP)
(v) Farm and Ranch Lands Protection Program (FRLPP)
(vi) Grassland Reserve Program (GRP)
(vii) Wetlands Reserve Program (WRP)
(viii) Wildlife Habitat Incentives Program (WHIP)

E. Required Knowledge by NRCS Employees

Personnel assigned HELC and WC responsibilities must have a working knowledge of this manual as well as 7 CFR Part 12.

F. State Supplements to this Manual

(1) Draft copies of all State supplements to this manual will be sent for review and approval before issuance to the appropriate Division Director in National Headquarters for HELC/WC guidance.
(2) All exceptions to this manual by States must be approved by the appropriate Division Director.
(3) Final copies of all amendments, technical notes, and guidelines relating to the provisions contained in this manual will be posted to the NRCS eDirectives Web site.

510.1 Purpose and Scope of the Provisions

A. Purpose of the HELC and WC Provisions

The purpose of the HELC and WC provisions are to:

(i) Remove certain incentives for persons who—
- Produce agricultural commodities on highly erodible land (HEL) without proper

Subpart A – Wetland Determination and Delineation

514.0 Background

A. The Food Security Act of 1985, as amended, requires NRCS to delineate, determine, and certify wetlands located on land on a farm or ranch subject to wetland conservation (WC) provisions in order to establish a producer's eligibility for certain USDA program benefits (16 U.S.C. Section 3822, 7 CFR Section 12.30).

B. This manual provides policy pertaining to the WC provisions. Policy concerning NRCS technical and financial assistance and the protection of wetlands is located in Title 190, General Manual (GM), Part 410, Subpart B, Section 410.26. In addition, wetlands may be subject to other Federal, State, or local regulations.

C. In carrying out the provisions of the Food Security Act, NRCS may request technical assistance from the U.S. Fish and Wildlife Service (FWS) and State or local conservation agencies (7 CFR Section 12.30). By statute, only NRCS may make certified wetland determinations (16 U.S.C. Section 3821(e)).

514.1 Certification

A. Certification of Wetland Determinations

(1) Certification of a wetland determination means that the wetland determination is of sufficient quality to make a determination of ineligibility for USDA program benefits. All wetland determinations made after July 3, 1996, are considered certified determinations (7 CFR Section 12.30(c)(1)). Determinations made prior to July 3, 1996, are considered certified if they met the procedural (appeal rights) and quality mandates as provided in 7 CFR Section 12, as detailed in paragraph B.

(2) Certified wetland determinations will be made under either of the following circumstances:

(i) In response to Farm Service Agency (FSA) Form AD-1026 or NRCS-CPA-038 completed by a USDA program participant for the field(s) identified

(ii) In response to Form FSA-569, if required

(3) To identify wetlands subject to the WC provisions, NRCS uses offsite (7 CFR Section 12.6(c)(5)) and onsite (7 CFR Section 12.6(c)(6)) methods. Site visits are conducted only in following circumstances:

(i) Before withholding any USDA benefits (7 CFR Section 12.30(c)(4))

(ii) When a USDA program participant requests an onsite determination (7 CFR Section 12.6(c)(7))

(iii) When there is an appeal (7 CFR Section 12.6(c)(6))

(iv) When a USDA program participant requests a preconversion minimal effect determination (7 CFR Section 12.31(d))

(v) In response to a Form FSA-569 or a whistleblower complaint (7 CFR Section 12.30(a)(6))

(vi) In conjunction with a compliance status review

(vii) If there is inadequate information to make determinations offsite (7 CFR Section 12.6(c)(6))

(4) Methods for offsite and onsite determinations are listed in the Food Security Act wetland identification procedures, located in the exhibit in section 514.8(A).

B. Evaluation of Previously Issued Wetland Determinations

Prior to conducting a certified wetland determination, NRCS will evaluate all previously issued determinations to determine their certification status using the criteria below:

(i) All wetland determinations made on or after July 3, 1996, are considered certified determinations (7 CFR Section 12.30(c)(1)) when all of the following apply:

- The determination was issued to the participant as noted on the Form NRCS-CPA-026(e), "Highly Erodible Land and Wetland Conservation Determination." For the purpose of this guidance, the NRCS-CPA-026(e) and previous versions will be referred to solely as the NRCS-CPA-026.
- The NRCS-CPA-026 was signed by NRCS.
- The NRCS-CPA-026 is accompanied by a wetland determination map.

(ii) For certified determinations issued on or after July 3, 1996, nonwetland (NW) and not inventoried (NI) areas were required labels according to policy, and unlabeled areas (cropland or noncropland) may not be considered NW. Unlabeled areas on a certified determination issued on or after July 3, 1996, are subject to receiving a new wetland conservation label.

(iii) All wetland determinations made after November 28, 1990, and before July 3, 1996, are considered certified if all of the following apply:

- The determination was issued to the participant as noted on the NRCS-CPA-026 or SCS-CPA-026.
- The NRCS-CPA-026 or SCS-CPA-026 was signed by NRCS (formerly known as SCS). The SCS-CPA-026 (version dated June 1991 – see exhibit at section 514.8B and later versions of the NRCS-CPA-026 contain a valid producer notification statement in block 29 and appeal rights were provided on the back of the "Person Copy." If a different version of the SCS-CPA-026 was used (other than the June 1991 version) to issue the determination, there must also be evidence that the producer was informed the determination was certified and provided appeal rights.
- The determination map document meets the quality mandate "of sufficient quality to make a determination of ineligibility for program benefits" (7 CFR Section 12.30(c)(1)). "Sufficient quality" means that the map document is legible to the extent that the location of designated wetlands in relation to other ground features can be determined. For example, the map document is of sufficient quality to be able to see reference ground features such as wooded areas, field boundaries, or roads, which then can be used as a reference for determining a wetland location.

(iv) In some cases, certified determinations issued on or after November 28, 1990, contain lands that were not labeled on the wetland determination map, but were recorded with a label on the associated NRCS-CPA-026, which indicated that the label applied to some numbered (or otherwise designated) land unit. Those land units are considered certified and are not subject to a new wetland conservation label.

(v) For certified wetland determinations issued prior to July 3, 1996, unlabeled cropland areas are considered NW and are not subject to a new wetland certification (unless cropland areas are marked "determination not made" or similar). For this purpose, cropland is considered nonrangeland or nonwoodland, which has a field polygon designated on the map with an associated field number.

(vi) Wetland determinations made prior to November 28, 1990, are not considered certified.

(vii) Regardless of the date the certified determination was issued, certain lands, within or associated with a certified determination, are subject to receiving a new (or revised in the case of NI) wetland conservation label, including—

- Noncropland areas without a wetland conservation label. This would include areas having a designation that is not a wetland conservation label such as "NCL" (noncropland).

- Areas marked as NI, "not determined," or similar designation.

- Noncropland when the NRCS-CPA-026 or map contains an explanation indicating that the "determination covers only cropland," "noncropland areas are not certified," or other description that limits the extent of the area subject to the determination or certification.

- Farmed wetland or farmed wetland pasture or hayland that is determined to meet abandonment criteria.

- Areas that are determined to meet converted wetland, converted wetland + year, manipulated wetlands, artificial wetland, converted wetland technical error, third-party conversion exemption, COE permit with mitigation exemption, minimal effect, mitigated wetlands, converted wetland timely assistance, or converted wetland in-lieu fee criteria.

C. Completing Determinations on New Lands That are Associated With Previously Certified Areas

When completing a certified wetland determination for lands associated with previously certified areas, the extent of the new determination is limited to only those lands receiving a new (or revised in the case of NI) wetland conservation label.

(i) NRCS will offer applicable appeal rights and only record on the map and NRCS-CPA-026 the lands subject to a new or revised label.

(ii) Note in the cover letter appeal rights are being offered only for those lands receiving a new or revised label.

(iii) A copy of any previously certified wetland determination for the subject land should be provided to the participant but not added to the NRCS-CPA-026 or map with the new determination.

D. Situations When More Than One Certified Determination Has Been Issued for the Same Tract or Area of Land

When multiple certified determinations exist for the same tract or area of land, NRCS will recognize the most recent determination as being the certified determination. However, in the process of conducting an investigation of possible noncompliance, NRCS will evaluate potential noncompliance actions utilizing the certified determination in place at the time the potential noncompliance action occurred.

E. Requirements for Job Approval Authority

(1) Certified wetland determinations must be completed by a qualified NRCS employee, as determined by the State Conservationist. Qualified employees (i.e., agency experts) must meet all of the following criteria:

(i) Have completed all the required training, including update courses

(ii) Have the appropriate job approval authority

(iii) Have demonstrated proficiency in making certified wetland determinations

(2) State Conservationists are responsible for maintaining a roster of agency experts, by training and experience, who have demonstrated the knowledge and skills necessary to conduct wetland determinations and delineations, scope and effect evaluations, functional assessments, minimal effects evaluations, mitigation planning, and mitigation easements. The roster will be filed in section III of the Field Office Technical Guide, "Legislated Programs, Job Approval Authority."

(3) In accordance with part 518 of this manual, State Conservationists will carry out appropriate quality control reviews of certified wetland determinations.

F. Effective Period of Certifications

(1) All certified wetland determinations, conditions, and exemptions remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification (16 U.S.C. Section 3822 (a)(4)).

(2) A person may request review of a final certified wetland determination only if a natural event alters the topography or hydrology of the subject land to the extent that the final certification is no longer a reliable indication of site conditions or if NRCS concurs with an affected person that an error exists in the current wetland determination (7 CFR Section 12.30(c)(6) and 16 U.S.C. Section 3822(a)(4)). A person must make all requests for review in writing, stating what the natural event was and to what extent that event altered the topography or hydrology, or, where NRCS error is cited as the reason for review, the participant must state what the error is and how it affects the final certified wetland determination validity.

G. Appeals of Certified Wetland Determinations

(1) Before finalizing a certified wetland determination, NRCS will notify the person affected by the certification and provide an opportunity to appeal it. NRCS will certify the wetland determination as final 30 days after providing the person notice of certification or, if an appeal is filed with USDA, after the administrative appeal procedures are exhausted or discontinued by the affected person (see Title 440, Conservation Program Manual (CPM), Part 510, for NRCS policies regarding appeals; NRCS appeal procedures are contained in 7 CFR Part 614). All requests for appeals, including those requests made at the preliminary technical determination stage, must be made in writing by the actual participants affected by the certified wetland determination.

(2) In the case of an appeal, NRCS must review and certify the accuracy of the determination for all lands subject to the appeal to ensure that it is accurate. Before a decision is rendered on the appeal, NRCS will conduct an onsite investigation of the subject land.

H. Preparing the Certified Wetland Determination and Delineation

(1) NRCS will delineate all wetlands subject to the WC provisions by outlining the boundaries of the wetland on aerial photography, digital imagery, or other graphic representation. If possible, NRCS will use the Global Positioning System (GPS) to digitally map the wetland boundary in the field and to import that data onto digital orthophotoquadrangle maps (DOQ) or other Geographic Information System (GIS) digital photographic imagery. Refer to part 514, subparts B through E, of this manual to determine the appropriate labels to apply to the delineated wetland types.

(2) The complete boundaries and size of all fields that were delineated and identified must be shown on the map, including areas identified as NW. The label and acreage information from the map will be used to prepare NRCS-CPA-026. A copy of the NRCS-CPA-026e, along with the delineation map, will be provided to the USDA program participant and FSA and retained in the participant's NRCS case file.

I. Duration of Ineligibility

(1) Persons who plant an agricultural commodity on a nonexempt wetland converted between December 23, 1985, and November 28, 1990, are ineligible for USDA benefits for any year in which an agricultural commodity crop is planted or until the functions, values, and acreage of the converted wetland are mitigated (7 CFR Section 12.4(a)(2)).

(2) Persons who convert wetlands for the purpose of, or in such a way as to make the production of an agricultural commodity possible after November 28, 1990, remain ineligible for USDA benefits until the functions, values, and acreage of the converted wetland are mitigated (7 CFR Section 12.4(a)(3)). Ineligibility will remain with the person even if the person is no longer associated with the land. Subsequent owners and operators will not be in violation as long as the converted wetland is not planted to an agricultural commodity and the new owner or operator was not affiliated with the conversion action (7 CFR Section 12.4(g)).

(3) Exemption for Wetland Conversions Completed Before February 7, 2014

No person will be ineligible for Federal crop insurance premium subsidies for a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. Sections 1501–1524) for—

- Converting a wetland if the wetland conversion was completed, as determined by NRCS, before February 7, 2014.

• Planting or producing an agricultural commodity on a converted wetland if wetland conversion was completed, as determined by NRCS, before February 7, 2014.

(4) There is an exemption for wetland conversion when a policy or plan of insurance is available to a person for the first time.

(i) When a policy or plan of insurance that provides coverage for an agricultural commodity is available to the person, including as a person who is a substantial beneficial interest holder, for the first time after February 7, 2014, as determined by the Risk Management Agency, ineligibility for Federal crop insurance premium subsidies for such policy or plan of insurance due to a wetland conversion violation will only apply to wetland conversions that are completed, as determined by NRCS, after the date the policy or plan of insurance first becomes available to the person.

(ii) The exemption—

• Does not exempt or otherwise negate the person's ineligibility for Federal crop insurance premium subsidies on any other policy or plan of insurance.

• Applies only if the person takes steps necessary, as determined by NRCS, to mitigate all wetlands converted after February 7, 2014, in a timely manner, as determined by NRCS, but not to exceed 2 reinsurance years.

J. Coordination with the U.S. Army Corps of Engineers

Certified wetland determinations performed by NRCS are based on Food Security Act definitions, and may not be valid for USACE Clean Water Act (CWA) jurisdiction and permitting requirements. NRCS will include the following language in all wetland determinations provided to the USDA participant:

"This certified wetland determination/delineation has been conducted for the purpose of implementing the wetland conservation provisions of the Food Security Act of 1985. This determination/delineation may not be valid for identifying the extent of the USACE's Clean Water Act jurisdiction for this site. If you intend to conduct any activity that constitutes a discharge of dredged or fill material into wetlands or other waters, you should request a jurisdictional determination from the local office of the USACE prior to starting the work."

514.2 Definitions

A. Agricultural Commodity.—An agricultural commodity is defined as any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane. (7 CFR Section 12.2)

B. Agricultural Use.—"Agricultural use" refers to land used for the production of food, fiber, or horticultural crops; used for haying or grazing; left idle in accordance with USDA program requirements; or diverted from crop production to an approved cultural practice that prevents erosion or other natural resource degradation.

C. For the Purpose of.—"For the purpose of" means actions completed that show intent to make production possible. Such actions need not actually make agricultural production possible.

D. Growing Season.—"Growing season" is the season of the year when climatic conditions are suitable for the growth and regeneration of plants.

E. Inundated.—"Inundated" means the ground is covered by water due to ponding, flowing, or flooded water.

F. Making Production Possible.—"Making production possible" means manipulation that—

(1) Allows or would allow production of an agricultural commodity where such production was not previously possible.

(2) Makes an area farmable more years than previously possible.

(3) Reduces crop stress and allows increased yields.

(4) After November 28, 1990, allows forage production or pasture and hayland use. On sites with woody vegetation, trees and stumps must be removed to constitute "making production possible."

production possible.

G. Manipulation.—The alterations that are considered manipulation may result from dams, dikes, ditches, diversions, subsurface drains, pumps, terraces, or dredge and fill. These measures may alter hydrology even if installed offsite from the effected wetlands.

H. Normal Circumstances.—Refers to the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed. The premise for the concept of normal circumstances is that for many wetlands where the vegetation has been removed, the soil and hydrological characteristics remain to the extent that hydrophytic vegetation could return if vegetation management ceased. In the event that the vegetation on such land has been altered or removed, NRCS will determine if a prevalence of hydrophytic vegetation typically exists in the local area on the same hydric soil map unit under non-altered hydrologic conditions (7 CFR Section 12.31 (b)(2)(ii)).

I. Wetlands.—Lands that have all of the following characteristics:

(1) A predominance of hydric soils

(2) Are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions

(3) Under normal circumstances support a prevalence of hydrophytic vegetation

Note: Lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils are not considered wetlands for purposes of the Food Security Act (7 CFR Section 12.2).

J. Wetland Delineation.—Outlining the boundaries of a wetland determination on aerial photography, digital imagery, or other graphic representation or on the land (7 CFR Section 12.2).

K. Wetland Determination.—A technical decision regarding whether or not an area is a wetland, including identification of wetland type (label) and size (acres) of each label (7 CFR Section 12.2). Wetland determinations are recorded on Form NRCS-CPA-026e.

L. Wetland Inventories.—Maps that outline the location of potential wetlands and are usually developed using offsite remote sensing. Wetland inventories are not certified wetland determinations.

M. Wetland Mapping Conventions.—A set of approved procedures used to make wetland determinations and delineations on agricultural lands. Mapping conventions are developed cooperatively between USACE, the Environmental Protection Agency, the FWS, and NRCS for consistent use for CWA and FSA purposes, and are State-specific (7 CFR Section 12.6(c)(5)). See "Food Security Act Wetland Identification Procedures" in the exhibit in section 514.8A for additional wetland determination and delineation definitions.

514.3 Wetland Identification

Wetland Criteria

(1) Wetlands are identified through the confirmation of three diagnostic factors:

(i) A predominance of hydric soil

(ii) The prevalence of hydrophytic vegetation

(iii) Wetland hydrology

(2) Wetlands must meet the definition of all three wetland factors (soils, plants, and hydrology). The Food Security Act wetland identification procedures will be used to decide if a sampling unit meets the definition at the diagnostic factor level. These procedures are provided in the exhibit in section 514.8A.

514.4 Hydric Soils (7 CFR Section 12.31(a))

A. Hydric Soils Definition

Hydric soils are defined in the Food Security Act as soils that, in an undrained condition, are saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation (16 U.S.C.

condition that supports the growth and regeneration of hydrophytic vegetation (16 U.S.C. Section 3801(a)(12)).

B. Hydric Soils Lists

(1) Lists of hydric soils are compiled from the hydric soils criteria and are published in the National List of Hydric Soils, as well as in local lists of hydric soils mapping units developed by NRCS. Hydric soils lists are used in conjunction with NRCS soil surveys to predict the location and properties of hydric soils in a given county or similar area.

(2) In addition, an official list of local hydric soils is maintained in the Soil Data Mart (Welcome to the Soil Data Mart) and includes map unit components identified as probable hydric soils based on the hydric soils criteria. The National List of Hydric Soils is an aggregation of the local hydric soils lists produced from Soil Data Mart data.

(3) Methods for hydric soil determination are provided in the Food Security Act wetland identification procedures, located in the exhibit in section 514.8A.

514.5 Hydrophytic Vegetation (7 CFR Section 12.31(b))

A. Definition

(1) Hydrophytic vegetation is defined in the Food Security Act as a plant growing in—

(i) Water.

(ii) Substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content (16 U.S.C. Section 3801(a)(13)).

(2) Methods for hydrophytic vegetation determination are provided in the Food Security Act wetland identification procedures, located in the exhibit in section 514.8A.

B. Definition of Growing Season

The regulations (7 CFR Part 12) for the WC provisions do not define the growing season. The State Conservationist, with advice from the State Technical Committee, will approve a growing season definition for Food Security Act purposes based on either of the following:

(i) Wetlands Climate Table Documentation (i.e., "WETS" tables from the NRCS National Water and Climate Center; NRCS National Water and Climate Center - Climate Products - General Information - Wetlands Documentation) methods provided for in the USACE regional supplements.

(ii) Observation of above-ground biological growth in vascular plants as described in the USACE regional supplements.

514.6 Wetland Hydrology

Definition

(1) Wetland hydrology is defined as inundation or saturation by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions. (7 CFR Section 12.2)

(2) Methods for wetland hydrology determination are described in the wetland identification procedures in the exhibit in section 514.8.

514.7 Relationship of Labels to Wetland Determinations and Delineations

The determination of whether or not land is a wetland is based on a technical determination using the Food Security Act wetland identification procedures, as described in the exhibit in section 514.8A and is independent of the assignment of wetland labels. Labels are used to identify land subject to exemptions or restrictions under the Food Security Act. Such land may or may not meet the definition of wetland. Subparts B through E contain instructions for identifying and labeling wetlands to determine whether restrictions or exemptions apply to the land per the WC provisions of the Food Security Act.

514.8 Exhibits

A. Food Security Act Wetland Identification Procedures

B. Form SCS-CPA-026, Person Copy (June 1991)

Subpart B - Labels: Natural and Artificial Wetlands

514.10 Wetlands (W)

A. Definition and Criteria

Areas assigned the Food Security Act label of Wetland (W) are areas that meet the criteria for the three wetland factors and typically have not been manipulated by altering hydrology and/or removing woody vegetation, including stumps. Wetland includes areas that have been abandoned, as described in Section 514.33. The wetland delineation tools described in the Appendix are used to assess the three wetland factors. Wetland factors are described in Section 514.3.

B. Wetlands Farmed Under Natural Conditions

(1) Wetlands may be planted to produce an agricultural commodity after December 23, 1985, without jeopardizing USDA benefits, as long as all of the following requirements are met:
(i) Production is possible as a result of a natural condition, such as drought, or normal seasonal hydrologic conditions.
(ii) Hydrology is not manipulated.
(iii) Woody vegetation is not removed.
(iv) Normal tillage does not fill, level, drain, or otherwise cause conversion of the wetland. (7 CFR Section 12.5(b)(3))
(2) Removal of herbaceous vegetation is not considered manipulation. Grading, land-leveling, or land-clearing is considered manipulation. Shearing stumps flush with the ground constitutes removal and, as it makes the site cropable, will result in conversion.
(3) Destruction of herbaceous hydrophytic vegetation resulting from the production of an agricultural commodity is not considered altering or destroying a natural wetland characteristic if both of the following apply:
(i) Such vegetation is able to return following cessation of the condition that made production of the agricultural commodity crop possible.
(ii) The destruction was the result of crop production activities that are common in the area.
(4) Removal of woody vegetation is *not considered farming under natural conditions*, even if this practice is temporarily enhanced by drought or other natural conditions, since such removal would destroy natural wetland characteristics for an extended period of time.
(5) Where hydric soils have been used for production of an agricultural commodity, and the effect of the drainage or other altering activity is not clearly discernible, NRCS will compare the site with other sites containing the same hydric soils in a natural condition to determine if the hydric soils can or cannot be used to produce an agricultural commodity under natural conditions. If the soil on the comparison site could not produce an agricultural commodity under natural conditions, the subject wetland will be considered to be converted wetland. (7 CFR Section 12.32(a)(1))

C. Restrictions

(1) Any manipulation to wetlands that results in a conversion (an activity that is for the purpose, or makes possible production of an agricultural commodity) may result in non-compliance with the WC provisions. Activities that do not constitute conversion under the Act may be controlled by other Federal, State, or local regulations.
(2) Drainage structures that were constructed through a wetland (W) before December 23, 1985, which have been maintained by the participant, and which serve as an outlet for drainage systems of Prior Converted Cropland (PC), Farmed Wetland (FW), or Farmed Wetland Pasture and Hayland (FWP) may be maintained to the extent of the scope and effect of the drainage as it existed on December 23, 1985, but may not be expanded, increased, or improved. These include structures operated and maintained as drainage outlets. See Part 516, Subpart B, Scope and Effect Determination, for policy and procedures to use in calculating the scope and effect of the original drainage.
(3) Participants should be advised to avoid impacts to wetlands during drainage maintenance activities. If drainage maintenance converts a wetland in violation of the WC provisions, the participant may need to restore the wetland or mitigate the loss of wetland acres and functions in order to remain eligible for USDA program benefits. (See NFSAM Part 515, Subpart B, Mitigation Exemption.)
(4) In cases where the original scope and effect is in question, documentation of the following may be of value:
(i) Any existing wetland easements.
(ii) Evaluation of the drainage system as it currently exists, with sufficient detail to evaluate factors affecting drainage of PC, FW, or FWP.
(iii) The scope and effect of the drainage system that existed on December 23, 1985.
(iv) Proposed drainage system maintenance activities, including structures and designs.
(v) Proposed dates of implementation and completion.
(5) Cropping and mechanical harvesting of hay within the wetlands affected by maintenance will be allowed to the extent that it was possible to conduct those activities prior to the maintenance of drainage capacity. Placement in the wetland of excavated material associated

maintenance of drainage capacity. Placement in the wetland of excavated material associated with the maintenance activities may constitute a conversion under the Act.
(6) Wetlands manipulated beyond the scope and effect of the drainage as it existed on December 23, 1985, will be labeled Converted Wetlands (CW or CW+year) or Manipulated Wetlands (WX). Other pre-existing wetland labels will remain as previously determined.

514.11 Manipulated Wetlands (WX)

A. Definition

(1) Wetlands that have been manipulated as described in Section 514.10 beyond the scope of allowable maintenance will be labeled as Manipulated Wetlands (WX) if both of the following conditions are met:
(i) The manipulation was not for the purpose of producing an agricultural commodity (See agricultural commodity definition NFSAM Part 514, Section 514.2 (A)).
(ii) The manipulation did not make production of an agricultural commodity possible.
(2) Manipulated wetlands may or may not meet wetland criteria, depending on the type and degree of manipulation. If production is later made possible or an agricultural commodity crop is produced on the manipulated wetland, the area will be labeled a converted wetland (CW or CW+year). Open water areas excavated in wetlands will be labeled WX unless the excavation results in conversion that makes possible production of an agricultural commodity. In this case, the converted areas would be labeled CW or CW+year.
(3) Wetlands manipulated for fish production, trees, vineyards, shrubs, cranberries, agricultural waste management structures, livestock ponds, fire control, or building and road construction where production of an agricultural commodity has not been made possible are labeled WX (7 CFR Section 12.5(b)(1)(iv)). The intended use of the manipulated area will not be agricultural commodity production.
(4) At times, annual cover crops are utilized in orchards, vineyards, blueberry patches, and other nonagricultural commodity crop fields. In these cases, even though the production of an agricultural commodity is possible, the cover crop must be destroyed by mechanical or chemical means before seed heads develop. If in any crop year, an annually tilled cover crop matures because it is not destroyed, or is harvested, the manipulated area will be labeled CW+year. The use of nonagricultural cover crops, such as clover or other biennials, is also allowed.
(5) NRCS employees are encouraged to assist persons in planning agriculturally-related activities under this exemption (e.g., items 1 through 8 in Section 514.11(B), below). Policy concerning USDA technical and financial assistance and the protection of wetlands is located in GM-190, Part 410, Subpart B, Related Environment Concerns, Section 410.26.

B. Examples of WX

Examples of activities that result in WX include, but are not limited to:

(i) An open ditch is constructed through a forested wetland that removes the hydrology, but the trees are not removed and the manipulation does not make production possible.
(ii) Piles of trees, stumps, and soil cover an area, but the area cannot be cropped without additional land-clearing activities.
(iii) Construction of roads, buildings, or other activities that do not make production possible.
(iv) Construction of stock watering or irrigation ponds.
(v) Conversion for orchards, groves, or vineyards.
(vi) Spring development.
(vii) Construction of agricultural waste management structures.
(viii) A non-perforated subsurface drain is constructed through a forested wetland that requires limited stump removal for installation and the manipulation does not make production of an agricultural commodity possible.

C. Procedures for Identifying WX

Use the following procedures to identify WX:

STEP	ACTION
1	Use appropriate wetland delineation tools, as described in the Appendix, to assess site conditions. A wetland factor may be altered or removed as a result of manipulation.
2	Review aerial photographs or FSA slides to check for land use changes that may indicate wetland manipulation or conversion.
3	The area qualifies for a WX exemption if manipulation was not for the purpose of producing a commodity crop or was such that production was not made possible.

D. Maintenance

WX can be maintained but not for the purpose of, or making possible production of, an agricultural commodity. To ensure compliance, a participant can complete Form AD-1026, Highly Erodible Land and Wetland Conservation Certification, before conducting any hydrologic manipulation to ensure that the proposed manipulation is not for the purpose of, and does not make production of, an agricultural commodity possible on the WX or another wetland.

514.12 Artificial Wetland (AW)

A. Definition

(1) An artificial wetland (AW) is land that was formerly non-wetland under natural conditions but now exhibits wetland characteristics because of the influence of human activities. (7 CFR Section 12.2) These areas are exempt from the WC provisions of the Act and thus can be drained, removed, or otherwise manipulated without causing ineligibility for USDA program benefits.

(2) Examples of AW include the following:

(i) A wetland created incidentally by an irrigation delivery system or other adjacent human activity on an area that was formerly upland.

(ii) Ponds constructed in non-wetlands (NW). These may be labeled as AW even if all or part of these areas may be too deep to allow wetland vegetation to grow (i.e., they do not meet the hydrophytic vegetation criteria). If a pond was constructed wholly or partially in wetlands, the portion of the pond that was constructed in wetlands is not AW. These areas shall be labeled WX if agricultural production is not possible.

(3) Increasing the hydrology on an existing wetland does not make the wetland an AW. Such an area would remain wetland unless the hydroperiod is increased to the point where wetland vegetation cannot survive, in which case it would be labeled WX.

B. Procedure

Appropriate wetland delineation tools are used, as described in the Appendix, to assess wetland criteria.

Subpart C - Labels: Non-Wetlands

514.20 Non-Wetlands (NW)

A. Definition

(1) Non-wetland (NW) is land that under normal conditions does not meet wetland criteria.
(2) NW also includes wetlands that were converted to the extent that wetland criteria were not present on December 23, 1985, but an agricultural commodity was not produced. For these NW areas, the wetland criteria have not returned and the area has not been abandoned.
(3) Deepwater habitat, which does not meet wetland criteria, may be labeled NW if it is necessary to make a determination of eligibility for these areas.
(4) In addition to NWs, "other waters of the U.S." as defined in Section 404 of the Clean Water Act, may occur on a tract. Other waters include streams, lakes, ponds, rivers, and ditches that are not wetlands as defined in the Act.
(5) Other waters are not subject to the WC provisions and are not labeled as such on certified wetland determinations. They may be labeled NW.

B. Procedure for Identifying NWs

Appropriate wetland delineation tools are used, as described in the Appendix, to assess wetland criteria.

Subpart D - Labels: Wetlands Converted to Agricultural Use Before December 23, 1985

514.30 Prior Converted Cropland (PC)

A. Definition

(1) Prior converted cropland (PC) is a converted wetland where the conversion occurred before December 23, 1985; an agricultural commodity had been produced at least once before December 23, 1985; and as of December 23, 1985, the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an agricultural commodity). The conversion could include draining, dredging, filling, leveling, or otherwise manipulating (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) the wetland area. In addition, PC meets the following hydrologic criteria:

(i) If the area is not a pothole, playa, or pocosin, inundation is less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more).

(ii) If the area is a pothole, playa, or pocosin, inundation is less than 7 consecutive days and saturation is less than 14 consecutive days during the growing season in most years (50 percent chance or more).

Note: Reference (7 CFR Section 12.2)

(2) The presence and extent of pothole, playa, and pocosin wetlands in each State will be determined by the State Conservationist with advice from the State Technical Committee.

B. Supporting Documentation

(1) The NRCS Engineering Field Handbook (EFH), Chapter 19, "Hydrology Tools for Wetland Determination;" the 1987 COE Manual; and the approved State mapping conventions are used to determine if the area is inundated for the requisite time. Site conditions must be thoroughly documented, using information such as:

(i) Aerial photographs and FSA slides.
(ii) Flood frequency studies.
(iii) Interviews with the person and other knowledgeable residents of the area.
(iv) Field indicators of surface water such as water marks, drift lines, and drowned or stressed crops.
(v) Stream gauge data.

(2) FSA records may be used to determine current or prior cropping history. In the absence of FSA records, any determination of cropping history should be based on aerial photography, crop expense or receipt records, grain elevator records specific to tract and field, or other suitable documentation that can be tied to the specific field and/or tract under review.

C. Drainage Maintenance and Improvement

Drainage systems or other hydrologic manipulations on PCs may be maintained or improved after December 23, 1985, without loss of eligibility for USDA program benefits. USDA program participants should exercise caution when maintaining drainage systems so that neighboring wetlands are not inadvertently drained.

D. Procedures for Identifying PCs

Aerial photographs, crop records, and other resources are consulted to determine if the area—

(i) Has hydric soils.
(ii) Was converted for production of an agricultural commodity before December 23, 1985.
(iii) Was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an agricultural commodity) as of December 23, 1985.
(iv) Fails to meet hydrologic criterion of Farmed Wetland (FW).

514.31 Farmed Wetlands (FW)

A. Definition

(1) FWs are wetlands that were drained, dredged, filled, leveled, or otherwise manipulated and used for producing an agricultural commodity before December 23, 1985, and that meet all of the following criteria:

(i) If the area is not a pothole, playa or pocosin, it is inundated for at least 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more).
(ii) If the area is a pothole, playa, or pocosin, it is inundated for at least 7 consecutive days or saturated for at least 14 consecutive days during the growing season in most years (50 percent chance or more).
(iii) Production was made possible or enhanced by the manipulation.

(iv) The area has not been abandoned (Section 514.33).

Note: Reference (7 CFR Section 12.2)

(2) The presence and extent of pothole, playa, and pocosin wetlands in each State will be determined by the State Conservationist with advice from the State Technical Committee.

B. Supporting Documentation

(1) EFH, Chapter 19, "Hydrology Tools for Wetland Determination;" the 1987 COE Manual; and the approved State mapping conventions are used to determine if the area is inundated for the requisite time. Site conditions must be thoroughly documented, using information such as:
(i) Aerial photographs and FSA slides.
(ii) Flood frequency studies.
(iii) Interviews with the person and other knowledgeable residents of the area.
(iv) Field indicators of surface water such as water marks, drift lines, and drowned or stressed crops.
(v) Stream gauge data.
(2) FSA records may be used to determine current or prior cropping history. In the absence of FSA records, any determination of cropping history should be based on aerial photography, crop expense or receipt records, grain elevator records specific to tract and field, or other suitable documentation that can be tied to the specific field and/or tract under review.

C. Drainage Maintenance and Improvement

(1) FWs may be maintained and used to produce agricultural commodities or other crops without a loss of eligibility for USDA program benefits. However, any additional hydrologic manipulation after December 23, 1985, that does not meet the definition of maintenance (Section 516.10) may result in non-compliance of the WC provisions. (7 CFR Section 12.32(b)) USDA program participants should exercise caution when maintaining drainage systems so that neighboring wetlands are not inadvertently drained.
(2) If a participant wants to restore wetland characteristics to FW areas and, at the same time, prevent the areas from being considered abandoned, the participant must document hydrologic and vegetative baseline conditions with NRCS before restoring wetland characteristics. (7 CFR Section 12.5(b)(1)(iii)).

D. Procedures for Identifying FW

(1) Aerial photographs, crop records, and other resources must be consulted to determine if the area—
(i) Has hydric soils.
(ii) Was converted for production of an agricultural commodity prior to December 23, 1985, and an agricultural commodity was produced at least one year before December 23, 1985.
(iii) Was capable of production of a commodity crop as of December 23, 1985.
(iv) As of December 23, 1985, met the hydrologic criterion of FW.
(v) Was not abandoned after December 23, 1985.
(vi) Did not meet the converted wetland criteria (manipulated since December 23, 1985, beyond the scope and effect of any prior manipulation).
(2) If the FW site meets abandonment criteria, without the abandonment being part of an approved plan (documented baseline conditions), the area should be labeled W unless other manipulation has occurred to the extent that it is a converted wetland.

514.32 Farmed Wetland Pasture or Hayland (FWP)

A. Definition

A farmed wetland pasture or hayland (FWP) is a wetland that was drained, dredged, filled, leveled, or otherwise manipulated and used for pasture or hayland (includes native pasture or hayland) as of December 23, 1985, and meets both of the following criteria:

(i) The area is inundated for at least 7 consecutive days during the growing season or saturated for at least 14 consecutive days during the growing season in most years (50 percent chance or more); and
(ii) The area has not been abandoned (Section 514.33).

Note: Reference (7 CFR Section 12.2)

B. Supporting Documentation

EFH, Chapter 19, "Hydrology Tools for Wetland Determination;" the 1987 COE Manual; and the approved State mapping conventions are used to determine if the area is inundated for the requisite time. Site conditions must be thoroughly documented, using information such as:

(i) Aerial photographs and FSA slides.
(ii) Flood frequency studies.
(iii) Interviews with the person and other knowledgeable residents of the area.
(iv) Field indicators of surface water such as water marks, drift lines, and drowned or stressed crops.
(v) Stream gauge data.

C. Maintenance

(1) FWP can be maintained and used to produce forage crops or other crops without loss of eligibility for USDA benefits. However, additional hydrologic manipulation after December 23, 1985, that does not meet the definition of maintenance (Section 516.10) may result in non-compliance with the WC provisions. (7 CFR Section 12.32(b)) USDA program participants should exercise caution when maintaining drainage systems so that neighboring wetlands are not inadvertently drained.
(2) If a participant wants to restore wetland characteristics to FWP areas and, at the same time, prevent the areas from being considered abandoned, the participant must document hydrologic and vegetative baseline conditions with NRCS before restoring wetland characteristics. (7 CFR Section 12.5(b)(1)(iii))

D. Procedures for Identifying FWP

(1) Aerial photographs, crop records, and other resources are consulted to determine if the area—
(i) Has hydric soils.
(ii) Was converted for production of a pasture and/or hayland use prior to December 23, 1985.
(iii) Had not produced an agricultural commodity at least one year before December 23, 1985.
(iv) As of December 23, 1985, met the hydrologic criterion of FWP.
(v) Was not abandoned after December 23, 1985.
(vi) Did not meet the converted wetland criterion (manipulated since December 23, 1985, beyond the scope and effect of any prior manipulation).
(2) If the FWP site meets abandonment criteria, without the abandonment being part of an approved plan (documented baseline conditions), the area should be labeled W unless other manipulation has occurred to the extent that it is a converted wetland.

514.33 Abandonment

A. Description

(1) Abandonment is the cessation for five consecutive years of management or maintenance operations related to the production of agricultural commodities or forage on areas labeled FW or FWP. (7 CFR Section 12.33) FW and FWP areas that are determined to be abandoned will be labeled W. An area will not be considered abandoned when either of the following occurs:
(i) It is enrolled in a conservation set-aside program or a State or Federal wetland restoration program, other than USDA perpetual easements such as the Wetland Reserve Program (WRP). Hydrologic and vegetative baseline conditions and restoration activities must be documented before the site is enrolled. Restoration is defined in Section 515.10.
(ii) NRCS documented hydrologic and vegetative baseline conditions and restoration activities before active maintenance and management ceased. A certified wetland determination conducted by NRCS can be used to verify baseline conditions. Documentation of baseline conditions should include a scope and effect determination of drainage systems to help ensure that the landowner returns the wetland to the water regime that existed before the wetland restoration. See Part 516 for more information.
(2) PC land will not be considered abandoned under the Food Security Act. (7 CFR Section 12.33 (c))
(3) Areas labeled CW or CW+year are not subject to abandonment. If restored/mitigated on-site, CW and CW+year areas will revert to the label that applied before the conversion.
(4) This definition of abandonment is applicable only for compliance with the Food Security Act. Regulations governing the Clean Water Act may provide different or additional criteria for abandonment, particularly with regard to PC areas. Participants who are planning to abandon PC areas should be advised to discuss their plans with the COE before proceeding.

B. Determination of Abandonment for FW and FWP

(1) Areas labeled FW – In order to demonstrate that the area has not been abandoned, the participant must be able to document that the site has been maintained such that an annually tilled crop can be produced on it and that drainage structures have been maintained to function at or near their as-built capacity. See Scope and Effect procedures in Part 516.
(2) Areas labeled FWP – In order to demonstrate that the area has not been abandoned, all drainage structures must be maintained to function at or near their as-built capacity, and the participant must have controlled woody vegetation.
(3) When making a determination of abandonment, the following types of records can be used:
(i) Commodity crop production records, for FW.
(ii) Aerial photographs, including color slides and color infrared photography, to determine the status of hydrology manipulations and cropping.
(iii) Drainage district or other drainage records to assess maintenance of drainage structures.

C. Manipulation on Land Considered Abandoned

(1) Drainage systems may not be reinstalled or maintained if the land has been abandoned and wetland criteria are met. Such land will be identified as W and any maintenance or manipulation of existing systems that results in conversion will cause the area to be labeled CW or CW+year.

(2) Maintenance of drainage outlets for PC, FW, or FWP through the area considered abandoned is allowed, as described in Section 514.10(C).

West's Revised Statutes of Nebraska Annotated
Chapter 72. Public Lands, Buildings, and Funds
Article 2. School Lands and Funds

Neb.Rev.St. § 72-270

72-270. Production of wind or solar energy; agreements; sections applicable

Currentness

Agreements involving the production of wind or solar energy on lands under the control of the Board of Educational Lands and Funds shall be regulated by sections 72-270 to 72-274.

Credits

Laws 2010, LB 235, § 1, eff. Feb. 12, 2010; Laws 2012, LB 828, § 11, eff. March 8, 2012.

Neb. Rev. St. § 72-270, NE ST § 72-270
Current through legislation effective May 7, 2025, of the 1st Regular Session of the 109th Legislature (2025)

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West's Revised Statutes of Nebraska Annotated
Chapter 72. Public Lands, Buildings, and Funds
Article 2. School Lands and Funds

Neb.Rev.St. § 72-271

72-271. Production of wind or solar energy; agreements; terms, defined

Currentness

For purposes of sections 72-270 to 72-274:

(1) Agreement means (a) for purposes of a solar energy system, a solar agreement as defined in section 66-909 and (b) for purposes of a wind energy conversion system, a wind agreement as defined in section 66-909.04;

(2) Board means the Board of Educational Lands and Funds;

(3) Lessee means any individual, corporation, or other entity that enters into an agreement with the board;

(4) Solar energy means radiant energy, direct, diffuse, or reflected, received from the sun at wavelengths suitable for conversion into thermal, chemical, or electrical energy; and

(5) Wind energy has the definition found in section 66-909.01.

Credits
Laws 2010, LB 235, § 2, eff. Feb. 12, 2010; Laws 2012, LB 828, § 12, eff. March 8, 2012.

Neb. Rev. St. § 72-271, NE ST § 72-271
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West's Revised Statutes of Nebraska Annotated
Chapter 72. Public Lands, Buildings, and Funds
Article 2. School Lands and Funds

Neb.Rev.St. § 72-272

72-272. Production of wind energy or solar energy; agreements; board; powers

Currentness

The board may authorize agreements for the use of any school or public lands belonging to the state and under its control for exploration and development of wind energy or solar energy for such durations and under such terms and conditions as the board shall deem appropriate, except that such agreements shall comply with sections 66-901 to 66-914. In making such determinations, the board shall consider comparable arrangements involving other lands similarly situated and any other relevant factors bearing upon such agreements.

Credits

Laws 2010, LB 235, § 3, eff. Feb. 12, 2010; Laws 2012, LB 828, § 13, eff. March 8, 2012.

Neb. Rev. St. § 72-272, NE ST § 72-272
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West's Revised Statutes of Nebraska Annotated
Chapter 72. Public Lands, Buildings, and Funds
Article 2. School Lands and Funds

Neb.Rev.St. § 72-273

72-273. Wind energy or solar energy agreement; prior lease; effect on rights; compensation for damages

Currentness

(1) If an agreement relating to wind energy or solar energy is authorized by the board on land already being leased for agricultural or other purposes by a prior lessee, the existing rights of the prior lessee shall not be impaired, and the board shall reduce the rental amount due from such prior lessee in proportion to the amount of land that is removed from use as a result of the agreement.

(2) A lessee for agricultural or other purposes shall be compensated for all damages to personal property owned by such lessee or to growing crops, including grass, caused by operations under a concurrent agreement regarding such land for wind energy or solar energy purposes, and the board shall require the lessee under the agreement to provide such insurance and indemnity agreements which the board determines are necessary for the protection of the state and its lessees.

(3) If an agreement relating to wind energy or solar energy is authorized by the board on land concurrently being leased for agricultural purposes, the lessee for agricultural purposes shall have priority as to the use of the water on the land, but lessees for other purposes, including parties to agreements relating to wind energy or solar energy, shall be allowed reasonable use of the water on the land.

Credits
Laws 2010, LB 235, § 4, eff. Feb. 12, 2010; Laws 2012, LB 828, § 14, eff. March 8, 2012.

Neb. Rev. St. § 72-273, NE ST § 72-273
Current through legislation effective May 7, 2025, of the 1st Regular Session of the 109th Legislature (2025)

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West's Revised Statutes of Nebraska Annotated
Chapter 72. Public Lands, Buildings, and Funds
Article 2. School Lands and Funds

Neb.Rev.St. § 72-274

72-274. Wind energy or solar energy agreement; rules and regulations

Currentness

The board may adopt and promulgate such rules and regulations as it shall deem necessary and proper to regulate the agreements relating to wind energy or solar energy exploration and development on school and public lands pursuant to sections 72-270 to 72-274 and to prescribe such terms and conditions, including bonds, as it shall deem necessary in order to protect the interests of the state and its lessees.

Credits

Laws 2010, LB 235, § 5, eff. Feb. 12, 2010; Laws 2012, LB 828, § 15, eff. March 8, 2012.

Neb. Rev. St. § 72-274, NE ST § 72-274
Current through legislation effective May 7, 2025, of the 1st Regular Session of the 109th Legislature (2025)

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Designation: E1527 – 21

Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process[1]

This standard is issued under the fixed designation E1527; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last reapproval. A superscript epsilon (ε) indicates an editorial change since the last revision or reapproval.

1. Scope

1.1 *Purpose*—The purpose of this practice is to define good commercial and customary practice in the United States of America for conducting an *environmental site assessment*[2] of a parcel of *commercial real estate* with respect to the range of contaminants within the scope of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9601) and *petroleum products*. As such, this practice is intended to permit a *user* to satisfy one of the requirements to qualify for the *innocent landowner*, *contiguous property owner*, or *bona fide prospective purchaser* limitations on CERCLA liability (hereinafter, the "*landowner liability protections*," or "*LLPs*"): that is, the practice that constitutes *all appropriate inquiries* into the previous ownership and uses of the *property* consistent with good commercial and customary standards and practices as defined at 42 U.S.C. § 9601(35)(B). (See Appendix X1 for an outline of CERCLA's liability and defense provisions.) Controlled substances are not included within the scope of this practice. Persons conducting an *environmental site assessment* as part of an EPA Brownfields Assessment and Characterization Grant awarded under CERCLA 42 U.S.C. § 9604(k)(2)(B) must include controlled substances as defined in the Controlled Substances Act (21 U.S.C. § 802) within the scope of the assessment investigations to the extent directed in the terms and conditions of the specific grant or cooperative agreement. Additionally, an evaluation of *business environmental risk (BER)* associated with a parcel of *commercial real estate* may necessitate investigation beyond that identified in this practice (see 1.4 and Section 13).

1.1.1 *Recognized Environmental Conditions*—The goal of the processes established by this practice is to identify *recognized environmental conditions*. The term *recognized environmental condition* means *(1)* the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* to the *environment*; *(2)* the likely presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* or likely *release* to the *environment*; or *(3)* the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* under conditions that pose a *material threat* of a future *release* to the *environment*. A *de minimis condition* is not a *recognized environmental condition*.

1.1.2 *Petroleum Products—Petroleum products* are included within the scope of this practice because they are of concern with respect to *commercial real estate* and current custom and usage is to include an inquiry into the presence of *petroleum products* when doing an *environmental site assessment* of *commercial real estate*. Inclusion of *petroleum products* within the scope of this practice is not based upon the applicability, if any, of CERCLA to *petroleum products*.

1.1.3 *CERCLA Requirements Other Than Appropriate Inquiries*—This practice does not address whether requirements in addition to *all appropriate inquiries* have been met in order to qualify for the *LLPs* (for example, the duties specified in 42 U.S.C. §§ 9607(b)(3)(a) and (b) and cited in Appendix X1, including the continuing obligation not to impede the integrity and effectiveness of *activity and use limitations [AULs]*, or the duty to take reasonable steps to prevent *releases*, or the duty to comply with legally required *release* reporting obligations).

1.1.4 *Other Federal, State, and Local Environmental Laws*—This practice does not address requirements of any state or local laws or of any federal laws other than the *all appropriate inquiries* provisions of the *LLPs*. *Users* are cautioned that federal, state, and local laws may impose environmental assessment obligations that are beyond the scope of this practice. *Users* should also be aware that there are likely to be

[1] This practice is under the jurisdiction of ASTM Committee E50 on Environmental Assessment, Risk Management and Corrective Action and is the direct responsibility of Subcommittee E50.02 on Real Estate Assessment and Management.

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[2] All definitions, descriptions of terms, and acronyms are defined in Section 3. Whenever terms defined in 3.2 are used in this practice, they are in *italics*.

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other legal obligations with regard to *hazardous substances* or *petroleum products* discovered in, on, or at the *subject property* that are not addressed in this practice and that may pose risks of civil and/or criminal sanctions for noncompliance.[3]

1.1.5 *Documentation*—The scope of this practice includes research and reporting requirements that support the *user's* ability to qualify for the *LLPs*. As such, sufficient documentation of all sources, records, and resources utilized in conducting the inquiry required by this practice must be provided in the written *report* (refer to 8.1.9 and 12.2).

1.2 *Objectives*—Objectives guiding the development of this practice are *(1)* to synthesize and put in writing good commercial and customary practice for *environmental site assessments* for *commercial real estate*; *(2)* to facilitate high quality, standardized *environmental site assessments*; *(3)* to provide a practical and reasonable *standard practice* for conducting *all appropriate inquiries*; and *(4)* to clarify an industry standard for *all appropriate inquiries* in an effort to guide legal interpretation of the *LLPs*.

1.3 *Units*—The values stated in inch-pound units are to be regarded as the standard. The values given in parentheses are mathematical conversions to SI units that are provided for information only and are not considered standard.

1.4 *Considerations beyond Scope*—The use of this practice is strictly limited to the scope set forth in this section. Section 13 of this practice identifies, for informational purposes, certain environmental conditions (not an all-inclusive list) that may exist at a *subject property* that are beyond the scope of this practice, but may warrant consideration by parties to a *commercial real estate transaction*. The need to include an investigation of any such conditions in the *environmental professional's* scope of services should be evaluated based upon, among other factors, the nature of the *subject property* and the reasons for performing the assessment (for example, a more comprehensive evaluation of *business environmental risk*) and should be agreed upon between the *user* and *environmental professional* as additional services beyond the scope of this practice before initiation of the *environmental site assessment* process.

1.5 *This practice offers a set of instructions for performing one or more specific operations. This document cannot replace education or experience and should be used in conjunction with professional judgment. Not all aspects of this practice may be applicable in all circumstances. This ASTM standard is not intended to represent or replace the standard of care by which the adequacy of a given professional service must be judged, nor should this document be applied without consideration of a project's many unique aspects. The word "Standard" in the title means only that the document has been approved through the ASTM consensus process.*

1.6 *This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety, health, and environmental practices and determine the applicability of regulatory limitations prior to use.*

1.7 *This international standard was developed in accordance with internationally recognized principles on standardization established in the Decision on Principles for the Development of International Standards, Guides and Recommendations issued by the World Trade Organization Technical Barriers to Trade (TBT) Committee.*

2. Referenced Documents

2.1 *ASTM Standards:*[4]

E2091 Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls

E2247 Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property

E2600 Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions

E2790 Guide for Identifying and Complying With Continuing Obligations

2.2 *Federal Statutes:*[5]

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund"), as amended by Superfund Amendments and Reauthorization Act of 1986 ("SARA") and Small Business Liability Relief and Brownfields Revitalization Act of 2002 ("Brownfields Amendments"), 42 U.S.C. § 9601 *et seq*.

Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11001 *et seq*.

Resource Conservation and Recovery Act (also referred to as the Solid Waste Disposal Act), as amended ("RCRA"), 42 U.S.C. § 6901 *et seq*.

2.3 *OSHA Standard:*

OSHA Hazard Communication Standard (HCS), 29 C.F.R. § 1910.1200[6]

2.4 *USEPA Documents:*[7]

"Standards and Practices for All Appropriate Inquiries" Final Rule (AAI), 40 C.F.R. Part 312

Superfund, Emergency Planning, and Community Right-To-Know Programs, 40 C.F.R. Parts 300-399

USEPA "Enforcement Discretion Guidance Regarding the

[3] Many states and other jurisdictions have differing definitions for terms used throughout this practice, such as "*release*" and "*hazardous substance*." If a *Phase I Environmental Site Assessment* is being conducted to satisfy state requirements and to qualify for the state (or other jurisdiction) equivalent of *LLPs*, *users* and *environmental professionals* are cautioned and encouraged to consider any differing jurisdictional requirements and definitions while performing the *Phase I Environmental Site Assessment*. Substances that are outside the scope of this practice (for example, emerging contaminants that are not *hazardous substances* under CERCLA) may be regulated under state law and may be federally regulated in the future. Although the presence or any *release*/threatened *release* of these substances are "non-scope considerations" under this practice, the *user* may nonetheless decide to include such substances in the defined scope of work for which the *environmental professional* conducting the *Phase I Environmental Site Assessment* is engaged. See 13.1.2.

[4] For referenced ASTM standards, visit the ASTM website, www.astm.org, or contact ASTM Customer Service at service@astm.org. For *Annual Book of ASTM Standards* volume information, refer to the standard's Document Summary page on the ASTM website.

[5] Available from https://uscode.house.gov/.

[6] Available from www.osha.gov.

[7] Available from www.epa.gov.

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Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections" (September 21, 2011)

USEPA "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision" (December 5, 2012)

USEPA "Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners" ("Common Elements Guidance") (July 29, 2019)

USEPA "Superfund Liability Protections for Local Government Acquisitions after the Brownfields Utilization, Investment, and Local Development Act of 2018" (June 15, 2020)

National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300

3. Terminology

3.1 This section provides definitions, descriptions of terms, and a list of acronyms for many of the words used in this practice. The terms are an integral part of this practice and are critical to an understanding of the practice and its use.

3.2 *Definitions:*

3.2.1 *abandoned property, n—property* that can be presumed to be deserted, or an intent to relinquish possession or control can be inferred from the general disrepair or lack of activity thereon such that a reasonable person could believe that there was an intent on the part of the current *owner* to surrender rights to the *property*.

3.2.2 *activity and use limitations (AULs), n*—legal or physical restrictions or limitations on the use of, or access to, a site or facility: *(1)* to reduce or eliminate potential exposure to *hazardous substances* or *petroleum products* in the soil, soil vapor, groundwater, and/or surface water on the *property*, or *(2)* to prevent activities that could interfere with the effectiveness of a response action, in order to ensure maintenance of a condition of no significant risk to public health or the environment. These legal or physical restrictions, which may include *institutional* and/or *engineering controls*, are intended to prevent adverse impacts to individuals or populations that may be exposed to *hazardous substances* and *petroleum products* in the soil, soil vapor, groundwater, and/or surface water on a *property*.

3.2.2.1 *Discussion*—The term *activity and use limitations (AULs)* is taken from Guide E2091 to include both legal (that is, institutional) and physical (that is, engineering) controls within its scope. Other agencies, organizations, and jurisdictions may define or utilize these terms differently (for example, EPA and California do not include physical controls within their definitions of "*institutional controls*." Department of Defense and International County/City Management Association use "Land Use Controls." The term "land use restrictions" is used but not defined in the *Brownfields Amendments*).

3.2.3 *actual knowledge, n*—knowledge actually possessed by an individual who is a real person, rather than an entity. *Actual knowledge* is to be distinguished from constructive knowledge that is knowledge imputed to an individual or entity.

3.2.4 *adjoining properties, n*—any real *property* or *properties* the border of which is contiguous or partially contiguous with that of the *subject property*, or that would be contiguous or partially contiguous with that of the *subject property* but for a street, road, or other public thoroughfare separating them.

3.2.5 *aerial photographs, n*—photographs taken from an aerial platform with sufficient resolution to allow identification of development and activities.

3.2.6 *all appropriate inquiries, n*—that inquiry constituting *all appropriate inquiries* into the previous ownership and uses of the *subject property* consistent with good commercial and customary practice as defined in CERCLA, 42 U.S.C. § 9601(35)(B) and 40 C.F.R. Part 312, that will qualify a party to a *commercial real estate transaction* for one of the threshold criteria for satisfying the *LLPs* to CERCLA liability (42 U.S.C. §§ 9601(35)(A) & (B), § 9607(b)(3), § 9607(q), and § 9607(r)), assuming compliance with other elements of the defense. See Appendix X1.

3.2.7 *approximate minimum search distance, n*—the area for which records must be obtained and reviewed pursuant to Section 8 subject to the limitations provided in that section. This may include areas outside the *subject property* and shall be measured from the nearest *subject property* boundary. This term is used in lieu of radius to include irregularly shaped *properties*.

3.2.8 *bona fide prospective purchaser [42 U.S.C. § 9607(r)], n*—a person may qualify as a *bona fide prospective purchaser* if, among other requirements, such person made "*all appropriate inquiries* into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." Knowledge of contamination resulting from *all appropriate inquiries* would not generally preclude this liability protection. A person must make *all appropriate inquiries* on or before the date of purchase. The facility must have been purchased after January 11, 2002. See Appendix X1 for the other necessary requirements that are beyond the scope of this practice.

3.2.9 *Brownfields Amendments, n*—amendments to CERCLA pursuant to the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002), 42 U.S.C. § 9601 *et seq*.

3.2.10 *building department records, n*—those records of the local government in which the *subject property* is located indicating permission of the local government to construct, alter, or demolish improvements on a *property*.

3.2.11 *business environmental risk (BER), n*—a risk which can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of *commercial real estate*, not necessarily related to those

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environmental issues required to be investigated in this practice. Consideration of *BER* issues may involve addressing one or more non-scope considerations, some of which are identified in Section 13.

3.2.12 *commercial real estate, n*—any real *property* except a *dwelling* or *property* with no more than four *dwelling* units exclusively for residential use (except that a *dwelling* or *property* with no more than four *dwelling* units exclusively for residential use is included in this term when it has a commercial function, as in the construction of such *dwellings* for profit). This term includes but is not limited to undeveloped real *property* and real *property* used for industrial, retail, office, agricultural, other commercial, medical, or educational purposes; *property* used for residential purposes that has more than four residential *dwelling* units; and *property* with no more than four *dwelling* units for residential use when it has a commercial function, as in the building of such *dwellings* for profit.

3.2.13 *commercial real estate transaction, n*—a transfer of title to or possession of real *property* or receipt of a security interest in real *property*, except that it does not include transfer of title to or possession of real *property* or the receipt of a security interest in real *property* with respect to an individual *dwelling* or building containing fewer than five *dwelling* units, nor does it include the purchase of a lot or lots to construct a *dwelling* for occupancy by a purchaser, but a *commercial real estate* transaction does include real *property* purchased or leased by persons or entities in the business of constructing or developing *dwelling* units.

3.2.14 *construction debris, n*—concrete, brick, asphalt, and other such building materials discarded in the construction of a building or other improvement to *property*.

3.2.15 *contaminated public wells, n*—public wells used for drinking water that have been designated by a government entity as contaminated by *hazardous substances* (for example, chlorinated *solvents*) or *petroleum products*, or as having water unsafe to drink without treatment.

3.2.16 *contiguous property owner [42 U.S.C. § 9607(q)], n*—a person may qualify for the *contiguous property owner liability protection* if, among other requirements, such person owns real *property* that is contiguous to, and that is or may be contaminated by *hazardous substances* from other real *property* that is not owned by that person. Furthermore, such person conducted *all appropriate inquiries* at the time of acquisition of the *subject property* and did not know or have reason to know that the *subject property* was or could be contaminated by a *release* or threatened *release* from the contiguous *property*. The *all appropriate inquiries* must not result in knowledge of contamination. If it does, then such person did "know" or "had reason to know" of contamination and would not be eligible for the *contiguous property owner liability protection*. See Appendix X1 for the other necessary requirements that are beyond the scope of this practice.

3.2.17 *controlled recognized environmental condition, n—recognized environmental condition* affecting the *subject property* that has been addressed to the satisfaction of the applicable regulatory authority or authorities with *hazardous substances* or *petroleum products* allowed to remain in place subject to implementation of required controls (for example, *activity and use limitations* or *other property use limitations*). For examples of *controlled recognized environmental conditions*, see Appendix X4.

3.2.17.1 *Discussion*—Identification of a *controlled recognized environmental condition* is a multi-step process that shall be reflected in the *report's* Findings and Opinions section(s), as described in 12.5 and 12.6, including the *environmental professional's* rationale for concluding that a finding is a *controlled recognized environmental condition*:

(1) When determining whether a *recognized environmental condition* has been "addressed to the satisfaction of the applicable regulatory authority or authorities with *hazardous substances* or *petroleum products* allowed to remain in place," the *environmental professional* shall review *reasonably ascertainable* documentation, such as no further action letters (or similar certifications or approvals) issued by the applicable regulatory authority or authorities, or, in the case of self-directed actions, documentation and relevant data that satisfy risk-based criteria established by the applicable regulatory authority or authorities.

(2) In determining whether a *recognized environmental condition* is "subject to implementation of required controls (for example, *activity and use limitations* or other *property use limitations*)," the *environmental professional* shall identify the documentation providing the control(s) that addresses the *recognized environmental condition* in the *report's* Findings and Opinions section(s).

(3) When the *environmental professional* determines that a *recognized environmental condition* is "subject to implementation of required controls," this determination does not imply that the *environmental professional* has evaluated or confirmed the adequacy, implementation, or continued effectiveness of the control(s).

(4) A past *release* that previously qualified as a *controlled recognized environmental condition* may no longer constitute a *controlled recognized environmental condition* at the time of the *Phase I Environmental Site Assessment* if new conditions or information have been identified such as, among other things, a change in regulatory criteria, a change of use at the *subject property*, or a subsequently identified *migration* pathway that was not previously known or evaluated.

3.2.18 *data failure, n*—failure to achieve the historical research objective in 8.3.1 even after reviewing the *standard historical resources* in 8.3.4.1 through 8.3.4.8 that are *reasonably ascertainable* and likely to be useful. *Data failure* is one type of *data gap*. See 8.3.6.

3.2.19 *data gap, n*—a lack of or inability to obtain information required by this practice despite *good faith* efforts by the *environmental professional* to gather such information. *Data gaps* may result from incompleteness in any of the activities required by this practice, including, but not limited to, *site reconnaissance* (for example, an inability to conduct the *site visit*), and *interviews* (for example, an inability to interview the *key site manager*, regulatory officials, etc.). See 12.6.

3.2.20 *de minimis condition, n*—a condition related to a *release* that generally does not present a threat to human health

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or the *environment* and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies. A condition determined to be a *de minimis condition* is not a *recognized environmental condition* nor a *controlled recognized environmental condition*.

3.2.21 *demolition debris, n*—concrete, brick, asphalt, and other such building materials discarded in the demolition of a building or other improvement to a *property*.

3.2.22 *drum, n*—a container (typically, but not necessarily, holding 55 gal (208 L) of liquid) that may be used to store *hazardous substances* or *petroleum products*.

3.2.23 *dry wells, n*—underground areas where soil has been removed and replaced with pea gravel, coarse sand, or large rocks. *Dry wells* are used for drainage, to control storm runoff, for the collection of spilled liquids (intentional and non-intentional), and *wastewater* disposal (often illegal).

3.2.24 *due diligence, n*—the process of inquiring into the environmental characteristics of *commercial real estate* or other conditions, usually in connection with a *commercial real estate* transaction. The degree and kind of *due diligence* vary for different *properties*, and differing purposes. See Appendix X1.

3.2.25 *dwelling, n*—structure or portion thereof used for residential habitation.

3.2.26 *engineering controls, n*—physical modifications to a site or facility (for example, capping, slurry walls, or point of use water treatment) to reduce or eliminate the potential for exposure to *hazardous substances* or *petroleum products* in the soil or groundwater on a *property*. *Engineering controls* are a type of *activity and use limitation (AUL)*.

3.2.27 *environment, n—environment* shall have the same meaning as the definition of *environment* in CERCLA 42 U.S.C. § 9601(8)). For additional background information, see Legal Appendix (Appendix X1) to X1.1.1 "Releases or Threatened Releases."

3.2.28 *environmental compliance audit, n*—the investigative process to determine if the operations of an existing facility are in compliance with applicable environmental laws and regulations. This term should not be used to describe this practice, although an *environmental compliance audit* may include an *environmental site assessment* or, if prior audits are available, may be part of an *environmental site assessment*.

3.2.29 *environmental lien, n*—a charge, security, or encumbrance upon title to a *property* to secure the payment of a cost, damage, debt, obligation, or duty arising out of response actions, cleanup, or other remediation of *hazardous substances* or *petroleum products* upon a *property*, including (but not limited to) liens imposed pursuant to CERCLA 42 U.S.C. §§ 9607(1) & 9607(r) and similar state or local laws.

3.2.30 *environmental professional, n*—a person meeting the education, training, and experience requirements as set forth in 40 C.F.R. § 312.10(b). For the convenience of the reader, this section is reprinted in Appendix X2. The person may be an independent contractor or an employee of the *user*.

3.2.31 *environmental site assessment (ESA), n*—the process by which a person or entity seeks to determine if a *subject property* is subject to *recognized environmental conditions*. At the option of the *user*, an *environmental site assessment* may include more inquiry than that constituting *all appropriate inquiries* or, if the *user* is not concerned about qualifying for the *LLPs*, less inquiry than that constituting *all appropriate inquiries*. An *environmental site assessment* is both different from and often less rigorous than an *environmental compliance audit*.

3.2.32 *ERNS list, n*—EPA's emergency response notification system list of reported CERCLA *hazardous substance releases* or spills in quantities greater than the reportable quantity, as maintained at the National Response Center. Notification requirements for such *releases* or spills are codified in 40 C.F.R. Parts 302 and 355.

3.2.33 *fill dirt, n*—dirt, soil, sand, or other earth, that is obtained off-site, that is used to fill holes or depressions, create mounds, or otherwise artificially change the grade or elevation of real *property*. It does not include material that is used in limited quantities for normal landscaping activities.

3.2.34 *fire insurance maps, n*—maps originally produced for fire insurance purposes that indicate uses of *properties* at specified dates.

3.2.35 *good faith, n*—absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

3.2.36 *hazardous substance, n*—a substance defined as a *hazardous substance* pursuant to CERCLA 42 U.S.C. § 9601(14), as interpreted by EPA regulations and the courts: "(A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any *hazardous waste* having the characteristics identified under or listed pursuant to section 3001 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, (42 U.S.C. § 6921) (but not including any waste the regulation of which under RCRA (42 U.S.C. § 6901 *et seq*.) has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act (42 U.S.C. § 7412), and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator (of EPA) has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *hazardous substance* under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)." (See Appendix X1.)

3.2.37 *hazardous waste, n*—any *hazardous waste* having the characteristics identified under or listed pursuant to section 3001 of RCRA, as amended, (42 U.S.C. § 6921) (but not including any waste the regulation of which under RCRA (42 U.S.C. §§ 6901-6992k) has been suspended by Act of Congress). RCRA is sometimes also identified as the Solid Waste

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Disposal Act. RCRA defines a *hazardous waste*, at 42 U.S.C. § 6903, as: "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may: (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness, or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

3.2.38 *hazardous waste/contaminated sites, n*—sites on which a *release* has occurred, or is suspected to have occurred, of any *hazardous substance*, *hazardous waste*, or *petroleum products*, and that *release* or suspected *release* has been reported to a government entity.

3.2.39 *historical recognized environmental condition, n*—a previous *release of hazardous substances* or *petroleum products* affecting the *subject property* that has been addressed to the satisfaction of the applicable regulatory authority or authorities and meeting unrestricted use criteria established by the applicable regulatory authority or authorities without subjecting the *subject property* to any controls (for example, *activity and use limitations* or other *property use limitations*). A *historical recognized environmental condition* is not a *recognized environmental condition*. For examples of *historical recognized environmental conditions*, see Appendix X4.

3.2.39.1 *Discussion*—Identification of a *historical recognized environmental condition* is a multi-step process that shall be reflected in the *report's* Findings and Opinions section(s), as described in 12.5 and 12.6, including the *environmental professional's* rationale for concluding that a finding is a *historical recognized environmental condition*:

(1) When determining whether a *recognized environmental condition* has been "addressed to the satisfaction of the applicable regulatory authority or authorities and meeting unrestricted use criteria established by the regulatory authority or authorities," the *environmental professional* shall review *reasonably ascertainable* documentation and relevant data that demonstrate that unrestricted use criteria established by the applicable regulatory authority or authorities was met.

(2) A past *release* that qualified as a *historical recognized environmental condition* may no longer qualify as a *historical recognized environmental condition* if new conditions or information have been identified such as, among other things, a change in regulatory criteria or a subsequently identified *migration* pathway that was not previously known or evaluated. As noted, the *report's* Findings and Opinions section(s) shall include the *environmental professional's* rationale for concluding that a condition at the *subject property* is or is not currently a *recognized environmental condition* or a *historical recognized environmental condition*.

3.2.40 *IC/EC registries, n*—databases of *institutional controls* or *engineering controls* that may be maintained by a federal, state, or local environmental agency for purposes of tracking sites that may contain residual contamination and *AULs*. The names for these may vary from program to program and state to state, and include terms such as, but not limited to the following: Declaration of Environmental Use Restriction database (Arizona), Land Use Restriction Sites (California Department of Toxic Substances Control), Sites with Deed Restrictions (California State Water Resources Control Board), Environmental Covenant List (Washington), Sites With Environmental Covenants and Use Restrictions (Colorado), Institutional Control Registry (Indiana), Environmental Site Tracking and Research Tool (Missouri), and the Pennsylvania Activity and Use Limitation (PA *AUL*) Registry.

3.2.41 *innocent landowner [42 U.S.C. §§ 9601(35) & 9607(b)(3)], n*—a person may qualify as one of three types of innocent landowners: *(1)* a person who "did not know and had no reason to know" that contamination existed on the *subject property* at the time the purchaser acquired the *subject property*; *(2)* a government entity which acquired the *subject property* by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; or *(3)* a person who "acquired the facility by inheritance or bequest." To qualify for the *innocent landowner* defense, such person must have made *all appropriate inquiries* on or before the date of purchase. Furthermore, the *all appropriate inquiries* must not have resulted in knowledge of the contamination. If it does, then such person did "know" or "had reason to know" of contamination and would not be eligible for the *innocent landowner defense*. See Appendix X1 for the other necessary requirements that are beyond the scope of this practice.

3.2.42 *institutional controls (IC), n*—a legal or administrative mechanism (for example, "deed restrictions," restrictive covenants, easements, or zoning) on the use of, or access to, a site or facility to *(1)* reduce or eliminate potential exposure to *hazardous substances* or *petroleum products* in the soil or groundwater on the *property*, or *(2)* to prevent activities that could interfere with the effectiveness of a response action, in order to ensure maintenance of a condition of no significant risk to public health or the environment. An *institutional control* is a type of *activity and use limitation (AUL)*.

3.2.43 *interviews, n*—those portions of this practice that are conducted to gather information from an individual or individuals in person, by telephone, in writing, or via other electronic media to meet the objectives of this practice.

3.2.44 *key site manager, n*—the person identified by the *owner* or *operator* of a *subject property* as having good knowledge of the uses and physical characteristics of the *subject property*. See 10.5.1.

3.2.45 *land title records, n*—records that affect the title of real estate, which may include, among other things, deeds, mortgages, leases, land contracts, court orders, easements, liens, and *AULs* recorded within the recording systems or land registration systems created by state statute in every state and ordinarily administered in the local jurisdiction (usually the county) in which the *subject property* is located, and available by performing a title search. Such records are publicly accessible, though the process of performing a title search to find *land title records* often requires specialized expertise or knowledge of the local system (see 5.4 – *AULs* and *Environmental Liens in Land Title Records*). Information about the title to the *subject property* that is filed or stored in any place other than where *land title records* are, by law or custom, recorded

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for the local jurisdiction in which the *subject property* is located, are not considered *land title records*.

3.2.46 *landfill, n*—a place, location, tract of land, area, or premises used for the disposal of solid wastes as defined by state solid waste regulations. The term is synonymous with the term *solid waste disposal site* and is also known as a garbage dump, trash dump, or similar term.

3.2.47 *landowner liability protections (LLPs), n*—a defense to CERCLA available to *bona fide prospective purchasers*, *contiguous property owners*, and *innocent landowners*. See 42 U.S.C. §§ 9601(35)(A), 9601(40), 9607(q), and 9607(r).

3.2.48 *local government agencies, n*—those agencies of municipal or county government having jurisdiction over the *subject property*. Municipal and county government agencies include but are not limited to cities, parishes, townships, and similar entities.

3.2.49 *local street directories, n*—directories published by private or government entities that list the *occupant(s)* of a specific address at the time the *occupant* data were collected, typically within a year of the publication date of the directory.

3.2.50 *major occupants, n*—those tenants, subtenants, or other persons or entities each of which uses at least 40 % of the leasable area of the *subject property* or any anchor tenant when the *subject property* is a shopping center.

3.2.51 *material safety data sheet (MSDS), n*—see *safety data sheet*.

3.2.52 *material threat, n—obvious* threat which is likely to lead to a *release* and that, in the opinion of the *environmental professional*, would likely result in impact to public health or the environment. An example might include an aboveground storage tank system that contains a *hazardous substance* and which shows evidence of damage. The damage would represent a *material threat* if it is deemed serious enough that it may cause or contribute to tank integrity failure with a *release* of contents to the *environment*.

3.2.53 *migrate/migration, v/n*—for the purposes of this practice, "*migrate*" and "*migration*" refers to the movement of *hazardous substances* or *petroleum products* in any form, including, for example, solid and liquid at the surface or subsurface, and vapor in the subsurface.

3.2.53.1 *Discussion*—Vapor *migration* in the subsurface is described in Guide E2600; however, nothing in this practice should be construed to require application of the Guide E2600 standard to achieve compliance with *all appropriate inquiries*.

3.2.54 *National Priorities List (NPL), n*—list compiled by EPA pursuant to CERCLA 42 U.S.C. § 9605(a)(8)(B) of sites with the highest priority for cleanup pursuant to EPA's Hazard Ranking System. See 40 C.F.R. Part 300.

3.2.55 *obvious, adj*—that which is plain or evident; a condition or fact that could not be ignored or overlooked by a reasonable observer.

3.2.56 *occupants, n*—those tenants, subtenants, or other persons or entities using a *property* or a portion of a *property*.

3.2.57 *operator, n*—person responsible for the overall operation of a facility.

3.2.58 *other historical resources, n*—any resource other than those designated in 8.3.4.1 through 8.3.4.8 that are credible to a reasonable person and that identify past uses of *properties*. See 8.3.4.9.

3.2.59 *owner, n*—generally the fee *owner* of record of a *property*.

3.2.60 *petroleum exclusion, n*—the exclusion from CERCLA liability provided in 42 U.S.C. § 9601(14), as interpreted by the courts and EPA: "The term (*hazardous substance*) does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *hazardous substance* under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)."

3.2.61 *petroleum products, n*—those substances included within the meaning of the *petroleum exclusion* to CERCLA, 42 U.S.C. § 9601(14), as interpreted by the courts and EPA, that is: petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *hazardous substance* under Subparagraphs (A) through (F) of 42 U.S.C. § 9601(14), natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). (The word fraction refers to certain distillates of crude oil, including gasoline, kerosine, diesel oil, jet fuels, and fuel oil, pursuant to Standard Definitions of Petroleum Statistics.[8])

3.2.62 *Phase I Environmental Site Assessment, n*—the process described in this practice.

3.2.63 *physical setting sources, n*—resources that provide information about the geologic, hydrogeologic, hydrologic, or topographic characteristics of the area that includes the *subject property*. See 8.2.1.

3.2.64 *pits, ponds, or lagoons, n*—manmade or natural depressions in a ground surface that are likely to hold liquids or sludge containing *hazardous substances* or *petroleum products*. The likelihood of such liquids or sludge being present is determined by evidence of factors associated with the pit, pond, or lagoon, including, but not limited to, discolored water, distressed vegetation, or the presence of an *obvious wastewater* discharge.

3.2.65 *practically reviewable, adj*—information that is *practically reviewable* means that the information is provided by the source in a manner and in a form that, upon examination, yields information relevant to the *subject property* without the need for extraordinary analysis of irrelevant data. The form of the information shall be such that the *user* can review the records for a limited geographic area. Records that cannot be feasibly retrieved by reference to the location of the *subject property* or a geographic area in which the *subject property* is located are not generally *practically reviewable*. Most databases of public records are *practically reviewable* if they can

[8] *Standard Definitions of Petroleum Statistics*, American Petroleum Institute, Fifth Edition, 1995.

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be obtained from the source agency by the county, city, zip code, or other geographic area of the facilities listed in the record system. Records that are sorted, filed, organized, or maintained by the source agency only chronologically are not generally *practically reviewable*. Listings in *publicly available* records which do not have adequate address information to be located geographically are not generally considered *practically reviewable*. For large databases with numerous records (such as RCRA hazardous waste generators and registered *underground storage tanks*), the records are not *practically reviewable* unless they can be obtained from the source agency in the smaller geographic area of zip codes. Even when information is provided by zip code for some large databases, it is common for an unmanageable number of sites to be identified within a given zip code. In these cases, it is not necessary to review the impact of all of the sites that are likely to be listed in any given zip code because that information would not be *practically reviewable*. In other words, when so much information is generated that it cannot be feasibly reviewed regarding its impact on the *subject property*, it is not *practically reviewable*.

3.2.66 *property, n*—real *property*, including buildings and other fixtures and improvements located on and affixed to the land.

3.2.67 *property use limitation, n*—limitation or restriction on current or future use of a *property* in connection with a response to a *release*, in accordance with the applicable regulatory authority or authorities that allows *hazardous substances* or *petroleum products* to remain in place at concentrations exceeding unrestricted use criteria.

3.2.68 *property tax files, n*—files kept for *property* tax purposes by the local jurisdiction which may include records of past ownership, appraisals, maps, sketches, photographs, or other information.

3.2.69 *publicly available, adj*—information that is *publicly available* means that the source of the information allows access to the information by anyone upon request.

3.2.70 *RCRA generators, n*—those persons or entities that generate *hazardous wastes*, as defined and regulated by RCRA.

3.2.71 *RCRA TSD facilities, n*—those facilities on which treatment, storage, and/or disposal of *hazardous wastes* takes place, as defined and regulated by RCRA.

3.2.72 *reasonably ascertainable, adj*—information that is *(1) publicly available*, *(2)* obtainable from its source within reasonable time and cost constraints, and *(3) practically reviewable*.

3.2.73 *recognized environmental conditions, n—(1)* the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* to the *environment*; *(2)* the likely presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* or likely *release* to the *environment*; or *(3)* the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* under conditions that pose a *material threat* of a future *release* to the *environment*.

3.2.73.1 *Discussion*—For the purposes of this definition, "likely" is that which is neither certain nor proved, but can be expected or believed by a reasonable observer based on the logic and/or experience of the *environmental professional*, and/or available evidence, as stated in the *report* to support the opinions given therein.

3.2.73.2 *Discussion*—A *de minimis condition* is not a *recognized environmental condition*. See Appendix X4: Additional Examination of the Recognized Environmental Condition Definition and Logic.

3.2.74 *records review, n*—that part that is contained in Section 8 of this practice that addresses which records shall or may be reviewed.

3.2.75 *release, n/v*—a *release* of any *hazardous substance* or *petroleum product* shall have the same meaning as the definition of "*release*" in CERCLA 42 U.S.C. § 9601(22). There are a number of statutory exclusions from the definition of *release* that may impact the *environmental professional's* opinions and conclusions, such as the normal application of fertilizer. For additional background information, see Legal Appendix (Appendix X1) to X1.1.1 "*Releases* and Threatened *Releases*."

3.2.76 *report, n*—written *report* prepared by the *environmental professional* and constituting part of a "*Phase I Environmental Site Assessment*," as required by this practice.

3.2.77 *safety data sheets, n*—written or printed material that is prepared by chemical manufacturers and importers for distributors' and employers' use that provides comprehensive information regarding a hazardous chemical pursuant to OSHA's Hazard Communication Standard (HCS), 29 C.F.R. § 1910.1200.

3.2.78 *significant data gap, n*—a *data gap* that affects the ability of the *environmental professional* to identify a *recognized environmental condition*. See 12.6.2.

3.2.79 *site reconnaissance, n*—that part that is contained in Section 9 of this practice and addresses what should be done in connection with the *site visit*. The *site reconnaissance* includes, but is not limited to, the *site visit* done in connection with such a *Phase I Environmental Site Assessment*.

3.2.80 *site visit, n*—the visit to the *subject property* during which observations are made constituting the *site reconnaissance* section of this practice.

3.2.81 *solid waste disposal site, n*—a place, location, tract of land, area, or premises used for the disposal of solid wastes as defined by state solid waste regulations. The term is synonymous with the term *landfill* and is also known as a garbage dump, trash dump, or similar term.

3.2.82 *solvent, n*—a chemical compound that is capable of dissolving another substance and may itself be a *hazardous substance*, used in a number of manufacturing/industrial processes including but not limited to the manufacture of paints and coatings for industrial and household purposes, equipment clean-up, and surface degreasing in metal fabricating industries.

3.2.83 *standard environmental record sources, n*—those records specified in 8.2.2.

3.2.84 *standard historical resources, n*—those resources of information about the history of uses of *properties* specified in 8.3.4.

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3.2.85 *standard physical setting resources, n*—recent *USGS 7.5 Minute Topographic Map* (or equivalent) showing contour lines and the area on which the *subject property* is located, and site-specific physical setting information obtained pursuant to agency file reviews. See 8.2.1.

3.2.86 *standard practice, n*—the activities set forth in this practice.

3.2.87 *standard sources, n*—sources of environmental, physical setting, or historical records specified in Section 8 of this practice.

3.2.88 *subject property, n*—the *property* that is the subject of the *environmental site assessment* described in this practice.

3.2.89 *sump, n*—pit, cistern, cesspool, or similar receptacle where liquids drain, collect, or are stored.

3.2.90 *topographic map, n*—graphic representation delineating natural and man-made features of an area or region in a way that shows their relative positions and elevations.

3.2.91 *TSD facility, n*—treatment, storage, or disposal facility. See 3.2.71.

3.2.92 *underground injection, n*—the emplacement or discharge of fluids into the subsurface by means of a well, improved sinkhole, sewage drain hole, subsurface fluid distribution system or other system, or groundwater point source.

3.2.93 *underground storage tank (UST), n*—any tank, including underground piping connected to the tank, that is or has been used to contain *hazardous substances* or *petroleum products* and the volume of which is 10 % or more beneath the surface of the ground.

3.2.94 *user, n*—the party seeking to use Practice E1527 to complete an *environmental site assessment* of the *subject property*.

3.2.94.1 *Discussion*—A *user* may include, without limitation, a potential purchaser of *subject property*, a potential tenant of *subject property*, an *owner* of the *subject property*, a lender, or a *property* manager. A *user* seeking to qualify for an *LLP* to CERCLA liability, or a *user* that is an EPA Brownfield Assessment and Characterization grantee, has specific responsibilities for completing a successful application of this practice as outlined in Section 6.

3.2.95 *USGS 7.5 Minute Topographic Map, n*—USGS Topographic Map, including the current US Topo 7.5-Minute Series or the historical 7.5-Minute Topographic Series, which is available from the United States Geologic Survey and showing the *subject property*.

3.2.96 *visually and/or physically observed, v*—during a *site visit* pursuant to this practice, this term means observations made by visual, auditory, or olfactory means while performing the *site reconnaissance*.

3.2.97 *wastewater, n*—water that *(1)* is or has been used in an industrial or manufacturing process, *(2)* conveys or has conveyed sewage, or *(3)* is directly related to manufacturing, processing, or raw materials storage areas at an industrial plant. *Wastewater* does not include water originating on or passing through or adjacent to a site, such as stormwater flows, that has not been used in industrial or manufacturing processes, has not been combined with sewage, or is not directly related to manufacturing, processing, or raw materials storage areas at an industrial plant.

3.2.98 *zoning/land use records, n*—those records of the local government of areas encompassing the *subject property* indicating the uses permitted by the local government in particular zones within its jurisdiction. The records may consist of maps or written records.

3.3 *Abbreviations and Acronyms:*

3.3.1 *AULs—Activity and Use Limitations*

3.3.2 *CERCLA*—Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (as amended, 42 U.S.C. § 9601 *et seq*.)

3.3.3 *C.F.R.*—Code of Federal Regulations

3.3.4 *CREC—Controlled Recognized Environmental Condition*

3.3.5 *EC—Engineering Control*

3.3.6 *EPA*—United States Environmental Protection Agency

3.3.7 *EPCRA*—Emergency Planning and Community Right to Know Act (also known as SARA Title III), 42 U.S.C. §§ 11001-11050 *et seq*.

3.3.8 *ERNS*—emergency response notification system

3.3.9 *ESA—environmental site assessment* (different than an *environmental compliance audit*, 3.2.28)

3.3.10 *FR*—Federal Register

3.3.11 *HREC—Historical Recognized Environmental Condition*

3.3.12 *IC—Institutional Control*

3.3.13 *LLP—Landowner Liability Protections* under the *Brownfields Amendments*

3.3.14 *LUST*—Leaking *underground storage tank*

3.3.15 *NCP*—National Contingency Plan

3.3.16 *NFRAP*—Sites where no further remedial action is planned under CERCLA

3.3.17 *NPDES*—National Pollutant Discharge Elimination System

3.3.18 *NPL*—National Priorities List

3.3.19 *PCBs*—Polychlorinated biphenyls

3.3.20 *RCRA*—Resource Conservation and Recovery Act (as amended, 42 U.S.C. § 6901 *et seq*.)

3.3.21 *REC—Recognized Environmental Condition*

3.3.22 *SARA*—Superfund Amendments and Reauthorization Act of 1986 (amendment to CERCLA).

3.3.23 *TSDF—hazardous waste* treatment, storage, or disposal facility

3.3.24 *U.S.C.*—United States Code

3.3.25 *USGS*—United States Geological Survey

3.3.26 *UST*—Underground Storage Tank

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4. Significance and Use

4.1 *Uses*—This practice is intended for use on a voluntary basis by parties who wish to assess the environmental condition of *commercial real estate* taking into account commonly known and *reasonably ascertainable* information. While use of this practice is intended to constitute *all appropriate inquiries* for purposes of the *LLPs*, it is not intended that its use be limited to that purpose. This practice is intended primarily as an approach to conducting an inquiry designed to identify *recognized environmental conditions* in connection with a *subject property*. No implication is intended that a person shall use this practice in order to be deemed to have conducted inquiry in a commercially prudent or reasonable manner in any particular transaction. Nevertheless, this practice is intended to reflect good commercial and customary practice (see 1.6).

4.2 *Clarifications on Use:*

4.2.1 *Use Not Limited to CERCLA*—This practice is designed to assist the *user* in developing information about the environmental condition of a *subject property* and as such has utility for a wide range of persons, including those who may have no actual or potential CERCLA liability and/or may not be seeking the *LLPs*.

4.2.2 *Residential Tenants/Purchasers and Others*—No implication is intended that it is currently customary practice for residential tenants of multifamily residential buildings, tenants of single-family homes or other residential real estate, or purchasers of *dwellings* for one's own residential use, to conduct an *environmental site assessment* in connection with these transactions. Thus, these transactions are not included in the term *commercial real estate* transactions, and it is not intended to imply that such persons are obligated to conduct an *environmental site assessment* in connection with these transactions for purposes of *all appropriate inquiries* or for any other purpose. In addition, no implication is intended that it is currently customary practice for *environmental site assessments* to be conducted in other unenumerated instances (including but not limited to many commercial leasing transactions, many acquisitions of easements, and many loan transactions in which the lender has multiple remedies). On the other hand, anyone who elects to do an *environmental site assessment* of a *subject property* may, in such person's judgment, use this practice.

NOTE 1—The 2018 BUILD Act amended the CERCLA definition of *bona fide prospective purchaser* at § 101(40) to include certain commercial tenants or lessees who acquire a leasehold interest in a *property*. Therefore, in certain cases, a person acquiring a leasehold interest in a commercial property may need to conduct an *environmental site assessment*, for the purposes of *all appropriate inquiries*, into the previous ownership and uses of the leased commercial property to qualify for the *bona fide prospective purchaser landowner liability protection*.

4.2.3 *Site-Specific*—This practice is site-specific in that it relates to the assessment of environmental conditions for specific *commercial real estate*. Consequently, this practice does not address many additional issues raised in transactions such as purchases of business entities, or interests therein, or of their assets, that may well involve environmental liabilities pertaining to *properties* previously owned or operated or other off-site environmental liabilities.

4.3 *Who May Conduct*—A *Phase I Environmental Site Assessment* must be performed by an *environmental professional* as specified in 7.5.1. No practical standard can be designed to eliminate the role of judgment and the value and need for experience in the party performing the inquiry. The professional judgment of an *environmental professional* is, consequently, vital to the performance of *all appropriate inquiries*.

4.4 *Additional Services*—As set forth in 12.10, additional services may be contracted for between the *user* and the *environmental professional*. Such additional services may include *business environmental risk (BER)* issues not included within the scope of this practice, examples of which are identified in Section 13 under Non-Scope Considerations.

4.5 *Principles*—The following principles are an integral part of this practice and are intended to be referred to in resolving any ambiguity or exercising such discretion as is accorded the *user* or *environmental professional* in conducting an *environmental site assessment* or in judging whether a *user* or *environmental professional* has conducted appropriate inquiry or has otherwise conducted an adequate *environmental site assessment*.

4.5.1 *Uncertainty Not Eliminated*—No *environmental site assessment* can wholly eliminate uncertainty regarding the potential for *recognized environmental conditions* in connection with a *subject property*. Performance of this practice is intended to reduce, but not eliminate, uncertainty regarding the potential for *recognized environmental conditions* in connection with a *subject property*, and this practice recognizes reasonable limits of time and cost.

4.5.2 *Not Exhaustive—All appropriate inquiries* does not mean an exhaustive assessment of a *property*. There is a point at which the cost of information obtained or the time required to gather it outweighs the usefulness of the information and, in fact, may be a material detriment to the orderly completion of transactions. One of the purposes of this practice is to identify a balance between the competing goals of limiting the costs and time demands inherent in performing an *environmental site assessment* and the reduction of uncertainty about unknown conditions resulting from additional information.

4.5.3 *Level of Inquiry is Variable*—Not every *property* will warrant the same level of assessment. Consistent with good commercial and customary standards and practices as defined at 42 U.S.C. § 9601(35)(B), the appropriate level of *environmental site assessment* will be guided by the type of *property* subject to assessment, the expertise and risk tolerance of the *user*, future intended uses of the *subject property* disclosed to the *environmental professional*, and the information developed in the course of the inquiry.

4.5.4 *Comparison with Subsequent Inquiry*—It should not be concluded or assumed that an inquiry was not *all appropriate inquiries* merely because the inquiry did not identify *recognized environmental conditions* in connection with a *subject property*. *Environmental site assessments* must be evaluated based on the reasonableness of judgments made at the time and under the circumstances in which they were made. Subsequent *environmental site assessments* should not be considered valid standards to judge the appropriateness of any

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prior assessment based on hindsight, new information, use of developing technology or analytical techniques, or other factors.

4.5.5 *Point in Time*—The *environmental site assessment* is based upon conditions at the time of completion of the individual *environmental site assessment* elements (see 7.2).

4.6 *Continued Viability of Environmental Site Assessment:*

4.6.1 *Presumed Viability*—Subject to 4.8 and the *user's* responsibilities set forth in Section 6, an *environmental site assessment* meeting or exceeding this practice is presumed to be viable when it is conducted within 180 days prior to the date of acquisition[9] of the *subject property* (or, for transactions not involving an acquisition such as a lease or refinance, the date of the intended transaction). The dates of the components presented in 4.6.2(i), (iii), (iv), and (v) for *interviews*, review of government records, visual inspections, and declaration by *environmental professional*, shall be identified in the *report*. Completion of searches for recorded environmental cleanup liens (4.6.2(ii)) is a *user* responsibility; however, if the *user* has engaged the *environmental professional* to conduct these searches, then that date shall also be identified in the *report*.

4.6.2 *Updating of Certain Components*—Subject to 4.8 and the *user's* responsibilities set forth in Section 6, an *environmental site assessment* meeting or exceeding this practice and for which the information was collected or updated within one year prior to the date of acquisition of the *subject property* (or, for transactions not involving an acquisition such as a lease or refinance, the date of the intended transaction) may be used provided that the following components of the inquiries were updated within 180 days prior to the date of purchase or the date of the intended transaction. All of the following components must be conducted or updated within 180 days prior to the date of acquisition or prior to the date of the transaction:

(i) *interviews* with *owners*, *operators*, and *occupants*;

(ii) searches for recorded environmental cleanup liens (a *user* responsibility, see Section 6);

(iii) reviews of federal, tribal, state, and local government records;

(iv) visual inspections of the *subject property* and of *adjoining properties*; and

(v) the declaration by the *environmental professional* responsible for the assessment or update.

4.6.3 *Compliance with All Appropriate Inquiries*—To qualify for one of the threshold criteria for satisfying the *LLPs* to CERCLA liability, the *all appropriate inquiries* components listed in 4.6.2 must be conducted or updated within 180 days of and prior to the date of acquisition of the *subject property*, and all other components of *all appropriate inquiries* must be conducted within one year prior to the date of acquisition of the *subject property*. The date of the *report* generally does not represent the date the individual components of *all appropriate inquiries* were completed and should not be used when evaluating compliance with the 180-day or 1-year *all appropriate inquiries* requirements.

4.6.4 *User's Responsibilities*—If, within this period, the *environmental site assessment* will be used by a *user* different than the *user* for whom the *environmental site assessment* was originally prepared, the subsequent *user* must also satisfy the *user's* responsibilities in Section 6.

4.7 *Prior Assessment Usage*—This practice recognizes that *environmental site assessments* performed in accordance with this practice will include information that subsequent *users* may want to use to avoid undertaking duplicative assessment procedures. Therefore, this practice describes procedures to be followed to assist *users* in determining the appropriateness of using information in *environmental site assessments* performed more than one year prior to the date of acquisition of the *subject property* (or for transactions not involving an acquisition such as a lease or refinance, the date of the intended transaction). The system of prior assessment usage is based on the following principles that should be adhered to in addition to the specific procedures set forth elsewhere in this practice:

4.7.1 *Use of Prior Information*—Subject to the requirements set forth in 4.6, *users* and *environmental professionals* may use information in prior *environmental site assessments* provided such information was generated as a result of procedures that meet or exceed the requirements of this practice. However, such information shall not be used without current investigation of conditions likely to affect *recognized environmental conditions* in connection with the *subject property*. Additional tasks may be necessary to document conditions that may have changed materially since the prior *environmental site assessment* was conducted. Nothing in this practice is intended to convey a right to use or to rely upon resources, information, findings, or opinions provided in prior assessments.

4.7.2 *Contractual Issues Regarding Prior Assessment Usage*—The contractual and legal obligations between prior and subsequent *users* of *environmental site assessments* or between *environmental professionals* who conducted prior *environmental site assessments* and those who would like to use such prior *environmental site assessments* are beyond the scope of this practice.

4.8 *Actual Knowledge Exception*—If the *user* or *environmental professional(s)* conducting an *environmental site assessment* has *actual knowledge* that the information being used from a prior *environmental site assessment* is not accurate or if it is *obvious*, based on other information obtained by means of the *environmental site assessment* or known to the person conducting the *environmental site assessment*, that the information being used is not accurate, such information from a prior *environmental site assessment* may not be used.

4.9 *Rules of Engagement*—The contractual and legal obligations between an *environmental professional* and a *user* (and other parties, if any) are outside the scope of this practice. No specific legal relationship between the *environmental professional* and the *user* is necessary for the *user* to meet the requirements of this practice.

4.10 *Organization of This Practice*—This practice has thirteen sections and six appendixes. Section 1 is the Scope. Section 2 is Referenced Documents. Section 3, Terminology, has definitions of terms not unique to this practice, descriptions

[9] Under "*All Appropriate Inquiries*" 40 C.F.R. Part 312, EPA defines "date of acquisition" as the date on which a person acquires title to the *property*.

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of terms unique to this practice, and acronyms. Section 4 is Significance and Use of this practice. Section 5 provides discussion regarding *activity and use limitations*. Section 6 describes *User's* Responsibilities. Sections 7 – 12 are the main body of the *Phase I Environmental Site Assessment*, including evaluation and *report* preparation. Section 13 provides additional information regarding non-scope considerations (see 1.4). The appendixes are included for information and are not part of the procedures prescribed in this practice. Appendix X1 explains the liability and defense provisions of CERCLA that will assist the *user* in understanding the *user's* responsibilities under CERCLA; it also contains other important information regarding CERCLA, the *Brownfields Amendments*, and this practice. Appendix X2 provides the definition of the *environmental professional* responsible for the *Phase I Environmental Site Assessment*, as required in the "*All Appropriate Inquiries*" Final Rule (40 C.F.R. Part 312). Appendix X3 provides an optional *User* Questionnaire to assist the *user* and the *environmental professional* in gathering information from the *user* that may be material to identifying *recognized environmental conditions*. Appendix X4 offers an additional examination of the *recognized environmental condition* definition. Appendix X5 provides a suggested table of contents and *report* format for a *Phase I Environmental Site Assessment*. Appendix X6 summarizes non-scope considerations that persons may want to assess.

5. Significance of Activity and Use Limitations

5.1 *Activity and Use Limitations—AULs* are one indication of a past or present *release* of *hazardous substances* or *petroleum products*. *AULs* are an explicit recognition by a federal, tribal, state, or local regulatory agency that residual levels of *hazardous substances* or *petroleum products* may be present on a *property*, and that unrestricted use of the *property* may not be acceptable. *AULs* are important to both the *user* and the *environmental professional*. Specifically, the *environmental professional* can review agency records and *IC/EC registries* for the presence of *AULs* on the *subject property* to determine if *recognized environmental conditions* are present on the *subject property* (see 8.2.2, 8.2.4, and 11.5.1.4). The *user* must comply with *AULs* to maintain the *LLP* (see Appendix X1).

5.2 *Different Terms for AULs*—The term *AUL* is taken from Guide E2091 to include both legal (that is, institutional) and physical (that is, engineering) controls, within its scope. Agencies, organizations, and jurisdictions may define or utilize these terms differently (for example, Department of Defense and International City/County Management Association use "Land Use Controls" and the term "land use restrictions" is used but not defined in the *Brownfields Amendments*).

5.3 *Information Provided by the AUL*—The *AUL* should provide information on the *hazardous substance* or *petroleum product* at the *subject property*, the potential exposure pathway(s) that the *AUL* is intended to control, the environmental medium that is being controlled, and the expected performance objective(s) of the *AUL*. *AULs* may be used to provide access to monitoring wells, sampling locations, or remediation equipment.

5.4 *AULs and Environmental Liens in Land Title Records or Judicial Records—Environmental liens* and *AULs* are legally distinct instruments and have very different purposes, but both instruments can provide an indication of a past or present *release* of a *hazardous substance* or *petroleum product*. *AULs* and *environmental liens* can ordinarily be found in *land title records*. In some jurisdictions, however, judicial records rather than *land title records* include *environmental lien* records. The process of searching and evaluating *land title records* or judicial records (as applicable) ordinarily requires specialized expertise provided by title insurance companies or title search professionals. As described in 6.2, reviewing *land title records* for *AULs* and *environmental liens* (or judicial records where applicable) is a *user* responsibility. See Appendix X1.7 (providing additional discussion of *Land Title Records*, judicial records, and the title search process).

5.5 *AULs in State IC/EC Registries*—In some cases, in lieu of or in addition to being filed in the *land title records*, *AULs* may be found in separate *IC/EC registries*. As 8.2 provides, lists of state and tribal *institutional control/engineering control* sites shall be reviewed by the *environmental professional*. This review can be accomplished by reviewing *IC/EC registries*. However, while some states maintain *reasonably ascertainable IC/EC registries*, other states do not. The *environmental professional* should determine whether *AULs* are considered *reasonably ascertainable* records in the state in which the *subject property* is located. Some *AULs* may only exist in project documentation, which may not be *reasonably ascertainable* for the *environmental professional*. This may be the case in states where project files are archived after a period of years and access to the archives is restricted. *AULs* imposed upon some *properties* by local agencies with limited environmental oversight may not be recorded in the *land title records*, particularly where a local agency has been delegated regulatory authority over environmental programs.

6. User's Responsibilities

6.1 *Scope*—The purpose of this section is to describe tasks to be performed by the *user*. The "*All Appropriate Inquiries*" Final Rule (40 C.F.R. Part 312) requires that these tasks be performed by or on behalf of a party seeking to qualify for an *LLP* to CERCLA liability (see Note 2). These tasks must also be completed by or on behalf of EPA Brownfield Assessment and Characterization grantees. While such information is not required to be provided to the *environmental professional*, the *environmental professional* shall request that the *user* provide the results of these tasks as such information can assist the *environmental professional* in identifying *recognized environmental conditions*. Appendix X3 provides an optional *User* Questionnaire to assist the *user* and the *environmental professional* in gathering information from the *user* that may be material to identifying *recognized environmental conditions*. If the *user* does not communicate the information to the *environmental professional* in connection with 6.1 through 6.6, the *environmental professional* should consider the significance of the absence of such information pursuant to 12.7.

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NOTE 2—Nothing in this section relieves the *environmental professional* of satisfying the *environmental professional* responsibilities set forth in the *All Appropriate Inquiries* Final Rule (40 C.F.R. Part 312).

6.2 *Review Land Title Records and Judicial Records for Environmental Liens and Activity and Use Limitations*—To meet the requirements of 40 C.F.R. 312.20 and 312.25, a search for the existence of *environmental liens* and *AULs* that are filed or recorded against the *subject property* must be conducted. To meet this requirement, *users* may rely on either of the following two methods:

6.2.1 *Method 1 Transaction-Related Title Insurance Documentation Such as Preliminary Title Reports and Title Commitments*—The *user* may rely on title insurance documentation, commonly fashioned as preliminary title reports or title commitments, which are prepared in the course of offering title insurance for the *subject property* transaction to identify *environmental liens* or *AULs* filed or recorded against the *subject property*. Title insurance documentation involves a reliable review of *land title records* or judicial records (see X1.7.4 discussing title insurance documentation). However, the *user* (or a title professional engaged by the *user*) should closely review the title insurance documentation, particularly the areas of the documentation listing *subject property* encumbrances or "restrictions on record," for indications of *AULs* or *environmental liens*.

6.2.2 *Method 2 Title Search Information Reports Such as Condition of Title, Title Abstracts, and AUL/Environmental Lien Reports*—Alternatively, *users* may rely on title search information reports to identify *environmental liens* or *AULs* filed or recorded against the *subject property*. Title search information reports, commonly fashioned as Condition of Title, Title Abstract, *AUL*/Environmental Lien, or similarly titled reports, provide the results of *land title record* and/or judicial records research (as applicable) for information purposes only, rather than for the purposes of offering title insurance. *Users* may rely on title search information reports as long as the title search information reports meet the following scope:

6.2.2.1 *Scope of Title Search Information Reports*—Title search information reports shall identify environmental covenants, environmental easements, land use covenant and agreements, declaration of environmental land use restrictions, environmental land use controls, environmental use controls, *environmental liens*, or any other recorded instrument that restricts, affects, or encumbers the title to the *subject property* due to restrictions or encumbrances associated with the presence of *hazardous substances* or *petroleum products*. Title search information reports shall review *land title records* for documents recorded between 1980 and the present. If judicial records are not reviewed, the title search information report shall include a statement providing that the law or custom in the jurisdiction at issue does not require a search for judicial records in order to identify *environmental liens*.

6.2.3 *Role of the Environmental Professional*—The *user's* responsibility to search for *environmental liens* and *AULs* required by this section is in addition to the *environmental professional's* search of *institutional control* and *engineering control* registries described in 8.2. Unless this task is expressly added by a change in the scope of work to be performed by the *environmental professional*, the *user* requirements set forth in 6.2 do not impose on the *environmental professional* the responsibility to undertake a review of *land title records* or judicial records for *environmental liens* or *AULs*.

6.2.3.1 *User Responsibility to Report Environmental Liens and AULs to the Environmental Professional*—Any *environmental liens* or *AULs* identified under the requirements of 6.2, or otherwise known to the *user*, should be reported to the *environmental professional* conducting the *environmental site assessment*. As provided in 6.1, the *environmental professional* shall request that the *user* provide the results of *user*-performed *AUL* and *environmental lien* searches performed under 6.2.

6.2.3.2 *Environmental Professional Report Requirements*—*Environmental professionals* shall describe in their *report* whether they received the results of the *environmental lien* and *AUL* search required by 6.2. The *environmental professional* does not need to review, assess, or otherwise evaluate the *land title records* or the *user's* conclusions as to whether *AULs* or *environmental liens* were identified. The *environmental professional* only needs to identify whether they received *land title records* from the *user* and whether the *user* identified *AULs* or *environmental liens*.

6.2.4 *Reasonably Ascertainable Title and Judicial Records for Environmental Liens and Activity and Use Limitations*—For this Section 6 (but not 8.2), *environmental liens* and *AULs* that are recorded or filed in any place other than *land title records* or judicial records (as applicable) are not considered to be *reasonably ascertainable* unless applicable federal, tribal, state, or local statutes or regulations specify a place other than *land title records* or judicial records (as applicable) for recording or filing of *environmental liens* and *AULs*.

6.3 *Specialized Knowledge or Experience of the User*—*Users* must take into account their specialized knowledge to identify conditions indicative of *releases* or threatened *releases*. If the *user* has any specialized knowledge or experience that is material to *recognized environmental conditions* in connection with the *subject property*, the *user* should communicate any information based on such specialized knowledge or experience to the *environmental professional*. The *user* should do so before the *environmental professional* conducts the *site reconnaissance* is conducted.

6.4 *Actual Knowledge of the User*—If the *user* has *actual knowledge* of any *environmental lien* or *AULs* encumbering the *subject property* or in connection with the *subject property*, the *user* should communicate such information to the *environmental professional*. The *user* should do so before the *site reconnaissance* is conducted.

6.5 *Reason for Significantly Lower Purchase Price*—In a transaction involving the purchase of a parcel of *commercial real estate*, the *user* shall consider the relationship of the purchase price of the *subject property* to the fair market value of the *subject property* if the *subject property* was not affected by *hazardous substances* or *petroleum products*. The *user* should try to identify an explanation for a lower price which does not reasonably reflect fair market value if the *subject property* was not contaminated, and make a written record of such explanation. Among the factors to consider will be the

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information that becomes known to the *user* pursuant to the *Phase I Environmental Site Assessment*. This practice does not require that a real estate appraisal be obtained in order to ascertain fair market value of the *subject property*. The *user* should inform the *environmental professional* if the *user* believes that the purchase price of the *subject property* is lower than the fair market value due to contamination. The *user* is not required to disclose the purchase price to the *environmental professional*.

6.6 *Commonly Known or Reasonably Ascertainable Information*—Commonly known or reasonably ascertainable information within the local community about the *subject property* must be taken into account by the *user*. If the *user* is aware of any commonly known or *reasonably ascertainable* information within the local community about the *subject property* that is material to *recognized environmental conditions* in connection with the *subject property*, the *user* should communicate such information to the *environmental professional*. The *user* should do so before the *site reconnaissance* is conducted. The *user* must gather such information to the extent necessary to identify conditions indicative of *releases* or threatened *releases* of *hazardous substances* or *petroleum products*.

6.7 *Degree of Obviousness*—The *user* must consider the degree of obviousness of the presence or likely presence of *releases* or threatened *releases* at the *subject property* and the ability to detect *releases* or threatened *releases* by appropriate investigation including the information collected under 6.2, 6.3, 6.5, 6.6, 8.2, 8.3, Section 9, and Section 10.

6.8 *Other*—Either the *user* shall make known to the *environmental professional* the reason why the *user* wants to have the *Phase I Environmental Site Assessment* performed or, if the *user* does not identify the purpose of the *Phase I Environmental Site Assessment*, the *environmental professional* shall assume the purpose is to qualify for an *LLP* to CERCLA liability and state this in the *report*.

7. Phase I Environmental Site Assessment

7.1 *Objective*—The purpose of this *Phase I Environmental Site Assessment* is to identify, to the extent feasible pursuant to the processes prescribed herein, *recognized environmental conditions* in connection with the *subject property* (see 1.1.1).

7.2 *Elements*—A *Phase I Environmental Site Assessment* shall include the following elements:

7.2.1 *User's Responsibilities*—Described in Section 6,

7.2.2 *Physical Setting Resources*—Described in 8.2.1,

7.2.3 *Government Records*—Described in 8.2.2,

7.2.4 *Historical Records*—Described in 8.3,

7.2.5 *Site Reconnaissance*—Described in Section 9,

7.2.6 *Owner/Operator/Occupant Interviews*—Described in Section 10,

7.2.7 *Local Government Officials Interviews*—Described in Section 11,

7.2.8 *Evaluation and Report*—Described in Section 12.

7.3 *Coordination of Parts:*

7.3.1 *Parts Used in Concert*—The *records review*, *site reconnaissance*, and *interviews* are intended to be used in concert with each other. If information from one source indicates the need for more information, other sources may be available to provide information. For example, if a previous use of the *subject property* as a gasoline station is identified through the *records review*, but the present *owner* and *occupants* interviewed report no knowledge of an *underground storage tank*, the person conducting the *site reconnaissance* should be alert for signs of the presence of an *underground storage tank*. The *environmental professional* shall, based on professional judgment, evaluate the relevant lines of evidence obtained as a part of the Phase I process to identify *recognized environmental conditions* in connection with the *subject property*.

7.3.2 *User's Responsibilities*—The *environmental professional* shall note in the *report* whether or not the *user* has reported to the *environmental professional* information pursuant to Section 6.

7.4 *No Sampling*—This practice does not include any testing or sampling of materials (for example, soil, water, air, or building materials).

7.5 *Who May Conduct a Phase I Environmental Site Assessment:*

7.5.1 *Environmental Professional's Duties*—The *environmental site assessment* must be conducted by the *environmental professional* or conducted under the supervision or responsible charge of the *environmental professional*. The *environmental professional* shall be involved in planning the *interviews* and the *site reconnaissance* if not conducted by the *environmental professional*. The person performing the *interviews* and *site reconnaissance* shall possess sufficient education, training, and experience to assess the nature, history, and setting of the *subject property*, and have the ability to identify issues relevant to *recognized environmental conditions* in connection with the *subject property*. The *environmental professional* shall review and interpret the information used to form the basis of the findings, opinions, and conclusions in the *report*.

7.5.2 *Information Obtained From Others*—Information for the *records review* needed for completion of a *Phase I Environmental Site Assessment* may be provided by a number of parties including government agencies, third-party vendors, the *user*, and present and past *owners* and *occupants* of the *subject property*, provided that the information is obtained by the *environmental professional* or person acting under the supervision or responsible charge of the *environmental professional*, or is obtained by a third-party vendor specializing in retrieval of the information specified in Section 8. Prior assessments may also contain information that will be appropriate for usage in a current *environmental site assessment* provided the prior usage procedures set forth in Sections 4, 8, 9, and 10 are followed. The *environmental professional* responsible for the *report* shall review all of the information provided.

7.5.2.1 *Reliance*—An *environmental professional* is not required to verify independently the information provided but may rely on information provided unless the *environmental professional* has *actual knowledge* that certain information is incorrect or unless it is *obvious* that certain information is incorrect based on other information obtained in the *Phase I*

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Environmental Site Assessment or otherwise actually known to the *environmental professional*.

8. Records Review

8.1 *Introduction:*

8.1.1 *Objective*—The purpose of the *records review* is to obtain and review records that will help identify *recognized environmental conditions* in connection with the *subject property*.

8.1.2 *Approximate Minimum Search Distance*—Some records to be reviewed pertain not just to the *subject property* but also pertain to *properties* within an additional *approximate minimum search distance* in order to help assess the likelihood of an impact to the *subject property* from migrating *hazardous substances* or *petroleum products*. When the term *approximate minimum search distance* includes areas outside the *subject property*, it shall be measured from the nearest *subject property* boundary. The term *approximate minimum search distance* is used in lieu of radius in order to include irregularly shaped *properties*.

8.1.2.1 *Adjustment to Approximate Minimum Search Distance*—When allowed by 8.2.2, the *approximate minimum search distance* for a particular record may be adjusted in the discretion of the *environmental professional*. Factors to consider in adjusting the *approximate minimum search distance* include: *(1)* the density (for example, urban, rural, or suburban) of the setting in which the *subject property* is located; *(2)* the distance that the *hazardous substances* or *petroleum products* are likely to *migrate* based on local geologic or hydrogeologic conditions; *(3)* the *property* type, *(4)* existing or past uses of surrounding *properties*, and *(5)* other reasonable factors. The justification for each adjustment and the *approximate minimum search distance* actually used for any particular record shall be explained in the *report*. If the *approximate minimum search distance* is specified as "*subject property* only," then the search shall be limited to the *subject property* and may not be reduced unless the particular record is not *reasonably ascertainable*.

8.1.3 *Accuracy and Completeness*—Accuracy and completeness of record information varies among information sources, including governmental sources. Record information is often inaccurate or incomplete. Neither the *user* nor the *environmental professional* is obligated to identify mistakes or insufficiencies in information provided. However, the *environmental professional* reviewing records shall make a reasonable effort to compensate for mistakes or insufficiencies in the information reviewed that are *obvious* in light of other information of which the *environmental professional* has *actual knowledge*.

8.1.4 *Reasonably Ascertainable/Standard Sources*—Availability of record information varies from information source to information source, including governmental jurisdictions. The *user* or *environmental professional* is not obligated to identify, obtain, or review every possible record that might exist with respect to a *property*. Instead, this practice identifies record information that shall be reviewed from *standard sources*, and the *user* or *environmental professional* is required to review only record information that is *reasonably ascertainable* from those *standard sources*. Record information that is *reasonably ascertainable* means information that is *(1) publicly available*, *(2)* obtainable from its source within reasonable time and cost constraints, and *(3) practically reviewable*.

8.1.5 *Reasonable Time and Cost*—Information that is obtainable within reasonable time and cost constraints means that the information will be provided by the source within 20 calendar days of receiving a written, telephone, or in-person request at no more than a nominal cost intended to cover the source's cost of retrieving and duplicating the information. Information that can only be reviewed by a visit to the source is *reasonably ascertainable* if the visit is permitted by the source within 20 calendar days of request.

8.1.6 *Alternatives to Standard Sources*—Alternative sources may be used instead of *standard sources* if they are of similar or better reliability and detail, or if a standard source is not *reasonably ascertainable*.

8.1.7 *Coordination*—If records are not *reasonably ascertainable* from *standard sources* or alternative sources, the *environmental professional* shall attempt to obtain the requested information by other means specified in this practice, such as questions posed to the current *owner* or *occupant(s)* of the *subject property* or appropriate persons available at the source at the time of the request.

8.1.8 *Sources of Standard Source Information—Standard source* information or other record information from government agencies may be obtained directly from appropriate government agencies or from commercial services. Government information obtained from non-governmental sources may be considered current if the source updates the information at least every 90 days or, for information that is updated less frequently than quarterly by the government agency, within 90 days of the date the government agency makes the information available to the public.

8.1.9 *Documentation of Sources Checked*—The *report* shall document each source that was checked, even if a source revealed no findings. Sources shall be sufficiently documented, including name, date request for information was filled, date information provided was last updated by source, date information was last updated by original source (if provided other than by original source; see 8.1.8). Supporting documentation shall be included in the *report* or adequately referenced to facilitate reconstruction of the assessment by an *environmental professional* other than the *environmental professional* who conducted it.

8.1.10 *Significance*—If a *standard environmental record source* (or other sources in the course of conducting the *Phase I Environmental Site Assessment*) identifies the *subject property* or another site within the *approximate minimum search distance*, the *report* shall include the *environmental professional's* judgment about the significance of the listing to the analysis of *recognized environmental conditions* in connection with the *subject property* (based on the data retrieved pursuant to 8.2, additional information from the government source, or other sources of information). In doing so, the *environmental professional* may make statements applicable to multiple sites (for example, a statement to the effect that none of the sites listed is likely to have current or former *releases* of *hazardous*

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substances and/or *petroleum products* with the potential to *migrate* to the *subject property* except...).

8.2 *Environmental Information:*

TABLE 1 Mandatory *Standard Physical Setting Resources*

USGS—Most recent 7.5 Minute Topographic Map (or equivalent) showing contour lines
Site-specific physical setting information obtained pursuant to agency file review
Discretionary and *Non-Standard Physical Setting Resources*
USGS and/or State Geological Survey—Groundwater Maps
USGS and/or State Geological Survey—Bedrock Geology Maps
USGS and/or State Geological Survey—Surficial Geology Maps
National Cooperative Soil Survey—Soil Survey Maps
Other *Physical Setting Resources* that are reasonably credible (as well as *reasonably ascertainable*)

8.2.1 *Physical Setting Resources*—A USGS topographic map (current USGS Topo or historical 7.5-Minute Topographic Series) showing the *subject property* shall be reviewed. The map shall be displayed at an appropriate scale such that the contour labels are visible and the topography can be visualized. Site-specific physical setting information obtained pursuant to agency file reviews set forth in 8.2.3 shall also be reviewed. One or more additional *physical setting resources* may be obtained at the discretion of the *environmental professional*. Because such resources provide information about the geologic, hydrogeologic, hydrologic, or topographic characteristics of a site, discretionary *physical setting resources* shall be sought when *(1)* conditions have been identified in which *hazardous substances* or *petroleum products* are likely to *migrate* to the *subject property* or from or within the *subject property* into the groundwater or soil, and *(2)* more information than is provided in the most recent *USGS 7.5 Minute Topographic Map* (or equivalent) is generally obtained, pursuant to local good commercial and customary practice in initial *environmental site assessments* for the type of *commercial real estate transaction* involved, to assess the impact of such *migration* on *recognized environmental conditions* in connection with the *subject property* (Table 1).

8.2.2 *Standard Federal, State, and Tribal Environmental Record Sources—Standard government environmental record sources* shall be reviewed, subject to the conditions of 8.1.1 through 8.1.8. Table 2 identifies the types of government records that shall be reviewed. The *approximate minimum search distance* may be reduced, pursuant to 8.1.2.1, for any of these *standard government environmental record sources* except the Federal *NPL* site list and Federal RCRA Treatment, Storage, and Disposal (TSD) records.

8.2.3 *Regulatory Agency File and Records Review:*

8.2.3.1 If the *subject property* or any of the *adjoining properties* is identified on one or more of the *standard government environmental record resources* in 8.2.2, pertinent regulatory files and/or records associated with the listing

TABLE 2 Types of Government Records to be Reviewed

Standard Environmental Record Resources (where available)	*Common Sources for Government Records*	*Approximate Minimum Search Distance* miles (kilometers)
Lists of Federal *NPL* (Superfund) sites	U.S. EPA Website and available EPA databases listing currently listed sites	1.0 (1.6)
Lists of Federal Delisted *NPL* sites	U.S. EPA Website and available EPA databases listing delisted NPL sites	0.5 (0.8)
Lists of Federal sites subject to CERCLA removals and CERCLA orders[A]	U.S. EPA Websites (HQs and Regions)	0.5 (0.8)
Lists of Federal CERCLA sites with NFRAP[B]	U.S. EPA Websites (HQs and Regions)	0.5 (0.8)
Lists of Federal RCRA facilities undergoing Corrective Action	U.S. EPA Website and EPA databases listing RCRA permitted or interim status facilities undergoing corrective action	1.0 (1.6)
Lists of Federal RCRA TSD facilities[A]	U.S. EPA Website and available EPA databases listing RCRA permitted and interim status facilities	0.5 (0.8)
Lists of Federal RCRA *generators*	U.S. EPA Website and available EPA databases listing RCRA Generators of hazardous waste	*subject property* and *adjoining properties*
Federal *institutional control/engineering control registries*	U.S. EPA Website and available EPA data bases listing response actions at CERCLA sites; RCRA sites with *ICs/ECs*, etc.	*subject property* only
Federal *ERNS* list	EPA and US Coast Guard websites and data bases;	*subject property* only
Lists of state- and tribal "Superfund" equivalent sites[A]	Varies by state / tribe	1.0 (1.6)
Lists of state- and tribal hazardous waste facilities	Varies by state / tribe	0.5 (0.8)
Lists of state and tribal *landfills* and *solid waste disposal facilities*	Varies by state / tribe	0.5 (0.8)
Lists of state and tribal leaking storage tanks[A]	Varies by state / tribe	0.5 (0.8)
Lists of state and tribal registered storage tanks	Varies by state / tribe	*subject property* and *adjoining properties*
State and tribal *institutional control/ engineering control registries*	Varies by state / tribe	*subject property* only
Lists of state and tribal voluntary cleanup sites[A]	Varies by state / tribe	0.5 (0.8)
Lists of state and tribal brownfield sites	Varies by state / tribe	0.5 (0.8)

[A] Records should be researched for both currently active and formerly active sites.
[B] Sites where, following an initial investigation, no contamination was found, contamination was removed quickly without the need for the site to be placed on the NPL, or the contamination was not serious enough to require Federal Superfund action. This should not be interpreted as there being no contamination at the site or that other regulatory agencies, such as at the State level, have not required further action. Such sites may be listed in other environmental record resources.

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should be reviewed in accordance with 8.1.1 through 8.1.8. The purpose of the regulatory file review is to obtain sufficient information to assist the *environmental professional* in determining if a *recognized environmental condition*, *historical recognized environmental condition*, *controlled recognized environmental condition*, or a *de minimis condition* exists at the *subject property* in connection with the listing. If, in the *environmental professional's* opinion, such a review is not warranted, the *environmental professional* must explain within the *report* the justification for not conducting the regulatory file review.

8.2.3.2 As an alternative, the *environmental professional* may review files/records from an alternative source(s) (for example, on-site records, *user*-provided records, records from *local government agencies*, *interviews* with regulatory officials or other individuals knowledgeable about the environmental conditions that resulted in the *standard environmental record source* listing, etc.). A summary of the information obtained from the file/record review shall be included in the *report* and the *environmental professional* must include in the *report* the *environmental professional's* opinion on the sufficiency of the information obtained from the files/records review to evaluate the existence of a *recognized environmental condition*, *historical recognized environmental condition*, *controlled recognized environmental condition*, or *de minimis condition*.

8.2.4 *Additional Federal, State, Tribal, and Local Environmental Record Sources*—To enhance and supplement the *standard environmental record sources* in 8.2.2, local records and/or additional federal, state, or tribal records shall be checked when, in the judgment of the *environmental professional*, such additional records *(1)* are *reasonably ascertainable*, *(2)* are sufficiently useful, accurate, and complete in light of the objective of the *records review* (see 8.1.1), and *(3)* are generally obtained, pursuant to local good commercial and customary practice, in initial *environmental site assessments* in the type of *commercial real estate transaction* involved. To the extent additional sources are used to supplement the same record types listed in 8.2.2, *approximate minimum search distances* should not be less than those specified above (adjusted as provided in 8.1.2.1 and 8.2.2). Examples of types of records and sources that may be useful are in Table 3.

TABLE 3 Types of Records

Local Brownfield Lists	
Local Lists of *Landfill* and *Solid Waste Disposal Sites*	
Local Lists of *Hazardous Waste* and *Contaminated Sites*	
Local Lists of Registered Storage Tanks	
Local Land Records (for *activity and use limitations*)	
Records of Emergency Release Reports (42 U.S.C. 11004)	
Records of *Contaminated Public Wells*	
Sources	
Department of Health/Environmental Division	
Fire Department	
Planning Department	
Building Permit/Inspection Department	
Local/Regional Pollution Control Agency	
Local/Regional Water Quality Agency	
Local Electric Utility Companies (for records relating to PCBs)	

8.3 *Historical Research:*

8.3.1 *Objective*—The objective of compiling and analyzing historical *property* information and developing a history of the previous uses of the *subject property*, *adjoining properties*, and surrounding area is to help identify the likelihood of past uses having led to *recognized environmental conditions* in connection with the *subject property*. The *environmental professional* shall exercise professional judgment and consider the possible *releases* that might have occurred at the *subject property*, *adjoining properties*, and surrounding area in light of the historical uses and, in concert with other relevant information gathered as part of the Phase I process, use this information to assist in identifying *recognized environmental conditions* in connection with the *subject property*.

8.3.2 *Property Identification—Properties* may be different in use, size, configuration, or address than in the past. Nonetheless, the *subject property* is defined by its current boundaries without regard for any historical change in configuration. For example, the review of historical resources may indicate that: *(1)* the *subject property* formerly comprised a different number or configuration of parcels or addresses or both; *(2)* the *subject property* was formerly part of a larger parcel; or *(3)* the street name(s) or address(es) changed during the research period. *Properties* historically considered to be adjoining the *subject property* may change over time. As an example, a current *adjoining property* may be located beyond a public thoroughfare; however, before the installation of the thoroughfare, a historically *adjoining property* with uses of concern may have been in the location of the current thoroughfare. These factors should be considered by the *environmental professional* when researching historical uses of the *subject property*, *adjoining properties*, and surrounding area.

8.3.3 *Standard Historical Information Sources*—Sources of historical information include, but are not limited to: *(1)* libraries; *(2)* historical societies; *(3)* government agencies; *(4)* local building permit/inspection department records or planning department records; *(5)* current *owners* and *occupants* of the *subject property*, *adjoining properties*, or surrounding *properties*; *(6)* local government officials or employees with knowledge of the *subject property*; *(7)* map preparation companies; *(8)* private resellers of historical *property* information; and *(9)* prior assessments (see 8.4).

8.3.4 *Standard Historical Resources*—Historical resources are obtained from historical information sources. Not all historical resources can be found in each listed source, nor is it necessary to consult every source (see 8.3.8, 8.3.9, and 8.3.10). The following *standard historical resources* include data, imagery, documents, records, and other resources that typically provide useful information about the historical uses of *properties* in light of the objective of the *records review* (see 8.1.1) and are typically *reasonably ascertainable*.

8.3.4.1 *Aerial Photographs*—The term *aerial photographs* means photographs taken from an aerial platform with sufficient resolution to allow identification of development and activities of areas encompassing the *subject property*. *Aerial photographs* are often available from government agencies or private collections unique to a local area.

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8.3.4.2 *Fire Insurance Maps*—The term *fire insurance maps* means maps produced for private fire insurance map companies that indicate uses of *properties* at specified dates and that encompass the *subject property*. These maps are often available at local libraries, historical societies, private resellers, or from the map companies who produced them.

8.3.4.3 *Local Street Directories*—The term *local street directories* means directories published by private or sometimes government entities, often published at regular intervals, that list the *occupant(s)* of a specific address at the time the *occupant* data were collected, which is typically within a year of the publication date of the directory. Often *local street directories* are available at libraries of local governments, colleges or universities, or historical societies.

8.3.4.4 *Topographic Maps—Topographic maps* reviewed for historical land use research purposes may be historical or current maps and should be published at a scale that allows the *environmental professional* to distinguish land surface elevation contour lines, hydrological features, place names, and various cultural features. *Topographic maps* for the entire United States may be obtained from the USGS; other possible sources are local government entities or a *property*-specific topographic survey commissioned by the *property owner*.

8.3.4.5 *Building Department Records*—The term *building department records* means those records of the local government in which the *subject property* is located indicating permission of the local government to construct, alter, or demolish improvements at the *subject property*. Often *building department records* are located in the building department of a municipality or county.

8.3.4.6 *Interviews—Interviews* with one or more persons knowledgeable about the past uses of the *subject property*, *adjoining properties*, or surrounding area may provide information about the past uses of the *subject property* and *adjoining properties*.

8.3.4.7 *Property Tax Files*—The term *property tax files* means the files kept for *property* tax purposes by the local jurisdiction which may include records of past ownership, appraisals, maps, sketches, photographs, or other information.

8.3.4.8 *Zoning/Land Use Records*—The term *zoning/land use records* means those records of the local government in which the *subject property* is located indicating the uses permitted by the local government in particular zones within its jurisdiction. The records may consist of maps and/or written records.

8.3.4.9 *Other Historical Sources*—The term *other historical resources* means a resource or resources other than those designated in 8.3.4.1 through 8.3.4.8 that are credible to a reasonable person and that identify past uses of *properties*. This category includes, but is not limited to: miscellaneous maps, news articles, books about the history of the area being researched, imagery, *land title records*, and a variety of other resources that may provide information about past land uses. These other resources may be found in sources such as prior assessments (see 8.4), newspaper archives, internet sites, community organizations, local libraries, historical societies, government agencies, current *owners* or *occupants* of surrounding *properties*, or records in the files and/or personal knowledge of *owners* and/or *occupants*. *Other historical resources* may be used to satisfy the objective of 8.3.1, but checking *other historical resources* is not required to comply with this practice.

8.3.5 *Intervals*—Review of *standard historical resources* at less than approximately five-year intervals is not required by this practice. For example, if the *subject property* had one use in 1950 and another use in 1955, it is not required to check for a third use in the intervening period. As another example, if the specific use of the *subject property* appears unchanged over a period longer than five years, then it is not required by this practice to research the use during the intervening period (such as if *fire insurance maps* show the same solely residential use building in 1940 and 1960, then the period in between need not be researched).

8.3.6 *Data Failure*—The historical research is complete when either: *(1)* the objective in 8.3.1 is achieved or *(2) data failure* is encountered. *Data failure* occurs when all of the *standard historical resources* that are *reasonably ascertainable* and likely to be useful have been reviewed and yet the objective has not been met. *Data failure* is not uncommon in trying to identify historical uses at five-year intervals back to first use or 1940 (whichever is earlier). Notwithstanding a *data failure*, *standard historical resources* may be excluded if: *(1)* the resources are not *reasonably ascertainable* or *(2)* if past experience indicates that the resources are not likely to be accurate or complete in terms of satisfying the objective (for example, if a particular historical data source is known to have insufficient data for the particular subject area). *Other historical resources* specified in 8.3.4.9 may be used to satisfy the objective of 8.3.1 but are not required to comply with this practice. If *data failure* is encountered, the *report* shall document the failure and, if any of the *standard historical resources* in 8.3.4.1 through 8.3.4.8 were excluded, give the reasons for their exclusion. If the *data failure* represents a *significant data gap*, the *report* shall comment on the impact of the *data gap* on the ability of the *environmental professional* to identify *recognized environmental conditions* (see 12.7).

8.3.7 *Type of Use*—In identifying previous uses, specific information about uses is more helpful than general information. If the general type of use is retail, industrial, or manufacturing, then additional *standard historical resources* in 8.3.4.1 through 8.3.4.8 shall be reviewed if they are likely to identify a more specific use and are *reasonably ascertainable*, subject to the constraints of *data failure* (see 8.3.6).

NOTE 3—Merely identifying that a building is present may not satisfy the historical research objective. For example, a strip-mall, which is typically a retail building, may have included past dry cleaning or other activities of concern as tenant operations. Identifying the more specific use as "past dry cleaning" is more helpful in fulfilling the historical research objective than simply stating “retail”.

8.3.8 *Uses of the Subject Property*—All *obvious* uses of the *subject property* shall be identified from the present, back to the *subject property's* first developed use, or back to 1940, whichever is earlier. The term “developed use” includes agricultural uses and placement of *fill dirt*, and other uses that may not involve structures. The *report* shall describe all identified uses, justify the earliest date identified for the *subject property's* first developed use (for example, records showed no

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development of the *subject property* prior to the specific date), and explain the reason for any gaps in the history of use (for example, *data failure*). This task requires reviewing as many of the *standard historical resources* in 8.3.4.1 through 8.3.4.8 as are necessary and both *reasonably ascertainable* and likely to be useful. The following *standard historical resources* shall be reviewed if, based on the judgment of the *environmental professional*, they are *reasonably ascertainable*, likely to be useful, and applicable to the *subject property*: *(1) aerial photographs* (see 8.3.4.1), *(2) fire insurance maps* (see 8.3.4.2), *(3) local street directories* (see 8.3.4.3), and *(4)* historical *topographic maps* (see 8.3.4.4). In cases in which any of the preceding four *standard historical resources* are not reviewed, the *environmental professional* shall indicate in the *report* why such a review was not conducted. Additional *standard historical resources* in 8.3.4.5 through 8.3.4.8 shall be reviewed if, in the opinion of the *environmental professional*, such additional review is warranted to achieve the objective in 8.3.1. For example, if the *subject property* was developed in the 1700s, it might be feasible to identify uses back to the early 1900s using resources such as *fire insurance maps* or historical *topographic maps* (or equivalent). Although other resources such as *land title records* might go back to the 1700s, it would not be required to review these resources unless these resources were both *reasonably ascertainable* and likely to be useful. As another example, if the *subject property* was reportedly not developed until 1960, it would still be necessary to attempt to confirm that it was undeveloped back to 1940. Such confirmation may come from one or more of the *standard historical resources* specified in 8.3.4.1 through 8.3.4.8, or it may come from *other historical resources* (see 8.3.4.9). However, checking *other historical resources* is not required.

8.3.9 *Uses of the Adjoining Properties*—During research of the *subject property*, as described in 8.3.8, uses of the *adjoining properties* that are obvious shall be identified to evaluate the likelihood that past uses of the *adjoining properties* have led to *recognized environmental conditions* in connection with the *subject property*. The *report* shall describe identified obvious uses of *adjoining properties*, and indicate the earliest dates identified. This task requires reviewing the following *standard historical resources* if they have been researched for the *subject property* (see 8.3.8), provide coverage of one or more *adjoining properties*, and are likely to be useful in satisfying the objective in 8.3.1: *(1) aerial photographs* (see 8.3.4.1), *(2) fire insurance maps* (see 8.3.4.2), *(3) local street directories* (see 8.3.4.3), and *(4)* historical *topographic maps* (see 8.3.4.4). In cases in which any of the preceding four *standard historical resources* are not reviewed for the *adjoining properties* but they were reviewed for the *subject property*, the *environmental professional* shall indicate in the *report* why such a review was not conducted. Additional *standard historical resources* should be reviewed if, in the opinion of the *environmental professional*, such additional review is warranted to achieve the objective in 8.3.1. Factors to consider in making this determination include, but are not limited to: known hydrogeologic/geologic conditions that may indicate a high probability of *hazardous substances* or *petroleum products* migrating to the *subject property*; the extent to which information is *reasonably ascertainable*; the extent to which information is likely to be useful; the time and cost involved in reviewing such resources (for example, reviewing *building department records* or *property tax files* for *adjoining properties* may be too time-consuming); and local good commercial and customary practice. *Other historical resources* may be used to satisfy the objective of 8.3.1 but checking *other historical resources* is not required to comply with this practice.

8.3.10 *Uses of Properties in Surrounding Area*—Uses in the area surrounding the *subject property* shall be identified in the *report*, but this task is required only to the extent that this information is revealed in the course of researching the *subject property* itself (for example, an *aerial photograph* or *fire insurance map* of the *subject property* will usually show the surrounding area). If the *environmental professional* uses resources that include the surrounding area, surrounding uses should be identified to a distance determined at the discretion of the *environmental professional* (for example, if an *aerial photograph* shows the area surrounding the *subject property*, then the *environmental professional* shall determine how far out from the *subject property* the photograph should be analyzed). Factors to consider in making this determination include, but are not limited to: the extent to which information is *reasonably ascertainable*; the time and cost involved in reviewing surrounding uses (for example, analyzing *aerial photographs* is relatively quick, but reviewing *local street directories* for more than the few streets that surround the *subject property* is typically too time-consuming); the extent to which information is useful, accurate, and complete in light of the purpose of the *records review* (see 8.1.1); the likelihood of the information being significant to *recognized environmental conditions* in connection with the *subject property*; the extent to which potential concerns are obvious; known hydrogeologic/geologic conditions that may indicate a high probability of *hazardous substances* or *petroleum products migrating* to the *subject property*; how recently local development has taken place; information obtained from *interviews* and other sources; and local good commercial and customary practice.

8.4 *Prior Assessment Usage*—Historical resources obtained from prior assessments may be reviewed as part of the current assessment provided that legible copies are appended to the prior assessment, and the *environmental professional* independently determines that the historical information meets the objective of 8.3.1 and the historical research requirements of 8.3.8, 8.3.9, and 8.3.10. Anecdotal information such as observations reported at the time of a prior assessment may also be helpful in evaluating historical conditions and may be used at the sole discretion of the *environmental professional* performing the current *environmental site assessment* (see 4.7.1).

8.5 *Referencing Historical Information*—Historical resources used to analyze the land use history of the *subject property*, *adjoining properties*, and surrounding area shall be properly referenced in the *report* or appendixes to provide sufficient information to facilitate reconstruction by another *environmental professional* (see 12.2). Resource references typically include: *(1)* the name of the publisher, title of the

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publication, and year of publication for a city directory, business directory, or historical map; *(2)* the name of the entity that produced an *aerial photograph* or series of photographs, and date or year that the photograph was taken; *(3)* the name and title of the interviewee and date of the *interview*; or *(4)* the website address and resource description for pertinent supplemental internet information.

9. Site Reconnaissance

9.1 *Objective*—The purpose of the *site reconnaissance* is to collect information and make observations to help identify *recognized environmental conditions* in connection with the *subject property*. In identifying *recognized environmental conditions*, *controlled recognized environmental conditions*, and *de minimis conditions*, the *environmental professional* shall exercise professional judgment and consider the observations made during the *site reconnaissance* in concert with other relevant information gathered as part of the *Phase I Environmental Site Assessment* process.

9.2 *Observation*—On a visit to the *subject property* (the *site visit*), the *environmental professional* (or the person under the supervision or responsible charge of the *environmental professional*) shall *visually and/or physically observe* the *subject property* and any structure(s) located on the *subject property*.

9.2.1 *Methodology*—The *environmental professional* (or the person under the supervision or responsible charge of the *environmental professional*) shall establish a method for observation of the *subject property* to satisfy the objective of the assessment (for example, grid patterns or other systematic approaches used for large *properties*). Such methodology shall be documented in the *report*.

NOTE 4—For large tracts of undeveloped land and/or rural *properties*, the *user* may consider whether to use Practice E2247.

9.2.2 *Exterior*—The periphery of the *subject property* as well as the periphery of all structures on the *subject property* shall be *visually and/or physically observed*. The *subject property* shall also be viewed from all adjacent public thoroughfares. If roads or paths with no apparent outlet are observed on the *subject property*, the use of the road or path shall be identified to determine whether it was likely to have been used as an avenue for *releases* or disposal of *hazardous substances* or *petroleum products*.

9.2.3 *Interior*—The interior of structures at the *subject property* shall be *visually and/or physically observed* including accessible common areas (such as lobbies, hallways, utility rooms, recreation areas, etc.); areas where *hazardous substances* or *petroleum products* are or may have been stored, used, treated, discharged, or disposed; maintenance and repair areas; boiler rooms; and a representative sample of *occupant* spaces.

9.2.4 *Activity Exclusions*—It is not necessary to conduct the following activities during the *site visit*:

9.2.4.1 Identification of any features, activities, uses and conditions specified in 9.4.1 through 9.4.28 that cannot be *visually and/or physically observed* during the *site visit*.

9.2.4.2 Identification of conditions under floors, above ceilings, on rooftops, or behind walls.

9.2.5 *Adjoining Properties and the Surrounding Area*—*Adjoining properties* and the surrounding area shall be observed during observation of the periphery of the *subject property*, from public thoroughfares adjacent to or traveled on the way to the *subject property*, and from buildings and structures otherwise accessed during the *site visit*. The purpose of observing *adjoining properties* and the surrounding area is to identify features, activities, uses, and conditions that may indicate *recognized environmental conditions* at the *subject property*.

9.2.6 *Limiting Conditions*—General limitations and basis of review, including limitations imposed by physical obstructions such as adjacent buildings, bodies of water, asphalt, or other paved areas, and other physical constraints (for example, snow, rain, flooding, etc.) shall be noted during the *site visit* and documented in the *report*.

9.2.7 *Frequency*—It is not expected that more than one *site visit* shall be made in connection with a *Phase I Environmental Site Assessment*.

9.3 *Prior Assessment Usage*—The information supplied in connection with the *site reconnaissance* portion of a prior *environmental site assessment* may be used for guidance but shall not be relied upon as representative of current features, activities, uses, or conditions.

9.4 *Features, Activities, Uses, and Conditions*—During the *site visit*, the *environmental professional* (or the person under the supervision or responsible charge of the *environmental professional*) shall look for and identify the features, activities, uses, and conditions specified in 9.4.1 through 9.4.28. The specified features, activities, uses, and conditions should also be the subject of questions asked as part of the *interviews* of *owners*, *operators*, and *occupants* (see Section 10). Any of the specified features, activities, uses, and conditions identified in, on, or at the *subject property* shall be described in the *report*. If any of the specified features, activities, uses, or conditions are not found to be present in, on, or at the *subject property*, the *environmental professional* shall document as such in the *report*.

9.4.1 *Current Use(s) of the subject property*—This includes any use, treatment, storage, disposal, or generation of *hazardous substances* or *petroleum products*. Unoccupied spaces should be noted. In identifying current uses of the *subject property*, specific information about uses is more helpful than general information. (For example, it is more useful to identify uses such as a hardware store, a grocery store, or a bakery rather than simply retail use.)

9.4.2 *Past Use(s) of the subject property*—This includes the likely past use, treatment, storage, disposal, or generation of *hazardous substances* or *petroleum products*.

9.4.3 *Current Uses of Adjoining Properties.*

9.4.4 *Past Uses of Adjoining Properties.*

9.4.5 *Current or Past Uses in the Surrounding Area* (for example, residential, commercial, industrial, etc.).

9.4.6 *Geologic, Hydrogeologic, Hydrologic, and Topographic Conditions*—This includes the *subject property* as well as the general topography of the area surrounding the *subject property*. If observations made during the *site visit* indicate there likely is or was a *release* of *hazardous substances* or

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petroleum products at a nearby *property* that may migrate to the *subject property*, geologic, hydrogeologic, hydrologic, topographic, and other environmental information shall be evaluated to determine whether the *release* is likely to result in a *recognized environmental condition* at the *subject property*.

9.4.7 *Structures and Other Improvements at the Subject Property*—This includes, for example, a general description of the number of buildings; number of stories each; approximate age of buildings; ancillary structures, if any, etc.

9.4.8 *Roads*—This includes roads, streets, and parking facilities on the *subject property*, and public thoroughfares adjacent to the *subject property*.

9.4.9 *Potable Water Supply/Source* for the *subject property*.

9.4.10 *Sewage Disposal System* for the *subject property*.

9.4.11 *Hazardous Substances and Petroleum Products in Connection with Identified Uses*—The approximate number of containers and a general description of the contents, capacity, types of containers, and the storage conditions shall be included in the *report*; however, a detailed inventory is not required.

9.4.12 *Storage Tanks*—This includes aboveground storage tanks, or *underground storage tanks*, vent pipes, fill pipes, or access ways indicating *underground storage tanks* at the *subject property*. The description should include tank construction (for example, single-wall steel, fiberglass, etc.), contents, capacity, and age.

9.4.13 *Strong, Pungent, or Noxious Odors and Their Sources.*

9.4.14 *Standing Surface Water and Pools or Sumps Containing Liquids Likely to be Hazardous Substances or Petroleum Products.*

9.4.15 *Drums, Totes, and Intermediate Bulk Containers*—The approximate number of containers and a general description of the contents, capacity, types of containers, and the storage conditions shall be included in the *report*; however, a detailed inventory is not required.

9.4.16 *Hazardous Substance and Petroleum Product Containers Not in Connection With Identified Uses*—The approximate number of containers and a general description of the contents, capacity, types of containers, and the storage conditions shall be included in the *report*; however, a detailed inventory is not required.

9.4.17 *Unidentified Substance Containers* (including approximate quantities, the types of containers, and conditions). The approximate number of containers and a general description of the contents, capacity, types of containers, and the storage conditions shall be included in the *report*; however, a detailed inventory is not required.

9.4.18 *PCB-Containing Items*—Electrical or hydraulic equipment known to contain PCBs or likely to contain PCBs. Fluorescent light ballasts, caulk, paint, or other materials that may contain PCBs, and are located inside and are part of the building or structure, are outside the scope of this practice.

NOTE 5—Materials potentially containing PCBs (for example, fluorescent light ballasts, paint, caulk) that are not part of the structure and that are not solely within the structure may require identification [see Appendix X1.1.4.3*(2)*].

9.4.19 *Heating/Cooling*—The means of heating and cooling the building(s) on the *subject property*, including the fuel source (example: natural gas furnace, heating oil fueled boiler, electric baseboards, municipally supplied steam, etc.).

9.4.20 *Stains or Corrosion on Floors, Walls, or Ceilings* (except for staining from water).

9.4.21 *Drains and Sumps.*

9.4.22 *Pits, Ponds, or Lagoons.*

9.4.23 *Stained Soil or Pavement.*

9.4.24 *Stressed Vegetation* (from something other than insufficient water).

9.4.25 *Solid Waste*—Areas that are apparently graded by non-natural causes (or filled with fill of unknown origin) suggesting trash, *construction debris*, *demolition debris*, or other solid waste disposal; and mounds or depressions suggesting trash or other solid waste disposal.

9.4.26 *Water/Wastewater*—Wastewater or other liquid (including stormwater) discharged from or to the *subject property*.

9.4.27 *Wells* (including *dry wells*, irrigation wells, injection wells, monitoring wells, abandoned wells, or other wells).

9.4.28 *Septic Systems or Cesspools.*

10. Interviews with Past and Present Owners, Operators, and Occupants

10.1 *Objective*—The purpose of *interviews* is to obtain information indicating *recognized environmental conditions* in connection with the *subject property*.

10.2 *Content—Interviews* with past and present *owners*, *operators*, and *occupants* of the *subject property* consist of questions to be asked in the manner and of persons as described in this section. The content of questions to be asked shall attempt to obtain information about current and past features, uses, activities, and conditions specified in 9.4.1 through 9.4.28, as well as information described in 10.8 and 10.9.

10.3 *Medium*—Questions to be asked pursuant to this section may be asked in person, by telephone, by electronic communication, or in writing, at the discretion of the *environmental professional*.

10.4 *Timing*—Except as specified in Sections 6, 10.8, and 10.9, it is in the discretion of the *environmental professional* whether to ask questions before, during, or after the *site visit* described in Section 9, or in some combination thereof.

10.5 *Interviews:*

10.5.1 *Key Site Manager*—Before the *site visit*, the *owner* of the *subject property* shall be asked to identify a person with good knowledge of the uses and physical characteristics of the *subject property* (the *key site manager*). Often the *key site manager* will be a property manager, the chief physical plant supervisor, or head maintenance person. (If the *user* is the current *subject property owner*, the *user* has an obligation to identify a *key site manager*, even if it is the *user* himself or herself.) If a *key site manager* is identified, the person conducting the *site visit* shall make at least one reasonable attempt (in writing or by telephone) to arrange a mutually convenient appointment for the *site visit* when the *key site manager* agrees to be there. If the attempt is successful, the *key site manager* shall be *interviewed* in conjunction with the *site*

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visit. If such an attempt is unsuccessful, when conducting the *site visit*, the *environmental professional* shall inquire whether an identified *key site manager* (if any) or if a person with good knowledge of the uses and physical characteristics of the *subject property* is available to be interviewed at that time; if so, that person shall be interviewed. In any case, it is at the discretion of the *environmental professional* to decide which questions to ask the *key site manager* before, during, or after the *site visit* or in some combination thereof.

10.5.2 *Occupants*—A reasonable attempt shall be made to *interview* a reasonable number of *occupants* of the *subject property*.

10.5.2.1 *Multi-Family Properties*—For multi-family residential *properties*, residential *occupants* do not need to be *interviewed*, but if the *subject property* has non-residential uses, *interviews* should be held with the non-residential *occupants* based on criteria specified in 10.5.2.2.

10.5.2.2 *Major Occupants*—Except as specified in 10.5.2.1, if the *subject property* has five or fewer current *occupants*, a reasonable attempt shall be made to *interview* a representative of each one of them. If there are more than five current *occupants*, a reasonable attempt shall be made to interview the major *occupant(s)* and those other *occupants* whose operations are likely to indicate *recognized environmental conditions* in connection with the *subject property*.

10.5.2.3 *Reasonable Attempts to Interview*—Examples of reasonable attempts to interview those *occupants* specified in 10.5.2.2 include (but are not limited to) an attempt to *interview* such *occupants* when making the *site visit* or calling such *occupants* by telephone. In any case, when there are several *occupants* to *interview*, it is not expected that the *site visit* must be scheduled at a time when they will all be available to be *interviewed*.

10.5.2.4 *Occupant Identification*—The *report* shall identify the *occupants interviewed* and the duration of their occupancy.

10.5.3 *Prior Assessment Usage*—Persons *interviewed* as part of a prior *environmental site assessment* consistent with this practice do not need to be questioned again about the content of answers they provided at that time. However, they should be questioned about any new information learned since that time, or others should be questioned about conditions since the prior *environmental site assessment* consistent with this practice.

10.5.4 *Past Owners, Operators, and Occupants—Interviews* with past *owners*, *operators*, and *occupants* of the *subject property* who are likely to have material information regarding the potential for contamination at the *subject property* shall be conducted to the extent that they have been identified and that the information likely to be obtained is not duplicative of information already obtained from other sources or resources.

10.5.5 *Interview Requirements for Abandoned Properties*—In the case of inquiries conducted at *abandoned properties* where there is evidence of potential unauthorized uses of the *abandoned property* or evidence of uncontrolled access to the *abandoned property*, *interviews* with one or more *owners* or *occupants* of *adjoining properties* or nearby *properties* shall be conducted.

10.6 *Quality of Answers*—The person(s) *interviewed* should be asked to be as specific as reasonably feasible in answering questions. The person(s) *interviewed* should be asked to answer in *good faith* and to the extent of their knowledge.

10.7 *Incomplete Answers*—While the person conducting the *interview(s)* has an obligation to ask questions, in many instances the persons to whom the questions are addressed will have no obligation to answer them.

10.7.1 *User*—If the person to be *interviewed* is the *user*, the *user* has an obligation to answer all questions in *good faith* and to the extent of their *actual knowledge*, or to designate a *key site manager* to do so. If answers to questions are unknown or partially unknown to the *user* or such *key site manager*, this *interview* section of the *Phase I Environmental Site Assessment* shall not thereby be deemed incomplete.

10.7.2 *Non-user*—If the person conducting the *interview(s)* asks questions of a person other than a *user* but does not receive answers or receives partial answers, this section of the *Phase I Environmental Site Assessment* shall not thereby be deemed incomplete, provided that *(1)* records have been kept of the person to whom the questions were addressed and the responses given, if any, and *(2)* at least one reasonable follow up was made asking for responses.

10.8 *Questions About Helpful Documents*—Prior to the *site visit*, the *subject property owner*, *key site manager* (if any is identified), and *user* (if different from the *subject property owner*) shall be asked if they know whether any of the documents listed in 10.8.1 exist and, if so, whether copies can and will be provided to the *environmental professional* within reasonable time and cost constraints. Even partial information provided may be useful. If so, the *environmental professional* conducting the *site visit* shall review the available documents prior to or at the beginning of the *site visit*.

10.8.1 *Helpful Documents:*

10.8.1.1 *Environmental site assessment* reports;

10.8.1.2 Environmental site investigation reports;

10.8.1.3 *Environmental compliance audit* reports;

10.8.1.4 Environmental permits (for example, solid waste disposal permits, *hazardous waste* disposal permits, *wastewater* permits, NPDES permits, *underground injection* permits, air permits);

10.8.1.5 Registrations for *underground storage tanks* and aboveground storage tanks;

10.8.1.6 Registrations for *underground injection* systems;

10.8.1.7 *Safety data sheets*;

10.8.1.8 Community right-to-know plans;

10.8.1.9 Safety plans; preparedness and prevention plans; spill prevention, countermeasure, and control plans; facility response plans, etc.;

10.8.1.10 Reports regarding hydrogeologic conditions at the *subject property* or surrounding area;

10.8.1.11 Reports regarding any self-directed or other cleanup activities conducted at the *subject property*;

10.8.1.12 Notices or other correspondence from any government agency relating to past or current violations of environmental laws with respect to the *subject property* or relating to *environmental liens* encumbering the *subject property*;

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10.8.1.13 *Hazardous waste* generator notices or *reports*;

10.8.1.14 Geotechnical studies;

10.8.1.15 Risk assessments; and

10.8.1.16 Recorded *AULs*.

10.9 *Proceedings Involving the Subject Property*—Prior to the *site visit*, the *subject property owner*, *key site manager* (if any is identified), and *user* (if different from the *subject property owner*) shall be asked whether they know of *(1)* any pending, threatened, or past litigation relevant to *hazardous substances* or *petroleum products* in, on, at, or from the *subject property*; *(2)* any pending, threatened, or past administrative proceedings relevant to *hazardous substances* or *petroleum products* in, on, at, or from the *subject property*; and *(3)* any notices from any governmental entity regarding any possible violation of environmental laws or possible liability relating to *hazardous substances* or *petroleum products*.

11. Interviews with State and/or Local Government Officials

11.1 *Objective*—The purpose of *interviews* with state and/or local government officials is to obtain information indicating *recognized environmental conditions* in connection with the *subject property*.

11.2 *Content—Interviews* with state and/or local government officials consist of questions to be asked in the manner and of persons as described in this section. The content of questions to be asked shall be decided in the discretion of the *environmental professional(s)* conducting the *Phase I Environmental Site Assessment*, provided that the questions shall generally be directed towards identifying *recognized environmental conditions* in connection with the *subject property*.

11.3 *Medium*—Questions to be asked may be asked in person, by telephone, by electronic communication, or in writing, in the discretion of the *environmental professional*.

11.4 *Timing*—It is in the discretion of the *environmental professional* whether to ask questions before or after the *site visit* described in Section 9, or in some combination thereof.

11.5 *Who Should Be Interviewed:*

11.5.1 *State and/or Local Agency Officials*—A reasonable attempt shall be made to *interview* at least one staff member of any one of the following types of state and/or *local government agencies*:

11.5.1.1 Local fire department that serves the *subject property*,

11.5.1.2 State and/or local health agency or local/regional office of state health agency serving the area in which the *subject property* is located,

11.5.1.3 State and/or local agency or local/regional office of state agency having jurisdiction over *hazardous waste* disposal or other environmental matters in the area in which the *subject property* is located, or

11.5.1.4 Local agencies responsible for the issuance of building permits or groundwater use permits that document the presence of *AULs* in the area in which the *subject property* is located.

11.6 *Prior Assessment Usage*—Person(s) *interviewed* as part of a prior *environmental site assessment* consistent with this practice do not need to be questioned again about the content of answers they provided at that time. However, they should be questioned about any new information learned since that time, or others should be questioned about conditions since the prior *Phase I Environmental Site Assessment* consistent with this practice (see also 4.7.1).

11.7 *Quality of Answers*—The person(s) *interviewed* should be asked to be as specific as reasonably feasible in answering questions. The person(s) *interviewed* should be asked to answer in *good faith* and to the extent of their knowledge.

11.8 *Incomplete Answers*—While the person conducting the *interview(s)* has an obligation to ask questions, in many instances the persons to whom the questions are addressed will have no obligation to answer them. If the person conducting the *interview(s)* asks questions but does not receive answers or receives partial answers, this section shall not thereby be deemed incomplete, provided that questions have been asked (or attempted to be asked) in person or by telephone, and written records have been kept of the person to whom the questions were addressed and their responses.

12. Evaluation and Report Preparation

12.1 *Report Format*—A suggested format for the *Phase I Environmental Site Assessment report* is presented in Appendix X5.

12.2 *Documentation*—The findings, opinions, and conclusions in the *Phase I Environmental Site Assessment report* shall be supported by documentation. If the *environmental professional* has chosen to exclude certain documentation from the *report*, the *environmental professional* shall identify in the *report* the reasons for doing so (for example, a confidentiality agreement). Required and other relevant supporting documentation shall be included in the *report* or adequately referenced to facilitate reconstruction of the assessment by an *environmental professional* other than the *environmental professional* who conducted it. Sources that revealed no findings shall also be documented.

12.3 *Contents of Report*—The *report* shall include those matters required to be included in the *report* pursuant to various sections of this practice. The *report* shall also identify the *environmental professional* and the person(s) who conducted the *site reconnaissance* and *interviews*, and the date(s) the *site reconnaissance* and *interviews* were conducted. In addition, the *report* shall state whether the *user* reported to the *environmental professional* any information pursuant to the *user's* responsibilities described in Section 6 of this practice (for example, an *environmental lien* or *AUL* encumbering the *subject property* or any relevant specialized knowledge or experience of the *user* regarding the *subject property*). A *site plan* showing the approximate location of features, activities, uses, and conditions of the *subject property*, as deemed relevant by the *environmental professional*, shall also be included. Photographs of features, activities, uses, and conditions indicative of *recognized environmental conditions* and *de minimis conditions* shall be included. At the discretion of the

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environmental professional, other relevant and representative photographs of features, activities, uses, and conditions at the *subject property* may also be included.

12.4 *Scope of Services*—The *report* shall describe all services performed in sufficient detail to permit another party to reconstruct the work performed.

12.5 *Findings*—The *report* shall have a Findings section that identifies those features, activities, uses, and conditions that, in the judgment of the *environmental professional*, may indicate the presence or likely presence of *hazardous substances* or *petroleum products* at the *subject property*. Some findings, but not necessarily all findings, may be indicative of the presence of *recognized environmental conditions*, *controlled recognized environmental conditions*, *historical recognized environmental conditions*, or *de minimis conditions*. All parts of the assessment work in concert, and all information identified during the assessment should be evaluated in an aggregated manner (see 7.3.1).

12.5.1 *Significant Data Gaps*—The *report* shall identify *significant data gaps* in the Findings section of the *report*. The resources and/or sources of information that were consulted to address the *significant data gaps* shall also be identified in the *report*. A *data gap* by itself is not inherently significant. For example, if a *subject property's* historical use is not identified back to 1940 because of *data failure* (see 8.3.6), but the earliest source shows that the *subject property* was undeveloped, this *data gap* by itself might not be significant. A *data gap* is only significant if other information and/or professional experience raises reasonable concerns involving the effects of that *data gap* on the ability of the *environmental professional* to render an opinion regarding whether conditions exist that are indicative of *recognized environmental conditions* or *controlled recognized environmental conditions*. For example, if a building on the *subject property* is inaccessible during the *site reconnaissance*, and the *environmental professional's* experience indicates that the use of such a building often involves activity that leads to a *recognized environmental condition*, the inability to inspect the building would be a *significant data gap* listed in the Findings section and discussed in the Opinions section.

12.6 *Opinions*—The *report* shall include the *environmental professional's* opinion(s) and supporting rationale regarding the likely impact to the *subject property* from features, activities, uses, and conditions identified in the Findings section. At the discretion of the *environmental professional*, opinions may be presented in a combined Findings and Opinions section. The logic and reasoning used by the *environmental professional* in evaluating information collected during the course of the assessment related to findings shall be discussed. The opinions shall specifically include the *environmental professional's* rationale for concluding that a finding is or is not a *recognized environmental condition*, *controlled recognized environmental condition*, *historical recognized environmental condition*, or *de minimis condition* insofar as the findings pertain to each of these conditions.

12.6.1 In the case of *controlled recognized environmental conditions*, the logic and reasoning shall: *(1)* discuss how the *recognized environmental condition* has been addressed to the satisfaction of the applicable regulatory authority or authorities as described in 3.2.17, and *(2)* identify the *activity and use limitation(s)* or other *property use limitation(s)* upon which the *controlled recognized environmental condition* finding was made.

12.6.2 If a *significant data gap* is identified, the *environmental professional* shall comment in the Opinion section of the *report* how the missing information that caused the *significant data gap* affects the *environmental professional's* ability to provide an opinion as to whether the inquiry has identified conditions indicative of *releases* or threatened *releases* in, on, or at the *subject property*. If there is a *significant data gap*, then the *environmental professional* should discuss whether additional information would likely assist the *environmental professional* in determining whether a *recognized environmental condition* or *controlled recognized environmental condition* exists (see 12.8). This comment is not intended to constitute a requirement that the *environmental professional* include any recommendations for additional inquiries or other services.

12.7 *Conclusions*—The *report* shall include a Conclusions section that lists all *recognized environmental conditions* (including *controlled recognized environmental conditions*) and *significant data gaps* connected with the *subject property*. The *report* shall include a statement substantially similar to one of the following statements:

12.7.1 "We have performed a *Phase I Environmental Site Assessment* in conformance with the scope and limitations of ASTM Practice E1527-21 of [insert address or legal description], the *subject property*. Any exceptions to, or deletions from, this practice are described in Section [ ] of this *report*. This assessment has revealed no *recognized environmental conditions*, *controlled recognized environmental conditions*, or *significant data gaps* in connection with the *subject property*," or

12.7.2 "We have performed a *Phase I Environmental Site Assessment* in conformance with the scope and limitations of ASTM Practice E1527-21 of [insert address or legal description], the *subject property*. Any exceptions to, or deletions from, this practice are described in Section [ ] of this *report*. This assessment has revealed the following *recognized environmental conditions*, *controlled recognized environmental conditions*, and/or *significant data gaps* in connection with the *subject property*:" (list).

12.8 *Additional Investigation*—The *environmental professional* should provide an opinion regarding additional appropriate investigation, if any, to detect the presence of *hazardous substances* or *petroleum products*. A *Phase I Environmental Site Assessment* which includes such an opinion by the *environmental professional* does not render the assessment incomplete. This opinion is not intended to constitute a requirement that the *environmental professional* include any recommendations for Phase II or other assessment activities.

NOTE 6—An opinion pursuant to 12.8 is a statement by the *environmental professional* that additional investigation may be appropriate, which is different than a recommendation that provides a specific course of action which is outside the scope of this practice (see 12.9).

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12.9 *Recommendations*—Recommendations are not required by this practice. A *user* should consider whether recommendations for additional inquiries or other services are desired. Recommendations are an additional service that may be useful in the *user's* analysis of *LLPs* or *business environmental risks*.

12.10 *Additional Services*—Any additional services contracted for between the *user* and the *environmental professional(s)*, including a broader scope of assessment, more detailed conclusions, liability/risk evaluations, recommendation for Phase II testing or other assessment activities, remediation techniques, and so forth, are beyond the scope of this practice, and should only be included in the *report* if so specified in the terms of engagement between the *user* and the *environmental professional(s)*.

12.11 *Limiting Conditions/Deviations*—All limiting conditions, deletions, and deviations from this practice (if any) shall be listed individually and in detail, including *user*-imposed constraints, and all additions shall be listed.

12.12 *References*—The *report* shall include a references section to identify published referenced sources relied upon in preparing the *Phase I Environmental Site Assessment*. Each referenced source shall be adequately annotated to facilitate retrieval by another party.

12.13 *Signature*—The *environmental professional(s)* responsible for the *Phase I Environmental Site Assessment* shall sign the *report*.

12.14 *Environmental Professional Statement*—As required by 40 C.F.R. § 312.21(d), the *report* shall include the following statements of the *environmental professional(s)* responsible for conducting the *Phase I Environmental Site Assessment* and preparation of the *report*:

12.14.1 "[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of *Environmental professional* as defined in § 312.10 of 40 C.F.R. § 312" and

12.14.2 "[I, We] have the specific qualifications based on education, training, and experience to assess a *property* of the nature, history, and setting of the *subject property*. [I, We] have developed and performed the *all appropriate inquiries* in conformance with the standards and practices set forth in 40 C.F.R. Part 312."

12.15 *Appendixes*—The *report* shall include an appendix section containing supporting documentation and the qualifications of the *environmental professional* and the qualifications of the personnel conducting the *site reconnaissance* and *interviews* if conducted by someone other than the *environmental professional*.

13. Non-Scope Considerations

13.1 *General:*

13.1.1 *Additional Issues*—There may be environmental issues or conditions at a *property* that parties may wish to assess in connection with *commercial real estate* that are outside the scope of this practice (that is, non-scope considerations). As noted by the legal analysis in Appendix X1 of this practice, some environmental conditions may be present at a *property* that do not present potential CERCLA liability, and are beyond the scope of this practice.

13.1.2 *Outside Standard Practices*—Whether or not a *user* elects to inquire into non-scope considerations in connection with this practice or any other *environmental site assessment*, no assessment of such non-scope considerations is required for *all appropriate inquiry* as defined by this practice.

13.1.3 *Other Standards*—There may be standards or protocols for assessment of potential hazards and conditions associated with non-scope conditions developed by governmental entities, professional organizations, or other private entities.

13.1.4 *Compliance With AULs*—Parties who wish to qualify for one of the *LLPs* will need to know whether they are in compliance with *AULs*, including land use restrictions that were relied upon in connection with a response action. A determination of compliance with *AULs* is beyond the scope of this practice.

13.1.5 *List of Additional Issues*—Following are several non-scope considerations that persons may want to assess in connection with *commercial real estate*. Some common non-scope considerations are discussed further in Appendix X1 and Appendix X6. No implication is intended as to the relative importance of inquiry into such non-scope considerations, and this list of non-scope considerations is not intended to be all-inclusive:

13.1.5.1 Asbestos-containing building materials unrelated to *releases* into the *environment*;

13.1.5.2 Biological agents;

13.1.5.3 Cultural and historic resources;

13.1.5.4 Ecological resources;

13.1.5.5 Endangered species;

13.1.5.6 Health and safety;

13.1.5.7 Indoor air quality unrelated to *releases* of *hazardous substances* or *petroleum products* into the *environment*;

13.1.5.8 Industrial hygiene;

13.1.5.9 Lead-based paint unrelated to *releases* into the *environment*;

13.1.5.10 Lead in drinking water;

13.1.5.11 Mold or microbial growth conditions;

13.1.5.12 PCB-containing building materials (for example, interior fluorescent light ballasts, paint, and caulk);

13.1.5.13 Naturally-occurring radon;

13.1.5.14 Regulatory compliance;

13.1.5.15 Substances not defined as *hazardous substances* (including some substances sometimes generally referred to as emerging contaminants) unless or until such substances are classified as a CERCLA *hazardous substance* (see 1.1.4 and Appendix X6.10); and

13.1.5.16 Wetlands.

14. Keywords

14.1 commercial real estate; contaminants; environmental site assessment; Phase I

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APPENDIXES

(Nonmandatory Information)

X1. LEGAL BACKGROUND ON CERCLA AND THE APPLICATION OF "ALL APPROPRIATE INQUIRIES" TO THE PRACTICE ON ENVIRONMENTAL ASSESSMENTS IN COMMERCIAL REAL ESTATE TRANSACTIONS

INTRODUCTION

(Note that EPA was not a party to the development of the appendix and the information and conclusions provided in the appendix do not in any way reflect the opinions, guidance, or approval of EPA. This appendix was last updated in October 2021. Users of this appendix are cautioned that statutes, regulations, guidance, case law, and/or other authorities analyzed and/or referenced in the appendix may have changed since that date. Thus, before relying on any of the analyses, conclusions, and/or guidance provided by this appendix, *users* should ensure that those analyses, conclusions, and/or guidance are current and correct at the time use is made of this appendix. In addition, this appendix is provided for background information purposes only, and does not alter, amend, or change the meaning of Practice E1527. If any inconsistency between this appendix and Practice E1527 arises, Practice E1527 applies, not this appendix or any interpretation based on this appendix.)

The specter of strict, joint and several liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (CERCLA) and analogous state laws, has been a primary driver for Environmental Assessments in *Commercial Real Estate Transactions*. While the E1527 practice can be used in many contexts, a familiarity with CERCLA, and especially its potential *landowner liability protections* (*LLPs*), is crucial to understanding and applying Practice E1527.

CERCLA authorizes the federal government to respond to *releases* of *hazardous substances*,[10] to seek reimbursement from potentially responsible parties ("PRPs"),[11] or to order PRPs to abate *releases* or threatened *releases* of *hazardous substances* that may present an "imminent and substantial endangerment" to the public health or welfare or the environment.[12] In addition, CERCLA requires anyone who is in charge of a facility or vessel to immediately report *releases* of *hazardous substances* that they become aware of which exceed the reportable quantity threshold established by EPA.[13] In addition, PRPs and other persons may seek cost recovery or contribution for response costs from other PRPs, provided they comply with certain requirements.[14]

EPA promulgated an "*all appropriate inquiries*" ("AAI") rule[15] that became effective in November 2006. EPA has indicated that this Practice E1527 is consistent with the requirements of AAI and may be used to comply with the provisions of the AAI rule.[16] This Legal Appendix provides background on CERCLA liability, the scope of the potential liability protections that may be available to *owners* and *operators* of *commercial real estate*, and the AAI rule. It should be noted that with the enactment of the 2002 CERCLA Amendments and the adoption of AAI, the Environmental Transaction Screen Practice (E1528) no longer meets the requirement for establishing the CERCLA *LLPs*. However, Practice E1528 may still be a useful transactional environmental screening tool.

This Legal Appendix is intended for informational purposes only and is not intended to be nor interpreted as legal advice.

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[10] Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604(a)(1).

[11] 42 U.S.C. § 9607(a)(4)(A).

[12] 42 U.S.C. § 9606.

[13] 42 U.S.C. § 9603.

[14] 42 U.S.C. § 9607(a)(4)(B)(authorizing innocent parties and PRPs to obtain cost recovery from other liable parties); 42 U.S.C. § 9613(f) (specifying the circumstances under which PRPs may seek contribution). *See also United States v. Atlantic Research Corp.*, 551 U.S. 128, 134-41 (2007); *Cooper Indus. Inc. v. Aviall Services., Inc.*, 543 U.S. 157, 165-68 (2004).

[15] 70 Fed. Reg. 66081 (Nov. 1, 2005). Codified at 40 C.F.R. § 312.

[16] 70 Fed. Reg. 66081 (Nov. 1, 2005).

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X1.1 **Elements of CERCLA Liability**—A plaintiff (federal government, state or local government, or private party[17]) must establish the following elements before a defendant may be found liable under CERCLA for response costs:

X1.1.1 *Releases or Threatened Releases*—The first element for establishing CERCLA liability is that there must be a *release* or threatened *release* of *hazardous substances* from a facility or a vessel. A *release* or threatened *release* of a *hazardous substance* includes any "*spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)*."[18]

X1.1.1.1 Courts have generally broadly interpreted the term "*release*." There is no minimum quantity requirement in order to qualify as a CERCLA *release*.[19] Likewise, courts have liberally construed the meaning of "threatened *release*" so that corroding or deteriorating *drums* have been interpreted to be a threatened *release*.[20] The *release* must also be "into the environment."[21]

X1.1.1.2 *Exclusions from definition of "release":*

(1) Section 101(22) contains a number of exclusions from the definition of *release*. For example, section 101(22)(A) excludes any *release* that results in exposures solely within the workplace for claims that may be asserted against an employer.[22] In a 1983 notice of proposed rulemaking to adjust the reportable quantities for the CERCLA *release* notification requirements, EPA discussed this so-called "workplace exclusion." EPA said the provision was a relic of an earlier House bill that had contemplated that CERCLA would provide a remedy for personal injury. The bill would have provided compensation to persons injured in the workplace from *releases* of *hazardous substances* unless they could file a workers compensation claim to avoid duplicate claims.[23] Citing to the legislative history, EPA said the "workplace exposure" exclusion was apparently intended to limit the potential scope of third-party actions for personal injuries under the Act.[24] EPA then went on to say that when the personal injury remedy for exposure to *releases* of *hazardous substances* was deleted Congress apparently failed to remove the workplace exclusion.[25] When EPA finalized the rule in 1985, the agency said that the workplace exclusion only applied to "claims compensable through workers compensation."[26] EPA then went on to say that the legislative history clearly indicates that Congress did not intend to exclude all workplace *releases* of *hazardous substances* from CERCLA reporting requirements and response authorities.[27] As a result, EPA said that if a *release* of a *hazardous substance* does not remain wholly contained within a building or structure, then it is a *release* "into the environment" for CERCLA purposes, whether or not it occurs within a workplace.[28]

(2) In 1993, EPA issued guidance on the use of authority under section 104(a) of CERCLA to conduct response actions to address *releases* of *hazardous substances*, pollutants, or contaminants that are found within buildings. EPA clarified that the phrase "*release into the environment*" refers to the location of the *release* itself and does not address the location of the hazard that the *release* poses. The guidance document then provided examples where EPA could exercise its authority. These included:

...[c]ontamination that is the direct result of a release into the environment from a non-natural source that migrates into a building or structure. For example, contamination in a

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[17] Private plaintiffs, as well as the government, may seek response costs under CERCLA from defendants. *see supra* note 5. While many *users* of these ASTM practices or other private parties may think in terms of how to defend against CERCLA liability, they should be aware of the alternative option of conducting a cleanup and then seeking response costs from other responsible parties.

[18] 42 U.S.C.§ 9601(22). The complete definition of a *release* is "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the *environment* (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any *hazardous substance* or pollutant or contaminant), but excludes (*A*) any *release* which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (*B*) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (*C*) *release* of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C. § 2011 *et seq*.], if such *release* is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C. § 2210], or, for the purposes of section 104 of this title [42 U.S.C. § 9604] or any other response action, any *release* of source byproduct, or special nuclear material from any processing site designated under section 102(a)(1) or 302(a) of the Uranium Mill Tailings Radiation Control Act of 1978 [42 U.S.C. § 7912(a) or § 7942(a)], and (*D*) the normal application of fertilizer. See, for example, *Carson Harbor Village, Ltd. v. Unocal Corp*., 270 F.3d 863, 878 (9th Cir. 2001) (en banc); *United States v. CDMG Realty*, 96 F.3d 706, 714-15 (3d Cir. 1996).

[19] *Amcast Industry Corp. v. Detrex Corp*., 779 F. Supp. 1519 (N.D. Ind. 1991). Note that 40 C.F.R. § 312.20(h) provides that the *environmental professional* need not specifically identify extremely small quantities or amounts of contaminants, so long as the contaminants generally would not pose a threat to human health or the environment.

[20] *New York v. Shore Realty Corp*., 759 F.2d 1032 (2d Cir. 1985).

[21] The term "environment" means (*A*) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. § 1801 *et seq.*], and (*B*) any other surface water, groundwater, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States. 42 U.S.C. § 9601(8). EPA has interpreted "into the environment" to apply to *releases* that remain on plant or installation grounds such as spills from tanks or valves onto concrete pads or into lined ditches open to the outside air, *releases* from pipes into open lagoons or ponds, or any other discharges that are not wholly contained within buildings or structures. 50 Fed. Reg. 13456 (April 4, 1985).

[22] 42 U.S.C. § 9601(22)(A). *See also United States v Saporito*, 2011 U.S. Dist. LEXIS 66456 (N.D.Ill. June 22, 2011).

[23] *Notice of Proposed Rulemaking: Notification Requirements; Reportable Quantity Adjustments*, 48 Fed. Reg. 23552, 23555 (May 25, 1983) (NPRM).

[24] *Id.* at 23555. EPA said in the preamble to the NRPM that "The legislative history of the Act indicates that the "workplace exposure" exclusion was apparently intended to limit the potential scope of third-party actions for personal injuries under the Act and cited to S. Rep. No. 96-848, 96th Cong., 2d. Sess. 94 (1980).

[25] 48 Fed. Reg. 23555 (May 25, 1983).

[26] 50 Fed. Reg. 13456, 13462 (April 4, 1985).

[27] *Id.* EPA included the following quote from the legislative history to support this statement "For example, if a *release* occurring solely within a workplace created a hazard of damage to human life or to the environment, it is contemplated that the Fund would have the authority to respond with all of its authorities except for compensating workers whose employers are liable for their injuries under worker's compensation law." *Id*., (citing to S. Rep. No. 96-848, 96th Cong., 2d Sess. 94 (1980)).

[28] 48 Fed. Reg. at 13463. *See also Cyker v. Four Seasons Hotels Ltd*., 1991 U.S. Dist. LEXIS 1310 (D. Mass. Jan. 3, 1991) (no *release* into the environment when chemicals from an indoor pool migrated into adjoining apartment building). *See also "Response Actions at Sites With Contamination Inside Buildings"*, Memorandum from Henry L. Longest, II, OSWER Directive 9360.3-12 (Aug. 12, 1993).

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yard may be tracked into a building on the feet of the residents or workers, or may migrate into the building through an open window or basement walls. In this situation, a release into the environment is occurring and has caused a building to become contaminated with the hazardous substance, pollutant, or contaminant.

(3) Another example EPA provided was when radium wastes that have been disposed in subsoil that may cause indoor hazards from *migration* and accumulation of radon gas in nearby homes can result in CERCLA liability.[29]

(4) Thus, the presence within a building of *hazardous substances* such as vapors that have *migrated* into a building from a "*release into the environment*" (that is, from a *release* outside of the building) can result in CERCLA liability.[30]

(5) Another exclusion to the definition of *release* that may be relevant to a *commercial real estate transaction* is the exclusion for the normal application of fertilizer contained in CERCLA section 101(22)(D). While CERCLA does not define the phrase "normal application of fertilizer," the legislative history indicates that phrase was meant to apply to the act of putting fertilizer on crops or cropland, and did not mean any dumping, spilling, or emitting, whether accidental or intentional, in any other place or of significantly greater concentrations or amounts than are beneficial to crops.[31] The exception may not apply to spillage or improper storage of fertilizer.[32]

X1.1.1.3 The objective of the investigation, according to the AAI rule, is to identify conditions indicative of *releases* or threatened *releases*.[33] While the rule refers to CERCLA section 101(22) that includes the exclusions to the definition of *release*, the rule does not specifically discuss if those excluded *releases* have to be identified to comply with the AAI rule.

X1.1.2 *Hazardous Substance*—The second element that must be satisfied is that there must be a *release* of a "*hazardous substance*." Section 101(14)[34] provides that the term "*hazardous substance*" includes *hazardous substances* designated under section 311 of the Clean Water Act (CWA)[35] or section 102 of CERCLA,[36] any toxic pollutant listed under section 307(a) of the CWA,[37] any waste that has been listed as a RCRA hazardous waste or possesses a RCRA hazardous waste characteristic,[38] any substance that is identified as a hazardous pollutant under section 112 of the Clean Air Act (CAA),[39] and any imminently hazardous chemical that EPA has taken action pursuant to section 7 of the Toxic Substances Control Act (TSCA).[40]

X1.1.2.1 *Petroleum exclusion:*

(1) The definition of a CERCLA *hazardous substance* specifically excludes *petroleum products* and crude oil.[41] EPA has determined that the "petroleum exclusion" applies to petroleum products such as gasoline and other fuels containing lead, benzene, or other *hazardous substances* that are normally added during the refining process.[42]

(2) If waste oil becomes contaminated during use from new *hazardous substances* that are added to oil during use or because the level of the *hazardous substances* that are normally found in the oil is increased beyond the concentrations normally found in petroleum, the EPA has said the petroleum exclusion should not apply.[43] Courts have generally upheld EPA's view that the "petroleum exclusion" does not apply to petroleum that has been contaminated through use. Thus, waste oil has been held to fall outside the "petroleum exclusion."[44] Courts have been less certain on whether sludges found at the bottom of a petroleum storage tank that become contaminated with rust from the steel tank fall within the petroleum exclusion.[45] Likewise, the petroleum exclusion was held not applicable where petroleum had commingled with *hazardous substances* in the subsurface beneath a refinery.[46]

X1.1.2.2 Notwithstanding the existence of the petroleum exclusion, *petroleum products* are included within the scope of this practice and the Legal Appendix for several reasons. First, *petroleum products* have historically been widely used at commercial *properties*. Second, other federal and state laws may impose liability for *releases* or spills of *petroleum products*. For example, *petroleum products* may become *hazardous wastes* such as when petroleum has spilled and cannot be reclaimed from soil. In addition, petroleum products *released* from *underground storage tanks* may be subject to corrective action under RCRA Subtitle I[47] or comparable state laws. Spills to surface waters could also result in cleanup

[29] *Id.*

[30] *See "Response Actions at Sites With Contamination Inside Buildings"*, Memorandum from Henry L. Longest, II, OSWER Directive 9360.3-12 (Aug. 12, 1993).

[31] S. Rep. No. 96-848, at 46 (1980).

[32] *City of Waco v. Schouten*, 385 F. Supp. 2d 595 (W.D. Tex. 2005)(use and storage of phosphorus in cow manure was beyond normal application of fertilizer).

[33] 40 C.F.R. § 312.1(c).

[34] 42 U.S.C. §§ 9601(14)(A)-(F).

[35] 33 U.S.C. § 1321(b)(2)(A).

[36] 42 U.S.C. § 9602. EPA has promulgated a list of CERCLA *hazardous substances* at 40 C.F.R. § 302.

[37] 33 U.S.C. § 1317(a).

[38] EPA has identified over 400 substances as listed hazardous wastes (see 40 C.F.R. § 261.11). EPA has also identified four hazardous waste characteristics for determining if a non-listed solid waste should be regulated as a hazardous waste (see 40 C.F.R. §§ 260.21-.24).

[39] 42 U.S.C. § 7412.

[40] 15 U.S.C. § 2606(f).

[41] 42 U.S.C. § 9601(14) provides that the term *hazardous substances* "does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a *hazardous substance* under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)."

[42] 50 Fed. Reg. 13 460 (April 4, 1985); "*Scope of the CERCLA Petroleum Exclusion*," Memorandum from Francis Blake, General Counsel, Environmental Protection Agency, to J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response (July 31, 1987); *Wilshire Westwood Associates v. Atlantic Richfield Corp*., 881 F.2d 801 (9th Cir. 1989).

[43] 50 Fed. Reg. 13460 (April 4, 1985); "*Scope of the CERCLA Petroleum Exclusion*," Memorandum from Francis Blake, General Counsel, Environmental Protection Agency, to J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response (July 31, 1987).

[44] *United States v. Alcan Aluminum*, 964 F.2d 252 (3d. Cir. 1992); *United States v. Alcan Aluminum Corp*., 755 F. Supp. 531 (N.D.N.Y. 1991); *City of New York v. Exxon Corp*., 766 F. Supp. 177 (S.D.N.Y. 1991).

[45] *Compare United States v. Western Processing Co*., 761 F. Supp. 713 (W.D. Wa. 1991) *with Cose v. Getty Oil Co*., 4 F.3d 700 (9th Cir. 1993) (reversing and remanding summary judgment in favor of appellee oil company).

[46] *Tosco Corp. v. Koch Industries, Inc*. 216 F.3d. 886 (10th Cir. 2000).

[47] 42 U.S.C. § 6991 *et seq*.

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liability pursuant to the Oil Pollution Act of 1990[48] and the CWA.[49] Finally, persons seeking to qualify for federal, state, or local brownfield funding may be required to investigate potential petroleum *releases* as part of implementing this practice.

X1.1.3 *Facility*—The third element of CERCLA liability is that the *release* must occur on or from a facility.[50] The term "facility" is meant to encompass the area of contamination so that a facility may extend beyond property boundaries such as when a groundwater plume has *migrated* offsite. EPA has said it has broad discretion to treat non-contiguous sites as one CERCLA facility.[51]

X1.1.4 *Response Costs*—Another element necessary to establish CERCLA liability is that response costs must be incurred as a result of a *release* or threatened *release* of a *hazardous substance*. There are two different types of response actions for which costs may be recovered: Removal actions[52] (typically short-term or temporary actions) and remedial actions[53] (typically long-term or permanent cleanups).

X1.1.4.1 To recover response costs, a plaintiff must demonstrate that its response costs were incurred consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP).[54] However, the burden of establishing NCP consistency differs depending if the plaintiff is the federal government or a private party. A private party or local government seeking to recover response costs has the burden of proving its response costs were consistent with the NCP.[55] Private plaintiffs only have to demonstrate "substantial compliance" with the NCP rather than strict technical compliance as long as a CERCLA-quality cleanup is achieved.[56] Some cases have held that cleanup costs incurred pursuant to a consent decree will be presumed to be in compliance with the NCP.[57]

X1.1.4.2 The federal government may recover response costs that are "not inconsistent" with the NCP.[58] Courts have interpreted the "not inconsistent" language to mean that the government has a rebuttable presumption that its response costs are consistent with the NCP. Thus, defendants have to introduce evidence to overcome this presumption of NCP consistency.[59] Some courts have held that the defendants must not simply prove variance from the NCP but that there were demonstrable excess costs.[60] Other courts have rejected defendant claims that a remedy was inconsistent with the NCP because it was not cost effective on the grounds that this factor is only relevant in choosing a remedy and not a criterion for challenging the implementation of the remedy.[61] While state agencies also enjoy the presumption of consistency, municipalities are not entitled to the presumption because they are not considered part of state government.[62] Another limitation on cost recovery by private plaintiffs is that they may recover only "necessary" response costs.[63]

X1.1.4.3 *No cost recovery for certain types of releases*—Sections 104(a)(3) and 107 identify certain categories of *releases* for which cost recovery is prohibited. While the cost prohibition of sections 107(i) and (j) broadly apply to all persons including the federal government, states, and Tribes, the limitation of section 104(a)(3) is expressly directed at the federal government.[64] However, courts have generally interpreted this provision not only to limit the federal government's ability to recover response costs for such *releases* under section 107, but also to apply to private cost recovery or contribution actions.[65] The section 104(a)(3) limitations on response actions by the federal government do not apply to any *release* or threatened *release* that EPA determines constitutes a public health or environmental emergency and no other person with

[48] 33 U.S.C. § 1321 *et seq*. Indeed, an "all appropriate inquiries" requirement was added to OPA in 2004 as part of a new OPA innocent landowner defense and the United States Coast Guard issued an OPA AAI rule in 2008 that is substantially similar to the CERCLA AAI rule. See 73 Fed. Reg. 2146 (Jan. 14, 2008).

[49] 33 U.S.C. § 1321 *et seq*.

[50] 42 U.S.C. § 9601(9) defines the term "facility" to mean "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, *landfill*, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a *hazardous substance* has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel."

[51] 55 Fed. Reg. 8689–91 (Mar. 8, 1990).

[52] 42 U.S.C. § 9601(23).

[53] 42 U.S.C. § 9601(24).

[54] 42 U.S.C § 9607(a)(4)(B). The National Contingency Plan is the federal government's blueprint on how *hazardous substances* are to be cleaned up pursuant to CERCLA. *See* 42 U.S.C. § 9605; 40 C.F.R. Part 300.

[55] *Amland Properties Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 794 (D.N.J. 1989); *Artesian Water Co. v. New Castle Cty*., 659 F. Supp. 1269, 1291 (D. Del. 1987); *United States v. Northeastern Pharmaceutical & Chemical Co*., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd on other grounds*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

[56] The NCP requirements for a private party response-action are set forth at 40 C.F.R. § 300.700.

[57] *United States v. Western Processing Co*., 1991 U.S. Dist. LEXIS 16021 (W.D. Wa. July 31, 1991).

[58] 42 U.S.C. § 9607(a)(4)(A). *See Dedham Water Co. v. Cumberland Farms Dairy, Inc*., 889 F.2d 1146 (1st Cir. 1989).

[59] *United States v. Gurley Refining Co*., 788 F. Supp. 1473 (E.D. Ak. 1992); *United States v. American Cyanamid*, 786 F. Supp. 152 (D.R.I. 1992); *Ambrogi v. Gould*, 750 F. Supp. 1233 (M.D. Pa. 1990); *Northeastern Pharmaceutical & Chemical Co*., 579 F. Supp. 823 (W.D. Mo. 1984).

[60] *United States v. American Cyanamid*, 786 F. Supp. 152 (D.R.I. 1992).

[61] *Id.*

[62] *Town of Bedford v. Raytheon Co*., 755 F. Supp. 469 (D. Mass. 1991); *Philadelphia v. Stephan Chemical Co*., 713 F. Supp. 1484 (E.D. Pa. 1989).

[63] 42 U.S.C. § 9607(a)(4)(B).

[64] 42 U.S.C. § 9604(a)(3).

[65] *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355 (9th Cir. 1990)(affirming district court ruling that it was unlikely that Congress would have intended to preclude the President from taking a specific action, while allowing private parties to respond by that precise action); *First United Methodist Church v. United States Gypsum Co*., 882 F.2d 862 (4th Cir. 1989)(§ 9604(a)(3)(B) represents much more than a procedural limitation on the President's authority; instead, it is a substantive limitation of the breadth of CERCLA itself); *Retirement Community Developers, Inc. v. Merine*, 713 F. Supp. 153 (D. Minn.1989)(legislative history supports view that § 9604(a)(3) was intended to be a limit on the substantive scope of CERCLA and not solely a limit on the President's authority under the statute). But see *Prudential Ins. Co. of America, v. United States Gypsum*, 711 F. Supp. 1244 (D.N.J. 1989) (holding that the plaintiffs did not state a CERCLA claim because the sale of asbestos building materials was not a "disposal" of a *hazardous substance* as defined by CERCLA but suggesting, *in dicta*, that it believed that the limits of § 9604(a)(3) did not apply to private asbestos removal actions).

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the authority and capability to respond to the emergency will do so in a timely manner.[66]

(1) Naturally occurring substances exclusion—This exclusion applies to *releases* from a substance that is in an unaltered form or altered by natural processes and where the *releases* occur from a location where the substance is naturally found.[67] Thus, the *migration* of radon gas into a building would not normally be considered a CERCLA *release*.[68] However, when the source material for the radon gas is radioactive waste material that has been disposed or spilled, the presence of radon gas in a structure or property can be a *release* of a *hazardous substance* for which cost recovery could be available.[69]

(2) Building materials exclusion—This exclusion applies to *releases* from products that are part of a building that result in exposure within that structure.[70] This exclusion has been invoked frequently to challenge claims for abatement of asbestos-containing building materials (ACM)[71] but can also apply to lead-based paint (LBP)[72] or to materials potentially containing polychlorinated biphenyls (PCBs) (for example, fluorescent light ballasts, paint, caulk). To fall within this exclusion, the *release* must be from a product that is part of the structure AND result in exposure within the structure.[73]

(a) For example, some building *owners* who have incurred ACM abatement costs have tried to circumvent the structural materials issue by arguing that the seller arranged for the disposal of *hazardous substances* by selling a building with ACM. For example, in *Sycamore Industrial Park Associates v. Ericsson, Inc*.[74] the plaintiff purchased an industrial park with an old heating system that was incorporated into the building. Plaintiff sued defendant under CERCLA, RCRA, and common law, and requested an injunction ordering the defendant to remove the ACM or pay plaintiff for its abatement costs. In its CERCLA claim, plaintiff tried to distinguish the long line of CERCLA case law holding that sellers of buildings with ACM in the building structures could not be liable for arranging for disposal of a *hazardous substance*. Plaintiff argued that since the ACM in the building was associated with an abandoned and obsolete heating system, it was no longer a useful product. Ruling for the defendant on its motion to dismiss, the court said that since installing ACM in a building was not disposal under CERCLA, then simply leaving the same material where it was originally installed could not qualify as disposal. Moreover, the court noted that the plaintiff did not allege that asbestos fibers were being *released* into the environment. If the defendant had dismantled the equipment with ACM or detached and abandoned the ACM, the court said it would not hesitate to impose liability on the seller. Since no such facts were alleged in the complaint, the court granted the defendant's motion to dismiss.

(b) In *California v. Blech*,[75] a fire caused asbestos dust to be *released* in office space leased by the California Department of General Services (DGS). When the building *owner*/defendant declined to abate the dust, DGS performed a cleanup and sought cost recovery. DGS argued that the fire-damaged ACM was no longer part of the building structure and had become asbestos waste. However, the court ruled that because the source of the asbestos dust was ACM that had been part of the building structure, the asbestos abatement costs were not recoverable under CERCLA.

(c) In *CP Holdings, Inc. v. Goldberg-Zoino & Associates, Inc*.[76] the purchaser of a building with ACM was allowed to recover its ACM disposal costs under CERCLA after the purchaser demolished the building because the asbestos *release* was not confined to the interior of the building. Courts have allowed plaintiffs to recover response costs for soil contaminated with asbestos that was *released* from buried asbestos-contaminated materials.[77]

(d) While the building materials exclusion of CERCLA § 104(a)(3) has been applied to LBP, EPA has used its CERCLA authority to conduct response actions for soils contaminated by a *release* of lead-contaminated paint chips from the exterior of homes that pose a lead hazard and to prevent recontamination of soils that have been remediated.[78]

(3) Exclusion for release into public or private drinking water supplies due to deterioration of the system through ordinary use[79]—Lead in drinking water (LIW) can be evaluated in terms of this exclusion. The statutory language seems clear that LIW would not fall within the CERCLA's AAI responsibilities. Indeed, there is no reported case law involving LIW and CERCLA.

(4) Application of pesticides—Section 107(i)[80] provides that no person (including the United States and state governments) may recover response costs resulting from the application of pesticides registered pursuant to Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The purpose of CERCLA's pesticide exemption is "to prevent the typical pesticide user from incurring CERCLA liability when he has

[66] 42 U.S.C. § 9604(a)(4). *See also "CERCLA Removal Actions at Methane Release Sites"*; Memorandum from Henry L. Longest, II to Basil G. Constantelos, OSWER Directive 9360.0-8 (Jan. 23, 1986).

[67] 42 U.S.C. § 9604(a)(3)(A).

[68] EPA has designated radionuclides as a CERCLA *hazardous substance*. Radon and its daughter products are considered radionuclides, and qualify as CERCLA *hazardous substances*. See 40 C.F.R. § 302.4.

[69] *Amoco Oil Co. v. Borden, Inc*., 889 F.2d 664 (5th Cir. 1990).

[70] 42 U.S.C. § 9604(a)(3)(B).

[71] *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *Dayton Independent School Dist. v. United States Mineral Products*, 906 F.2d 1059 (5th Cir. 1990); First United Methodist Church v. United States Gypsum Co., 882 F.2d 862 (4th Cir. 1989); *Black v. Carey Canada, Inc*., 791 F. Supp. 1120 (S.D. Miss. 1990); *Retirement Community Developers v. Merine*, 713 F. Supp. 153 (D. Md. 1989).

[72] *California v. Blech*, 976 F.2d 525, 527 (9th Cir. 1992); *First United Methodist Church v. United States Gypsum Co*., 882 F.2d 862, 868 (4th Cir. 1989); *ABD Assocs. v. American Tobacco Co*., 1995 U.S. Dist. LEXIS 11094 (M.D.N.C. June 26, 1995).

[73] *ABD Assocs. v. American Tobacco Co*., 1995 U.S. Dist. LEXIS 11094 (the legislative history of § 9604(a)(3) shows no intention by Congress to distinguish between asbestos and other products such as lead-based paint).

[74] 2007 U.S. Dist. LEXIS 23881 (N.D. Ill. Mar. 30, 2007).

[75] *California v. Blech*, 976 F.2d 525 (9th Cir. 1992).

[76] 769 F. Supp. 432 (D.N.H. 1991).

[77] *Hidden Lakes Development, LP v. Allina Health System and Park Construction Co*., 2004 U.S. Dist. LEXIS 19360 (D. Minn. Sept. 27, 2004); *Richmond American Homes of Colorado, Inc., v. United States*, 75 Fed. Cl. 376 (2007).

[78] *See generally "Superfund Lead-Contaminated Residential Sites Handbook"*, OSWER 9285.7-50 (August 2003); *See also* OSWER Directive *"Clarification to the 1994 Revised Interim Soil Lead (Pb) Guidance for CERCLA Sites and RCRA Corrective Action Facilities"*, OSWER Directive 9200.4-27P (August 1998).

[79] 42 U.S.C. § 9604 (a)(3)(C).

[80] 42 U.S.C. § 9607(i).

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done nothing more than to have purchased and applied a pesticide in the customary manner."[81] FIFRA registration is not a complete defense to a CERCLA claim, though, and a defendant will have the burden of establishing its entitlement to the exemption.[82] To qualify for this cost recovery prohibition, the pesticide must have been applied in accordance with the labeling requirements established for that pesticide product at the place where the pesticide product was to be applied. Courts have held that the pesticide exemption should be construed narrowly and the exemption has been held not to apply to pesticide disposal, storage, spills, or transport.[83] The misapplication of pesticides that causes contamination on *adjoining properties* has been held not to fall within the pesticide exemption.[84] The pesticide exemption also contains a "savings clause" that provides that the cost recovery prohibition does not alter or modify any obligations or liability under any other federal or state law for damages, injury, or loss resulting from a *release* of *hazardous substances*, or for the costs of removal or remedial actions of such *hazardous substances*.[85]

(5) Federally Permitted Releases—Likewise, section 107(j)[86] prohibits cost recovery by any persons (including the United States and state governments) for response costs or damages resulting from federally-permitted *releases*.[87] There is also a "savings clause" that provides that this section does not alter or modify any obligations or liability under any other federal or state law for damages, injury, or loss resulting from a *release* of *hazardous substances*, or for the costs of removal or remedial actions of such *hazardous substances*.[88]

X1.1.5 *Responsible Party*—The final element of CERCLA liability is that the plaintiff must establish that defendant falls within at least one of the four categories of potentially responsible parties (PRP) identified in section 107(a). The categories of PRPs include current *owners* and *operators* of a facility;[89] past *owners* or *operators* of a facility at the time of disposal;[90] any person who arranges for disposal, treatment or transport of *hazardous substances* ("arrangers" or "generators");[91] and any person who accepts or accepted any *hazardous substances* for transport to a disposal or treatment facility selected by such person ("transporter").[92] Because this practice is focused on *commercial real estate* transactions, the discussion in this Legal Appendix focuses on the *owner* and *operator* PRP categories.

X1.1.5.1 *CERCLA owner:*[93]

(1) Courts have broadly construed the term and some courts have ruled that persons holding equitable title,[94] easement holders,[95] and holders of mineral estates[96] could be liable as CERCLA *owners*. A purchaser of tax liens who has obtained tax deeds has been found to be a CERCLA *owner*,[97] as well as an *owner* of equipment that is an important component of the production process at a facility.[98] Other courts have ruled that mere possessory interests without some incidents of ownership cannot support CERCLA *owner* liability.[99] Some courts appear to be reluctant to extend ownership liability to persons who simply serve as conduits and hold title for only a very short period of time to facilitate a multi-step transaction.[100]

(2) Current *owners* may be liable for any contamination existing on the site even if the current *owner* did not place the *hazardous substances* on the site or cause the *release*.[101] One federal appeals court held that current ownership is measured at the time of cleanup and not necessarily when a cost recovery lawsuit is filed.[102] Passive landlords or sublessors who do not

[81] *Jordan v. Southern Wood Piedmont Co*., 805 F. Supp. 1575, 1581-82 (S.D. Ga. 1992).

[82] *Cameron v. Navarre Farmers Union Coop. Ass'n*, 76 F. Supp. 2d 1178 (D. Kan. 1999); *Beers v.Williams Pipe Line Co*., 1994 U.S. Dist. LEXIS 12303 (D. Kan. Aug. 23, 1994).

[83] *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1511 (11th Cir. 1996) (affirming the district court's finding that the defendant could not be held liable for the alleged disposal of FIFRA-registered pesticides because plaintiff failed to produce any evidence refuting the defendant's proof that the pesticides were properly applied.); *South Fla. Water Management Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996) (exemption inapplicable to "spills while loading planes and the drainage of contaminated rinse water following spraying runs."); *In re Sundance Corp*., 149 B.R. 641, 663 (Bankr. E.D. Wash. 1993) (allowing excess dip to drain off the stakes was a *release* and not an application of pesticides); *Jordan v. Southern Wood Piedmont Co*., 805 F. Supp. 1575 (S.D. Ga. 1992) (exemption did not apply to wood treatment facility but defendant not liable on other grounds); *United States v. Hardage*, 1989 U.S. Dist. LEXIS 17877 (W.D. Okla. 1989) (rejecting a stock yard company's argument that exemption afforded a defense to liability for the disposal of FIFRA-registered dipping vat pesticide waste).

[84] *United States v. Tropical Fruit*, S.E., 96 F. Supp. 2d 71 (D.P.R. 2000).

[85] 42 U.S.C. § 9607(i).

[86] 42 U.S.C. § 9607(j).

[87] Federally-Permitted *Releases* are defined in 42 U.S.C. § 9601(10). Some of the categories of *releases* that may be relevant to *commercial real estate* transactions include discharges in compliance with NPDES and pre-treatment permits issued under the Clean Water Act; *releases* in compliance with a legally enforceable final permit issued pursuant to RCRA where the permit specifically identifies the *hazardous substances* and establishes treatment practice for that discharge; emissions of air pollutants pursuant to permits issued under the CAA; injection of fluids authorized under the federal *underground injection* control programs or approved state programs pursuant to the Safe Drinking Water Act; and any *release* of source, special nuclear, or byproduct material in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

[88] 42 U.S.C. § 9607(j).

[89] 42 U.S.C. § 9607(a)(1).

[90] 42 U.S.C. § 9607(a)(2).

[91] 42 U.S.C. § 9607(a)(3).

[92] 42 U.S.C. § 9607(a)(4).

[93] 42 U.S.C. § 9601(20).

[94] *K.C. 1986 Ltd. Pshp. v. Reade Mfg*., 33 F. Supp.2d 820 (W.D. Mo. 1998); *United States v. Wedzeb Enters., Inc*., 809 F. Supp. 646, 652 (S.D. Ind. 1992); United States v. Union Corp., 259 F. Supp.2d 356, 395 (E.D. Pa. 2003).

[95] *United States v. Union Gas Co*., 1992 U.S. Dist. LEXIS 14834 (E.D. Pa. Sept. 30, 1992). *But see Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1369 (9th Cir. 1994) and *Grand Trunk Western Railroad Co. v. Acme Belt Recoating, Inc*., 859 F. Supp. 1125 (W.D. Mich. 1994).

[96] *City of Grass Valley v. Newmont Mining Corp*., 2007 U.S. Dist. LEXIS 97340 (E.D. Cal. Dec. 3, 2007) (holding that ownership of the mineral estate was sufficient to impose liability as an *owner* under CERCLA).

[97] *United States v. Capital Tax Corp*., 2007 U.S. Dist. LEXIS 1184 (N.D. Ill. Jan. 4, 2007).

[98] *United States v. Saporito*, 684 F. Supp. 2d 1043 (N.D. Ill. 2010); *Elf Atochem North American, Inc. v. United States*, 868 F. Supp. 707, 709 (E.D. Pa. 1994).

[99] *City of L.A. v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir. 2011); *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1368 (9th Cir. 1994).

[100] *Ameripride Servs. v. Valley Indus. Serv*., 2007 U.S. Dist. LEXIS 18806 (E.D. Cal. Jul. 7, 2007); *Robertshaw Controls v. Watts Regulator*, 807 F. Supp. 144 (D. Me. 1992); In *re Diamond Reo Trucks, Inc. v. Lansing*, 115 B.R. 559 (Bankrcy. W.D. Mich. 1990).

[101] *Nurad, Inc. v. Hooper & Sons Co*., 966 F.2d 837 (4th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992); *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1989).

[102] *Pennsylvania Dep't of Envtl. Prot. v. Trainer Custom Chem*., LLC, 906 F.3d 85, (3d Cir. 2018): *Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp*., 613 F.3d 910 (9th Cir. 2010).

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participate in the management of the property have been held to be liable for cleanup costs.[103]

(3) In contrast to the scope of liability for a current *owner*, a person may only be liable as a "former *owner*" if the person held title "at the time of disposal." Some courts have held that even the mere *migration* of previously-deposited or *released hazardous substances* constitutes "disposal" so that a former *owner* that simply held title while contaminants *migrated* (passive disposal) could be liable as a CERCLA past owner.[104] However, the majority of jurisdictions now appear to require that a party must be engaged in active conduct to be liable as a former *owner* "*at the time of disposal*."[105] In many jurisdictions, development activities such as grading and soil relocation may be the kind of active conduct that can be considered "disposal" for purposes of CERCLA liability.[106]

X1.1.5.2 *CERCLA operator liability:*[107]

(1) A person may be liable as a CERCLA *operator* when they exercise control over a facility. To be considered a CERCLA *operator*, the United States Supreme Court held in *United States v. Bestfoods* that a person must "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[108] Following *Bestfoods*, parent corporations and individual shareholders may be directly liable as CERCLA *operators* for subsidiary facilities only if they exercise actual control over the operations at the facility that caused the contamination.[109] A parent corporation may be held derivatively or indirectly liable for the environmental liabilities of its subsidiary only on a traditional corporate veil piercing analysis.[110] Municipalities have been found liable as *operators* of sewer systems that allowed contaminants to escape into the environment.[111]

(2) Some courts have held that a person may be liable as a current CERCLA *operator* where the person did not exercise control over historic operations that caused the contamination but dispersed or moved around contaminated soil during grading and excavation activities.[112] A managing agent of a shopping center that had been contaminated by *releases* from a dry cleaner may also be potentially liable as a CERCLA *operator*.[113]

(3) Like a past CERCLA *owner*, a past *operator* must have exercised control over the site "at the time of disposal" to be liable as a CERCLA *operator*. Many courts have held that disposal is not limited to the original *release* but can encompass subsequent dispersal or movement of *hazardous substances*. Thus, CERCLA *operator* liability has been imposed on persons as a result of grading or excavation activities that moved contaminated soil.[114]

X1.1.5.3 *Arrangers/generators and transporters*—CERCLA arrangers/generators and transporters are not usually found liable for *releases* at property that they do not own or operate. Therefore, this practice is typically not impacted by CERCLA arranger/generator and transporter liability.

X1.1.6 *Exclusions from Definition of Owner or Operator*—There are several important statutory exemptions from the definition of *owner* or *operator*. A party that does not qualify for one of the statutory exemptions may still be able to assert one of the *LLPs*.

X1.1.6.1 *Secured creditor exemption*—The "secured creditor" exemption exempts from the definition of "*owner* or

[103] *United States v. A & N Cleaners & Launderers, Inc*., 788 F. Supp. 1317 (S.D.N.Y. 1992).

[104] *Nurad, Inc. v. Hooper & Sons Co*., 966 F.2d 837 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992).

[105] *Carson Harbor Vill., Ltd. v. Unocal Corp*., 270 F.3d 863 (9th Cir. 2001); *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000); *ABB Indus. Sys., Inc. v. Prime Tech., Inc*., 120 F.3d 351 (2d Cir. 1997); *United States v. CDMG Realty Co*., 96 F.3d 706 (3d Cir. 1996).

[106] *Bonnieview Homeowners v. Woodmont Builders*, 2009 U.S. Dist. LEXIS 86737 (D.N.J. Sept. 22, 2009); *United States v. Honeywell Intl., Inc*., 542 F. Supp.2d 1188 (E.D. Cal. 2008).

[107] 42 U.S.C. § 9601(20).

[108] *United States v. Bestfoods*, 524 U.S. 51 (1998).

[109] *Atlanta Gas Light Co. v. UGI Utilities, Inc*., 463 F.3d 1201 (11th Cir, 2006). *See also Consolidated Edison of New York, Inc. v. UGI Utilities*, 310 F. Supp.2d 592 (S.D.N.Y.), *aff'd in part*, 423 F.3d 90 (2d Cir. 2005); *cert. denied* 551 U.S. 1130 (2007); *Yankee Gas Services Company v. UGI Utilities*, 616 F. Supp.2d 228 (D. Conn. 2009), aff'd, 428 Fed. Appx. 18. *But see United States v. Newmont USA Ltd*., 2008 U.S. Dist. LEXIS 82922 (E.D. Wa. Oct. 11, 2008).

[110] 524 U.S. at 63-64.

[111] *Westfarm Assocs. Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669 (4th Cir. 1995); *City of Bangor v. Citizens Communications Co*., 2004 U.S. Dist. LEXIS 3845 (D. Me. Mar. 11, 2004); *United States v. Union Corp*., 277 F. Supp.2d 478 (E.D. Pa. 2003). *But see Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528 (E.D. Cal. 1992).

[112] *Trinity Amer. Corp. v. EPA*, 150 F.3d 389 (4th Cir. 1998); *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 177 (4th Cir. 2013), *cert. denied*, 571 U.S. ___ (Nov. 4, 2013); *United States v. Honeywell Int'l, Inc*., 542 F. Supp.2d 1188 (E.D. Cal. 2008).

[113] *Scarlett & Associates, Inc. v Briarcliff Center Partners, LLC*, 2009 U.S. Dist. LEXIS 90483 (N.D. Ga. 2009). There, the managing agent did not maintain an office or have personnel at the site, nor did it have keys to any leased space or have the power to evict tenants. The managing agent said its principal responsibilities were to attempt to rent space to tenants that were approved by the *owner*, collect rent, maintain the common areas of the shopping center, pay bills in a timely manner, and send any excess revenues to the *owner*. The *owner* pointed to language in the management services agreement that the managing agent was to obtain all necessary government approvals and perform such acts necessary to ensure that *owner* was in compliance with all laws. The court noted that the managing agent sent the dry cleaner a certified letter advising the dry cleaner of certain environmental reporting requirements, and requested copies of the documentation that the dry cleaner was required to provide to the EPA or an explanation as to why the dry cleaner was exempt from providing such documentation. The court said that this correspondence combined with the other evidence of record indicating that the managing agent generally was responsible for managing and maintaining the shopping center and performing all acts necessary to effect compliance with all laws, rules, ordinances, statutes, and regulations of any governmental authority applicable to the operation of the shopping center was sufficient to create a genuine issue as to whether the managing agent managed the operations of the dry cleaner specifically related to pollution, and it therefore met the definition of a former "*operator*."

[114] *Tanglewood Homeowners v. Charles-Thomas, Inc*., 849 F.2d 1568 (5th Cir. 1988); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp*., 976 F.2d 1338 (9th Cir. 1992); *Bonnieview Homeowners Ass'n, LLC v. Woodmont Builders, L.L.C*., 655 F. Supp.2d 473 (D.N.J. 2009). But see *Montville Township v. Woodmont Builders, LLC*., 2009 U.S. Dist. LEXIS 93629 (D.N.J. 10/7/09)(no evidence that developer activities spread contaminated soil).

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operator" persons holding an "indicia of ownership" primarily to protect a security interest in a vessel or facility so long as the person did not participate in the management of the facility.[115] The CERCLA secured creditor exemption can insulate a secured creditor from liability during the administration of a loan, including workouts, so long as the lender's actions during the life of a loan do not constitute exercising managerial control over the operations of its borrower.[116] The secured creditor exemption contains some key definitions.

X1.1.6.2 *Security interest*—This term includes a right under a mortgage, deeds of trust, assignment, judgment lien, pledge, security agreement, factoring agreements, or lease and any other right accruing to a person to secure the repayment of money, performance of a duty, or any other obligations by a non-affiliated person.[117]

X1.1.6.3 *Lender permissible actions:*

(1) A lender holding indicia of ownership primarily to protect a security interest in a facility or vessel will not be liable as a CERCLA *owner* or *operator* during the term of a loan if it does not participate in the management of that facility. The term "participate in management" means actually participating in the management or operational affairs of a vessel or facility, and does not include merely having the capacity to influence or the unexercised right to control vessel or facility operations. Thus, the mere presence of clauses in a financing agreement giving a lender the right to take certain actions, such as responding to violations of law or *releases* of *hazardous substances*, will not expose the lender to liability.[118]

(2) The secured creditor exemption includes a list of nine permissible activities commonly taken by lenders that are considered consistent with the exemption and therefore do not constituent "participation in management." A lender may take the following nine actions and not be deemed to have participated in management:

(a) Holding, releasing, or abandoning a security interest, including environmental compliance covenants, warranties, or other environmental conditions in a security agreement or extension of credit;[119]

(b) Monitoring or enforcing any terms or conditions of a security agreement or extension of credit;

(c) Monitoring or undertaking any inspections of the collateral;

(d) Requiring the borrower to take response actions to address *releases* of *hazardous substances*;

(e) Providing financial or other advice or counseling to mitigate, prevent, or cure default or diminution of the value of the collateral;

(f) Restructuring, renegotiating, or otherwise agreeing to alter terms and conditions of a security agreement or extension of credit;

(g) Exercising forbearance of any rights;

(h) Exercising any remedies that may be available under applicable law for breaches of security agreements or extensions of credit; and

(i) Conducting a response action under CERCLA in accordance with the National Contingency Plan or under the direction of an on-scene coordinator.[120]

(3) A lender may be considered to be participating in management of a facility if it does the following while the borrower is in possession of the property encumbered by the security interest:

(a) Exercises decision-making control over the borrower's environmental compliance, such that the holder (that is, lender) has undertaken responsibility for the borrower's *hazardous substance* handling or disposal practices; and

(b) Exercises control at a level comparable to that of a manager of the facility or vessel so that the lender has assumed or manifested responsibility for the overall management of the day-to-day decision making at the facility with respect to environmental compliance or overall or substantially all of the operational aspects or functions of the facility or vessel.[121]

X1.1.6.4 *Workouts and Foreclosure*—The secured creditor exemption also provides limited protection to lenders during workouts and foreclosures. A lender will not be considered a CERCLA *owner* or *operator* if it did not participate in the management of a facility prior to foreclosure, forecloses on the facility or vessel, and then follows certain requirements. After foreclosure, the lender may maintain business activities, wind up operations, undertake a response action in accordance with the NCP or under the direction of an on-scene coordinator, or otherwise take any other actions to preserve, protect, or prepare the vessel or facility prior to sale or disposition *provided* the lender tries to sell, release or otherwise divest itself of the facility or vessel at the earliest practicable, commercially

[115] 42 U.S.C. § 9601(20)(E)(i). In 1992, EPA sought to further clarify the scope of the secured creditor exemption when it issued its "Lender Liability under CERCLA" as an amendment to the NCP ("Lender Liability Rule"). 57 Fed. Reg. 18344 (April 29, 1992). However, the Lender Liability Rule was subsequently invalidated. *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (D.C. Cir. 1994). In response, EPA announced it would use the Lender Liability Rule as a guidance document in exercising its enforcement discretion. See "*Policy on CERCLA Enforcement Against Lenders and Government Entities that Acquire Property Involuntarily*" (Sept. 22, 1995). Congress subsequently enacted the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act ("1996 Lender Liability Amendments") which substantially amended the secured creditor exemptions of CERCLA and RCRA. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No 104-208 §§ 2501-2505, 110 Stat. 3009 (Sept. 30, 1996). The 1996 Lender Liability Amendments added new defined terms and identified the kinds of actions lenders could take without being considered to be participating in the management of a facility, as well as the steps that lenders had to follow to foreclose on property and still be considered simply protecting their security interest.

[116] *Monarch Tile, Inc. v. City of Florence*, 212 F.3d 1219, 1222 (11th Cir. 2000); *United States v. Marvin Pesses*, 1998 U.S. Dist. LEXIS 7902 (W.D. Pa. May 6, 1998).

[117] 42 U.S.C. § 9601(20)(G)(vi).

[118] 57 Fed. Reg. at 18357 (Apr. 29, 1992).

[119] An extension of credit includes a lease finance transaction where the lessor does not initially select the leased vessel or facility, during the term of the lease does not control the daily operation or maintenance of the vessel or facility, or the transaction conforms with regulations issued by a federal banking agency, an appropriate state bank supervisor, or with regulations promulgated by the National Credit Union Administration Board. 42 U.S.C. § 9601(20)(G)(i).

[120] 42 U.S.C. § 9601(20)(F)(iv).

[121] 42 U.S.C. § 9601(20)(F)(ii).

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reasonable time, and on commercially reasonable terms after taking into account market conditions and legal or regulatory requirements.[122]

X1.1.7 *Trustees*—The secured creditor exemption also includes liability protections for persons and financial institutions acting in a fiduciary capacity.[123]

X1.1.7.1 *Definition of fiduciary:*

(1) The liability protection applies to anyone holding title, having control, or otherwise having an interest in a facility or vessel pursuant to the exercise of its responsibilities as a fiduciary. Covered persons include trustees, receivers, executors, administrators, custodians, guardians of estates or a guardian *ad litem*, conservators, committees of estates of incapacitated persons, personal representatives, trustees under a various forms of indebtedness where the trustee is not the lender (for example, a trustee in an indenture agreement, trust agreement, lease, or similar financing agreement for debt securities, certificates of participation in debt securities, or other), or a representative that EPA determines is acting in one of the foregoing capacities.[124]

(2) The term does not include a person acting as a fiduciary for an estate organized for the primary purpose of, engaged in, or actively carrying on a trade or business for profit, or a person who acquires ownership or control of a vessel or facility with the objective of avoiding liability. In addition, it does not apply to the assets of the estate or trust, or to a non-employee agent or independent contractor of the fiduciary.

(3) A trustee is not a "fiduciary" for the purpose of the safe harbor provision where they are the trustee of a trust that engages in a business for profit, or is organized to engage in a business for profit, unless the reason for the trust was the facilitation of an estate plan due to the incapacity of the estate *owner*.[125] Also excluded are fiduciaries of trusts that would be considered fraudulent in that they were created specifically and intentionally to avoid liability.[126]

X1.1.7.2 *Fiduciary permissible actions*—A fiduciary will also not forfeit its immunity from liability by taking the following actions:

(1) Terminating the fiduciary relationship;

(2) Including covenants or other conditions requiring compliance with environmental laws in the fiduciary agreement;

(3) Monitoring or conducting inspections of a facility or vessel;

(4) Providing financial advice or other advice to other parties in the fiduciary relationship, including the settlor or beneficiary;

(5) Restructuring or renegotiating the terms of the fiduciary relationship;

(6) Administering a vessel or facility that was contaminated prior to the commencement of the fiduciary relationship; or

(7) Declining to take any of the foregoing actions.

X1.1.7.3 *Limitation of liability:*

(1) A fiduciary will only be liable for *releases* of *hazardous substances* from a facility or vessel held in a fiduciary capacity up to the value of the assets held in the trust or estate so long as the *release* was not caused by the *negligence* of the fiduciary. In addition, a fiduciary will not be exposed to personal liability by undertaking or directing another person to take response actions to address *releases* of *hazardous substances*.

(2) Importantly, the limitation on the liability of a fiduciary will not apply if the fiduciary negligently caused or contributed to the *release* or threatened *release* of a *hazardous substance*. An example of the negligence exception is *Canadyne-Georgia Corp. v. NationsBank, N.A.*[127] where a former site *owner* was allowed to proceed with a contribution action against a bank that served as trustee for a trust that held a general partnership interest in a limited partnership owning the site.[128]

X1.2 **Defenses to CERCLA Liability**—Assuming all the elements of liability exist (and no specific liability exclusions apply), a party may still avoid CERCLA liability by qualifying

[122] The CERCLA Lender Liability Rule had required lenders to take actions consistent with the NCP, such as removing abandoned *drums* at a facility they have foreclosed on, in order to preserve their immunity. Abandonment of *drums* or equipment would not be consistent with the requirements of the NCP and could cause a lender to lose its immunity even where it has complied with all of the aspects of the CERCLA Lender Liability Rule. However, the Lender Liability Amendments did not expressly address this issue of post-foreclosure NCP compliance.

The Lender Liability rule contained a "bright-line" test requiring a lender to publish certain notices of sale and retain brokers to sell the property. If the lender complied with these requirements, there would be a presumption that the lender had complied with the rule which a plaintiff would have to rebut to proceed against a secured creditor under CERCLA. Unfortunately, the 1996 Lender Liability Amendments did not incorporate the "bright-line" test. As a result, the CERCLA secured creditor exemption provides little guidance to lenders on the specific steps that they may take and still preserve their safe harbor. Accordingly, it is imperative that holders of security interests carefully review site conditions before foreclosing.

Note that EPA promulgated a final rule in 1995 that clarified the regulatory obligations of lending institutions and other persons who hold a security interest in a petroleum *underground storage tank* (UST) subject to the RCRA Subtitle I UST program or in real estate containing a petroleum UST, or that acquired title or deed to property with petroleum USTs subject to the RCRA Subtitle I UST program. See "*Underground Storage Tanks—Lender Liability; Final Rule*," 60 Fed. Reg. 46691 (Sept. 7, 1995) ("RCRA Lender Liability Rule"). The RCRA Lender Liability Rule contains a "bright-line" test for persons holding security interests that foreclose on property containing USTs subject to the RCRA Subtitle I program. *See* 40 C.F.R. § 280.210(c)(1)(ii). In the RCRA Lender Liability Rule, EPA stated that it believed the *Kelly* decision did not apply to the RCRA Subtitle I UST program. 60 Fed. Reg. at 46695 n.3. Thus, the RCRA "bright-line" test for foreclosing lenders remains in effect.

[123] 42 U.S.C. § 9607(n).

[124] Generally powers of a trustee are greater and broader than those of an executor or conservator. Actions of a trustee require court approval in fewer instances. The trustee obtains written title by the very trust instrument itself. CERCLA *owner* liability can extend to conservators and executors so long as they hold adequate indicia of ownership over and above bare legal title. Bare legal title is not enough to impose CERCLA *owner* liability on a fiduciary. Other factors must be considered in determining this issue. As a result, one court held that conservators and executors must not only hold bare legal title, but must possess other indicia of ownership. *Castlerock Estates v. Estate of Markham*, 871 F. Supp. 360 (N.D. Cal. 1994).

[125] 42 U.S.C. § 9607(n)(5)(A)(ii)(I).

[126] 42 U.S.C. § 9607(n)(5)(A)(ii)(II). Trustees of an Illinois land trust are not "*owners*" under CERCLA, even though they hold legal title. *United States v. Petersen Sand and Gravel, Inc*., 806 F. Supp. 1346, 1359 (N.D. Ill. 1992).

[127] 183 F.3d 1269 (11th Cir. 1999).

[128] It is unclear if a fiduciary who fails to respond to a *release* of *hazardous substances* can still take advantage of the fiduciary safe harbor. Thus, a fiduciary with knowledge of a *release* may want to consider authorizing response actions to address any such *release* or threatened *release* since such actions will not expose the fiduciary to liability, and the failure to take such action might amount to negligence that could expose the fiduciary to personal liability.

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for one of the so-called affirmative defenses.[129] These listed affirmative defenses are exclusive of other common law defenses that a defendant might be able to assert.[130]

X1.2.1 *Third Party Defense*—The most commonly asserted defense is that the *release* is attributable to the acts or omissions of a third party.[131] To successfully assert this defense, a party must establish the following four elements:

X1.2.1.1 The *release* of the *hazardous substance* was caused solely by a third party;

X1.2.1.2 The third party is not an employee or agent of the defendant, or the acts or omissions of the third party did not occur in connection with a direct or indirect contractual relationship with the defendant;

X1.2.1.3 The defendant exercised due care with respect to the *hazardous substances* (Due Care Element);[132] and

X1.2.1.4 The defendant took precautions against foreseeable acts or omissions of the third party (Precaution Element).[133]

X1.2.1.5 The Third Party Defense does not require that the landowner perform pre-acquisition *all appropriate inquiries*.[134] Of course, if the defendant has a direct or indirect contractual relationship with the person solely responsible for the *release*, it would have to comply with the all appropriate inquiries rule to assert the innocent landowner defense (see below).

X1.2.2 *Innocent Landowner Defense (ILO)*—The second element of the third party defense prohibits the defendant from having a direct or indirect "contractual relationship" with the person solely responsible for the *release*. A "contractual relationship" encompasses "land contracts, deeds or other instruments transferring title or possession."[135]

X1.2.2.1 In the early days of CERCLA, a number of courts broadly construed the meaning of this phrase so that it encompassed nearly every contractual arrangement transferring title or possession of land such as a purchase agreement or lease.[136] For example, a deed was held to serve as an indirect contractual relationship that could prevent a property *owner* from asserting the third party defense.[137] As a result, it was difficult for purchasers or landowners to assert this defense in jurisdictions adopting this view since a landowner could only effectively invoke the defense if the *release* was a result of acts of trespassers, or adjacent landowners, and then only if the landowner exercised due care.[138]

X1.2.2.2 Because of this harsh impact on *owners* who did not cause the contamination, Congress enacted the ILO defense in 1986 to exclude from the phrase "in connection with a contractual relationship" purchasers who conducted an appropriate inquiry into the past use and ownership of the property,

[129] Section 9607(b) provides that a party shall not be liable if it can establish by a preponderance of the evidence [meaning more probable than not] that the *release* or threat of *release* of a *hazardous substance* and the damages resulting therefrom were caused by (1) an act of God; (2) an act of war; (3) the "third party defense" (discussed below). 42 U.S.C. § 9607(b). The Contiguous Property Owner (CPO) liability protection of 42 U.S.C. § 9607(q) and the Bona Fide Prospective Purchaser (BFPP) liability protection of 42 U.S.C. § 9607(r) are not contained within the affirmative defenses of 107(b) so they are discussed separately.

[130] *United States v. Aceto Agricultural Chemicals Corp*., 872 F.2d 1373 (8th Cir. 1989). *But see United States v. Marisol, Inc*., 725 F. Supp. 833 (M.D. Pa. 1989) (equitable defenses under Superfund may be available after the development of a factual record). The equitable defenses may be considered by the court when resolving or apportioning contribution claims under 42 U.S.C. § 9613(f). *AT&T Global Info. Solutions Co. v. Union Tank Car Co*., 1997 U.S. Dist. LEXIS 6090 (S.D. Ohio Mar. 31, 1997).

[131] 42 U.S.C. § 9607(b)(3).

[132] CERCLA does not indicate what types of actions would constitute the exercise of "due care" that would satisfy the third party defense. The legislative history indicates that a person must demonstrate that their actions were consistent with those that a "reasonable and prudent person would have taken in light of all relevant facts and circumstances." H.R. Rep. No. 253, 99th Cong., 2d Sess. 187 (1986). The due care requirement has been interpreted to include "those steps necessary to protect the public from a health or environmental threat." *New York v. Lashins Arcade*, 91 F.3d 353 (2d Cir. 1996). Because a person's actions will be evaluated based on the "relevant facts and circumstances," the due care analysis is a fact-intensive inquiry and will be evaluated on a case-by-case basis. *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996). In one case, the owner of a shopping center was able to demonstrate that it exercised due care because it took steps such as maintaining water filters, sampling drinking water, instructing tenants to avoid discharging into the septic system, inserting institutional and land use controls into leases, and conducting periodic inspections. *Lashins*, 91 F.3d 353. At the other extreme are the cases that hold that a person who does not take any affirmative measures will not be able to satisfy its due care obligations. *See United States v. DiBiase*, 45 F.3d 541 (1st Cir. 1995); *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co*., 14 F.3d 321 (7th Cir. 1994). For a survey of "due care" case law, see William R. Weissman & J. Michael Sowinski, Jr., *Revitalizing the Brownfields Revitalization and Environmental Restoration Act: Harmonizing the Liability Defense Language to Achieve Brownfield Restoration*, 33 Va. Envtl. L.J. 257, 338-43 (2015).

[133] *United States v. A & N Cleaners & Launderers, Inc*., 854 F. Supp. 229, 239 (S.D.N.Y. 1994). Like the *Due Care Element*, the *Precaution Element* will be evaluated on a case-by-case basis. In one case, a municipal sewer authority was found to have failed to take adequate precautions when it knew that a dry cleaner discharged PCE into the sewer system and that there were cracks in its sewer pipes, had the power to abate the foreseeable *release* of PCE and failed to exercise that power. *Westfarm Associates Ltd. Pshp. v. Washington Suburban Sanitary Comm'n*, 66 F.3d. 669 (4th Cir. 1995) (despite this knowledge, the county did not repair its pipes or prohibit the discharge of PCE into its system).

[134] *Town of New Windsor v. Tesa Tuck, Inc*., 935 F. Supp. 310 (S.D.N.Y. 1996) (landowner established the Third Party Defense despite having not taken steps to discover the contamination at its property from the encroachment of a neighboring *landfill*). Of course, it might be difficult to satisfy the *Due Care and Precaution Elements* of the third party defense in the absence of any *due diligence*. Indeed, some courts have held in the context of what constitutes due care that the failure to inquire about past environmental practices may constitute a lack of due care on the grounds that Congress intended CERCLA to provide incentives for private parties to investigate potential sources of contamination and initiate remediation efforts. *United States v. A & N Cleaners & Launderers*, 842 F. Supp. 1543 (failure to inquire about past use of a floor drain, not communicating with local environmental authorities, or inquiring about environmental compliance of commercial tenants). Other courts have held that CERCLA "does not sanction willful or negligent blindness." *Westfarm Associates Ltd. Pshp. v. Washington Suburban Sanitary Comm'n*, 66 F.3d. 669 (4th Cir. 1995); *United States v. Monsanto*, 858 F.2d. 160; *United States v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985).

[135] 42 U.S.C. § 9601(35)(A).

[136] *See New York v. Shore Realty Corp*., 759 F.2d 1032 (2d Cir. 1985); *United States v. Pacific Hide & Fur Depot, Inc*., 716 F. Supp. 1341 (D. Idaho 1989); *United States v. Northernaire Plating Co*., 670 F. Supp. 742 (W.D. Mich. 1987); *United States v South Carolina Recycling and Disposal, Inc*., 653 F. Supp. 984 (D.S.C. 1984).

[137] *United States v. Occidental Chemical Corp*., 965 F. Supp. 408 (W.D.N.Y. 1997).

[138] An exception to this trend was *State of New York v. Lashins Arcade*, 91 F.3d 353 (2d Cir. 1996) where the Second Circuit allowed the current *owner*/purchaser of a shopping center to invoke the third-party defense even though it knew of contamination because the current owner had no contractual relationship with a former dry cleaner tenant who had discharged *hazardous substances* into the ground 15 years prior to the current *owner's* acquisition. In addition, the property *owner* took proactive steps to minimize exposure to the contamination. Compare Lashins conduct to the purchaser/*owner* in *Idylwoods Associates v. Mader Capital Inc*., 956 F. Supp. 410 (W.D.N.Y. 1997).

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and did not know or have reason to know of any *releases* as a result of that investigation.[139]

X1.2.2.3 Following the enactment of the ILO defense, some courts began holding that the mere existence of a contractual relationship was not sufficient to defeat the third party defense and began looking into the purpose of the contractual relationship to see if it related to the *hazardous substances* that had impacted the property or if the contract allowed the landowner to assert some level of control over the third party's activities at the site.[140]

X1.2.2.4 *Pre-acquisition obligations of ILO*—The ILO defense is actually a component of the third party defense. It provides that a purchaser will not be considered to have a "contractual relationship" if at the time the defendant acquired the facility the defendant did not know and had no reason to know that any *hazardous substance* which is the subject of the *release* was disposed of on, in, or at the facility.[141] To establish that the defendant "did not know and had no reason to know of" the *hazardous substance* with respect to the property, the defendant must show that it undertook "*all appropriate inquiries*" into the past ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.[142]

X1.2.2.5 *Post-acquisition obligations of the ILO*—A defendant claiming the ILO defense would still have to comply with the Due Care and Precautionary Elements of the Third Party Defense after learning of the *release* of the *hazardous substance*.[143]

(1) In addition, following the 2002 CERCLA Amendments, a person seeking to assert the ILO defense must after acquiring the property:

(a) Cooperate, assist, and provide access to persons that are authorized to conduct response actions or natural resource restoration at the property;

(b) Comply with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and

[139] 42 U.S.C. § 9601(35)(A).

[140] *New York v. Lashins Arcade*, 91 F.3d 353 (2d Cir. 1996); *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution*, 964 F.2d 85 (2d Cir. 1992) (requiring some relationship between the contractual relationship and the disposal or *release*). *See also, CERCLA Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections* Memorandum from Elliot Gilberg, Director of Office of Site Remediation Enforcement, Environmental Protection Agency to Regional Counsel of EPA (Sept. 21, 2011). *But see Cal. Dep't of Toxic Substances Control v. Westside Delivery, LLC*, 888 F.3d 1085 (9th Cir. 2018) (tax sale buyer had "contractual relationship with the pre-tax-sale *owner* of that property. Court specifically rejected Westwood rationale and distinguished from *Lashins*). See also *Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750 (5th Cir. 2011) (describing a "contractual relationship . . . involving a chain of intermediaries" as "an indirect" contractual relationship within the meaning of the Oil Pollution Act, which contains "a third-party defense provision virtually identical to" CERCLA's); *United States v. CDMG Realty Co*., 96 F.3d 706 (3d Cir. 1996) (noting that "[t]he [third-party] defense is generally not available if the third party causing the *release* is in the chain of title with the defendant); *Lefebvre v. Cent. Me. Power Co*., 7 F. Supp. 2d 64, 71 n.3 (D. Me. 1998) (rejecting *Lashins Arcade*); *Goe Eng'g Co. v. Physicians Formula Cosmetics, Inc*., 1997 U.S. Dist. LEXIS 23627 (C.D. Cal. June 4, 1997) (rejecting *Lashins Arcade* and *Westwood*). *See also* Craig N. Johnston, *Current Landowner Liability Under CERCLA: Restoring the Need for Due Diligence*, 9 Fordham Envtl. L.J. 401, 462 (1998) ("The Westwood approach makes no sense . . . in the context of preexisting contamination.").

[141] 42 U.S.C. § 9601(35)(A)(i).

[142] 42 U.S.C.§ 9601(35)(B)(i)(I). The 2002 CERCLA Amendments required EPA to promulgate a regulation establishing the requirements for conducting "all appropriate inquiries" ("AAI"). 42 U.S.C. § 9601(35)(B)(ii). The 2002 CERCLA Amendments also provided that property *owners* who acquired commercial property before May 31, 1997 would have to establish that they complied with the five statutory criteria for the ILO defense that had been in effect prior to the 2002 CERCLA Amendments. These criteria were: any specialized knowledge or experience on the part of the defendant; the relationship of the purchase price to the value of the property, if the property was not contaminated; commonly known or *reasonably ascertainable* information about the property; the obviousness of the presence or likely presence of contamination at the property; and the ability of the defendant to detect the contamination by appropriate inspection ("1986 AAI"). 42 U.S.C. § 9601(35)(B)(iv)(I). *See Coppola v. Smith*, 2015 U.S. Dist. LEXIS 5127(E.D.Cal. Jan. 15, 2015)(ASTM Practice E1527-93 not dispositive for complying with 1986 AAI).

Persons who acquired commercial property after May 31, 1997 would have to demonstrate compliance with the interim federal AAI standard until EPA promulgated its AAI Rule. 42 U.S.C. § 9601(35)(B)(iv)(II). While a draft AAI Rule was under development, EPA clarified that persons who purchased or occupied property on or after May 31, 1997 would have to demonstrate compliance with the "*Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*" ASTM E1527-00 or the earlier 1997 version (ASTM E1527-97). 68 Fed. Reg. 24888 (May 9, 2003). EPA promulgated its AAI Rule on November 1, 2005. "*Standards and Practices for All Appropriate Inquiries*," 70 Fed. Reg. 66069 (Nov. 1, 2005).

Beginning November 1, 2006, a party seeking to establish the ILO defense must show that it has complied with the requirements of EPA's AAI Rule. 40 C.F.R. § 312. EPA has referenced both ASTM Practices E1527-13 and E2247-16 as being in compliance with the final AAI Rule (*see* 40 C.F.R. § 312.11) and is expected to review this update.

[143] 42 U.S.C. § 9601(35)(A).

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(c) Must not impede the effectiveness or integrity of any *institutional control* employed at the vessel or facility in connection with a response action.[144]

(2) Finally, the defendant must take reasonable steps to:

(a) Stop any continuing *release*;

(b) Prevent any threatened future *release*; and

(c) Prevent or limit any human, environmental, or natural resources exposure to any previously *released hazardous substance*."[145]

X1.2.3 *Beneficiaries*—Persons who acquire title by inheritance or bequest will not be considered to be in a "contractual relationship" and will be able to assert the Third Party Defense if they comply with the Due Care and Precaution Elements of the Third Party Defense and the same post-acquisition obligations as those required by the ILO defense.[146]

X1.2.4 *State and Local Governments*—CERCLA contains two exemptions for state or local governmental units that acquire ownership or control involuntarily by virtue of their function as sovereigns. The first exemption is from the definition of *owner* or *operator* and applies to involuntary acquisitions or control of property through the bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. However, this exclusion does not apply if the government entity contributed or caused the *release* of *hazardous substances*.[147]

X1.2.4.1 The second state or local government liability exemption is contained within the exclusion for "contractual relationships" for the third party defense. This exemption contains slightly different language than the "*owner* or *operator*" exemption as it applies to a "government entity which acquired a facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation."[148] A government unit seeking to rely on this exemption would have to comply with the *Due Care and Precautionary Elements* of the third-party defense to maintain their liability protection.

X1.3 **Landowner Liability Protections**—The 2002 CERCLA Amendments added two new *landowner liability protections (LLPs)* to CERCLA liability.

X1.3.1 *Bona Fide Prospective Purchaser (BFPP)*[149]—The BFPP is a significant *LLP* because it allows a purchaser to acquire property with knowledge that it is contaminated. The BFPP liability protection applies to purchasers (and their tenants) that acquire ownership of a facility after January 11, 2002.[150] In 2018, the BUILD Act further amended CERCLA to allow certain tenants to qualify for CERCLA's *bona fide prospective purchaser* protections if the *property owner* qualifies as a *bona fide prospective purchaser*, and certain tenants can qualify as *bona fide prospective purchasers* only if, among other conditions, the tenants fulfill *continuing obligations*.[151] Unlike the ILO defense, a party that qualifies as a BFPP is by definition not a responsible party.[152]

X1.3.1.1 *Pre-acquisition requirements*—To qualify as a BFPP, a person must satisfy the following pre-acquisition criteria prior to acquiring title: *(1)* all disposal of *hazardous substances* at the facility occurred before the person acquired the facility;[153] *(2)* the person conducted "*all appropriate inquiries*;"[154] and *(3)* the person is not a PRP or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual, corporate or financial relationship,[155] or as a result of a reorganization of a business entity that was a PRP.[156]

X1.3.1.2 *Post-acquisition obligations*—A BFPP must also comply with the following continuing obligations after taking title to the property:

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[144] 42 U.S.C. § 9601(35)(A).

[145] 42 U.S.C. § 9601(35)(B)(i)(II).

[146] 42 U.S.C. § 9601(35)(A)(iii).

[147] 42 U.S.C. § 9601(20)(D). Courts have not consistently interpreted the reference to taking title to a facility by the exercise of eminent domain. Some courts have held that the exemption applies to municipalities that assert their eminent domain authority but reach an agreement to purchase the property without having to resort to judicial proceedings. *City of Emeryville v. Elements Pigments, Inc*., 2001 U.S. Dist. LEXIS 4712 (N.D. Ca. Mar. 7, 2001). Other courts have ruled that a local government will not be entitled to the liability protection unless the land is purchased pursuant to a judicial proceeding. *See City of Toledo v. Beazer Materials and Services, Inc*., 923 F. Supp. 1013 (N.D. Ohio. 1996). Some have also examined if the purchase was voluntary. *See United States v. Occidental Chem. Corp*., 965 F. Supp. 408 (N.D.N.Y. 1997) (City of Niagara Falls was held to have voluntarily acquired title to Love Canal area.); *City of Petoskey v. Oxy USA, Inc*., 1996 U.S. Dist. LEXIS 22640 (W.D. Mich. Feb. 6, 1996) (city that purchased site for use as a municipal park as part of a waterfront redevelopment project was performing a governmental function but purchase was not involuntary transfer); *Transportation Leasing Co. v. California*, 861 F. Supp. 931 (C.D. Cal. 1993) (exclusion did not apply to state government that voluntarily acquired land by eminent domain to build a freeway). *In re Sundance Corp*., 149 B.R. 641 (E.D. Wash.1993), a court-appointed receiver was held to fall within the protection afforded by this section under derivative judicial immunity theory as an officer of court performing judicial functions.

[148] 42 U.S.C. § 9601(35)(A)(ii).

[149] 42 U.S.C. § 9601(40).

[150] The BFPP *LLP* could result in the *owner* becoming subject to a windfall lien for unrecovered response costs against an increase in value of the property because of cleanup. 42 U.S.C. § 9607(r).

[151] Enacted as part of the Consolidated Appropriations Act 2018, Pub. L. No. 115-141 (2018).

[152] 42 U.S.C. § 9607(r)(1).

[153] 42 U.S.C. § 9601(40)(A).

[154] 42 U.S.C. § 9601(40)(B).

[155] 42 U.S.C. § 9601(40(H)(i)(II) narrows the potential scope of the phrase "contractual, corporate or financial relationship." It excludes any such relationship that is created by an instrument by which title to a facility is conveyed or financed, or by a contract for the sale of goods or services.

[156] 42 U.S.C. § 9601(40)(H). Note that the ILO defense does not include the "no affiliation" language. Also note that in *Ashley II of Charleston LLC v. PCS Nitrogen, Inc.*, 791 F. Supp 2d 431 (D.S.C. 2011), *aff'd on other grounds*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 571 U.S. 990 (2013), a federal district ruled that a plaintiff had an inappropriate affiliation when it indemnified the seller of contaminated property and then sought to discourage EPA from bringing an enforcement action against the seller/indemnitee. This aspect of the *Ashley II* decision has been criticized in legal commentary. *See* William R. Weissman & J. Michael Sowinski, Jr., *Revitalizing the Brownfields Revitalization and Environmental Restoration Act: Harmonizing the Liability Defense Language to Achieve Brownfield Restoration*, 33 Va. Envtl. L.J. 257, 348-51 (2015). EPA also seems to have been troubled by the decision because it subsequently issued enforcement guidance stating that "deeds or agreements that make transfer of title possible," including certain types of indemnification or insurance agreements, would not be considered to be disqualifying affiliations. *See CERCLA Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections* at 10 Memorandum from Elliot Gilberg, Director of Office of Site Remediation Enforcement, Environmental Protection Agency to Regional Counsel of EPA (Sept. 21, 2011). *See also SPS L.P. LLLP v. Sparrows Point, LLC*, 2017 U.S. Dist. LEXIS 144740 (D. Md., Sept. 6, 2017)(no inappropriate affiliations).

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(1) No disposal of *hazardous substances* can occur after the person acquires the property;[157]

(2) Provide all legally required notices with respect to the discovery or *release* of any *hazardous substances* at the facility;[158]

(3) Exercise appropriate care with respect to *hazardous substances* by taking reasonable steps to stop any continuing *release*; prevent any threatened future *releases*; and prevent or limit human, environmental, or natural resource exposure to any previously *released hazardous substance*;[159]

(4) Provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration (including the cooperation and access necessary for the installation, integrity, and maintenance of any complete or partial response actions or natural resource restoration;[160]

(5) Comply with any land use restrictions established or relied on in connection with the response action, and not impede the effectiveness or integrity of any *institutional control* employed at the vessel or facility in connection with a response action;[161] and

(6) Comply with any request for information or administrative subpoena issued under CERCLA.[162]

ASTM International has issued a guide to assist users in satisfying post-acquisition continuing obligations.[163]

X1.3.2 *Contiguous Property Owner (CPO) Liability Protection*[164]—This *LLP* excludes from the definition of a CERCLA *owner* or *operator*, a landowner whose property has been impacted solely by a *release* from a source located at real *property* that is not owned or operated by the person and that is contiguous to or otherwise similarly situated to the impacted property.[165]

X1.3.2.1 *No knowledge of contamination*—Unlike a BFPP, a CPO must not know or have reason to know following performance of *all appropriate inquires* that their property was or could be contaminated by the adjacent or contiguous real *property*.[166]

X1.3.2.2 *Pre-acquisition requirements*—To satisfy this *LLP*, the property *owner* must show that *(1)* it did not cause, contribute, or consent to the *release* at the *property*; *(2)* the person is not a PRP or affiliated with any other PRP;[167] and *(3)* the person conducted *all appropriate inquiries*.[168]

X1.3.2.3 *Post-acquisition obligations*—A CPO must comply with the so-called "Continuing Obligations" after taking title to maintain the CPO *LLP*. These Continuing Obligations are:

(1) Taking reasonable steps to stop any continuing *release*; prevent any threatened future *release*; and prevent or limit human, environmental, or natural resource exposure to any *hazardous substance released* on or from *property* owned by that person;[169]

(2) Provide full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the facility from which there has been a *release* or threatened *release* (including the cooperation

[157] EPA identified "no disposal" as a continuing post-acquisition requirement in the 2019 Common Elements guidance, discussed in section X1.4. Note that some development activities, like moving soil, may be considered "new" disposals and cause an *owner* to fail to qualify as a BFPP. *See PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 177 (4th Cir. 2013), *cert. denied*, 571 U.S. 990 (2013); *Cranbury Brick Yard, LLC v. United States, 2018 U.S. Dist. LEXIS 171458 (D.N.J., Sept. 17, 2018) (mixing contaminated soil with clean and using as fill was a new disposal)*; *Bonnieview Homeowners Ass'n, LLC v. Woodmont Builders, LLC*., 655 F. Supp.2d 473 (D.N.J. 2009)(spreading contaminated soil through grading operations considered new disposal). *But see SPS L.P. LLLP v. Sparrows Point, LLC*, 2017 U.S. Dist. LEXIS 144740 (D. Md., Sept. 6, 2017) (passive *migration* of benzene plume not new disposal).

[158] 42 U.S.C. § 9601(40)(C).

[159] 42 U.S.C. § 9601(40)(D). *See MPM Silicones, LLC v. Union Carbide Corp*., 2016 U.S. Dist. LEXIS 98535 (N.D.N.Y. July 7, 2016) (appropriate care is at least as stringent as due care).

[160] 42 U.S.C. § 9601(40)(E).

[161] 42 U.S.C. § 9601(40)(F).

[162] 42 U.S.C. § 9601(40)(G).

[163] ASTM E2790, Standard Guide for Identifying and Complying with Continuing Obligations.

[164] 42 U.S.C. § 9607(q).

[165] EPA has issued guidance explaining its views on the CPO. *See Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners*, Memorandum from the USEPA Office of Enforcement and Compliance Assurance (Jan. 2004). In addition, EPA issued policies that preceded the CPO but may still reflect how the agency will exercise its enforcement discretion since the CPO was based on these policies. *See "Final Policy Towards Owners of Property Containing Contaminated Aquifers"*, Memorandum from Bruce Diamond, Director of Office of Site Remediation Enforcement Environmental Protection Agency (May 24, 1995); and *Policy Towards Owners of Residential Property at Superfund Sites*, Memorandum from U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response to Regional Administrators (July 3, 1991). This policy was referenced by the US Supreme Court in *Atlantic Richfield Co. v. Christian*, 590 U.S. _____, 140 S. Ct. 1335, 1354 (2020).

[166] 42 U.S.C. § 9607(q)(1)(A)(viii)(II). A person that does not qualify for the CPO because it knew or should have known that its property was impacted by an off-site source may still qualify for the BFPP *LLP*. 42 U.S.C. § 9607(q)(1)(C).

[167] 42 U.S.C. § 9607(q)(1)(A)(ii)(I)-(II). The improper affiliation includes any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services), or the result of a reorganization of a business entity that was potentially liable. Note that the District Court decision in *Ashley II*, discussed in note 148, could also affect the CPO's eligibility for the defense.

[168] 42 U.S.C. § 9607(q)(1)(A)(viii)(I).

[169] 42 U.S.C. § 9607(q)(1)(A)(iii).

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and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the facility);[170]

(3) Comply with any land use restrictions established or relied on in connection with the response action at the facility;[171]

(4) Not impede the effectiveness or integrity of any *institutional control* employed in connection with a response action;[172]

(5) Comply with any request for information or administrative subpoena issued by EPA;[173] and

(6) Provide all legally required notices with respect to the discovery or *release* of any *hazardous substances* at the facility.[174]

X1.4 **EPA "Common Elements" Guidance**:

X1.4.1 EPA finalized its Common Elements Guidance, which interprets the obligations that parties must satisfy to qualify for the CERCLA *LLPs*, in 2019 (the "2019 Common Elements").[175] The 2019 Common Elements identifies two initial "threshold criteria" that a party must satisfy at the time it takes title to or possession of the property, including (a) completing *All Appropriate Inquiries* prior to property acquisition, and (b) having no affiliation with a PRP.[176] The guidance discusses five "Continuing Obligations" that landowners or building *occupants* must continue to satisfy following acquisition or possession to maintain a defense to liability, including:

(a) Ensuring no disposal activity occurs after acquisition;

(b) Complying with Land Use Restrictions, not impeding the effectiveness or integrity of the *Institutional Controls* required as part of a response action, implementing *institutional controls* required as part of a response action, and monitoring activities designed to assist in satisfying statutory obligations;

(c) Taking "reasonable steps" with respect to *hazardous substance releases*;

(d) Providing cooperation, assistance, and access to those performing response actions;

(e) Complying with information requests and administrative subpoenas; and

(f) Providing legally required notices.[177]

X1.4.2 Both CERCLA legislative history and EPA in its 2019 Common Elements Guidance indicate that to satisfy *continuing obligations*, a *landowner* is not necessarily required to undertake the same level of *response actions* that would be required of a liable party. "EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (for example, removal of contaminated soil, extraction and treatment of contaminated groundwater)."[178] Both Courts and EPA have indicated that "the 'due care' case law . . . serves as a useful reference point" for evaluating the reasonable steps requirement but is not dispositive.[179] The *Ashley II* appellate court concluded that due care case law should "inform [the] determination of appropriate care in the BFPP context" and that the appropriate care standard "is at least as stringent as due care under 9607(b)(3) [the innocent landowner defense]."

X1.4.3 Complying with the "Continuing Obligations" is the subject of ASTM Guide E2790 and is not directly addressed by this practice.[180] Thus we refer the reader with interest in Common Elements to ASTM Guide E2790 or the 2019 Common Elements guidance.[181]

[170] 42 U.S.C. § 9607(q)(1)(A)(iv).

[171] 42 U.S.C. § 9607(q)(1)(A)(v)(I).

[172] 42 U.S.C. § 9607(q)(1)(A)(v)(II).

[173] 42 U.S.C. § 9607(q)(1)(A)(vi).

[174] 42 U.S.C. § 9607(q)(1)(A)(vii). Note that all criteria must be established to qualify for the CPO defense. *See Atlantic Richfield Co. v. Christian*, 590 U.S. _____, 140 S. Ct. 1335, 1356 (2020) (contiguous landowners could not satisfy all criteria to qualify for CPO defense). In *Atlantic Richfield*, the EPA and the PRP negotiated a cleanup agreement under CERCLA. Nearby landowners, relying on state law, sought to require additional cleanup beyond the negotiated agreement. The court found that the landowners were PRPs under CERCLA. As PRPs, the only procedural way to get an approved cleanup was to follow the NCP procedures and obtain EPA approval. The court noted that some PRPs may not be liable for costs, by virtue of a defense or by virtue of EPAs enforcement discretion, but are still PRPs under CERCLA for its other purposes, including performing remedial actions.

[175] Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners ("Common Elements"). July 2019 (hereafter "USEPA 2019 Common Elements).The original interim guidance was titled "*Interim Guidance Regarding Criteria Landowners Must Meet In Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner or Innocent Landowner Limitations on CERCLA Liability*" ("Common Elements Guidance"), Memorandum from Susan E. Bromm, Director of Site Remediation Enforcement, Environmental Protection Agency (March 6, 2003). Note that this document, the 2019 Common Elements guidance, and other informal documents issued by EPA without formal rulemaking, is not a regulation and does not have the force of law. Thus, it does not impose legal duties or obligations on landowners. Instead, it is EPA's interpretation of some of the Continuing Obligations and a court can choose to adopt or ignore EPA's interpretation.

[176] *Id*. For application of BFPP criteria to tenants, in 2012, EPA issued guidance on the applicability of the BFPP protection to tenants who lease contaminated or formerly contaminated *properties*, and how EPA intends to exercise its enforcement discretion to treat certain tenants as BFPPs under CERCLA. See "*Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision*" Memorandum from Cynthia Giles and Mathy Stanislaus to Regional Administrators (Dec. 5, 2012) (available at: http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/tenants-bfpp-2012.pdf). This EPA policy was sanctioned by Congress in the *BUILD Act* of 2018, Pub. L. No. 115-141 (2018).

[177] USEPA 2019 Common Elements guidance. Further discussion on the legal contours of these elements can be found in ASTM Guide E2790 and its legal appendix.

[178] See S. Rep. No. 107-2, at 10-11 (2001); see also USEPA 2019 Common Elements at 18.

[179] USEPA 2019 Common Elements Guidance at 18. See also *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 180-81 (4th Cir.), *cert, denied*, 571 U.S. 990 (2013) (citing USEPA 2003 Interim Common Elements Guidance, at 9 and *MPM Silicones, LLC v. Union Carbide Corp*., 2016 U.S. Dist. LEXIS 98535 (N.D.N.Y. July 7, 2016) (appropriate care is at least as stringent as due care)).

[180] For example, the 2019 Common Elements reinterpreted prior 2003 guidance from EPA and concluded that "no prior disposal" was a Continuing Obligation, as opposed to a threshold requirement. Additionally, EPA's guidance on what constituted "land use restrictions" is spelled out with more specificity. The *environmental professionals* and *users* seeking to preserve CERCLA *LLPs* are encouraged to review the Common Elements document, the ASTM Guide E2790 standard, and consult with their environmental attorney prior to acquisition to ensure that continuing obligations can be satisfied, and to develop a plan to ensure continued compliance prior to acquiring ownership or occupancy of real *property*.

[181] See USEPA 2019 Common Elements guidance.

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X1.5 **All Appropriate Inquiries**:

X1.5.1 As noted above, a prerequisite for each of the *LLPs* is that the *owner* conduct "*all appropriate inquiries*" into the previous ownership and uses of the *subject property* "in accordance with generally accepted good commercial and customary standards and practices" as established by EPA before acquiring title to property. The purpose of the pre-acquisition AAI is to determine if there has been a *release* of *hazardous substances* of on, in, or at the *property*.[182]

X1.5.2 Before the 2002 CERCLA Amendments, persons seeking to qualify for the ILO had to demonstrate compliance with the five statutory criteria added to CERCLA in 1986 ("1986 AAI"). In the 2002 CERCLA Amendments, Congress added to the statutory criteria. The ten criteria are listed below with "1986" placed in parenthesis next to the original 1986 statutory criteria:

X1.5.2.1 The results of an inquiry by an *environmental professional*;

X1.5.2.2 *Interviews* with past and present *owners*, *operators*, and *occupants* of the facility for the purpose of gathering information regarding the potential for contamination at the facility;

X1.5.2.3 Reviews of historical sources, such as chain-of-title documents, *aerial photographs*, *building department records*, and land use records, to determine previous uses and occupancies of the real *property* since the *property* was first developed;

X1.5.2.4 Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law;

X1.5.2.5 Reviews of Federal, State and local governmental records, waste disposal records, *underground storage tank* records, and *hazardous waste* handling, treatment, disposal and spill records, concerning contamination at or near the facility;

X1.5.2.6 Visual inspections of the facility and of *adjoining properties* (1986);

X1.5.2.7 Specialized knowledge or experience on the part of the defendant (1986);

X1.5.2.8 The relationship of the purchase price to the value of the *property*, if the *property* was not contaminated (1986);

X1.5.2.9 Commonly known or *reasonably ascertainable* information about the *property* (1986); and

X1.5.2.10 The degree of obviousness of the presence or likely presence of contamination at the *property*, and the ability to detect contamination by appropriate investigation (1986).[183]

X1.5.3 To clarify further the scope of "*all appropriate inquiries*," Congress instructed EPA to promulgate regulatory standards and practices for carrying out *all appropriate inquiries*.[184] The 2002 CERCLA Amendments also provided that property *owners* who acquired commercial property before May 31, 1997 would have to establish that they complied with the 1986 AAI.[185]

X1.5.4 The purpose of Practice E1527 is to set forth a practice that constitutes *all appropriate inquiries* into the previous ownership and uses of the *property* consistent with good commercial and customary practice as defined at 42 U.S.C. § 9601(35)(B).[186] The goal of Practice E1527 is to identify "the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* to the environment; or the likely presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* due to a *release* or likely *release* to the environment; or the presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* under conditions that pose a material threat of a future release to the environment."[187] Practice E1527 labels the presence or likely presence of a *hazardous substance* (or *petroleum products*) as a "*Recognized Environmental Condition*" ("REC").[188] In other words, the *environmental professional*'s determination pursuant to an AAI procedure that a *hazardous substance* (or petroleum) from a *release* is or is likely to be present at the *property* in a non-*de minimis*

[182] 42 U.S.C. § 9601(35)(A)(i).

[183] 42 U.S.C. § 9601(35)(B)(iii).

[184] 42 U.S.C.§ 9601(35)(B)(ii). In the preamble to its AAI rule, USEPA said that AAI was "legally distinct" from the more general concepts or processes of "*environmental site assessment*" and "environmental *due diligence*." 70 Fed. Reg. 66069, 66072 (Nov. 1, 2005).

[185] 42 U.S.C. § 9601(35)(B)(iv)(I). Persons who acquired commercial property after May 31, 1997 and who sought *LLPs* were required to have complied with the interim federal AAI standard until EPA promulgated its AAI Rule. See footnote 122, *infra*.

[186] Practice E1527-13, Section 1.1.

[187] Practice E1527-21, Section 1.1.1. Note that Practice E1527-21 includes petroleum and is not limited to CERCLA *hazardous substances*. See Section 1.1.2 of Practice E1527-21 that explains that Practice E1527-21 includes *petroleum products* because they are a concern in assessing real estate, but not because of any applicability of CERCLA to *petroleum products*.

[188] Practice E1527-21, Section 1.1.1. Because CERCLA does not contain any exclusion for minor spills, the REC definition is not necessarily congruent with the definition of a CERCLA *release*. For example, there could be a spill or discharge of *hazardous substance* that would satisfy the CERCLA liability element of a *release* but would not qualify as a REC if the contamination does not exceed applicable cleanup levels. Under such a circumstance, the contamination could be considered a "*de minimis condition*" since it would not likely result in an enforcement action if brought to the attention of regulators.

Likewise, the REC definition also refers to conditions indicating the existence of a "*material threat* of a *release*." Again, CERCLA liability does not have a "materiality" requirement to satisfy the *release* element for CERCLA. Of course, a *release* that does not result in contamination that exceeds applicable cleanup standards will not likely result in significant response costs though some investigation might be required to make that determination.

Under a strict reading of CERCLA, the absence of a REC might not necessarily mean that the *owner* or *operator* of the property under evaluation would be immune from CERCLA liability albeit not likely to be significant. However, EPA determined that this practice is the equivalent of AAI. Thus, a landowner who conducts an investigation consistent with this practice that does not identify any "RECs" and otherwise complies with the other requirements of AAI might be able to satisfy the ILO or CPO notwithstanding the lack of congruence between the definition of a CERCLA *release* and a REC.

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condition results in the identification of a REC under Practice E1527. Although many of the specific steps set forth in AAI are prescriptive,[189] the rule clearly requires the exercise of professional judgment by the *environmental professional* who conducts the inquiry as guided by the objectives and performance standards of the AAI rule.[190]

X1.5.5 Recommendations by *environmental professionals* are not required by this practice. Under AAI, the report should include an opinion by an *environmental professional* on whether additional information could assist in determination of a REC, if any.[191] Some *environmental professionals* and *users* of this practice may contract for recommendations. While contract liability is beyond the scope of this practice, the recommendations by the *environmental professional* may be read by courts evaluating continuing obligations.[192]

X1.6 Case Law Interpretation of "*All Appropriate Inquiries*" in Commercial Real Estate Transactions:

X1.6.1 The vast body of case law interpreting the parameters of "*all appropriate inquiries*" pre-date the 2002 CERCLA Amendments, though, as discussed below, AAI parameters may be increasingly addressed by courts.[193] The older case law involving the Third Party Defense and *LLPs* is fact-intensive and is influenced by the particular circumstance of the case.

X1.6.2 The courts have said that deciding what constitutes an appropriate inquiry presents a mixed question of law and fact[194] that is to be guided by the statutory language, legislative history, and common sense.[195] The duty to make inquiry is judged as of the time of acquisition. Defendants must be held to a higher standard as public awareness of the hazards associated with *releases* of *hazardous substances* has grown, as reflected by CERCLA and other federal and state statutes. For pre-2002 acquisitions, good commercial and customary practice has been viewed through a prism of what a reasonable inquiry must have included in all circumstances, in light of best business and land transfer principles. Those engaged in commercial transactions should, however, be held to a higher standard than those who are engaged in private residential transactions.[196]

X1.6.3 AAI represents the minimum level of inquiry necessary to support the *LLPs*. However, it is important to understand that additional inquiry ultimately may be necessary or desirable for legal as well as business reasons depending upon the outcome of this inquiry and the particular risk tolerances of a *user*. For example, such additional inquiry may assist the *user* in determining whether the *user* would have continuing obligations in the event he acquires the *property* and may also assist the *user* in defining the scope of future steps to be taken to satisfy the obligation to take reasonable steps. In addition, a *user* may be concerned about *business environmental risks* that do not fall within the definition of a REC. If an investigation performed to the requirements of this practice identifies the presence of RECs, the *user* may desire to conduct additional subsurface investigation (commonly referred to as a "Phase II" environmental investigation).

X1.6.4 The burden of proof for establishing an *LLP* or Third Party Defense lies with the person seeking to qualify for the liability protection.[197] The person seeking to assert a defense to CERCLA liability must show only that the evidence offered to support the level of inquiry that was taken at the time of acquisition is of greater weight or more convincing than the evidence offered in opposition to it. In other words, the evidence on the inquiry issue taken as a whole shows that the fact sought to be proved is more probable than not.

X1.6.5 AAI issues sometimes are addressed in preliminary orders during a case, though few such issues have, to date, been addressed squarely on appeal. For example, courts have been

[189] For example, see § 312.21 (an inquiry by an *environmental professional*), § 312.22 (collection of certain required information), and § 312.25 (searches for recorded environmental cleanup liens).

[190] 40 C.F.R. §§ 312.20(e) and (f). EPA discussed the importance of the objectives and performance standards in the Preamble to the AAI Final Rule, 70 Fed. Reg. 66070, 66101 (Nov. 1, 2005): "After collecting and considering all the information required to comply with the rule's objectives and performance standards, all the information should be considered in total to determine whether or not there are indications of *releases* or threatened *releases* of *hazardous substances* on, at, in, or to the property."

[191] C.F.R. § 312.31(b).

[192] See for example, *Ashley II of Charleston v PCS Nitrogen, Inc*., 791 F. Supp. 2d 431 (D.S.C. 2011), *aff'd on other grounds*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 571 U.S 990 (2013). In Ashley II, the Phase I Report recommended that the *sumps* be cleaned out and filled, the cracks in the concrete pad and debris pile be investigated, and that the asphalt base be maintained. The court found that Ashley failed to timely implement these recommendations, thus impacting its ability to claim BFPP protections. Thus, recommendations included in the report (if any), may give rise to CERCLA liability if not completely resolved in the report.

[193] Prior to 2012, only one case has directly addressed AAI. In *Ashley II of Charleston v PCS Nitrogen, Inc*., 791 F. Supp. 2d 431 (D.S.C. 2011), *aff'd on other grounds*, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 571 U.S 990 (2013), the plaintiff had performed a *Phase 1 Environmental Site Assessment* using ASTM Practice E1527-05 that was referenced by EPA as being in compliance with the AAI rule. The defendant claimed there were some inconsistencies between Ashley's Phase I reports and ASTM Practice E1527-05. The court simply held that any such inconsistencies "lacked significance" without explaining the alleged inconsistencies between the Phase 1 reports and Practice E1527-05. What was important, the court held, was that Ashley acted reasonably; it hired an expert to conduct an AAI, and relied on that expert to perform its job properly. As a result, the court ruled that Ashley had properly conducted AAI. *Id*. At 500-01.

[194] *Advance Technology Corp. v. Eliskim, Inc*. 87 F. Supp.2d 780, 785 (N.D. Ohio 2000).

[195] *See United States v. Serafini*, 706 F. Supp. 346 (M.D. Pa. 1988), 791 F. Supp. 107 (M.D. Pa. 1990) (By entertaining disputed facts as to the custom and practice of viewing land prior to purchase, the court implied that appropriate inquiry necessarily varies on a site-by-site basis); *United States v. Pacific Hide and Fur Depot, Inc*., 716 F. Supp. 1341 (D. Idaho 1989) (No inquiry was required by those who received an ownership interest in property via corporate stock transfer and warranty deed under the facts of this case); *International Clinical Laboratories, Inc. v. Stevens*, 1990 U.S. Dist. LEXIS 3685 (E.D.N.Y. Jan. 12,1990) (Despite a long history of toxic *wastewater* disposal and presence of the site on the state's hazardous waste disposal site list, the purchaser was able to establish the *innocent landowner* defense since there were no visible environmental problems at the site, the defendant had no knowledge of environmental problems at the site, and the purchase price did not reflect a reduction on account of the problem).

[196] H.R. Rep. No. 962, 99th Cong., 2d Sess. 187 (1986), reprinted at 1986 U.S.C.C.A.N. 3276, 3280.

[197] *United States v. Domenic Lombardi Realty, Inc*., 290 F. Supp.2d 198 (D.R.I. 2003).

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willing to find certain purported AAI reports deficient.[198] One court found that a Phase I Report may not be used by a person to whom the report was not addressed.[199] A separate court followed this line of logic to disallow a landowner to use a Phase I Report to satisfy AAI where the Phase I Report was addressed to a separate company within the same corporate group as the landowner.[200] Another court found that failure to conduct certain *interviews* resulted in a defective Phase I Report.[201] There is limited precedential value on preliminary orders that are not directly appealed, but *users* seeking *LLPs* should nonetheless take care to ensure the requirements of AAI are completed in accordance with applicable standards.

X1.7 **Title Searches for Environmental Liens and *AULs***:

X1.7.1 *AAI Requirements for Finding Recorded Environmental Liens and AULs*—CERCLA requires and, in turn, EPA's AAI rule requires that AAI must include "[s]earches for recorded environmental cleanup liens."[202] The AAI rule's preamble further explains that "recorded environmental cleanup liens are encumbrances on property for the recovery of incurred cleanup costs on the part of a state, tribal, or federal government agency or other third party."[203] CERCLA also requires that EPA's AAI regulations cover government records, namely "[r]eviews of Federal, State, and local government records … concerning contamination at or near the facility."[204] In turn, EPA's AAI rule requires the review of "registries or *publicly available* lists of *institutional controls*, including environmental land use restrictions, applicable to the *subject property*."[205] As to government record reviews,[206] EPA explains that "information on *institutional controls* and *engineering controls* may be recorded in local land records."[207] *Institutional control* information may be identified as "restrictions of record on title" by title company reports.[208] As EPA explains, the AAI process "may want to request information on restrictions of record on title."[209] Speaking specifically about where to search for environmental cleanup liens, EPA did not provide specific instructions but, instead, explained "we advise that prospective landowners and grantees to seek the advice of a local realtor, real estate attorney, title company, or other real estate professional."[210]

X1.7.2 *Land Title Records*—"Title" is a legal construct that describes the various property rights affecting land – often described as a bundle of rights.[211] The bundle of rights, as a practical matter, are fashioned as separate legal documents including ownership deeds, as well as those that encumber the rights of ownership. Such encumbrances include liens, covenants, easements, mortgages, boundary agreements, mineral claims, development rights, leases, and many more.[212] A given parcel could have 50-75 recorded interests that affect it.[213] The "title" to land is the combination of all of these things. Subject to a complex body of property law (beyond the scope of this Appendix), recorded interests ordinarily "run with the land," which means that interests recorded against a parcel in the past will remain as an interest affecting the parcel, even if the ownership interest transfers to another. Pursuant to state recording acts,[214] the county recorder's office (or similarly named custodian or records) stores the *land title records* for the County.[215] The recording of *land title records* provides the important purpose of giving "constructive notice" (imputed knowledge to the world) that the recorded interest exists.

X1.7.3 *Environmental Cleanup Liens and AULs in Land Title Records:*

X1.7.3.1 EPA regulations first contemplated the use of *AULs* in 1990.[216] While there are different types of *AULs*[217] (some of which do not ordinarily get recorded in *land title*

[198] *Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050, 1063 (9th Cir. 2013).

[199] *Mt. Kisco Associates LLC v. Carozza*, No. 7:2015cv05346, 2019 WL 6998008, at *15 (S.D.N.Y. Dec. 20, 2019) (local government *interviews* are essential to completion of the Phase I, but there was no reliance letter or other document linking the party seeking to use the *report* with the actual *report* itself).

[200] *Von Duprin LLC v. Moran Electric Service Inc*., No. 1:16-cv-01942, 2019 WL 535752, at *15 (S.D. Ind. Feb. 11, 2019) (entry on the parties' cross-motions for summary judgment) (Phase I ESA report was prepared for Major Tool and Machine, but Major Holdings was the nominal owner of the parcel). That same court also determined that tenants must perform AAI prior to occupying the property. *Von Duprin LLC v. Moran Electric Service Inc*., No. 1:16-cv-01942-TWP-DML, 2020 WL 1501876, at *14 (S.D. Ind. Mar. 3, 2020), appeal docketed, No. 0:20-cv-01793 (7th Cir. May 12, 2020). (Note that the trial court did not require the use of Practice E1527 or 40 C.F.R. Part 312 to satisfy AAI).

[201] *BankUnited, N.A. v. Merritt Envtl. Consulting Group*, 360 F. Supp. 3d 172, 180 (S.D.N.Y. 2018) (failure to conduct *interviews* produced a "defective and misleading Phase I Report")

[202] 42 U.S.C. § 9601(35)(b)(iii) (regulations shall address "Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law"); 40 C.F.R. § 312.25 (a).

[203] Standards and Practices for All Appropriate Inquiries and Notice of Public Meeting to Discuss Standards and Practices for All Appropriate Inquiries, 69 Fed. Reg. 52542, 52562 (Aug. 26, 2004).

[204] 42 U.S.C. § 9601(35)(b)(iii).

[205] 40 C.F.R. § 312.26 (b)(7) (government records or data bases must be reviewed).

[206] See Standards and Practices for All Appropriate Inquiries; Final Rule, 70 Fed. Reg. 66070, 66092 (Nov. 1, 2005) (providing "*What Are the Requirements for Reviewing Federal, State, Tribal, and Local Government Records*").

[207] *Id.* at 66093; see also Jack S. Levey, A Beginner's Guide to the Commitment for *Owner's* Title Insurance, 14 Probate & Property 34, 39 (May/June 2000) (restrictions of record include easements and covenants that limit use).

[208] *Id.*

[209] *Id.* (internal quotations omitted).

[210] *Id.* at 66092.

[211] AMERICAN LAND TITLE ASSOCIATION, LAND TITLE INSTITUTE, Ch. 1, p. 1-2 (2001).

[212] *Id.*

[213] *Id.* at 3-3.

[214] Tom Hayden and Jordan Kelner, *The Value of Title Insurance*, 15 J. Bus & Tech. L. 305, 320 (2020) ("The nation's recording system is based on state law").

[215] "Real estate records may be filed in the office of the register or registrar of deeds, recorder, county clerk, clerk of courts, the Torrens officer, or the probate registrar." J. Bushnell Nielsen, Real Estate Closing, Title Examination and Title Insurance Policy Procedures and Customs in the United Stated by Region (Aug. 08, 2018) (avail. at https://www.reinhartlaw.com/knowledge/real-estate-closing-title-examination-and-title-insurance-policy-procedures-and-customs-in-the-united-states-by-region/) (visited Jan. 31, 2021) (hereafter *Nielsen*).

[216] 40 C.F.R. § 300.430(a)(1)(3) (1990); National Oil and Hazardous Substances Pollution Contingency Plan Final Rule, 55 Fed. Reg. 8666 (Mar. 8, 1980).

[217] William R. Weissman & J. Michael Sowinski, Jr., *Revitalizing the Brownfields Revitalization and Environmental Restoration Act: Harmonizing the Liability Defense Language to Achieve Brownfield Restoration*, 33 Va. Envtl. L.J. 257, 285-287 (2015).

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records), *AULs* recorded in *land title records*, such as environmental covenants, are a critical type of *AUL*. Approximately half of the states have enacted UECA statutes[218] which, among other things, expressly require environmental covenants to be recorded in *land title records*.[219] Various non-UECA states have similarly enacted statutes addressing recorded *AULs* or, instead, simply rely on common law to govern the use of recorded *AULs*.[220] Following the UECA-based or similar templates provided by states, recorded *AULs* are ordinarily fashioned as free-standing documents that define the land affected as well as the restrictions or conditions associated with environmental impacts.[221]

X1.7.3.2 In 1980, CERCLA established Federal Superfund Liens. Under CERCLA, the costs and damages owed by a liable party to the United States constitute a lien against the person's real *property*.[222] To establish priority of the Superfund Lien over other secured interests, a notice of the lien needs to be filed in "the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located".[223] Nearly all states have passed legislation modeled after the Uniform Federal Lien Registration Act, which defines the appropriate local records office in which to file federal liens.[224] While state laws differ, they commonly provide that federal liens must be filed in the county recorder office.[225] EPA guidance instructs EPA staff to file notice of liens in accordance with state laws and adds that where there is any doubt, the notice should be filed in the local records office as well as the United States district court.[226] In addition to federal CERCLA liens, some State Superfund statutes establish liens for state-incurred or other cleanup related costs.[227] Notice of State Superfund liens are often filed in the same manner as Federal Superfund liens.[228]

X1.7.4 *Title Insurance*—Property purchase transactions routinely involve the buyer's purchase of title insurance.[229] Title insurance indemnifies the property purchaser if they suffer monetary loss or damage because of defects in title.[230] Importantly, title insurance does not cover defects that the policy excludes or excepts from coverage. Accordingly, the issuance of title insurance involves a search and examination of *land title records* that results in a written itemization of the defects, liens, and encumbrances affecting the title and, in turn, excepted from coverage.[231] Indeed, insurers spend a vast majority of policy premium revenues to comprehensively search and examine *land title records* for title defects, liens, or encumbrances.[232]

X1.7.4.1 *Title commitments*—Before issuing the final title insurance policy, title insurers prepare a "title commitment" (or similarly named document).[233] Title commitments act as a promise to provide title insurance subject to the exclusions, exceptions, and other terms of the commitment. In an American Land Title Association-provided (or very similar) format, title commitments provide a standard means for listing each encumbrance and lien. If title commitments fail to identify title defects, the insured can seek compensation from the title company under the contractual terms of the policy or, in some jurisdictions, based on tort liability theories such as "negligence searching."[234] While serving to except liens and encumbrances from policy coverage, the title commitment also provides the property purchaser with knowledge of the encumbrances.[235] Indeed, as some commenters explain, "purchasers of real estate often rely on the title insurance company to serve

[218] The Uniform Environmental Covenants Act (UECA) provides a model state statute defining a perpetual real estate interest that restricts use at contaminated property when it is transferred. See Unif. Law Comm'n, Environmental Covenants Act (avail. at https://www.uniformlaws.org/committees/community-home?CommunityKey=ce3a1f73-4bc5-4de2-82a9-f4f54ce70294) (visited Jan. 31, 2021).

[219] "An environmental covenant and any amendment or termination of the covenant must be recorded in every [county] in which any portion of the real property subject to the covenant is located." Id. at § 8(a).

[220] ASTM, Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls E2091-17, 6.6.2-6.6.3 (discussing state statute and common law on recorded *AULs*).

[221] See, for example, Pennsylvania Dep't Envt'l Prot., Model Environmental Covenant (avail. at https://www.dep.pa.gov/Business/Land/LandRecycling/Pages/Uniform-Environmental-Covenants.aspx) (visited Jan. 31, 2021).

[222] 42 U.S.C. § 9607(l)(1).

[223] EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, GUIDANCE ON FEDERAL SUPERFUND LIENS, Directive 9832912, p.5 (Sept. 22, 1987) (citing 42 U.S.C. § 9607(1)(3)).

[224] See Unif. Law Comm'n, Environmental Covenants Act, Federal Lien Registration Act (avail. at https://www.uniformlaws.org/committees/community-home?communitykey=a1cec079-1996-418e-aff0-8ec5a34f619b&tab=groupdetails) (visited Jan. 31, 2021).

[225] American Bankruptcy Institute, *Secured Creditors Beware The Latest Tool in the Creditors Committee Toolbox Aiding and Abetting in the Breach of a Fiduciary Duty* (Oct. 2004) (avail. at https://www.abi.org/abi-journal/searching-for-federal-tax-liens-the-typical-search-for-ucc-financing-statements-may-not) (visited Jan. 31, 2021) (for "real property, the state statutes appear to be quite uniform"); see NETROnline, Environmental Lien and *AUL* Statutes (avail. at https://environmental.netronline.com/lienStatutes.aspx) (visited Jan. 31, 2021) (listing and summarizing state statutes addressing federal liens and state liens).

[226] EPA, Office of Solid Waste and Emergency Response, Guidance on Federal Superfund Liens, Directive 9832912, p.6 (Sept. 22, 1987).

[227] *Id.* at 3.

[228] *Id.* at 6.

[229] "Title Insurance has become the prevailing method by which real estate purchasers and mortgage lenders protect themselves against the risk of defects in title." James Bruce Davis, More Than They Bargained For: Are Title Insurance Companies Liable in Tort for Undisclosed Title Defects?, 45 Cath. U.L. Rev 71 (Fall 1995).

[230] *Nielsen* (*citing* J. Bushnell Nielsen, Title and Escrow Claims Guide, 2017 Edition, American Land Title Association, § 9.1.1).

[231] "Schedule B, Section 2 of the commitment lists the risks that the underwriter proposes to exclude from coverage." Jack S. Levey, A Beginner's Guide to the Commitment for *Owner's* Title Insurance, 14 Probate & Property 34, 35 (May/June 2000).

[232] *Id.* (*citing* A.M. Best Special Report, *Market Review: Title*, December 13, 2010, pp. 4-6, 14; A.M. Best, *Title & Mortgage Industry Fundamentals*, 2014, p. 1; and Robert Bozarth, *Lawyers Notes: Customers ask about title insurance forms and policies*, in *Lawyers Title News*, Fall 1995, p. 16).

[233] "A title commitment also has the synonyms: preliminary title report or PTR, title binder, title report, commitment to insure, preliminary title, or just preliminary." *Id*.

[234] *Id.* (*citing* J. Bushnell Nielsen, Title and Escrow Claims Guide, 2017 Edition, American Land Title Association, § 15.2); *see generally* James Bruce Davis, More Than They Bargained For: Are Title Insurance Companies Liable in Tort for Undisclosed Title Defects?, 45 Cath. U.L. Rev 71 (Fall 1995).

[235] "Because the title insurance policy insures the title to land, and defects in title exist in full or not at all, title insurers can eliminate a risk by identifying it…." Tom Hayden and Jordan Kelner, *The Value of Title Insurance*, 15 J. Bus & Tech. L. 305, 315 (2020). "As a result of their extensive knowledge of local land and title law, established title insurers know what they must do to eliminate risk." *Id*.

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not only as the insurer, but also as a supplier of information regarding the titles they will acquire."[236]

X1.7.4.2 *Title searches for the title commitment*—Whether because of the potential exposure to claims or because of the requirements set forth in state title insurance laws to perform "reasonable examinations" of title (or otherwise addressing title searches),[237] title searching to find liens and encumbrances is an integral part of the title commitment. A common search technique, a grantor-grantee index search, begins with the current *owner* (the most recent grantee) and reviews the grantee index backwards in time to find when and from whom the current *owner* received the interest, and when and from that party received it and so on, identifying each grantee and grantor of the property backwards in time. After "chaining" the title, the search then looks to find which other interests (easements, covenants, mortgages, etc.) the grantor conveyed during their ownership,[238] thereby identifying each interest that may affect title. Another common method, and in some states a required method,[239] searches *land title records* via title plants – described by some as being very efficient and comprehensive – which rely on information technology to reliably access *land title records*.[240] As a California appellate court described, "a title plant is essentially a duplicate of county land records, but reorganized to indicate relevant data on a geographic or parcel-by-parcel basis."[241] Title insurance companies have invested heavily to construct their title plants.[242] Because of their comprehensiveness and efficiency, title plants are "the primary source used by title insurance companies and their agents in the process of producing commitments."[243] Regardless of the search method, the question exists as to how far back in time does a title search need to extend. How far back depends on local customs or, where applicable, marketable title statutes.[244] Generally, local custom demands a search backward as far as 50 to 60 years.[245] In states with marketable title statutes, this period is shortened to usually extend from approximately 30 to 50 years.[246]

X1.7.5 *Title Searching for Informational Purposes*—Title search information reports are not associated with an offer for title insurance, and therefore operate separately from the laws and rules governing title insurance. Based on the need and desire for land record information for purposes other than title insurance, these reports serve the marketplace that seeks select *land title record* information. Often considered as an attractive feature, title search information offerings can be tailored to meet various needs. For example, on one extreme, title search reports might simply identify the current *owner* of real estate or, on the other extreme, such reports can provide a detailed abstract of every *land title record* ever recorded against a *property*. Common title search information reports go by the name "condition of title," "title abstracts," "ownership and encumbrance," or similar names. The breadth and nature of the report are ordinarily based on the scope of work or contractual agreement between the provider and the requesting party. Similarly, the extent to which such reports look back in time can also be tailored. Some title information vendors directly address *AULs* in products titled "*AUL and Environmental Lien Search*" (or similar). These offerings arose as a direct result of the need required by AAI.

[236] James Bruce Davis, *More Than They Bargained For: Are Title Insurance Companies Liable in Tort for Undisclosed Title Defects?*, 45 Cath. U.L. Rev 71, 76 (Fall 1995). "[A]lthough title insurers do not tout the fact that buyers and lenders review the title insurance commitment to determine what defects, liens, and encumbrances affect the title, it does serve that purpose." *Nielsen* (avail. at https://www.reinhartlaw.com/knowledge/real-estate-closing-title-examination-and-title-insurance-policy-procedures-and-customs-in-the-united-states-by-region/) (visited Jan. 31, 2021).

[237] See James L. Gosdin, Title Insurance A Comprehensive Overview, pp.172-241 (2nd ed. 2000) (summarizing title search provision of state title insurance laws).

[238] Barlow Burke, Law of Title Insurance (2006 Supp.), p. 12-9.

[239] "Ten states have statutory title plant requirements." Tom Hayden and Jordan Kelner, *The Value of Title Insurance*, 15 J. Bus & Tech. L. 305, 318 (2020).

[240] "[T]itle companies implement technology at the title plants to make searches of the title plant's records far more comprehensive." *Id.* at 318.

[241] *Coldwell Banker & Co. v. Department of Insurance* (1980) 102 Cal.App.3d 381. "Generally, title plants duplicate public records for real property, adding information and additional cross-references that are not tracked by public record keepers." Tom Hayden and Jordan Kelner, *The Value of Title Insurance*, 15 J. Bus & Tech. L. 305, 318 (2020).

[242] "For generations, established title insurance companies have been adding information to their title plants, organizing the legal documents in a manner optimized for searching and identifying legal risks that would be impossible for new entrants…." *Id.* at 318.

[243] *Id.* at 318-319.

[244] Marketable title statutes "require a title company to review title knowledge going back a certain amount of years before producing a policy showing marketable title." Tom Hayden and Jordan Kelner, *The Value of Title Insurance*, 15 J. Bus & Tech. L. 305, 318 (2020).

[245] American Land Title Association, Land Title Institute, Ch. 3, p. 5 (2001). Barlow Burke, Law of Title Insurance (2006 Supp.), pp. 12-4 through 12-5.

[246] *Id.*

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X2. DEFINITION OF ENVIRONMENTAL PROFESSIONAL AND RELEVANT EXPERIENCE THERETO, PURSUANT TO 40 C.F.R. § 312.10

X2.1 Environmental Professional

X2.1.1 *Environmental Professional* means:

X2.1.1.1 A person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of *releases* or threatened *releases* (see § 312.1(c)) on, at, in, or to a *property*, sufficient to meet the objectives and performance factors in §§ 312.20(e) and (f).

X2.1.1.2 Such a person must: (i) hold a current Professional Engineer's or Professional Geologist's license or registration from a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) and have the equivalent of three (3) years of full-time relevant experience; or (ii) be licensed or certified by the federal government, a state, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries as defined in § 312.21 and have the equivalent of three (3) years of full-time relevant experience; or (iii) have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of five (5) years of full-time relevant experience; or (iv) have the equivalent of ten (10) years of full-time relevant experience.

X2.1.1.3 An *environmental professional* should remain current in his or her field through participation in continuing education or other activities.

X2.1.1.4 The definition of *environmental professional* provided above does not preempt state professional licensing or registration requirements such as those for a professional geologist, engineer, or site remediation professional. Before commencing work, a person should determine the applicability of state professional licensing or registration laws to the activities to be undertaken as part of the inquiry identified in § 312.21(b).

X2.1.1.5 A person who does not qualify as an *environmental professional* under the foregoing definition may assist in the conduct of *all appropriate inquiries* in accordance with this part if such person is under the supervision or responsible charge of a person meeting the definition of an *environmental professional* provided above when conducting such activities.

X2.2 Relevant Experience

X2.2.1 *Relevant experience*, as used in the definition of *environmental professional* in this section, means: participation in the performance of *all appropriate inquiries* investigations, *environmental site assessments*, or other site investigations that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of *releases* or threatened *releases* (see § 312.1(c)) to the *subject property*.

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X3. USER QUESTIONNAIRE

INTRODUCTION

To qualify for one of the *Landowner Liability Protections (LLPs)*[247] offered by the Small Business Liability Relief and Brownfields Revitalization Act of 2001 (the "*Brownfields Amendments*"),[248] the *user* must conduct the following inquiries required by 40 C.F.R. §§ 312.25, 312.28, 312.29, 312.30, and 312.31. These inquiries must also be conducted by EPA Brownfield Assessment and Characterization grantees. The *user* should provide the following information to the *environmental professional*. Failure to conduct these inquiries could result in a determination that "*all appropriate inquiries*" is not complete.

(1.) Environmental liens that are filed or recorded against the *subject property* (40 C.F.R. § 312.25).
Did a search of *land title records* (or judicial records where appropriate, see Note 1 below) identify any *environmental liens* filed or recorded against the *subject property* under federal, tribal, state, or local law?

NOTE 1—In certain jurisdictions, federal, tribal, state, or local statutes, or regulations specify that *environmental liens* and *AULs* be filed in judicial records rather than in *land title records*. In such cases judicial records shall be searched for *environmental liens* and *AULs*.

(2.) *Activity and use limitations* that are in place on the *subject property* or that have been filed or recorded against the *subject property* .
Did a search of *land title records* (or judicial records where appropriate, see Note 1 above) identify any *AULs*, such as *engineering controls*, land use restrictions or *institutional controls* that are in place at the *subject property* and/or have been filed or recorded against the *subject property* under federal, tribal, state or local law?

(3.) Specialized knowledge or experience of the person seeking to qualify for the *LLP* (40 C.F.R. § 312.28).
Do you have any specialized knowledge or experience related to the *subject property* or nearby *properties*? For example, are you involved in the same line of business as the current or former *occupants* of the *subject property* or an *adjoining property* so that you would have specialized knowledge of the chemicals and processes used by this type of business?

(4.) Relationship of the purchase price to the fair market value of the *subject property* if it were not contaminated (40 C.F.R. § 312.29).
Does the purchase price being paid for this *subject property* reasonably reflect the fair market value of the *property*? If you conclude that there is a difference, have you considered whether the lower purchase price is because contamination is known or believed to be present at the *subject property*?

(5.) Commonly known or *reasonably ascertainable* information about the *subject property* (40 C.F.R. § 312.30).
Are you aware of commonly known or *reasonably ascertainable* information about the *subject property* that would help the *environmental professional* to identify conditions indicative of *releases* or threatened *releases*? For example,
(a.) Do you know the past uses of the *subject property*?
(b.) Do you know of specific chemicals that are present or once were present at the *subject property*?
(c.) Do you know of spills or other chemical *releases* that have taken place at the *subject property*?
(d.) Do you know of any environmental cleanups that have taken place at the *subject property*?

(6.) The degree of obviousness of the presence or likely presence of contamination at the *subject property*, and the ability to detect the contamination by appropriate investigation (40 C.F.R. § 312.31).
Based on your knowledge and experience related to the *subject property*, are there any *obvious* indicators that point to the presence or likely presence of *releases* at the *subject property*?

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[247] *Landowner Liability Protections*, or *LLPs*, is the term used to describe the three types of potential defenses to Superfund liability in EPA's *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability* ("*Common Elements*" Guide) issued on March 6, 2003.
[248] P.L. 107-118.

X3.1 In addition, certain information should be collected, if available, and provided to the *environmental professional* conducting the *Phase I Environmental Site Assessment*. This information is intended to assist the *environmental professional*, but is not necessarily required to qualify for one of the *LLPs*. The information includes:

X3.1.1 The reason why the Phase I is being performed;

X3.1.2 The type of *property* and type of *property* transaction, for example, sale, purchase, exchange, etc.;

X3.1.3 The complete and correct address for the *subject property* (a map or other documentation showing *subject property* location and boundaries is helpful);

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X3.1.4 The scope of services desired for the Phase I (including whether any parties to the *property* transaction may have a required standard scope of services or whether any considerations beyond the requirements of Practice E1527 are to be considered);

X3.1.5 Identification of all parties who will rely on the Phase I *report*;

X3.1.6 Identification of the site contact and how the contact can be reached;

X3.1.7 Any special terms and conditions which must be agreed upon by the *environmental professional*; and

X3.1.8 Any other knowledge or experience with the *subject property* that may be pertinent to the *environmental professional* (for example, copies of any available prior *environmental site assessment reports*, documents, correspondence, etc., concerning the *subject property* and its environmental condition).

X4. ADDITIONAL EXAMINATION OF THE RECOGNIZED ENVIRONMENTAL CONDITION DEFINITION AND LOGIC

X4.1 *Recognized Environmental Condition*—Definition Broken down

The definition of a *recognized environmental condition* is found in 3.2.73:

"*recognized environmental condition*—**(1)** the presence of *hazardous substances* or *petroleum products* in, on, or at a *subject property* due to a *release* to the *environment*; **(2)** the likely presence of *hazardous substances* or *petroleum products* in, on, or at a *subject property* due to a *release* or likely *release* to the *environment*; or **(3)** the presence of *hazardous substances* or *petroleum products* in, on, or at a *subject property* under conditions that pose a *material threat* of a future *release* to the *environment*. A *de minimis condition* is not a *recognized environmental condition*."

To understand better the concept of *recognized environmental condition*, the definition can be broken down as follows:

(1) "The presence of *hazardous substances* or *petroleum products* in, on, or at a *subject property* due to a *release* to the *environment*."

a) "*Presence*"—This is definitive.
   i) *Hazardous substances* or *petroleum products* are observed, or
   ii) There is the documented or known presence of *hazardous substances* or *petroleum products*.

b) "In, on, or at a *subject property*."
   i) There can be no off-site (that is, off *subject property*) *recognized environmental conditions*.
   ii) There can be *recognized environmental conditions* because of off-site *releases* (that is, the presence of *hazardous substances* or *petroleum products* in, on, or at a *subject property* because of an off-site *release* to the *environment* that has *migrated* to the *subject property*) – for this to be a *recognized environmental condition* under condition 1) of the definition, both the *release* at the off-site *property* and the presence in, on, or at the *subject property* are known.

c) "Due to a *release* to the *environment*."
   i) There is direct evidence of a *release*, that is, there is/are observations, data, documentation, or other information indicating that a *release* of *hazardous substances* or *petroleum products* has occurred.
      (1) Observations could include pooled liquids and stressed vegetation around a *drum* storage area, stained soil under an aboveground petroleum storage tank, and so forth.
      (2) Data could be from the analysis of samples of environmental media collected at the *subject property*, from information in a commercial database *report*, and so forth.
      (3) Documentation could be from an *underground storage tank* closure inspection form indicating an observed leak condition (that is, a *release*), government records, and so forth.
      (4) Other information could be from *interviews* (for example, the *key site manager* has *actual knowledge* that an *underground storage tank* removed from the *subject property* was found to be leaking).
   ii) "*Release*" is not intended to relate to most naturally occurring conditions such as heavy metals.
      (1) See X1.1.1 for further discussion of "*release*."
      (2) See X1.1.1 for further discussion of "*environment*."

(2) "The likely presence of *hazardous substances* or *petroleum products* in, on, or at a *subject property* because of a *release* or likely *release* to the *environment*."

Unlike the certainty expressed in condition 1 above, condition 2 does not require the known presence, but the likely presence.

a) The likely presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* from a likely *release* at the *subject property*.
   i) The two subjective conditions – likely *release* and likely presence – exist in conjunction with each other.
   ii) Information indicates that a *release* of *hazardous substances* or *petroleum products* has likely occurred at the *subject property*.
   iii) The opinion that a *release* is (was) likely is subjective, and should be based upon the *environmental professional's* experience, observations made during the *site reconnaissance*, and on other *reasonably ascertainable* information collected as part of the assessment, and so forth. Some of the factors to consider include:
      (1) Features, conditions, or operations on or at the *subject property* involving *hazardous substances* or *petroleum products*;
      (2) Duration of the features, conditions, or operations in, on, or at the *subject property* involving *hazardous substances* or *petroleum products*;
      (3) Period of time in which operations took place (for example, the operations at the *subject property* took place when there was or may have been a lack of management practices and/or regulatory oversight and/or when common work practices at that time may likely have resulted in a *release*); and
      Note—Petroleum storage/dispensing, dry cleaning, manufacturing, and so forth operating at the *subject property* for a significant period of time prior to regulatory controls, or a bare-steel *underground storage tank* installed at the *subject property* decades ago without any leak detection systems may be examples of such a *recognized environmental condition* if the *environmental professional* believes there has likely been a *release* of *hazardous substances* or *petroleum products* associated with those uses and features.
      (4) Other information obtained during the assessment.

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b) Likely presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* from a known *release* at an off-site *property* (if the known *release* is at the *subject property*, refer to condition 1 above.)
   i) The single subjective condition – likely presence – exists in the context of a known off-site *release*.
   ii) The opinion that a known *release* of *hazardous substances* or *petroleum products* at an off-site property has, in the opinion of the *environmental professional*, likely impacted the *subject property* is subjective and should be based upon the *environmental professional's* experience, observations made during the *site reconnaissance*, and other *reasonably ascertainable* information collected as part of the assessment, and so forth. Some of the factors to consider include:
      (1) Location of the source of the *release* with respect to the *subject property* (for example, adjoining the *subject property*, or proximate to the *subject property*, and so forth);
      (2) Topographic, geologic, and hydrogeologic conditions in the vicinity of the *subject property* and the location of the *release* (for example, up-gradient in an area with sandy soils and shallow groundwater); and
      (3) Other information obtained during the assessment (for example, reports, data or information from a regulatory authority or commercial database provider, prior assessment reports, and so forth).

c) Likely presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* from a likely *release* at an off-site *property*.
   i) The two subjective conditions – likely *release* and likely presence – exist in conjunction with each other.
   ii) The opinion that an off-site *release* is (was) likely is subjective, and should be based upon the *environmental professional's* experience, observations made during the *site reconnaissance*, other *reasonably ascertainable* information collected as part of the assessment, and so forth. The *environmental professional* should consider the factors in 2) a) iii) above.
   iii) The opinion that the likely off-site *release* has, in the opinion of the *environmental professional*, likely impacted the *subject property* is subjective, and should be based upon the *environmental professional's* experience, observations made during the *site reconnaissance*, and other *reasonably ascertainable* information collected as part of the assessment, and so forth. The *environmental professional* should consider the factors in 2) b) ii) above.

(3) "The presence of *hazardous substances* or *petroleum products* in, on, or at the *subject property* under conditions that pose a *material threat* of a future *release* to the *environment*."

a) This practice defines *material threat* as "an *obvious* threat which is likely to lead to a *release* and that, in the opinion of the *environmental professional*, would likely result in impact to public health or the *environment*."
b) This practice defines *obvious* as "that which is plain or evident; a condition or fact that could not be ignored or overlooked by a reasonable observer."
c) The *environmental professional* shall believe that the likely future *release* might result in impact to public health or the *environment*.

Note — Examples of conditions that pose a *material threat* of a future *release* to the *environment* might include *drums* of *hazardous substances* precariously stacked on pallets, or bulging *petroleum product* tanks; the condition(s) would represent a *material threat* only if the *environmental professional* deems the condition(s) serious enough that it would cause or contribute to a *release* of *hazardous substances* or *petroleum products* to the *environment*.

X4.2 **REC Logic Diagram—**See Fig. X4.1.

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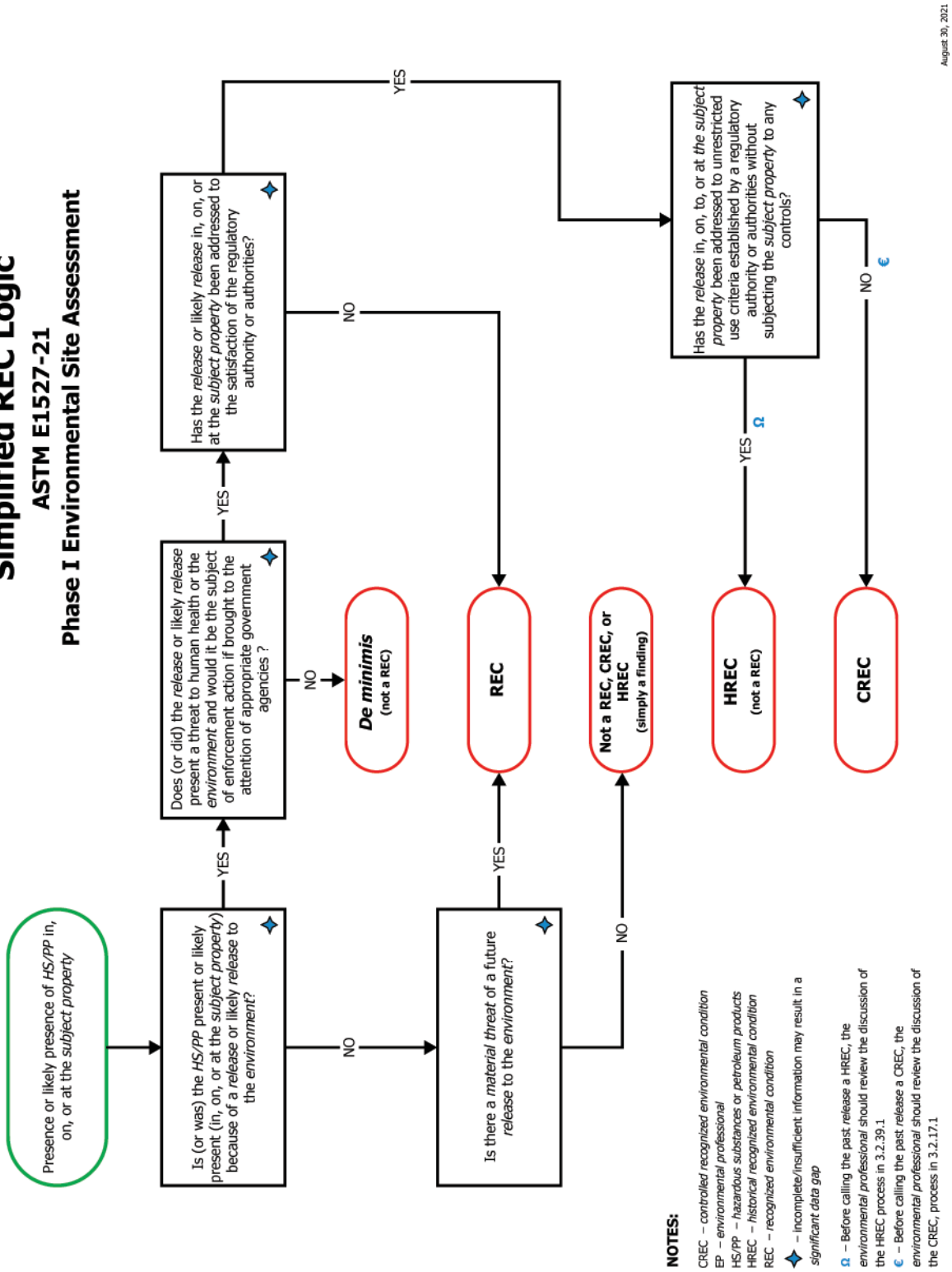

FIG. X4.1 Simplified REC Logic

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X4.3 Examples to Accompany Simplified REC Logic Diagram

These examples are meant to accompany the preceding REC Logic Diagram and are provided for illustrative purposes only. Nothing herein is meant to suggest that these opinions are absolute or to be universally applied in similar situations. *Environmental professionals* shall always consider the totality of *subject property*-specific information to identify *recognized environmental conditions*.

Example 1—Not a REC
During a *site visit* to an occupied 70-year-old office building (the *subject property*) heated by a natural-gas-fired boiler, the assessor observes a *drum* of boiler treatment product. The *drum's* label indicates it is a corrosive compound containing sodium metabisulfite and potassium hydroxide (a CERCLA *hazardous substance*). The *drum* appears to be in good, non-leaking condition and there are no stains or corrosion of the floor around the *drum*.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, the *drum* contains a *hazardous substance* and is at the *subject property*.

Have hazardous substances been released to the environment? (are the hazardous substances present because of a release or likely release to the environment)—NO, the *hazardous substance* is contained within the *drum* and there is no evidence of a release.

Is there a material threat of a future release to the environment?—NO, the *drum* appears in good condition.

Result—The *drum* in this example is a finding and there is not a *recognized environmental condition* associated with the *drum*.

Example 2—REC (Material Threat)
During a *site visit* to a warehouse (the *subject property*), the assessor observes an aboveground storage tank that reportedly contains diesel fuel (a *petroleum product*) for an emergency generator. The tank is outside on a gravel surface and is not protected by a roof, bollards, or a containment structure. The tank shows evidence of damage. There appears to be no staining under the tank.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, the tank contains a *petroleum product* and is at the *subject property*.

Have petroleum products been released or likely released to the environment? (are the petroleum products present a result of a release or a likely release to the environment) —NO, *the petroleum product* is contained within the aboveground storage tank.

Is there a material threat of a future release to the environment? —YES, in the assessor's opinion the *obvious* conditions of the aboveground tank are reasonably likely to lead to a future *release* that might result in impact to public health or the *environment*.

Result—There is a *recognized environmental condition* associated with the tank (because of the *material threat* of a *release*).

Example 3—De Minimis Condition
During a *site visit* to a manufacturing facility (the *subject property*), the assessor observes a small, localized stain of what appears to be oil on the parking lot beside the building.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property— YES, the stain appears to be petroleum on the *subject property*.

Have petroleum products been released? (are the petroleum products present because of a release or a likely release to the environment)—YES, the (presumed) oil on the ground surface would constitute a *release* to the *environment*.

Does the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—NO, the *environmental professional's* experience leads the *environmental professional* to believe that the regulators in that jurisdiction would not pursue enforcement action.

Result—The oily stain is a *de minimis condition*.

Example 4—REC (Conditions Indicative of a Release)
During a *site visit* to an automobile dealership (the *subject property*), the assessor observes staining on the pavement where *drums* of waste motor oil and degreasers were formerly stored. The staining extends to the adjacent grassy area (on-site) where the assessor observes blackened soil and stressed vegetation. Government records in the database report reviewed prior to the *site visit* indicated that the dealership had been a RCRA generator, disposing of waste chlorinated *solvents*, specifically trichloroethylene (a CERCLA hazardous substance).

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, government records indicate the use, storage, and management of *petroleum products* and *hazardous substances* at the *subject property*.

Have hazardous substances or petroleum products been released? (are the hazardous substances or petroleum products present because of a release or a likely release to the environment)—YES, in the *environmental professional's* opinion the staining and stressed vegetation are conditions indicative of a *release* of *hazardous substances* or *petroleum products* to the *environment*.

Does the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—YES, the *environmental professional's* experience leads the *environmental professional* to believe that such a *release* of *hazardous substances* and *petroleum products* is not a *de minimis condition* and that regulators in that jurisdiction would pursue enforcement of the state spill response rule.

Has release (or likely release) been addressed?—NO.

Result—There is a *recognized environmental condition* associated with the stained soil and stressed vegetation.

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Example 5—REC (Likely Presence)
During an assessment of a small, asphalt-paved parking lot (the *subject property*), the assessor learns from historical records that the *adjoining property* was formerly occupied by a gas station and *historical fire insurance maps* from 1958 and 1970 depict three gas tanks at this *adjoining property* very near the *property* line shared with the *subject property*. The *adjoining property* is listed in the LUST and Spills databases. Information indicates that three gasoline *underground storage tanks* were removed from that *adjoining property* in 1990 and that the local fire inspector observed odors in the excavation area, staining of the soil surrounding the tanks, and a sheen on the water in the *UST* excavation. There are no records of a response action and the case is still "open." The *adjoining property* is hydrogeologically up-gradient, groundwater is believed to be less than 15 ft (4.5 m) below ground surface, and near-surface soils in the area are sand and gravel.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, the *environmental professional's* experience with *USTs* suggest that there is a likely presence of *petroleum product* at the *subject property* as a result of contaminant *migration* from the past *release* of *petroleum product* at the *adjoining property*.

Have petroleum products been released?—YES, the *environmental professional* believes that the *petroleum product* likely present at the *subject property* is a result of a *release* of *petroleum product* at the *adjoining property*.

Does the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—YES, the regulatory records indicate that cleanup was required at the *adjoining property* by the regulatory authority, and in the *environmental professional's* opinion, the concentrations of contaminants likely present at the *subject property* would require a response action.

Has release (or likely release) been addressed?—NO.

Result—There is a *recognized environmental condition* associated with the *petroleum product release*.

Example 6—HREC
During an assessment of a commercial *property* (the *subject property*), the assessor learns from regulatory records that a leaking *underground storage tank* containing petroleum was removed from the *subject property* several years ago. The information indicates that the responsible party excavated the impacted soil and that the regulatory authority subsequently issued a closure letter. The assessor completes a file review and learns that even though the closure letter was issued before the adoption of a tiered approach to closure options (namely, "risk-based closure"), the data collected would satisfy the current unrestricted use criteria without subjecting the *subject property* to any controls.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property— YES, there was *petroleum product* stored at the *subject property* in an *underground storage tank*.

Have petroleum products been released?—YES, there is documentation of a *release* (the regulatory records).

Did the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—YES, the regulator required a response action.

Has release (or likely release) been addressed?—YES, the responsible party removed impacted soil and the regulator issued a closure notification ("no further action letter," "site rehabilitation completion order," or other documentation as used by the presiding government authority).

Has the release been addressed meeting unrestricted use criteria, without subjecting the property to any required controls?—YES, the data indicate conformance to current unrestricted use criteria.

Result—The *release* from the former leaking tank is a *historical recognized environmental condition*.

Example 7—REC, not a CREC or HREC
During an assessment of a commercial *property* (the *subject property*), the assessor learns from regulatory records that a leaking *underground storage tank* containing petroleum was removed from the *subject property* several years ago. The information indicates that the responsible party excavated the impacted soil and that the regulatory authority subsequently issued a closure letter based on meeting the unrestricted use criteria at the time. However, review of the post-excavation data included in the regulatory file revealed that petroleum concentrations in the soils remaining at the *subject property* exceed the current state regulatory levels for unrestricted use (that is, the standards have changed).

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, there was *petroleum product* stored at the *subject property* in an *underground storage tank*.

Have petroleum products been released?—YES, there is documentation of a *release* (the regulatory records).

Did the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—YES, the regulator required a response action.

Has release (or likely release) been addressed?—YES, the responsible party removed impacted soil and the regulator issued a closure notification.

Has the release been addressed meeting unrestricted use criteria, without subjecting the property to any required controls?—The regulatory authority granted closure without an *activity and use limitation* or other *property use limitation* because the post-excavation data met unrestricted use criteria at the time of the closure.

Result—REC—The *release* from the leaking tank is not a *historical recognized environmental condition* because the data show that conditions at the *subject property* do not meet current unrestricted use standards, despite the previous regulatory closure letter that was issued prior to the current cleanup standards. The *release* is also not a *controlled recognized environmental condition* because there are no documented controls applicable to the *subject property*. The *release* is a *recognized environmental condition*.

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Example 8—CREC
During an assessment of a commercial *property* (the *subject property*), the assessor learns from regulatory records of a *release* from a dry cleaner at the *subject property*. The *subject property* was enrolled in the state's voluntary cleanup program as part of a *property* transfer. The records indicate that contaminated soil was excavated; the post-excavation data meet restricted use criteria established by the applicable state regulation, guidance, or policy; and the regulatory authority issued a Certificate of Completion. The state environmental agency required that a restrictive covenant be recorded in the land records prior to issuing a Certificate of Completion for the *subject property*.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, the dry cleaner used *hazardous substances* at the *subject property*.

Has the hazardous substance been released?—YES, the *hazardous substance* in the soil is from a *release* documented in the government records.

Does the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—YES, the residual *hazardous substance* concentrations exceed unrestricted use criteria.

Has release (or likely release) been addressed?—YES, the responsible party removed impacted soil, documented that the remaining impact(s) met the restricted use criteria established by the applicable regulatory authority, and the responsible party received a closure notification from the authority.

Has the release been addressed meeting unrestricted use criteria, without subjecting the property to any required controls?—NO, the closure was based on meeting restricted use criteria, and the regulatory authority stated in the restrictive covenant that the *subject property* may not be used for residential purposes (that is, an *AUL*).

Result—The residual *hazardous substance* is a *controlled recognized environmental condition*.

Example 9—CREC
During an assessment of a commercial *property* (the *subject property*), the assessor learns from regulatory records that a leaking *underground storage tank* containing petroleum was recently removed from the *subject property*. The records indicate that contaminated soil was excavated; the post-excavation data meet restricted use criteria established by the applicable state regulation, guidance, or policy; and the regulatory authority issued a closure letter. The assessor reviews other information and learns from the data that some petroleum contamination exceeding unrestricted use criteria cleanup standards (but not exceeding the restricted use criteria cleanup standards) was allowed to remain at the *subject property*.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, some residual petroleum remains in the soil at the *subject property*.

Has the petroleum product been released?—YES, the petroleum in the soil is from a *release* documented in the government records.

Does the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—YES, the residual petroleum concentrations exceed unrestricted use criteria.

Has release (or likely release) been addressed?—YES, the responsible party removed impacted soil, documented that the remaining impact(s) met the restricted use criteria established by the applicable regulatory authority, and the responsible party received a closure notification from the authority.

Has the release been addressed meeting unrestricted use criteria, without subjecting the property to any required controls?—NO, the closure was based on meeting restricted use criteria, and the regulatory authority stated that *subject property* may not be used for residential purposes (that is, a *property use limitation*).

Result—The residual petroleum is a *controlled recognized environmental condition*.

Example 10—CREC
During an assessment of a commercial *property* (the *subject property*), the assessor learns from the *key site manager* that a *release* of a CERCLA *hazardous substance* occurred at the *subject property*. The assessor reviews the provided reports documenting the response actions and learns that active agency involvement was not required. The *reports* indicate that contaminated soil was excavated, and the post-excavation residual contamination concentrations meet state regulations, guidance, or policy establishing restricted use criteria.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, some residual *hazardous substance* remains in the soil at the *subject property*.

Have hazardous substances been released?—YES, the *hazardous substance* in the soil is from a documented *release*.

Does the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—YES, the residual *hazardous substance* concentrations that remain exceed unrestricted use criteria.

Has release (or likely release) been addressed?—YES, the responsible party removed impacted soil and documented that the remaining impact met (and still meets) the restricted use criteria.

Has the release been addressed meeting unrestricted use criteria, without subjecting the property to any required controls?—NO, the closure was based on meeting restricted use criteria, and the *subject property* shall continue to be used for non-residential purposes (that is, a *property use limitation*).

Result—The *release* of the *hazardous substance* at the *subject property* is a *controlled recognized environmental condition*.

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Example 11—REC, not a CREC
During an assessment of a commercial *property* (the *subject property*), the assessor learns from regulatory records that a leaking *underground storage tank* containing petroleum was removed from the *subject property* at some point in the past. Records available on-site indicate that contaminated soil was excavated, and data show that some petroleum contamination was left in-place at the *subject property*. The state regulatory agency did not provide response action oversight, there are no risk-based state closure standards, and there is no state mechanism for third-party *environmental professional* oversight of the property *owner's* response.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, some residual *petroleum* remains in the soil at the *subject property*.

Have petroleum products been released?—YES, the petroleum in the soil is from a documented *release*.

Does the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—YES, regulators in that jurisdiction were likely to pursue enforcement action when the tank was removed, and contaminated soil was initially encountered.

Has release (or likely release) been addressed?—YES, the responsible party removed impacted soil; however, there is no basis for finding that the conditions at the *subject property* "ha[ve] been addressed to the satisfaction of the applicable regulatory authority or authorities…"

Has the release been addressed meeting unrestricted use criteria, without subjecting the property to any required controls?—NO.

Result—The *release* from the leaking tank is a *recognized environmental condition*.

Example 12—HREC
During an *interview* of the current *owner* of the *subject property*, the *environmental professional* is advised that a self-directed cleanup took place at the *subject property* several years ago. The cleanup was in an area on the *subject property* where lead-acid batteries were disposed. The *owner* provides the *environmental professional* a copy of the consultant's response action report and tells the *environmental professional* that there was no filing with a regulatory agency as none was required. The records indicate that contaminated soil was excavated, and the post-excavation data meet current state regulations, guidance, or policy establishing criteria for unrestricted (for example, residential) use where active agency involvement is not required.

Presence or likely presence of hazardous substances or petroleum products in, on, or at the subject property—YES, in the opinion of the *environmental professional* some residual *hazardous substance* likely remains in the soil at the *subject property*.

Have the hazardous substances been released? (are the hazardous substances present because of a release or a likely release to the environment)—YES, the *owner* stated, and the report documented, that there had been staining on the bare ground and damaged batteries beneath the ground surface that would have constituted a *release* to the *environment*.

Does the release (or likely release) present a threat to human health or the environment and would it be the subject of enforcement action?—In the opinion of the *environmental professional*, the original *release* was not a *de minimis condition*, and required response actions.

Result—HREC—Upon reviewing the response action report, it was the *environmental professional's* opinion that adequate and representative closure sampling of applicable media was conducted. The *environmental professional* agreed that the impacted media was removed to the unrestricted use conditions.

NOTE X4.1—These examples are provided for illustrative purposes only. Nothing herein is meant to suggest that these opinions are absolute or to be universally applied in similar situations. *Environmental professionals* shall always consider the totality of *subject property*-specific information to identify *recognized environmental conditions*.

X5. SUGGESTED TABLE OF CONTENTS AND REPORT FORMAT

INTRODUCTION

The table of contents and report format and appendixes outlined in Appendix X5 comprise a suggested format only; the sections outlined, either in whole or in part, may be included elsewhere in the *report* at the discretion of the *environmental professional*.

X5.1 *Executive Summary*—This section provides a summary of the *Phase I Environmental Site Assessment* process and may include findings, opinions, and conclusions. An Executive Summary provides a concise and clear overview of the main findings of the Phase I ESA. The Executive Summary should provide key evidence used to justify the identification of RECs, CRECs, HRECs, *significant data gaps*, *de minimis conditions*, and recommendations (if provided), without repeating the detailed presentation of data or information in the body of the *report*. The *user* should be able to understand critical information provided in the Executive Summary and, if necessary, make an executive decision based on that information.

X5.1.1 In general, a Phase I ESA Executive Summary should be no more than two pages; longer than that usually does not constitute a summary. It may include, but should not consist solely of, a summary table which identifies RECs,

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CRECs, HRECs, or *de minimis conditions*, but which does not provide sufficient explanation of the basis for those findings.

X5.1.2 The Executive Summary should include supporting or explanatory language, as needed, but should avoid unnecessary technical details. For example, the body of the *report* will include a detailed *subject property* history meeting the requirements of 8.3, or may include details of past subsurface investigations including sampling methodologies, locations, dates, analytical data, and so forth. The Executive Summary should provide a "big picture" summary of this information *without* repeating all details, that is, do not "copy and paste" entire sections from the *report* into the Executive Summary.

X5.1.3 The Executive Summary should not introduce or provide information not provided elsewhere in the *report*, including findings, opinions, or conclusions.

X5.1.4 As provided in 12.10 of the practice, recommendations are not required to be included in a Phase I ESA. If, however, recommendations are to be provided based on the *user's* request, they should be included in the Executive Summary, if the suggested format is followed.

X5.2 *Introduction*—This section identifies the *subject property* (location and legal description) and the purpose of the *Phase I Environmental Site Assessment*. This section also provides a place to discuss contractual details (including scope of work or constraints due to contracted timing) as well as limiting conditions, deviations, exceptions, significant assumptions, and special terms and conditions.

X5.3 *User-Provided Information*—This section presents information under Section 6 *User's* Responsibilities and may include information from the *User* Questionnaire (see Appendix X3), if completed.

X5.4 *Site Reconnaissance*—This section includes *site reconnaissance* observations as discussed in Section 9 *Site Reconnaissance*, including general *subject property* setting, interior and exterior observations, and uses and conditions of the *subject property* and *adjoining properties*.

X5.5 *Records Review*—This section presents a review of *physical setting resources*, *standard government environmental record resources* and additional government environmental record sources, and historical use information regarding the *subject property* and surrounding area as detailed in Section 8, *Records Review*. The *Records Review* should be segregated into separate report sections, including *(1)* Physical Setting, *(2)* Historical *Records Review*, and *(3)* Regulatory *Records Review*. It should be noted that the Physical Setting information may be presented earlier in the report if deemed appropriate by the *environmental professional*.

X5.6 *Interviews*—This section provides a summary of *interviews* conducted as detailed in Section 10, *Interviews* with Past and Present *Owners* and *Occupants*, and Section 11, *Interviews* with State and Local Government Officials.

X5.7 *Non-Scope Services*—This section, if needed, summarizes additional services discussed in Section 13, which are not a part of this practice. This section should be included as agreed upon between the *user* and the *environmental professional*, and, as such, this should be clearly stated in the *report*.

X5.8 *Findings and Opinions*—These sections document the findings and opinions of the *Phase I Environmental Site Assessment* as stated in Section 12, and may be combined into one section at the discretion of the *environmental professional*. These sections also include *significant data gaps* and deletions. Non-Scope Services, if requested, and accompanying *business environmental risks (BERs)* may also be discussed in this section.

X5.9 *Conclusions*—This section documents the conclusions, and, if requested, recommendations of the *Phase I Environmental Site Assessment*, as stated in Section 12. *BERs* associated with non-scope services, if requested by the *user*, may also be discussed in this section.

X5.10 *Environmental Professional Statement*—This section is where *environmental professionals*, as described in 3.2.30 and Appendix X2, provide their statement and signature(s).

X5.11 *References*—This section identifies referenced resources relied upon in preparing the *Phase I Environmental Site Assessment*. Each referenced resource should be adequately annotated to facilitate retrieval by another party.

X5.12 *Appendixes*—This section contains supporting documentation and the qualifications of the *environmental professional* and other personnel who may have conducted the *site reconnaissance* and *interviews*. Supporting documentation includes *subject property* figures, photographs, historical documentation, regulatory database information, relevant prior reports/report excerpts, and relevant regulatory file information. Supporting documentation should also include documentation of *Activity and Use Limitations* and/or *Institutional Controls/Engineering Controls (IC/EC)* in effect at the *subject property*.

X5.12.1 *Figures—Subject property* figures should encompass the entire *subject property*. The site plan should include a north arrow, approximate scale, all major structures, and *occupants*/business names or land uses on the *subject property* and *adjoining properties*. The site plan should include locations of features, activities, uses, and conditions such as above or *underground storage tanks*, *sumps*, clarifiers, floor drains/trenches, wells, chemical storage areas, disposal areas, marked pipelines, significant staining, and other features of potential environmental concern.

X5.12.2 *Photographs*—The Photograph Appendix should include color photographs of the *subject property* (exterior and interior), on-site significant features (refer to the list in X5.12.1), *recognized environmental conditions* (as applicable), and any *adjoining properties* or nearby *properties* of note. Significant features depicted in photographs should also be described the *report* text. Photographs should have captions identifying the location on the *subject property* or features of note in the photograph.

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X6. SUMMARY OF COMMON NON-SCOPE ISSUES (COMMON NON-SCOPE CONSIDERATIONS)

INTRODUCTION

Note that the EPA was not a party to the development of Appendix X6 and the information and conclusions, provided in the appendix do not in any way reflect the opinions, guidance, or approval of the EPA. *Users* of this appendix are cautioned that statutes, regulations, guidance, case law, and/or other authorities analyzed and/or referenced in the appendix may have changed since the publication of this appendix. Thus, before relying on any of the analyses, conclusions, and/or guidance provided by this appendix, *users* should ensure that those analyses, conclusions, and/or guidance are current and correct at the time use is made of this appendix. In addition, this appendix is provided for background information purposes only and does not alter, amend, or change the meaning of Practice E1527. If any inconsistency between this appendix and Practice E1527 arises, Practice E1527 applies, not this appendix or any interpretation based on this appendix.

The objective of Practice E1527 is to help *users* qualify for one of the CERCLA *Landowner Liability Protections (LLPs)*. *Users* should be aware that there are other federal, state, and local environmental laws and regulations that can impose liabilities and obligations on *owners* and *operators* of *property* that are outside the scope of this practice. This appendix explains by illustration that this practice does not address all possible environmental liabilities that a *user* may need to consider in the context of a *commercial real estate transaction*. Therefore, *users* may desire to expand the scope of prepurchase *due diligence* to assess other *business environmental risks* that exist beyond CERCLA liability associated with the *subject property*.

Subsection 3.2.11 defines a *business environmental risk (BER)* as a risk which can have a material environmental or environmentally-driven impact on the business associated with the current or planned use of *commercial real estate*, and is not necessarily an issue required to be investigated under this practice. A *BER* may include one or more of the non-scope issues contained in 13.1.5 (Non-Scope Considerations). Evaluation of non-scope items, including those addressed in this appendix, is not required nor relevant for compliance with the AAI Rule or Practice E1527. Inclusion of any non-scope item in a Phase I *report* is entirely within the discretion of the *user* based on its own risk tolerance, the particular requirements of a specific transaction, and the factors discussed in 3.2.11. As a result, this appendix should not be construed as requiring the inclusion of any non-scope issues in a Phase I *report*.

The items in this appendix are some of the more common non-scope items that may be encountered in *commercial real estate transactions*. Those non-scope items discussed in this appendix should not be construed as being more important than any non-scope items that are not addressed by this appendix. Furthermore, it is noteworthy that, in some circumstances, a non-scope consideration in an old Phase I analysis may represent a *recognized environmental condition* for a subsequent Phase I analysis based on the rise of potential CERCLA liability. For example, asbestos-containing building materials within an existing structure are excluded from CERCLA. However, following the demolition of the building, asbestos-containing materials buried in soil may no longer fall within the exclusion from the definition of a CERCLA *release*. To more fully understand the circumstances under which a particular non-scope consideration could result in potential CERCLA liability, readers should consult the Legal Appendix (Appendix X1).

This appendix discusses nine of the non-scope considerations listed in 13.1.5 in more detail:

X6.1 *Asbestos-Containing Building Materials*—Asbestos is a naturally occurring mineral fiber that was once widely used in building materials and products for its thermal insulating properties and fire resistance. EPA defines asbestos-containing material (ACM) as material that contains more than 1 % asbestos. Building products containing ACM are often referred to as asbestos containing building materials (ACBM). Undisturbed ACBM generally does not pose a health risk. However, ACBM may pose an increased risk if damaged, disturbed in certain manners, or if it deteriorates so that asbestos fibers can

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be released into building air.

X6.1.1 Asbestos has been specifically designated as a *hazardous substance* pursuant to CERCLA § 102 (42 U.S.C. § 9602) but ACBM abatement costs generally are not recoverable under CERCLA. For more information, please consult the Legal Appendix (Appendix X1). There are other federal and state environmental statutes that impose obligations with respect to ACM. Although CERCLA does not provide a remedy for asbestos abatement, *property owners* may still be subject to liability for exposure to asbestos fibers under other federal or state environmental statutes and common laws. For example, under the Clean Air Act (CAA), EPA adopted a National Emission Standard for Hazardous Air Pollutants (NESHAP) for asbestos that regulates or restricts certain uses of asbestos and imposes certain work practices for demolition and renovation projects that disturb certain thresholds of regulated ACM (See 40 C.F.R. Part 61 for more information). Local rules may be more stringent than the federal asbestos NESHAP.

X6.1.2 Many building materials such as structural steel fireproofing, acoustic finishes, ceiling texture, ceiling tile, suspended ceiling panels, textured and elastomeric paints, window putty, flexible duct connectors, rubbery pipe insulation tape, building wiring insulation, pipe insulation, boiler insulation, vessel insulation, interior plaster, and duct insulation commonly contained asbestos until the late 1970s. Other types of ACMs were commonly used until the middle to late 1980s such as drywall, joint compound, exterior stucco, sheet vinyl flooring, vinyl flooring products, flooring and other mastics (adhesives), roof tiles and coatings, asbestos-cement products, and flues. Under the Toxic Substance Control Act (TSCA), EPA bans the use of asbestos in many products. Building materials that post-date the 1989 and 1993 partial bans, but pre-date the 2019 significant new use rule (SNUR), may contain asbestos. Nevertheless, NESHAP requires sampling prior to renovation and demolition activities regardless of the age of the building. A complete list of these products may be found in docket identification (ID) number EPA-HQOPPT-2018-0159 at www.regulations.gov.

X6.1.3 EPA recommends that *owners* and managers of office buildings, shopping centers, apartment buildings, hospitals, and similar facilities that may contain ACM, implement an Asbestos Operations and Maintenance (O&M) program to minimize risk posed by ACBM. EPA suggests that ACBM O&M plans should include work practices so that ACM is maintained in good condition, to ensure proper cleanup of asbestos fibers previously released, to prevent further releases of asbestos fibers, and to monitor the condition of ACBM. OSHA also regulates worker exposure to asbestos. [For more information on ACM Assessment and Abatement, readers may refer to Guide E2308 and Practice E2356.]

X6.1.4 Some areas of the country have naturally-occurring asbestos (NOA). Although NOA is not commonly an issue for real estate transactions, some jurisdictions with NOA have adopted local ordinance or regulations that require construction activities that would disturb NOA to observe certain work practices to minimize release of fibers.

X6.2 *Radon*—Radon is a radioactive gas that is produced from the natural decay of uranium, radium, and thorium in soil, rock, and groundwater. As uranium naturally breaks down, it releases radon gas which is a colorless, odorless, radioactive gas. Radon gas enters homes through dirt floors, cracks in concrete walls and floors, floor drains, and *sumps*. When radon becomes trapped in buildings and concentrations accumulate and increase indoors, exposure to radon can become a concern. Sometimes radon enters the home through well water.

X6.2.1 CERCLA generally prohibits recovery for radon mitigation costs where the presence of radon gas in a building is a result from naturally-occurring materials. For more information, readers should consult the Legal Appendix (Appendix X1).

X6.2.2 EPA has divided the country into three radon zones based on the potential for indoor radon levels. Counties in Radon Zone 1 have a predicted average indoor radon screening level greater than the 4.0 picocuries per liter (pCi/L), Radon Zone 2 counties have a predicted average indoor radon screening level between 2 and 4 pCi/L, and Radon Zone 3 counties have a predicted average indoor radon screening level less than 2 pCi/L. EPA recommends homeowners take steps to reduce radon levels when homes have radon levels of 4 pCi/L or more. For new construction in Radon Zone 1 areas, EPA also recommends use of radon-resistant construction design. Because there is no known safe level of exposure to radon, EPA also recommends radon mitigation measures for homes with radon levels above 2 pCi/L (see http://www.epa.gov/radon/aboutus.html).

X6.2.3 Because the danger posed by radon rises when radon gas accumulates in an interior space, “energy efficient” structures with reduced airflow can contribute to radon problems, and radon testing may be especially warranted. However, actual radon exposures can be affected by diverse factors such as building construction, heating, ventilation, and air conditioning (HVAC) systems, and occupancy patterns. [For more information about radon assessment, readers may refer to Practices D7297, E2121, and E1465.]

X6.2.4 Costs to investigate and mitigate radon may be material in certain transactions. In addition, failing to account for these risks, or inadequately responding to such risks, may give rise to possible exposure to personal injury law suits and/or judgments.

X6.3 *Lead-Based Paint (LBP)*—Lead is a soft, bluish metallic element that has been used in a wide variety of products. According to EPA, paint manufacturers frequently used lead as a primary ingredient in many oil-based interior and exterior house paints through the 1940s and gradually decreased its use in the 1950s and 1960s as latex paints became more widespread. The federal Department of Housing and Urban Development (HUD) estimated that 30 % of the houses built in the United States before 1978 contain some lead-based paint, and 44 % contain significant lead-based paint hazards. Lead from paint, chips, and dust can pose health hazards if not properly managed. The Consumer Product Safety Commission (CPSC) prohibited use of lead in paint for residential use in 1978 in

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concentrations greater than 0.05 percent lead by weight. It should be noted that the use of LBP in commercial and industrial buildings has not been prohibited.

X6.3.1 Because CERCLA authorizes EPA to address *releases* of *hazardous substances* into the environment, the agency has limited authority to use the federal Superfund program to address exposure from interior LBP. In limited circumstances, EPA may use its CERCLA authority to conduct response actions for soils contaminated by a *release* of lead-contaminated paint from building exteriors that pose a lead hazard and to prevent recontamination of soils that have been remediated. In general, EPA has determined that lead contamination in soils at or exceeding 400 parts per million in play areas and 1200 parts per million in other residential areas where children below 6 years of age are present may pose serious health risks that can justify time-critical removal actions. CERCLA generally does not provide cost recovery for LBP abatement. However, response costs for remediation of lead in soil may be recoverable even where the source of the presence of lead may be from damaged exterior LBP. Please refer to the Legal Appendix (Appendix X1) for more information.

X6.3.2 LBP debris from renovation or demolition projects can be regulated as a RCRA hazardous waste. EPA has also adopted certain work practices for renovation, repair, and painting projects that will disturb certain thresholds of LBP. OSHA also regulates worker exposure to lead.

X6.4 *Lead-in-Drinking-Water (LIW)*—The major source of LIW is leaching of lead from household plumbing materials or water service lines used to bring water from the main to the home. Lead can leach into drinking water through contact with the plumbing, solder, fixtures and faucets (brass), and fittings. The amount of lead in drinking water will be influenced by the type and amount of minerals in the water, how long the water stays in the pipes, the amount of wear in the pipes, and the water's acidity and temperature.

X6.4.1 Since 1986, the Safe Drinking Water Act (SDWA) has required that only "lead free" pipe, solder, or flux can be used in plumbing in residential or non-residential facilities providing water for human consumption. The SDWA also required businesses selling plumbing supplies to sell solder or flux that is "lead free" after August 6, 1996. Moreover, after that date the SDWA prohibited any person from introducing into commerce any solder or flux containing lead unless a label was attached to the solder or flux stating that it is illegal to use the solder or flux to install or repair plumbing providing water for human consumption. However, "lead free" does not mean "no lead." Products such as solders and flux may be considered "lead free" if they contain less than 0.2 % lead. Similarly, pipes and pipe fittings will be considered "lead free" if they contain less than 8 % lead. Thus, lead may still be introduced in new homes with brass or chrome-plated brass faucets and fixtures.

X6.4.2 The SDWA requires EPA to establish enforceable maximum contaminant levels (MCLs) for a variety of contaminants in drinking water. Because lead contamination of drinking water often results from corrosion of the plumbing materials belonging to water system customers, EPA established a treatment technique rather than an MCL for lead. A treatment technique is an enforceable procedure or level of technological performance which water systems shall follow to ensure control of a contaminant. The treatment technique regulation for lead (referred to as the Lead and Copper rule) requires water systems to control the corrosivity of the water. The regulation also requires systems to collect tap samples from sites served by the system that are more likely to have plumbing materials containing lead. If more than 10 % of tap water samples exceed the lead action level of 15 parts per billion, then water systems are required to take additional actions. Local rules may be more stringent than the federal SDWA.

X6.5 *Wetlands*:

X6.5.1 Wetlands provide a number of economically and environmentally important functions such as flood control, water quality protection, groundwater recharge, spawning areas for commercially important fish, and wildlife habitat. Wetlands are evaluated using three indicators: hydrology, hydrophytic vegetation, and hydric soils. Section 404 of the Clean Water Act requires a permit before dredged or fill material may be discharged into regulated wetlands (known as Jurisdictional Wetlands). The Army Corps of Engineers has primary responsibility for making wetlands jurisdictional determinations and issuing wetlands permits. A number of activities are authorized through the use of nationwide permits.

X6.5.2 The presence of wetlands may impede or eliminate the potential for planned activities at a *property*, including proposed construction or expansion. In addition, it is possible that the existence of wetlands will increase the costs associated with any planned development. Furthermore, in some instances, structures may have been constructed on illegally filled wetlands. While *owners* are rarely required to demolish completed buildings on illegally filled wetlands, they could become subject to civil or criminal fines, and also be required to perform mitigation projects or make payments to a conservation bank to offset the loss of the wetlands.

X6.6 *Regulatory Compliance (Includes Health and Safety)—Properties* used for industrial, commercial, and even residential purposes are frequently subject to a panoply of environmental laws and regulations that relate to many aspects of operations conducted at the *subject property*. In the context of a *property* transaction, noncompliance with environmental laws and regulations may create a material risk of financial loss for both building *operators* and *owners* of the *properties*.

X6.6.1 *Common Sources of Federal Compliance Obligations*—Many federal regulations apply to industrial, commercial, and residential *properties*. *Owners* or *operators* of facilities that generate, store, treat, or dispose of *hazardous wastes* may be subject to regulation under the RCRA, 42 U.S.C. § 6901 *et seq.* For example, *properties* with petroleum storage tanks, dry cleaners that use chlorinated *solvents*, and photograph developing operations may be required to comply with RCRA. Facilities that manufacture and use many hazardous or toxic substances may be subject to the Toxic Substances

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Control Act (TSCA), 15 U.S.C. § 2601 *et seq.* Manufacturing operations that emit air pollutants, and commercial or residential *properties* that burn fossil fuels, may be required to obtain permits and install emissions control equipment under the Clean Air Act (CAA), 42 U.S.C. § 7401, *et seq.* Facilities that discharge pollutants into waters of the United States and public sewer systems may be required to comply with the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.* Many commercial *properties* will also be required to comply with stormwater permitting requirements under the CWA. Facilities that store or use certain volumes of hazardous chemicals and extremely *hazardous substances*, which can include warehouses and distribution centers, may be required to comply with the reporting requirements of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. 11001, *et seq.*. In addition, the Occupational Safety & Health Administration (OSHA) has promulgated regulations pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* that establish operating standards and work practices for employees in certain industrial and commercial facilities.

X6.6.2 *Common Sources of State and Local Compliance Obligations*—Many state agencies have been delegated authority to implement state versions of these federal laws in lieu of EPA. For example, state agencies may be designated to issue permits and bring enforcement actions under the CAA, CWA, or RCRA. Even where a state agency has been delegated authority to implement the federal environmental programs, EPA often retains the ability to veto a permit or take enforcement action where EPA disagrees with a state agency's enforcement decision or where the state has declined enforcement. In some cases, state regulations may be broader in scope or stricter than the federal rules. In addition, state laws also implement state-specific regulatory regimes. For example, several states retain permitting and enforcement authority for flood control or construction in floodways. Furthermore, local government bodies can impose an entirely distinct set of operating restrictions or compliance obligations as well; for example, building code requirements, green building mandates, zoning requirements, and local licensing requirements.

X6.6.3 *Potential Effects of Noncompliance*—Depending on the circumstances, noncompliance with various regulatory requirements could result in material costs to *owners* and *operators* of industrial, commercial, or residential *properties*, including fines or other monetary penalties, injunctions, or other equitable relief that slows or eliminates productivity, and could result in increased transaction costs associated with defending claims of noncompliance. Furthermore, even in the absence of administrative or legal enforcement proceedings, the costs to bring facilities into compliance with applicable regulatory requirements could be material in some circumstances.

X6.7 *Endangered Species Act*—Under the Endangered Species Act, the government protects endangered and threatened plants and animals (listed species) and their habitats. The presence of listed species can restrict use of *property* to ensure that the proposed activities do not adversely affect endangered or threatened species as well as their critical habitats.

X6.8 *Indoor Air Quality*—(excluding impacts to indoor air from releases of *hazardous substances* into the *environment*)—There are many sources of indoor air pollution. These include combustion sources such as oil, gas, kerosene, coal, wood, tobacco products, asbestos-containing materials, wet or damp carpet, formaldehyde, certain pressed wood products, cleaning and maintenance chemicals, and pesticides. EPA estimates that indoor levels of air pollutants can be two to five times higher, and occasionally 100 times higher, than outdoor levels. In general, EPA does not regulate indoor air quality except to the extent that indoor air impacts are caused by *releases* of *hazardous substances* into subsurface soil or groundwater (vapor intrusion). For more information, please refer to the Legal Appendix (Appendix X1). [For more information about assessing indoor air quality, refer to Practice D7297.]

X6.9 *Mold*—Molds are organisms that belong to the Fungi Kingdom. Molds are present virtually everywhere in the outdoor and indoor environments. Molds lack chlorophyll and survive by digesting organic materials for food such as some types of building materials. To grow, molds require a food source and moisture. Molds can produce toxic substances called mycotoxins that may result in human health effects. Some compounds produced by molds are volatile and are released directly into the air. These are known as microbial volatile organic compounds (mVOCs). In addition, spores may contain allergens that can remain allergenic for years, even if the mold is dead.

X6.9.1 Currently, there are no federal regulations or standards for airborne mold contaminants. However, EPA and some states or local jurisdictions have issued publications discussing mold issues. In addition, under the OSHA General Duty Clause (29 U.S.C. § 654), an employer has an obligation to protect workers from serious and recognized workplace hazards, even where there is no standard. Thus, it is possible that the OSHA general duty clause may impose a duty on employers to disclose hazards relating to mold to employees, although the disagreement on the degree of hazard, if any, makes this uncertain. Significant mold contamination may fall under the general disclosure requirements for real estate transactions in various jurisdictions. For more information on investigating and assessing mold, readers may refer to Guide E2418.

X6.9.2 Mold in a building(s) on a *property* could result in a variety of business risks such as litigation for exposures by tenants and *occupants*, abatement costs, loss of tenants, adverse publicity, and loss in property value.

X6.10 *Substances Not Defined as Hazardous Substances*—As defined in 3.2.36 of this practice, *hazardous substance* means "those substances defined as a *hazardous substance* pursuant to CERCLA 42 U.S.C. § 9601(14), as interpreted by EPA regulations and the courts." There are some substances that non-*environmental professionals* and others may assume to be *hazardous substances* that are not defined (or not yet defined) as *hazardous substances* under CERCLA through interpretation by EPA regulations and the

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courts. These substances may include: *(1)* some substances that occur naturally or through biological digestion (for example, methane), and *(2)* substances about which human understanding is evolving (for example, per- and polyfluoroalkyl substances, also known as "PFAS"). These and any other "emerging contaminants," where they are not identified as a *hazardous substance* by CERCLA, as interpreted by EPA regulations and the courts, are not included in the scope of this practice. Some of these substances may be considered a "*hazardous substance*" (or equivalent) under applicable state laws. In those instances, where a *Phase I Environmental Site Assessment* is performed to satisfy both federal and state requirements, or as directed by the *user* of the *report*, it is permissible to include analysis and/or discussion of these substances in the same manner as any other Non-Scope Consideration. If and when such emerging contaminants are defined to be a *hazardous substance* under CERCLA, as interpreted by EPA regulations and the courts, such substances shall be evaluated within the scope of this practice.

X6.11 *Petroleum Products—Petroleum products* are included within the scope of this practice because they are of concern with respect to *commercial real estate*, and current custom and usage is to include an inquiry into the presence of *petroleum products* when doing an *environmental site assessment* of *commercial real estate*. Inclusion of *petroleum products* within the scope of this practice is not based upon the applicability, if any, of CERCLA to *petroleum products*. (See X1.1.2.1 for discussion of *petroleum exclusion* to CERCLA liability.)

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MINIMUM STANDARD DETAIL REQUIREMENTS FOR ALTA/NSPS LAND TITLE SURVEYS

(Effective February 23, 2021)

1. **Purpose -** Members of the American Land Title Association® (ALTA®) have specific needs, unique to title insurance matters, when asked to insure title to land without exception as to the many matters which might be discoverable from survey and inspection, and which are not evidenced by the public records.

For a survey of real property, and the plat, map or record of such survey, to be acceptable to a title insurance company for the purpose of insuring title to said real property free and clear of survey matters (except those matters disclosed by the survey and indicated on the plat or map), certain specific and pertinent information must be presented for the distinct and clear understanding between the insured, the client (if different from the insured), the title insurance company (insurer), the lender, and the surveyor professionally responsible for the survey.

In order to meet such needs, clients, insurers, insureds, and lenders are entitled to rely on surveyors to conduct surveys and prepare associated plats or maps that are of a professional quality and appropriately uniform, complete, and accurate. To that end, and in the interests of the general public, the surveying profession, title insurers, and abstracters, the ALTA and the NSPS jointly promulgate the within details and criteria setting forth a minimum standard of performance for ALTA/NSPS Land Title Surveys. A complete 2021 ALTA/NSPS Land Title Survey includes:

(i) the on-site fieldwork required pursuant to Section 5,
(ii) the preparation of a plat or map pursuant to Section 6 showing the results of the fieldwork and its relationship to documents provided to or obtained by the surveyor pursuant to Section 4,
(iii) any information from Table A items requested by the client, and
(iv) the certification outlined in Section 7.

2. Request for Survey - The client shall request the survey, or arrange for the survey to be requested, and shall provide a written authorization to proceed from the person or entity responsible for paying for the survey. Unless specifically authorized in writing by the insurer, the insurer shall not be responsible for any costs associated with the preparation of the survey. The request must specify that an **"ALTA/NSPS LAND TITLE SURVEY"** is required and which of the optional items listed in Table A, if any, are to be incorporated. Certain properties or interests in real properties may present issues outside those normally encountered on an ALTA/NSPS Land Title Survey (e.g., marinas, campgrounds, mobile home parks; easements, leases, mineral interests, other non-fee simple interests). The scope of work related to surveys of such properties or interests in real properties should be discussed with the client, lender, and insurer, and agreed upon in writing prior to commencing work on the survey. When required, the client shall secure permission for the surveyor to enter upon the property to be surveyed, adjoining properties, or offsite easements.

3. **Surveying Standards and Standards of Care**

A. **Effective Date** - The 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys are effective February 23, 2021. As of that date, all previous versions of the Minimum Standard Detail Requirements for ALTA/ACSM or ALTA/NSPS Land Title Surveys are superseded by these standards.

B. **Other Requirements and Standards of Practice** - Many states and some local jurisdictions have adopted statutes, administrative rules, and/or ordinances that set out standards regulating the practice of surveying within their jurisdictions. In addition to the standards set forth herein, surveyors must also conduct their surveys in accordance with applicable jurisdictional survey requirements and standards of practice. Where conflicts between the standards set forth herein

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and any such jurisdictional requirements and standards of practice occur, the more stringent must apply.

C. **The Normal Standard of Care** - Surveyors should recognize that there may be unwritten local, state, and/or regional standards of care defined by the practice of the "prudent surveyor" in those locales.

D. **Boundary** - The boundary lines and corners of any property or interest in real property being surveyed (hereafter, the "surveyed property" or "property to be surveyed") as part of an ALTA/NSPS Land Title Survey must be established and/or retraced in accordance with appropriate boundary law principles governed by the set of facts and evidence found in the course of performing the research and fieldwork.

E. **Measurement Standards** - The following measurement standards address Relative Positional Precision for the monuments or witnesses marking the corners of the surveyed property.

   i. "Relative Positional Precision" means the length of the semi-major axis, expressed in meters or feet, of the error ellipse representing the uncertainty in the position of the monument or witness marking any boundary corner of the surveyed property relative to the position of the monument or witness marking an immediately adjacent boundary corner of the surveyed property resulting from random errors in the measurements made in determining those positions at the 95 percent confidence level. Relative Positional Precision can be estimated by the results of a correctly weighted least squares adjustment of the survey. Alternatively, Relative Positional Precision can be estimated by the standard deviation of the distance between the monument or witness marking any boundary corner of the surveyed property and the monument or witness marking an immediately adjacent boundary corner of the surveyed property (called local accuracy) that can be computed using the full covariance matrix of the coordinate inverse between any given pair of points, understanding that Relative Positional Precision is based on the 95 percent confidence level, or approximately 2 standard deviations.

   ii. Any boundary lines and corners established or retraced may have uncertainties in location resulting from (1) the availability, condition, history and integrity of reference or controlling monuments, (2) ambiguities in the record descriptions or plats of the surveyed property or its adjoiners, (3) occupation or possession lines as they may differ from the written title lines, or (4) Relative Positional Precision. Of these four sources of uncertainty, only Relative Positional Precision is controllable, although, due to the inherent errors in any measurement, it cannot be eliminated. The magnitude of the first three uncertainties can be projected based on evidence; Relative Positional Precision is estimated using statistical means (see Section 3.E.i. above and Section 3.E.v. below).

   iii. The first three of these sources of uncertainty must be weighed as part of the evidence in the determination of where, in the surveyor's opinion, the boundary lines and corners of the surveyed property should be located (see Section 3.D. above). Relative Positional Precision is a measure of how precisely the surveyor is able to monument and report those positions; it is not a substitute for the application of proper boundary law principles. A boundary corner or line may have a small Relative Positional Precision because the survey measurements were precise, yet still be in the wrong position (i.e., inaccurate) if it was established or retraced using faulty or improper application of boundary law principles.

   iv. For any measurement technology or procedure used on an ALTA/NSPS Land Title Survey, the surveyor must (1) use appropriately trained personnel, (2) compensate for systematic errors, including those associated with instrument calibration, and (3) use appropriate error propagation and measurement design theory (selecting the proper instruments, geometric layouts, and field and computational procedures) to control random errors such that the maximum allowable Relative Positional Precision outlined in Section 3.E.v. below is not exceeded.

   v. The maximum allowable Relative Positional Precision for an ALTA/NSPS Land Title Survey is 2 cm (0.07 feet) plus 50 parts per million (based on the direct distance between the two

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corners being tested). It is recognized that in certain circumstances, the size or configuration of the surveyed property, or the relief, vegetation, or improvements on the surveyed property, will result in survey measurements for which the maximum allowable Relative Positional Precision may be exceeded in which case the reason shall be noted pursuant to Section 6.B.x. below.

4. **Records Research** - It is recognized that for the performance of an ALTA/NSPS Land Title Survey, the surveyor will be provided with appropriate and, when possible, legible data that can be relied upon in the preparation of the survey. In order to complete an ALTA/NSPS Land Title Survey, the surveyor must be provided with the following:
   A. The current record description of the real property to be surveyed or, in the case of an original survey prepared for purposes of locating and describing real property that has not been previously separately described in documents conveying an interest in the real property, the current record description of the parent parcel that contains the property to be surveyed;
   B. Complete copies of the most recent title commitment or, if a title commitment is not available, other title evidence satisfactory to the title insurer;
   C. The following documents from records established under state statutes for the purpose of imparting constructive notice of matters relating to real property (public records):
      i. The current record descriptions of any adjoiners to the property to be surveyed, except where such adjoiners are lots in platted, recorded subdivisions;
      ii. Any recorded easements benefitting the property to be surveyed; and
      iii. Any recorded easements, servitudes, or covenants burdening the property to be surveyed; and
   D. If desired by the client, any unrecorded documents affecting the property to be surveyed and containing information to which the survey shall make reference.

Except, however, if the documents outlined in this section are not provided to the surveyor or if non-public or quasi-public documents are otherwise required to complete the survey, the surveyor must conduct that research which is required pursuant to the statutory or administrative requirements of the jurisdiction where the surveyed property is located and that research (if any) which is negotiated and outlined in the terms of the contract between the surveyor and the client.

5. **Fieldwork** - The survey must be performed on the ground (except as may be otherwise negotiated pursuant to Table A, Item 15 below). Except as related to the precision of the boundary, which is addressed in Section 3.E. above, features located during the fieldwork shall be located to what is, in the surveyor's professional opinion, the appropriate degree of precision based on (a) the planned use of the surveyed property, if reported in writing to the surveyor by the client, lender, or insurer, or (b) the existing use, if the planned use is not so reported. The fieldwork shall include the following:

A. Monuments
   i. The location, size, character, and type of any monuments found during the fieldwork.
   ii. The location, size, character, and type of any monuments set during the fieldwork, if item 1 of Table A was selected or if otherwise required by applicable jurisdictional requirements and/or standards of practice.
   iii. The location, description, and character of any lines that control the boundaries of the surveyed property.

B. Rights of Way and Access
   i. The distance from the appropriate corner or corners of the surveyed property to the nearest right of way line, if the surveyed property does not abut a right of way.
   ii. The name of any street, highway, or other public or private way abutting the surveyed property, together with the width of the travelled way and the location of each edge of the travelled way including on divided streets and highways. If the documents provided to or obtained by the surveyor pursuant to Section 4 indicate no access from the surveyed property to the abutting street or highway, the width and location of the travelled way need not

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be located.

iii. Visible evidence of physical access (e.g., curb cuts, driveways) to any abutting streets, highways, or other public or private ways.

iv. The location and character of vehicular, pedestrian, or other forms of access by other than the apparent occupants of the surveyed property to or across the surveyed property observed in the process of conducting the fieldwork (e.g., driveways, alleys, private roads, railroads, railroad sidings and spurs, sidewalks, footpaths).

v. Without expressing a legal opinion as to ownership or nature, the location and extent of any potentially encroaching driveways, alleys, and other ways of access from adjoining properties onto the surveyed property observed in the process of conducting the fieldwork.

vi. Where documentation of the location of any street, road, or highway right of way abutting, on, or crossing the surveyed property was not disclosed in documents provided to or obtained by the surveyor, or was not otherwise available from the controlling jurisdiction (see Section 6.C.iv. below), the evidence and location of parcel corners on the same side of the street as the surveyed property recovered in the process of conducting the fieldwork which may indicate the location of such right of way lines (e.g., lines of occupation, survey monuments).

vii. Evidence of access to and from waters adjoining the surveyed property observed in the process of conducting the fieldwork (e.g., paths, boat slips, launches, piers, docks).

C. Lines of Possession and Improvements along the Boundaries

i. The character and location of evidence of possession or occupation along the perimeter of the surveyed property, both by the occupants of the surveyed property and by adjoiners, observed in the process of conducting the fieldwork.

ii. Unless physical access is restricted, the character and location of all walls, buildings, fences, and other improvements within five feet of each side of the boundary lines observed in the process of conducting the fieldwork (see Section 5.E.iv. regarding utility poles). Trees, bushes, shrubs, and other vegetation need not be located other than as specified in the contract, unless they are deemed by the surveyor to be evidence of possession or occupation pursuant to Section 5.C.i.

iii. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the evidence, location, and extent of potentially encroaching structural appurtenances and projections observed in the process of conducting the fieldwork (e.g., fire escapes, bay windows, windows and doors that open out, flue pipes, stoops, eaves, cornices, areaways, steps, trim) by or onto adjoining property, or onto rights of way, easements, or setback lines disclosed in documents provided to or obtained by the surveyor.

D. Buildings

The location of buildings on the surveyed property observed in the process of conducting the fieldwork.

E. Easements and Servitudes

i. Evidence of any easements or servitudes burdening the surveyed property as disclosed in the documents provided to or obtained by the surveyor pursuant to Section 4 and observed in the process of conducting the fieldwork.

ii. Evidence of easements, servitudes, or other uses by other than the apparent occupants of the surveyed property not disclosed in the documents provided to or obtained by the surveyor pursuant to Section 4, but observed in the process of conducting the fieldwork if they are on or across the surveyed property (e.g., roads, drives, sidewalks, paths and other ways of access, utility service lines, utility locate markings (including the source of the markings, with a note if unknown), water courses, ditches, drains, telephone lines, fiber optic lines, electric lines, water lines, sewer lines, oil pipelines, gas pipelines).

iii. Surface indications of underground easements or servitudes on or across the surveyed property observed in the process of conducting the fieldwork (e.g., utility cuts, vent pipes, filler pipes, utility locate markings (including the source of the markings, with a note if unknown)).

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iv. Evidence on or above the surface of the surveyed property observed in the process of conducting the fieldwork, which evidence may indicate utilities located on, over or beneath the surveyed property. Examples of such evidence include pipeline markers, utility locate markings (including the source of the markings, with a note if unknown), manholes, valves, meters, transformers, pedestals, clean-outs, overhead lines, guy wires, and utility poles on or within ten feet of the surveyed property. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the extent of all encroaching utility pole crossmembers or overhangs.

F. Cemeteries

As accurately as the evidence permits, the perimeter of cemeteries and burial grounds, and the location of isolated gravesites not within a cemetery or burial ground, (i) disclosed in the documents provided to or obtained by the surveyor, or (ii) observed in the process of conducting the fieldwork.

G. Water Features

i. The location of springs, ponds, lakes, streams, rivers, canals, ditches, marshes, and swamps on, running through, or outside, but within five feet of, the perimeter boundary of the surveyed property and observed during the process of conducting the fieldwork.

ii. The location of any water feature forming a boundary of the surveyed property. The attribute(s) of the water feature located (e.g., top of bank, edge of water, high water mark) should be congruent with the boundary as described in the record description or, in the case of an original survey, in the new description (see Section 6.B.vi. below).

6. **Plat or Map** - A plat or map of an ALTA/NSPS Land Title Survey shall show the following information. Where dimensioning is appropriate, dimensions shall be annotated to what is, in the surveyor's professional opinion, the appropriate degree of precision based on (a) the planned use of the surveyed property, if reported in writing to the surveyor by the client, lender, or insurer, or (b) existing use, if the planned use is not so reported.

A. Field Locations. The evidence and locations gathered, and the monuments and lines located during the fieldwork pursuant to Section 5 above, with accompanying notes if deemed necessary by the surveyor or as otherwise required as specified below.

B. Boundary, Descriptions, Dimensions, and Closures

i. (a) The current record description of the surveyed property, or
(b) In the case of an original survey, the current record document number of the parent tract that contains the surveyed property.

ii. Any new description of the surveyed property that was prepared in conjunction with the survey, including a statement explaining why the new description was prepared. Except in the case of an original survey, preparation of a new description should be avoided unless deemed necessary or appropriate by the surveyor and insurer. Preparation of a new description should also generally be avoided when the record description is a lot or block in a platted, recorded subdivision. Except in the case of an original survey, if a new description is prepared, a note must be provided stating (a) that the new description describes the same real estate as the record description or, (b) if it does not, how the new description differs from the record description.

iii. The point of beginning, the remote point of beginning or point of commencement (if applicable) and all distances and directions identified in the record description of the surveyed property (and in the new description, if one was prepared). Where a measured or calculated dimension differs from the record by an amount deemed significant by the surveyor, such dimension must be shown in addition to, and differentiated from, the corresponding record dimension. All dimensions shown on the survey and contained in any new description must be horizontal ground dimensions unless otherwise noted.

iv. The direction, distance and curve data necessary to compute a mathematical closure of the surveyed boundary. A note if the record description does not mathematically close. The basis

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of bearings and, where it differs from the record basis, the difference.

v. The remainder of any recorded lot or existing parcel, when the surveyed property is composed of only a portion of such lot or parcel, shall be graphically depicted. Such remainder need not be included as part of the actual survey, except to the extent necessary to locate the lines and corners of the surveyed property, and it need not be fully dimensioned or drawn at the same scale as the surveyed property.

vi. When the surveyed property includes a title line defined by a water boundary, a note on the face of the plat or map noting the date the boundary was measured, which attribute(s) of the water feature was/were located, and the caveat that the boundary is subject to change due to natural causes and that it may or may not represent the actual location of the limit of title. When the surveyor is aware of natural or artificial realignments or changes in such boundaries, the extent of those changes and facts shall be shown or explained.

vii. The relationship of the boundaries of the surveyed property to its adjoiners (e.g., contiguity, gaps, overlaps) where ascertainable from documents provided to or obtained by the surveyor pursuant to Section 4 and/or from field evidence gathered during the process of conducting the fieldwork. If the surveyed property is composed of multiple parcels, the extent of any gaps or overlaps between those parcels must be identified. Where gaps or overlaps are identified, the surveyor must, prior to or upon delivery of the final plat or map, disclose this to the insurer and client.

viii. When, in the opinion of the surveyor, the results of the survey differ significantly from the record, or if a fundamental decision related to the boundary resolution is not clearly reflected on the plat or map, the surveyor must explain this information with notes on the face of the plat or map.

ix. The location of buildings on the surveyed property dimensioned perpendicular to those perimeter boundary lines that the surveyor deems appropriate (i.e., where potentially impacted by a setback line) and/or as requested by the client, lender or insurer.

x. A note on the face of the plat or map explaining the site conditions that resulted in a Relative Positional Precision that exceeds the maximum allowed pursuant to Section 3.E.v.

xi. A note on the face of the plat or map identifying areas, if any, on the boundaries of the surveyed property, to which physical access within five feet was restricted (see Section 5.C.ii.).

xii. A note on the face of the plat or map identifying the source of the title commitment or other title evidence provided pursuant to Section 4, and the effective date and the name of the insurer of same.

C. Easements, Servitudes, Rights of Way, Access, and Documents

i. The location, width, and recording information of all plottable rights of way, easements, and servitudes burdening and benefitting the surveyed property, as evidenced by documents provided to or obtained by the surveyor pursuant to Section 4.

ii. A summary of all rights of way, easements, and other survey-related matters burdening the surveyed property and identified in the title evidence provided to or obtained by the surveyor pursuant to Section 4. Such summary must include the record information of each such right of way, easement or other survey-related matter, a statement indicating whether it lies within or crosses the surveyed property, and a related note if:

(a) its location is shown;
(b) its location cannot be determined from the record document;
(c) there was no observed evidence at the time of the fieldwork;
(d) it is a blanket easement;
(e) it is not on, does not touch, and/or - based on the description contained in the record document – does not affect, the surveyed property;
(f) it limits access to an otherwise abutting right of way;
(g) the documents are illegible; or
(h) the surveyor has information indicating that it may have been released or otherwise

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terminated.
In cases where the surveyed property is composed of multiple parcels, indicate which of such parcels the various rights of way, easements, and other survey-related matters cross or touch.

iii. A note if no physical access to an abutting street, highway, or other public or private way was observed in the process of conducting the fieldwork.

iv. The locations and widths of rights of way abutting or crossing the surveyed property and the source of such information, (a) where available from the controlling jurisdiction, or (b) where disclosed in documents provided to or obtained by the surveyor pursuant to Section 4.

v. The identifying titles of all recorded plats, filed maps, right of way maps, or similar documents that the survey represents, wholly or in part, with their recording or filing data.

vi. For non-platted adjoining land, recording data and, where available, tax parcel number, identifying adjoining tracts according to current public records. For platted adjoining land, the recording data of the subdivision plat.

vii. Platted setback or building restriction lines that appear on recorded subdivision plats or that were disclosed in documents provided to, or obtained by, the surveyor.

viii. If in the process of preparing the survey the surveyor becomes aware of a recorded easement not otherwise listed in the title evidence provided, the surveyor must advise the insurer prior to delivery of the plat or map and, unless the insurer provides evidence of a release of that easement, show or otherwise explain it on the face of the plat or map, with a note that the insurer has been advised.

D. Presentation

i. The plat or map must be drawn on a sheet of not less than 8 ½ by 11 inches in size at a legible, standard engineering scale, with that scale clearly indicated in words or numbers and with a graphic scale.

ii. The plat or map must include:

(a) The boundary of the surveyed property drawn in a manner that distinguishes it from other lines on the plat or map.
(b) If no buildings were observed on the surveyed property in the process of conducting the fieldwork, a note stating *"No buildings observed*."
(c) A north arrow (with north to the top of the drawing when practicable).
(d) A legend of symbols and abbreviations.
(e) A vicinity map showing the surveyed property in reference to nearby highway(s) or major street intersection(s).
(f) Supplementary or detail diagrams when necessary.
(g) Notes explaining any modifications to Table A items and the nature of any additional Table A items (e.g., 20(a), 20(b), 20(c)) that were negotiated between the surveyor and client.
(h) The surveyor's project number (if any), and the name, registration or license number, signature, seal, street address, telephone number, company website, and email address (if any) of the surveyor who performed the survey.
(i) The date(s) of any revisions made by the surveyor who performed the survey.
(j) Sheet numbers where the plat or map is composed of more than one sheet.
(k) The caption "ALTA/NSPS Land Title Survey."

iii. When recordation or filing of a plat or map is required by state statutes or local ordinances, such plat or map shall be produced in the required form.

7. **Certification -** The plat or map of an ALTA/NSPS Land Title Survey must bear only the following unaltered certification except as may be required pursuant to Section 3.B. above:

To (name of insured, if known), (name of lender, if known), (name of insurer, if known), (names of others as negotiated with the client):

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This is to certify that this map or plat and the survey on which it is based were made in accordance with the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, jointly established and adopted by ALTA and NSPS, and includes Items _____ of Table A thereof. The fieldwork was completed on _____ *[date].*

Date of Plat or Map: _____ *(Surveyor's signature, printed name and seal with Registration/License Number)*

8. **Deliverables** - The surveyor shall furnish copies of the plat or map of survey to the insurer and client and as otherwise negotiated with the client. Hard copies shall be on durable and dimensionally stable material of a quality standard acceptable to the insurer. A digital image of the plat or map may be provided in addition to, or in lieu of, hard copies pursuant to the terms of the contract. If the surveyor is required to record or file a plat or map pursuant to state statute or local ordinance it shall be so recorded or filed.

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TABLE A

OPTIONAL SURVEY RESPONSIBILITIES AND SPECIFICATIONS

NOTE: Whether any of the nineteen (19) items of Table A are to be selected, and the exact wording of and fee for any selected item, may be negotiated between the surveyor and client. Any additional items negotiated between the surveyor and client must be identified as 20(a), 20(b), etc. Any additional items negotiated between the surveyor and client, and any negotiated changes to the wording of a Table A item, must be explained pursuant to Section 6.D.ii.(g). Notwithstanding Table A Items 5 and 11, if an engineering design survey is desired as part of an ALTA/NSPS Land Title Survey, such services should be negotiated under Table A, Item 20.

If checked, the following optional items are to be included in the ALTA/NSPS LAND TITLE SURVEY, except as otherwise qualified (see note above):

1. _____ Monuments placed (or a reference monument or witness to the corner) at all major corners of the boundary of the surveyed property, unless already marked or referenced by existing monuments or witnesses in close proximity to the corner.

2. _____ Address(es) of the surveyed property if disclosed in documents provided to or obtained by the surveyor, or observed while conducting the fieldwork.

3. _____ Flood zone classification (with proper annotation based on federal Flood Insurance Rate Maps or the state or local equivalent) depicted by scaled map location and graphic plotting only.

4. _____ Gross land area (and other areas if specified by the client).

5. _____ Vertical relief with the source of information (e.g., ground survey, aerial map), contour interval, datum, with originating benchmark, when appropriate.

6. _____ (a) If the current zoning classification, setback requirements, the height and floor space area restrictions, and parking requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, list the above items on the plat or map and identify the date and source of the report or letter.

_____ (b) If the zoning setback requirements specific to the surveyed property are set forth in a zoning report or letter provided to the surveyor by the client or the client's designated representative, and if those requirements do not require an interpretation by the surveyor, graphically depict those requirements on the plat or map and identify the date and source of the report or letter.

7. _____ (a) Exterior dimensions of all buildings at ground level.

(b) Square footage of:

_____ (1) exterior footprint of all buildings at ground level.

_____ (2) other areas as specified by the client.

_____ (c) Measured height of all buildings above grade at a location specified by the client. If no location is specified, the point of measurement shall be identified.

8. _____ Substantial features observed in the process of conducting the fieldwork (in addition to the improvements and features required pursuant to Section 5 above) (e.g., parking lots, billboards, signs, swimming pools, landscaped areas, substantial areas of refuse).

9. _____ Number and type (e.g., disabled, motorcycle, regular and other marked specialized types) of clearly identifiable parking spaces on surface parking areas, lots and in parking structures.

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Striping of clearly identifiable parking spaces on surface parking areas and lots.

10. _____ As designated by the client, a determination of the relationship and location of certain division or party walls with respect to adjoining properties.

11. Evidence of underground utilities existing on or serving the surveyed property (in addition to the observed evidence of utilities required pursuant to Section 5.E.iv.) as determined by:

_____ (a) plans and/or reports provided by client (with reference as to the sources of information)

_____ (b) markings coordinated by the surveyor pursuant to a private utility locate request

Note to the client, insurer, and lender - With regard to Table A, item 11, information from the sources checked above will be combined with observed evidence of utilities pursuant to Section 5.E.iv. to develop a view of the underground utilities. However, lacking excavation, the exact location of underground features cannot be accurately, completely, and reliably depicted. In addition, in some jurisdictions, 811 or other similar utility locate requests from surveyors may be ignored or result in an incomplete response, in which case the surveyor shall note on the plat or map how this affected the surveyor's assessment of the location of the utilities. Where additional or more detailed information is required, the client is advised that excavation may be necessary.

12. _____ As specified by the client, Governmental Agency survey-related requirements (e.g., HUD surveys, surveys for leases on Bureau of Land Management managed lands). The relevant survey requirements are to be provided by the client or client's designated representative.

13. _____ Names of adjoining owners according to current tax records. If more than one owner, identify the first owner's name listed in the tax records followed by "et al."

14. _____ As specified by the client, distance to the nearest intersecting street.

15. _____ Rectified orthophotography, photogrammetric mapping, remote sensing, airborne/mobile laser scanning and other similar products, tools or technologies as the basis for showing the location of certain features (excluding boundaries) where ground measurements are not otherwise necessary to locate those features to an appropriate and acceptable accuracy relative to a nearby boundary. The surveyor must (a) discuss the ramifications of such methodologies (e.g., the potential precision and completeness of the data gathered thereby) with the insurer, lender, and client prior to the performance of the survey, and (b) place a note on the face of the survey explaining the source, date, precision, and other relevant qualifications of any such data.

16. _____ Evidence of recent earth moving work, building construction, or building additions observed in the process of conducting the fieldwork.

17. _____ Proposed changes in street right of way lines, if such information is made available to the surveyor by the controlling jurisdiction. Evidence of recent street or sidewalk construction or repairs observed in the process of conducting the fieldwork.

18. _____ Pursuant to Sections 5 and 6 (and applicable selected Table A items, excluding Table A item 1), include as part of the survey any plottable offsite (i.e., appurtenant) easements disclosed in documents provided to or obtained by the surveyor.

19. _____ Professional liability insurance policy obtained by the surveyor in the minimum amount of $_____ to be in effect throughout the contract term. Certificate of insurance to be furnished upon request, but this item shall not be addressed on the face of the plat or map.

20. _____ _____

Adopted by the Board of Governors, American Land Title Association, on October 1, 2020.

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American Land Title Association, 1800 M St., N.W., Suite 300S, Washington, D.C. 20036-5828.
www.alta.org

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The post-*Chevron* Federal Regulatory Environment for Food and Agriculture

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I. *Chevron* Deference

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), the Court analyzed whether the Environmental Protection Agency (EPA) had the authority to change its interpretation of the term "stationary source" under the Clean Air Act. The EPA adopted a more flexible "bubble" concept, allowing multiple pollution-emitting devices within a single plant to be treated as one source, thereby easing regulatory burdens if overall emissions did not increase. NRDC challenged this interpretation, arguing it was inconsistent with the statute. The Supreme Court, however, upheld the EPA's interpretation, establishing what became known as the *Chevron* deference doctrine.

The Court articulated a two-step test for judicial review of agency interpretations of statutes:

1. Step One: Determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.
2. Step Two: If the statute is silent or ambiguous, the question becomes whether the agency's interpretation is based on a permissible construction of the statute.

This framework granted significant deference to administrative agencies in interpreting ambiguous statutes, provided their interpretations were reasonable.

Several Supreme Court cases prior to *Loper Bright Enterprises* expressed skepticism or criticism of Chevron deference, signaling a shift in judicial attitudes toward agency authority:

1. *Michigan v. EPA*, 576 U.S. 743 (2015): The Court held that the EPA acted unreasonably by not considering costs when deciding to regulate power plants under the Clean Air Act. Justice Scalia, writing for the majority, emphasized that agencies must operate within the bounds of reasonableness, implicitly questioning the breadth of deference Chevron allowed

2. *King v. Burwell*, 576 U.S. 473 (2015): In this case concerning the Affordable Care Act, the Court declined to apply *Chevron* deference, stating that the question at hand was of deep "economic and political significance" and thus not one Congress would have delegated to an agency. This introduced the "major questions doctrine" as a limit on Chevron

3. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014): The Court rejected the EPA's broad interpretation of its authority under the Clean Air Act, with the majority opinion warning against agencies rewriting clear statutory terms under the guise of interpretation

4. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016): The Court refused to defer to a Department of Labor regulation due to its lack of reasoned explanation, reinforcing that Chevron deference does not apply when an agency fails to justify its interpretation adequately.

While the Court's decisions gradually chipped away at *Chevron* deference, the Court also developed the "major questions" doctrine, which reined in administrative agency's authority. In *West Virginia v. EPA*, 597 U.S. ____ (2002), the Supreme Court held that agencies must have clear congressional authorization to decide issues of "vast economic and political significance." The Court ruled that the EPA overstepped its authority under the Clean Air Act by attempting to restructure the nation's energy policy without explicit congressional approval

II. *Loper Bright Enterprises, Inc. v. Raimondo*

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Court overturned the *Chevron* Deference Doctrine.

The issue at question was whether the National Marine Fisheries Service (NMFS) had the statutory authority under the Magnuson-Stevens Fishery Conservation and Management Act to require commercial Atlantic herring fishing vessels to pay for at-sea monitors when such fees were not explicitly authorized by Congress. These monitors were tasked with collecting data to support sustainable fishery management. The Magnuson Stevens Act explicitly authorized NMFS to require certain Pacific commercial fishing vessels to pay the costs of monitors tasked with collecting data to support sustainable fishery management. The NMFS implemented a rule mandating that certain vessels in the Atlantic herring fishery fund these observers—at an estimated cost of $710 per day. The fishing vessels asserted that Congress had not granted NMFS the authority to impose these fees.

In *Loper Bright*, the Court held that the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in interpreting statutes, even when those statutes are ambiguous. The majority opinion emphasized that deference to agency interpretations undermines the judiciary's constitutional role in saying what the law is. While the Court acknowledged that agency expertise may still be considered under the more limited Skidmore deference (*see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)), *Loper Bright* effectively ends the automatic judicial deference that Chevron once mandated.

> Shortly after the Court's decision in *Loper Bright* was announced, the Court also issued its decision *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 602 U.S. ___ (2024). Here, the Court held that the APA's six-year statute of limitations for challenging federal regulations begins when a plaintiff is first injured, not when the rule was published. This opens many longstanding agency regulations to potential challenge.

III. Post-*Chevron* Developments in Food and Agriculture

While there have not been any blockbuster cases in the food and agriculture space since *Chevron's* agency deference doctrine was struck down, there are examples of agency actions that were taken in apparent response (or anticipation) to the new limits on agency authority. Some examples include:

- AAFCO – In August 2024, FDA announced[1] it would let its Memorandum of Understanding with the Association of American Feed Control Officials (AAFCO)[2] lapse. Under the MOU, FDA participated in the safety evaluation of AAFCO's animal food ingredient definition process. FDA also recognized AAFCO's ingredient definition process as a potential ingredient review pathway. The Federal Food, Drug, and Cosmetic Act (FDC Act) is silent on AAFCO.
    - In announcing the move to end the MOU, FDA published guidance indicating it would exercise enforcement discretion with respect to ingredient definitions contained in the 2024 AAFCO *Official Publication*.[3]

- Packers and Stockyards Act – On June 28, 2024, the USDA Agricultural Marketing Service (AMS) published a proposed rule, "Fair and Competitive Livestock and Poultry Markets."[4] The proposed rule sought to define "unfair practices" under Section 202(a) of the Packers and Stockyards Act of 1921. Eight U.S. Circuit Courts of Appeals had previously ruled that a complainant alleging "unfair practices" must demonstrate that such practices also were harmful to competition (nationally or regionally) to prevail. AMS' definition would not have made harm to competition a prerequisite element.
    - Although the decision pre-dated the Court's decision in *Loper Bright*, the preamble's to the proposed rule was geared towards demonstrating USDA's interpretation was permissible under the *Skidmore* deference doctrine.
    - AMS withdrew the proposed rule on January 16, 2025 without finalizing it.

- USDA *Salmonella* Framework – USDA's Food Safety and Inspection Service (FSIS) published the "Salmonella Framework for Raw Poultry Products" on August 7, 2024.[5] One of the notable elements of the proposal was a proposed determination that certain raw products containing (1) 10 CFU/g of *Salmonella* and (2) certain serotypes were adulterated.

  There is longstanding precedent that *Salmonella* in raw meat and poultry does not render the products adulterated unless it is associated with human illness. In *Supreme Beef*

[1] "FDA Letter to Stakeholders: Acknowledgment of Expiring FDA-AAFCO MOU," (Aug. 2, 2024). *Available at* https://www.fda.gov/animal-veterinary/animal-food-feeds/fda-letter-stakeholders-acknowledgment-expiring-fda-aafco-mou.

[2] "Memorandum of Understanding between the United States Food and Drug Administration and the Association of American Feed Control Officials" - FDA MOU 225-07-7001. *Available at* https://www.fda.gov/about-fda/domestic-mous/mou-225-07-7001.

[3] "CVM GFI #293 – FDA Enforcement Policy for AAFCO-Defined Animal Feed Ingredients," (Oct. 2024). *Available at* https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cvm-gfi-293-fda-enforcement-policy-aafco-defined-animal-feed-ingredients.

[4] 89 *Fed. Reg.* 53,886. *Available at* https://www.govinfo.gov/content/pkg/FR-2024-06-28/pdf/2024-14042.pdf.

[5] 89 *Fed. Reg.* 64,678. *Available at* https://www.govinfo.gov/content/pkg/FR-2024-08-07/pdf/2024-16963.pdf.

Processors, Inc. v. USDA, 275 F.3d 432 (5th Cir. 2001), the court reasoned: "Because normal cooking practices for meat destroy the Salmonella organism, the presence of Salmonella in raw meat products does not render them 'injurious to health' for purposes of the FMIA." *Supreme Beef*, 275 F.3d at 439.

In drafting the proposal, FSIS asserted that products that would be deemed adulterated would be dangerous under ordinary cooking practices. This argument aligns with the argument the court accepted in *Texas Food Industry Ass'n v. Espy*, 879 F.Supp. 143 (W.D. Tex. 1994). In *Texas Food Industry Ass'n*, FSIS sought to deem raw ground beef containing *E. coli* 0157:H7 adulterated on the basis that consumers regularly prepared ground beef at temperatures insufficient to kill *E. coli*. Here, the court upheld FSIS' decision, noting "[r]egardless of whether the court would have arrived at the same interpretation, if the agency's interpretation is reasonable the court must respect it."[6]

- On April 23, 2025, FSIS withdrew the proposal, citing burdens on producers and legal questions regarding the agency's statutory authority to enact the proposed framework.

[6] Citing *Ayoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Although this is a pre-*Chevron* decision, it provides agency's substantial deference

Shifting Sands: Agency Authority, Ag, & Food in a Post-Chevron World

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I. The Impact of *Loper Bright* on Judicial Review of Agency Action

As has been well established, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* provided a mandate for Courts to defer to a Federal Agency's interpretation of ambiguous statutory provisions. *Chevron* "deference" provided Agencies the flexibility to interpret ambiguous statutes *within the bounds of reasonableness*, reflecting their expertise and policy-making prerogatives. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, see also *Barber v. Thomas*, 560 U.S. 474.

The Supreme Court's ruling in *Loper Bright* was highly reported in the media, but our United States District Courts were not immediately certain of how to implement the decision in their review of agency actions and decision-making. In certain cases, District Courts reached out to Counsel and sought their opinion as to how this ruling should impact the Courts' review under the Administrative Procedure Act. In at least one case, a District Court required re-briefing "under the new framework" to include "what impact, if any, the *Loper Bright* holding has on this Court's reliance on Federal Regulations. *W. Virginia Highlands Conservancy v. United States Dep't of Agric.*, No. 2:23-CV-06, 2024 WL 4958306, at *1 (N.D.W. Va. Sept. 27, 2024). It appears the general response from practitioners was that *Loper Bright* stood for the proposition that Courts need not, and under the Administrative Procedure Act (APA) may not, defer to an agency's interpretation of the law. In *Derick Miller v. FCIC,* et al, Counsel for the Parties agreed as follows:

> The majority of the Court in *Loper Bright Enterprises v. Raimondo*, indicated that "interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an Agency's." *Loper Bright Enterprises v. Raimondo,* 602 U.S. ____, 24, No. 22-451 (June 28, 2024). This holding provides the Court the ultimate authority to determine the law, in this case.
>
> The Supreme Court of the United States, in *Loper Bright Enterprises v. Raimondo*, held that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether a Federal agency has acted within its statutory authority, and instructed that United States District Courts may not defer to agency interpretations as to the law. This holding does not impact the statutory "standard of review" . . . Instead, it makes clear that the Agency's interpretation as to the applicable Law is not to be provided deference.
>
> *Derick Miller vs. Federal Crop Insurance Corp.,* U.S.D.C. Case No. 5:23−CV−00069 (N.D. Texas).

While the question of whether Court's must allow "deference" to an Agency's interpretation of its own regulations may not be settled, an Agency interpretation of an ambiguous

statute is no longer entitled to deferential treatment by the Courts The role of the Court reviewing "the best reading of a statute" under the Administrative Procedure Act is "to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright Enters.*, 603 U.S. at 395. Interestingly, at least one United States District Court has questioned whether "the Supreme Court's recent decision overturning *Chevron* deference calls into question the applicability of the arbitrary and capricious standard to agency legal conclusions." *Finneman v. United States Dep't of Agric.,* No. 5:23-CV-05034-KES, 2024 WL 5158473, at *9 (D.S.D. Dec. 17, 2024).[1]

II. The Administrative Procedure Act Still Guides Review of Agency Action

Loper Bright did not change the standard of review for agency actions. The APA still provides that a "reviewing court shall ... hold unlawful and set aside agency action ... found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law ... [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." "Until the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, Courts generally applied the two-step *Chevron* framework in determining whether an agency's action exceeded its statutory authority." *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, 749 F. Supp. 3d 697, 721 (W.D. La. 2024), opinion clarified, No. 6:23-CV-831, 2024 WL 4729319 (W.D. La. Nov. 7, 2024**)**

A review of "the Standard of Review" cited by any U.S. District Court or Appellate Court will typically identify the standard of review as whether an Agency action is "arbitrary and capricious" or justified by "substantial evidence," meaning that the reviewing court must assure itself that the agency decision was based on a consideration of the relevant factors (and that the agency) has exercised a reasoned discretion." This approach does not appear to be impacted by *Loper Bright.* Prior to *Loper Bright*, "If a statute is ambiguous, and if the implementing agency's construction [of the statute] is reasonable," a court would generally defer to the agency's interpretation of the statute" . . . . "Now, when an agency's interpretation of statute is challenged, the agency is not entitled to deference even when a statute is ambiguous." *Teche Vermilion Sugar Cane Growers Ass'n Inc. v. Su*, 749 F. Supp. 3d 697, 721 (W.D. La. 2024), opinion clarified, No. 6:23-CV-831, 2024 WL 4729319 (W.D. La. Nov. 7, 2024).

Post *Loper Bright,* District Courts have noted that they may still "consider an agency's interpretation as a body of experience and informed judgment to which courts and litigants may properly resort for guidance, especially when the interpretation "rests on factual premises within the agency's expertise." Id. at 721-722.

III. What Takes the Place of Chevron Deference?

A. "Ordinary judicial interpretation of statutes, and courts are free to review and reject statutory interpretations that federal agencies offer." *Gallegos v. Fed. Emergency Mgmt.*

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[1] The Court, in *Finneman,* asked *"*whether NAD determinations that are based on applicable law as required by 5 U.S.C. § 6998(c), and that present mixed questions of law and fact, are to be reviewed under the arbitrary and capricious standard, or de novo."

Agency, No. CIV 24-0170 JB/JFR, 2025 WL 961665, at *28 (D.N.M. Mar. 31, 2025). Do not overlook that the *Loper Bright* opinion provided that holdings which relied upon *Chevron* "are still subject to statutory stare decisis" despite the Court's "change in interpretive methodology."[2] "Although the Court must not blindly defer to agency rules and rulings, it must give due respect to the views of the agency, which can be "especially informative to the extent it rests on factual premises within the agency's expertise." Id. quoting *Loper Bright*, 603 U.S. at 402 (cleaned up).

B. *Skidmore* Deference is not dead. See *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). *Skidmore* requires a court to assign a weight to an administrative judgment based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 (3d Cir. 2012).

IV. Does Auer Deference Still Exist?

Auer deference has been historically applied by our Federal Courts to provide for the Court's affirmation of an agency's interpretation of its own rules unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Gallegos v. Fed. Emergency Mgmt. Agency*, No. CIV 24-0170 JB/JFR, 2025 WL 961665, at *29 (D.N.M. Mar. 31, 2025) "***The agency's interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading -- within the scope of the ambiguity that the regulation contains***." Id.

Auer Deference appears to be standing on shaky legs following the Supreme Court's decision in *Loper Bright.* Litigants are presently arguing that the Supreme Court's reasoning in *Loper Bright* should also apply to Agency interpretations of regulations. Multiple District Courts have been critical of *Auer,* post- *Loper Bright.* However, Federal Agencies and District Courts have continued to take the position that *Auer* is *"still the law of the land."* See *New Mexico Cattle Growers' Ass'n v. United States Forest Serv.*, No. CIV 23-0150 JB/GBW, 2025 WL 327265 (D.N.M. Jan. 29, 2025).

"Despite *Chevron's* demise, when agencies interpret their regulations -- to, for example, adjudicate whether a regulated party is in compliance with them -- courts accord agencies what is known as *Auer* or *Seminole Rock* deference. *See Auer v. Robbins*, 519 U.S. 452 (1997)("Auer"); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Id. at *59. "**It is, for the time being, the law of the land, and, as a federal district court, the Court must apply it**." Id. at 62.

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[2] *CTM HOLDINGS, LLC, an Iowa limited liability company, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE; BROOKE ROLLINS, in her official capacity as the Sec'y of the United States Dep't of Agriculture; NATURAL RESOURCES CONSERVATION SERVICE; LOUIS ASPEY, in his official capacity as Chief of the Nat. Res. Conservation Service; & JON HUBBERT, in his official capacity as Iowa State Conservationist, Defendants. IOWA FARMERS UNION, IOWA ENVIRONMENTAL COUNCIL, FOOD & WATER WATCH, & DAKOTA RURAL ACTION, Intervenors. Intervenors.*, No. 24-CV-2016-CJW-MAR, 2025 WL 1532146, at *13 (N.D. Iowa May 29, 2025).

V. Practical Take-Aways

Auer Deference appears to be on its last leg. Clear holdings that Agencyies are not entitled to deference as to the interpretations of their own regulations may be more impactful to the regulated citizenry than the *Loper Bright* decision. Litigants repeatedly raise *Loper Bright* for the proposition that Federal Agency are not deserving of *Auer* or *Kisor* deference. Reviews of opinions from Administrative decision-makers including the USDA National Appeals Division suggest that *Loper Bright* may become more relevant in the long term as it relates to Agency interpretations of regulations and/or policy guidance documents, the terms of which are disputed more often, perhaps, than agency interpretations of statutes.

In an interesting and recent case, the Director of the USDA National Appeals Division was faced with the question of whether an Agency interpretation of a certain crop insurance policy procedure was in accordance with the law. The policyholder's Counsel cited *Loper Bright* for the proposition that "When reviewing agency action that requires the resolution of a question of law, the reviewing court must resolve that question of law itself without any deference to the agency's resolution of that question of law." The USDA Risk Management Agency, on the other hand, argued that it was "entitled to deference" in primary part because *Auer-Kisor* is still good law."[3] The Director of the National Appeals Division affirmed the Agency's interpretation of the contested provision finding the "agency's analysis and ultimate agreement with the AIP's interpretation, persuasive, for the reasons stated above, "under the Skidmore deference framework."[4] Again, the question of whether *Auer* deference is still good law is up for debate. However, the Director resorted to applying a *Skidmore* analysis thereby demonstrating there is still support for some degree of Agency deference following *Loper Bright.* In this particular case, the Director noted that "deference to agency decision-making does not require a reviewing official to accept an agency's failure to consider relevant factors or to accept its clear errors in judgment. Rather, the focus is on "whether the agency has examined the relevant facts and has articulated a satisfactory explanation for its decision that reflects a 'rational connection between the facts found and the choice made.'" *El Rio Santa Cruz Neighborhood Health Center v. Department of Health and Human Services*, 300 F. Supp.2d 32, 41 (D.D.C. 2004) (quoting *Lozowski v. Mineta*, 292 F.3d 840, 845 (D.C. Cir. 2002) (citations omitted").[5]

For a USDA program participant working its way through the National Appeals Division, Agency deference begins at the administrative level as it is codified in the Agency's own regulations. 7 CFR § 11.8(e) provides that the appellant has the burden of proving that the adverse decision of the agency was erroneous by a preponderance of the evidence. The Agency has no burden to prove that it engaged in reasonable decision-making. The aforementioned Director Review Determination indicates that the question is <u>not</u> whether the Agency reached the correct decision but instead whether "whether the agency has examined the relevant facts and has articulated a satisfactory explanation for its decision."

The fact that the goal of the administrative judge or Court may not be to reach the "correct" decision is an oft repeated criticism of the review of Federal Agency decision-making under the Administrative Procedure Act. Numerous opinions of Federal Appellate Courts can be cited for

[3] See NAD Case No. 2024W000094 (Director Review Determination).
[4] <u>Id</u>.
[5] <u>Id</u>.

the proposition that review of agency actions for "arbitrary and capricious" action or for "substantial evidence" . . . "limits the reviewing court from deciding the facts anew, making credibility determinations, or re-weighing the evidence."[6] These holdings do not appear to have been disturbed by *Loper Bright.* Similarly, *Loper Bright* could be construed to support prior holdings that "the more technical and complex the regulatory area is, the more the Courts defer to the Expertise of the Agency as a matter of public policy."[7]

Courts can easily evade using the term "Chevron Deference" in upholding an Agency Interpretation of a Statute. "In its opinion, here the Court did not use *Chevron* deference to defer to the USDA's interpretations . . . Instead, the Court relied on the plain language." *Black Farmers & Agriculturalists Ass'n, Inc. v. Vilsack*, No. 2:23-CV-02527-SHL-CGC, 2024 WL 4571446, at *1 (W.D. Tenn. Oct. 24, 2024). Traditional rules of statutory interpretation still apply.

VI. *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109 (2024).

This Opinion following closely in time after *Loper Bright* should not be overlooked when considering the developing case law concerning Judicial Review of Agency administrative actions. The threshold issue was whether an administrative enforcement action seeking civil penalties for alleged fraudulent conduct would implicate the Seventh Amendment right to a jury trial. The Supreme Court of the United States held "it does." This decision would appear relevant to any Agency enforcement action which sought a civil penalty from an individual or entity based upon alleged actions which could have sustained a suit "at common law."

The Seventh Amendment to the United States Constitution guarantees that in "suits at common law, ... the right of trial by jury shall be preserved." *Sec. & Exch. Comm'n v. Jarkesy*, 603 U.S. 109, 122 (2024). The right to a jury trial "is not limited to the "common-law forms of action recognized" when the Seventh Amendment was ratified." Id. at 122. The *Jaresky* case noted that actions by the Government "to recover civil penalties under statutory provisions" are historically the kinds of cases that required a trial by jury. Id.

> In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." *Ibid*. That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.

Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 125 (2024).

Jaresky can now be cited for the proposition that when an Agency seeks civil penalties against a defendant for fraud, the Seventh Amendment entitles the defendant to a jury trial.

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[6] *Spring Creek Farming Co. v. Federal Crop. Ins. Corp.,* 653 Fed. Appx. 728 (11th Cir. 2016) citing *Stone & Webster Const., Inc. v. U.S. Dep't of Labor,* 684 F.3d 1127, 1133 (11th Cir. 2012).

[7] *Dawson Farms. v. Risk Mgmt. Agency*, No. 09-67, 2011 WL 3862195 (D.N.D. Aug. 31, 2011) *quoting Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (1994).

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SUMMARY

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December 31, 2024

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Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law

"*Chevron* is overruled": On June 28, 2024, the Supreme Court overruled the *Chevron* framework in *Loper Bright Enterprises v. Raimondo*, holding that the *Chevron* framework violated Section 706 of the Administrative Procedure Act (APA). The *Chevron* framework required courts to defer to reasonable agency interpretations of ambiguous statutes. In its place, the Court directed the judiciary to exercise its independent judgment to determine the meaning of federal statutes.

The *Chevron* framework was named for the case that articulated it, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* For four decades, the *Chevron* case, and the framework that grew out of it, was one of the foundational decisions in administrative law, governing the relationship between agencies and courts in matters of statutory interpretation and acting as a backdrop against which Congress has legislated. The *Chevron* framework typically applied if Congress had given an agency the general authority to make rules with the force of law. If a court determined that *Chevron* governed its analysis, at step one it would determine whether Congress directly addressed the precise issue before the court. If the statute was clear on its face with respect to the issue before the court, the court was to implement Congress's stated intent. If the court concluded instead that a statute was silent or ambiguous with respect to the specific issue, the court then proceeded to *Chevron*'s second step. At step two, courts were required to defer to an agency's reasonable interpretation of the statute regardless of whether the court would adopt that interpretation on its own were it to have reviewed the statute without the benefit of the agency's interpretation. The *Chevron* framework rested on several related assumptions, including that (1) statutory ambiguity indicates a congressional delegation of interpretive authority, (2) agencies have more expertise than courts do to interpret the statutes they administer, and (3) agencies are politically accountable and therefore have more claim to make policy than courts do.

The APA's Section 706, the Court held in *Loper*, codified existing judicial review practice at the time of its enactment in 1946. Recounting a long line of cases going back to the beginning of the 19th century, the Court explained that the federal courts always understood their role as the final arbiters of the meaning of statutes. Given this history, the Court took specific aim at *Chevron*'s first presumption—that statutory ambiguities indicate implicit delegation of interpretive authority to an agency. This presumption, the Court held, violated the APA's "unremarkable yet elemental proposition … that courts decide legal questions by applying their own judgment." Despite the Court's direction that courts are obligated to exercise their independent legal judgment, the Court emphasized several times that the executive branch's views on the meaning of a statute should be given "weight" or "respect" under certain circumstances outlined by the 1944 Supreme Court case *Skidmore v. Swift & Co*. The Court's emphasis on the judiciary's role to render independent legal judgment on the best meaning of a statute, moreover, does not preclude a court from concluding that a particular statute has vested the agency with discretion. Where Congress has vested an agency with delegated authority, courts must still ensure that the agency has stayed within "the boundaries of the delegated authority and … the agency has engaged in 'reasoned decisionmaking' within those boundaries."

Exactly how Congress, the executive branch, and the judiciary will react to the *Loper* decision is still an open question. In broad terms, *Loper* will likely have a much greater effect in the lower courts than at the Supreme Court, as the Supreme Court did not defer to an agency interpretation under *Chevron* since 2016. The lower courts, however, relied on the framework until the day *Chevron* was overruled. Whether agencies will lose more cases before the courts is another open question. Some evidence of the effect of *Chevron* on the lower courts indicates that overruling *Chevron* may depress agency successes in the lower courts where an agency interpretation of law is at issue. Nonetheless, in the absence of *Chevron*, courts may rely more heavily on *Skidmore* weight or find more readily that statutes delegate authority to agencies, thereby limiting agency losses in court. Further, *Chevron* did not apply to all agency actions—only to agency interpretations of statutes. Exercises of statutorily delegated policy discretion are (and will continue to be) reviewed under the APA's deferential arbitrary and capricious standard.

The extent to which *Loper* will affect the way agencies regulate and Congress legislates is yet to be seen. The *Loper* decision does not legally bind the executive branch or Congress—it directs *courts* how to resolve cases of statutory interpretation. *Loper* will likely have an indirect effect on each branch, however. Agencies may respond to *Loper* by drafting their interpretations to better mirror the way courts interpret statutes and limit expansive interpretations of the statutes they administer. Congress may respond by drafting more specific statutes, codifying *Chevron* or *Loper*, or using more express delegations in statutes.

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Introduction

On June 28, 2024, the Supreme Court overruled the *Chevron* framework in a pair of cases, *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce* (collectively *Loper*).[1] The *Chevron* framework—named for the case that articulated it, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*—required federal courts to defer to federal agencies' reasonable interpretations of ambiguous statutory provisions the agencies administer.[2]

For four decades, the *Chevron* case, and the framework that grew out of it, has been one of the foundational decisions in administrative law, governing the relationship between agencies and courts in matters of statutory interpretation and acting as a backdrop against which Congress has legislated. As one legal scholar put it: *Chevron* "is the most talked about, most written about, most cited administrative law decision of the Supreme Court. Ever."[3] For the past decade or so, however, *Chevron* had come under increasing fire from some corners of the federal judiciary and legal academia.[4] Once cited often and approvingly by a majority of Supreme Court Justices, *Chevron* fell into desuetude at the Court.[5] Over the past several terms, the Court has declined to apply or even cite *Chevron* in cases where it may once have governed.[6] Other methods of statutory interpretation, such as the major questions doctrine, appear to have displaced *Chevron*, at least in some instances.[7] *Chevron*'s absence at the Court has not gone unnoticed, with several Justices commenting on *Chevron*'s absence as evidence that it should be overruled.[8]

Against this backdrop, the Court explicitly overruled the *Chevron* framework, holding that it violates Section 706 of the Administrative Procedure Act (APA).[9] For cases that fall within the ambit of the APA, Section 706 requires courts reviewing agency actions to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[10] The majority held that the APA's command required courts to exercise their own independent judgment on the meaning of federal statutes, but *Chevron* required courts to defer to reasonable agency interpretations of ambiguous statutes.[11] That deference requirement, the Court held, abdicated the judiciary's foundational function to

[1] 144 S. Ct. 2244 (2024).

[2] 467 U.S. 837, 843 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[3] Ronald A. Cass, *Chevron—Complicated, Start to Finish*, 23 FEDERALIST SOC'Y REV. 265, 265 (2022).

[4] *See* Pereira v. Sessions, 585 U.S. 198, 221 (2018) (Alito, J., dissenting) (writing that *Chevron* is now an "increasingly maligned precedent" that the Court feels comfortable "simply ignoring"); Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari) (arguing that that *Chevron* "deserves a tombstone no one can miss."). Prior to being appointed to the Supreme Court, Justice Kavanaugh raised concerns that *Chevron* was conceptually muddled, while Chief Justice Roberts had suggested that *Chevron* should be significantly narrowed. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016); City of Arlington v. FCC, 569 U.S. 290, 323–27 (2013) (Roberts, C.J., dissenting) (advancing a narrower theory of *Chevron*). For a survey of academic literature criticizing *Chevron* deference, see Christopher J. Walker, *Attacking* Auer *and* Chevron: *A Literature Review*, 16 GEO. J.L. & PUB. POL. 103 (2018).

[5] *See* Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron's Domain*, 70 DUKE L.J. 931, 1000 (2021).

[6] *See Loper*, 144 S. Ct. at 2271 (stating that the Court has not deferred under *Chevron* since 2016).

[7] *See Buffington,* 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari); CRS Legal Sidebar LSB11084, *Clear Statement Rules, Textualism, and the Administrative State*, by Benjamin M. Barczewski and Valerie C. Brannon (2023); CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022).

[8] *See, e.g.*, *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari); Pereira v. Sessions, 585 U.S. 198, 221–22 (2018) (Alito, J., dissenting).

[9] *Loper*, 144 S. Ct. at 2263.

[10] 5 U.S.C. § 706(2).

[11] *Loper*, 144 S. Ct. at 2266.

"say what the law is."[12] Although the petitioners in *Loper* also challenged the *Chevron* framework on constitutional grounds, the majority's opinion did not address those arguments.[13]

The *Chevron* Framework

The *Chevron* framework required a court to defer to an executive agency's interpretation of an ambiguous statute that it administers so long as the agency's interpretation was reasonable.[14] The framework's namesake 1984 Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*, set out a two-step process for determining whether a court must defer to an agency's statutory interpretation.[15]

The *Chevron* framework typically applied if Congress had given an agency the general authority to make rules with the force of law.[16] If a court determined that *Chevron* applied, at step one it would use the traditional tools of statutory construction to determine whether Congress directly addressed the precise issue before the court.[17] If the statute was clear on its face with respect to the issue before the court, the court was to implement Congress's stated intent.[18] If the court concluded instead that a statute was silent or ambiguous with respect to the specific issue, the court then proceeded to *Chevron*'s second step.[19] At step two, a court was required to defer to an agency's reasonable interpretation of the statute regardless of whether the court would adopt that interpretation on its own were it to have reviewed the statute without the benefit of an agency's interpretation.[20] The *Chevron* framework rested on several related assumptions, including that (1) statutory ambiguity indicates a congressional delegation of interpretive authority, (2) agencies have more expertise than courts do to interpret the statutes they administer, and (3) agencies are politically accountable and therefore have more claim to make policy than courts do.[21]

The *Loper* Decision

The Supreme Court's decision to overrule the *Chevron* framework relied exclusively on Section 706 of the APA. The APA generally governs judicial review of agency actions.[22] Section 706 of the APA states "the reviewing court shall decide all relevant questions of law."[23]

[12] *Id.* at 2257 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[13] Brief for Petitioners at 24, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451).

[14] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[15] *Id.*

[16] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[17] *Chevron*, 467 U.S. at 843 n.9.

[18] *Id.*

[19] *Id.* at 843.

[20] *Id*. at 844–45, 865–66.

[21] *Id*. Justice Scalia later expressed another justification for *Chevron* deference, rooted in the history of federal court review of agency action before passage of the federal question jurisdiction statute in 1875. *See* United States v. Mead Corp., 533 U.S. 218, 241–42 (2001) (Scalia, J., concurring) (asserting that the *Chevron* decision "was in accord with the origins of federal-court judicial review," because a court would issue "the prerogative writ of mandamus" only if the executive officer "was acting plainly beyond the scope of his authority.").

[22] 5 U.S.C. §§ 701–706.

[23] *Id*. § 706.

Judicial Practice Before Enactment of the APA

Section 706, the Supreme Court held, codified existing judicial review practice at the time of its enactment in 1946.[24] Recounting a long line of cases going back to the beginning of the 19th century, the Court explained that the federal courts always understood their role to be the final arbiters of the meaning of statutes.[25] The Court began by quoting the now famous statement from the seminal 1803 case *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is."[26] Although *Marbury* embodied the "Framers' understanding" of the role of the federal judiciary, the judiciary also historically "accorded due respect" to the views of the executive branch entrusted with administering a statute.[27] That respect was "especially warranted" where the executive branch's interpretation was roughly contemporaneous with the enactment of the statute.[28] Agency interpretations that warranted judicial respect, however, "could inform … but did not supersede" the judgment of a court on a question of law.[29]

The Court acknowledged that it appeared that some cases decided before the enactment of the APA had applied various deference doctrines. Those cases, however, as understood by the Court, did not shift the foundational role of the courts, nor did they apply anything like the deference required under *Chevron*.[30] In a pair of pre-APA cases from the 1940s, *National Labor Relations Board (NLRB) v. Hearst Publications, Inc.*[31] and *Gray v. Powell*,[32] the Court applied what the *Loper* majority called "deferential review"—but only insofar as Congress had empowered the agency to determine the meaning of the statute.[33] In *Hearst Publications*, for example, the Court deferred to the NLRB's determination that newsboys were "employees" within the meaning of the National Labor Relations Act.[34] Deeming the newsboys (who were actually adult men) "employees" provided them the opportunity to engage in collective bargaining with their employer, Hearst Publications.[35] The Court concluded that the task of defining *employee* was "assigned primarily to the agency created by Congress to administer the Act."[36] The NLRB, the Court held, had "[e]veryday experience in administering the statute" and "familiarity with the circumstances and backgrounds of employment relationships in various industries."[37]

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[24] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).

[25] *Id.* at 2257–60.

[26] *Id.* at 2257 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[27] *Id.* The Court cited another of its early 19th-century cases, *Edwards' Lessee v. Darby*, for the proposition that from the very beginning of the Republic, courts accorded contemporaneous executive branch interpretations of "doubtful and ambiguous law ... very great respect." 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the cotemporaneous [sic] construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.")

[28] *Loper*, 144 S. Ct. at 2258.

[29] *Id.*

[30] *Id.* at 2259.

[31] 322 U.S. 111 (1944).

[32] 314 U.S. 402 (1941).

[33] *Loper*, 144 S. Ct. at 2259.

[34] *Hearst Publications*, 322 U.S. at 129–30.

[35] *Id.* at 113–14.

[36] *Id.* at 130.

[37] *Id.* "In making [the NLRB's] determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing (continued...)

Gray was decided under similar circumstances. In that case, the Supreme Court found that Congress had "specifically granted the agency the authority to" determine whether a coal-burning railroad with contracts with several coal mines was a coal "producer" pursuant to the Bituminous Coal Act of 1937. The *Gray* Court held "[w]here as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched."[38]

The *Loper* majority reasoned that *Hearst Publications* and *Gray* are examples of deferential review "where application of a statutory term was sufficiently intertwined with the agency's factfinding" rather than evidence that the Court had adopted generally applicable *Chevron*-like deference doctrines prior to the enactment of the APA.[39] *Gray* and *Hearst Publications*, in the Court's reasoning, were examples of an adjudication-like action of applying a statutory term to the particular facts before it.[40] As a result, these cases, according to the Court, did not depart from the general rule at the time of the enactment of the APA that pure questions of law were to be answered by the courts—not agencies.[41]

The APA and *Chevron*'s Presumptions

Given this history, the Supreme Court took specific aim at *Chevron*'s first presumption—that statutory ambiguities indicate implicit delegation of interpretive authority to an agency.[42] This presumption, the Court held, violated the APA's "unremarkable, yet elemental proposition … dating back to *Marbury*: that courts decide legal questions by applying their own judgment."[43] The majority explained that presumptions can be salutary but only where they approximate reality.[44] *Chevron*'s presumption, the Court explained, does not approximate reality, "because '[a]n ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.'"[45] Instead, the Court held that, when confronted with a statutory ambiguity, a court should not defer to an agency's interpretation but instead should do its "ordinary job of interpreting statutes, with due respect for the views of the Executive Branch."[46]

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the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record." *Id.* (citing NLRB v. Nev. Consol. Copper Corp. 316 U.S. 105 (1942)).

[38] *Gray v. Powell*, 314 U.S. 402, 412 (1941).

[39] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2260 (2024).

[40] *See id.* at 2259–60.

[41] *Id.* In *The* Chevron *Doctrine: Its Rise and Fall, and the Future of the Administrative State*, Professor Thomas Merrill notes that one way to read *Hearst Publications* and similar cases is that the Court engaged in deferential review where the agency was engaged in applying the law to the facts before it (e.g., is a particular entity covered by a statutory term?)—not pure legal analysis. THOMAS W. MERRILL, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 39 (2022) [hereinafter THE CHEVRON DOCTRINE]. This view aligns squarely with the majority in *Loper*. 144 S. Ct. at 2259 (calling the agency actions in *Hearst Publications* and *Gray* "factbound"). If that is what in fact the Court was doing in *Hearst Publications* and *Gray*, then those cases do not necessarily stand for the proposition that the Court was engaged in something like a proto-*Chevron* analysis prior to the enactment of the APA. Nonetheless, Professor Merrill explains that *Hearst Publications* can also be understood to be an early instantiation of one of *Chevron*'s core assumptions—that ambiguities are implicit delegations of interpretive authority. THE CHEVRON DOCTRINE 39-40.

[42] *Loper*, 144 S. Ct. at 2265.

[43] *Id.* at 2261.

[44] *Id.* at 2265.

[45] *Id.* (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 445 (1989)).

[46] *Id.* at 2267.

By sweeping away one of *Chevron*'s core assumptions about delegation, the majority declared that ambiguities in statutes pose questions of law, not questions of policy.[47] In holding that the judiciary, not agencies, is to resolve statutory ambiguities, the majority explained that the Framers understood "the complexity of objects … the imperfection of the human faculties, and the simple fact that no language is so copious as to supply words and phrases for every complex idea," yet they still expected politically insulated judges to exercise independent legal judgment in resolving statutory ambiguities.[48]

Statutory Interpretation Under *Loper*

While the Supreme Court acknowledged that ambiguities in statutes surely exist, the majority held that a statute's meaning was fixed at the time of enactment, permitting one and only one interpretation of the statute.[49] The majority reasoned that poorly drafted, complex, or technical statutes are no different than statutes with clear or obvious meanings—they both have meanings fixed at the time of enactment that a court is obligated to give effect to.[50] According to the majority, a court's job is to find this single "best" meaning by applying the "traditional tools of statutory construction."[51] Courts apply these tools to resolve any potential ambiguity so that the law does not "run out" or leave a "gap" for agencies to fill.[52] The Court itself did not list which tools it believes are included in the traditional tools of statutory construction.[53] Methods of statutory interpretation and how *Loper* may interact with them will be discussed in more detail below.[54]

Regardless of the methods a court uses to interpret a statute, the Court was confident that the judiciary was up to the task of determining the best meaning of any statute. "Resolution of statutory ambiguities," the Court explained, "involves legal interpretation. That task does not suddenly become policymaking just because a court has an 'agency to fall back on.'"[55] The majority stressed that courts resolve statutory ambiguities all the time when reviewing statutes that has agencies have not yet interpreted or in cases where agencies are not involved.[56] In the Court's view, the legal nature of questions of statutory interpretation do not change just because an agency happens to be involved.[57] By characterizing the resolution of statutory ambiguities as a question of law, the Court swept away another one of *Chevron*'s presumptions—that ambiguities call for agency expertise.[58] In light of the majority's reasoning, there is no role for agency

[47] *Id.* at 2267–68.

[48] *Id.* at 2266 (quoting THE FEDERALIST NO. 37, at 236 (J. Madison) (J. Cooke ed. 1961).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See id.* Similarly, while the Court suggested in *Chevron* itself that courts should use "traditional tools of statutory construction" at step one, it did not elaborate on what those tools are. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

[54] *See infra* "The De Novo Standard of Review, Methods of Statutory Interpretation, and Statutory Ambiguity." For a longer discussion of statutory interpretation, see CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023).

[55] *Loper*, 144 S. Ct. at 2268 (quoting Kisor v. Wilkie, 588 U.S. 558, 575 (2019)).

[56] *Id.* at 2266.

[57] *Id.*

[58] *Id.* at 2268.

expertise to play in interpreting a statute because courts—not agencies—are experts in statutory interpretation.[59]

Application of the *Skidmore* Standard

Despite the Supreme Court's direction that courts are obligated to exercise their independent legal judgment, the majority emphasized several times that the executive branch's views on the meaning of a statute should be given "weight" or "respect" under certain circumstances.[60] As the Court explained, the views of the executive branch may, in the words of the 1944 Supreme Court case *Skidmore v. Swift & Co.*, have the "power to persuade, if lacking the power to control."[61]

Prior to *Loper*, *Skidmore* primarily applied to agency interpretations that were not eligible to be evaluated under the *Chevron* framework.[62] The majority's frequent reference to *Skidmore* and use of language from that decision suggest that, going forward, the Court may expect lower courts to look to *Skidmore* to guide their consideration of agencies' preferred interpretations of ambiguous statutes. *Skidmore* does not require courts to defer to agencies but permits courts to give weight or respect to agency interpretations that the court considers persuasive.[63] The *Skidmore* case itself laid out a list of factors for courts to consider when determining whether an agency's interpretation commands the "power to persuade."[64] Under *Skidmore*,

> the rulings, interpretations and opinions of [an agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[65]

Skidmore has received far less attention from the courts than *Chevron* has and may need additional development by the courts to refine its application. How courts might apply *Skidmore* after *Loper* is discussed below.[66]

Delegations to Agencies and Statutory Interpretation

The Loper Court's emphasis on the judiciary's role to render independent legal judgment on the best meaning of a statute does not preclude a court from deciding that a statute's best meaning is that "the agency is authorized to exercise a degree of discretion."[67] The majority identified two forms of delegation in particular.

[59] *Id.*

[60] *Id.* at 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[61] *Id.* at 2267 (quoting *Skidmore*, 323 U.S. at 140).

[62] Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1245–46 (2007), (summarizing the evolution of the *Skidmore* doctrine).

[63] *See Skidmore*, 323 U.S. at 140.

[64] *Id.*

[65] *Id.*

[66] *See infra* "Skidmore Weight."

[67] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

Express Delegations

This discretion, the Court explained, could be provided by an express delegation to an agency from Congress to interpret a particular statutory term or phrase.[68] The Court cited several statutes where Congress has expressly delegated interpretive authority to an agency.[69] For instance, the Court cited a provision of the Fair Labor Standards Act, which states in relevant part:

> [A]ny employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*).[70]

According to the Court in *Loper*, the phrase *as such terms are defined and delimited by regulations of the Secretary* indicates that Congress delegated authority to the agency to define the terms referenced in that statutory provision. The Court's requirement that courts give effect to a statute's best meaning accordingly requires a court to respect Congress's explicit choice of which branch—executive or judicial—has the authority to render a final and binding interpretation of a statutory provision.[71]

Delegations of Policy "Flexibility"[72]

In addition to expressly delegating interpretive authority to an agency to interpret a particular word or phrase, the Court also identified instances where Congress has delegated authority to an agency using terms or phrases "that '[leave] agencies with flexibility.'"[73] The Court identified terms such as *appropriate* and *reasonable* as indications that Congress has delegated flexibility to the agency to make policy within "the boundaries of the delegated authority."[74] The Court cited additional examples of statutory language that delegates this kind of flexibility.[75] For instance, the Court referred to the Clean Air Act, which states: "The Administrator shall regulate [power plants] … *if the Administrator finds such regulation is appropriate and necessary*."[76] In instances where such language is used, the majority reasoned that a court's role is to "ensur[e] the agency has engaged in 'reasoned decisionmaking' within [statutory] boundaries."[77]

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[68] *Id.*

[69] *Id.* at 2263 nn.5–6.

[70] 29 U.S.C. § 213(a)(15) (emphasis added).

[71] *See Loper*, 144 S. Ct. at 2263.

[72] The Court identified another category where Congress delegates authority to an agency. The Court identified it as authority for an agency to "prescribe rules to 'fill up the details'" of a statutory scheme. *Id.* (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

[73] *Id.* (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 2263 n.6 (citing 42 U.S.C. § 7412(n)(1)(A)) (emphasis added).

[77] *Id.* at 2263 (quoting Michigan, 576 U.S. at 750). The Court's reference to "reasoned decisionmaking" may be a nod to a court's role in reviewing an agency's discretionary policy decisions, findings of fact, and exercise of its technical expertise under the APA's arbitrary and capricious standard of review. *See id.*; 5 U.S.C. § 706(2); Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983). Under that standard, which will be discussed in more detail below, an agency must show that its decision was reasonable give the facts before it. *State Farm*, 463 U.S. at 43.

Stare Decisis and Cases Decided at *Chevron* Step Two

Although the Supreme Court overruled *Chevron*, it appears to have preserved the holdings in cases that were decided pursuant to the *Chevron* framework prior to *Loper*.[78] In the briefing of the case and during oral argument, the litigants and some of the Justices discussed the fate of cases decided at *Chevron* step two.[79] As explained above, at *Chevron* step two, a court must defer to an agency's reasonable interpretation of an ambiguous statute.[80] In such a case, a court has not made a specific ruling on what the statute means—it has left that determination to an agency in light of the court's finding at step one that the statute is ambiguous.[81] At oral argument, some of the Justices questioned the litigants about whether these step two decisions would still be considered binding if *Chevron* were overruled.[82] Counsel for the petitioners argued that overruling *Chevron* would not disturb these cases because what the court had found at step two was that an agency's interpretation was "lawful."[83] The Court appears to have adopted this argument in its opinion, holding that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are *lawful*—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology."[84] Despite the Court's holding, questions are likely to remain about what circumstances allow a court to overrule a past decision in favor of an agency based on the application of step two of *Chevron*. That issue is taken up in more detail below.[85]

The Dissent

The dissent, penned by Justice Kagan and joined by Justices Sotomayor and Jackson (the latter only with respect to the *Relentless* case),[86] defended the *Chevron* framework on grounds that largely track those that supported the continued application of *Chevron* for the past four decades.[87] *Chevron*, Justice Kagan wrote, is part of the "warp and woof of modern government" and "reflects what Congress would want": politically accountable expert agencies—not judges—making policy.[88] Justice Kagan, providing examples, explained that regulatory statutes often contain ambiguities or gaps (sometimes purposefully so) that cannot be resolved without the exercise of some kind of policymaking expertise that the courts simply do not have.[89] Justice Kagan reasoned that statutes with such ambiguities or gaps have not fixed any "best" meaning at

[78] *Loper*, 144 S. Ct. at 2273.

[79] *See* Brief for Respondents at 31, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-451); Transcript of Oral Argument at 59–61, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (No. 22-1219).

[80] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844–45 (1984).

[81] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. 545 U.S. 967, 982 (2005) (holding "only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction").

[82] Transcript of Oral Argument at 59:8-61:7, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (No. 22-1219).

[83] *Id.*

[84] *Loper*, 144 S. Ct. at 2273.

[85] *See infra* "Further Litigation: Prior Chevron Cases."

[86] Justice Jackson recused herself from Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023), because she was on the panel that decided Loper Bright Enters. v. Raimondo, 45 F.4th 359, 363 (D.C. Cir. 2022), *cert. granted in part*, 143 S. Ct. 2429 (2023).

[87] *Loper*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

[88] *Id.*

[89] *Id.* at 2296–97.

the time of enactment, and accordingly a court using the tools of statutory construction may find multiple possible readings for which the statute provides no rule of decision for a court to choose one over another.[90]

The judiciary's role, Justice Kagan articulated, is only to ensure that an agency's interpretation is a reasonable one, which ensures that courts stay out of policymaking.[91] This limited role for courts, Justice Kagan stressed, is one of judicial "humility," recognizing that agencies have a better claim to democratic legitimacy and more expertise in making policy than courts do.[92] In other words, she explained, "agencies often know things about a statute's subject matter that courts could not hope to."[93] Courts, Justice Kagan explained, can "muddle through" when asked to determine the meaning of an ambiguous statute, but, compared to an agency that Congress has entrusted to administer a statute that may deal with technical subjects such as wildlife regulation or medical drugs and devices, it is reasonable to believe that Congress would prefer the agency to have interpretive authority.[94]

Implications for the Federal Judiciary

As with the *Chevron* framework, the *Loper* decision is legally binding only on the judiciary: It sets out the proper methodology that courts must use for determining the meaning of a federal statute where an agency has also provided its own interpretation.[95] The *Loper* decision, however, will likely affect the Supreme Court differently than it will the lower courts. The Supreme Court has largely avoided applying the *Chevron* framework since 2016, while the lower courts, bound by precedent to apply *Chevron*, were applying the framework regularly until the Court handed down its *Loper* decision.[96]

The lower courts will also be called to address some of the questions left open by the *Loper* decision. Over the coming years, courts may address how they are to engage in statutory interpretation,[97] whether and how the *Skidmore* standard applies to agency interpretations of statutes,[98] how to evaluate delegations of discretion from Congress to agencies,[99] and *Loper*'s interaction with other doctrines such as the major questions doctrine and *Auer* deference, which applies to an agency's interpretation of its own ambiguous regulations.[100]

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[90] *Id.* at 2297.

[91] *Id.*

[92] *Id.* at 2295.

[93] *Id.* at 2298.

[94] *Id.*

[95] *Id.* at 2273 (majority opinion) (holding that *courts* are no longer permitted to apply the *Chevron* framework).

[96] *Id.* at 2271–72 (citing William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1125 (2008)) ("we have avoided deferring under *Chevron* since 2016. That trend is nothing new; for decades, we have often declined to invoke *Chevron* even in those cases where it might appear to be applicable."); Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/ (studying the application of the *Chevron* framework in the lower courts in 2020 and 2021).

[97] *See infra* "Methods of Statutory Interpretation."

[98] *See infra* "Skidmore Weight."

[99] *See infra* "Delegations from Congress."

[100] *See infra* "Relationship with other Doctrines of Judicial Review."

The Supreme Court

Between 2016 and its decision in *Loper* in 2024, the Court did not defer to agency interpretations under *Chevron* and often did not even mention the framework in cases where it would have once governed.[101] Even prior to the past decade, scholars had identified a trend that the Court was relying less on *Chevron* than might be expected.[102] From roughly the mid-1980s to the mid-2000s, studies found that the Supreme Court applied *Chevron* to about one-quarter[103] to one-third[104] of cases where an agency interpretation was at issue. Even where the Court applied *Chevron*, various studies found that the application of *Chevron* had little effect on the outcome of the case. A 2008 study, for instance, found that agencies prevailed about 76% of the time when the Court applied *Chevron*—similar to agencies' litigation successes in cases where the Court did not apply *Chevron*.[105]

Another study that analyzed cases decided between 1984 and 1990 (i.e., just after the Court decided the *Chevron* case) found similarly that the Court applied *Chevron* in only about one-third of cases to which it would have been applicable.[106] The same study found that despite *Chevron*'s "agency friendly" reputation, agencies had a lower litigation success rate when the Court applied *Chevron* than when it did not.[107] These studies indicate that, at least at the Supreme Court, *Chevron* may not have had a significant impact on the outcome of cases. Put another way by one pair of scholars, "The Court's questionable loyalty to *Chevron* suggests that the doctrine is not meant to discipline Supreme Court decisionmaking. Instead, the doctrine may better serve to control lower courts and provide nationwide uniformity."[108] This difference between the use of *Chevron* at the Supreme Court and in the lower courts has led some to claim that there was a "*Chevron* Supreme and a *Chevron* Regular."[109] Partially in light of this history at the Court, the majority in *Loper* dubbed *Chevron* a "decaying husk" with little practical reason for keeping it.[110]

Overruling *Chevron* may ultimately have little effect on the way the Court approaches questions of statutory interpretation that involve agencies. Rather than applying or even citing *Chevron*, the Court has often engaged in what is known as *de novo* review of statutory text. *De novo* literally means "anew" in Latin and, as applied to the judicial context, means that a reviewing court analyzes the meaning of statutory text without deference to an agency.[111] This type of review reflects the approach the Court in *Loper* directs courts to apply as the proper approach to statutory

[101] *Loper*, 144 S. Ct. at 2271–72.

[102] *See* William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1125 (2008); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992).

[103] William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1125 (2008).

[104] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992).

[105] William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008).

[106] Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 981–84 (1992).

[107] *Id.* at 984.

[108] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 18 (2017).

[109] *Id.* at 6.

[110] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

[111] Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended; *De novo*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("When a court engages in de novo review of a legal issue, it makes an independent determination without deference to any earlier analysis about the matter.").

interpretation.[112] Overruling *Chevron*, accordingly, may have little impact on the outcome of cases at the Court, as the Court began engaging in *de novo* review well before it overruled *Chevron*.[113]

The Lower Courts

Overruling *Chevron* may have a larger impact on the lower courts. Until the day *Loper* was decided, the lower courts were applying the *Chevron* framework regularly.[114] According to legal scholars, *Chevron* was cited by the federal courts roughly 18,000 times in the four decades of its existence, making it the most-cited administrative law decision of all time and one of the most cited cases in history.[115] A 2017 study that evaluated more than 1,300 courts of appeals cases from 2003 to 2013—the largest study of courts of appeals decisions that refer to *Chevron*—found that the courts of appeals on average applied *Chevron* in close to three-quarters of cases addressing agency interpretations.[116] A subsequent study that surveyed federal appellate cases from 2020 to 2021 revealed that courts of appeals continued to apply *Chevron* at similar rates as those founds in the 2017 study.[117] In the more recent study, federal courts of appeals applied *Chevron* in close to 85% of cases where agency interpretation was at issue.[118] Thus, unlike the Supreme Court, the lower courts continued to apply *Chevron* in nearly all of the cases in which it would have applied prior to *Loper*.[119]

Loper instructs courts to apply their independent legal judgment in determining the best interpretation of statutes in light of any respect or weight given to agency interpretation under the *Skidmore* standard.[120] In other words, *Loper* instructs courts to engage in *de novo* review of questions of statutory interpretation involving agencies potentially tempered by the *Skidmore* standard.[121] Lower courts are familiar with the *de novo* standard. It is the standard that has traditionally been applied to questions of law where no agency had rendered an interpretation.[122] After *Loper*, that same standard will apply in statutory interpretation cases where *Chevron* would

[112] *Loper*, 144 S. Ct. at 2266.

[113] Kristen E. Hickman & Aaron L. Nielson. *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 934 (2021) (noting "At a minimum, the Justices seem more willing to find clarity using traditional tools of statutory interpretation, thereby avoiding Chevron deference altogether."); *see, e.g.*, Becerra v. Empire Health Foundation, 597 U.S. 424, 434 (2022) (resolving the case without mentioning *Chevron*); Am. Hosp. Ass'n v. Becerra, 596 U.S. 724, 734 (2022) (same); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 520–21 (2018) (holding that where a statute is clear after application of tools of statutory construction *Chevron* does not apply).

[114] *See, e.g.*, Soumah v. Collett, No. TDC-23-2473, 2024 WL 3201096, at *7 (D. Md. Jun. 26, 2024); Associated Gen. Contractors of Am. v. DOL, No. 5:23-CV-0272-C, 2024 WL 3635540, at *11 (N.D. Tex. Jun. 24, 2024).

[115] Ronald A. Cass, *Chevron—Complicated, Start to Finish*, 23 FEDERALIST SOC'Y REV. 265, 265 (2022); Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/.

[116] Barnett & Walker, *supra* note 108, at 5.

[117] McKinney, *supra* note 111.

[118] *Id.*

[119] *Id.*; Barnett & Walker, *supra* note 108, at 29.

[120] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[121] *Id.*

[122] *See* Pierce v. Underwood, 487 U.S. 552, 558 (1988) (noting that questions of law are traditionally reviewable *de novo*).

have once governed.[123] The shift from *Chevron* to a *de novo* standard may affect the outcome of those cases.

According to the 2017 study, in general, agencies were significantly more likely to prevail in the lower courts when a court applied the *Chevron* framework (77.4%)—even if the court decided that the statute was unambiguous and did not defer to the agency's interpretation—than when a court applied *Skidmore* (56.0%) or no deference regime whatsoever (38.5%).[124] Given these data, it is possible that overruling *Chevron* will, in the aggregate, diminish the chances that agencies will prevail in federal court in cases where questions of statutory interpretation arise.[125] Several factors may moderate that trend. According to the 2017 study authors, "courts could be strategically choosing deference regimes that more easily allow them to reach an outcome that matches their policy preferences."[126] In other words, some courts may have applied the *Chevron* framework in cases where the agencies were likely to prevail anyway and did not apply the framework where they believed that the agencies were not likely to win.

Agencies may also change their behavior to accommodate the courts' new standard of review.[127] A 2014 study indicated that agency rule drafters may adopt less "aggressive" interpretations of statutes when they did not expect *Chevron* to apply.[128]

The *Loper* decision itself also recognizes that in certain circumstances, agencies' interpretations should be given "great weight" or "respect" pursuant to *Skidmore*.[129] The Court also recognized that in some cases, the best reading of a statute is that Congress delegated discretion to the agency—not the courts.[130] How the lower courts implement these principles from the *Loper* decision is yet to be seen. Nonetheless, they provide courts with the option to adopt an agency's interpretation under appropriate circumstances or determine that a statute has delegated the authority to resolve the statutory interpretation question to the agency.

The Court's citation to other pre-APA cases (such as *Hearst Publications*) that, in the Court's view, formed the traditional understanding of judicial review codified in Section 706 may also signal approval of the lower courts engaging in deferential review where an agency's

[123] *Loper*, 144 S. Ct. at 2266.

[124] Barnett & Walker, *supra* note 108, at 30. These aggregate averages disguise significant variation in outcomes across different federal circuit courts of appeals, different agencies, and different subject matters. For example, the D.C. Circuit led the way in applying *Chevron*, relying on it in approximately 89% of cases that concerned agency interpretations of a statute, while the Sixth Circuit applied *Chevron* in 61% of cases involving agency interpretation. *Id.* at 44. Courts of appeals applied *Chevron* at high rates (75%-100%) to cases involving telecommunications, Indian affairs, and pensions, and courts deferred to agencies under *Chevron* at similar rates (83%-92%) in those same subject matter areas. *Id.* at 50, 54. Conversely, courts applied *Chevron* less frequently (52%-67%) in cases involving housing, tax law, and employment. *Id.* at 50. Furthermore, even when the courts applied *Chevron* in this latter group of cases, win rates for agencies were comparatively low (69%-81%). *Id.* at 54. Somewhat surprisingly, some agencies, such as the Federal Trade Commission, had a *higher* litigation success rate when courts did not apply *Chevron*. *Id.* at 54. Overruling *Chevron* will likely have differing effects within different circuits and across different agencies.

[125] *See generally* Robert Lafolla, *GOP-Picked Judges Take Hard Line on Regulations Post*-Chevron, BLOOMBERG LAW (Sep. 4, 2024), https://news.bloomberglaw.com/daily-labor-report/gop-picked-judges-take-hard-line-on-rules-after-chevrons-demise (finding that out of 26 cases decided after *Loper* agencies won only 4).

[126] Barnett & Walker, *supra* note 108, at 32.

[127] For a more detailed discussion, see *infra* "Implications for Executive Branch Agencies."

[128] Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 724 (2014).

[129] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[130] *Id.* at 2263.

interpretation is particularly fact-bound.[131] *Skidmore*, statutory delegations, and mixed questions of law and fact are discussed in more detail below.[132]

Some scholars have contended that *Chevron* may have saved lower courts time by permitting them to engage in meaningful review without having to start from scratch interpreting complex statutory regimes.[133] In the absence of the *Chevron* framework, it is possible that lower courts might turn to other doctrines that serve a similar function as *Chevron*.[134] Two of those doctrines—*Skidmore* and congressional delegations—are addressed in more detail below.[135]

The *De Novo* Standard of Review, Methods of Statutory Interpretation, and Statutory Ambiguity

Scholars have described judicial standards of review as a continuum with independent judgment or *de novo* review on one end and *Chevron* deference at the other.[136] The *Loper* decision fits this model, holding that a court applying the *de novo* review standard is required to exercise its independent judgment to determine the best interpretation of a federal statute.[137] Under the *de novo* standard of review, an agency receives no deference whatsoever.[138]

The *de novo* standard of review typically refers to the methods courts apply to independently determine the meanings of statutes. The Supreme Court in *Loper* (as well as *Chevron*) called these methods the "traditional tools of statutory construction."[139] The Court's reference to "traditional tools," however, masks significant debate over which methods of statutory interpretation are included in a court's traditional toolkit.[140] While the Court used this same phrase in *Chevron*, the importance of particular interpretive methods has changed since *Chevron*

[131] *Id.* at 2259, 2263.

[132] *See infra* "Policy Discretion, Mixed Questions of Law and Fact, and Arbitrary and Capricious Review"; "Skidmore Weight"; "Delegations from Congress."

[133] *See* Barnett & Walker, *supra* note 108, at 71; Thomas W. Merrill, *Response: Chevron's Ghost Rides Again*, 103 B.U. L. REV. 1717, 1738 (2023); Gary Lawson, *The Ghosts of Chevron Present and Future*, 103 B.U. L. REV. 1647, 1709 (2023).

[134] *See* Lisa Schultz Bressman, *Lower Courts After* Loper Bright, 31 GEO. MASON L. REV. 499, 504 (2024) (arguing "deference (of the controlling variety) is unlikely to disappear after *Loper Bright*").

[135] *See infra* "Skidmore Weight"; "Delegations from Congress."

[136] *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453–54 & n.10 (1989); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 971 & n.6 (1992).

[137] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

[138] *See, e.g.*, Salve Regina College v. Russell, 499 U.S. 225, 238 (1991); Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 650 (1990) (holding that the Court would not defer to an agency's interpretation of a judicial review provision); Denis v. Att'y Gen. of United States., 633 F.3d 201, 207–08 (3d Cir. 2011) (contrasting *Chevron* deference with *de novo* review).

[139] *Loper*, 144 S. Ct. at 2266; *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 n.9 (1984); Am. Hosp. Assoc. v. Becerra, 596 U.S. 724, 739 (2022).

[140] *See, e.g.*, THE CHEVRON DOCTRINE, *supra* note 41, at 110 (explaining that use of legislative history "was the most obvious point of disagreement" over what tools are included in the traditional toolkit); Bostock v. Clayton Cty, 590 U.S. 644, 654–63 (2020) (explaining that the Court "normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment"); *id.* at 685 (Alito, J., dissenting) (calling the majority's statutory analysis "a pirate ship ... sail[ing] under a textualist flag" but not adhering to textualist principles). *Compare* West Virginia v. EPA, 597 U.S. 697, 736 (2022) (Gorsuch, J., concurring) (endorsing the use of some clear statement rules such as the major questions doctrine as tools of statutory interpretation) *with* Biden v. Nebraska, 600 U.S. 477, 507 (2023) (Barrett, J. concurring) (noting that she "takes seriously" the claim that the major questions doctrine—described by Justice Gorsuch as a clear statement rule—is "inconsistent with textualism").

was decided.[141] Most notably, when *Chevron* was decided, the statutory interpretation method known as *textualism*—which primarily focuses on the text of a law rather than legislative purpose or prevailing societal values—was not as widely adopted by the federal courts as it is currently.[142] It is unlikely that courts will return to pre-*Chevron* methods of statutory interpretation regardless of the Court's consistent reference to "traditional tools" of statutory interpretation.

Methods of Statutory Interpretation

The *Chevron* Court referred to the "traditional tools" of statutory interpretation in its discussion of how a court should engage in a *Chevron* step one analysis (i.e., to determine whether a statute is clear). As a result, a court's step one analysis in many ways mirrored how courts approached statutory interpretation as a general matter outside of the *Chevron* framework. Sweeping away the *Chevron* framework did not inaugurate a new approach to statutory interpretation: The methods the courts had been using at step one of *Chevron* and in cases where *Chevron* did not apply at all will continue to apply to cases in which agency interpretations of law are at issue. How courts approach statutory interpretation may accordingly shed light on how courts will approach legal challenges to agency interpretations of statutes after *Loper*.

Despite some convergence toward a focus on the text of a statute over the past four decades,[143] there remains significant current debate among judges and scholars over the proper methods of statutory interpretation.[144] There are different theories of statutory interpretation, and each interpretive school has a distinct view of which tools courts should appropriately deploy when they seek to discern statutory meaning.[145] Some studies suggest that many judges do not subscribe to any particular method of statutory interpretation, instead using different methods in different

[141] *See* William N. Eskridge, et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1612–26 (2023) (discussing the modern textualist revolution that began in earnest with Justice Scalia); John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1287–98 (discussing the rise of textualism in the 1980s). *Compare* J.W. Bateson Co. v. United States ex rel. Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978) (concluding that "the authoritative Committee Reports" "leave[] no room for doubt about Congress' intent") *with* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 523 (2018) (holding "legislative history is not the law. 'It is the business of Congress to sum up its own debates in its legislation,' and once it enacts a statute 'we do not inquire what the legislature meant; we ask only what the statute means.'" (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring)). In fact, the Court in *Chevron* engaged in an extensive review of the legislative history of the Clean Air Act—the statute at issue in *Chevron*. *Chevron*, 467 U.S. at 851–53.

[142] *See generally* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 24 (2006) (discussing the origins of modern textualism in the 1980s and 1990s); William N. Eskridge, et al., *Textualism's Defining Moment* 123 Colum. L. Rev. 1611, 1611–16 (2023) (identifying earlier statutory interpretation methods and dubbing modern textualism "clearly ascendant and will remain so for the foreseeable future").

[143] Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 Tex. L. Rev. 479, 480 (2013) ("The dust from the Thirty Years' statutory interpretation wars may have settled and, while textualism has not won an unconditional surrender in the Supreme Court, it appears to have gained substantial territory before its truce with purposivism."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 75 (2006) ("I argue here that textualism and purposivism do in fact share more conceptual common ground than textualists (myself included) have sometimes emphasized. Nonetheless, salient differences remain.... ").

[144] *See supra* note 140 and accompanying text.

[145] *See* CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023) (discussing various approaches to statutory interpretation); *see also* Lisa Shultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 551 (2009) ("In applying *Chevron*, courts rely heavily on the dominant theories of statutory interpretation: intentionalism, purposivism, or textualism."). *See generally* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) ("[W]hereas intentionalists believe that legislatures have coherent and identifiable but *unexpressed* policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text.").

contexts.[146] Nonetheless, many (if not most) courts start their statutory interpretation analyses with the statutory text.[147] Moreover, there are several variants of textualism applied throughout the federal judiciary.[148] Many, however, share some common assumptions, such as that the words of a statute read in context are the best evidence of the meaning of the statute and that a court can identify the best meaning by resorting to rules of grammar and syntax, context, and canons of construction.[149]

A focus on text has consequences for which methods of statutory interpretation are considered valid. For example, judges who consider themselves textualists may discount the value of legislative history as poor evidence of the meaning of a statute because legislative history was not enacted through the legislative process as the text of the statute was.[150] They may turn to legislative history only when a court cannot resolve the meaning of a statute using other approaches or as a second order justification for an interpretation derived using more textualist methods.[151] Textualists may also turn to legislative history not as objective evidence of congressional intent but as evidence of ordinary meaning (i.e., how Congress used a statutory term).[152] Textualists are sometimes skeptical of methods of interpretation that impose judges'

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[146] *See, e.g.*, Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018); James J. Brudney & Lawrence Baum, *Protean Statutory Interpretation in the Courts of Appeals*, 58 WM. & MARY L. REV. 681 (2017); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325, 338–51 (2001); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 56 (2018).

[147] *See, e.g.*, Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 583 U.S. 366, 378 (2018) ("Our analysis beings with the text ... and we look to both 'the language itself and the specific context in which that language is used.'" (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)); United States v. Magassouba, 544 F.3d 387, 404 (2d Cir. 2008) (laying out the traditional hierarchy of statutory interpretation tools, starting with plain text and context, and moving to canons of construction if the plain text is found to be ambiguous, and finally resorting to legislative history only if after the application of canons of construction the statute is still unclear); CGM, LLC v. BellSouth Telecomms, Inc., 664 F.3d 46, 53–54 (4th Cir. 2011) (quoting Graden v. Conexant Systems Inc., 496 F.3d 291, 295 (4th Cir. 2007)) ("We employ the usual tools of statutory interpretation. We look first at the text of the statute and then, if ambiguous, to other indicia of congressional intent such as the legislative history.").

[148] *See* William N. Eskridge, et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1616–23 (2023) (summarizing debates among modern textualists).

[149] *See generally* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 71, 91–92 (2006); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2119, 2135 (2016). Tools of statutory construction that focus on determining legislative intent have become somewhat more controversial since *Chevron* was decided but are sometimes still deployed. *Compare, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon, 515 U.S. 687, 698 (1995) ("[T]he broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."); *with id.* at 726 (Scalia, J., dissenting) ("Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or, in this case, the quite simple one) of reading the whole text.").

[150] *See* Nelson, *supra* note 149, at 393–94.

[151] *See supra* note 147; *see also* Fischer v. United States, 144 S. Ct. 2176, 2186 (2024) (turning to "the history" of a criminal law provision to support the Court's textual analysis of a catchall phrase); Snyder v. United States 144 S. Ct. 1947, 1955 (2024) (turning to enactment history to support the Court's evaluation of the text of a bribery statute); *Astrue*, 566 U.S. at 553 (2012) (considering prior version of statute); INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37, 441–42 (1987) (reviewing congressional record and rejection of Senate version of bill); THE CHEVRON DOCTRINE, *supra* note 41, at 108; *see also Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring) (disapproving of majority's use of legislative history because courts "are not free to replace [clear statutory language] with an unenacted legislative intent"). The *Chevron* decision itself, however, relied heavily on legislative history in coming to its conclusion about the meaning of the Clean Air Act. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 851–53 (1984).

[152] Bostock v. Clayton Cnty., 590 U.S. 644, 674–75 (2020) ("To ferret out such shifts in linguistic usage or subtle (continued...)

substantive values on the meaning of the text, such as clear statement rules or other substantive canons of construction.[153] As noted above, however, many judges take a more eclectic approach to statutory interpretation and may deploy these tools of interpretation at different times or in different ways.

In addition, some of the Supreme Court's more recent decisions have appeared to use older tools of statutory construction that were commonly used prior to *Chevron*. It was common prior to *Chevron* for courts to look to long-standing agency practice as evidence of a statute's meaning.[154] After *Chevron* was decided, there was some dispute over whether courts should continue to do so as part of the *Chevron* framework.[155] While the Court never entirely stopped referring to past agency practice,[156] more recently, the Court has appeared to rely on it more often.[157] The Court in *Loper* appeared to explicitly endorse past agency practice as an appropriate tool of statutory interpretation.[158] In *Loper*, for instance, the Court interpreted Section 706 of the APA by relying in part on the Department of Justice's long-standing interpretation of Section 706 set forth in a 1947 manual.[159] The *Loper* Court explicitly justified its use of past agency practice by citing *Skidmore*,[160] which identified a number of indicia to which a court may look to determine the persuasiveness of an agency's interpretation. Some of those indicia include the consistency of an agency's interpretation and whether the interpretation was issued contemporaneously with the

distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence."); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024) ("The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning.").

[153] *See* CRS Legal Sidebar LSB11084, *Clear Statement Rules, Textualism, and the Administrative State*, by Benjamin M. Barczewski and Valerie C. Brannon (2023). A *substantive canon of construction* is a judicial presumption for or against certain outcomes in a case. *Id.* A *clear statement rule* is a type of substantive canon that represents a judicial presumption that courts should not interpret a statute a certain way unless Congress made a "clear statement" requiring that outcome. *Id.*

[154] THE CHEVRON DOCTRINE, *supra* note 41, at 34–37; Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 938 (2017).

[155] THE CHEVRON DOCTRINE, *supra* note 41, at 34–45, 134–37. Explicit reference to longstanding agency interpretations was somewhat rare post-*Chevron*. *See id.* at 137–38; *Cardoza-Fonseca*, 480 U.S. at 434–35; Barnhart v. Walton, 535 U.S. 212, 219–20 (2002); NLRB v. United Food & Com. Workers Union, 484 U.S. 112, 124 n.20 (1987); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 984–85, 1018–22 (1992) (finding in a study of the Court's opinions citing *Chevron* between 1984 and 2006 that the Court referred to the long-standing nature of an interpretation less often after *Chevron*). Justice Scalia took issue with the Court's reliance on past agency practice, arguing that after *Chevron* inquiries into past agency practice is "a relic of pre-*Chevron* days." *Barnhart*, 535 U.S. at 226 (Scalia, J., concurring in part and concurring in the judgment).

[156] *See, e.g.*, *Barnhart*, 535 U.S. 212, 219–20 (2002) (noting the agency's interpretation was "longstanding"); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs 531 U.S. 159, 168 (2001) (looking to agency's original interpretation of a federal statute); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 145–46 (2000) (looking to prior agency interpretations of the governing statute, as announced in congressional hearings).

[157] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 726–27 (2022) (turning to EPA's long-standing interpretation of a provision of the Clean Air Act as evidence of statutory meaning); Biden v. Nebraska, 600 U.S. 477, 497 (2023) (surveying the Department of Education's interpretation of a statute over time as evidence of the statute's meaning); Am. Hosp. Assoc. v. Becerra, 596 U.S. 724, 729 (2022) (noting that the Department of Health and Human Services consistently relied an interpretation of the Medicare Act for decades); Nat'l Fed. of Indep. Bus. v. Occupational Safety and Health Admin., 595 U.S. 109, 119–20 (2022) (noting the novelty of the agency's interpretation of a statute in finding that it lacked the authority it claimed); THE CHEVRON DOCTRINE, *supra* note 41, at 34–45 (discussing the prevalence of the Court resorting to past agency practice in the decades prior to *Chevron*).

[158] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 549 (1940)) ("[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

[159] *Id.* (citing Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947)).

[160] *Id.*

statute.[161] *Skidmore* predated the APA by two years and, in the Court's view, forms part of the general background norms of judicial review that were codified in Section 706 of the APA.[162]

Statutory Ambiguity

Related to the broader debates in the legal community over the proper methods of statutory interpretation, the majority and the dissent in *Loper* split over whether statutory ambiguity could still exist even after the application of the traditional tools of statutory interpretation. The existence of statutory ambiguity was a central assumption of the *Chevron* framework.[163] *Chevron*'s first step required a court to apply the traditional tools of statutory construction to determine whether the statute at issue was clear or ambiguous.[164] The implicit assumption in the *Chevron* framework was that there would be some statutes that, even after the application of all the generally accepted methods of statutory interpretation, may not yield clear answers. In these situations, the *Loper* dissent argued that "Congress's instructions have run out."[165] The choice between different reasonable interpretations of an ambiguous statute was, according to the dissent's view, more akin to policy than to law.[166] Where statutory ambiguity existed, the Court in *Chevron* determined that the judiciary should stay out of making policy.[167] Accordingly, the APA's charge that courts "decide all relevant questions of law" did not conflict with *Chevron* on this account, because instances where courts deferred were not questions of law.[168]

The *Loper* Court rejected the claim that statutory ambiguity implies an absence of law.[169] For the majority, law never "run[s] out."[170] Questions of the meaning of a statute are, for the *Loper* Court, always questions of law susceptible to resolution by the application of the tools of statutory interpretation.[171] "[S]tatutes, no matter how impenetrable, do—*in fact, must*—have a single, best meaning" that is "fixed at the time of enactment."[172] In *Loper* the Court left unsaid which tools

[161] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards] Act ... constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[162] *Loper*, 144 S. Ct. at 2262, 2265.

[163] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). During the four decades between *Chevron* and *Loper*, judges and scholars often debated how clear a statute needed to be in order for a court to resolve the case at step one of *Chevron* or move to step two. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 ("Here, of course, is the chink in *Chevron*'s armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions (though still a better one than what it supplanted). How clear is clear?"); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1082 (2016) (noting "lurking questions about how hard courts ought to work before deciding whether a statute is clear"); Kavanaugh, *supra* note 149, at 2138; Ryan D. Doerfler, *How Clear is Clear?*, 109 VA. L. REV. 651 (2023). The question in *Loper*, however, shifted from how to identify statutory ambiguity to whether statutory ambiguity even exists after the application of the tools of statutory interpretation. *Loper*, 144 S. Ct. at 2266.

[164] *Chevron*, 467 U.S. at 842–43.

[165] *Loper*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

[166] *Id.*

[167] *Chevron*, 467 U.S. at 865–66; *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001) (arguing the "*Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President" and is best justified as ensuring that policymaking functions track political accountability).

[168] *Loper*, 144 S. Ct. at 2302 (Kagan, J., dissenting).

[169] *Id.* at 2266–68.

[170] *Id.* at 2266.

[171] *Id.*

[172] *Id.* (emphasis added).

produce the most persuasive evidence of statutory meaning—for example, the text of the statute, statutory purposes, or legislative history.[173] It is likely, given the views of a majority of Justices expressed in other opinions, that they would consider themselves textualists.[174] Although textualists typically focus on what is within the four corners of the statute, modern textualists also take into account certain types of "context."[175] Context can be as narrow as the context in which a contested word or phrase is used in the statute itself[176] or as broad as general constitutional norms.[177] Falling somewhere between those two poles, statutory structure,[178] enactment history[179] and prior judicial precedent[180] can also supply "context" for the meaning of a statute. Judges and scholars, however, debate the proper use of context, including how widely courts should look for context and under what circumstances some forms of context should be used.[181]

Regardless of which evidence is used to determine the meaning of a statute, the Court's statement that a statute's meaning (however determined) is fixed at a particular time—the time of enactment—implies that post-enactment policy considerations by, for example, agency personnel implementing the statute (as happened under *Chevron*) and possibly by courts interpreting the statute may be inappropriate as a means to provide meaning to a statute. If this reading of the *Loper* decision is correct, it may call into question certain tools of statutory construction (e.g., substantive canons of construction) that themselves are triggered by ambiguity and impose post-enactment and extratextual value choices on a statute's text.[182]

In a footnote in her dissent, Justice Kagan took up this issue, arguing that the majority's view that *Chevron* was based on an erroneous presumption when a court identified an ambiguity may call into question other presumptions that are likewise triggered by "a congressional lack of

[173] *See id.*

[174] Bostock v. Clayton County, 590 U.S. 644, 654 (2020) ("This court normally interprets a statute in accord with the ordinary public meaning of its terms ... "); Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 436 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself."); Kevin Tobia, et al. *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 216 (2022) (noting that a majority of Supreme Court justices adhere to textualist principles).

[175] *See, e.g.*, Biden v. Nebraska, 600 U.S. 477, 511–12 (2023) (Barrett, J., concurring) (discussing the importance of "context" in textualist statutory interpretation methodology).

[176] *See* Brown v. United States, 602 U.S. 101, 112 (2024) (relying in part on the provisions surrounding the contested term as evidence of its meaning); John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457 (2003).

[177] Snyder v. United States, 603 U.S. 1, 13 (2024) (holding that notions of federalism point in favor of a particular interpretation of a statute); *see also Biden*, 600 U.S. at 515 (Barrett, J., concurring) (arguing that the major questions doctrine "makes eminent sense in light of our constitutional structure, which is itself part of the legal context").

[178] *See, e.g.*, Becerra v. Empire Health Found., 597 U.S. 424, 434 (holding that the structure of the Medicare Act supported the agency's interpretation); *Snyder*, 603 U.S. at 12 (relying in part on statutory structure as evidence of statutory meaning).

[179] *See, e.g.*, Becerra v. San Carlos Apache Tribe, 602 U.S. 222, 238 (2024) (recounting the enactment history of the contested provision of the statute and relying on it in part as evidence of statutory meaning); *Snyder*, 603 U.S. at 12 ("[T]he statutory history ....reinforces [our] textual analysis.").

[180] *See, e.g.*, *Brown*, 602 U.S. at 111–12 (relying in part on prior judicial precedent to determine the meaning of a statute).

[181] *See, e.g.*, William N. Eskridge, et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1660 (2023) (surveying disputes among textualists about the proper use of "context").

[182] *See, e.g.*, Iancu v. Brunetti, 588 U.S. 388, 397 (2019) (holding that the constitutional avoidance canon applies only where a statute is found to be ambiguous); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 590 (2008) (holding that the Court need not apply the sovereign immunity canon because the statute was not ambiguous); South Carolina v. Catawba Indian Tribe, Inc. 476 U.S. 498, 506 (1986) (holding that an ambiguity in a statute must exist before the court resorts to the Indian canon); Hassett v. Welch, 303 U.S. 303, 314 (1938) ("Resort is had to canons of constructions as an aid in ascertaining the intent of the Legislature.... The matter is, we think, involved in sufficient ambiguity to warrant our seeking such aid.").

direction."[183] In Justice Kagan's view, like *Chevron*, these presumptions both rely on identifying a statutory gap or ambiguity and impose post-enactment values on the meaning of a statute.[184] The majority's skepticism of the existence of ambiguity as a trigger for *Chevron* may prompt courts to revisit some of these other presumptions.[185]

Whether and to what extent lower courts embrace the Court's view of statutory ambiguity is yet to be seen. The Court's skepticism of the existence of ambiguity, if taken at face value by the lower courts, may have implications for how courts approach statutory interpretation in general and which tools of statutory construction are considered applicable in particular. For instance, as described above, substantive canons are triggered only by ambiguity.[186] Substantive canons are judicial presumptions that impose certain substantive values on the outcome of a case.[187] Unlike semantic canons, substantive canons are not derived from general assumptions about how ordinary speakers use English or how Congress uses statutory terms.[188] For instance, the federalism canons serve to preserve the federal-state balance, requiring Congress to make a clear statement before intruding on state authority.[189] As a result, substantive canons are viewed by certain judges with some trepidation because they impose judicial values that may not be represented in the text of the statute.[190]

Moreover, the application of *Skidmore* and other deference doctrines such as *Auer* deference, which are discussed in more detail below, may also be affected by the Court's skepticism of ambiguity.[191] *Skidmore*, like some canons of construction, has often been applied where a court is unable, after using the tools of statutory construction, to resolve a question of statutory

[183] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2297 n.1 (2024) (Kagan, J., dissenting) (quoting Boechler v. Commissioner, 596 U.S. 199, 203 (2022)) (citing to the presumption against extraterritoriality, the presumption against retroactivity, the presumption against implied repeal, and the "(so far unnamed) presumption against treating a procedural requirement as 'jurisdictional'"); *see also* Abbe R. Gluck, *Overruling Chevron Without a Coherent Theory of Statutory Interpretation and the Court-Congress Relationship*, 62 HARV. J. ON LEG. 20 (2024) (arguing that *Loper* calls into question many tools of statutory construction that rely on ambiguity as a trigger and a presumption about congressional intent).

[184] *Loper*, 144 S. Ct. at 2297.

[185] One potential way courts could respond is along the lines suggested by then-Judge Kavanaugh. Kavanaugh, *supra* note 4, at 2144. Prior to joining the Court, then-Judge Kavanaugh wrote that, rather than determining whether a statute is clear or ambiguous, a court should identify the "best reading" of a statute. *Id.* Once the best reading has been identified, the court "can apply—openly and honestly—any substantive canons (such as plain statement rules of the absurdity doctrine) that may justify departure from the text." *Id.*

[186] *See id.*

[187] *See* Barczewski & Brannon, *supra* note 153 (discussing clear statement rules and substantive canons of construction).

[188] CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023).

[189] *Id.* at 57.

[190] Biden v. Nebraska, 600 U.S. 477, 507–08 (2023) (Barrett, J. concurring) (discussing reactions to substantive canons); Barczewski & Brannon, *supra* note 153 (discussing the reaction some textualist judges and scholars have to substantive canons); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (explaining that substantive canons "pose[] a significant problem" for textualists); Robert A. Katzmann, JUDGING STATUTES 52 (2014) ("[W]iping out legislative history, in the face of empirical evidence that Congress views it as essential in understanding its meaning, leaves us largely with a canon-based interpretive regime that may not only fail to reflect the reality of the legislative process, but may also undermine the constitutional understanding that Congress's statutemaking should be respected as a democratic principle."); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 870 (1992) (arguing legislative history is more accessible than are the canons to give notice of statutory meaning).

[191] *See infra*, "*Auer* (*Kisor*) Deference."

meaning.[192] The same goes for *Auer* deference.[193] Like *Chevron*, *Auer* deference applies only where a court first identifies an ambiguity.[194] Thus, if it is not possible for ambiguity to exist after applying the traditional tools, *Skidmore* and *Auer* deference would never come into play. Whether these doctrines and tools of statutory construction will play a significant role or even persist in future cases is unclear.

It is possible to read the *Loper* majority's view more modestly. The Supreme Court stressed that courts should "*use every tool* at their disposal to determine the best reading of the statute."[195] Tools such as substantive canons, *Auer*, and *Skidmore* can help resolve statutory ambiguities and at least superficially appear to fit within the majority's view that questions about the meaning of statutes should be resolved through legal means.[196] Under this view, the Court was simply reiterating that questions of the meaning of law are legal questions to be resolved by *any* means peculiar to courts.[197] This more modest view stands in some tension with the Court's description of a statute as having a "single best" meaning "fixed at the time of enactment."[198]

Skidmore Weight

The Supreme Court cited *Skidmore* several times in the *Loper* decision.[199] The Court's frequent invocation of *Skidmore* appears to endorse courts' consideration of agency practice as potential evidence of the best meaning of a statute.[200]

Prior to *Loper*, *Chevron* deference applied only to an interpretation that had been issued by an agency that possessed statutorily delegated authority to regulate with the force of law and used that delegated authority to announce its interpretation.[201] Interpretations advanced in non-legally binding forms—such as guidance documents, policy statements, or interpretive rules—were not eligible for *Chevron* deference.[202] In the 2001 case *United States v. Mead*, the Supreme Court held

[192] Hickman & Krueger, *supra* note 62, at 1254–55 (2007) (noting that courts typically find statutes to be ambiguous or less than clear before turning to *Skidmore*). The Court in *Loper* cited favorably to *Skidmore* as a potential tool to resolve statutory ambiguity but did not address under what circumstances a court should resort to *Skidmore*. Given its statements about ambiguity, it is not clear how much of a rule *Skidmore* will play in future cases. Some lower court cases decided after *Loper* appear to embrace the view that *Skidmore* applies only if the court cannot determine the meaning of statute by other means. *See infra*, "Post-Loper Applications of Skidmore."

[193] *See* Kisor v. Wilkie, 588 U.S. 558, 573 ("[T]he possibility of deference can arise only if a regulation is genuinely ambiguous.").

[194] *Id.*

[195] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

[196] *Id.* at 2266–68. At least one commentator has taken a similar view of the Court's statements in *Loper*. *See* Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4908863. Some scholars have classified deference doctrines as canons of statutory construction rather than binding precedent. Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: an Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1765 (2010).

[197] *See Loper*, 144 S. Ct. at 2266–68.

[198] *Id.* at 2266.

[199] *Id.* at 2259, 2262, 2265, 2267.

[200] *See id.* at 2267 (holding agency "expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'" (quoting Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944))).

[201] United States v. Mead Corp., 533 U.S. 218, 234 (2001).

[202] *Id.*

that even where an agency interpretation, because of its lack of the force of law, was ineligible for *Chevron*, it may be eligible to be evaluated pursuant to *Skidmore*.[203]

Chevron and subsequent cases refining its application, such as *Mead*, accordingly created a two-tiered standard of review for agency interpretations.[204] Agency interpretations that carried the force of law were eligible for evaluation under *Chevron*, while every other interpretation by an agency was potentially eligible for treatment pursuant to *Skidmore*.[205] By overruling *Chevron*, *Loper* collapsed this two-tiered system into a single standard of review, with the option for courts to evaluate an agency's interpretation pursuant to *Skidmore* where appropriate.[206] As a result, any agency interpretation is now potentially eligible to be evaluated under *Skidmore*, although, given the Court's statements regarding ambiguity, it is not clear how much of a role *Skidmore* will play in the future.[207]

Skidmore is considered to be less deferential than *Chevron* is.[208] Just how deferential *Skidmore* is, however, has been the subject of some debate.[209] The Court in *Mead*, for example, described *Skidmore* as providing "some deference"[210] to agency interpretations, though not "the same deference as [interpretations] that derive from the exercise of delegated lawmaking powers."[211] At bottom, unlike *Chevron*, *Skidmore* is understood to permit—but not require—a court to adopt an agency's interpretation.[212] *Skidmore* provided a framework through which a court might give special consideration to an agency's interpretation.[213]

It is still not entirely clear whether application of *Skidmore* post-*Loper* will resemble the courts' application of *Skidmore* during the time of *Chevron*. Only a relatively small number of cases have addressed *Skidmore* post-*Loper*. Moreover, prior to *Loper*, *Skidmore* typically applied only to agency interpretations that did not carry the force of law. In practice, this scope meant that most agency interpretations evaluated pursuant to *Skidmore* were not promulgated through notice and comment rulemaking and as a result may have lacked the thorough explanations that accompany

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[203] *Id.*

[204] *Id.*; Thomas W. Merrill & Kristen E. Hickman, Chevron's *Domain*, 89 GEORGETOWN L.J. 833, 863 (2001) (discussing the continued existence of *Skidmore* as a default deference doctrine when *Chevron* did not apply); Peter L. Strauss, *"Deference" is too Confusing—Let's Call them "*Chevron *Space" and "*Skidmore *Weight*,*"* 112 COLUM. L. REV. 1143, 1146 (2012) (identifying the different circumstances in which *Chevron* and *Skidmore* applied).

[205] *See Mead*, 533 U.S. at 234; Christensen v. Harris County, 529 U.S. 576, 586–88 (2000).

[206] *See Loper*, 144 S. Ct. at 2267.

[207] *See id. See also supra*, "Statutory Ambiguity." At least one scholar has argued that *Loper*, by doing away with *Mead*'s focus on agency procedures as a threshold to being eligible to be evaluated under the *Chevron* framework, may open the door to courts paying "due respect" to "a type of specialized lawyerly expertise that comes with extensive executive branch experience, such that agency legal briefs, ... can still warrant special respect in court." Adam Crews, *Navigating the New* Loper Bright *Regime*, 34 WIDENER COMMONWEALTH L. REV. 41, 64–65 (2024).

[208] *Mead*, 533 U.S. at 234–35; Merrill, *supra* note 204, at 860–63. *But see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008) (finding between 1983 and 2005 agencies won 76.2% of cases when the Supreme Court applied *Chevron* and 73.5% when the Court applied *Skidmore*).

[209] Hickman & Krueger, *supra* note 62, at 1251 (noting that some have argued that *Skidmore* requires nothing more than "independent judgment," while others have argued that *Skidmore* is "a type of deference that varies in extent from case to case on a sliding scale").

[210] *Mead*, 533 U.S. at 227.

[211] Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 157 (1991).

[212] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024) ("Such expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'" (quoting Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944))).

[213] Strauss, *supra* note 204, at 1145 ("'*Skidmore* weight' addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority.")

agency actions promulgated through notice and comment. By making all agency interpretations potentially eligible for treatment under *Skidmore*, an agency's chance of prevailing in court on its preferred statutory interpretation may increase compared to win rates under *Skidmore* prior to *Loper*. This could be true because some number of interpretations promulgated through notice and comment rulemaking will likely include more thorough explanations of agencies' positions.[214] Nonetheless, empirical analyses of *Skidmore*'s effect on the outcome of cases and how courts applied it prior to *Loper* may provide clues as to what the application of *Skidmore* may look like in the years to come.

Analyses of *Skidmore* Pre-*Loper*

The way courts applied *Skidmore* before *Loper* may help illuminate how courts might approach *Skidmore* going forward. As an initial matter, *Skidmore* has received far less attention from the courts in the past decades than did *Chevron* and may need additional development by the courts to refine its application. Nonetheless, scholars studying judicial approaches to *Skidmore* were able to identify certain trends in its application. A 2007 study of cases applying *Skidmore* prior to the *Loper* decision identified significant variability in the ways in which courts applied *Skidmore*.[215] The study identified two conceptions of *Skidmore*.[216] In one conception—dubbed the "independent judgment conception"—the *Skidmore* standard evaluates an interpretation as persuasive on its merits or its rightness.[217] This view tends to discount *Skidmore*'s contextual factors, such as the long-standing nature of the interpretation.[218] "In effect, [under this view] *Skidmore* directs courts to treat the agency's view just as it would the view of any litigant."[219]

The Court's decision in *Christensen v. Harris County* exemplifies the independent judgment conception.[220] In that case, the Court was called on to evaluate a Department of Labor (DOL) interpretation of the Fair Labor Standards Act.[221] Although the Court found the statute silent on the question at hand, it began with an independent evaluation of the statute's text to find the "better" reading of the statute.[222] The Court's conclusion ran counter to the agency's

[214] *See* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, DUKE LAW JOURNAL ONLINE 10–11 (forthcoming 2025) (predicting that agency win rates under *Skidmore* in challenges to their rulemakings may approach the win rates agencies enjoyed under *Chevron*).

[215] Hickman & Krueger, *supra* note 62, at 1251–52. Additionally, empirical analyses prior to *Loper* confirm that *Skidmore* results in less deference (measured by agency win rates) than *Chevron* did. In a different study of more than 1,000 published decisions of the federal courts of appeals decided between 2003 and 2013, the authors found that agency interpretations prevailed 77.4% of the time when a court applied *Chevron* but only 56% of the time when a court applied *Skidmore*. Barnett & Walker, *supra* note 108, at 5–6. As with *Chevron*, agencies prevailed at different rates under *Skidmore* in different circuits. For example, agencies only won 25% of the time in the Tenth Circuit, 50% of the time in the Sixth and Ninth Circuits, and 100% of the time in D.C. and Eighth Circuits. *Id.* at 44 n.228. The study authors note that their findings on win rates in agency rule challenges under *Skidmore* are in line with earlier studies of the application of *Skidmore*. *Id.* at 31, n.178. Earlier studies found affirmance rates of 55.1% in 1965, 60.6% in 1975, and 60.4% in 2001 to 2005. *Id.* (citing Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 84 (2011)). It should be noted, however, that the sample size for cases only applying *Skidmore* is small and accordingly may skew to the extremes in certain instances. *Id.* at 44 n.228.

[216] Hickman & Krueger, *supra* note 62, at 1252–55.

[217] *Id.* at 1252.

[218] *Id.* 1253.

[219] *Id.*

[220] *Id.*; Christensen v. Harris County, 529 U.S. 576, 583 (2000).

[221] *Christensen*, 529 at 578–79.

[222] *Id.* at 582–86.

interpretation.[223] Only then did the Court turn to *Skidmore*.[224] In applying *Skidmore*, the Court ignored *Skidmore*'s contextual factors, finding the agency's interpretation "unpersuasive" compared with its own interpretation.[225]

There is some question as to whether the independent judgment conception differs from finding that a statute has a clear meaning.[226] Some see the independent judgment conception as amounting to a court finding the statute clear.[227] In these cases, *Skidmore* takes on a subordinate role to other tools of statutory interpretation rather than extending respect.[228] The 2007 study found that the independent judgment conception represented the minority view in the lower courts, with 18.9% of the cases evaluated applying *Skidmore* in this way.[229]

The 2007 study identified a second approach it dubbed the "sliding-scale conception."[230] Under this view, application of *Skidmore* yields varying degrees of deference (or weight) to an agency's interpretation based on a court's evaluation of *Skidmore*'s contextual factors.[231] "The sliding-scale model … counsels special consideration of agency interpretations that courts do not necessarily afford to the views of other litigants."[232] Describing this approach, the Supreme Court explained that *Skidmore* "has produced a spectrum of judicial responses, from great respect on one end to near indifference at the other."[233] What differentiates it from the independent judgment conception is that, although applying the sliding-scale approach may result in a court giving little to no weight to an agency interpretation, the court treats the agency's interpretation as at least potentially deserving of greater respect than that of an ordinary litigant after evaluating *Skidmore*'s contextual factors.[234] The 2007 study found that the sliding-scale conception was by far the most commonly used by the lower courts, accounting for 74.5% of all the uses of *Skidmore* in the study.[235] While it was the most commonly applied approach to *Skidmore* in the 2007 study, the study authors noted that the Supreme Court had "not offered firm rules" for the application of *Skidmore* or provided an exhaustive list of factors for courts to consider in applying *Skidmore*.[236]

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[223] *Id.*

[224] *Id.* at 587.

[225] *Id.*

[226] Hickman & Krueger, *supra* note 62, at 1254 (discussing differing views of *Skidmore*).

[227] *Id.*

[228] *Id.*

[229] *Id.* at 1271. The independent judgment conception may have had greater purchase at the Supreme Court. *See, e.g.*, *Christensen*, 529 U.S. at 587; Yates v. Hendon, 541 U.S. 1, 17–18 (2004) (finding agency guidance document "accords" with the Court's interpretation of the statute based on other methods); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 448–50 (2003) (finding the agency's interpretation the same as the Court's only after engaging in its own statutory interpretation). As noted above, the Supreme Court has, in general, been far less deferential to agency interpretations than the lower courts have. *See* William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008).

[230] Hickman & Krueger, *supra* note 62, at 1255.

[231] *Id.* at 1255–56.

[232] *Id.* at 1256.

[233] United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citing Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389–390 (1984)).

[234] Hickman & Krueger, *supra* note 62, at 1255.

[235] *Id.* at 1271.

[236] *Id.* at 1257. The study authors identified a number of different factors that courts used in their *Skidmore* analyses: thoroughness, formality, validity, consistency, agency expertise, longevity, and contemporaneity. *Id.* at 1281–91. As (continued...)

Post-*Loper* Applications of *Skidmore*

As of December 2024, there are only a handful of cases addressing the application of *Skidmore* since the *Loper* decision.[237] In an early post-*Loper* example of the independent judgment approach, the U.S. Court of Appeals for the Fifth Circuit in *Restaurant Law Center v. Department of Labor* held that although courts should carefully consider long-standing and contemporaneous interpretations, those considerations never have "the power to control."[238] Rather, the court found that the statute clearly resolved the case and that *Skidmore*'s contextual factors could not outweigh the clear text of the statute.[239] The court's approach is consistent with the application of *Skidmore* prior to *Loper*.[240] Nevertheless, the number of cases applying the principles set out in *Loper* is still quite small. It may take some time before trends in the application of *Skidmore* can be identified.

Conversely, a handful of cases decided after July 2024 appear to have approached the application of *Skidmore* akin to the sliding-scale approach discussed above. In these cases, the courts, although not always ruling in favor of the agencies, engaged with the *Skidmore* indicia of persuasiveness as a way to measure the weight the agencies' interpretations should be given. In one case, the federal district court for the Northern District of Ohio found that a DOL regulation had the "power to persuade" based largely on its thoroughness and validity.[241] The court found the regulation was the product of "thorough consideration" during the notice and comment process and that the "reasoning behind the regulation is valid."[242] In another case from the U.S. Court of Appeals for the Eleventh Circuit, the court found another DOL interpretation "persuasive" because of its consistency over time.[243] DOL, the court found, had maintained the same interpretation of the Fair Labor Standards Act for 80 years.[244] Neither case, however, addressed whether a court must find the statute ambiguous before turning to *Skidmore*'s contextual factors.

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noted above, prior to *Chevron*, courts reviewing agency interpretations would often give weight to long-standing and contemporaneous interpretations. *See* THE CHEVRON DOCTRINE, *supra* note 41, at 134–37. Prior to *Chevron*, courts also sometimes looked to whether Congress had reenacted the relevant statute after the agency had adopted an interpretation of the statute. *See, e.g.*, United States v. Cerecedo Hermanos, 209 U.S. 337, 339 (1908) ("[T]he re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction."); *see also* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, DUKE LAW JOURNAL ONLINE at 6 (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144 (discussing *Skidmore* factors).

[237] In an evaluation of the first twenty cases citing *Loper*, one media source found that only one cited *Skidmore* and only to hold that *Skidmore* did not apply. Robert LaFolla, *Courts Show Little Interest in* Skidmore *as a* Chevron *Alternative*, BLOOMBERG LAW (Jul. 29, 2024), https://news.bloomberglaw.com/daily-labor-report/courts-show-little-interest-in-skidmore-as-a-chevron-alternative.

[238] 120 F.4th 163, 174 (5th Cir. 2024) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[239] *Id.*

[240] *See* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, DUKE LAW JOURNAL ONLINE at 8 (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4941144 (noting that in addition to the Fifth Circuit, the U.S. Courts of Appeals for the Second, Third, Eighth, Ninth, Federal, and D.C. Circuits have all held that *Skidmore* applies when interpreting an ambiguous statute).

[241] Harding v. Steak N Shake, Inc. No. 1:21-cv-1212, 2024 WL 3833341, at *8 (N.D. Ohio Aug. 15, 2024).

[242] *Id.*

[243] Perez v. Owl, Inc., 110 F.4th 1296, 1307 (11th Cir. 2024).

[244] *Id.* Other notable cases where *Skidmore* was discussed include Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS, 107 F.4th 1064, 1085 (9th Cir. 2024) (Johnstone, J., concurring) (arguing that the Department of Homeland Security's interpretation of the Vacancies Reform Act is persuasive because it was "thorough, reasoned, and consistent"); In re MCP No. 185, No. 24-7000, 2024 WL 3650468, at *6 (6th Cir. Aug. 1, 2024) (Sutton, C.J., concurring) (arguing that the Federal Communications Commission's interpretation of "common carrier" to include (continued...)

The U.S. Court of Appeals for the Ninth Circuit has also begun applying *Skidmore*. In an appeal decided in September 2024, a panel of the Ninth Circuit applied *Skidmore* in what appears to be a highly deferential way.[245] The appeal arose from a decision of the Bureau of Immigration Appeals (BIA) interpreting the meaning of *crimes involving moral turpitude* found in the Immigration and Nationality Act.[246] The Ninth Circuit concluded that BIA's interpretation was "entitled to" *Skidmore* deference.[247] The court concluded that BIA's interpretation was entitled to "deference" because it was "thorough and well-reasoned," "consistent with judicial precedent," and "consistent with the generic definition of theft."[248] The court did not determine whether BIA's interpretation was the best interpretation as the Supreme Court directed in *Loper*, nor did the court engage in its own statutory analysis.[249] The Ninth Circuit's decision was announced in a reported decision, which will have binding effect on future Ninth Circuit panels and the district courts within the geographic bounds of the Ninth Circuit. It is not clear whether the Ninth Circuit's more deferential approach to *Skidmore* will be applied in future cases. More broadly, it will take some time for any trends to emerge in how the courts are (or are not) applying *Skidmore*.

Delegations from Congress

Following *Loper*, the judiciary will also confront questions about whether and to what extent Congress has delegated authority to an agency. If the primary question courts faced applying the *Chevron* framework was whether the statute was ambiguous, one of the most important questions courts will face under *Loper* is whether Congress delegated authority to the agency to resolve the question at issue in the case. As the Supreme Court held in *Loper*, "[i]n a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion."[250]

As discussed previously, the Court in *Loper* laid out a handful of examples to illustrate where Congress had delegated certain powers to an agency. In one set of examples, the Court pointed to statutes that expressly delegated to agencies the power to define statutory terms.[251] In another set of examples, the Court cited statutes that delegated discretionary regulatory authority to agencies.[252] In a third category, the Court explained that Congress sometimes delegates to agencies the authority to "fill up the details" of statutory schemes.[253] The Court appears to have treated these categories as illustrative, not intending to furnish an exhaustive list of ways in which Congress might delegate authority to an agency.[254]

The Court left open whether delegations must be express or whether courts could recognize implied delegations. At least one commentator has argued that the best understanding of the Court's opinion is that although the Court did away with *Chevron*'s general presumption that ambiguities are delegations of interpretive authority, it did not state that all delegations must be

internet service providers under the Telecommunications Act was not entitled to respect because its interpretation was inconsistent across different presidential Administrations).

[245] Lopez v. Garland, 116 F.4th 1032 (9th Cir. 2024).

[246] *Id.* at 1037 (citing 8 U.S.C. § 1227(a)(2)(A)(ii)).

[247] *Id.* at 1041.

[248] *Id.* at 1040–41.

[249] *Id.*

[250] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

[251] *Id.* at 2263 n.5.

[252] *Id.* at 2263 n.6.

[253] *Id.* at 2263 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

[254] *See id.*

express.[255] For example, this commentator argued, delegations to "fill up the details" "might be discerned not from express delegation, but simply from Congress leaving essential details incompletely specified."[256] To read *Loper* to require express delegations would, this argument goes, cut against a background principle of statutory interpretation that holds that "what a legislature may do explicitly, it may do implicitly."[257] Whether and to what extent courts will recognize implicit delegations is yet to be seen. Post-*Loper* decision and as of the time of this writing, few courts have addressed the delegation issue in any depth.[258]

More fundamentally, in light of the Court's discussion of congressional delegations, some have questioned whether the *Loper* decision changed much at all. One law professor has argued that the Court's acknowledgement that courts must continue to respect statutory delegations from Congress has "recreated" *Chevron* "under a different label: '*Loper Bright* delegation.'"[259] Others have argued that something like *Chevron* deference may be inevitable.[260] One reason that *Chevron* likely took on such an important role in the lower courts is the differential capacity of the Supreme Court and the lower federal courts to engage in independent review of statutory interpretations advanced by agencies. While the Supreme Court hears roughly 75 cases per year—a handful of which involve agency interpretations of law—each lower court might handle thousands of cases per year.[261] Some contended that *Chevron* saved lower courts time by permitting them to engage in meaningful statutory review without having to start from scratch.[262] Removing this tool, some argue, will add to the already heavy burden of the federal courts.[263] That additional burden may create an incentive for the lower courts to apply *Loper* in ways that

[255] Adrian Vermeule, *Implied Delegations After Loper*, YALE J. ON REG.: NOTICE AND COMMENT BLOG (Jul. 9, 2024), https://www.yalejreg.com/nc/implied-delegations-after-loper-by-adrian-vermeule/.

[256] *Id.*

[257] *Id.*

[258] A decision by the U.S. Court of Appeals for the Fifth Circuit evaluated a claim by the Department of Health and Human Services (HHS) that the No Surprises Act delegated authority to the agency to prescribe a standard of review for a system of arbitration created by the statute, but the court rejected the government's position. Tex. Med. Ass'n, v. HHS, 110 F.4th 762, 775 (5th Cir. 2024). The court held that Congress explicitly left how to weigh certain statutory factors to the individual arbitrators—not to HHS. *Id.* HHS, accordingly, lacked the authority to issue a regulation creating a standard of review directing arbitrators to assign certain weights to statutory factors. *Id.* at 776.

[259] Adrian Vermeule, *Chevron by Any Other Name*, THE NEW DIGEST (Jun. 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name; Adrian Vermeule, *The Deference Dilemma*, 31 GEO. MASON L. REV. 619, 630 (2024) (arguing prior to the *Loper* decision that the Court might overrule *Chevron* and replace it with some kind of evaluation of delegation on a case-by-case basis). For Professor Vermeule, *Chevron* step two cases can just be reconceptualized as *Loper* delegation cases without losing much in translation. "That is, cases that used to be labeled as 'deference to reasonable agency interpretations of ambiguous statutes' will now be called 'independent judicial interpretation that identifies a single best answer, an answer that consists of a delegation of discretionary authority to agencies within a given range.'" Adrian Vermeule, *Chevron by Any Other Name*, THE NEW DIGEST (Jun. 28, 2024) https://thenewdigest.substack.com/p/chevron-by-any-other-name.

[260] *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron's *Inevitability*, 85 GEO. WASH. L. REV. 1392, 1458 (2017) (arguing at the time that something like *Loper* delegation might take hold were *Chevron* overruled).

[261] U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2022), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (last visited Dec. 19, 2024).

[262] *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 71 (2017); Thomas W. Merrill, *Response: Chevron's Ghost Rides Again*, 103 B.U. L. Rev. 1717, 1738 (2023); Gary Lawson, *The Ghosts of Chevron Present and Future*, 103 B.U. L. REV. 1647, 1709 (2023).

[263] Brief of Professor Thomas W. Merrill as Amicus Curiae in Support of Neither Party at 27, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-541).

recreate something like *Chevron*, such as identifying statutory delegations or finding interpretations that are persuasive under *Skidmore* (discussed above).[264]

Policy Discretion, Mixed Questions of Law and Fact, and Arbitrary and Capricious Review

Even when courts determine that the best reading of a statute is that Congress delegated the relevant question to the agency to resolve, courts will still play a role. As the Supreme Court in *Loper* explained, courts must still ensure that the agency has stayed within "the boundaries of the delegated authority and … the agency has engaged in 'reasoned decisionmaking' within those boundaries."[265] The Court's reference to "reasoned decisionmaking" and subsequent citation to *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* appears to indicate that the Court expects that where a court determines that the best reading of a statute is that Congress delegated the issue to the agency, the court should evaluate the reasonableness of the agency's action pursuant to the APA's arbitrary and capricious review standard.[266]

Section 706 of the APA defines the scope of judicial review of final agency actions.[267] In addition to providing the standard of review for questions of law, which formed the basis of the Court's decision in *Loper*, the APA also provides that a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions" that violate any of the six standards in Section 706.[268] One of the mostly commonly invoked standards is the arbitrary and capricious standard, which requires agencies when exercising discretionary policymaking authority to do so in a reasonable way.[269]

The *State Farm* decision is credited with defining the arbitrary and capricious standard of review in Section 706 of the APA—sometimes referred to as "hard look" review.[270] In now often-cited language, the Court held that, to survive judicial scrutiny under the arbitrary and capricious standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[271] Elaborating on this standard, the Court explained that, among other things, "an agency rule would be arbitrary and capricious" if the agency's explanation of its action "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[272] The arbitrary

[264] *See, e.g.*, Lisa Schultz Bressman, *Lower Courts After Loper Bright*, 31 GEO MASON L. REV. 500, 504–05 (2024) (arguing that if *Chevron* is overturned, lower courts may resort to other doctrines that approximate the *Chevron* framework).

[265] *Id.* at 2265 (quoting Henry Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983); Michigan v. EPA, 576 U.S. 743, 750 (2015); Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).

[266] *See id.*

[267] *See* 5 U.S.C. § 706.

[268] *Id.* § 706(2)(A)-(F).

[269] *Id.* § 706(2)(A); *State Farm*, 463 U.S. at 43.

[270] *See, e.g.*, Kristin E. Hickman & Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 11.3 (7th ed. 2024) (referring to the *State Farm* standard as "hard look review"); Long Island Head Start Child Dev. Servs. v. NLRB, 460 F.3d 254, 257 (2d Cir. 2006) (referring to the standard set out in *State Farm* as the "'hard look' standard"); N.W. Env't Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687 n.15 (9th Cir. 2007) (referring to the arbitrary and capricious standard as the "hard look" standard); Panhandle E. Pipe Line Co. v. FERC, 890 F.2d 435, 439 (D.C. Cir. 1989) (same).

[271] *State Farm*, 463 U.S. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

[272] *Id.*

and capricious standard is deferential to agency policy choices.[273] The Court in *State Farm* held that a court may not use the arbitrary and capricious standard to substitute its judgment for that of the agency's.[274] So long as the agency's decision is a reasonable one, even if the court would prefer a different policy, it must be upheld.[275]

The *Loper* decision did not disturb the arbitrary and capricious review standard announced in *State Farm*.[276] *Chevron*, and by extension *Loper*, applied only to agency interpretations of law, not to exercises of an agency's discretionary policymaking authority.[277] That policymaking authority has traditionally been evaluated pursuant to the arbitrary and capricious review standard—it is not a question of statutory interpretation.[278] As the Court in *State Farm* indicated, the arbitrary and capricious standard is generally (although not always) applicable when an agency applies its expertise to evaluate facts and form a policy from that evaluation.[279] A classic example of an agency action subject to arbitrary and capricious review is the Environmental Protection Agency's (EPA's) regulation of ambient air quality that "in the judgment of the Administrator … [is] requisite to protect the public health."[280]

As the Court recognized in *Loper*, determining whether an agency acting pursuant to a statutory delegation of the type noted above acted unlawfully entails two inquiries—whether the agency acted within the scope of the delegation and whether the agency's decision is reasonable (i.e., is not arbitrary and capricious).[281] Although the first inquiry focuses on statutory meaning, and thus is subject to *de novo* review, the determination of statutory meaning does not dictate the agency's policy outcome—it only serves to set the parameters of the agency's decision.[282] The agency's ultimate decision would appear to be subject only to a reasonableness analysis.[283]

Along these lines, some legal scholars have argued that courts will continue their tradition of respecting agencies' assessments of data, collection of facts, and choices among competing policy options. In other words, these scholars argue, courts are likely to treat questions of statutory interpretation that "turn on facts about the world, non-legal, technical expertise, and judgments about policy priorities, and likely outcomes" "as questions of policy judgment subject to standard

[273] *Id.* ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."). *But see* Ohio v. EPA, 603 U.S. 279, 293–94 (2024) (finding EPA's Good Neighbor Plan likely to be arbitrary and capricious for not responding in a reasonable way to comments submitted during the notice and comment period).

[274] *State Farm*, 463 U.S. at 43.

[275] *Id.*; FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) ("A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."). Prior to *Loper*, *Chevron*'s step two reasonableness analysis was often associated with the APA's arbitrary and capricious standard. *See* Judulang v. Holder 565 U.S. 42, 52 n.7 (2011) (equating *Chevron*'s second step with the arbitrary and capricious standard).

[276] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (citing favorably to cases applying the arbitrary and capricious standard).

[277] *See, e.g.*, *Judulang*, 565 U.S. at 52 n.7.

[278] *See* Hickman & Pierce, *supra* note 270, at § 11.7 (discussing the differences and overlap between *Chevron* and *State Farm*).

[279] *State Farm*, 463 U.S. at 43.

[280] 42 U.S.C. § 7409(b); *see, e.g.*, Mississippi v. EPA, 744 F.3d 1344, 1357 (2013) (applying the arbitrary and capricious standard to a challenge to EPA's determination to lower the National Ambient Air Quality Standard for ozone).

[281] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

[282] *See id.*

[283] *See id.*

arbitrary-and-capricious review."[284] The upshot for agency actions that a court determines are subject to the arbitrary and capricious review standard is that those actions will be reviewed under a standard often understood to be similar to deference under *Chevron*.[285]

Nonetheless, the distinction between agency decisions that are "factbound" or mixed questions of law and fact and decisions regarding pure statutory interpretation is murky.[286] The Court has not set out a bright-line rule for how to differentiate between the two.[287] The *Chevron* case itself provides a useful example to illustrate the difficulty that courts may have in determining whether a case presents a question of law application or a "naked question of law."[288] The *Chevron* case concerned a provision of the Clean Air Act that authorizes EPA to regulate "stationary sources" of pollution.[289] The Court treated the case as one of statutory interpretation—about what *stationary source* means—ultimately creating the *Chevron* two-step framework to resolve that question.[290] Some have argued that *Chevron* could have been decided on grounds similar to those in *Hearst Publications*, where the Court treated the meaning of *employee* as a policy determination informed by the agency's application of its expertise to its findings of fact.[291] The regulation challenged in *Chevron* does not just provide an interpretation of *stationary sources* but engages with various factual scenarios regarding ownership of different facilities, geographical distribution of facilities, and third-party industrial classifications of sources.[292] In many ways, this argument goes, EPA's regulation at issue in *Chevron* is an example of the agency exercising authority delegated to it by Congress through the application of its factfinding abilities and expertise.[293]

There are important differences between *Hearst Publications* and *Chevron* that may partly explain the different approaches the Court took in each case. *Hearst Publications*, like *Gray*, was

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[284] Jeffery A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1086–87 (2016).

[285] *See* Judulang v. Holder 565 U.S. 42, 52 n.7 (2011) (equating *Chevron*'s second step with the arbitrary and capricious standard).

[286] *See, e.g.*, Bressman, *supra* note 134, at 8–9; Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 23 (1985) (observing generally that it is often difficult to identify questions of law and mixed questions of law and fact); Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73, 73–74 (1950) (discussing the difficulty of clearly identifying the law/fact distinction); Thompson v. Keohane, 516 U.S. 99, 110–11 (1995) (calling the fact/law distinction "slippery"). At times, courts have engaged in both statutory interpretation and analysis and arbitrary and capricious review. For example, in *Michigan v. EPA*, the Supreme Court evaluated EPA's determination that it need not consider costs when deciding to regulate certain air pollutants under both the *Chevron* framework and the arbitrary and capricious standard. 576 U.S. 743, 750–51. The provision of the Clean Air Act at issue in *Michigan* empowered EPA to regulate when it found it to be "appropriate and necessary." *Id.* at 748. The Court held that "EPA strayed far beyond" the bounds of reasonableness under *Chevron* step two and that, under its arbitrary and capricious review, "it was unreasonable for EPA to read [the Clean Air Act] to mean that cost is irrelevant to the initial decision to regulate power plants." *Id.* at 751, 759. *See also, e.g.*, Arent v. Shalala, 70 F.3d 610, 614–15 (applying arbitrary and capricious standard to review Food and Drug Administration determination regarding regulated entities' compliance with a federal statute); *id.* at 619 (Wald, J., concurring) (arguing for the application of *Chevron*).

[287] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 980–81 (2017) (noting that the Court has sent "mixed signals" on how to review mixed questions of law and fact).

[288] Packard Motor Car Co. v. NLRB, 330 U.S. 485, 493 (1947) ("We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute."); *see* Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[289] *Chevron*, 467 U.S. at 840.

[290] *Id.* at 843.

[291] *See* John F. Duffy, Chevron, *De Novo*: *Delegation, Not Deference*, 31 GEO. MASON L. REV. 541, 548–49 (2024).

[292] *Id.* (quoting 40 C.F.R. § 51.18(j)(1)(i)–(ii) (1983)).

[293] *Id.* ("[I]t is hard to imagine all these complex distinctions and their interrelationships can somehow be teased out of the two-word statutory phrase 'stationary sources.'").

an appeal from an agency adjudication. That is, it was an appeal from a decision the agency made applying the relevant statute to a particular party before it. *Chevron*, however, was a challenge to a rulemaking. EPA's regulation in *Chevron* was generally applicable to any entity that fell within the sweep of the regulation. It was not directed at determining whether a particular facility was a "stationary source." Agency adjudications may lend themselves more easily to being categorized as presenting mixed questions of law and fact, because, by their nature, agency adjudications apply law to the particular facts presented by the party or parties before the agency. Regulations, although often based on factual determinations, are not typically directed at particular sets of facts connected to particular parties.[294] Nonetheless, the Court in *Loper* did not make this distinction and appears to have endorsed the approach the Court took in *Hearst Publications* and *Gray* as useful in informing the proper standard of review for mixed questions of law and fact regardless of the form of agency action.[295]

Because of the similarity between *Chevron* step two and the arbitrary and capricious standard, the Court had little incentive to explicitly define which issues should be reviewed under the *Chevron* framework and which should be evaluated under the arbitrary and capricious standard.[296] Now that questions of law will be reviewed *de novo*, while exercises of policy discretion and mixed questions of law and fact will continue to be evaluated under the deferential arbitrary and capricious review standard, the Court may find reason to provide additional guidance on this issue.[297] Unless and until the Court refines its approach to differentiating these two spheres, it may be hard to predict whether any specific agency action will be reviewed under the *de novo* standard of review or the more deferential arbitrary and capricious standard.

Relationship with other Doctrines of Judicial Review

Major Questions Doctrine

Overruling *Chevron* has raised questions in the legal community over whether the major questions doctrine is still viable. For some, by overruling *Chevron*, the Supreme Court undermined the purpose of the major questions doctrine, while for others, it may still serve an independent purpose regardless of the existence of the *Chevron* framework.

The major questions doctrine requires an agency to point to clear congressional authorization if it seeks to regulate on an issue of great "economic and political significance."[298] The Supreme Court first referred to the major questions doctrine by name in a 2022 decision, but the doctrine has its roots in scattered cases over many years.[299]

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[294] The APA provides for a class of regulations known as regulations of "particular applicability." 5 U.S.C. § 551(4). Although technically considered regulations, regulations of particular applicability in many ways resemble agency "orders" that are the products of agency adjudications. 5 U.S.C. § 551(6), (7). Orders, however, typically have immediate effect, while regulations, particular or otherwise, have "future effect." 5 U.S.C. § 551(4); Yesler Terrace Comty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994).

[295] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).

[296] *See* Judulang v. Holder 565 U.S. 42, 52 n.7 (2011) (equating *Chevron*'s second step with the arbitrary and capricious standard); *see also* Pharm. Research & Mfrs. of Am. v. FTC, 790 F.3d 198, 207–12 (D.C. Cir. 2016) (analyzing a challenge under both *Chevron* and arbitrary and capricious review).

[297] *See* Pojanowski, *supra* note 284, at 1087 (predicting that if *Chevron* were overruled, the distinction between questions of law and questions of policy would be "reestablish[ed]").

[298] West Virginia v. EPA, 597 U.S. 697, 721 (2022).

[299] *See, e.g.*, FDA v. Brown & Williamson, 529 U.S. 120, 159–60; Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); King v. Burwell, 576 U.S. 473, 485–86 (2015); (continued...)

Until recently, the major questions doctrine was closely associated with the *Chevron* framework and was often invoked as a part of the *Chevron* framework.[300] The major questions doctrine rests on a determination by the Court that one of the core assumptions that supported *Chevron* deference—that Congress intended the agency to resolve the statutory ambiguity—was no longer tenable.[301] Where major questions are at stake, the Court has said, "there may be reason to hesitate before concluding that Congress … intended" to delegate resolution of that question to the agency.[302]

Further, while some cases suggested that the major questions doctrine might have been part of the *Chevron* analysis, the Court's approach has not been consistent. Initially, the Court invoked this concern while applying *Chevron*[303] to justify concluding that under the two-part test, the Court should not defer to the agency's construction of the statute.[304] The Court then shifted its approach slightly, holding that the fact that an agency interpretation implicates a major question renders the *Chevron* framework of review inapplicable.[305] In its most recent major questions cases, the Court has invoked the doctrine without resort to *Chevron* at all, suggesting that the more recent version of the doctrine operated as a principle of statutory interpretation independently from the *Chevron* framework.[306] In *Loper*, the Court reiterated that "*Chevron* does not apply if the question at issue is one of 'deep economic and political significance.'"[307]

The Court made this statement in the context of a discussion of the "many refinements" the Court has made to *Chevron* in an attempt to "match *Chevron*'s presumption" regarding implicit legislative delegation "to reality."[308] The Court identified the major questions doctrine among these "many refinements."[309] Given these statements, the majority in *Loper* seemed to understand

Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (per curiam); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 119 (2022) (per curiam).

[300] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 303 (2013) (describing major questions cases as applications of *Chevron*); Massachusetts v. EPA, 549 U.S. 497, 531 (2007) (invoking the major questions doctrine during *Chevron* step one); Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014) (invoking the major questions doctrine during *Chevron* step two).

[301] *See, e.g.*, *West Virginia*, 597 U.S. at 723 ("[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." (quoting *UARG*, 573 U.S. at 324)); King v. Burwell, 576 U.S. 473, 485–86 (2015).

[302] *West Virginia*, 597 U.S. at 768 (Kagan, J., dissenting) (quoting *Brown & Williamson*, 529 U.S. at 159).

[303] *See City of Arlington*, 569 U.S. at 303 (describing major-questions cases as applications of *Chevron*).

[304] *E.g.*, *Massachusetts*, 549 U.S. at 531 (invoking the major questions doctrine during *Chevron* step one); *UARG*, 573 U.S. at 324 (invoking the major questions doctrine during *Chevron* step two).

[305] *See King*, 576 U.S. at 485–86 (holding that *Chevron* was inapplicable and instead invoking the major questions doctrine); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (invoking the major questions doctrine during step zero inquiry).

[306] *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 504 U.S. 758, 764 (2021) (per curiam) (applying the major questions doctrine without mentioning *Chevron*); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 112 (per curiam) (same); *West Virginia*, 597 U.S. at 697 (same); Biden v. Nebraska, 600 U.S. 477, 501 (2023) (same). For a more detailed discussion of the Court's recent major questions cases, *see* CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022); CRS Legal Sidebar LSB10791, *Supreme Court Addresses Major Questions Doctrine and EPA's Regulation of Greenhouse Gas Emissions*, by Kate R. Bowers (2022).

[307] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2269 (2024) (quoting *King*, 576 U.S. at 486).

[308] *Id.* at 2268.

[309] *Id.* at 2269. On this point the Court explained, "We have instead expected Congress to delegate such authority expressly if at all, for extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *Id.* at 2269 (quoting *King*, 576 U.S. at 486; *West Virginia*, 597 U.S. at 723). Prior to *Loper* some commentators argued that both the *Chevron* step zero doctrine and the major questions doctrine serve to align *Chevron* deference more closely with those situations in which Congress has actually delegated to agencies the (continued...)

the major questions doctrine as a response to *Chevron*.[310] With *Chevron* overruled, some have questioned whether the major questions doctrine should be retained. One commentator has argued that now that *Chevron* is gone, there is no longer reason to apply the major questions doctrine to depart from applying ordinary textualist methods of statutory interpretation.[311] The Court's approach to statutory interpretation in *Loper* may support this argument. The major questions doctrine applies where a statute is less than clear,[312] but if courts, following *Loper*, find the single best meaning of a statute, then the major questions doctrine may not come into play, because there is no question what the meaning of the statute is.[313]

The *Loper* opinion also provides reason to believe that the major questions doctrine may be preserved. As already discussed, the opinion recognizes that Congress sometimes delegates to agencies the authority to regulate pursuant to broad terms such as *reasonable* and *appropriate*.[314] The Court explained that in those situations, a court's job is twofold: ensure that the agency has stayed within the bounds of the statutory delegation and come to its decision through "reasoned decisionmaking."[315] It is in fulfilling this first duty where courts might turn to the major questions doctrine. Broad grants of regulatory power subject to statutory limits such as "reasonable" may give rise to questions over how much authority Congress delegated to the agency at the outer margins of the agency's statutory authority. Were an agency to rely on a broad (but not specific) grant of power to regulate something of "vast economic and political significance,"[316] the major questions doctrine might play a role in resolving the case.

For instance, in the 2023 Supreme Court decision in *Biden v. Nebraska*, the Court held that the Department of Education's plan to cancel hundreds of billions of dollars of student loans was a major question and that the agency could not point to clear congressional authorization for such a plan.[317] At issue in that case was a provision of the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act) that authorizes the Secretary of Education to "waive or modify any statutory or regulatory provisions" applicable to certain student loan programs.[318] The

authority to interpret particular statutory provisions. *See, e.g.*, Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 MO. L. REV. 983, 99–94 (2016).

[310] *See Loper*, 144 S. Ct. at 2269. Justice Kagan's dissent in *West Virginia v. EPA* points to the history of the doctrine to make a similar point that the doctrine served only as an offramp from the *Chevron* framework. *West Virginia,* 597 U.S. at 769–70 (Kagan, J., dissenting); *see also*, *Loper*, 144 S. Ct. at 2309 (Kagan, J., dissenting).

[311] Jamie Conrad, *Looks Like We Don't Need the Major Questions Doctrine Anymore*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Jul. 3, 2024), https://www.yalejreg.com/nc/looks-like-we-dont-need-the-major-questions-doctrine-any-more-by-jamie-conrad/. Professor Richard Pierce makes a similar argument, noting that the Court has sufficient tools to police agencies through *de novo* review of questions of law and a possibly new heightened version of arbitrary and capricious review applied in *Ohio v. EPA*. Richard J. Pierce, Jr., *Two Neglected Effects of* Loper Bright, THE REGULATORY REVIEW (Jul. 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/.

[312] *See West Virginia*, 597 U.S. at 732 (requiring "clear" congressional authorization to regulate a major question).

[313] *See Loper*, 144 S. Ct. at 2266.

[314] *Id.* at 2263.

[315] *Id.*

[316] *West Virginia*, 597 U.S. at 716, 719.

[317] 600 U.S. 477, 501 (2023). The Court's major questions analysis came *after* the Court found that "the statutory text alone precludes the Secretary's program." *Id.* at 506 n.9. Nonetheless, the Court explained that its major questions analysis provided an additional ground to support its conclusion. *Id.* That the Court engaged in a major questions analysis after it determined that, upon a *de novo* review of the statute, the text alone did not authorize the loan forgiveness plan may indicate that even where ordinary means of statutory interpretation reveal a best meaning, the major questions doctrine may still play a role.

[318] *Id.* at 494 (quoting 20 U.S.C. § 1098bb(a)(1)). For more information on this case and the HEROES Act in general, (continued...)

Court called the magnitude of the loan cancellation "staggering by any measure" and held that the plan was of the kind of politically and economically significant actions that mark a major question.[319] As such, the Court held, "it is 'highly unlikely that Congress' authorized such a sweeping loan cancellation program 'through such a subtle device as permission to "modify."'"[320] To come to this conclusion, the Court relied, in part, on the Secretary's past uses of the HEROES Act.[321] The Court surveyed the Secretary's past invocations of power to waive or modify student loans and explained that past waivers were "modest and narrow in scope."[322] These modest and narrow uses of the waive or modify authority, the Court reasoned, supported the Court's view that Congress likely did not delegate the authority to cancel student loans generally.[323]

Although *Nebraska* was decided prior to *Loper*, it may provide an insight into where the major questions doctrine may still play a role—instances where agencies acting under broad, but not specific, statutory authorizations attempt to regulate in a novel way that a court finds to be economically or politically significant.

Auer (*Kisor*) Deference

Overruling *Chevron* has also raised questions about the viability of other deference doctrines, such as *Auer* deference.[324] *Auer* deference closely mirrors *Chevron* but applies to an agency's reasonable interpretations of its own ambiguous *regulations*.[325] This form of deference originated in a 1945 Supreme Court case *Bowles v. Seminole Rock & Sand Co.*, which concerned the proper interpretation of a maximum price regulation issued by the Office of Price Administration.[326] o determine the proper interpretation of the regulation, the Court explained that it "must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt."[327] Where that is the case, "[t]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[328] It is this formulation that later found its way into the 1997 Supreme Court case authored by Justice Scalia, *Auer v. Robbins*, from which the deference doctrine takes its name.[329]

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see CRS Legal Sidebar LSB10997, *Supreme Court Invalidates Student Loan Cancellation Policy Under the HEROES Act*, by Edward C. Liu and Sean M. Stiff (2023); CRS Report R47505, *Student Loan Cancellation Under the HEROES Act*, by Edward C. Liu and Sean M. Stiff (2023).

[319] *Nebraska*, 600 U.S. at 502.

[320] *Id.* at 496 (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).

[321] *Id.* at 495.

[322] *Id.* at 501. One of the contextual factors courts look to in applying *Skidmore* is the consistency of the agency's interpretation over time. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[323] *Nebraska*, 600 U.S. at 502.

[324] *See* Cass R. Sunstein, *The Consequences of* Loper Bright, 2 n.6 (Harv. Pub. L. Working Paper, Paper No. 24-29), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501 (noting that *Auer* deference sits "uneasily" with *Loper*); Anthony G. Amsterdam and James S. Liebman, Loper Bright *and the Great Writ (with Appendices)*, COLUM. HUMAN RIGHTS L. REV. (forthcoming Feb. 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4991093 (questioning whether federal court deference to state court interpretations of the U.S. Constitution in *habeas corpus* cases will continue after *Loper*).

[325] Auer v. Robbins, 519 U.S. 452, 461 (1997) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359, (1989)).

[326] 325 U.S. 410, 414 (1945).

[327] *Id.*

[328] *Id.*

[329] *See Auer*, 519 U.S. at 461.

In addition to mirroring *Chevron*'s structure, *Auer* also shares a similar foundation. The Court explained that it "presume[s] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[330] As with *Chevron*, the Court assumed that Congress would have wanted the agency rather than a court resolving ambiguities because of an agency's "unique expertise and policymaking prerogatives," ability to conduct investigations, and political accountability.[331]

In 2019 the Supreme Court revisited—and on some accounts narrowed—*Auer* deference in *Kisor v. Wilkie*.[332] The petitioners asked the Court to overrule *Auer*, but in an opinion written by Justice Kagan, the Court "restate[d]" and "somewhat expand[ed]" on the principles governing the application of *Auer*.[333] The Court acknowledged that it had at times sent mixed signals regarding how to apply *Auer*, may have inadvertently suggested that deference was "reflexive," and in some cases had applied it "without significant analysis of the … regulation."[334]

The Supreme Court took the opportunity to remind lower courts that they should not be too quick to find ambiguity in a regulation. "[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous."[335] "The core theory of *Auer*," the Court held, "is that sometimes the law runs out."[336] Courts must first resort to all of the "traditional tools of construction" before declaring a regulation ambiguous.[337] A court "cannot waive the ambiguity flag just because it found the regulation impenetrable on first read."[338] The Court stressed that a court must use every tool—including the text, structure, history, and purpose of the regulation—before determining that there is no single right answer.[339]

Even after a court finds a regulation ambiguous, the Court clarified that not all reasonable interpretations "are entitled to deference."[340] *Auer*, like *Chevron*, presumes that Congress would want an agency rather than a court to resolve ambiguities in regulations, but the Court stressed that "such a presumption cannot always hold."[341] The Court then went on to provide an illustrative list of factors that indicate that deference is appropriate.[342] The interpretation must represent the agency's official position, implicate its substantive expertise, and be the product of "fair and considered judgment."[343] In the Court's view, if these guardrails are properly observed, *Auer* deference "often" does not apply.[344]

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[330] Martin v. Occupational Safety and Health Rev. Comm'n, 499 U.S. 144, 151 (1991) (citing Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, 568 (1980)).

[331] *Id.*; Kisor v. Wilkie, 588 U.S. 558, 571–72 (2019).

[332] 588 U.S. at 573; Peter L. Strauss, *Kisor, Gundy, Mead Chevron, Skidmore, Hearst*, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Jul. 16, 2019) https://www.yalejreg.com/nc/kisor-gundy-mead-chevron-skidmore-hearst-by-peter-strauss/ (*Kisor* "distinctly constrain[ed]" the reach of *Auer*).

[333] *Kisor*, 588 U.S. at 574.

[334] *Id.*

[335] *Id.* at 573.

[336] *Id.* at 575.

[337] *Id.* 575 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, n.9 (1984)).

[338] *Id.*

[339] *Id.*

[340] *Id.* at 573.

[341] *Id.* at 576.

[342] *Id.* at 577–79.

[343] *Id.* at 578–79 (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)).

[344] *Id.* at 580.

Despite *Kisor*'s refinement of *Auer*, its continued viability after *Loper* is a serious question. The *Loper* decision rested on an interpretation of Section 706 of the APA.[345] That same provision of the APA directing courts to "decide all relevant questions of law" applies equally to challenges to agency interpretations of their own regulations.[346] Professor Cass Sunstein has observed that "*Loper Bright* sits (umm, errr) uneasily with *Kisor*."[347] The *Kisor* opinion itself, he notes, is "essentially identical" to Justice Kagan's dissent in *Loper*.[348] It would, in his estimation, be "awkward" to revisit *Kisor* so soon after it was decided but equally awkward for the Court to preserve *Auer* deference.[349] That awkwardness stems primarily from the similarities between the presumptions underpinning *Chevron* that the *Loper* decision swept away and those that underpin *Auer*—that in many cases Congress would have wanted agencies to resolve ambiguities in their own regulations.[350] If the presumption that statutory ambiguities are implicit delegations of interpretive authority violates Section 706 of the APA, then it is possible that the same presumption for regulations also violates the APA. Whether the Court takes up this issue in the future, however, is an open question.[351]

Further Litigation: Prior *Chevron* Cases

Although the Supreme Court overruled *Chevron*, it appears to have preserved the holdings in cases that were decided pursuant to the *Chevron* framework prior to *Loper*.[352] In the briefing of the case and during oral argument, the litigants and some of the Justices discussed the fate of cases decided at *Chevron* step two.[353] As explained above, at *Chevron* step two, a court must defer to an agency's reasonable interpretation of an ambiguous statute.[354] In such a case, a court has not made a specific ruling on what the statute means—it has left that determination to an agency in light of the court's finding at step one that the statute is ambiguous.[355] At oral argument, some of the Justices questioned the litigants about whether these step two decisions would still be considered binding if *Chevron* were overruled.[356] Counsel for the petitioners argued that overruling *Chevron* would not disturb these cases, because what the court had found at step two

[345] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

[346] *See* 5 U.S.C. § 706.

[347] Sunstein, *supra* note 324, at 2 n.6.

[348] *Id.*

[349] *Id.*

[350] *Compare Kisor*, 588 U.S. at 576 ("[W]e give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to."), *with Loper*, 144 S. Ct. at 2265 (Ambiguity does not "necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question.").

[351] In a decision of the U.S. Court of Appeals for the Fourth Circuit issued shortly after *Loper*, the court recognized that *Loper* "calls into question the viability of *Auer* deference," but because *Loper* addressed only agency interpretations of federal statutes—not regulations—the court would apply *Auer*. United States v. Boler, 115 F.4th 316, at 322 n.4 (4th Cir. Aug. 23, 2024) (amended Oct. 8, 2024).

[352] *Loper*, 144 S. Ct. at 2273.

[353] *See* Brief for Respondents at 31, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-541); Transcript of Oral Argument at 59:8-61:7, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (No. 22-1219).

[354] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 843–44 (1984).

[355] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (citing *Chevron*, 467 U.S. 843-44 (Allowing "a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps.").

[356] Transcript of Oral Argument at 59:8-61:7, Relentless, Inc. v. Dep't of Commerce, 144 S. Ct. 2244 (2024) (22-1219).

was that an agency's interpretation was "lawful."[357] The Court appears to have adopted this argument in its opinion, holding that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory stare decisis despite our change in interpretive methodology."[358]

The Court held that its decision to overturn *Chevron* is not itself a reason to overturn a prior case finding an agency's interpretation "lawful" pursuant to step two of *Chevron*.[359] Rather, litigants will have to make an additional showing that the older decision should be overturned on other grounds.[360] The *Loper* majority did not elaborate on what that additional showing could or should be.[361] It is possible that the additional showing could be that the agency's interpretation of the statute upheld in the prior case as "reasonable" under step two of *Chevron* is at variance with the present-day court's view of the "best" interpretation of that statute.

Despite the Court's holding, questions are likely to remain regarding the circumstances in which a court can overturn a prior decision that rested on application of *Chevron*'s second step. For instance, the *Loper* case leaves open the question of what exactly a court decided at step two of *Chevron*.[362] If, as has been commonly understood, a decision in favor of the agency at step two simply means that the agency chose one of the multiple possible reasonable interpretations of an ambiguous statute, then that decision may have little binding effect on a future court considering whether the agency's interpretation is the single best interpretation of the statute.[363] The Court in *Loper*, however, described decisions pursuant to step two as finding the agency's interpretation "lawful."[364] Accordingly, it may be the case that the Supreme Court was signaling to the lower courts that a decision at step two should be taken as more than just determining that an agency interpretation is a "reasonable" one.[365] Instead, the Court's use of the term *lawful* could be read to instruct lower courts to interpret prior decisions upholding agency interpretations at step two such that a court's prior decision carries more precedential weight than might otherwise be accorded a decision finding an agency interpretation reasonable. Although the U.S. Court of Appeals for the

[357] *Id.*

[358] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[359] *Id.*

[360] *Id.*

[361] *See id.*

[362] *Compare id.* (holding cases decided at step two determining that the agency interpretation was "lawful"), *with* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740–41 (1996)) ("*Chevron* established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'").

[363] *See Brand X*, 545 U.S. at 982; NLRB v. Viola Industries-Elevator Division, Inc., 979 F.2d 1384 1391–92 (10th Cir. 1992) (en banc) (finding that prior decisions were based on a judicial determination that the agency's construction was reasonable and as a result applied the *Chevron* framework); Hickman & Pierce, *supra* note 270, at § 3.6; Emily Bremer, Brand X *is Right There in* Chevron, NOTICE & COMMENT, YALE J. ON REGUL. BLOG (Feb. 16, 2024), https://www.yalejreg.com/nc/brand-x-is-right-there-in-chevron/; Jonathan Remy Nash, Chevron Stare Decisis *in a Post*-Loper Bright *World*, Iowa L. Rev. Online 5 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4966351 (noting that a decision upholding an agency decision at step two recognizes the that an agency can choose among a range of potentially reasonable interpretations of a statute).

[364] *Loper*, 144 S. Ct. at 2273.

[365] *See id.*

Sixth Circuit (Sixth Circuit) has confronted this issue,[366] it will likely be some time before there is enough case law to identify trends in how the lower courts are resolving this issue.

Loper does not address whether an agency retains the ability to change its interpretation of a statute that a court found to be ambiguous under *Chevron*. Finding a statute ambiguous under *Chevron* brought with it the assumption that Congress had implicitly delegated interpretive authority to the agency to resolve that ambiguity. *Loper* swept that assumption away as in conflict with Section 706 of the APA, holding that a statute has a fixed meaning at the time of enactment. As a practical matter, an agency likely could still change an interpretation upheld under step two and may choose to do so where the agency believes a different interpretation would better align with the best meaning of the statute. It is not clear how courts would evaluate this situation. The Sixth Circuit, for example, has suggested that *Loper* implicitly overruled *Brand X* and that agencies no longer have any authority to change their interpretations.[367]

The Process of Relitigating Prior *Chevron* Cases

One significant consideration in assessing the practical effect of the Court's holding that *Loper* is not a reason to overrule prior cases relying on *Chevron* is whether a future court is bound by a prior case that relied on *Chevron* and, if it is, whether that court has the authority to overrule the prior case. As discussed in more detail below, the geographic jurisdiction and the hierarchy of the federal courts and the Supreme Court's decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*[368] may provide additional opportunities to challenge regulations upheld under *Chevron* step two. New challenges brought in a circuit that does not have any precedent on point will not be bound by circuit precedent from other courts of appeals. Further, decisions of the federal district courts are not precedential and accordingly do not bind future courts' decisions. As a result, although the *Loper* Court's holding regarding the precedential value of prior *Chevron* cases may limit certain challenges, the scope of the Court's holding does not reach all prior *Chevron* cases.

Geographic Jurisdiction of the Federal Courts

A decision by a federal court of appeals is binding precedent only for federal district courts within the geographic jurisdiction of the relevant court of appeals and future panels of the same circuit court of appeals.[369] There are 12 geographic federal courts of appeals in the United States (see **Figure 1** below).

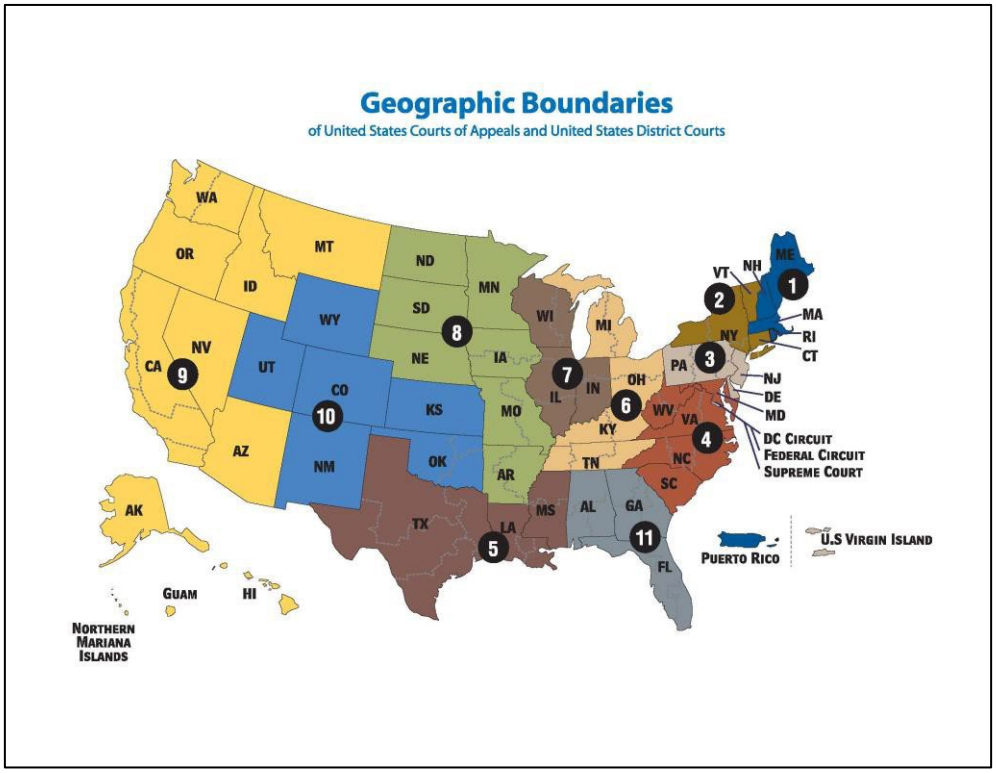
[366] Tennessee v. Becerra, 117 F.4th 348 (6th Cir. Aug. 26, 2024). *Tennessee v. Becerra* will be discussed in more detail below. *See infra*, "*Tennessee v. Becerra*: *Stare Decisis* and *Loper* Applied."

[367] *See* Mazariegos-Rodas v. Garland, ___F.4th ___, No. 21-4064, 2024 WL 4986390 (6th Cir. Dec. 5, 2024). The case may present a unique set of facts, which may limit its future applicability. In the case, BIA changed its approach to adjudicating certain asylum claims. *Id.* The court held that after *Loper*, an agency could no longer change its interpretation of a statute after a court had previously found the agency's interpretation unlawful. *Id.* at *12. The prior cases finding BIA's approach unlawful, however, did not rely on *Chevron*, much less *uphold* BIA's approach under *Chevron* step two. *See id.* (citing Bi Xia Qu v. Holder, 618 F.3d 602 (6th Cir. 2010); Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009)). It is possible that the Sixth Circuit in *Mazariegos-Rodas* in fact faced an instance of agency nonacquiescence, whereby the agency declined to follow the Sixth Circuit's prior caselaw. *See* CRS Report R47882, *Agency Nonacquiescence: An Overview of Constitutional and Practical Considerations*, by Benjamin M. Barczewski (2023).

[368] 603 U.S. 799 (2024).

[369] *See* Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488–89 (1900) (holding that a decision of another circuit "persuades; but it does not command").

Figure 1. Geographic Boundaries of the Federal Courts



Source: ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Dec. 20, 2024).

Notes: District court boundaries are delineated by gray lines within state boundaries. The U.S. Court of Appeals for the D.C. Circuit's geographical jurisdiction covers only the District of Columbia, but because many D.C. Circuit cases involve the federal government, decisions of the D.C. Circuit often bind agencies nationwide. Additionally, the U.S. Court of Appeals for the Federal Circuit has nationwide jurisdiction but can hear appeals on only a limited number of subjects.

If a plaintiff challenges a regulation in a jurisdiction that has not previously rendered a decision evaluating the regulation, then that court would not be bound by any precedent regarding the legality of the regulation. Decisions by courts in other jurisdictions regarding the legality of the regulation may be persuasive authority, but they would not control the outcome of the new case.[370] The *Loper* decision did not address this scenario, likely because decisions from one court of appeals have never been thought to be binding on decisions of its sister courts of appeals.[371] The *Loper* decision does not change that basic fact of the federal judiciary.[372]

[370] *See, e.g.*, Owens *ex rel*. Owens v. Lott, 372 F.3d 267, 279–80 (4th Cir. 2004) (holding that where there is no controlling precedent, the court may look to cases from other jurisdictions for "persuasive authority").

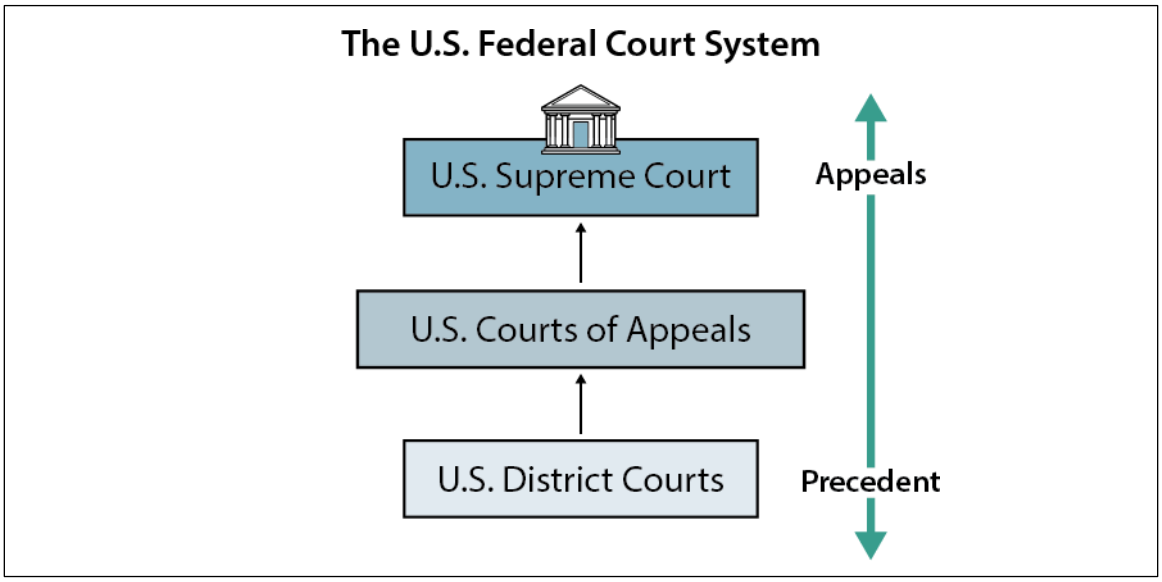
[371] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *see, e.g.*, Haberle Crystal Springs Brewing Co. v. Clarke, 30 F.2d 219, 222 (2d Cir. 1929), *rev'd on other grounds*, 280 U.S. 384 (1930).

[372] The discretion afforded each circuit means that appellate courts sometimes reach different conclusions on the same issue of federal law, causing a "split" that in some cases Congress or the Supreme Court may resolve. *See, e.g.*, CRS Legal Sidebar LSB11246, *Congressional Court Watcher: Circuit Splits from October 2024*, by Michael John Garcia (2024).

Hierarchy of the Federal Courts

Even where a new challenge is brought in a jurisdiction that has already found an agency's interpretation to be reasonable under step two of *Chevron*, the court in which the challenge is brought may not have the authority to overturn the prior decision.[373] The binding nature of precedent flows down the hierarchy of a court system. Decisions made by higher courts, such as the Supreme Court, are binding on lower courts—federal courts of appeals and district courts.[374] A corollary is that lower courts have no authority to overturn binding precedent decided by a higher court.[375]

Figure 2. Hierarchy of the Federal Court System



Source: CRS.

A district court's decision has no precedential value—that is, it binds only the parties to the case but not future decisions of other district courts.[376] District courts also have no power to overturn a decision of the court of appeals.[377] A three-judge-panel of a court of appeals has no authority to overturn a decision of a prior three-judge panel.[378] A circuit court can overturn its own precedent

[373] *See, e.g.*, 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3506 (4th ed. 2023).

[374] *See, e.g.*, 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE - CIVIL § 134.02 (2024).

[375] *See, e.g.*, Gilead Cmty, Servs., Inc. v. Town of Cromwell, 112 F.4th 93, 100 (2d Cir. 2024) (quoting United States v. Peguero, 34 F.4th 143, 158 (2d Cir. 2022) ("Our precedent is 'binding authority from which we cannot deviate,' unless and until it is "overruled either by an en banc panel of our Court or by the Supreme Court.").

[376] Threadgill v. Armstrong World Indus., 928 F.2d 1366, 1371 (3d Cir. 1991) (collecting cases).

[377] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 430 n.10 (1996) (noting that if there is a standard that all district court judges follow, it must come from the relevant court of appeals or the Supreme Court).

[378] *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001); Winslow v. FERC, 587 F.3d 1133, 1135 (D.C. Cir, 2009); 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][a](2024); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824 (1994); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 721 n.91 (2000) (noting each circuit has adopted the rule that prior decisions are binding on future decisions of the same court).

through a special circuit court procedure known as a *rehearing en banc*.[379] A rehearing en banc is a hearing before a larger panel of appellate judges. In smaller circuits, all active judges on the court of appeals participate in en banc proceedings, while in larger circuits a subset of active judges may participate.[380] Rehearings en banc are discretionary, meaning that, unless the judges of the circuit vote to hear an appeal en banc, the only way to overturn a decision of the court of appeals is to seek review by the Supreme Court.[381]

Precedential weight, to the extent any attaches, attaches only to published opinions. Not all decisions by the federal courts are published, meaning not all appear in the official reports of the decisions of the federal courts. The judges who author the opinions decide which decisions should be published. Unpublished decisions of the federal courts of appeals are not binding and may be treated only as persuasive authority.[382]

The upshot for prior cases decided at *Chevron* step two is that cases decided by district courts or cases decided through unpublished opinions of courts of appeals have no precedential value. Accordingly, because they do not bind future courts analyzing the same agency interpretations, the *Loper* Court's pronouncement regarding prior *Chevron* cases likely does not apply in those situations. A case that was decided through a published opinion of a court of appeals may be considered binding precedent within the relevant circuit. Few courts have addressed the Supreme Court's direction to treat prior *Chevron* cases as binding precedent. The Sixth Circuit provided an early example of how a court might analyze this issue after *Loper* in *Tennessee v. Becerra*.

Tennessee v. Becerra: *Stare Decisis* and Loper Applied

In 2021, the Department of Health and Human Services (HHS) promulgated a regulation requiring federal grant recipients under Title X of Public Health Service Act (PHSA) to offer neutral, nondirective counseling and referrals for abortions to patients who request it.[383] Tennessee, a Title X grant recipient, challenged the regulation, arguing, among other things, that the requirement violates Section 1008 of the PHSA.[384] The Sixth Circuit affirmed the federal district court's denial of Tennessee's motion for a preliminary injunction to stop the enforcement of the Title X regulation.[385] In affirming the district court's denial, the court addressed the

[379] FED. R. APP. P. 35 (providing for en banc procedure). There is some variation across the circuits in how they implement binding precedent within their own circuits. Henry J. Dickman, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1355 (2020). While all circuits provide for en banc review to revisit circuit precedent, some circuits have adopted additional mechanisms for overturning circuit precedent. The First Circuit, for example, permits a panel to overrule the decision of a prior panel in the "exceedingly infrequent situation" where "non-binding but compelling caselaw convinces us to abandon it." AER Advisors Inc. v. Fidelity Brokerage Servs., LLC, 921 F.3d 282, 293 (1st Cir. 2019). The D.C. Circuit permits a panel to overrule a prior panel decision without a full en banc hearing if the panel circulates a draft of the opinion to all active judges and they unanimously agree to overrule circuit precedent. U.S. CT. OF APP. FOR THE D.C. CIR., POLICY STATEMENT ON EN BANC ENDORSEMENT OF PANEL DECISIONS (IRONS FOOTNOTE) 1 (Jan. 17, 1996), https://www.cadc.uscourts.gov/sites/cadc/files/rules-IRONS.PDF.

[380] 9TH CIR. R. 35.3 (en banc panel consists of the chief judge and ten additional randomly selected judges); 2D CIR. R. 35.1 (en banc panel consists of all active judges).

[381] FED. R. APP. P. 35(a) ("A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered.").

[382] *See, e.g.*, United States v. Torres-Jamie, 821 F.3d 577, 582 (5th Cir. 2016); D.C. CIR. R. 36(e)(2) ("a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.").

[383] Tennessee v. Becerra, 117 F.4th 348, 355–56 (6th Cir. Aug. 26, 2024) (citing Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144 (Oct. 7, 2021)).

[384] *Id.* at 357.

[385] *Id.* at 370.

precedential value of two prior cases—one a Supreme Court case and another a prior Sixth Circuit case—that had held that Section 1008 was ambiguous and deferred to HHS's earlier interpretations of that section of the PHSA.[386] In addition, the prior Sixth Circuit case addressed the same 2021 regulation at issue in *Becerra*.[387] As a result, the Sixth Circuit had already found HHS's interpretation "lawful" under step two of *Chevron*.[388]

In light of *Loper*, Tennessee disputed whether these two prior cases had precedential effect.[389] Relying on *Loper*, the court held that "it forecloses new challenges based on specific agency actions that were already resolved via *Chevron* deference analysis."[390] *Loper*, the court held, opens the door only to new challenges to agency interpretations that have not yet been adjudicated.[391] Arguing, as Tennessee did, that *Loper* abrogated the precedential effect of the two prior cases, the court reasoned, would just be making an argument that the prior cases were wrongly decided.[392] *Loper* explicitly held, however, that argument is "not enough to justify overruling a statutory precedent."[393]

The Sixth Circuit's opinion is one of the first, if not the first, decision from a federal court of appeals addressing the precedential effect of a prior case decided pursuant to *Chevron* step two. As such, it is difficult to say whether other courts will approach the issue in the same way. For instance, *Loper* held that reliance on *Chevron* is not by itself enough to justify overruling prior precedent, but the Sixth Circuit in *Becerra* found that Tennessee did not present any other argument to the court other than that prior precedent relied on *Chevron*. Accordingly, it is unclear how courts may treat overruling prior precedent if presented with arguments that go beyond those made in *Becerra*.

Interactions with Corner Post, Inc. v. Board of Governors of the Federal Reserve System

Several days after the Supreme Court issued its *Loper* opinion, it issued an opinion in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*.[394] The opinion addressed the statute of limitations for a claim brought against the government pursuant to the APA.[395] The APA itself has no statute of limitations, but Section 2401(a) of Title 28 provides a general statute of limitations for civil claims brought against the United States.[396] Section 2401(a) requires plaintiffs to bring suit "within six years after the right of action first accrues."[397]

[386] *Id.* at 362–63 (citing Ohio v. Becerra, 87 F.4th 759, 770–75 (6th Cir. 2023); Rust v. Sullivan, 500 U.S. 173, 187 (1991)).

[387] *Ohio*, 87 F.4th at 770–75.

[388] *Tennessee*, 117 F.4th at 362–63.

[389] *Id.* at 363.

[390] *Id.*

[391] *Id.*

[392] *Id.*

[393] *Id.* at 364 (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024)).

[394] 603 U.S. 799 (2024). For more information, see CRS Legal Sidebar LSB11197, *Corner Post and the Statute of Limitations for Administrative Procedure Act Claims*, by Benjamin M. Barczewski and Jonathan M. Gaffney (2024).

[395] *Corner Post*, 603 U.S. at 804.

[396] *See* 5 U.S.C. §§ 701–706; 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

[397] 28 U.S.C. § 2401(a).

The Court held that a claim accrues when a plaintiff is first injured by a final agency action.[398] The Court's decision was a departure from decades of caselaw that had determined that, for the purposes of Section 2401(a), a claim accrues on the date the agency action becomes final for all plaintiffs.[399]

The import of the shift in interpretation of Section 2401(a) is best illustrated by the facts of the *Corner Post* case itself. Corner Post is a truckstop and convenience store located in North Dakota.[400] It opened for business in 2018.[401] Corner Post accepts credit cards for payment and as a result is required to pay an "interchange fee" to the bank that issued the credit card.[402] In 2011, the Federal Reserve, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, issued a regulation that set a maximum interchange fee that banks could charge to retailers.[403] Corner Post joined a suit against the Federal Reserve in 2021, challenging the Federal Reserve's regulation as allowing higher fees than permitted by Dodd-Frank.[404] Under then-prevailing caselaw in a majority of the federal circuit courts of appeals, a cause of action challenging the legality of the Federal Reserve's regulation accrued for any and all plaintiffs the date the regulation became final (2011) and expired six years later (2017), effectively barring Corner Post's suit.[405] Under the Supreme Court's interpretation of Section 2401(a), however, Corner Post's claim did not accrue until it was injured by the regulation (e.g., when it paid the first interchange fee).[406] That means that Corner Post's claim did not expire until six years after that initial injury—possibly sometime in 2024.[407]

Plaintiffs that are newly injured by older regulations (for example, by entering a regulated market) will now be able to challenge those regulations so long as they bring suit within six years of first being injured by the regulations. As a result, *Corner Post* may permit parties that did not exist at the time an agency took an action interpreting a statute to challenge that interpretation. That is true where a court had already found an agency interpretation reasonable under step two of *Chevron* or where the agency action was never challenged in court. *Corner Post* may, accordingly, lead to more agency interpretations being litigated under the principles set out in *Loper*.

Implications for Executive Branch Agencies

Neither the *Chevron* framework nor *Loper* applies directly to agencies; they direct how courts are to interpret a statute when an agency has issued its own interpretation.[408] Relatedly, *Chevron* did not give—and *Loper* did not take away—an agency's ability to interpret the statutes that it administers. When Congress vests an agency with regulatory authority, an agency will necessarily

[398] *Corner Post*, 603 U.S. at 808.

[399] *Id.* at 806 (identifying six circuits that held that the statute of limitations begins to run from the date the agency action became final); Barczewski, *supra* note 394 (identifying nine circuits that held that the statute of limitations began to run from the date the agency action became final).

[400] *Corner Post*, 144 S. Ct. at 805.

[401] *Id.*

[402] *Id.*

[403] *Id.*

[404] *Id.* at 806.

[405] *See id.*

[406] *Id.* at 813.

[407] *See id.* at 825.

[408] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 841–42 (1984).

interpret the provisions of that statute when it takes action pursuant to the statute. *Loper* changed which branch of the federal government—the judiciary or the executive—will have the final say about what the statute means when an agency's interpretation is challenged in court.[409] Where an agency's interpretation is never challenged in court, the agency will likely be the first and only interpreter of the statute.

That context does not mean that *Loper* will not have significant indirect effects on how agencies interpret statutes. As the lower courts resolve some of the questions left open by the *Loper* decision through case-by-case adjudication, agencies will likely shift their behavior in light of trends that emerge from the lower courts applying *Loper* and subject to their own particular success before the courts.

By its own terms, *Chevron* did not purport to instruct *agencies* how they should interpret the statutes that they administer.[410] Although the framework announced by *Chevron* was not binding on agencies, according to at least one study, it did have an effect on how agencies interpreted the statutes they administer. In a 2014 survey of agency personnel engaged in drafting regulations, approximately 43% of respondents agreed or strongly agreed (10% strongly agreed; 33% agreed) "that their agencies would be more aggressive in their interpretive practices" if they knew or strongly believed that a particular statutory interpretation would be entitled to *Chevron* deference.[411] Another 40% somewhat agreed.[412] Similarly, one commentator described *Chevron*'s effect as encouraging agencies to be "more adventurous" in interpreting statutes.[413]

Like the *Chevron* framework, *Loper*'s requirement to apply the traditional tools of statutory construction is directed at the courts; it does not directly bind or apply to agencies.[414] Nonetheless, as with *Chevron*, it is likely that *Loper* will have an indirect effect on agencies as the lower courts adjudicate more and more agency interpretations. By overruling *Chevron*, *Loper* may cause agencies to be more cautious in their interpretations. In the same 2014 study, when agency rule drafters were asked if they would be less aggressive in their interpretive practices if *Chevron* did not apply, roughly the same proportions strongly agreed (7%), agreed (31%), and somewhat agreed (45%).[415]

In addition to becoming more cautious in their interpretations, interpretations may also become more legalistic. In a 2005 essay, Donald Elliott, EPA's general counsel under President George H. W. Bush, explained that *Chevron* shifted power away from agency lawyers to other professionals within agencies.[416] Prior to *Chevron*, Elliott observed, agency lawyers exercised significant authority within agencies through the interpretation of the agencies' statutes.[417] In his telling, the predominant view of the courts prior to *Chevron* was that a statute had a single "best meaning" and it was an agency lawyer's job to identify the best meaning through the application of specialized legal means.[418] In this account, *Chevron* shifted how courts approach the meaning of statutes and, as a result, shifted the relative power of lawyers and other professionals within

[409] *Loper*, 144 S. Ct. at 2266.

[410] *Chevron*, 467 U.S. at 841–42.

[411] Walker, *supra* note 128, at 722–23.

[412] *Id.*

[413] E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Refined the Roles of Congress, Courts, and Agencies in Environmental Law*, 16 VILL. L. REV. 1, 3 (2005).

[414] *Loper*, 144 S. Ct. at 2266.

[415] Walker, *supra* note 128, at 724.

[416] Elliott, *supra* note 413, at 2.

[417] *Id.* at 11.

[418] *Id.*

agencies.[419] While *Chevron* was in place, agency lawyers attempted to describe the permissible range of discretion created by ambiguous statutory terms.[420] Agency policymakers would then select one of the permissible interpretations to adopt.[421] The shift to *Chevron* led to a policymaking dialogue within agencies over what policy an agency should adopt and why that was not possible prior to *Chevron*.[422] It is too early to tell whether overruling *Chevron* will result in the balance of power within agencies shifting back to lawyers. It is possible that, as the lower courts apply *Loper* in more and more cases, agencies may begin to rely more on agency lawyers to apply the specialized tools of statutory interpretation to identify the best meanings of statutes to increase their chances of prevailing in court.[423]

Overruling *Chevron* will also result in reifying interpretations of statutes such that agencies will no longer be able to change their interpretations without legislative intervention. The *Chevron* framework rested on a presumption that an ambiguity was an implicit delegation of interpretive authority to the agency to resolve that ambiguity.[424] One consequence of this assumption was that, where a court found an ambiguity, a court had no power to determine what the meaning of the statute was—that was for the agency.[425] As a result, even where a court had reviewed the statute, if it had determined that the statute was ambiguous, the agency could change its interpretation in the future.[426] So long as the new interpretation was reasonable, a court would be bound to defer to the agency's interpretation.[427] The *Chevron* decision itself recognized the policy discretion that attended ambiguous statutory provisions.[428] In a 2005 case captioned *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court explicitly confirmed this consequence of *Chevron*.[429] The Court held that in light of *Chevron*, "only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[430]

The policy space or discretion that statutory ambiguity provided to agencies under *Chevron* was one factor the Court identified in *Loper* as a reason to overrule *Chevron*.[431] The *Loper* majority explained, "Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with 'unexplained inconsistency' being 'at most a reason for holding an interpretation to be arbitrary and capricious.'"[432] Except where Congress has delegated interpretive authority to an agency to interpret the statutory provisions at issue, *Loper* likely forecloses an agency's ability to change its interpretation after a

[419] *Id.* at 11–12.

[420] *Id.*

[421] *Id.*

[422] *Id.* at 12.

[423] *See supra* "The De Novo Standard of Review, Methods of Statutory Interpretation, and Statutory Ambiguity."

[424] Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 841–42 (1984).

[425] *Id.*; Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005). *See also* Strauss, *supra* note 204, at 1145 ("*Chevron* space denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority.").

[426] *Brand X*, 545 U.S. at 982.

[427] *Id.*

[428] *Chevron*, 467 U.S. at 841–44.

[429] 545 U.S. 967, 982 (2005).

[430] *Id.*

[431] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

[432] *Id.*

court has determined the best meaning of a statute.[433] The *Loper* decision held that a statute has a single meaning fixed at the time of enactment.[434] Where a court has identified that meaning, there is no policy space within which an agency has discretion to choose among different reasonable interpretations.[435]

Loper also held that sometimes the single best meaning fixed at the time of enactment was that Congress delegated interpretive authority to an agency to define certain statutory terms.[436] In these circumstances, agency interpretations may be subject to only a reasonableness standard similar to *Chevron*'s second step.[437] Under these conditions it may be possible for an agency to change its interpretation even after the agency's interpretation was litigated. In that scenario, a court has fulfilled its duty to "say what the law is" by determining that the best meaning of the statute is that Congress vested the agency with discretion to define particular terms or phrases so long as it exercises that discretion reasonably.[438] As a corollary, although the agency may be able to change its interpretation of the statute, it has no power to adopt an interpretation that conflicts with the court's determination that the statute vests the agency with interpretive authority.[439]

Considerations for Congress

The *Loper* decision was based on an interpretation of the APA, not the Constitution. *Loper*, accordingly, did not diminish Congress's constitutional lawmaking authority. Put another way, *Loper* does not direct Congress to legislate in any particular way—it directs *courts* how to resolve cases of statutory interpretation. Because *Loper* does not directly bind Congress, whether *Loper* will affect how Congress legislates is still an open question.

Legislative Productivity

The *Loper* decision may affect Congress's approach to legislation in an indirect way. Courts and commentators argued that while *Chevron* was in place, Congress often legislated with it in mind.[440] That is, Congress may have made the same assumption that the *Chevron* decision made—that ambiguous terms in a statute would be interpreted by the relevant agency, not a court. The *Loper* decision disposed of that assumption when it held that *Chevron*'s general presumption about statutory ambiguity violated the APA.

Prior to the Court's decision in *Loper*, some had argued that Congress's assumption that courts would grant agencies deference pursuant to *Chevron* reduced Congress's incentive to pass new legislation—sometimes called "congressional abdication."[441] Proponents of this argument,

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[433] *See id.* at 2266 ("In the business of statutory interpretation, if it is not the best, it is not permissible.").

[434] *Id.*

[435] *See id.* ("Courts instead understand that such statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning.").

[436] *Id.* at 2263.

[437] *Id.* (citing Michigan v. EPA, 576 U.S. 743, 750 (2015)).

[438] *See id.*

[439] *See id.*

[440] *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989); City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

[441] Daniel E. Walters, *Will* Loper Bright *Spur a Congressional Renaissance?* (Tex. A&M Univ. Sch. of L. Legal Studies Rsch. Paper, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4792884; *see also* Richard J. Pierce, Jr., *Delegation, Time, and Congressional Capacity: A Response to Adler and Walker*, 105 IOWA L. REV. ONLINE 1, 12 (continued...)

including the petitioners in *Loper*, argued that because *Chevron* permitted agencies to change their interpretations of ambiguous statutes, Congress may not have thought it necessary to provide additional statutory authority for agencies to address new or unforeseen circumstances.[442] At oral argument, the petitioners argued that overruling *Chevron* would prompt Congress to limit using vague terms and take the lead in deciding questions of policy through an increase in legislation.[443] As of fall 2024, there is little data at the federal level regarding how overruling *Chevron* may change legislative drafting.

A 2024 study of state legislatures' reactions to the varying deference regimes at play in different state courts may shed some light on how Congress might react.[444] The study used variations among different states' judicial deference doctrines and variations of the same state's judicial deference doctrine across time and compared them to "legislative productivity" in state legislatures.[445] It found that differences in deference doctrines had almost no effect on legislative activity.[446] To the extent that judicial deference had any effect, some evidence indicated that legislatures produced more statutory text and used more definitions while also relying on explicit delegations and vague and precatory terms.[447] The study noted that these results were a "mixed bag, sometimes aiding legislatures' efforts to produce high-quality legislation and sometimes impeding it."[448] The study itself cautions that data from states may not translate directly to Congress and that a focus on all legislative output from state legislatures might miss important effects from deference or the absence of it that might appear only in certain types of legislation.[449]

Legislative Specificity

Regardless of the experience of state legislatures, Congress has a number of options to respond to *Loper*. Congress could respond as the petitioners in *Loper* argued that it might—by drafting statutes with more specificity and fewer vague or ambiguous terms.[450] As noted above, *Loper* does not require any particular congressional response, but after *Loper*, where litigation occurs between an agency and a private party regarding the meaning of a statute, a court rather than an agency will determine the meaning of the statute. If Congress does not want a court to have the power to resolve vague or ambiguous statutory text, Congress could choose to draft statutes with more specificity, effectively choosing the policy it prefers rather than leaving the judiciary to interpret a vague or ambiguous term.

(2020); Adam White, *Constitutional Government After Chevron?*, LAW & LIBERTY (May 1, 2024), https://lawliberty.org/forum/constitutional-government-after-chevron/; Justin Walker, *The Kavanaugh Court and the* Schechter-*to*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 926–27 (2020).

[442] White, supra note 441; Transcript of Oral Argument at 25–26, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-541). Some scholars have characterized this argument regarding *Chevron* as part of broader claims about congressional decline. Walters, *supra* note 441; *see also* Beau Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465 (2023).

[443] Transcript of Oral Argument at 25–26, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-541).

[444] Walters, *supra* note 441.

[445] *Id.* at 5.

[446] *Id.* at 29–30.

[447] *Id.* at 29.

[448] *Id.* at 30.

[449] *Id.* at 30–31.

[450] Transcript of Oral Argument at 25–26, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244 (2024) (No. 22-541).

Some have argued that Congress currently lacks the institutional capacity to draft statutes with more specificity.[451] The House Committee on Administration held a hearing less than a month after the Court issued the *Loper* opinion seeking input on how *Loper* might change how Congress operates.[452] While the witnesses disagreed on a number of issues, they all agreed that were Congress to want to draft more specific statutes or increase oversight of agency rulemaking in response to *Loper*, it would need to increase the quantity and quality of congressional staff.[453]

Codifying *Chevron* or *Loper*

Congress could also respond by codifying some form of deference either for all agencies or for specific agencies or specific agency actions. As noted above, the *Loper* decision rested on an interpretation of the APA. As a result, Congress retains the authority to amend the APA to require courts to defer to agency interpretations of federal law or to enact stand-alone statutes that apply to some agencies but not others. For example, in 2023, the Stop Corporate Capture Act was introduced in the House.[454] The bill would amend Section 706 of the APA to codify a version of *Chevron* deference. A companion bill was introduced in the Senate in July 2024.[455]

Codifying *Chevron* may raise constitutional concerns for some Justices. Justices Thomas and Gorsuch have both written publicly that they believe *Chevron* deference violates Article III of the Constitution.[456] Article III, their argument goes, requires that courts have the final word on the meaning of federal law.[457] *Chevron*, however, shifted the authority to render final binding interpretations of federal law to agencies under certain circumstances.[458] That shift, they believe, violates Article III's command as declared by the Court in *Marbury v. Madison* to "say what the law is."[459] The petitioners' appeal to the Court in the *Loper* case was built around the Article III argument.[460] Although the Court ultimately rested its decision on an interpretation of the APA, the Court referred back to 19th-century cases interpreting Article III to support its finding that the APA rendered in statute the traditional role of the courts to "say what the law is."[461] Thus, although the Court declined to decide the case on constitutional grounds, its decision was influenced by Article III cases that predated the APA.[462]

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[451] *Congress in a Post*-Chevron *World: Hearing Before the Comm. on H. Admin*, 118th Cong. (2024).

[452] *Id.*

[453] *E.g.*, *id.* at 21 (statement of Satya Thallam, Senior Vice President of Government Affairs, Americans for Responsible Innovation and Senior Fellow, Foundation for American Innovation), 50 (statement of Josh Chafetz, Agnes Williams Sesquicentennial Professor of Law and Politics, Georgetown University Law Center).

[454] Stop Corporate Capture Act, H.R. 1507, 118th Cong. § 12 (2023). In addition to codifying deference, the Stop Corporate Capture Act would amend a number of other provisions in the APA, including amending 5 U.S.C. § 553 to create new disclosure requirements for commenters participating in the public comment period of the informal rulemaking process. *Id.* § 4.

[455] Stop Corporate Capture Act, S. 4749, 118th Cong. § 12 (2024).

[456] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (Thomas, J., concurring); Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[457] *Loper*, 144 S. Ct. at 2274 (Thomas, J., concurring).

[458] *Id.*

[459] *Id.*; *Buffington*, 143 S. Ct. at 18 (Gorsuch, J., dissenting from denial of certiorari).

[460] *See, e.g.*, Brief for Petitioners at 24, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (No. 22-541).

[461] *Loper*, 144 S. Ct. at 2257.

[462] *See id.* at 2257-58. Prior to the *Loper* decision, there was a rich scholarly debate regarding the constitutionality of *Chevron*. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B. U. L. REV. 1271, 1283–91 (2008) (surveying these (continued...)

Conversely, Congress could also codify the *Loper* decision. By basing its decision on the meaning of the APA, the *Loper* decision essentially fixed the meaning of Section 706. Were Congress to want to reinforce *Loper*'s holding and potentially limit the effect were the Court to overrule *Loper*, it could amend the APA to explicitly bar the application of any kind of deference doctrine for cases brought pursuant to the APA. Prior to the *Loper* decision, the House had introduced the Separation of Powers Restoration Act (SOPRA) in the 106th[463], 107th[464], and 114th-118th Congresses.[465] SOPRA would amend Section 706 of the APA to require courts to apply *de novo* review to questions of law raised in cases brought pursuant to the APA.[466] Were it enacted prior to the *Loper* decision, it would have prevented courts from deferring to agency interpretations pursuant to *Chevron*—at least for cases brought pursuant to the APA. If SOPRA were enacted now, it would likely reinforce the *Loper* decision and prevent deference from applying to cases brought pursuant to the APA if the Court overrules *Loper* in the future.

Congress could also amend other judicial review statutes. Although the APA is the most prominent judicial review statute, the Administrative Conference of the United States has identified more than 600 other statutes that provide for judicial review of certain agency actions.[467] Many of those statutes do not include text similar to the language on which the Supreme Court based its decision in *Loper*.[468] Whether the Court's decision in *Loper*, which was based on an interpretation of the APA, extends to other judicial review provisions is an open question. Congress may wish to amend other non-APA judicial review provisions to either ensure that the *Loper* decision applies to judicial review conducted under those statutes or to codify deference for cases brought under those statutes.

arguments); Kent Barnett, *How* Chevron *Deference Fits into Article III*, 89 GEO. WASH. L. REV. 1143, 1174 (2021); Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 693–95 (2020); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 941–42, 963, 982 (2018); Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057 (2016); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 783 (2010). This debate will likely continue after the *Loper* decision but could shift its focus to whether Congress could codify *Chevron* deference or something similar to it.

[463] H.R. 2655, 106th Cong. (1999).

[464] H.R. 864, 107th Cong. (2001).

[465] H.R. 29, 114th Cong. (2015); H.R. 4768, 114th Cong. (2016); H.R. 7895, 116th Cong. (2020); H.R. 76, 115th Cong. (2017); H.R. 1927, 116th Cong. (2019); H.R. 3494, 117th Cong. (2021); H.R. 288, 118th Cong. (2023); H.R. 464, 118th Cong. (2023).

[466] H.R. 288, 118th Cong. § 2 (2023).

[467] JONATHAN R. SIEGEL, THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES, https://www.acus.gov/sites/default/files/documents/ACUS-Sourcebook-of-Federal-Judicial-Review-Statutes.pdf (last visited Dec. 19, 2024).

[468] *See, e.g.*, 28 U.S.C. § 2343 ("The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity" of final order of certain agencies); 49 U.S.C. § 46110(c) ("the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings."); 15 U.S.C. § 21(c).

Delegations to Agencies

Another potential congressional response to *Loper* is the use of different drafting techniques to delegate certain authority to agencies. As noted above, the Supreme Court in *Loper* recognized that Congress retains the authority to craft delegations of authority by statute that can empower agencies to interpret statutory terms or exercise discretionary authority.[469] The Court cited phrases such as *as determined by the Secretary* to indicate where Congress has empowered an agency, rather than a court, to render final and binding interpretations of particular terms or phrases.[470] Similarly, the Court cited phrases such as *the Administrator shall regulate if the Administrator finds such regulation appropriate and necessary* as delegations from Congress to an agency of policy discretion that the courts may not second-guess unless the agency exercises its discretion unreasonably.[471] Congress can use these drafting techniques to tailor the type and scope of delegation to an agency to ensure that the agency is able to exercise whatever authority Congress intends it to have. As the Court explained in *Loper*, a court's job when faced with a statutory delegation is to ensure that the agency has not exceeded the boundaries of the delegation and ensure that it exercises its delegated authority reasonably.[472]

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[469] *Loper*, 144 S. Ct. at 2263.

[470] *Id.* at 2263 n.5.

[471] *Id.* at 2263 n.6.

[472] *Id.* at 2263.

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IN FOCUS

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Farm Bill Primer: Background and Status

The farm bill is an omnibus, multiyear law that governs an array of agricultural and food programs. It provides an opportunity for policymakers to comprehensively and periodically address agricultural and food issues. The farm bill has typically been renewed about every five years since the 1930s (CRS Report R45210, *Farm Bills: Major Legislative Actions, 1965-2024*).

What Is in a Farm Bill?

The breadth of the farm bill is optional and determined mostly by the joint jurisdiction of the House and Senate agriculture committees. Initially, farm bills focused on support for a handful of staple commodities—corn, soybeans, wheat, cotton, rice, peanuts, dairy, and sugar. Since 1973, farm bills have become increasingly expansive, when a nutrition title was first included. Other prominent additions include formerly stand-alone laws, such as conservation, credit, and research. New topics were added, such as bioenergy and horticulture. In 2024, the farm bill considered by the House committee (H.R. 8467) and introduced in the Senate (S. 5335) contained the same 12 titles as the Agriculture Improvement Act of 2018 (2018 farm bill; P.L. 115-334; see **text box**).

The omnibus nature of the farm bill can create broad coalitions for policies that individually might not have a majority of support in the legislative process. In recent years, more stakeholders have become involved in the farm bill debate representing conservation, rural development, nutrition, local food systems, and organic production.

When Does the Farm Bill Expire?

The 2018 farm bill was written to cover five years through FY2023 and the 2023 crop year. Congress enacted a one-year extension in November 2023 for 2024 (P.L. 118-22, Division B, §102) and a second one-year extension in December 2024 to cover FY2025 and the 2025 crop year (P.L. 118-158, Division D).

Without reauthorization, some farm bill programs expire and may not continue operations. Most nutrition assistance programs can be continued by providing appropriations. Farm commodity programs need to be reauthorized for future crop years. The farm bill also suspends long-abandoned permanent laws from the 1940s for the farm commodity programs that used supply controls and price regimes that would be costly to implement if their suspension expires. Other programs like crop insurance have permanent authority and do not need reauthorization (CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension for 2025*).

What Does the Farm Bill Cost?

Farm bills authorize programs in two spending categories: mandatory and discretionary. They authorize mandatory funding for programs based on multiyear budget estimates (*baseline*) and estimates of what provisions in newly enacted bills cost (*scores*). Programs authorized for discretionary funding are not funded by the farm bill and depend on future appropriations action. Mandatory programs usually dominate the farm bill debate (CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*).

Farm bills have both 5-year and 10-year budget projections for the programs that operate as entitlements based on formulas and eligibility criteria. The 10-year projection for the 2018 farm bill was $867 billion over FY2019-FY2028 (**Table 1**). Four titles accounted for 99% of the 2018 farm bill's mandatory spending: nutrition (primarily the Supplemental Nutrition Assistance Program, SNAP), farm commodities, crop insurance, and conservation. Programs in all other farm bill titles accounted for about 1% of mandatory outlays and receive mostly discretionary funds.

Titles in Recent Farm Bills

Title I, Commodities: Provides support for major commodity crops, including wheat, corn, soybeans, peanuts, rice, dairy, and sugar. Authorizes disaster assistance.

Title II, Conservation: Encourages environmental stewardship of farmlands and improved management through land retirement programs, working lands programs, or both.

Title III, Trade: Supports U.S. agricultural export programs and international food assistance programs.

Title IV, Nutrition: Provides nutrition assistance for low-income households through programs, including SNAP.

Title V, Credit: Offers direct government loans and guarantees to producers to buy land and operate farms and ranches.

Title VI, Rural Development: Supports rural housing, community facilities, business, and utility programs through grants, loans, and guarantees.

Title VII, Research, Extension, and Related Matters: Supports agricultural research and extension programs to expand academic knowledge and help producers be more productive.

Title VIII, Forestry: Supports forestry management programs run by U.S. Department of Agriculture (USDA) Forest Service.

Title IX, Energy: Encourages 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, USDA-certified organic foods, and locally produced foods and authorizes a regulatory framework for industrial hemp.

Title XI, Crop Insurance: Enhances risk management through the permanently authorized Federal Crop Insurance Program.

Title XII, Miscellaneous: Includes programs and assistance for livestock and poultry production, support for beginning farmers and ranchers, and other miscellaneous and general provisions.

Table 1. Projected Budget for the 2018 Farm Bill, the June 2024 Baseline, and the CBO Score of H.R. 8467
(million dollars, 10-year mandatory outlays)

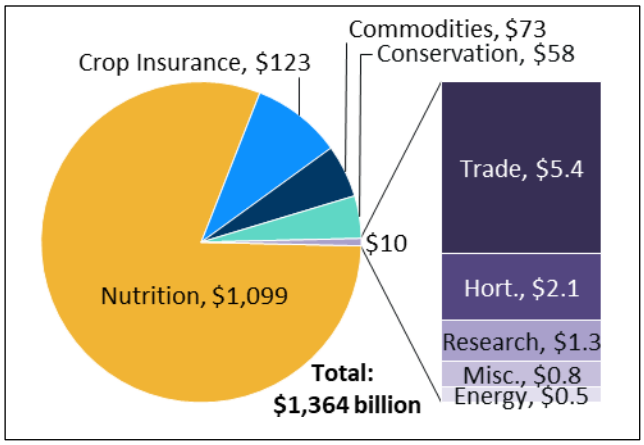
Title	2018 Farm Bill at Enactment FY2019-FY2028	CBO Baseline (June 2024) FY2025-FY2034	Changes in H.R. 8467 (CBO score)[a] FY2025-FY2034
Commodities	$61,414	$72,511	+$37,027
Conservation	59,748	58,419	+4,521
Trade	4,094	5,430	+2,420
Nutrition	663,828	1,099,396	-27,099
Credit	-4,558	—[b]	0
Rural Dev.	-2,362	—[b]	0
Research	1,219	1,300	+3,493
Forestry	10	—[b]	+0
Energy	737	500	+50
Horticulture	2,047	2,100	+360
Crop Ins.	77,933	123,468	+4,819
Miscellaneous	3,091	800	+2,495
Total	**$867,200**	**$1,363,924**	**+$28,086**

Source: CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*; CRS analysis of the Congressional Budget Office (CBO) June 2024 baseline for SNAP and the USDA Mandatory Farm Programs for the five largest titles and amounts in law for other titles; and CBO, "Estimate of H.R. 8467 Relative to CBO's June 2024 Baseline Projections," November 8, 2024.

a. The score is the change relative to the June 2024 baseline. CBO has not released a score for S. 5335.

b. Baseline for the credit title is likely negative, indicating payments into the Farm Credit System Insurance fund. The rural development title has no current programs with baseline. Baseline for the forestry title is $10 million or less.

Figure 1. Baseline for Farm Bill Programs, by Title
(billion dollars, 10-year mandatory outlays, FY2025-FY2034)



Source: CRS using the CBO June 2024 baseline for the five largest titles and amounts in law for programs in other titles.

The June 2024 Congressional Budget Office (CBO) baseline is the latest projection for the major farm bill programs. **Table 1** and **Figure 1** include these updates and the funding indicated in law for other farm bill programs not included in the CBO projection. The June 2024 baseline has $662 billion over 5 years (FY2025-FY2029) and $1,364 billion over 10 years (FY2025-FY2034).

What Are the Current Issues?

On May 23, 2024, the House Committee on Agriculture ordered reported a farm bill, H.R. 8467, the Farm, Food, and National Security Act of 2024. On November 18, 2024, the Senate Committee on Agriculture, Nutrition, and Forestry chair introduced a farm bill, S. 5335. The Senate committee took no further action on this bill.

Throughout 2024, budget issues pursuant to achieving various policy goals were leading obstacles in advancing the farm bill. The major policy issues included increasing

"reference prices" for the farm commodity programs that would provide greater payments to farmers when market prices fall below a target support level. Both bills would have provided some level of increases. Another policy goal in both bills was to incorporate one-time conservation funding from P.L. 117-169 (referred to as the Inflation Reduction Act) into the permanent farm bill conservation baseline. Both bills increased mandatory funding for export promotion, agricultural research, and animal health programs. Both bills would also have restricted USDA's ability to use the Commodity Credit Corporation (CCC) to initiate farm assistance outside the farm bill. In nutrition policy, the House bill would have prevented USDA from reevaluating the market basket for the Thrifty Food Plan (TFP) in SNAP in a way that exceeds the cost of inflation.

The baseline CBO initially used to evaluate H.R. 8467 was the May 2023 baseline, which indicated that the bill would increase mandatory spending by $33.0 billion over nine years (FY2025-FY2033). CBO subsequently scored the bill against the June 2024 baseline, which indicated a smaller increase in spending. Nonetheless, the score remained budget increasing for budget enforcement rules such as pay-as-you-go (PAYGO), which assume bills should not increase the federal budget deficit. This latest score indicated that H.R. 8467 would increase mandatory spending by $28 billion over 10 years (**Table 1**). CBO has not released a score of S. 5335.

By policy areas, the major budgetary changes in H.R. 8467 include a net increase of about $37.0 billion over 10 years for commodity support programs, including limiting the CCC; a net increase of $4.5 billion for conservation programs; a net decrease of $27.1 billion for the domestic nutrition programs, including by limiting the TFP; and 10-year increases of $2.4 billion for trade, $3.5 billion for research, $4.8 billion for crop insurance, and $2.5 billion for the miscellaneous title (CRS Report R48167, *The 2024 Farm Bill: H.R. 8467 Compared with Current Law*).

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IN FOCUS

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Farm Bill Primer: Budget Dynamics

Congress is considering a new farm bill because the 2018 farm bill (P.L. 115-334) and the latest of its two one-year extensions (P.L. 118-158, Division D) begin expiring at the end of FY2025 (CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension for 2025*). In 2024, the House Committee on Agriculture ordered reported H.R. 8467, and the Senate Agriculture Committee chair introduced S. 5335.

Farm Bills from a Budget Perspective

Federal spending for agriculture is divided into two main categories—mandatory and discretionary spending:

- **Mandatory** spending is authorized primarily for the farm commodity programs, conservation, crop insurance, and the nutrition assistance programs. A farm bill authorizes outlays for mandatory programs when the law is enacted.

- **Discretionary** appropriations are authorized for most other programs, including rural development, research, and credit programs. Farm bills set program parameters. Funding may be provided in appropriations acts.

Some farm bill programs have received both types of funding. Discretionary appropriations are the primary source for many programs, but mandatory spending usually dominates the farm bill budget debate and is the focus here.

Importance of Baseline to the Farm Bill

The Congressional Budget Office (CBO) **baseline** is a projection at a particular point in time of what future federal mandatory spending would be under the assumption that current law continues. The baseline is the *benchmark* against which proposed changes in law are measured.

When a bill is proposed that would affect mandatory spending, the **score** (cost impact) is measured in relation to the baseline. Changes that increase spending relative to the baseline have a *positive* score; those that decrease spending relative to the baseline have a *negative* score.

Increases in a bill's total cost beyond the baseline may be subject to budget constraints, such as pay-as-you-go (PAYGO) rules. Reductions from the baseline may be used to offset costs for other provisions that have a positive score or used to reduce the federal deficit. The annual budget resolution determines whether a farm bill is held budget neutral or can increase or must decrease spending.

Recent Farm Bills' Budget Positions

In the past 25 years, farm bills have had both positive and negative scores relative to their baselines, according to CBO. The 2002 farm bill had a positive score and increased spending by $73 billion over 10 years under a budget resolution during a budget surplus. The 2008 farm bill was budget neutral, although it added $9 billion to outlays over 10 years by using offsets from a tax-related title. The 2014 farm bill had a negative score, reducing spending by $16 billion over 10 years. The 2018 farm bill was budget neutral with increases in some titles offset by reductions in others. In 2024, the House committee's bill, H.R. 8467, would have increased the 10-year cost by $28 billion.

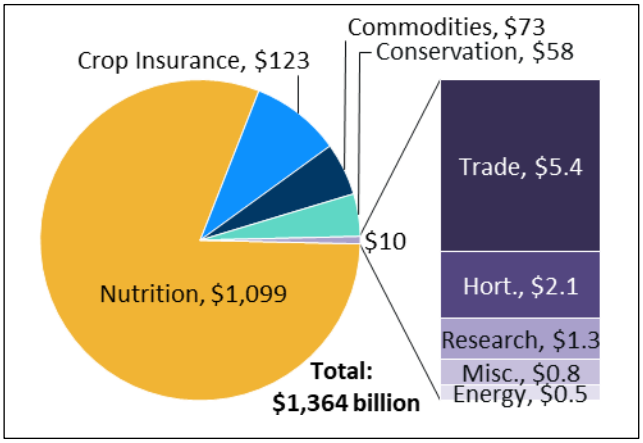
CBO's June 2024 Baseline

The current baseline used to score the farm bill is the June 2024 CBO baseline. A new CBO baseline with updated projections of spending is expected in the spring of 2025.

Farm bills have 5-year and 10-year budget projections according to federal budgeting practices. Converting the baseline update for programs into farm bill titles and adding funding indicated in law for other farm bill programs, CRS estimates that the 2024 baseline for all farm bill titles is $662 billion over 5 years (FY2025-FY2029) and $1,364 billion over 10 years (FY2025-FY2034) (**Figure 1**).

For individual agriculture-related programs with a mandatory spending baseline, excluding nutrition, current projections are for $265 billion of outlays over the next 10 years (**Figure 2**).

Figure 1. Farm Bill Titles with Mandatory Baseline
(billions of dollars, 10-year projected outlays, FY2025-FY2034)



Source: Created by CRS using the Congressional Budget Office (CBO) June 2024 baseline for the five largest titles and amounts indicated in law for programs in other titles.

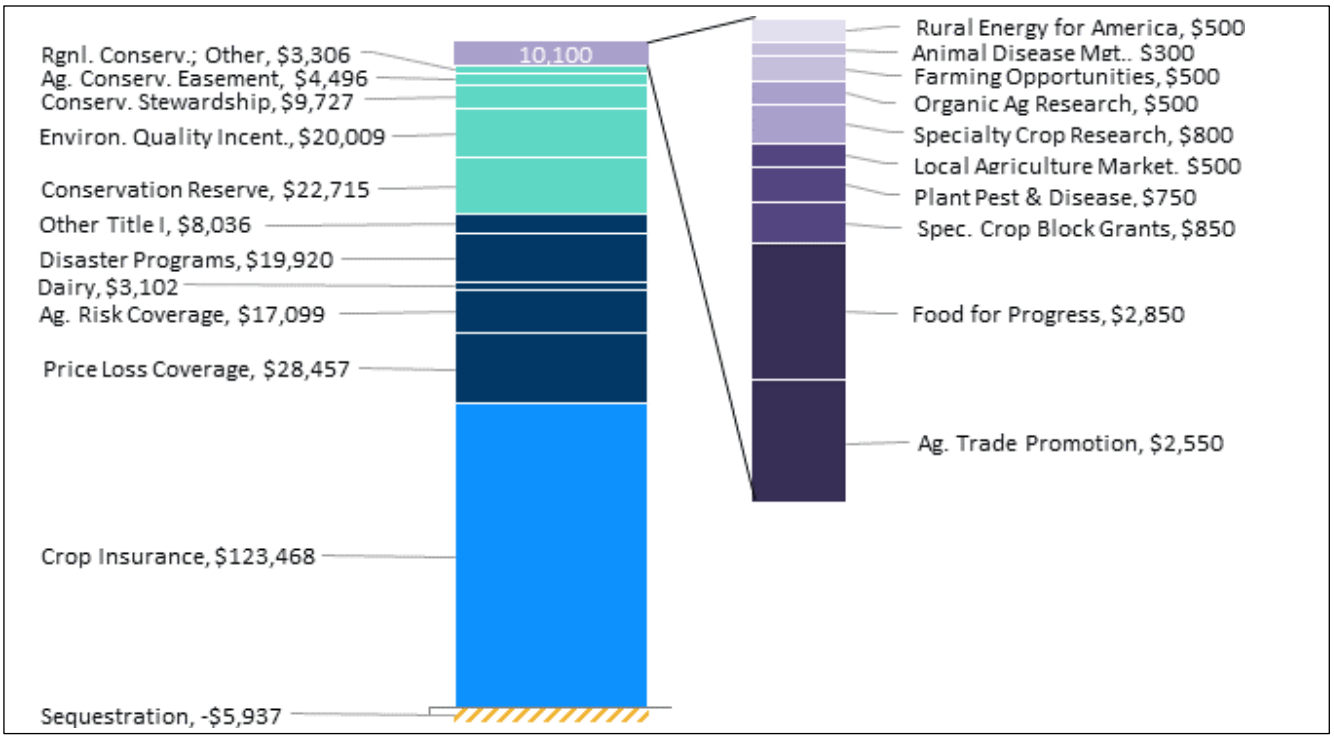
Extension of the Farm Bill in 2025

The latest one-year extension of the farm bill covers FY2025 and the 2025 crop year. It authorizes the continuation of mandatory and discretionary programs; for

programs with a mandatory spending baseline, Congress did not need to offset any cost for the extension.

Figure 2. Agriculture Programs with Baseline in the Farm Bill

(millions of dollars, 10-year projected outlays [excluding the nutrition title], FY2025-FY2034)



Source: Created by CRS using the CBO June 2024 baseline and amounts indicated in law for programs in other titles.

Programs Without Baseline

Twenty-one programs received mandatory funding in the 2018 farm bill but do not have a baseline to cover the cost of their reauthorization. The 2023 farm bill extension for FY2024 provided $177 million of one-year mandatory funding to 19 of those programs. The December 2024 extension for FY2025 did not provide any additional mandatory funding for any of these programs (CRS In Focus IF12115, *Farm Bill Primer: Programs Without a Budget Baseline*).

Supplemental Funding Not in the Baseline

Supplemental spending is not part of the baseline but may be important because of its size in recent years and may have created expectations for the farm bill. In FY2019 and FY2020, the Trump Administration provided over $25 billion for producers affected by retaliatory tariffs. From FY2020 to FY2022, Congress and the Trump and Biden Administrations provided pandemic assistance over $30 billion to farms and over $60 billion for nutrition. Congress has authorized more than $42 billion of ad hoc agricultural disaster assistance since 2018. The Biden Administration announced $3.5 billion for climate-smart commodities and $2.3 billion for trade promotion and global food aid, among other initiatives. The American Relief Act (P.L. 118-158) provided $10 billion of economic assistance for farmers in 2025. P.L. 117-169 (referred to as the Inflation Reduction Act) added over $17 billion for conservation and energy title programs. Unobligated balances may be cancelled or repurposed.

2024 Farm Bill Markup

When the House Agriculture committee marked up H.R. 8467 in May 2024, CBO had not released an official score of the bill. In August 2024, CBO published a score using the year-old May 2023 baseline that indicated the bill would increase mandatory spending by $33.0 billion over nine years (FY2025-FY2033). In November 2024, CBO updated the score of the bill using the June 2024 baseline, concluding that the bill would increase mandatory spending by $28 billion over 10 years. This new score indicated a smaller increase in spending, though it was still not budget neutral for meeting budget enforcement rules.

The latest score indicated that the major changes in H.R. 8467 included a net increase of about $37.0 billion over 10 years for commodity support programs, after accounting for the new restrictions on the Secretary of Agriculture's authority to use the Commodity Credit Corporation; a net increase of $4.5 billion for conservation programs including incorporating funding from P.L. 117-169 (referred to as the Inflation Reduction Act); a net decrease of $27.1 billion for the domestic nutrition programs, including by limiting future increases to the Thrifty Food Plan (TFP) that is used to determine Supplemental Nutrition Assistance Program (SNAP) benefit levels; and an increase of $13.6 billion for other titles (CRS Report R48167, *The 2024 Farm Bill: H.R. 8467 Compared with Current Law*).

The Senate Committee on Agriculture, Nutrition, and Forestry did not mark up S. 5335, and CBO has not released a score for it.

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Farm Bill Primer: Programs Without a Budget Baseline

From a budgetary perspective, many farm bill programs that receive mandatory funding are assumed to continue beyond the end of their authorization. That is, they have a continuing *baseline* beyond the end of a farm bill that gives them built-in future funding if Congress decides that the programs are to continue. Baseline can be reallocated or used as an offset for deficit reduction. Mandatory spending programs do not need annual discretionary appropriations.

Authorizing or reauthorizing mandatory funding for *farm bill programs without baseline* results in a positive score (cost) and would need to be offset by reductions elsewhere for the bill to remain budget neutral.

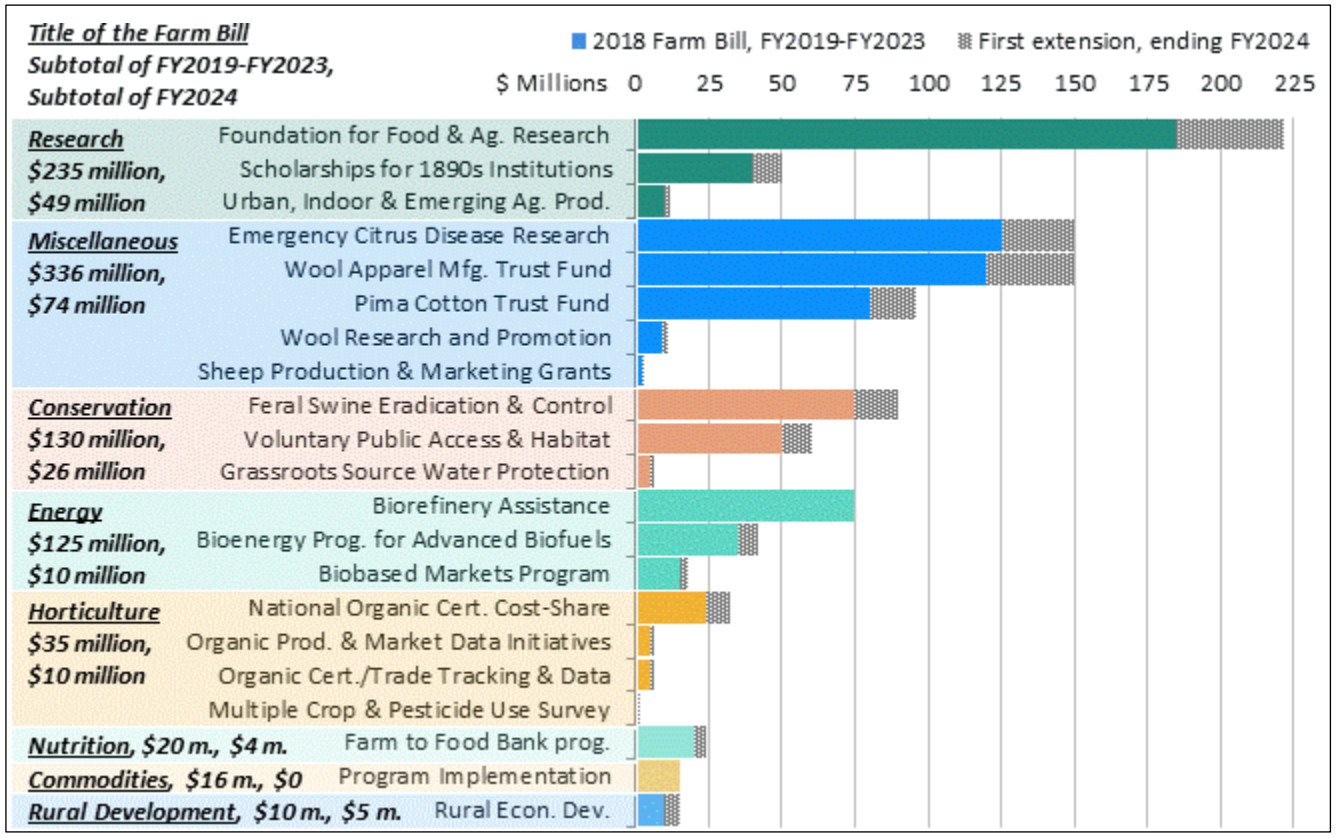
The first one-year farm bill extension of the farm bill during FY2024 (P.L. 118-22, Division B, §102) provided $177 million of mandatory funding to 19 of the 21 programs in the 2018 farm bill without a budget baseline (Agriculture Improvement Act of 2018, P.L. 115-334; **Figure 1**). The second one-year extension for FY2025 (P.L. 118-158) did not provide additional funding for these programs.

Why Some Programs Have Baseline, Others Not

Under budget rules, a program with mandatory spending authority in the last year of its authorization generally may be assumed to continue as if it did not expire and have baseline (2 U.S.C. §907(b)(2)), as explained by the Congressional Budget Office (CBO) in the annual *Budget and Economic Outlook*. This is the case for long-standing farm bill programs. Some of the newer, smaller farm bill programs do not continue in the baseline because the authorizing and budget committees did not provide them a baseline to continue.

CBO projects future government spending in its official budget baselines but has not published a list of expiring farm bill programs without a continuing baseline. To compile this list, CRS analyzed the CBO score of the 2018 farm bill, current CBO baseline projections, the statutory text of the farm bill, and the text of the extension acts, looking for programs that received mandatory funding but do not have baseline for reauthorization (**Figure 1**).

Figure 1. 2018 Farm Bill Programs Without a Budget Baseline, by Title



Source: CRS analysis of P.L. 115-334, P.L. 118-22, P.L. 118-158, and CRS Report R45425, *Budget Issues That Shaped the 2018 Farm Bill*, Table 3.
Notes: Includes 2018 farm bill programs that received mandatory funding but had no baseline beyond FY2023. The first farm bill extension, P.L.

118-22, Division B, §102, provided one year of funding for most programs. The second extension, P.L. 118-158, Division D, §4101(e), did not.

Types of Programs Affected

In the 2018 farm bill, 21 programs across 8 of the 12 titles do not have a baseline, per CRS analysis. They received $906 million of mandatory spending authority at enactment of the 2018 farm bill (colored bars in **Figure 1**). This was less than 0.3% of $428 billion total mandatory spending projected for all farm bill programs over FY2019-FY2023.

While the subset is small over the entire farm bill, the impact varies by title of the bill. For example, the single program in the rural development title receiving mandatory funding is affected. No programs in the trade, credit, forestry, or crop insurance titles are affected. For the research title, 34% of mandatory funding for the title is affected. By comparison, less than 0.1% of funding in the farm commodities and nutrition titles are affected.

Some provisions exist within programs with a baseline but nonetheless result in a cost to reauthorize. The Transition Incentive Program within the Conservation Reserve Program, which was excluded from the farm bill extension, is an example. These are not included in this analysis.

First Extension Provided Funding with an Offset

The farm bill extension for FY2024 (P.L. 118-22, Division B, §102) provided one year of mandatory funding to 19 of the 21 programs without baseline ($177 million; the gray hatched bars in **Figure 1**). Included programs generally received one-fifth of their five-year allocation that was in the 2018 farm bill. These programs remain without baseline beyond the extension and expired with FY2024.

Two of the programs that did not receive additional funding in the extension are Program Implementation funding in the commodity title (a one-time supplement in 2019) and the Biorefinery Assistance program in the energy title. The extension fully offset the mandatory funding provided to the 19 programs by rescinding unobligated balances in the Biorefinery Assistance account ($177 million) remaining from the 2014 and 2018 farm bills. Even after rescission, the Biorefinery Assistance program—a loan guarantee program that has operated at low cost during the low interest rate environment of the last decade—may retain sufficient funding to operate during FY2024.

Second Extension Provides No Such Funding

The second one-year farm bill extension for FY2025 (P.L. 118-158, Division D) did not provide additional funding for any of the programs without baseline (§4101(e)).

Comparison with Past Farm Bills

Farm bill programs without a budget baseline have been an issue since the 2008 farm bill. As Congress considers the next farm bill, fewer programs without a budget baseline exist than during previous farm bill debates (**Table 1**).

During past reauthorizations, some affected programs received mandatory funding during the farm bill but not permanent baseline. In other cases, programs received permanent baseline during reauthorization by consolidating them into a larger umbrella program to exceed a $50 million scoring threshold, which required extra funding in the 10-year score.

- Of the 37 programs with no baseline after the 2008 farm bill expired, the 2014 farm bill provided 29 of the programs with $6.2 billion over FY2014-FY2018.

- Of the 39 programs with no baseline after the 2014 farm bill expired, the 2018 farm bill provided 23 of the programs with $1.6 billion over FY2019-FY2023; nine of which received permanent baseline, costing an additional $1.5 billion over FY2024-FY2028.

Table 1. Time Series of Farm Bill Programs Without Baseline That Received Mandatory Funding

Farm Bill	Programs	Expiration	$ million[a]
2008 farm bill	37	FY2012	$9,131[b]
2013 extension	0	—	$0
2014 farm bill	39	FY2018	$2,824
2018 farm bill	21	FY2023	$906
2024 extension	19	FY2024	$177
2025 extension	0	—	$0

Sources: CRS In Focus IF10780, *Farm Bill Primer: Programs Without Baseline Beyond FY2018*, and CRS Report R41433, *Programs Without a Budget Baseline at the End of the 2008 Farm Bill.*

a. Amounts are for five years for a farm bill or one year for an extension.

b. At enactment in 2008, the five-year estimated cost of affected programs was $9.131 billion. In 2012, the estimated cost to reauthorize the programs was as high as $14 billion.

The situation facing these programs in FY2025 is similar to a previous one-year extension of the farm bill in 2013 (P.L. 112-240, Title VII). None of the programs without baseline received additional mandatory funding. Although the extension in January 2013 added new "authorizations of appropriations" for many programs without baseline, those authorizations went unfunded in the eventual FY2013 appropriations act in March 2013.

For the next farm bill reauthorization, a smaller number of programs have no baseline and comprise a smaller dollar amount than in previous reauthorizations. This may make it easier for Congress to balance some of the budget considerations in the next farm bill than when it wrote the 2014 and 2018 farm bills.

CRS Products

CRS In Focus IF12047, *Farm Bill Primer: Background and Status*

CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*

CRS Report R47659, *Expiration of the 2018 Farm Bill and Extension for 2025*

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IF12115

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Congressional Research Service
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The Commodity Credit Corporation (CCC)

Updated May 15, 2025

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CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

The Commodity Credit Corporation (CCC)

SUMMARY

R44606

May 15, 2025

Megan Stubbs
Specialist in Agricultural Conservation and Natural Resources Policy

The Commodity Credit Corporation (CCC) has served as a mandatory funding mechanism for agricultural programs since 1933. The CCC Charter Act enables the CCC to broadly support the U.S. agriculture industry for authorized purposes and programs including commodity and income support, natural resources conservation, export promotion, international food aid, disaster assistance, agricultural research, and bioenergy development.

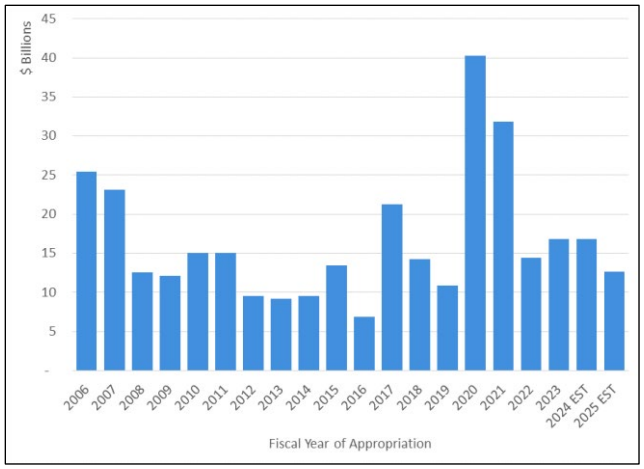
While CCC is authorized to carry out a number of activities, it has no staff of its own. Rather, U.S. Department of Agriculture (USDA) employees and facilities carry out all of its activities. CCC is overseen by the Secretary of Agriculture and a board of directors, which are also USDA officials. CCC has capital stock; buys, owns, sells, and donates agricultural commodities; and provides loans and payments to farmers and ranchers. It has a permanent indefinite borrowing authority of $30 billion from the U.S. Treasury. By law, it receives an annual appropriation equal to the amount of the previous year's net realized loss (see inset figure). This replenishes its borrowing authority from the Treasury and allows it to cover authorized expenditures that will not be recovered. Variations in its annual appropriation each year do not indicate any action by Congress to change program support but rather reflect changes in farm program payments and other discretionary uses of CCC's authority that fluctuate based on economic circumstances and weather conditions.

The majority of CCC activities are authorized through omnibus farm bills—most recently the Agriculture Improvement Act of 2018 (2018 farm bill, P.L. 115-334) and related extensions (P.L. 118-158, Division D; and P.L. 118-22, Division B, §102). Farm bill authorization directs programs to use CCC's borrowing authority, thereby dispensing with the need for an annual appropriation for individual programs. The use of this mandatory spending authority has expanded over time.

The CCC Charter Act also grants the Secretary of Agriculture broad powers and discretion to use the CCC, sometimes referred to as Section 5 authority, to fund activities that support agriculture. The mandatory funding nature of CCC activities may make CCC an attractive funding mechanism but one that is subject to budget enforcement rules if used by Congress. USDA's use of CCC is not subject to the same congressional budget procedures; therefore, certain USDA actions may increase federal spending without needing to be offset under congressional budget enforcement rules.

This discretionary use has been restricted by Congress in the past, which can reduce the Secretary's options to use CCC. Since FY2018, no restriction has been placed on USDA's use of CCC, and both the Trump and Biden Administrations have used CCC for various purposes to support U.S. agriculture. Congress may consider future restrictions as a cost saving measure for budget reconciliation, to offset other spending (e.g., through farm bill reauthorization), or for deficit reduction. Restrictions on CCC's discretionary use authority could impact USDA's ability to respond to adverse economic conditions facing U.S. agriculture, such as trade disruptions or commodity purchases. Congressional support for discretionary use of CCC typically varies depending on amount and purpose. CCC funding and activities authorized by USDA are at the discretion of the Secretary of Agriculture and may change or be suspended by the Secretary of Agriculture at any time (e.g., the current Administration may change or suspend actions taken by a previous Administration).

CCC Net Realized Loss, FY2006-FY2025 (est.)



Sources: Compiled by CRS from USDA, Farm Service Agency (FSA), *Commodity Estimates Book*, FY2008-FY2017 President's Budgets (Output 3); USDA, FSA, *Data Master*, FY2008 through FY2017 President's Budgets; and USDA, FY2016 through FY2025 *Explanatory Notes-Commodity Credit Corporation*, "Account 1: Net Realized Losses." FY2024 and FY2025 estimates are from the FY2025 Explanatory Notes.

Notes: Total funding for CCC is constrained by the $30 billion borrowing limit that does not adjust for inflation. The totals presented are nominal budget authority in billions of dollars not adjusted for inflation. The net realized loss estimated for FY2020 and FY2021 is above the $30 billion borrowing limit due, in part, to a midyear appropriation in FY2020 that reimbursed a portion of the loss before the end of the fiscal year. Actual losses occur in the fiscal year prior to the year of appropriation.

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The Commodity Credit Corporation (CCC) has served as the financial institution for carrying out federal farm commodity price support and production programs since 1933. It is a wholly government-owned entity that exists solely to finance authorized programs that support U.S. agriculture. It is subject to the supervision and direction of the Secretary of Agriculture at the U.S. Department of Agriculture (USDA). The CCC mission was conceived mainly as one of commodity support, but over time it has expanded to include an increasingly broad array of programs, including export and commodity programs, resource conservation, disaster assistance, agricultural research, and bioenergy development.

While CCC operates according to a large number of statutory authorities, its broad powers allow it to carry out many operations to meet the objectives of supporting U.S. agriculture. This broad mandate, and its significant borrowing authority, has traditionally drawn little attention. For most of its history, CCC's responsibilities have been expanded through legislative directives such as the farm bill. From FY2012 through FY2017, Congress took actions to limit the use of CCC funds by USDA through restrictions in appropriations language. Beginning in FY2018, Congress lifted these restrictions, allowing for USDA to use CCC's broad powers and discretionary authority for various payments and purchases related to supporting U.S. agriculture.[1] The expanded use of CCC since FY2018 has generated questions about what the CCC is, how it operates, what its current uses are, and what it may be used for in the future. This report provides a brief review of CCC's unique history, funding structure, general operation, and recent issues associated with its use and possible future restrictions.[2]

Origin of the Commodity Credit Corporation

For over a decade prior to the creation of CCC in 1933, the farm economy struggled with low levels of income from depressed commodity prices and increasing costs for supplies and services. The first major federal effort to boost commodity prices was through the Federal Farm Board, established by the Agricultural Marketing Act of 1929.[3] An inadequate and ultimately failed effort to eliminate commodity surpluses was attempted by making loans to cooperative associations for the purpose of carrying out surplus purchase operations. Without the ability to control production, it was impossible to eliminate surplus stocks. This led to proposals to regulate the harvested acreage of farm commodities and the quantities sold. The concept of acreage and marketing controls was incorporated in to the Agricultural Adjustment Act of 1933 (AAA).[4]

The AAA sought to reduce production by paying producers to participate in acreage control programs. Funding came from a tax on companies that processed farm products. Additional provisions of the law dealt with fair marketing practices and voluntary agreements between producers and handlers of commodities to regulate marketing. CCC was created as the financial institution to carry out and fund the activities of the AAA. Executive Order 6340 of October 17, 1933, directed the incorporation of CCC in the state of Delaware.[5]

[1] These payments are discussed in the "Discretionary Use" section.

[2] Other CRS reports cover in detail programs and activities authorized through the Commodity Credit Corporation (CCC). For additional information regarding programs and activities authorized through CCC, see CRS farm bill and farm support reports at http://www.crs.gov/iap/agriculture-and-food.

[3] P.L. 71-10; 46 Stat. 11.

[4] P.L. 73-10; 48 Stat. 31.

[5] Executive Order 6340, "Creating the Commodity Credit Corporation," *Public Papers of the Presidents of the United States: Franklin D. Roosevelt* (Washington: GPO, October 16, 1933).

The Delaware charter authorized CCC, among other things, to buy and sell farm commodities; lend; undertake activities for the purpose of increasing production, stabilizing prices, and ensuring adequate supplies; and facilitate the efficient distribution of agricultural commodities. It was originally capitalized in 1933 with $3 million appropriated by Congress. In 1936, sufficient stock was acquired to raise the capitalization to $100 million. Its capital stock remains at this level.[6] In 1939, Executive Order 8219 ordered that all rights of the United States arising out of the ownership of CCC be transferred to the Secretary of Agriculture.[7]

At that time, low prices became so critical for cotton and corn producers that waiting for another season for supply controls to impact the market was judged to be untenable. With the establishment of CCC, it became possible to make *price-support loans*, now commonly referred to as nonrecourse loans, allowing farmers to obtain cash using crops as collateral. These loans provided farmers funds to hold their products off the market until prices improved. The first loans were made to cotton farmers for more than the market price. Since loans were higher than the market price and the loans were nonrecourse, they could be satisfied by forfeiting the cotton pledged as collateral against the loan, thereby serving as a form of price support and effectively establishing a floor price for the domestic market.[8] Funding for these first loan operations came from a tax on commodity processing and from CCC's $3 million capital account, which was appropriated under authority of the National Industrial Recovery Act and the Fourth Deficiency Act.[9]

Constitutional difficulties with some provisions of the AAA, and practical shortcomings with other elements of the law, led to additional legislation in the 1930s that continues to provide permanent authority for many USDA activities. Subsequent omnibus "farm bills" set most of the policy goals and program constraints for farm price and income support operations that are funded through CCC.

CCC Charter Act

The Government Corporation Control Act of 1945[10] (GCCA) required all wholly owned government corporations to be reincorporated as agencies or instrumentalities of the United States. Accordingly, Congress passed the Commodity Credit Corporation Charter Act of 1948 (Charter Act).[11] All CCC rights, duties, assets, and liabilities were assumed by the federal corporation, and the Delaware corporation was dissolved.

[6] The Reconstruction Finance Corporation originally acquired the $100 million capitalization stock. The Reconstruction Finance Corporation was a New Deal–era government corporation that provided financial support and loans, including the recapitalization of banks.

[7] Executive Order 8219, 4 *Federal Register* 3565, August 10, 1939. Executive Order 7848, 3 *Federal Register* 632, March 22, 1938, had previously designated the Secretary of the Treasury as the holder of CCC's capital stock.

[8] David Godfrey, "The Commodity Credit Corporation," Texas Tech University, 1974, http://hdl.handle.net/10601/1696.

[9] 48 Stat. 195, and 48 Stat. 274, respectively.

[10] The Government Corporation Control Act of 1945 (GCCA, 31 U.S.C. §§9101-9110) standardized budget, auditing, debt management, and depository practices for government corporations. The GCCA is not a general incorporation act such as those in effect in the states. The charter for each federal government corporation is the separate enabling legislation passed by Congress. The GCCA also does not offer a general definition of what constitutes a government corporation. It simply enumerates the organizations covered by the act. For additional information, see General Accounting Office, *Government Corporations: Profiles of Existing Government Corporations*, GAO/GGD 96-14, December 1995, https://www.gao.gov/products/GGD-96-14.

[11] P.L. 80-806; 62 Stat. 1070; 15 U.S.C. §714.

Government Corporations in General

Government corporations have existed for over a century. The exact number of government corporations depends on how they are defined (ranging from around a dozen to over 40). While no single definition exists, they are generally defined as agencies of the federal government established by Congress to perform a public purpose. Commonly, they provide a market-oriented product or service and are intended to produce revenue that meets or approximates its expenditures. Generally, government corporations must submit annual management reports to Congress and are assigned to committees of subject matter jurisdiction. Many have a board of directors and are overseen by political appointees or executive branch officials. Commonly, government corporations are perceived as discrete entities with individual administrative requirements defined in law.[12]

According to the Charter Act, the purpose of CCC is to stabilize, support, and protect farm income and prices; assist in maintaining balanced and adequate supplies of agricultural commodities; and facilitate the orderly distribution of commodities. A list of some of CCC's authorities (paraphrased from Section 5 of the Charter Act, 15 U.S.C. §714c) conveys a sense of its broadly stated powers:

- Support agricultural commodity prices through loans, purchases, payments, and other operations.[13]
- Make available materials and facilities in connection with the production and marketing of agricultural products.
- Procure commodities for sale to other government agencies; foreign governments; and domestic, foreign, or international relief or rehabilitation agencies and for domestic requirements.
- Remove and dispose of surplus agricultural commodities.
- Increase the domestic consumption of commodities by expanding markets or developing new and additional markets, marketing facilities, and uses for commodities.
- Export, or cause to be exported, or aid in the development of foreign markets for commodities.
- Carry out authorized conservation or environmental programs.
- Carry out other operations specifically authorized by Congress.

Congressionally Authorized Activities

The majority of CCC operations are governed by statutory authorities that direct USDA on how to administer CCC activities and in what amounts to fund them. Over time, Congress has added new activities to CCC's original mission, including conservation, specialty crop support, and bioenergy development (see text box below). Most of these activities are authorized in periodic omnibus farm bills.[14] In carrying out these operations, CCC is directed, to the maximum extent practicable, to use the usual and customary channels, facilities, and arrangements of trade and commerce.[15]

[12] Government Accountability Office (GAO), *Federally Created Entities: An Overview of Key Attributes*, GAO-10-97, October 2009, pp. 13-16, https://www.gao.gov/products/GAO-10-97.

[13] Amendments to the Commodity Credit Corporation Charter Act in 2004 preclude tobacco from being considered within the definition of "agricultural commodities" (P.L. 108-357).

[14] CRS In Focus IF12047, *Farm Bill Primer: Background and Status*.

[15] 15 U.S.C. §714c.

Examples of CCC Activities and Programs

CCC is authorized to fund a broad array of programs supporting U.S. agriculture. These programs are typically authorized through omnibus farm bills, most recently the 2018 farm bill (CRS Report R45525, *The 2018 Farm Bill (P.L. 115-334): Summary and Side-by-Side Comparison*). A general description of the assistance that has been congressionally authorized and examples of associated programs are listed below. This is not an exhaustive list.

Commodity and Income Support provides farm payments and loans when crop prices or revenues decline for major commodity crops—including wheat, corn, soybeans, peanuts, and rice—as well as other support mechanisms for dairy, cotton, and sugar (e.g., Agriculture Risk Coverage, Price Loss Coverage, and Dairy Margin Coverage).

Conservation provides financial and technical assistance for voluntary participation in resource conservation programs to protect soil, water, wildlife, and other natural resources on private lands (e.g., Environmental Quality Incentives Program, Conservation Reserve Program, and Agricultural Conservation Easement Program).

Disaster provides payments for livestock and crop production losses resulting from weather events and disease outbreaks (e.g., Livestock Forage Disaster Program, Noninsured Crop Disaster Assistance Program, and Tree Assistance Program).

Export and Foreign Food Assistance promotes U.S. agricultural products abroad, develops export markets, and supports international food assistance programs (e.g., Agricultural Trade Promotion Program and Food for Progress Program).

Bioenergy provides assistance for the research, development, and adoption of renewable energy—primarily biofuels (e.g., Biorefinery Assistance Program and Rural Energy for America Program).

Specialty Crops supports research, market promotion (including organic certification), and pest and disease prevention for fruits, vegetables, tree nuts, floriculture, and other ornamental products (e.g., Specialty Crop Block Grant Program and Specialty Crop Research Initiative).

Discretionary Use (Section 5 Authority)

The CCC authorities provided to the Secretary of Agriculture under Section 5 of the CCC Charter Act allows the Secretary a level of discretion to carry out many broad operations in support of U.S. agriculture. This discretion (sometimes referred to as Section 5 authority) has been used during CCC's history for various purposes, including purchases of food for distribution, responses to adverse economic conditions, and to fund USDA priorities (see **Table 1**). The scope and scale of this use traditionally has been targeted to specific events, crops, or domestic needs.

Table 1. Examples of USDA's Discretionary Use of CCC

FY2015-FY2024

Fiscal Year	Program Name	Total Authorized Funding Level
2015	Biofuels Infrastructure Partnership Program	$100 million
2016, 2018	Cotton Ginning Cost Share	$542 million
2018-2019	Food Purchase and Distribution Program	$2,600 million
2018-2019	Market Facilitation Program	$28,000 million
2020	Higher Blends Infrastructure Incentive Program	$100 million
2020	Seafood Assistance Program	$530 million
2020	Coronavirus Food Assistance Program (CFAP)	$6,500 million
2021	Drought Recovery & Water Smart Practices	$500 million
2021-2024	School Food/Child Nutrition Support	$4,000 million
2022	Partnerships of Climate-Smart Commodities	$3,500 million
2023	Food Aid to Address Global Hunger	$1,060 million

Fiscal Year	Program Name	Total Authorized Funding Level
2023-2024	Regional Agricultural Trade Promotion Program	$1,680 million

Source: Compiled by CRS from USDA press releases, *Federal Register* notices, and budget documents.

Notes: The nominal authorized level of funding, as announced by USDA, is included. Actual expenditures may vary from authorized levels. Reallocations from unused announced funding are not included. This table is not comprehensive, and no comprehensive list of USDA's discretionary use of CCC is publicly available.

Congress can alter USDA's use of CCC authority through direct amendments to the CCC Charter Act or through limitation, such as in appropriations, on how CCC funds may be used. The latter occurred from FY2012 to FY2017, when Congress limited USDA's discretion to use CCC's authority to remove surplus commodities and support prices. The limitation was included in annual appropriation acts (see text box below).

Restrictions on CCC Use: FY2012-FY2017

Each annual appropriation between FY2012 and FY2017 temporarily prohibited the use of select discretionary authority under CCC. This restriction was specific to any surplus removal activities or price support activities under Section 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. §714c).[16] This restriction did not affect USDA's ability to administer authorized programs under the 2014 farm bill (P.L. 113-79).[17]

This recurring provision was a reaction to administrative activities following 2009 crop losses, in which the Obama Administration announced that it would implement a disaster program under "Section 32" authority.[18] In 2010, USDA spent $348 million distributed across three categories: (1) select crop producers (upland cotton, rice, soybeans, and sweet potatoes),[19] (2) poultry producers, and (3) aquaculture producers. USDA used CCC authority to make purchases that usually would have otherwise been made with Section 32 funds for domestic feeding programs.[20]

Critics of the 2009 disaster assistance, in Congress and elsewhere, objected to USDA using its authority to make such payments without a legislative mandate. Concerns at that time about the limits on CCC's mandate were related to assistance—or lack thereof—for cottonseed payments, dairy assistance, and biofuel infrastructure.

The FY2018 Consolidated Appropriations Act (P.L. 115-141) did not include these restrictions, thereby allowing the Secretary of Agriculture full use of the CCC Charter Act's discretionary authority. The Secretary of Agriculture used this authority in 2018 and 2019, when it was announced that USDA would be taking several actions to assist farmers in response to economic trade damage from retaliatory tariffs that targeted various U.S. products.[21] USDA used its discretion under the CCC Charter Act to authorize up to $28 billion in total assistance—referred to as the "trade aid" package—for certain agricultural commodities.[22] Secretaries of Agriculture

[16] For example, see Section 715 of the Consolidated Appropriations Act of 2016 (P.L. 114-113) or Section 715 of the Consolidated Appropriations Act of 2017 (P.L. 115-31).

[17] Appropriations acts also limited clause 3 of Section 32, which provides that funds may be used to reestablish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption (7 U.S.C. §612c).

[18] U.S. Department of Agriculture's (USDA) Section 32 program is funded by a permanent appropriation of 30% of the previous year's customs receipts, less certain mandatory transfers. Section 32 funds are used for a variety of activities, including child nutrition programs, the purchase of commodities for domestic food programs, and farm disaster relief. For more information, see CRS Report R48141, *Trends in USDA Procurement of U.S. Food and Agricultural Products*.

[19] On October 22, 2010, USDA announced it would begin making payments to producers in eligible counties under the Crop Assistance Program using payment rates established for each crop. A fact sheet is available at http://www.fsa.usda.gov/Internet/FSA_File/cap10pfs.pdf.

[20] USDA, *Background on 2009 Disaster Assistance*, http://www.agri-pulse.com/uploaded/Disaster_Backgrounder.pdf.

[21] For more information, see CRS Insight IN10880, *China's Retaliatory Tariffs on Selected U.S. Agricultural Products*.

[22] For more information, see CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*; and CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*.

have continued to use their administrative discretion to authorize funding and food purchases in response to economic disruptions and administrative priorities (see **Table 1**).

Management of CCC

The Charter Act makes CCC an agency and instrumentality of the United States within USDA, subject to the supervision and direction of the Secretary of Agriculture. A board of directors appointed by the President, consisting of the Secretary and seven other USDA officials, is responsible for the management of CCC.[23] CCC officers and advisors—also USDA officials—are charged with maintaining liaisons with other governmental and private trade operations on the CCC's behalf.

The CCC has no personnel of its own. Rather, USDA employees and facilities carry out all of its activities. Administrative functions generally fall to the USDA agencies directed to administer the various CCC programs. The majority of its functions are administered by the Farm Service Agency (FSA).[24] Other agencies also administer CCC programs, including the Natural Resources Conservation Service, the Agricultural Marketing Service, the Foreign Agricultural Service, and the Food and Nutrition Service. CCC reimburses other agencies for their administrative costs.

CCC cannot acquire property or interest in property unless it is related to providing storage for program implementation or protecting CCC's financial interests.[25] CCC is allowed to rent or lease space necessary to conduct business (e.g., warehousing of commodities).

Financing CCC

CCC is responsible for the direct spending and credit guarantees used to finance the federal government's agricultural commodity price support and related activities that are undertaken by authority of agricultural legislation (such as farm bills) or the Charter Act itself. It is, in brief, a broadly empowered financial institution. The money that CCC needs comes from its own funds (including its $100 million capital stock, appropriations from Congress, and its earnings from sales and fees) and from borrowings. In accordance with government accounting statutes and regulations, CCC is required to submit an annual business-type budget statement to Congress. This is typically released annually with the President's budget request.[26]

The Office of Management and Budget (OMB) also plays a role in how CCC funds are administered through an apportionment process, which allows OMB to set a limit on the funds available for obligation and subsequent outlay.[27] OMB apportions funds for select CCC programs and operating expenditures.[28] OMB is precluded, however, from apportioning funds "for price

[23] 15 U.S.C. §714g.

[24] The bylaws of CCC name the administrator of the Farm Service Agency (FSA) as executive vice president of CCC, which "shall have general supervision and direction of the day-to-day conduct of the business of the Corporation and its officers." USDA, CCC, *Bylaws of the Corporation*, May 3, 2022, https://www.usda.gov/sites/default/files/documents/usda-ccc-bylaws.pdf.

[25] 15 U.S.C. §714b(h).

[26] CCC budget estimates can be found annually at USDA, Office of Budget and Program Analysis, https://www.usda.gov/about-usda/general-information/staff-offices/office-budget-and-program-analysis.

[27] General Accounting Office, *Commodity Credit Corporation: Information on the Availability, Use, and Management of Funds*, GAO/RCED-98-114, April 1998, http://www.gao.gov/assets/230/225533.pdf.

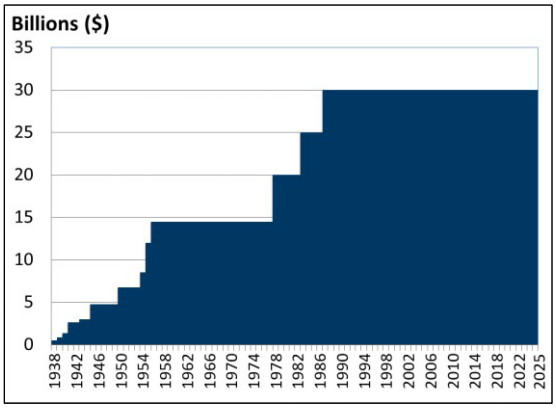
[28] In accordance with the Antideficiency Act, as amended (31 U.S.C. §1512), among other statutory requirements.

support and surplus removal of agricultural commodities" and therefore may not limit funds for this purpose unless it relates to administrative expenses.[29]

Borrowing Authority and Related Appropriations

CCC borrows from the U.S. Treasury to finance its programs. CCC has permanent indefinite authority to borrow from the Treasury (and also private lending institutions) within limits set by Congress in statute. As the amount of money used to carry out its activities has grown over time, the borrowing limit has steadily increased (**Figure 1**). CCC's borrowing authority has been capped at $30 billion since 1987.[30]

Figure 1. CCC's Borrowing Authority
1938-2025



Source: CRS from USDA, *Reports of Financial Conditions and Operations of the CCC*, various years.

Notes: The graph illustrates the year in which legislation authorized an increase in the nominal borrowing authority. Prior to 1938, CCC had no specific borrowing authority. In 1954, Congress passed two increases, one to $8.5 billion and a second to $10 billion.

Most CCC-funded programs are classified as mandatory spending programs and therefore do not require annual appropriations in order to operate. Mandatory spending, however, is subject to budget enforcement procedures such as cut-as-you-go (CUTGO) and pay-as-you-go (PAYGO) rules.[31]

CCC activity is often described using two similar but different measures. The first is *net expenditures*, which is a combination of outlays and receipts. The second is *net realized losses*, which are expenditures that will never be recovered.

Net Expenditures

CCC recoups some money from authorized activities (e.g., sale of commodity stocks, loan repayments, and fees), though not nearly as much money as it spends, resulting in net expenditures. Net expenditures include all cash outlays minus all cash receipts, commonly referred to as "cash flow." CCC outlays or expenditures represent the total cash outlays of the CCC-funded programs (e.g., loans made, conservation program payments, commodity purchases, and disaster payments). Outlays are offset by receipts (e.g., loan repayment, sale of commodities, and fees). In practice a portion of these net expenditures may be recovered in future years (e.g., through loan repayments).

Net Realized Losses

CCC also has net realized losses, also referred to as nonrecoverable losses. These refer to the outlays that CCC will never recover, such as commodities sold or donated, uncollectible loans,

[29] 31 U.S.C. §1511(b)(1)(A).

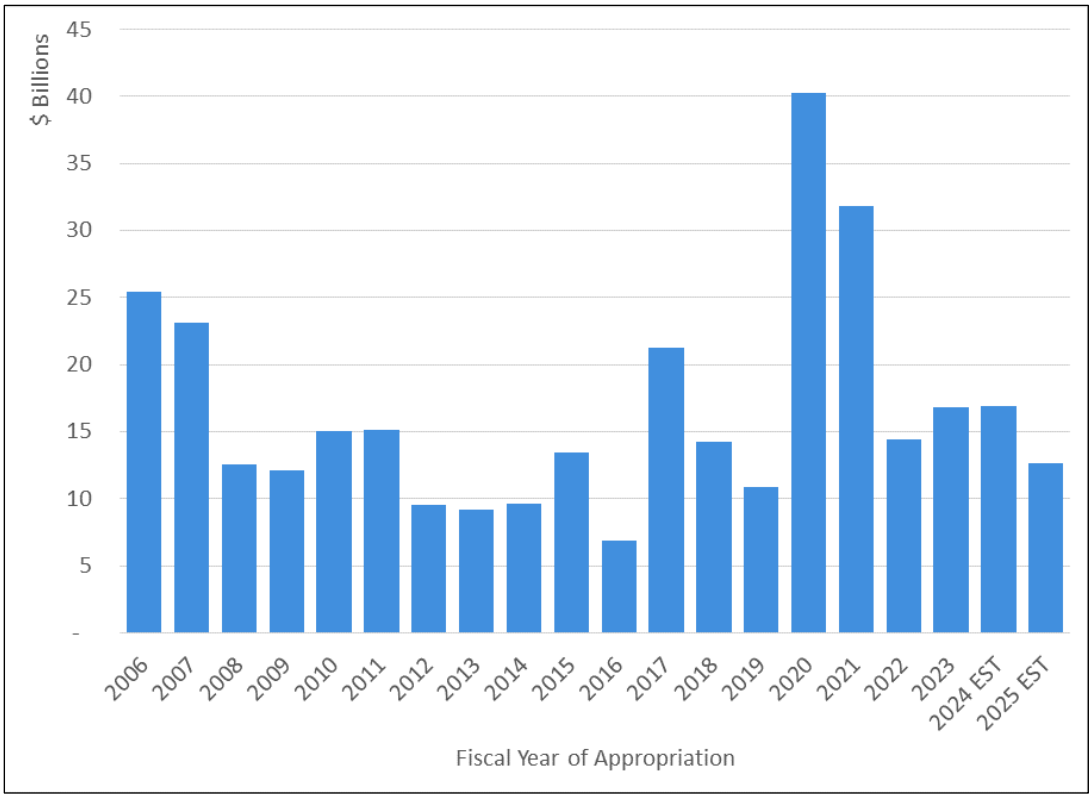
[30] 15 U.S.C. §714b(i).

[31] In general, pay-as-you-go (PAYGO) rules require legislation that is projected to increase mandatory spending or reduce revenues to also include offsetting provisions over a specified period. For more information on the House and Senate PAYGO rules, see CRS Report R41510, *House Rule XXI, Clause 10: The CUTGO Rule* and CRS Report RL31943, *Budget Enforcement Procedures: The Senate Pay-As-You-Go (PAYGO) Rule*, respectively. For information on how budget enforcement affects the farm bill, see CRS In Focus IF12233, *Farm Bill Primer: Budget Dynamics*.

storage and transportation costs, interest paid to the Treasury, program payments, and operating expenses. The net realized loss is the amount that CCC, by law, is authorized to receive through appropriations to replenish its borrowing authority (see **Figure 2**).[32]

Figure 2. CCC Realized Losses

FY2006-FY2025



Sources: Compiled by CRS from USDA, Farm Service Agency (FSA), *Commodity Estimates Book,* FY2008-FY2017 President's Budgets (Output 3); USDA, FSA, *Data Master*, FY2008 through FY2017 President's Budgets; and USDA, FY2016 through FY2025 *Explanatory Notes-Commodity Credit Corporation*, "Account 1: Net Realized Losses." FY2024 and FY2025 estimates are from the FY2025 Explanatory Notes.

Notes: Total funding for CCC is constrained by the $30 billion borrowing limit that does not adjust for inflation. The totals presented are nominal budget authority in billions of dollars not adjusted for inflation. The net realized loss estimated for FY2020 and FY2021 is above the $30 billion borrowing limit due, in part, to a midyear appropriation in 2020 that reimbursed a portion of the loss before the end of the fiscal year.

Appropriations to Reimburse Net Realized Loss

The annual appropriation for CCC varies each year based on the net realized loss of the previous year.[33] For example, the FY2021 appropriation (P.L. 116-260) covered the net realized loss for the previous year of $31.8 billion. This reduced by more than half the next year, to cover a net realized loss of $14.4 billion. The decline does not indicate any action by Congress to change

[32] 15 U.S.C. §713a-11.

[33] According to a General Accounting Office report, CCC changed the manner in which it calculates its request for an appropriation to cover its net realized losses in 1998 in response to recommendations from USDA's Office of Inspector General. Prior to 1998, the annual appropriation request included estimates for prior and future losses. This resulted in an over-appropriation of about $5 billion in FY1996 due to overestimates of CCC's prior and future losses. General Accounting Office, *CCC: Information*, GAO/RCED-98-114.

program support; it reflects changes in farm program payments and other uses of CCC's authority that fluctuated based on economic circumstances and weather conditions. Also, CCC's assets, which include loans and commodity inventories, are not considered to be "losses" until CCC ultimately disposes of the asset (e.g., by sales, exports, or donations). Once CCC has disposed of these assets, its total losses are realized and are added to other program expenses less any other program income.

Reimbursement Timing

Congress has annually appropriated CCC funding to cover its net realized losses incurred in the previous fiscal year. The total amount appropriated is based on the required financial statement and audit of the CCC following the completion of a fiscal year.[34] The financial statement and audit typically are not completed until several months following the end of the fiscal year, thereby resulting in a gap between the end of the fiscal year and the receipt of the annual appropriated reimbursement.

Many farm program payments are required to be made annually in October (e.g., Agricultural Risk Coverage, Price Loss Coverage, Conservation Stewardship Program, and the Conservation Reserve Program).[35] In most years, CCC has enough room within the borrowing authority limit to make these payments before receiving its annual appropriated reimbursement. In years of high expenditures, CCC could reach its borrowing authority limit before receiving its appropriation.[36] If CCC reaches its borrowing limit, all functions and operations of CCC would be suspended until the borrowing authority is restored through the reimbursement that is pursuant to an appropriation.

The timing of this appropriation may be altered if Congress were to authorize reimbursement before the conclusion of the annual financial statement or at a time other than the conclusion of the fiscal year. Both of these timing adjustments have occurred in recent years.

Anomaly

In the absence of an enacted Agriculture appropriation at the beginning of a fiscal year, Congress may pass a continuing resolution (CR) to continue operations and prevent a government shutdown. In general, a CR continues the funding rates and conditions that were in the previous year's appropriation. In some cases, exceptions (or "anomalies") are also included in CRs to provide changes and exceptions to the general funding rate or to address special circumstances. In FY2017 and FY2019-FY2021, CCC expenditures for the previous fiscal year were high enough that Congress included an anomaly in CRs allowing CCC to receive its annual reimbursement before completion of the required financial statement and audit. The anomaly did not change the amount reimbursed or the financial reporting requirement, only the timing of when CCC could receive reimbursement. Under a CR without the anomaly, CCC could still receive its annual reimbursement following the completion of the required financial statement and audit. Congress

[34] 15 U.S.C. §713a-11. Audits are in accordance with 31 U.S.C. §9105.

[35] For example, the farm bill directs that for certain farm commodity programs, such as the Price Loss Coverage program "the payments shall be made beginning October 1, or as soon as practicable thereafter, after the end of the applicable marketing year for the covered commodity" (7 U.S.C. §9016(e)).

[36] The Congressional Budget Office (CBO) baseline projection for CCC estimates these first quarter of the fiscal year outlays in its estimate of the availability of funds for discretionary use. CBO, *Baseline Projection for USDA Farm Programs*, "Appendix B. Assumptions for Estimating CCC Section 5 Use Under the $30 Billion Borrowing Limit," January 2025, https://www.cbo.gov/data/baseline-projections-selected-programs#23.

may also include an anomaly in a regular appropriation that could shift the timing of when CCC could receive reimbursement.

Supplemental Appropriation

CCC operates as a line of credit, borrowing funds from the U.S. Treasury as needed to carry out its activities. The net realized loss is provided through appropriations and reimbursed to the Treasury, effectively lowering the CCC's outstanding debit. Typically, the reimbursement occurs annually through the annual appropriations process; however, Congress can choose to authorize a reimbursement of CCC's net realized losses before the end of the fiscal year, thereby reducing CCC's debit and allowing additional expenditures in a given fiscal year. This occurred in FY2020, when the CARES Act (P.L. 116-136, §11002) allowed for up to $14 billion of CCC's net realized losses to be reimbursed as of the June 2020 financial report. This supplemental appropriation did not permanently raise the CCC's borrowing authority limit but rather paid off a portion of its debit earlier than usual, allowing it to incur more expenses within FY2020 and FY2021. This is why the net realized loss for FY2020 and FY2021 in **Figure 2** is above the $30 billion borrowing authority threshold. Supplemental appropriations to reimburse the CCC are uncommon; most of which having occurred in the 1980s.[37]

Non-Borrowing Authority Appropriations

Some CCC operations are financed through appropriated funds and are unrelated to the permanent indefinite borrowing authority described above. These activities have included specific statutory authorities for separate reimbursements—for example, export credit guarantee programs, foreign donations, concessional sales under the Food for Peace Program (P.L. 83-480, also known as P.L. 480), and disaster aid.

Historically, CCC had what was referred to as a "parent/child" account relationship with U.S. Agency for International Development (USAID). CCC allocated funds (as the parent) to USAID (as the child) to fund P.L. 480 Title II and Bill Emerson Humanitarian Trust transportation costs and other administrative costs in connection with foreign commodity donations. CCC then reported USAID's budgetary and proprietary activities in its financial statements.[38] On January 20, 2025, President Trump began taking actions affecting U.S. foreign assistance and USAID. As of this writing, USAID's role in providing foreign assistance and the use of CCC for these purposes is evolving.[39]

Congress may also appropriate funding to programs or activities authorized to receive CCC funds but not drawn from the borrowing authority. For example, the act commonly referred to as the Inflation Reduction Act of 2022 (IRA, P.L. 117-169) authorized additional funding for conservation, rural development, and forestry programs that are authorized to receive CCC funds. Funding provided by the IRA is in addition to funding received through CCC.[40]

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[37] In the 1980s, CCC received nine supplemental appropriations to cover losses that exceeded the borrowing authority limit at the time. Congress increased the borrowing authority limit three times in the same period (1982, 1983, and 1987; see **Figure 1**).

[38] USDA, Office of Inspector General, *Commodity Credit Corporation's Financial Statements for Fiscal Years 2024 and 2023*, Audit Report 06403-0007-11, November 2024, https://usdaoig.oversight.gov/reports/audit/commodity-credit-corporations-financial-statements-fiscal-years-2024-and-2023.

[39] For additional information, see CRS In Focus IF10261, *U.S. Agency for International Development: An Overview*.

[40] For example, P.L. 117-169, §21001, directs "using the facilities and authorities of the Commodity Credit Corporation" (but not the funds), as compared to other provisions of farm bills that state to "use the funds, facilities, and authorities of the Commodity Credit Corporation" (e.g., 16 U.S.C. §3841).

Considerations for Congress

The mandatory funding nature of CCC activities may make it an attractive funding mechanism for both Congress and the Secretary of Agriculture. Any expansion of activities or programs authorizing mandatory funding by Congress is subject to budget enforcement rules and may require a spending/revenue offset or a waiver of congressional budgetary rules. USDA's discretionary use of CCC is not subject to the same congressional budget offset requirements; therefore, certain USDA actions can increase federal spending without budget enforcement procedures requiring offsets. Both the Trump and Biden Administrations used CCC for various purposes to support U.S. agriculture.[41] These administrative actions were undertaken using CCC's discretionary authority; therefore, no budget offset was required under congressional budget procedures. CCC's indefinite funding authority means that expenditures for USDA's CCC uses were automatically reimbursed as a net realized loss. Without offsets, this increases total federal spending.

Congress has restricted the use of CCC in the past and may consider future restrictions as a cost saving measure for budget reconciliation, to offset other spending (e.g., through farm bill reauthorization), or for deficit reduction. Such a restriction was proposed in the 118th Congress as part of the House ordered to be reported farm bill.[42] The bill proposed restricting USDA's discretionary use of CCC between FY2025 through FY2034, which was estimated to save $5.4 billion over the 10-year scoring period.[43] The savings would have partially offset additional spending on other farm support measures.[44] Restrictions on CCC's discretionary use authority, however, could impact USDA's ability to respond to adverse economic conditions facing U.S. agriculture, such as trade disruptions, or to make commodity purchases.

Congressional support for discretionary use of CCC typically varies depending on the amount used and for what purpose.

During the first Trump Administration, the total amount authorized by USDA through CCC for the trade aid package was more than previous individual discretionary uses of CCC.[45] This increase in spending brought CCC close to its borrowing authority limit of $30 billion; congressional action altered the timing of CCC's appropriation and of a supplemental appropriation that restored CCC's borrowing authority.[46] While these congressional actions by the 116th Congress could be viewed as congressional support for the trade aid package, some in

[41] For example, during the first Trump Administration, USDA used CCC to mitigate commodity price declines from retaliatory tariffs on a variety of U.S. agricultural products. See USDA, "[Archived] Market Facilitation Program," https://www.farmers.gov/archived/protection-recovery/mfp. An example during the Biden Administration was CCC's use to issue payments for agricultural producers to implement "climate-smart" production practices. See USDA, "[Archived] Partnerships for Climate-Smart Commodities Project Summaries," https://web.archive.org/web/20250110181709/https://www.usda.gov/climate-solutions/climate-smart-commodities.

[42] H.R. 8467; §1608.

[43] CBO, "Estimate of H.R. 8467 Relative to CBO's June 2024 Baseline Projections," November 8, 2024, https://www.cbo.gov/publication/60972.

[44] For more information, see "Budgetary Impact" in CRS Report R48167, *The 2024 Farm Bill: H.R. 8467 Compared with Current Law*.

[45] For additional information on MFP, see CRS In Focus IF11289, *Farm Policy: Comparison of 2018 and 2019 Market Facilitation Programs*; and CRS In Focus IF11245, *FY2019 Supplemental Appropriations for Agriculture*.

[46] See "Reimbursement Timing" section; §119 of the FY2020 continuing appropriations act (P.L. 116-59); §118 of the FY2021 continuing appropriations act (P.L. 116-159); and §11002 of the CARES Act (P.L. 116-136).

Congress still questioned the amount and distribution of expenditures, yet wanted to avoid the consequence of reaching the borrowing limit and the effects on other CCC programs.[47]

During the Biden Administration, CCC funds were used to create market opportunities for U.S. agricultural and forest products produced using climate-smart production practices. Although the development of markets is an included use of CCC Section 5 authority, the approach of the initiative to incentivize commodities produced using climate-smart practices caused some in Congress to question its validity.[48] The Government Accountability Office determined that USDA's use of CCC's Section 5 authority for the initiative was an authorized use.[49] Legislation has been introduced that would expand CCC's authorized uses, and other legislation proposes to restrict it.[50]

CCC funding and activities authorized by a Secretary of Agriculture, including current and past Secretaries, are at the discretion of the current Secretary of Agriculture. Previously announced uses may change or be suspended by an Administration at the Secretary of Agriculture's discretion.[51] Congress may continue or amend these activities through legislation; funding to do so may be subject to congressional budgetary constraints. Despite the temporary nature of the activities authorized by the Secretary through CCC, funds are available until expended once transferred from CCC to a USDA agency for implementation. If funding authorized for a purpose during a previous Administration is not carried out by the subsequent Administration, USDA is not to return the funds to CCC but rather may use the funds for other programs or purposes authorized under CCC Section 5 authority or return the funds to the Treasury.[52]

Conclusion

CCC is a government-owned and broadly empowered financial institution supporting U.S. agriculture. Its activities are derived from authorities granted by Congress. It is one of several mandatory funding mechanisms used in omnibus farm bills but is not the largest when measured by funds obligated.[53] The nature of its borrowing authority and use of funding can raise questions

[47] For example, see Letter from Sen. Debbie Stabenow et al. to Sonny Perdue, Secretary of Agriculture, November 12, 2019, https://www.agriculture.senate.gov/mfp-letter; and Letter from Sen. John Hoeven et al. to Nancy Pelosi, Speaker of the U.S. House of Representatives, September 17, 2019, https://republicans-agriculture.house.gov/UploadedFiles/CCC_Letter.pdf.

[48] See Letter from Rep. Dan Newhouse et al. to Tom Vilsack, Secretary of the U.S. Department of Agriculture, October 28, 2022, https://westerncaucus.house.gov/uploadedfiles/10.28.22_ccc_climate_smart_commodities_letter_signed.pdf; and Letter from Sen. Chuck Grassley and Rep. Chip Roy to Chuck Schumer, Majority Leader of the U.S. Senate and Mike Johnson, Speaker of the House of Representatives, December 7, 2023, https://www.grassley.senate.gov/imo/media/doc/grassley_roy_to_congressional_leaders_-_farm_bill.pdf.

[49] GAO, *Decision: U.S. Department of Agriculture—Use of Commodity Credit Corporation Funds for Various Programs*, B-334146.1, September 20, 2023.

[50] For example, in the 118th Congress, H.R. 6690 and S. 2876 would have expanded CCC's authorized uses, and H.R. 8467 and S. 2244 would have restricted CCC use.

[51] For example, the Local Food Purchase Assistance Cooperative Agreement Program (LFPA) was authorized during the Biden Administration and cancelled during the Trump Administration. According to media reports, a USDA spokesperson was quoted as saying, "These programs [LFPA], created under the former Administration via Executive authority, no longer effectuate the goals of the agency." Marcia Brown, "USDA Cancels $1B in local food purchasing for schools, food banks," *Politico*, March 10, 2025.

[52] GAO, *Decision: USDA—Use of CCC*, B-334146.1.

[53] For more on total funding for agricultural activities, see CRS Report R48431, *Agriculture and Related Agencies: FY2025 Appropriations*.

about how CCC's functional operations support some of USDA's core farm program activities and whether they should or could be expanded or reduced.

The authorities that Congress has granted to CCC allow it to carry out many operations that are consistent with the objective of supporting U.S. agriculture. These same broad powers and the CCC's borrowing authority have also made CCC an object of attention, and of controversy at times, among the legislative and executive branches, stakeholders, and some interest groups.

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Representing a Foreign Entity

Rule 1.1

Client-Lawyer Relationship

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment:

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Rule 1.2
Client-Lawyer Relationship

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Comment:

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Rule 2.1

Counselor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment:

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Rule 6.4

Public Service

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Soil for Sale? State Legislative Efforts to Restrict Foreign Investments – Part Seven

By NALC staff

Available at: https://nationalaglawcenter.org/soil-for-sale-state-legislative-efforts-to-restrict-foreign-investments-part-seven/

Since January 2021, almost every state has proposed at least one piece of legislation to prohibit or restrict foreign investments and landholdings in land, particularly private agricultural land, located within the boundaries of their states to some degrees. In fact, over the past few years, the number of states with a foreign ownership law has increased from fourteen to twenty-five. This trend continues in 2025 as the majority of states in the U.S. are considering measures that will enact a foreign ownership law or will amend certain provisions of their states' foreign ownership law.

This is the seventh article of a series discussing recent state proposals that seek to limit or restrict foreign investments in land. The other articles in this series are available **here**. This article discusses the proposals introduced in North Carolina.

North Carolina is one of several states that do not limit or restrict foreign investments in real property located within the state. In fact, the state's code expressly permits "aliens to take…any lands,…and to hold and convey the same as fully as citizens of" the state. **N.C. Gen. Stat. Ann. § 64-1**. However, the North Carolina state legislature is considering **House Bill 133** ("HB 133") which seeks to restrict certain foreign investments in certain real property. Specifically, this measure will prohibit an adversarial foreign government from acquiring or holding any interest, including a leasehold interest, in agricultural land and land within a 75-mile radius of a military installation.

HB 133 defines "adversarial foreign government" as a government or government-controlled business entity of a country or group subject to International Traffic in Arms Regulations ("ITAR") as provided under **22 C.F.R. § 126**. Some countries subject to ITAR include China, Iran, North Korea, and Russia. Foreign business entities that have been identified by the Committee on Foreign Investment in the U.S. ("CFIUS") as not being a risk to U.S. national security and entities that have a national security agreement with CFIUS are exempt from the foreign ownership restriction under HB 133.

Any transaction that provides an adversarial foreign government an interest in land in violation of this restriction is void, meaning the transaction is treated as if it never happened. Further, HB 133 does not require an individual or entity to investigate or determine whether a party to a transaction is an adversarial foreign government. These individuals and entities will not face civil or criminal liability for failing to determine whether a buyer or tenant of agricultural land or land within a 75-mile radius of a military installation is an adversarial foreign government.

The state legislature is also considering **Senate Bill 504** ("SB 504"), which contains almost identical language to HB 133. HB 133 has been referred to the Committee on Homeland Security and Military of the House and Veterans Affairs for consideration and SB 504 has been referred to the Committee on Rules and Operations of the Senate. At this stage, the committee can review the bill, hear

testimony in support and opposition of the bill, amend the bill, pass the bill for consideration by its respective chamber, or vote to fail passage of the bill out of committee.

The North Carolina state legislature is also considering **Senate Bill 338** ("SB 338"), which contains very similar language to HB 133 and SB 504; however, there are some differences between these measures. SB 338 defines "adversarial foreign government" as government or government-controlled business entity of a country designated as a "foreign adversary" by the U.S. Secretary of Commerce. Currently, the countries deemed as foreign adversaries include China, Cuba, Iran, North Korea, Russia, and Venezuela's Maduro Regime. *See* **15 C.F.R. § 791.1(a)**. Accordingly, SB 338 restricts a narrower set of governments and government-controlled businesses because there are several more countries subject to ITAR compared to the countries designated as foreign adversaries.

Like HB 133 or SB 504, SB 338 restricts adversarial foreign governments from acquiring any interest in agricultural land located within the state of North Carolina. However, SB 338 prohibits these restricted foreign governments from acquiring land within a 25-mile radius of military installations located within the state, rather than a 75-mile radius as proposed under HB 133 and SB 504.

SB 338 has been referred to the Committee on Rules and Operations of the Senate.

Another piece of foreign ownership legislation considered by the North Carolina state legislature is **Senate Bill 394** ("SB 394"). This measure will restrict a prohibited foreign party ("PFP") of an adversarial nation—which includes China, Iran, North Korea, and Russia—from acquiring any interest, including leasehold interests, in agricultural land, land within 25 miles of a military installation, and land situated underneath special use airspace designed by the Federal Aviation Administration. SB 394 defines PFP as an individual, business entity, or government of an adversarial nation. Entities, including U.S. entities, are considered PFPs where a significant interest or substantial control is directly or indirectly held by a PFP.

Specifically, a PFP has a "significant interest or substantial control" when they hold 33% or more interest in an entity. In other words, if a Russian citizen holds a 33% interest in a U.S. business, that business is a PFP and is prohibited from acquiring North Carolina agricultural land. Furthermore, multiple PFPs have a significant interest or substantial control of an entity when they hold, in the aggregate, a 33% or more interest and are "acting in concert." Two or more PFPs that "may not be acting in concert" have a significant interest or substantial control in an entity when they hold an interest of 50% or more.

Entities that have a national security agreement with CFIUS and maintain this agreement are not considered PFPs under SB 394. Also, PFPs that are resident aliens of the U.S. are not subject to the restriction under this legislation. However, once a PFP resident alien is no longer a legal resident alien of the U.S., they are required to divest of any interest they hold in agricultural land, land within a 25-mile radius of a military installation, and land under special use airspace located within the state.

This bill will permit PFPs to acquire land through inheritance and enforcement of a security interest; however, they must divest of this interest within 3 years after acquiring the land. Further, purchasers of land are required to sign an affidavit stating (1) they are not a PFP and (2) their purchase does not violate the restriction provided under SB 394. This measure permits the state's attorney general to bring a forfeiture action against PFPs that violate the prohibition. If a court determines a violation has occurred, it will order the land be sold through a public auction.

Additionally, PFPs that violate the restriction under SB 394 are guilty of a Class 2 misdemeanor that carries a penalty of up to 60 days imprisonment and a $1,000 fine. Individuals and entities that knowingly sell land to a PFP are also guilty of a Class 2 misdemeanor.

Last, SB 394 permits PFP that acquired real property before the effective date of the measure, but these investors must register their landholdings with the North Carolina Secretary of State and Attorney General. PFPs that fail to register are subject to a civil penalty of up to $1,000 for each day the registration is late.

SB 394 is currently being considered by Senate Committee on the Judiciary.

Conclusion

Over the past few years, the issue of restricting foreign ownership and investments in real property, particularly agricultural and forestland, has emerged or reemerged in almost every state. In fact, fourteen states in 2024 enacted a foreign ownership law or amended its foreign ownership law. In 2025, this trend has continued as most states have introduced at least one piece of foreign ownership legislation in their state. So far in 2025, three states—Kentucky, Idaho, and Utah—have enacted or amended certain portions of its states' foreign ownership law. NALC is tracking each states' foreign ownership proposals and will update this **Statutes Regulation Ownership of Agricultural Land** compilation when there are changes to a state's law.

To read NALC articles discussing foreign investments in U.S. agriculture, click **here**.

To learn more about foreign ownership of U.S. land, click **here**.

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IN FOCUS

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Committee on Foreign Investment in the United States (CFIUS)

The Committee on Foreign Investment in the United States (CFIUS) is an interagency body chaired by the Secretary of the Treasury. It serves the President in overseeing the potential national security risks of certain foreign direct investment (FDI) in the U.S. economy. CFIUS jurisdiction includes the review of mergers, acquisitions, and takeovers that could result in foreign control of a U.S. business; certain noncontrolling investments in businesses involved in critical technologies, critical infrastructure, or sensitive personal data (so-called "TID U.S. businesses"); and certain real estate transactions. At the recommendation of CFIUS, the President may suspend or prohibit transactions that threaten to impair U.S. national security.

The United States is the world's largest foreign investor and recipient of FDI. U.S. policy has supported a rules-based and open investment environment domestically and globally to promote U.S. economic growth and ensure the U.S. position as a premier FDI destination. Amid this backdrop, CFIUS has reviewed a small subset of foreign investment with an exclusive focus on national security. The focus of CFIUS's national security actions has evolved over time in response to emerging issues and concerns. Congressional focus on CFIUS has intensified since 2016 amid growing attention to the potential national security ramifications of investments by firms directed, controlled, or funded by a foreign government, notably the People's Republic of China (PRC), and in strategic sectors. Members have focused on oversight of CFIUS reforms mandated by Congress in 2018 and a variety of legislation that seeks to address perceived gaps in CFIUS's jurisdiction and actions.

CFIUS Authorities and Composition

CFIUS derives its authorities from Section 721 of the Defense Production Act (DPA), as amended (50 U.S.C. §4565), and implementing regulations (31 C.F.R. Chapter VIII). CFIUS initially was created and operated through a series of executive orders. In 1988, Congress passed the "Exon-Florio" amendment to the DPA (50 U.S.C. App. §2170), which codified the review process, at the time largely driven by concerns over Japanese firms' acquisitions of U.S. defense-related firms. In 2007, amid concerns over the proposed purchase of commercial operations of six U.S. ports by a firm based in the United Arab Emirates, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49), which formally gave CFIUS statutory authority.

In 2018, Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-232), which expanded CFIUS's jurisdiction and review process in key ways. FIRRMA was intended to "strengthen and modernize" CFIUS and enhance its ability to address concerns involving nonpassive, noncontrolling investments (e.g., minority stake) in TID business and real estate transactions (e.g., land purchases) in proximity to military installations, or part of maritime ports or airports. Foreign investors with ties to countries that are part of the "five eyes" alliance—Australia, Canada, New Zealand, and the United Kingdom—may be exempt from some of the rules.

CFIUS consists of nine members: Secretary of the Treasury (chair); Secretaries of State, Defense, Homeland Security, Commerce, and Energy; Attorney General; U.S. Trade Representative; and Director of the Office of Science and Technology Policy. The Secretary of Labor and Director of National Intelligence (DNI) are nonvoting, ex officio members. Five White House offices observe or participate in CFIUS, as appropriate (e.g., the Council of Economic Advisers and National Security Council). The President can appoint other officials to serve on a case-by-case basis.

CFIUS Review Process

The review process begins with notification to CFIUS by the parties to the transaction, which is a voluntary step except in certain cases. Even when notification is not mandatory, firms have an incentive to do so to receive potential "safe harbor" from CFIUS, which limits future CFIUS action on a transaction after its cleared. Non-notified transactions remain subject indefinitely to future CFIUS review and possible divestment or other actions mandated by the President. As directed by FIRRMA, CFIUS has increased attention and resources to monitoring non-notified transactions of concern. CFIUS may also unilaterally initiate a review.

> The President can exercise authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he/she finds that (1) credible evidence exists that the foreign person might take action that threatens to impair national security, and (2) no other laws provide "adequate and appropriate authority" to protect the national security risks.

Notification. A party's filing of a transaction can be submitted as (1) a declaration (an abbreviated, short-form filing (30-day CFIUS assessment) or (2) a traditional written notice (45-day CFIUS review). Declarations and notices are distinguished by submission length, timeline for CFIUS' consideration, and CFIUS's options for disposition of the submission. Filing is mandatory in select cases where a transaction involves (1) a foreign government acquiring a "substantial interest" in a TID U.S. business, and (2) a TID U.S. business that produces, designs, manufactures, etc. a critical technology subject to export licensing/controls.

National Security Review. Treasury and a co-lead agency conduct a 45-day review to determine the effects of the transaction on U.S. national security, informed by a DNI threat analysis. CFIUS's "risk-based assessment" considers the threat, vulnerabilities, and consequences to national security related to the transaction. In its assessment, CFIUS is to consider an illustrative list of national security factors.

Factors for consideration laid out in statute include the domestic production needed for national defense; control of domestic industries and commercial activity by foreign citizens; effects on sales of military goods or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; U.S. technological leadership in areas affecting national security; and effects on U.S. critical infrastructure and critical technologies. In 2022, President Biden issued Executive Order (E.O.) 14083 to elaborate and expand on the factors CFIUS is to consider. These include a transaction's effect on the resilience of U.S. critical supply chains and technological leadership; aggregate industry investment trends; cybersecurity risks; and risks to U.S. persons' sensitive data. See CRS In Focus IF12415.

National Security Investigation. The review proceeds to a 45-day investigation if CFIUS finds that a transaction threatens U.S. national security and the risk has not been mitigated; is foreign-government controlled; or would result in foreign control of any U.S. critical infrastructure. A 15-day extension is permitted in the event of "extraordinary circumstances." CFIUS can negotiate and impose mitigation conditions on the parties to address its concerns; a lead agency is tasked with monitoring compliance with such agreements. Treasury issued its first CFIUS Enforcement and Penalty Guidelines in 2022 and regulatory updates in November 2024, emphasizing monitoring and compliance with mitigation measures as priorities.

Presidential Decision. If CFIUS determines a transaction poses unresolved concerns, it may recommend to the President that the deal be prohibited, unless the parties choose to abandon the transaction. The President has 15 days to act. Presidents have prohibited eight transactions to date, the majority in the past decade (**Table 1**). In 2020, President Trump ordered PRC ByteDance Ltd. to divest from musical.ly, a social media firm; this 2017 acquisition formed the basis of U.S. operations of TikTok (see CRS In Focus IF12640). In 2024, President Biden ordered a PRC cryptocurrency mining firm to divest its real estate acquisition/operations near a strategic missile base.

Table 1. Presidential Blocks of Foreign Transactions

Year	U.S. Business	Acquirer	Sector
1990	MAMCO	CATIC	Aerospace
2012	4 wind farms	Ralls Corp. (Sany Group)	Renewables
2016	Aixtron SE	Grand Chip (China IC Fund)	Semiconductor
2017	Lattice	Canyon Bridge Capital Partners	Semiconductor
2018	Qualcomm	Broadcom	Semiconductor
2020	StayNTouch	Shiji Information Technology Co.	Software
2020	Musical.ly	ByteDance	Digital platform
2024	Real estate	MineOne	Crypto mining

Source: Presidential orders.

Recent Activity

CFIUS must report annually to Congress on its activities (**Table 2**). In most years since FIRRMA was enacted, there has been an increase in transactions reviewed. In 2023, CFIUS reviewed 342 filings (109 declarations, 233 notices). CFIUS cleared 83 declarations and requested parties submit a subsequent notice in 18% of cases. Three declarations involved real estate transactions. More than half of total notices proceeded to an investigation. In 57 cases, parties withdrew the notice during the investigation to address issues, and the majority refiled with CFIUS. CFIUS adopted mitigation measures for 43 notices (18% of total). In 14 cases, parties abandoned the deal after CFIUS was unable to resolve its concerns, or after the parties did not accept the proposed measures.

Table 2. Transactions Reviewed by CFIUS, 2018-2023

	2018	2019	2020	2021	2022	2023
Declarations	20	94	126	164	154	109
Notices	229	231	187	272	286	233
Investigations	158	113	88	130	163	128
Withdrawals	64	30	28	72	87	57
Presidential Decision	1	1	1	0	0	0

Source: CFIUS Annual Report to Congress for CY2023, July 2024.
Note: Report includes one of two presidential orders issued in 2020.

Issues for Congress

Congress remains engaged in oversight of implementation of FIRRMA and CFIUS activities. Some Members say that, despite FIRRMA, PRC and other state-directed investments require a more proactive and strategic approach. Some are concerned that PRC investments, particularly in emerging technologies and new operations, may evade or fall outside current authorities. Some Members have introduced legislation, for example, to expand CFIUS jurisdiction over agricultural land; ban some investments by the PRC and foreign adversaries; and add the Secretary of Agriculture as a member of CFIUS. These efforts stem in part from reports of an uptick in PRC land purchases and Treasury's 2022 decision that CFIUS did not have jurisdiction to review a PRC firm's land purchase in North Dakota near a U.S. Air Force base. (Treasury has since added some military installations subject to CFIUS jurisdiction over real estate.) Members also have proposed legislation on certain outbound investment to China. Some in Congress have expressed concerns about other high-profile deals (e.g., the bid by Japan's Nippon Steel for U.S. Steel Corp., reportedly under CFIUS review). Other issues facing Congress include

- How well is CFIUS balancing an open U.S. investment posture with the aim to protect national security? How should CFIUS protect critical technologies in ways that promote competitiveness and a market-driven economy?
- Post FIRRMA, how sufficient are CFIUS's authorities to achieve current and emerging policy objectives? How has E.O. 14083 affected CFIUS reviews in practice?
- There may be incentives to file declarations instead of notices due to their fast turnarounds. What types of transactions is CFIUS clearing through declarations?
- How is the Commerce Department's process of identifying "emerging and foundational technologies" for export controls facilitating or hindering CFIUS reviews of transactions related to such technologies?
- In what ways has CFIUS improved coordination with U.S. allies and partners in information sharing and in investment screening efforts as mandated by FIRRMA?

Cathleen D. Cimino-Isaacs, Specialist in International Trade and Finance
Karen M. Sutter, Specialist in Asian Trade and Finance

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State of Arkansas *As Engrossed: H3/31/25*
95th General Assembly **A Bill**
Regular Session, 2025 HOUSE BILL 1680

By: Representatives Vaught, Achor, Andrews, Barker, Beaty Jr., Beck, Bentley, S. Berry, Breaux, Brooks, K. Brown, M. Brown, N. Burkes, R. Burkes, Joey Carr, John Carr, Cavenaugh, Childress, C. Cooper, Cozart, Crawford, Eaton, Evans, Furman, Gazaway, Gramlich, Hall, Hawk, Hollowell, L. Johnson, Long, Lundstrum, Lynch, Maddox, McAlindon, McClure, M. McElroy, McGrew, B. McKenzie, McNair, Milligan, J. Moore, Nazarenko, Painter, Pearce, Perry, Pilkington, Puryear, Ray, R. Scott Richardson, Richmond, Rose, Rye, Schulz, M. Shepherd, Steimel, Torres, Tosh, Underwood, Unger, Walker, Wing, Wooten
By: Senator B. Johnson

For An Act To Be Entitled

AN ACT TO AMEND THE LAW CONCERNING OWNERSHIP OF REAL PROPERTY AND AGRICULTURAL LAND; TO PROHIBIT A FOREIGN-PARTY-CONTROLLED BUSINESS FROM LEASING AN INTEREST IN LAND; TO DEFINE "CRITICAL INFRASTRUCTURE" AS USED IN RELATION TO FOREIGN OWNERSHIP OF LAND; TO PROHIBIT A PROHIBITED FOREIGN PARTY FROM HOLDING AN INTEREST IN REAL PROPERTY OR AGRICULTURAL LAND IN CERTAIN CIRCUMSTANCES; AND FOR OTHER PURPOSES.

Subtitle

TO PREVENT A FOREIGN-PARTY-CONTROLLED BUSINESS FROM LEASING LAND; AND TO PROHIBIT A PROHIBITED FOREIGN PARTY FROM HOLDING AN INTEREST IN REAL PROPERTY OR AGRICULTURAL LAND IN CERTAIN CIRCUMSTANCES.

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

SECTION 1. Arkansas Code § 18-11-110(a)—(c), prohibitions on land ownership by a prohibited foreign-party-controlled business, are amended to

read as follows:

(a) As used in this section:

(1) “Controlling interest” means an ownership interest of fifty percent (50%) or more, in the aggregate;

(2)(A) "Critical infrastructure" means physical or virtual systems and assets that:

(i) If incapacitated or destroyed would have a debilitating impact on security, national economic security, public health or safety, or any combination of security, national economic security, or public health and safety; and

(ii) Are publicly or privately owned.

(B) "Critical infrastructure" includes without limitation:

(i) A military installation or facility;

(ii) An emergency service;

(iii) A power generation or transmission location;

(iv) A utility;

(v) A bridge;

(vi) A tunnel;

(vii) A railway;

(viii) A dam;

(ix) A cybersecurity or classified information storage system; and

(x) A communication or information technology node or facility;

(3) “Prohibited foreign party” means the same as in § 18-11-802; and

~~(3)~~(4) “Prohibited foreign-party-controlled business” means a corporation, company, association, firm, partnership, society, joint-stock company, trust, estate, or other legal entity whose controlling interest is owned by a prohibited foreign party.

(b)(1) A prohibited foreign-party-controlled business shall not acquire by grant, purchase, lease, devise, descent, or otherwise any interest in public or private land in this state.

(2) A party may not hold or retain public or private land as an agent, trustee, or other fiduciary for a prohibited foreign-party-controlled business in violation of this section.

(3) A prohibited foreign-party-controlled business shall not lease any interest in land in this state.

(4) A prohibited foreign party shall not hold any interest in agricultural land located within a ten-mile radius of critical infrastructure.

(c)(1) A prohibited foreign-party-controlled business entity in violation of this section shall have ~~two (2) years~~ one (1) year to divest of the public or private land.

(2) If a prohibited foreign-party-controlled business entity does not divest the public or private land as required by subdivision (c)(1) of this section, the Attorney General shall commence an action in the circuit court within the jurisdiction of the public or private land.

(3)(A) If the public or private land is held in violation of this section, the circuit court shall order that the public or private land be sold through judicial foreclosure.

(B) Proceeds of the sale shall be first disbursed to lien holders, if any, in the order of priority, except for liens which under the terms of the sale are to remain on the public or private land.

(4) The Attorney General shall promptly record a copy of the following in the local land records:

(A) Upon commencement, notice of the pendency of an action brought under subdivision (c)(2) of this section; and

(B) The order for the sale of the public or private land under subdivision (c)(3)(A) of this section.

SECTION 2. Arkansas Code § 18-11-802 is amended to read as follows:

18-11-802. Definitions.

As used in this subchapter:

(1)(A) "Agricultural land" means any Arkansas land ~~which~~ that is ~~outside the corporate limits of a municipality and is~~:

(i) Used for forestry production, including without limitation land exceeding ten (10) acres in which ten percent (10%) of the land is stocked by trees of any size, including land that formerly had trees of any size covering the land that will be naturally or artificially regenerated; or

(ii) Currently used for, or, if currently idle, land

last used within the past five (5) years, for farming, ranching, or timber production, except land not exceeding ten (10) acres in the aggregate, if the annual gross receipts from the sale of the farm, ranch, or timber products produced on the land do not exceed one thousand dollars ($1,000), including without limitation land used for activities described in the Standard Industrial Classification Manual (1987), Division A, exclusive of industry numbers 0711-0783, 0851, and 0912-0919 which cover animal trapping, game management, hunting carried on as a business enterprise, trapping carried on as a business enterprise, and wildlife management.

(B) "Agricultural land" does not include oil, gas, and all other minerals, including coal, lignite, brine, and all minerals known and recognized as commercial minerals underlying the land;

(2)(A) "Critical infrastructure" means physical or virtual systems and assets that:

(i) If incapacitated or destroyed would have a debilitating impact on security, national economic security, public health or safety, or any combination of security, national economic security, or public health and safety; and

(ii) Are publicly or privately owned.

(B) "Critical infrastructure" includes without limitation:

(i) A military installation or facility;

(ii) An emergency service;

(iii) A power generation or transmission location;

(iv) A utility;

(v) A bridge;

(vi) A tunnel;

(vii) A railway;

(viii) A dam;

(ix) A cybersecurity or classified information storage system; and

(x) A communication or information technology node or facility;

(3) "Foreign government" means the same as provided by § 2-3-102;

~~(3)~~(4) "Interest in agricultural land" means all direct interest acquired, transferred, or held in agricultural land, including without

limitation a lease of agricultural land~~:~~

~~(A) For a term of one (1) year or longer; or~~

~~(B) Renewable by option for terms which, if the options were all exercised, would total one (1) year~~;

~~(4)~~(5) "Party" means the same as provided by § 2-3-102;

~~(5)~~(6) "Prohibited foreign party" means:

(A) A citizen or resident of a country subject to International Traffic in Arms Regulations, 22 C.F.R. § 126.1*, unless the person is also a citizen of the United States*;

(B) A foreign government formed within a country subject to International Traffic in Arms Regulations, 22 C.F.R. § *126.1*;

(C) A party or entity other than an individual or a government, that is created or organized under the laws of a foreign government within a country subject to International Traffic in Arms Regulations, 22 C.F.R. § 126.1;

(D) Any party or entity other than an individual or a government:

(i) That is created or organized under the laws of any state; and

(ii) In which a significant interest or substantial control is directly or indirectly held or is capable of being exercised by:

(a) An individual referred to in subdivision ~~(5)(A)~~ (6)(A) of this section;

(b) A foreign government referred to in subdivision ~~(5)(B)~~ (6)(B) of this section;

(c) A party or entity referred to in subdivision ~~(5)(C)~~ (6)(C) of this section; or

(d) A combination of the individuals, parties, entities, or governments referred to in this subdivision ~~(5)(D)(ii)~~ (6)(D)(ii);

(E) An Entity of Particular Concern designated by the United States Department of State; or

(F) An agent, trustee, or other fiduciary of a person or entity enumerated in subdivisions ~~(5)(A)-(E)~~ (6)(A)-(E) of this section;

~~(6)~~(7) "Residence" means a person's principal dwelling place where the person intends to remain permanently for an indefinite period of

time;

~~(7)~~(8) "Resident alien" means a person who:

(A) Is not a citizen of the United States; and

(B) Is a resident of a:

(i) State of the United States;

(ii) Territory of the United States;

(iii) Trusteeship of the United States; or

(iv) Protectorate of the United States; and

~~(8)~~(9) "Significant interest" or "substantial control" means:

(A) An interest of thirty-three percent (33%) or more held by:

(i) A party referred to in subdivision ~~(5)(D)~~ (6)(D) of this section;

(ii) An individual referred to in subdivision ~~(5)(A)~~ (6)(A) of this section;

(iii) A party referred to in subdivision ~~(5)(C)~~ (6)(C) of this section; ~~or~~

(iv) A single government referred to in subdivision ~~(5)(B)~~ (6)(B) of this section; or

(v) A party acting in concert with one (1) or more prohibited foreign parties;

(B) An interest of thirty-three percent (33%) or more held whenever the parties, individuals, or governments referred to in subdivision ~~(5)~~ (6) of this section are acting in concert with respect to the interest even though no single individual, party, or government holds an interest of thirty-three percent (33%) or more; or

(C) An interest of fifty percent (50%) or more, in the aggregate, held by parties, individuals, or governments referred to in subdivision ~~(5)~~ (6) of this section even though the individuals, parties, or foreign governments may not be acting in concert.

SECTION 3. Arkansas Code § 18-11-803 is amended to read as follows:

18-11-803. Limitations on owning agricultural land — Violation.

(a)(1) Except as provided in § 18-11-804, a prohibited foreign party shall not acquire by grant, purchase, lease, devise, descent, or otherwise any interest in agricultural land in this state ~~regardless of whether the~~

~~prohibited foreign party intends to use the agricultural land for nonfarming purposes~~.

(2) A party may not hold agricultural land as an agent, trustee, or other fiduciary for a prohibited foreign party in violation of this subchapter.

(3) A prohibited foreign party shall not hold any interest in agricultural land located within a ten-mile radius of critical infrastructure.

(b) A prohibited foreign party that acquires agricultural land in violation of this subchapter remains in violation as long as the prohibited foreign party holds an interest in the agricultural land.

SECTION 4. Arkansas Code § 18-11-804(b)(1), concerning an interest in agricultural land owned by a prohibited foreign party, is amended to read as follows:

(b)(1) If a prohibited foreign party is no longer a resident alien under subsection (a) of this section, he or she shall have ~~two (2) years~~ one (1) year to divest of the agricultural land.

SECTION 5. Arkansas Code § 18-11-804(e), concerning an interest in agricultural land owned by a prohibited foreign party, is amended to read as follows:

(e) A prohibited foreign party or other party acting in concert with a prohibited foreign party as an agent, trustee, or other fiduciary owning agricultural land subsequent to the passage of this subchapter and not listed under one (1) of the exceptions set out in subsections (a) and (b) of this section shall upon conviction be guilty of a felony punishable by not more than two (2) years' imprisonment in the custody of the Division of Correction or a fine of fifteen thousand dollars ($15,000), or both.

/s/Vaught

APPROVED: 4/17/25

State of Arkansas *As Engrossed: H4/1/25 S4/8/25*
95th General Assembly **A Bill**
Regular Session, 2025 HOUSE BILL 1800

By: Representative McAlindon
By: Senator M. McKee

For An Act To Be Entitled

AN ACT TO AMEND THE LAW CONCERNING DISCLOSURE FOR CAMPAIGN FINANCE; TO REQUIRE DISCLOSURE BY A *REPRESENTATIVE OF A HOSTILE FOREIGN PRINCIPAL; TO* AMEND PORTIONS OF THE ARKANSAS CODE THAT RESULTED FROM INITIATED ACT 1 OF 1990; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE LAW CONCERNING DISCLOSURE FOR CAMPAIGN FINANCE; TO REQUIRE DISCLOSURE BY A REPRESENTATIVE OF A HOSTILE FOREIGN PRINCIPAL; AND TO AMEND PORTIONS OF THE ARKANSAS CODE THAT RESULTED FROM INITIATED ACT 1 OF 1990.

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

SECTION 1. Arkansas Code § 7-6-217(g)(1) - (3), concerning the creation of the Arkansas Ethics Commission and resulting from Initiated Act 1 of 1990, is amended to read as follows:

(g) The commission shall have the authority to:

(1) Under the Arkansas Administrative Procedure Act, § 25-15-201 et seq., promulgate reasonable rules to implement and administer the requirements of this subchapter, as well as § 7-1-114 [repealed]; the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters, § 7-9-401 et seq.; § 19-11-718; § 21-8-301 et seq.; the Disclosure Act for Lobbyists and State and Local Officials, § 21-8-401 et seq., § 21-8-601 et seq., § 21-8-701 et seq., and § 21-8-801 et seq.; § 21-8-901 et seq.;

§ 21-8-1001 et seq.; § 21-8-1101 et seq.; § 25-1-125; and Arkansas Constitution, Article 19, §§ 28-30; and to govern procedures before the commission, matters of commission operations, and all investigative and disciplinary procedures and proceedings;

(2) Issue advisory opinions and guidelines on the requirements of § 6-24-101 et seq.; § 7-1-103(a)(1)-(4), (6), and (7); § 7-1-114 [repealed]; this subchapter; the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters, § 7-9-401 et seq.; § 19-11-718; § 21-8-301 et seq.; the Disclosure Act for Lobbyists and State and Local Officials, § 21-8-401 et seq., § 21-8-601 et seq., § 21-8-701 et seq., and § 21-8-801 et seq.; § 21-8-901 et seq.; § 21-8-1001 et seq.; § 21-8-1101 et seq.; § 25-1-125; and Arkansas Constitution, Article 19, §§ 28-30;

(3) After a citizen complaint has been submitted to the commission, investigate alleged violations of § 6-24-101 et seq.; § 7-1-103(a)(1)-(4), (6), and (7); § 7-1-114 [repealed]; this subchapter; the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters, § 7-9-401 et seq.; § 19-11-718; § 21-1-401 et seq.; § 21-8-301 et seq.; the Disclosure Act for Lobbyists and State and Local Officials, § 21-8-401 et seq., § 21-8-601 et seq., § 21-8-701 et seq., and § 21-8-801 et seq.; § 21-8-901 et seq.; § 21-8-1001 et seq.; § 21-8-1101 et seq.; § 25-1-125; and Arkansas Constitution, Article 19, §§ 28-30; and render findings and disciplinary action thereon;

SECTION 2. Arkansas Code § 7-6-218(a)(1), concerning citizen complaints filed with the Arkansas Ethics Commission and resulting from Initiated Act 1 of 1990, is amended to read as follows:

(a)(1) Any citizen may file a complaint with the Arkansas Ethics Commission against a person covered by this subchapter, by § 6-24-101 et seq.; § 7-1-103(a)(1)-(4), (6), or (7); § 7-1-114 [repealed]; the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters, § 7-9-401 et seq.; § 21-1-401 et seq.; § 21-8-301 et seq.; the Disclosure Act for Lobbyists and State and Local Officials, § 21-8-401 et seq., § 21-8-601 et seq., § 21-8-701 et seq., and § 21-8-801 et seq.; § 21-8-901 et seq.; § 21-8-1001 et seq.; § 21-8-1101 et seq.; § 25-1-125; and Arkansas Constitution, Article 19, §§ 28-30, for an alleged violation of the subchapters or sections. For purposes of this subdivision (a)(1), the Arkansas Ethics

Commission shall be considered a citizen.

SECTION 3. Arkansas Code § 7-6-218(b)(1)(A), concerning citizen complaints filed with the Arkansas Ethics Commission and resulting from Initiated Act 1 of 1990, is amended to read as follows:

(b)(1)(A) Upon a complaint stating facts constituting an alleged violation signed under penalty of perjury by any person, the Arkansas Ethics Commission shall investigate the alleged violation of this subchapter or § 6-24-101 et seq.; § 7-1-103(a)(1)-(4), (6), or (7); § 7-1-114 [repealed]; the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters, § 7-9-401 et seq.; § 21-1-401 et seq.; § 21-8-301 et seq.; the Disclosure Act for Lobbyists and State and Local Officials, § 21-8-401 et seq., § 21-8-601 et seq., § 21-8-701 et seq., and § 21-8-801 et seq.; § 21-8-901 et seq.; § 21-8-1001 et seq.; <u>§ 21-8-1101 et seq.;</u> § 25-1-125; and Arkansas Constitution, Article 19, §§ 28-30.

SECTION 4. Arkansas Code § 7-6-218(b)(4), concerning citizen complaints filed with the Arkansas Ethics Commission and resulting from Initiated Act 1 of 1990, is amended to read as follows:

(4) If the Arkansas Ethics Commission finds a violation of this subchapter; § 6-24-101 et seq.; § 7-1-103(a)(1)-(4), (6), or (7); § 7-1-114 [repealed]; § 21-1-401 et seq.; § 21-8-301 et seq.; the Disclosure Act for Lobbyists and State and Local Officials, § 21-8-401 et seq., § 21-8-601 et seq., § 21-8-701 et seq., and § 21-8-801 et seq.; § 21-8-901 et seq.; § 21-8-1001 et seq.; <u>§ 21-8-1101 et seq.;</u> § 25-1-125; or Arkansas Constitution, Article 19, §§ 28-30, then the Arkansas Ethics Commission shall do one (1) or more of the following, unless good cause be shown for the violation:

(A) Issue a public letter of caution or warning or reprimand;

(B)(i) Notwithstanding the provisions of §§ 7-6-202, 7-9-409, 21-8-403, ~~and~~ 21-8-903, <u>and 21-8-1105,</u> impose a fine of not less than fifty dollars ($50.00) nor more than three thousand five hundred dollars ($3,500) for negligent or intentional violation of this subchapter; § 6-24-101 et seq.; § 7-1-114 [repealed]; the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters, § 7-9-401 et seq.; § 21-8-301 et seq.; the Disclosure Act for Lobbyists and State and Local Officials, § 21-8-

401 et seq., § 21-8-601 et seq., § 21-8-701 et seq., and § 21-8-801 et seq.; § 21-8-901 et seq.; § 21-8-1001 et seq.; § 21-8-1101 et seq.; § 25-1-125; or Arkansas Constitution, Article 19, §§ 28-30.

(ii) A fine for violating § 7-1-114 [repealed]~~.~~ shall not exceed one hundred fifty dollars ($150).

(iii) The Arkansas Ethics Commission shall adopt rules governing the imposition of such fines in accordance with the provisions of the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(iv) All moneys received by the Arkansas Ethics Commission in payment of fines shall be deposited into the State Treasury as general revenues;

(C) Order the respondent to file or amend a statutorily required disclosure form; or

(D)(i) Report its finding, along with such information and documents as it deems appropriate, and make recommendations to the proper law enforcement authorities.

(ii) When exercising the authority provided in this subdivision (b)(4), the Arkansas Ethics Commission is not required to make a finding of a violation of the laws under its jurisdiction.

Subchapter 11 — Disclosure by Representatives of a Hostile Foreign Principal

21-8-1101. Legislative findings.

The General Assembly finds that:

(1) The voters, citizens, and policymakers of this state are entitled to transparency in the political and propaganda activities of organizations that may be controlled by or under the influence of foreign countries hostile to the interests of this state and of the United States;

(2) In an increasingly globalized world, determining whether an organization's political and propaganda activities are funded by hostile foreign interests is often difficult; and

(3) Legislation is needed to ensure the transparency necessary to allow voters, citizens, and policymakers to evaluate whether political and propaganda activities are funded by potentially hostile foreign actors.

21-8-1102. Definitions.

As used in this subchapter:

(1) "Foreign-supported political organization" means a political party or a domestic partnership, association, corporation, organization, or any other combination of persons that has, within the past five (5) calendar years, received money or other things of value from a hostile foreign principal or a representative of a hostile foreign principal and that engages in political activity;

(2) "Hostile foreign nation" means the:

(A) People's Republic of China;

(B) Russian Federation;

(C) Democratic People's Republic of Korea; or

(D) Islamic Republic of Iran;

(3) "Hostile foreign principal" means:

(A) A government of a hostile foreign nation, a political party of a hostile foreign nation, or any member of a political party of a hostile foreign nation;

(B) A nonresident alien of a hostile foreign nation; or

(C) A partnership, association, corporation, organization, or other combination of persons organized under the law of or having its principal place of business in a hostile foreign nation;

(4) "Political activity" means an activity that is performed to influence an agency or public official of this state, a local government entity within this state, or the public within this state, with reference to:

(A) Formulating, adopting, or changing the policies or laws of this state; or

(B) Electing or opposing a candidate for local or state public office, not including campaign donations; and

(5) "Representative of a hostile foreign principal" means a person:

(A) Who acts as an agent, employee, representative, or servant, or otherwise acts at the order, request, or under the direction or control of a hostile foreign principal;

(B) Whose actions are financed in whole or in part by a hostile foreign principal; and

(C) Who engages in political activity.

21-8-1103. Transparency in representation of hostile foreign principals.

(a)(1) Except as otherwise provided in this subchapter, a person shall not act as a representative of a hostile foreign principal unless the person has filed a true and complete registration statement with the Secretary of State as required by this subchapter.

(2) Except as otherwise provided in this section, a person who becomes a representative of a hostile foreign principal shall file a registration statement under oath with the Secretary of State within ten (10) days of the person's becoming a representative of a hostile foreign principal.

(3) The obligation of a representative of a hostile foreign principal to file a registration statement, after the tenth day of becoming a representative of a hostile foreign principal, shall continue from day to day, and termination of status as a representative of a hostile foreign principal shall not relieve the representative of a hostile foreign principal from the obligation to file a registration statement for the period during which he or she was a representative of a hostile foreign principal.

(b) The registration statement required under this section shall include the following:

(1) The registrant's:

(A) Name;

(B) Principal business address;

(C) Other business addresses in the United States or elsewhere; and

(D) Residence addresses, if any; and

(2) A comprehensive statement of the nature of the registrant's business.

(c) A registered representative of a hostile foreign principal under this subchapter shall update the registration statement required under this section no less frequently than quarterly.

21-8-1104. Transparency in foreign-supported political organizations.

(a) No later than January 31, 2026, and each following year, each foreign-supported political organization shall register with the Secretary of

State and provide the following information:

(1) The name of the foreign-supported political organization, its business address, and upon request the names, titles, and addresses of all officers and directors of the foreign-supported political organization;

(2) If the foreign-supported political organization is affiliated with or a chapter of a national organization, the name of the national organization, its address, and the names and addresses of its officers and directors;

(3) A detailed statement of any expenditures of money or other things of value made by the foreign-supported political organization within the prior calendar year to influence an agency or public official of this state, a local government entity within this state, or the public within this state, with reference to formulating, adopting, or changing the policies or laws of this state or electing a candidate to local or state public office; and

(4) A detailed statement of all money or other thing of value received by the foreign-supported political organization from a hostile foreign principal or a representative of a hostile foreign principal during the prior calendar year.

(b) A foreign-supported political organization under this subchapter shall update the registration statement required under this section no less frequently than annually.

21-8-1105. Penalties for violation.

(a) Upon receipt of a complaint that a representative of a hostile foreign principal or a foreign-supported political organization has failed to comply with the registration and reporting requirements of this subchapter, or upon his or her own determination, the Secretary of State may investigate and assess penalties for the violation of this subchapter.

(b) The Secretary of State may assess the following civil penalties:

(1) For any violation of this subchapter, up to five hundred dollars ($500) per violation; and

(2) For willful or repeated violations of this subchapter, up to two thousand dollars ($2,000) per violation.

21-8-1106. Rules.

The Secretary of State shall promulgate rules to:

(1) Create and maintain registration statement forms as described under this subchapter; and

(2) Implement this subchapter.

/s/McAlindon

APPROVED: 4/22/25

CHAPTER 12 BASICS

History

The 1980s were difficult times for family farmers. The American farm economy was in its worst financial condition in almost 50 years. Crop prices were decreasing, farm income was down and land prices were declining. Farm debt was increasing and agricultural credit markets were tightening. Farmers across the country were caught between the falling land values and the inability to borrow money to finance their farming operations. As land values fell, lenders refused to extend credit to farmers whose land values had fallen to the point where there was insufficient equity to secure existing loans.

Some farmers tried to reorganize under chapter 11 or chapter 13, but found both unworkable and did not help them save their farms. Chapter 11 was designed for large, corporate reorganizations. It was cumbersome, complex, expensive and almost impossible to confirm. Chapter 13 was simpler and less costly, but did not have sufficient debt limits to cover most farming operations.

An Interim Solution

Chapter 12 bankruptcy was created in 1986. It was enacted by Congress as a part of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 passed in October of 1986. It went into effect on November 26, 1986.

Chapter 12 was originally scheduled to sunset on October 1, 1993. The sunset provision was extended to October 1, 1998, then extended an additional 11 times until it was made a permanent part of the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

How Does Chapter 12 Work?

A case under Chapter 12 begins as cases under all other chapters. The debtor files a petition, schedules and a statement of financial affairs. Upon case filing the automatic stay commences. A trustee is appointed to oversee the case, either a sanding trustee or a case-by-case trustee. The debtor must file a plan within 90 days of filing the bankruptcy petition (unless the court extends the deadline). The plan payment period must be at least 36 months but may be as long as 60 months.

In addition to providing for payment of secured and priority unsecured claims, a chapter 12 plan must provide that net disposable income be paid for distribution to unsecured creditors until discharge. 11 U.S.C. § 1222(a)(1). The Plan must propose to pay general unsecured creditors as much as they would receive under a liquidation under chapter 7. 11 U.S.C. § 1225(a)(4). The plan must provide for full payment, in deferred cash payments, of all priority claims under 11 U.S.C. § 507, unless the holder of the claim agrees to accept less favorable treatment, 11 U.S.C. § 1222(a)(2). The plan must also provide the same treatment for each class of claim or interest within a particular class unless the holder of claim or class agrees to less favorable treatment, 11 U.S.C. § 1222(a)(3).

Who can file a chapter 12?

The Bankruptcy code provides that "Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12 of this title". 11 U.S.C. § 109(f). The debtor or debtors must also be engaged in a farming operation at the time of filing. 11 U.S.C. § 101(18)(1). Determination of whether a debtor is eligible to file Chapter 12 requires a careful look at each of the statutory definitions. Requirements to be considered a family farmer are found in 11 U.S.C 101(18):

1. An individual or individual and spouse;

2. With aggregate debts not to exceed $12,562,350 (4/1/25);

3. Not less than 50% of debts (excluding residence) arise out of a farming operation.

4. More than 50% of gross income arises from farming operation in the taxable year before filing, or more than 50% of the gross income arises from farming operation in each of the 2d and 3d taxable years preceding filing.

If a corporation or partnership:

1. More than 50% of outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family and such family or such relatives conduct the farming operation;

2. More than 80% of the value of the assets consists of assets related to the farming operation;

3. Aggregate debts are less than $12,562,350 (4/1/25);

4. If a corporation issues stock, the stock is not publicly traded.

There are no income requirements.

The requirements for a family fisherman are found in U.S.C. §101(19)A and are similar:

1. An individual or individual and spouse engaged in a commercial fishing operation;

2. With aggregate debts not to exceed $2,568,000 (4/1/25);

3. Not less than 80% of debts (excluding principal residence) arise out of commercial fishing operation owned or operated by debtor;

4. More than 50% of gross income for the taxable year preceding filing arise from the commercial fishing operation;

A corporate or partnership fisherman is eligible if:

1. 50% or more of the outstanding stock is held by one family that conducts the fishing operation, or one family and the relatives of the members of such family, and such family or relatives conduct the fishing operation;

2. More than 80% of the value of its assets consists of assets related to the commercial fishing operation;

3. Aggregate debts do not exceed $2,568,000 (4/1/25);

4. Not less than 80% of debts are related to the commercial fishing operation;

5. If a corporation, none of the stock is publicly traded.

Definitions of "farmer" and "farming operation," when determining Chapter 12 eligibility are to be liberally construed after review of a totality of the circumstances. In evaluating the totality of the circumstances, courts have considered:

1. Whether the location of the operation would be considered a traditional farm;

2. The nature of the enterprise at the location;

3. The type of product and its eventual market;

4. The physical presence or absence of family members on the farm;

5. Ownership of traditional farm assets;

6. Whether the debtor is involved in the process of growing or developing crops or livestock; and

7. Whether or not the practice or operation is subject to the inherent risks of farming.

Judge Thomas Cornish, Eastern District of Oklahoma, in applying these factors, held that where the debtors had a cow and calf operation and sold their own timber and brokered the timber of neighbors to Weyerhaeuser qualified as farming because the operation was subject to the inherent risks of farming, as a fire could potentially destroy all of the Debtors' timber for more than one year. *In Re Glenn*, 181 B.R 105, 1995.

Chapter 12 eligibility is generally determined as of the date of filing, without consideration of post-petition events. *In re Dawes,* 2008 WL 718304. Eligibility requirements have been determined not jurisdictional. *See In re Perkins,* 581 B.R. 822 (2018) citing *In re Glance*, 487 F.3d 317(6th Cir. 2007).

The elements that must be established before a Chapter 12 plan can be confirmed are set out at 11 U.S.C. § 1225(a). As the plan proponent the burden rests with the debtor to establish all of the elements essential to plan confirmation. *Matter of Burnett,* 2024 WL 4965087.

Benefits of Chapter 12 over other chapters

1. Plan is not due until 90 days after filing;
2. Simpler plans than Chapter 11 and no disclosure statement required;
3. Debtor may retain an asset and may reduce the balance of secured claims to the value of the collateral, including the claim against the debtor's residence (which is prohibited in a chapter 13);
4. A plan may be confirmed even though unsecured creditors may not receive full payment for their claims, as long as all disposable income is paid out during the plan. There is

no absolute priority rule;

5. The automatic stay applies to co-debtors on consumer debts as well;

6. Payment terms on secured debts can be stretched out, re-amortized, and the interest rate adjusted. Plans may also propose the payment of secured creditors be extended over a period longer than the life of the chapter 12 plan even if that exceeds the term of the original debt without the need for cure of default.

7. Only the farmer/debtor may propose a plan, not the creditors or the trustee

8. Chapter 12 has a high debt limit - debt limit of $11,097,350.00, much greater than that of Chapter 13

9. Chapter 12 Plans provide a great amount of flexibility in addressing secured farm debts such as equipment loans and mortgages. Plans do not necessarily require monthly payments (as chapter 13 does). The plan may provide for payments on a monthly, seasonally, annually or variable schedule, depending on the type of farming operation. Farms with regular monthly income such as dairy farms typically provide for monthly payments. Poultry operations typically provide plans that call for 4 or 5 payments per year. Farms with annual crops, such as row crops and sometimes cattle operations typically propose annual payments corresponding to the timing of the sale of the crop.

10. Deprioritization of tax claims.

Special Chapter 12 Tax Rule

A key change to the tax treatment of certain farm debts was implemented in October, 2017 with the addition of 11 U.S.C. § 1232:

§1232. Claim by a governmental unit based on the disposition of property used in a farming operation

(a) Any unsecured claim of a governmental unit against the debtor or the estate that arises before the filing of the petition, or that arises after the filing of the petition and before the debtor's discharge under section 1228, as a result of the sale, transfer, exchange, or other disposition of any property used in the debtor's farming operation-

(1) shall be treated as an unsecured claim arising before the date on which the petition is filed;

(2) shall not be entitled to priority under section 507;

(3) shall be provided for under a plan; and

(4) shall be discharged in accordance with section 1228.

(b) For purposes of applying sections 1225(a)(4), 1228(b)(2), and 1229(b)(1) to a claim described in subsection (a) of this section, the amount that would be paid on such claim if the estate of the debtor were liquidated in a case under chapter 7 of this title shall be the amount that would be paid by the estate in a chapter 7 case if the claim were an unsecured claim arising before the date on which the petition was filed and were not entitled to priority under section 507.

(c) For purposes of applying sections 523(a), 1228(a)(2), and 1228(c)(2) to a claim described in subsection (a) of this section, the claim shall not be treated as a claim of a kind specified in subparagraph (A) or (B) of section 523(a)(1).

(d)(1) A governmental unit may file a proof of claim for a claim described in subsection (a) that arises after the date on which the petition is filed.

(2) If a debtor files a tax return after the filing of the petition for a period in which a claim described in subsection (a) arises, and the claim relates to the tax return, the debtor shall serve notice of the claim on the governmental unit charged with the responsibility for the collection of the tax at the address and in the manner designated in section 505(b)(1). Notice under this paragraph shall state that the debtor has filed a petition under this chapter, state the name and location of the court in which the case under this chapter is pending, state the amount of the claim, and include a copy of the filed tax return and documentation supporting the calculation of the claim.

(3) If notice of a claim has been served on the governmental unit in accordance with paragraph (2), the governmental unit may file a proof of claim not later than 180 days after the date on which such notice was served. If the governmental unit has not filed a timely proof of the claim, the debtor or trustee may file proof of the claim that is consistent with the notice served under paragraph (2). If a proof of claim is filed by the debtor or trustee under this paragraph, the governmental unit may not amend the proof of claim.

(4) A claim filed under this subsection shall be determined and shall be allowed under subsection (a), (b), or (c) of section 502, or disallowed under subsection (d) or (e) of section 502, in the same manner as if the claim had arisen immediately before the date of the filing of the petition.

Chapter 12 Eligibility Test

Updated on April 1, 2025

Bankruptcy Case No.: _____

Debtor(s) Name: _____

Select the Checklist Group that applies for this case:

Eligibility Checklist for Individual Farmers

REQUIREMENTS	YES	NO
1. Individual or individual and spouse Family Farmer -**11 U.S.C. 101(19)**		
2. Engaged in a farming operation on date of filing -**11 U.S.C. 101(21)**		
3. Aggregate debts are less than **$12,562,350** (4/1/25) **11 U.S.C 101(18)**		
4. Not less than 50% of debts (excluding residence) arise out of a farming operation		
5. More than 50% of gross income arises from farming operation in the taxable year before filing, **OR…**		
- More than 50% of the gross income arises from farming operation in each of the 2d and 3d taxable years preceding filing		

Eligibility Checklist for Corporate or Partnership Farmers
(Note: Not based on income at all)

REQUIREMENTS	YES	NO
1. More than 50% of o/s stock or equity is held by one family, or by one family and the relatives of the members of such family		
2. Such family or such relatives conduct the farming operation		
3. More than 80% of the value of the assets consists of assets related to the farming operation		
4. Aggregate debts are less than **$12,562,250** (4/1/25) 11 U.S.C. 101(18)		
5. Not less than 50% of aggregate noncontingent, liquidated debts (excluding dwelling used by shareholder or partner as principal residence) arise out of a farming operation		
6. If a corporation issues stock, the stock is not publicly traded		

Eligibility Checklist for Individual Family Fisherman

REQUIREMENTS	YES	NO
1. Individual or individual and spouse engaged in a commercial fishing operation **[11 U.S.C. 101 (7A)]**		
2. Aggregate debts do not exceed **$2,568,000** (4/1/25) **11 U.S.C. 101(19)(A)**		
3. Not less than 80% of debts (excluding principal residence) arise out of commercial fishing operation owned or operated by debtor		
4. More than 50% of gross income for the taxable year preceding filing arise from the commercial fishing operation		

Eligibility Checklist for Corporate or Partnership Fishermen

(Note: Not based on income at all)

REQUIREMENTS	YES	NO
1. 50% or more of the o/s stock is held by 1 family that conducts the fishing operation, **OR…**		
2. One family and the relatives of the members of such family, and such family or relatives conduct the fishing operation, **AND…**		
3. More than 80% of the value of its assets consists of assets related to the commercial fishing operation, **AND…**		
4. Aggregate debts do not exceed **$2,568,000** (4/1/25) **11 U.S.C. 101(19)(A)**		
5. Not less than 80% of debts are related to the commercial fishing operation.		
6. If a corporation, none of the stock is publicly traded		

Dealing with Debt: Practical Considerations in Preparing for and Navigating Ag Bankruptcy

I. Why Are We Talking About This?
   a. Multiple sources report a substantial increase (55% or more) in Chapter 12 filings in 2024 compared to 2023. This marks an end to a four-year downward trend in ag bankruptcies.
   b. Data from early 2025 suggests this upward trend is continuing – some reports indicate that YTD filings in 2025 are nearly double.
   c. Farm bankruptcies are often a "lagging indicator" of financial distress.

II. What are necessary Pre-Petition Considerations?
   a. Assessment!
      i. What is the current financial status?
      ii. What has been the historical financial performance?
      iii. Is Chapter 12 necessary – are there other options?
   b. Determine current financial status.
      i. Balance Sheet (See Addendum 1).
      ii. Debts and terms.
      iii. Assets – a complete, accurate listing.
         1. Matched with liens / mortgages.
   c. Determine historical financial performance.
      i. Income statements (See Addendum 2).
   d. Determine historical production performance.
      i. Crop.

ii. Livestock / livestock products.
iii. Other revenue streams.

III. Constructing / Developing the Chapter 12 Plan.
   a. Begin with a “Typical Year” (a long-range projection).
      i. Based upon reasonable, objective expectations.
   b. Construct / develop a “bridge projection" to get “from here to there”

IV. Navigating the Plan
   a. Monitoring and reporting during the plan.
      i. Periodic reports to the Trustee
      ii. Internal reporting and monitoring
   b. Modifying the Plan

V. Post-Discharge Financial Management
   a. Continued engagement with a farm management advisor / consultant

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Addendum 1: Example Balance Sheet.

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Broke-S Farms
1/1/2005 Balance Sheet

Current Assets			Value
Cash and checking			3,624
Prepaid exp. & suppl. (Schd B)			7,647
Growing crops			-
Accounts receivable (Schd D)			14,242
Hedging accounts			-
Other current assets			-
Crops (Schd G)	Quantity	Value/Unit	
Corn	16,400	1.78 /bu.	29,260
Alfalfa Hay	90	85.00 /ton	7,650
Corn Silage	220	18.00 /ton	3,960
Oats	300	1.45 /bu.	435
Mkt Ivst (Schd H)	No.	Value/Unit	
Raised Hogs	175	57.00 /cwt.	11,970
Fin Yearling	41	98.00 /cwt.	30,135
Total Current Assets			**108,923**

Current Liabilities				Balance
Accrued interest				3,068
Payables & accr exp (Schd T)				11,550
	Int		P & I	Principal
Current loans (Schd U)	Rate		Due	Balance
1st Ntl Oper	7.25		-	55,560
1st Ntl catt	7.50		23,677	22,650
CCC-Corn 12/04	3.25		14,560	14,560
Principal due within 12 months on term liabilities				23,127
Total Current Liabilities				**130,515**

Intermediate Assets		
		Market
Brdg Ivst (Schd I)	No.	Value
Dairy cows	52	62,400
Heifers	47	23,500
Sows	30	4,500
Gilts	10	1,250
Boars	2	500
Machinery (Schd J)		105,109
Titled vehicles (Schd K)		10,000
Other intermediate assets		-
Total Intermediate Assets		**207,259**

Intermediate Liabilities (Schd V)					
	Int	Principal	P & I	Principal	Intermed
Loan	Rate	Balance	Due	Due	Balance
1st Ntl mach	7.25	63,910	13,512	8,915	54,995
John Deere	7.75	37,593	9,353	7,064	30,529
1st Ntl cows	7.25	16,030	4,813	3,295	12,735
Total Intermediate Liabilities					**98,259**

Long Term Assets		
		Market
Land (Schd M)	Acres	Value
Home farm	160	1,360,000
Buildings and improvements		124,260
Other long term (Schd O)		30,356
Total Long Term Assets		**1,514,616**

Long Term Liabilities (Schd W)					
	Int	Principal	P & I	Principal	Lg Term
Loan	Rate	Balance	Due	Due	Balance
1st Ntl RE	7.00	70,621	8,596	3,853	66,768
Total Long Term Liabilities					**66,768**

Total Farm Assets	**1,830,797**
Personal Assets (Schd P)	17,634
Total Assets	**1,848,431**

Total Farm Liabilities	**295,542**
Personal Liabilities	-
Total Liabilities	295,542
Net Worth	**1,552,889**

Addendum 2: Example Income Statement - Financial Trend

MACS
Morgan Ag Consulting Svcs

Broke-S Farms
Farm Income Statement Summary

	2000	***2001***	***2002***	***2003***	***2004***	***Average***
Source	FINAN	FINAN	Accr Sch F	Accr Sch F	FINAN	
Farm Income Statement						
Gross farm income	161,554	175,624	187,785	233,240	272,271	206,095
Total cash expense	123,325	128,506	165,139	177,121	196,068	158,032
Net cash farm income	38,229	47,118	22,646	56,119	76,204	48,063
Inventory Changes						
Crop and feed	-5,065	4,900	7,090	5,924	-13,674	-165
Market livestock	7,750	471	4,507	-6,852	10,132	3,202
Prepaids expenses and supplies	-780	452	183	280	4,812	989
Accounts receivable	-687	339	6,702	-2,012	4,050	1,678
Breeding livestock	-542	-602	2,216	1,449	15,725	3,649
Other assets	1,784	1,350	2,070	1,796	-	1,400
Accounts payable	3,815	-	-396	-1,368	2,570	924
Accrued interest	-1,098	545	139	193	241	4
Total inventory change	5,177	7,455	22,511	-590	23,856	11,682
Net operating profit	43,405	54,573	45,157	55,529	100,059	59,745
Depreciation						
Machinery and equipment	-7,899	-7,301	-7,451	-20,651	-7,911	-10,243
Titled vehicles	-	-	-	10,675	-2,000	1,735
Buildings and improvements	-4,838	-2,242	-5,190	-4,930	-	-3,440
Total depreciation	-12,737	-9,543	-12,641	-14,906	-9,911	-11,948
Net farm income from operations	**30,668**	**45,030**	**32,516**	**40,623**	**90,148**	**47,797**
Net farm income	**30,668**	**45,030**	**32,516**	**40,623**	**90,148**	**47,797**

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INSIGHT

Farm Debt and Chapter 12 Bankruptcy Eligibility

March 15, 2019

As farm income has declined over multiple years since 2013, the number of reported farm bankruptcies has begun to increase. The Federal Reserve Bank of Minneapolis observed that Chapter 12 farm bankruptcies increased in 2018 across the Midwest and appear to be higher among dairy farms. The American Farm Bureau Federation has compiled farm bankruptcy data from the U.S. Courts at the national level. According to this data, in 2018, 498 U.S. farms filed for Chapter 12 bankruptcy, nearly constant with 501 farm bankruptcies in 2017 (a rate of about 2.5 per 10,000 farms). The continuing steady number of farm bankruptcies at the national level masks an increase in filings across 19 states, particularly in the upper Midwest where a 19% rise in annual Chapter 12 filings has occurred since 2017. Wisconsin had 47 Chapter 12 bankruptcies in 2018, one-third more than the next highest state (Nebraska) and 18% above the number in Wisconsin in 2016.

Chapter 12 of the Bankruptcy Code is reserved for family farmers and family fishermen (11 U.S.C. 1201-1232). It allows financially distressed farmers and fishermen to restructure their debt and remain in operation. Chapter 12 was designed to be less complicated, less expensive, and more appropriate for farmers than other types of bankruptcy, such as Chapter 11, which is better suited to large corporations, or Chapter 13, which is designed for wage earners who typically have smaller debts. To qualify for Chapter 12, family farmers must meet several eligibility requirements (11 U.S.C. 101(18)), including that their total debt is less than $4.153 million (as adjusted for inflation every three years; 11 U.S.C. 104), that at least half of the debt is farm business debt, and that at least half of their gross income is from farming.

A policy concern has arisen over whether the $4.153 million Chapter 12 debt limit should be raised to allow larger farms to qualify for this bankruptcy option in light of recent family farm financial stress, the rise in the number of bankruptcies, and the growth in the average size of farms.

While the U.S. Department of Agriculture (USDA) has published some tables that summarize how farms use debt, those data do not measure combinations of debt at the $4 million Chapter 12 threshold nor include non-farm debt. Additional data obtained from the USDA Economic Research Service allow for the following observations about total household debt per family farm:

Congressional Research Service
https://crsreports.congress.gov
IN11073

- Of the approximately 2 million family farms in the United States, nearly two-thirds have no farm business debt, and about one-third have no household debt (farm or non-farm debt). Hereinafter, this analysis includes both farm and nonfarm debt unless otherwise specified.
- More specifically, of 1,996,000 family farms,
  - 592,000 (29.6%) have no debt,
  - 1.32 million (66.3%) have between $1 and $1 million of debt. Farms in this debt range hold 41% of total farm debt.
  - 76,000 (3.8%) have between $1 million and $4.153 million of debt. Farms in this range hold 42% of total farm debt.
  - 7,700 (0.4%) have debt greater than the $4.153 million, which is above the initial threshold for Chapter 12 bankruptcy. Farms in this debt range hold 17% of total farm debt and account for about 12% of the value of production.

In terms of eligibility for Chapter 12, only a fraction of the farms above would meet the filing requirements that farm debt be at least half of total debt and that farm income be at least half of gross income.

- About 269,000 of the 1.4 million farms above (19%) with total debt between $1 and $4.153 million have ratios of farm-to-nonfarm debt and farm-to-nonfarm income that would allow them to qualify to file under Chapter 12. That only one-fifth of these farms meet the current eligibility standards for Chapter 12 likely highlights the prevalence of non-farm income for many smaller farms in this category.
- To illustrate the hypothetical effect of a higher Chapter 12 debt limit, if the debt limit were raised to $10 million per farm, about an additional 5,000 farms nationwide would become eligible for Chapter 12, based on their total debt and their ratios of farm-to-nonfarm debt and income. Not all of these farms are financially vulnerable, however. About another 800 farms have greater than $10 million of debt and meet the farm-to-nonfarm ratios.

Information is not available to further subdivide these farms by type of enterprise (e.g., crop or livestock) or by location, and still measure the farm and nonfarm components of debt and income.

A question that might arise if the debt limit for Chapter 12 were to be increased: which agricultural lenders would be exposed to additional farms qualifying for this type of bankruptcy? Based on the underlying shares of farm debt held by the various lenders, commercial banks and the Farm Credit System hold about 83% of the farm debt, nearly equally divided. About 6% of that debt is guaranteed for repayment by the Farm Service Agency (FSA) in the case of a default. Loans directly issued by FSA are only about 3% of the total farm debt. Moreover, statutory lending limits on FSA loans ($400,000 per borrower for direct operating loans, $600,000 per borrower for direct farm ownership loans, and $1.75 million per borrower for guaranteed loans) would likely limit FSA exposure to a change that would allow farms with more than $4 million of debt to be eligible to file for bankruptcy under Chapter 12. In the 2018 farm bill, Congress raised these FSA loan limits by about one-quarter to one-third, or double in the case of direct farm ownership loans, in recognition of growing financial stress and the increasing size of family farms.

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High-Capacity Wells: A Survey of Groundwater Withdrawal Rights and Regulations

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Groundwater represents roughly 30% of the world's freshwater supply, and 2.5 billion people depend solely on groundwater to meet their daily water needs. In the United States, around 20% of total freshwater withdrawals come from groundwater sources. Agricultural irrigation is currently the largest use of groundwater in the United States. To satisfy demand, high-capacity wells that have the ability to withdraw water over an established daily threshold are often employed. These wells are capable of achieving withdrawal rates that exceed natural groundwater recharge rates and can disrupt the hydrological cycle as a result. Therefore, unregulated groundwater withdrawals through the use of high-capacity wells can become unsustainable.

Like the regulation of rights to use surface water, regulation of groundwater rights and high-capacity wells has largely been left to states. Although states typically regulate surface water according to two common law doctrines (riparianism and prior appropriation), the regulations of groundwater has been more complex. Currently, there are five common law doctrines that states have used to regulate groundwater: absolute ownership, American reasonable use, correlative rights, the Restatement (Second) of Torts, and prior appropriation. However, few states apply any of these doctrines in a uniform way. As a result, groundwater management in the United States has been highly fragmented.

The following chart provides a brief summary of the common law doctrine applied to groundwater management in each state, and the regulatory frameworks in place for groundwater withdrawal through the use of high-capacity wells. Note, that the common law doctrine that some states adhere to is unclear. Furthermore, some states are not able to be neatly categorized as following a single doctrine. We selected the doctrine(s) that were most clear in the state's legislation and case law. The applicable common law doctrine may differ in special management areas.

The information contained in this document is provided for educational purposes only. It is not legal advice and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.

State	Regulating Agency/Department	Groundwater Common Law Doctrine	Special Management Areas for Groundwater Supply	Maximum Withdrawal Amount	Registration	Permitting	Exceptions to Registration/Permitting	Reporting	Exceptions to Reporting Requirements	Footnotes
Alabama										
Alabama Water Resources Act (Ala. Code § 9-10B)	Alabama Office of Water Resources (within the Department of Economic and Community Affairs)	Reasonable Use	Capacity stress area	No limit (exception = capacity stress areas)	All public water systems Users with a capacity to withdraw at least 100,000 gallons/day	N/A	Temporary withdrawals may be eligible to be exempt from registering	Registered user must submit annual report	Users outside of capacity stress areas with a withdrawal capacity of less than 100,000 gallons/day	
Alaska										
Alaska Water Use Act (Alaska Stat. § 46.15) *Water Management Act (Alaska Admin. Code tit. 11, § 93)*	Alaska Department of Natural Resources	Prior Appropriation	Critical water management area	N/A	N/A	Permit required when withdrawal is a "significant amount"	(1) 5,000 gallons for 1 day from a single source (2) 500 gallons from a single source for more than 10 day/year (3) 30,000 gallons/day non-consumptive use from a single source	Well meters generally required for large commercial wells (greater than 30,000 gallons/day)	Smaller domestic wells	
Arizona										
Arizona Groundwater Management Act (Ariz. Rev. Stat. Ann. tit. 45)	Arizona Department of Water Resources	Reasonable Use[1]	Active management areas (AMA) Irrigation non-expansion areas (INA)[2]	AMA/INA: see local water management plan for amount (goal of most is "safe yield")	N/A	Permit required for any withdrawal in an AMA or INA	Special management areas: Exempt wells (withdrawal for non-irrigation use from a well with a pump capacity of less than 35 gallons/minute), certain existing irrigation uses grandfathered in	Required for non-exempt wells in special management areas AMA: required (see AMA water management plan for specific requirements) INA: required for all users using water for irrigation purposes, and required for all users withdrawing more than 10 acre-feet/year	Exempt wells (pump capacity of more than 35 gallons/minute) AMA: see local land management plan INA: irrigators of 10 acres or less	[1] Exception = doesn't apply in special management areas. [2] INAs subject to either the specific rules of the basin or all irrigation is prohibited unless the area was irrigated within 5 years before the adoption of the rule.
Arkansas										
Arkansas Ground Water Management and Protection Act (Ark. Code Ann. § 15-22: Water Resources)	Arkansas Natural Resources Commission	Reasonable Use[1]	Critical groundwater areas	Amount that can be beneficially used on one's own property	Required for all withdrawals	May be required in critical groundwater areas	Withdrawals for domestic uses Withdrawals from wells with a maximum potential flow rate of less than 50,000 gallons/day Certain existing uses grandfathered in (exception = an equally or less costly substitute exists)	Annual reports on the water usage from October 1st to September 30th of the next year required for all users	None	[1] There is also support for Correlative Rights in the state's common law. The eastern version of Correlative Rights differs from the doctrine as it was originally developed in California. In Arkansas, "reasonableness" is determined with respect to other landowners. A water right gives "each riparian owner . . . an equal right to make reasonable use of water subject to the equal rights of other owners to make reasonable use." Lingo v. City of Jacksonville, 258 Ark. 63, 65 (Ark. 1975).
California										
Cal. Water Code[1]	Groundwater is managed at the local level and no single state agency has authority	Reasonable Use and Correlative Rights	State divided into 515 basins (larger areas classified as medium or high priority basins)	Courts can limit the rights of a pumper to extract groundwater in order to protect the water supply and prevent overdraft	N/A	No default state groundwater withdrawal permitting requirements (see the permitting regime established for a particular basin by the local groundwater sustainability agency)	N/A	No statewide reporting requirements	N/A	[1] *See generally* Division 2: Water, Division 6: Conservation, Development, and Utilization of State Water Resources.

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Colorado Colorado Groundwater Management Act (Colo. Rev. Stat. Ann. § 37-90)	Colorado Division of Water Resources Colorado Ground Water Commission (regulates groundwater within designated basins)	Cal. Water Code [FN = *See generally* Division 2: Water, Division 6: Conservation, Development, and Utilization of State Water Resources]	Designated basins	Amount specified in permit[2]	N/A	Permit required regardless of where the well is located[3, 4]	Designated basins = Small capacity wells: (1) Wells not exceeding 50 gallons/minute and used for no more than 3 single-family dwellings (exception = does not include irrigation on more than 1 acre of land) (2) Livestock wells not exceeding 50 gallons/minute and used for watering livestock (3) Wells used in 1 commercial business not exceeding 50 gallons/minute (4) Certain wells used for observation purposes (5) Wells used exclusively for firefighting purposes (6) Certain monitoring wells Nondesignated basin = Exempt wells: flow rates of 15 gallons/minute or less for in-house use and outside use only for domestic animals	Reporting required	N/A	[1] Colorado has complicated water system, with rights and procedures differing based on how the groundwater is classified and where it is located. Groundwater classifications are: (1) Tributary groundwater: This is the "default" and is groundwater that is tributary to a natural stream. (2) Designated groundwater: This is groundwater in areas that have been declared "designated basins." (3) Nontributary groundwater: Groundwater that is located deep in an aquifer that is outside of a designated basin, that is not tributary to surface flows. (4) Not nontributary groundwater: Groundwater in the Denver Basin aquifers with slightly more connection to surface water than nontributary groundwater, but not located within a designated basin. [2] For nontributary groundwater, the State Engineer allocates the total available groundwater based on the 100-year aquifer life, with each permit holder being allowed to deplete the aquifer by 1% each year. [3] In a non-designated basin, the permit is a "non-exempt well permit." In a designated basin, it is a "large capacity well permit." [4] For tributary groundwater, the water right must first be adjudicated in Water Court.
Connecticut Conn. Gen. Stat. tit. 22a, ch. 446i (Water Resources)	Connecticut Department of Energy and Environmental Protection	Absolute Dominion	Aquifer protection areas[1]	N/A	Required for certain existing diversions (diversions maintained prior to or on July 1, 1982)	Required for all withdrawals over 50,000 gallons/day	Well(s) where withdrawal will not exceed 50,000 gallons during any 24-hour period Certain existing diversions grandfathered in (diversions existing and registered before July 1, 1983)[2]	Annual reporting required for registered wells Annual reporting required for permit holders putting water to consumptive use (non-consumptive use permit holders should consult their permit for reporting requirements)	None	[1] Focused on groundwater quality/pollution. [2] § 22a-377(a) for other exemptions.
Delaware Del. Code Ann. tit. 7 (Conservation), ch. 60 (Environmental Control) Del. Admin. Code tit. 7 (Natural Resources and Environmental Control), § 7303 (Regulations Governing the Allocation of Water)	Delaware Division of Water Resources	Correlative Rights	Groundwater management zones[1]	For permitted new withdrawals, a pumper can use up to 20 acre-inches/year, but not more than 10 acre-inches/month *See* Del. Admin. Code § 7303 for groundwater withdrawal rate limits	N/A	Required for all withdrawals over 50,000 gallons/day	N/A	Annual reports on water usage required for permit holders	Permit holders for irrigation only need to report from Mar. to Nov.	[1] Focused on groundwater quality/pollution.

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Florida Florida Water Resources Act of 1972 (Amended by 1997 Water Act) (Fla. Stat. §§ 373.302 - 373.342: Regulation of Wells) Fla. Admin. Code ch. 40A-E (Water Management Districts)	Water Management Districts (5 local governing bodies), with the Florida Department of Environmental Protection providing general supervision and oversight	Reasonable Use	Water resource caution areas (in some WMDs)	"Reasonable-beneficial use" ("use of water in such a quantity as necessary for economic and efficient utilization for a purpose and in such a manner that is both reasonable and in the public interest") Permit may contain limits on withdrawal amounts if the aquifer level time table is below that set by the Department of Environmental Protection	N/A	Every WMD requires groundwater users to obtain a permit for consumptive uses of water	Domestic consumption of water by individual users Additional exemptions vary based on WMD[1]	Annual reporting required for permit holders authorized to withdraw more than 100,000 gallons/day	Groundwater users exempt from permitting requirements Permit holders authorized withdraw 100,000 gallons/day or less	[1] *See* Fla. Admin. Code 40 A-E
Georgia Groundwater Use Act of 1972 (Ga. Code Ann. § 12-5-90) Ga. Comp. R. & Regs 12-5-3 (Wells and Drinking Water)	Georgia Environmental Protection Division (within the Georgia Department of Natural Resources)	Absolute Dominion	N/A	N/A	N/A	Required for any user who withdraws more than 100,000 gallons/day for any purpose Note: special permitting rules apply to farms	Withdrawals of less than 100,000 gallons/day	Permittees must submit a semiannual statement on the nature and quantity of their use, an annual report of their water use, and a progress report every 5 years that details water conservation techniques and supplemental information ;	Farm uses (includes irrigation for farm purposes)	
Hawaii State Water Code (Haw. Rev. Stat. ch. 174C)	Hawaii Commission on Water Resources Management	Correlative Rights	Water management areas	N/A	Required for wells in existence before State Water Code was adopted	Well construction permit required everywhere Water *use* permit required in water management areas	Domestic consumption for individual users	Monthly reports required for all wells[1]	None	[1] Salt water wells can report annually
Idaho Ground Water Act of 1951, as amended (Idaho Code tit. 42: Irrigation and Drainage - Water Rights and Reclamation) Idaho Admin. Code tit. 37: Dept. of Water Resources	Idaho Department of Water Resources	Prior Appropriation	Critical groundwater areas	Amount that can be beneficially used Note: Irrigation greater than 1 cubic-foot/second per 50 acres is prohibited without approval from IDWR	N/A	Required for all withdrawals	Domestic wells: use of water for individual use, irrigation of less than 1/2 acre of land, and any other associated purpose, so long as not more than 13,000 gallons/day, and any other use so long as the total use is not more than .04 cubic-feet/second or 2,500 gallons/day	Required for permittees	Exempt uses	
Illinois Illinois Water Use Act (1983) (525 Ill. Comp. Stat. 45)	County Soil and Water Conservation Districts (overseen by the Illinois Department of Agriculture)	Reasonable Use	Regulated recharge areas[1]	Limits may be placed upon wells with a capacity of 100,000 gallons/day or more if the District has investigated and recommended a limit State regulators may restrict withdrawals in certain counties	Required for high capacity wells (facilities with a capacity to withdraw at least 100,000 gallons/day)	Required for special jurisdictions (any town where the Iroquois River flows, or any town with more than 100,000 people where the Mackinaw River flows)	High capacity wells	Annual report to the Illinois Water Inventory Program for high capacity wells	Wells with pump capacity of less than 100,000 gallons/day	[1] Focused on groundwater quality/pollution.
Indiana Ind. Code § 14-25-3 (Water Rights; Ground Water)	Indiana Department of Natural Resources	Absolute Dominion	Restricted use areas	May be limits if the Director declares a groundwater emergency if small quantity users (less than 100,000 gallons/day) have a cause of action	Required for all facilities with a capacity to withdraw at least 100,000 gallons/day	Required in restricted use areas for all new users or those withdrawing more than 100,000 gallons/day	Wells with a pump capacity of less than 100,000 gallons/day	Annual reporting required for owners of registered facilities	None	

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Iowa Iowa Code ch. 455A (Water Rights), ch. 455E (Groundwater Protection) Iowa Admin. Code tit. 567 (Environmental Protection Commission)	Iowa Department of Natural Resources	Correlative Rights	Protected source areas	Each aquifer has a different limit on the amount or rate of withdrawal	N/A	Required for withdrawals that exceed 25,000 gallons/day[1]	Withdrawals less than 25,000 gallons/day	Annual reporting required	None	[1] Additional permitting requirements for high-capacity wells that have an expected pump capacity of 500 gallons/minute or more.
Kansas Kansas Water Appropriation Act (Kan. Stat. Ann. § 82a-701 *et seq*.) Kan. Admin. Regs. tit. 28 (Dept. of Human Health and Env.)	Division of Water Resources (within the Kansas Department of Agriculture)	Prior Appropriation	Intensive groundwater use control areas Local enhanced management areas	Annual authorized quantity (cannot be increased) Local groundwater management districts can impose additional limitations	N/A	Required for all withdrawals	Domestic uses (2 acres or less) Certain existing uses grandfathered in	Annual reporting required	Domestic users	
Kentucky Ky. Rev. Stat. ch. 151 (Geology and Water Resources)	Division of Water (within the Kentucky Energy and Environment Cabinet)	Reasonable Use	N/A	Quantity and rate specified in permit	N/A	Required for facilities with a withdrawal rate of more than 10,000 gallons/day	Domestic uses Agricultural uses (includes irrigation) Withdrawals made at a constant rate with an average withdrawal rate of 10,000 gallons/day or less[1]	Monthly reporting required for permitted withdrawals	Withdrawals exempt from the permitting process	[1] Permit may be required if the withdrawals are made on an irregular basis and at an irregular rate if the water withdrawn represents a significant portion of the available water supply.
Louisiana Water Control Law (La. Stat. Ann. §§ 30:2071 *et seq*.) La. Admin. Code tit. 43 (Natural Resources), Part VI (Water Resources Management), Subpart 1 (Ground Water Management)	Office of Conservation (within the Louisiana Department of Natural Resources)	Absolute Dominion	Areas of groundwater concern	No limit	Required for all wells (new wells and those that have been re-worked) producing more than 50,000 gallons/day	N/A	Wells pumping less than 50,000 gallons/day (owner is not considered a "user")	Monthly reporting required for owners of non-domestic water wells in an area of groundwater concern DNR can require registered wells to submit information	None	
Maine Me. Stat. tit. 38 (Waters and Navigation), ch. 3 (Protection and Improvement of Waters) See specifically: Art. 1-B (Ground Water Protection Program) § 404 Ground Water Rights Art. 4-B (Water Withdrawal Reporting Program) Art. 5-A (Natural Resources Protection Act)	Maine Department of Environmental Protection	Absolute Dominion	N/A	Amount needed for beneficial domestic use at single family home, so long as it doesn't cause harm to another beneficial user	N/A	If withdrawal is within 500 feet of a body of water: withdrawal of at least 75,000 gallons/week or 50,000 gallons/day If withdrawal is over 500 feet from a body of water: withdrawals of at least 216,000 gallons/week or 144,000 gallons/day Required for withdrawal from a significant groundwater well	Public water systems Home domestic supply Agricultural use	Annual usage reports required for those withdrawing more than threshold amount (varies depending on the location of nearby lakes/ponds)[1] Required for withdrawals from certain groundwater sources within 500 feet of a lake or pond Required if the withdrawal is from groundwater greater than 500 feet from certain water bodies and is 50,000 gallons or more on any day (exception = the person making the withdrawal demonstrates that it won't impact any adjacent surface water body)	Proven to the Department's satisfaction that the withdrawal won't impact the adjacent surface water body Nonconsumptive uses Household uses Emergencies	[1] § 470-B for threshold volumes for reporting annually.

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Maryland										
Md. Code Ann., Envir. tit. 5 (Water Resources)	Maryland Department of the Environment	Reasonable Use	Water management strategy areas	Administrative decisions suggest that the Department has an unwritten rule limiting withdrawals to an amount it calculates that belongs to the land or to land under the user's control	N/A	Required for all withdrawals	Certain domestic uses (other than heating/cooling) Agriculture use less than 10,000 gallons/day (with some exceptions) Groundwater withdrawals of less than 5,000 gallons/day (does not include use for public water systems, or uses within a water management strategy area)	Semi-annual reporting required for permit holders when permit is issued for an average withdrawal of more than 10,000 gallons/day Annual reporting required for agricultural uses	Users exempt from permitting process	
Massachusetts										
Massachusetts Water Management Act (Mass. Gen. Laws ch. 21G)	Massachusetts Department of Environmental Protection	Absolute Dominion	N/A	No limit	Users withdrawing over 100,000 gallons/day on average during the 5 years prior to January 1986	Required for withdrawals over 100,000 gallons/day	Nonconsumptive uses not factored into calculating the volume withdrawn	Annual reporting required for registered users and permit holders	None	
Michigan										
Natural Resources and Protection Act (Mich. Comp. Laws ch. 324 (Act 451 of 1994))	Michigan Department of Natural Resources	Restatement (Second) of Torts § 858 (Beneficial Purpose Doctrine)	N/A	A reasonable amount up to the point of interfering with a neighbor's reasonable use	Required for owners of prospective new or increased "large quantity water withdrawals" (1 or more cumulative withdrawals of over 100,000 gallons/day average in any consecutive 30-day period)	Required for users proposing to withdraw over 2,000,000 gallons/day	Owners of a noncommercial well on certain residential properties (either a single family residential property, or a multi-family residential property not exceeding 4 residential units on 3 acres or less) (exception = well is a lake augmentation well) Seasonal withdrawal of 2,000,000 gallons/day in any consecutive 90-day period to supply a common distribution system	Annual reporting required for registered users and permit holders	Owner of a farm who submits a water conservation plan under § 32708 User who withdraws less than 1,500,000 gallons in any year is subject to less stringent reporting requirements	
Minnesota										
Minn. Stat. ch. 103A - 114B	Minnesota Department of Natural Resources	Correlative Rights	Groundwater management areas	Non-essential uses may be limited if governor declares a critical water deficiency	N/A Note = Legislative approval is needed if a user plans to appropriate more than 2,000,000 gallons/day for a consumptive use, along with a determination from DNR that there are adequate resources	Facilities that withdraw at least 10,000 gallons/day or 1,000,000 gallons/year (exception = Commissioner can require a permit for wells with a capacity less than this in groundwater management areas)	Water is used to supply less than 25 people's domestic uses	Annual report tracking monthly withdrawals required for permit holders	None	
Mississippi										
Mississippi Commission on Environmental Quality Regulation LW-2 (Surface Water and Groundwater Use and Protection) Miss. Code Ann. tit. 51 (Water, Water Resources, Water Districts, Drainage, and Flood Control) Miss. Admin. Procedures Act Rules tit. 11 (Mississippi Department of Environmental Quality)	Office of Land and Water Resources (within the Mississippi Department of Environmental Quality)	Absolute Dominion[1]	Water use caution area	No limit	N/A	Required for all withdrawals[2]	Water for domestic uses (ordinary household purposes, livestock watering, and irrigation of non-commercial lands) Water withdrawn from a well with a surface casing diameter of less than 6 inches Existing water rights before grandfathered in Note = Board may require permits for exempt wells in in a water caution area for withdrawals in excess of 20,000 gallons/day	Annual reporting required on volume withdrawn over the year for owners of wells that withdraw over 20,000 gallons/day	None	[1] In *Bd. of Supervisors v. Miss. Lumber Co.*, 31 So. 905 (Miss. 1902), Mississippi was categorized as an absolute ownership state, but the court indicated that if faced with the appropriate case, it would instead apply reasonable use rule. [2] Additional permit requirements for wells with a withdrawal capacity in excess of 20,000 gallons/day.

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Missouri Mo. Rev. Stat. § 256.400 *et seq*.	Missouri Department of Natural Resources	Reasonable Use[1]	N/A	No limit	Required for "major water users" (owners of wells with a capacity to withdraw at least 70 gallons/minute or 100,000 gallons/day)	N/A	Water pumped from mines and quarries	Registered users must submit an annual report on their withdrawal/use May be required in water quality protection areas if the State Water Resource Plan requires reporting	None	[1] Missouri follows a modified version of the Reasonable Use rule called Comparative Reasonable Use, which is determined on case-by-case basis and takes into account all relevant facts/circumstances. See *Higday v. Nickolaus*, 469 S.W.2d 859 (Mo. App. 1971).
Montana Montana Water Use Act (Mont. Code Ann. § 85-2-5)	Montana Department of Natural Resources and Conservation	Prior Appropriation	Controlled ground water areas	No limit (exception = may be limits in controlled groundwater areas)	Required for wells that are exempt from the permitting process	Permit required for withdrawals over 35 gallons/minute or that exceed 10 acre-feet/year[1] Note = Appropriations greater than 3,000 acre-feet/year requires legislative approval (exception = appropriations for irrigating croplands owned and operated by applicant.]	Exempt well: well outside of a stream depletion zone with a maximum pumping rate of 35 gallons/minute and a maximum volume of 10 acre-feet/year[2], well in a stream depletion zone with a pumping rate of 20 gallons/minute or less, and a volume less than 2 acre-free/year[3] Existing water rights (appropriations put to beneficial use between 1962-1973) do not require a permit	Well log report must be filed by the driller	N/A	[1] Appropriations of 4,000 or more acre-feet/year and 5.5 or more cubic-feet/second of water may not get permit without proving the regular criteria and that that use of water is reasonable. [2] Permit may still be required to appropriate water in a controlled groundwater area, even if ordinarily exempt. [3] Combined appropriation by 2 or more wells exceeding 10 acre-feet/year requires permit, regardless of flow rate.
Nebraska Groundwater Management and Protection Act (1975) (Neb. Rev. Stat. §§ 46-701, *et seq*.) Neb. Rev. Stat. ch. 61 (Natural Resources)	Natural Resources Districts (local entities, supervised by the Nebraska Department of Natural Resources)	Reasonable Use (Correlative Rights in times of shortage)	Management areas	No limit	Required for all wells constructed after July 1, 2001	Required when pumping will be done for irrigation purposes Required in management areas	No registration required for domestic wells (wells used solely for domestic purposes and built before Sept. 9, 1993) No permit needed in management areas for single water wells designed and built to pump 50 gallons/minute or less (certain other exceptions)	Requirements differ based on the groundwater management plan for each Natural Resources District	N/A	
Nevada Nev. Admin. Code ch. 533 (Adjudication of Vested Water Rights; Appropriation of Public Waters), ch. 534 (Underground Water and Wells)	Nevada Division of Water Resources (within the Department of Conservation and Natural Resources)	Prior Appropriation	Designated basins (State Engineer can further designate areas within these basins as critical management areas)[1]	Withdrawals in designated basins generally limited to "safe yield" (State Engineer may limit to less)	State Engineer has authority to require registration of exempt domestic uses in certain water basins	Required before well is drilled in a designated basin Required before water is used outside of designated basins	Domestic wells (diverts less than 2 acre-feet/year and has a flow rate below 1,800 gallons/day, serving not more than 3 single-family dwellings) Wells existing before July 1, 1983	N/A	N/A	[1] Designation status of basins divided into general categories: (1) Designated areas, where order does not define administrative control (2) Designated, irrigation denied areas (irrigation is not a preferred use in the basins) (3) designated, prefered use areas (certain types of preferred uses) (4) designated preferred uses, irrigation denied areas (orders designate certain uses as preferred, but not irrigation)
New Hampshire Groundwater Protection Act (N.H. Rev. Stat. Ann. ch. 385-C)	New Hampshire Department of Environmental Services	Reasonable Use (the rights are correlative)	N/A	N/A	Users withdrawing over 20,000 gallons/day averaged over a 7-day period or over 600,000 gallons over any 30-day period (registration is in addition to any required permits)	Large groundwater withdrawal (any withdrawal of 57,600 gallons or more in any 24-hour period at a single property)	Emergency withdrawals Withdrawals associated with short-term use	Registered users must report their monthly water use on a quarterly basis	None	

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New Jersey Water Supply Management Act (N.J. Stat. Ann. tit. 58)	New Jersey Department of Environmental Protection	Reasonable Use or Correlative Rights[1]	Areas of critical water supply concern	Maximum diversion quantity set in permit (can modify conditions of existing diversion permit to limit or reduce the quantity of water to the safe or dependable yield)	Required for any user with the capacity to divert over 100,000 gallons/day, but who diverts less	Required for users withdrawing over 100,000 gallons/day for a period of more 30 days in a 365 consecutive day period	Agriculture uses Aquaculture or horticulture uses Certain existing uses grandfathered in	Registered users must annually report their monthly water use Permittees must submit monthly diversion amounts on a quarterly basis	None	[1] New Jersey common law as it pertains to groundwater remains unclear.
New Mexico New Mexico Groundwater Code (N.M. Stat. Ann. § 31-12)	New Mexico Division of Water Resources	Prior Appropriation	Declared groundwater basins (entire state)	Unclear: the rules have been changing and challenged	N/A	*Not required (*See exception)	Required if in declared groundwater basin (*entire state is a declared groundwater basin, so technically yes, a permit is required for all withdrawals) Certain existing uses grandfathered in and have to fill out a form (vested rights with priority dates prior to 1907 as long as they have been for a continuous use and not a 1 time diversion)[1]	Must *meter* if well serves more than 1 household	N/A	[1] Permit applications presumptively granted for minimal domestic uses, but they aren't technically exempted. A domestic use is irrigation of 1 acre or less of non-commercial land and other domestic uses.
New York Water Resources Law (N.Y. Envtl. Conserv. § 15: Water Resources) N.Y. Stat. tit. 6 (Department of Environmental Conservation), ch. V (Resource Management Services), Subchapter E (Water Regulation) Great Lakes Water Conservation and Management Act of 1989 imposes certain additional requirements to water users in the Great Lakes Basin	New York Department of Environmental Conservation	Reasonable Use	Special groundwater protection areas	Permit holders can withdraw amounts that are reasonable to meet proposed use of water	Anyone making a withdrawal of water for agricultural purposes must annually register or report the withdrawal Required in the Great Lakes Basin for withdrawals of 100 gallons/day averaged over a 30-day period or 3,000,000 gallons in a 30-day period	Required for wells with a pump capacity of at least 100,000 gallons/day Required for agricultural irrigation[1]	Withdrawals for fire/public emergency Withdrawals approved from a compact basin commission Existing registered withdrawals for agricultural purposes[2]	Annual reporting required for permit holders, detailing water usage and conservation measures Anyone who withdraws for agricultural purposes over an average of 100,000 gallons/day in any consecutive 30-day period must annually report	None	[1] Certain counties or areas may have imposed more stringent thresholds. [2] *See* § 15-1501 for other exceptions
North Carolina Water Use Act of 1967 (N.C. Gen. Stat. §§ 143-215.11, *et seq.*)	North Carolina Environmental Management Commission (within the Department of Environmental Quality) Division of Water Resources (issues permits) (within the North Carolina Department of Natural Resources and Community Development)	Reasonable Use	Capacity use areas	Limits must be set in capacity use areas on quantity and rate (*see* § 143-215.14)	Required for any withdrawal of at least 100,000 gallons/day	Required for any withdrawal of at least 100,000 gallons/day in capacity use areas	Agricultural-related withdrawals of less than 1,000,000 gallons/day Certain other uses exempt	Registrants required to update withdrawal information every 5 years Permittees must submit a statement on quantity, sources, and nature of use no more frequently than every 30 days Users in capacity use areas must submit monthly reports	None	

State	Regulating Agency/Department	Groundwater Common Law Doctrine	Special Management Areas for Groundwater Supply	Maximum Withdrawal Amount	Registration	Permitting	Exceptions to Registration/Permitting	Reporting	Exceptions to Reporting Requirements	Footnotes
North Dakota										
N.D. Cent. Code tit. 61 (Waters) N.D. Admin. Code tit. 89 (Water Commission)	State Engineer (assisted by the Water Appropriation Division of the North Dakota State Water Commission)	Prior Appropriation	Source water protection areas[1]	Amount that can be beneficially used (permit cannot be issued in an amount that is more than this) Conditions may be imposed on the permit by State Engineer	N/A	Required for all withdrawals	Domestic uses of less than 12.5 acre-feet/year (use of water by a single individual, family, or household (includes irrigation of land not exceeding 5 acres for non-commercial purposes)[2] Livestock uses of less than 12.5 acre-feet/year Fish, wildlife, or other recreational uses of less than 12.5 acre-feet/year Certain historical uses grandfathered in	Annual reporting required for permit holders	None	[1] Focused on groundwater quality/pollution. [2] Watering a large garden is a domestic use, but it's irrigation when watering more than 5 acres of land. A permit is then needed.
Ohio										
Ohio Rev. Code Ann. ch. 1521 (Division of Water Resources)	Division of Water Resources (within the Ohio Department of Natural Resources)	Restatement (Second) of Torts § 858 (Beneficial Purpose Doctrine)	Groundwater stress areas	A reasonable amount[1]	Required for all facilities with a capacity to withdraw at least 100,000 gallons/day Required for all water users in a capacity stress area that withdraw more than the amount set by the Division	Required if a facility plans to increase their withdrawal by more than 2,000,000 gallons/day over a 30 day period	Certain registration exceptions applying mostly to public water suppliers	Annual water use reporting required for owners of registered facilities and permit holders	None	[1] *See* § 1521.17 for factors to be considered when making a reasonableness determination
Oklahoma										
Okla. Stat. § 82-11 (Oklahoma Groundwater Law)	Oklahoma Water Resources Board	Reasonable Use and Correlative Rights	Sensitive sole source groundwater basin	Proportionate share of the maximum annual yield (MAY) allocated to the landowner on a per-acre basis[1]	N/A	Required for all withdrawals[2]	Domestic uses (household purposes, for farm and domestic animals up to normal grazing capacity of the land and for irrigation of land not more than 3 acres)	Annual reporting required for permit holders	None	[1] Maximum annual yield: a determination of total groundwater that can be produced from a basin maintaining safe yield. There are different types of permits, so the maximum amount depends on the type of permit. [2] Different requirements apply based on the type of permit: regular, temporary, provisional temporary, special, limited quantity.
Oregon										
Or. Rev. Stat. tit. 45, ch. 536 (Water Resources Administration), ch. 537 (Appropriation of Water Generally) Ground Water Act of 1955 (Or. Rev. Stat. § 537.505, *et seq.*)	Oregon Water Resources Department Oregon Water Resources Commission	Prior Appropriation	Groundwater management area	Beneficial use, without waste Permit may impose conditions May be limits in critical groundwater management areas	Required for a pre-Aug. 3, 1955 right	Required for all withdrawals	Domestic uses up to 15,000 gallons/day Stock watering Lawn watering up to 1/2 an acre Small industrial or commercial uses up to 5,000 gallons/day Note = exempt uses still require a permit in designated groundwater management areas[1]	On an honor system not to use more than permit allows Must complete a pump test every 10 years and report results to Commission	None	[1] *See* § 537.545 for other exempt uses
Pennsylvania										
No statute directly on regulation of the allocation of groundwater resources (*See generally*, Pa. Cons. Stat. § 25-110) Water Rights Act (PL 842, No. 365)	Pennsylvania Department of Environmental Protection	Reasonable Use	Critical water planning areas	N/A	Required for all facilities and operations that withdraw or use more than 10,000 gallons/day over a 30-day period	Required for all new or increased withdrawals of 10,000 gallons/day in the Delaware or Susquehanna River basins	Domestic wells	Registered users must annually report their withdrawals and use	None	

State	Regulating Agency/Department	Groundwater Common Law Doctrine	Special Management Areas for Groundwater Supply	Maximum Withdrawal Amount	Registration	Permitting	Exceptions to Registration/Permitting	Reporting	Exceptions to Reporting Requirements	Footnotes
Utah Utah Code Ann. tit. 73 (Water and Irrigation)	Utah Department of Natural Resources	Prior Appropriation	Critical management areas	Withdrawing large volumes of groundwater that have a certain chemical makeup making it suitable for irrigation is permitted only in certain basins State Engineer can set limits on maximum annual withdrawals in areas where water management plans have been issued Conditions may be placed on permit	N/A	Required for all withdrawals	None	N/A	N/A	
Vermont Vt. Stat. Ann. tit. 10 § 37 (Water Resources Management) (*See* specifically Act 250: ch. 151 of tit. 10)	Vermont Department of Environmental Conservation	Correlative Rights	N/A	N/A	N/A	Required for withdrawals over 57,600 gallons/day (40 gallons/minute for 24 hours)	Emergencies Domestic uses Farming Public water systems Waterworks enhancements that don't expand facilities capabilities by more than 10%	Annual report on water usage required for permit holders Required for commercial and industrial uses that have a monthly average of 20,000 gallons/day	None	
Virginia Ground Water Management Act of 1992 (Va. Code Ann. § 62.1-25) 9 Va. Admin. Code § 25-610 (Groundwater Withdrawal Regulations)	State Water Control Board (within the Virginia Department of Environmental Quality)	Reasonable Use	Ground water management areas	Board may include conditions or limits necessary to protect public welfare, health, and safety	Required for each private well constructed in a groundwater management area by the certified water well systems provider within 30 days of completion of construction	Required for withdrawals of at least 300,000 gallons in any 30-day period in ground water management areas	Withdrawals of groundwater in any area not declared a ground water management area Withdrawals less than 300,000 gallons/month in a groundwater management area Withdrawals related to the exploration/production of oil, gas, coal or other materials if the withdrawal won't injure another landowner Temporary withdrawals associated with state-approved groundwater remediation Certain existing rights grandfathered in	Every user withdrawing an average of 10,000 gallons/day must submit an annual report on their withdrawals Required for users withdrawing 1,000,000 gallons/month for irrigation	None	
Washington Groundwater Code (Wash. Rev. Code § 90.44) Wash. Admin. Code tit. 173 (Department of Ecology)	Washington State Department of Ecology	Prior Appropriation	Groundwater management areas	Beneficial use Department may approve an application for less than the full amt	N/A	Required for withdrawals greater than 5,000 gallons/day	SIngle or group domestic uses less than 5,000 gallons/day Industrial uses of less than 5,000 gallons/day Irrigation of non-commercial area less than 1/2 acre Stock watering	Department may still require exempt users to submit information about water use	N/A	

State	Regulating Agency/Department	Groundwater Common Law Doctrine	Special Management Areas for Groundwater Supply	Maximum Withdrawal Amount	Registration	Permitting	Exceptions to Registration/Permitting	Reporting	Exceptions to Reporting Requirements	Footnotes
West Virginia										
Groundwater Protection Act (W. Va. Code § 22-12) Water Resources Protection Act (W. Va. Code § 22-26)	West Virginia Division of Environmental Protection	Reasonable Use	Critical planning areas	N/A	Required for "large-quantity users" (withdraw more than 300,000 gallons in a 30 day period)	N/A	Note = "Large-quantity users" excludes farm use Large-quantity users who are buying water from a public or private water utility or other service that is reporting its total withdrawal	Registrants must submit annual reports, but agricultural users can voluntarily submit their use Required for "large quantity users (any person withdrawing more than 750,000 gallons in any month)	None	
Wisconsin										
Wis. Admin. Code Natural Resources ch. 811 (Requirements for the Operation and Design of Community Water Systems), ch. 812 (Well Construction and Pump Installation), ch. 856 (Water Use Registration and Report) and 812 Wis. Stat. § 281.34 (HCW statute) Wis. Stat. § 281.35 (HCW must comply with this if it has water loss of more than 2 million gallons/day) 2003 WI Act 310 (groundwater protection law)	Wisconsin Department of Natural Resources	Restatement (Second) of Torts § 858 (Beneficial Purpose Doctrine)	Water management areas	Additional requirements for wells withdrawing 2,000,000 or more gallons/day Wells of 5,000,000 gallons/day in Great Lakes Basin need prior notification and comment by the governors of states/provinces in the basin	Required for new and existing high-capacity wells (facilities with the capacity, from all wells on a property, to withdraw at least 100,000 gallons/day or more in any 30-day period) Certain registration requirements as a result of being part of GLC	Required for high-capacity wells (facilities with the capacity, from all wells on a property, to withdraw at least 100,000 gallons/day or more in any 30-day period) Additional requirements for wells within the Great Lakes Basins (individual permit required for withdrawals of at least 1,000,000 gallons/day for any 30 consecutive days) Required for certain water users, including diversion for stream level maintenance, agriculture and irrigation Required for for a system or plan which consumptive withdraws an average of more than 2,000,000 gallons/day in any 30-day period	DNR can waive the requirement to obtain coverage under the general permit for a person that makes a withdrawal for purpose of agriculture or irrigation in Great Lakes Charter basins	Annual reports are required for facilities that withdraw an average of at least 100,000 gallons/day in any 30-day period	None	
Wyoming										
Wyo. Stat. Ann. ch. 3 (Water Rights; Administration and Control)	Wyoming Department of Natural Resources	Prior Appropriation	Control areas	25 gallons/minute for domestic and stock uses (domestic use: household use where the area to be irrigated is not greater than 1 acre, supplying not more than 3 single family homes) May enact temporary corrective measures in groundwater control area	Required for all withdrawals	Required for all withdrawals	None	Owner must continue to ensure that the well is maintained so that it does not pollute the groundwater	N/A	

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The information contained in this document is provided for educational purposes only. It is not legal advice, and is not a substitute for the potential need to consult with a competent attorney licensed to practice law in the appropriate jurisdiction.

High-Capacity Wells: A Survey of Groundwater Withdrawal Rights and Regulations

Linda Reid[1]
Megan Kiplinger[2] Jordan Miller[3] Benjamin Edelstein[4] Samuel Ouimet[5]

INTRODUCTION

Although out of sight, groundwater represents a critical portion of the world's freshwater supply. Approximately 30% of the world's freshwater is groundwater,[6] and 2.5 billion people depend solely on groundwater to satisfy their daily water consumption needs.[7] In the United States, approximately 20% of total freshwater withdrawals come from groundwater sources.[8] Historically, these extractions occurred through crude devices that limited efficiency[9] This changed in 1937 with the invention of the high-speed centrifugal pump, which drastically increased the rate at which groundwater could be extracted.[10] Current practices in many regions of the United States permit groundwater withdrawals that exceed the rate at which the aquifers naturally replenish, leading to sustained and long-term depletion.[11]

Agricultural irrigation accounts for the single largest use of groundwater in the United States.[12] Satisfying this demand often requires utilizing high-capacity wells, which are wells that, together with all other wells on a property, have the ability to withdraw water over an established daily threshold.[13]

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[6] Deepak Khare, Manesh Kumar Jat & P.K. Minshra, *Groundwater Hydrology: An Overview*, *in* SUSTAINABLE HOLISTIC WATER RESOURCES MANAGEMENT IN A CHANGING CLIMATE 4-1 (2017).

[7] Jenny Grönwall & Kerstin Danert, *Regarding Groundwater and Drinking Water Access through a Human Rights Lense: Self-Supply as a Norm*, 12 Water 419, 419 (2020).

[8] Jacob D. Peterson-Perlman et al., *Critical Issues Affecting Groundwater Quality Governance and Management in the United States*, 10 Water 735, 735 (2018).

[9] BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 447 (6th ed. 2018).

[10] *Id.*

[11] Leonard F. Konkikow, *Long-Term Groundwater Depletion in the United States*, 53 Groundwater 2, 2-4 (2015).

[12] Agriculture accounts for approximately 80% of the nation's consumption of surface and ground water. U.S. DEP'T OF AGRIC. ECON. RESCH. SERV., *Irrigation & Water Use*, https://www.ers.usda.gov/topics/farm-practices-management/irrigation-water-use/ (last updated Sept. 23, 2019).

[13] *See High-Capacity Wells*, WIS. DEP'T OF NAT. RES., https://dnr.wisconsin.gov/topic/Wells/HighCap (last visited Mar. 3, 2021).

High-capacity wells have the ability to reach withdrawal rates that exceed natural groundwater recharge and disrupt the hydrological cycle as a result.[14] Unlimited and unregulated groundwater withdrawals through the use of high-capacity wells are not sustainable.

Absent an overarching federal framework to avoid depleting underground aquifers, the regulation of high-capacity wells is left largely to the separate states. Groundwater and surface water supplies are part of a single hydrological system, but the law of groundwater rights does not recognize this relationship.[15] While surface water is covered by two common law doctrines (riparianism and prior appropriation), five groundwater doctrines have some acceptance (absolute ownership, American reasonable use, correlative rights, the Restatement (Second) of Torts, and prior appropriation).[16] However, few states apply any one of these doctrines in a uniform way.[17] Furthermore, state regulatory frameworks reflect varying degrees of scientific understanding of hydrology.[18] As a result, groundwater management in the United States has been highly fragmented.[19]

An inefficient and piecemeal regulatory framework at the state level can have consequences, including: overallocation of groundwater, reduction in levels of surface waters that are supplied by the groundwater, agricultural supply problems, impaired water quality, and land subsidence.[20] Furthermore, mismanagement can have economic consequences because of the expenses associated with drilling deeper wells in response to dropping water table levels and costs that must be expended to remediate declining water quality.[21] There may be additional consequences of over-appropriating aquifers with high-capacity wells that are "not yet apparent because the processes of groundwater movement occur slowly and the effects of capture are not always immediately visible."[22] Groundwater is a shared resource, and the consequences of improper or inefficient regulation of wells withdrawing large quantities of water are both localized and far-reaching.

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[14] ROBERT GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS 2 (2002).

[15] *Id.*

[16] *Id.* at 449.

[17] *Id.*

[18] Melissa K. Scanlan, *Droughts, Floods, and Scarcity on a Climate-Disrupted Plante: Understanding the Legal Challenges and Opportunities for Groundwater Sustainability*, 37 Va. Envtl. L.J. 52, 88 (2019).

[19] *Id.* ("While individuals are focused on specific 'rights' to withdraw water, there is a need for an overarching holistic management of the entire common pool resource as an integrated system where ground and surface waters, and the quality and quantity of these waters, are viewed together.")

[20] *Groundwater Decline and Depletion*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/special-topic/water-science-school/science/groundwater-decline-and-depletion?qt-science_center_objects=0#qt-science_center_objects (last visited Mar. 5, 2021).

[21] GLENNON, *supra* note 13, at 32.

[22] *Id.* at 77.

This report proceeds as follows. Part I discusses the limited role of the federal government plays in managing groundwater resources. Part II provides an overview of the legal rights and obligations pertaining to the use of groundwater and examines the regulatory frameworks in place for groundwater withdrawal via high-capacity wells. Part III offers a brief conclusion.

I. FEDERAL LAW

The federal government is generally authorized to act in the public's interest to protect the *quality* of the nation's waters. In 1972, Congress passed the Federal Water Pollution Control Act, which is commonly referred to as the Clean Water Act (CWA).[23] Designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[24] regulates discharges of pollutants from point sources.[25] The CWA defines the phrase "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source."[26] A "point source," is "any discernible, confined, and discrete conveyance from which pollutants are or may be discharged."[27] Historically, the CWA has not been applied to protect groundwater.[28] However, the Supreme Court recently held that indirect discharges of pollutants to groundwater are subject to the CWA if they are the "functional equivalent" of a direct discharge.[29] Uncertainty surrounding the definition of key terms in the CWA has resulted in a patchwork regulatory framework.[30]

The federal government's role in managing and allocating groundwater resources (*quantity*) is much more limited. While the federal government generally does not have direct authority to monitor

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[23] *History of the Clean Water Act*, U.S. ENV'T PROT. AGENCY, epa.gov/laws-regulations/summary-clean-water-act (last updated Jun. 15, 2020).

[24] 33 U.S.C. § 1251 *et seq.*

[25] For an overview of events leading up to the CWA, see William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts*, 1789-1972: Part I, 22 Stanford Envtl. L. J. 145 (2003), and *Part II*, 22 Stanford Envtl. L. J. 215 (2003). For a retrospective of the CWA and a discussion of its limitations see William L. Andreen, *Success and Backlash: The Remarkable (Continuing) Story of the Clean Water Act,* 4 Geo. Wash. J. of Energy & Envtl. L. 25 (Winter 2013).

[26] 33 U.S.C. § 1362(12).

[27] *Id.* § 1362(14).

[28] DAVID H. GETCHES ET. AL., WATER LAW IN A NUTSHELL 272 (5th ed. 2015). Some courts have held that the NPDES permit program covers discharges of pollutants to groundwater that is hydrologically connected to surface waters. *See, e.g.,* Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Idaho 2001); Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428 (D. Colo. 1993). However, most courts have held that the statute does not reach that far. See, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F. 3d 962 (7th Cir.1994); Exxon Corp v. Train, 554 F.2d 1310 (5th Cir. 1977).

[29] County of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1468 (2020). For a discussion of the implications of the Court's decision, see Rachel L. Wagner, County of Maui, Hawaii v. Hawaii Wildlife Fund, 0 Pub. Land & Res. L. Rev. 9 (2020).

[30] Brigit Rollins, *Waters of the United States: Timeline of Definitions*, NAT'L AGRIC. L. CTR. 1 (Apr. 21, 2020), https://nationalaglawcenter.org/wp-content/uploads//assets/articles/WOTUS-Timeline.pdf.

and manage groundwater, several federal agencies help to inform state decision-making by providing assessments and information on groundwater trends.[31] Beyond this limited role, the responsibility for managing groundwater belongs to the states. The exception to this pertains to groundwater on land reserved to the federal government.[32] The Supreme Court stated that this exception is rooted in "Congress's explicit deference to state water law in other areas."[33] Thus, the default is that the authority to manage issues related to groundwater quantity, such as the use of high-capacity wells, is deferred to the states.

II. STATE LAW

The rules and regulations for the allocation, withdrawal, and use of groundwater are made by the governments of the several states, as opposed to by the federal government.[34] States regulate groundwater rights through application of common law, state statutes and regulations, or judicial precedent.[35] The rules that states adopt tend to incorporate more than one theory of groundwater rights.[36] As a result of these state-by-state differences, the regulatory framework for the nation's groundwater is complicated and often contradictory.

A. GROUNDWATER AS A PROPERTY RIGHT

A water right authorization is the right to use groundwater in a prescribed manner. States differ in who they consider to be the legal owner of the water right authorization. The right to withdraw and use groundwater is owned either by: (1) the overlying landowner, or (2) the public, held by the state. According to the Water Systems Council, there is a clear trend of increasing conflict between private property rights in groundwater and public rights in groundwater.[37]

While the Supreme Court has recognized a limited form of property rights in groundwater use, a state may still regulate this right. However, governmental regulation that goes "too far" by denying a landowner of the "economically viable use" of their property may be considered a

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[31] U.S. Geological Survey (USGS), NASA, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Agriculture (USDA); PETER FOLGER, ET AL., CONG. RSCH. SERV., R425259 THE FEDERAL ROLE IN GROUNDWATER SUPPLY: OVERVIEW AND LEGISLATION IN THE 115TH CONGRESS 16 (2018).

[32] Winters v. United States, 207 U.S. 564, 575-77 (1908).

[33] United States v. New Mexico, 438 U.S. 696 (1978).

[34] John D. Leshy, *Interstate Groundwater Resources: The Federal Role*, 14 Hastings W-Nw. J. Envtl. L. & Pol'y 1475, 1480 (2008).

[35] ALEXANDER BENNET ET AL.., GROUNDWATER LAWS AND REGULATIONS: A PRELIMINARY SURVEY OF THIRTEEN U.S. STATES 7 (2d. ed 2020).

[36] GETCHES ET AL., *supra* note 27, at 226.

[37] *Who Owns the Water?*, WATER SYSTEMS COUNCIL 3, http://nationalaglawcenter.org/wp-content/uploads/2017/03/Who-Owns-the-Water-2016-Update-FINAL.pdf (last updated Aug. 2016).

"regulatory taking."[38] The Constitution provides that the government may not take private property for public use without just compensation.[39] While the regulatory authority of a state over groundwater is not unlimited, the overall trend appears to be toward increased state regulation of groundwater resources.[40] This generally requires a prospective user to comply with applicable state procedures to obtain a groundwater right authorization. This process does not result in the user obtaining ownership of the actual groundwater, but the right to use the groundwater in a way that is consistent with limitations imposed by the state.

1. Overlying Common Law Doctrines Governing the Right to Withdraw and Use Groundwater

Common law principles serve as the foundation for how a water use right is obtained in each state. Common law is "[t]he body of law derived from judicial decisions, rather than statutes or constitutions."[41] While not a groundwater management law, common law serves as the theoretical basis used for managing groundwater withdrawals and uses in each state.

States generally follow one of five groundwater law doctrines:

(a) **Absolute ownership.** The oldest and simplest doctrine, it gives landowners an unlimited right to withdraw any water beneath their land for any purpose.[42] Also referred to as "capture" or the English Rule.[43]

(b) **Reasonable use.** The predominant groundwater doctrine in the United States, it is a modified version of absolute ownership wherein groundwater must be put to a reasonable use and must be used on the overlying land.[44] Also referred to as the "American Rule."[45]

(c) **Correlative rights.** Described as "riparianism on its side,"[46] it requires that groundwater be shared among overlying landowners.[47] In times of shortage, overlying owners must limit withdrawals to a "fair and just proportion" of the supply."[48]

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[38] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[39] U.S. CONST. amend. V.
[40] GLENNON, *supra* note 13, at 219.
[41] *Common law*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[42] THOMPSON ET AL., *supra* note 8, at 472.
[43] *Id.*
[44] Linda A. Malone, *The Necessary Interrelationship Between Land Use and Preservation of Groundwater Resources*, 9 UCLA J. J. Envtl. L. & Pol'y 1, 6 (1990).
[45] Adams v. Lang, 553 So.2d 89, 91 (Ala. 1989).
[46] THOMPSON ET AL., *supra* note 8, at 472.
[47] *Id.*
[48] Katz v. Walkinshaw, 74 P. 766, 772 (Cal. 1903).

(d) **Restatement of Torts Reasonable Use.** A combination of the English and American rules,[49] it imposes liability for withdrawals that cause unreasonable harm to others.[50] The Restatement "attempts to balance equities and hardships among competing users.[51]

(e) **Prior Appropriation.** A "first in time, first in right" system of ownership.[52] The first landowner to put a water source to beneficial use is granted a priority right.[53]

A common thread running through these doctrines is an emphasis on individualism.[54] "That is, like the common law of torts, the doctrines contemplate 'freedom of action where the effects of individual action cannot be demonstrated with specific proof.'"[55] Additionally, each doctrine is a variation on reasonableness as it relates to the withdrawal and use of groundwater. However, reasonableness is defined in various ways as it relates to each doctrine. Moreover, a state may modify a doctrine from its traditional form or combine aspects from multiple systems.[56] Thus, a prospective groundwater user should consult with the relevant agency or department in their state to ensure that they properly secure a groundwater use right.

Table 1 summarizes the distribution of the different approaches to groundwater rights across the United States.

[49] *Who Owns the Water?*, *supra* note 36, at 5.
[50] RESTATEMENT (SECOND) OF TORTS § 858 (1979)
[51] GETCHES ET AL., *supra* note 27, at 236.
[52] THOMPSON ET AL., *supra* note 8, at 472.
[53] Malone, *supra* note 43, at 8.
[54] THOMPSON ET AL., *supra* note 8, at 473.
[55] *Id.*
[56] THOMPSON ET AL., *supra* note 8, at 449.

Table 1: Summary of Groundwater Rights in the United States

Groundwater Allocation	States	Total
Absolute Ownership	CT, GA, IN, LA, ME, MA, MS, RI, TX	9
Reasonable Use	AL, AZ, AR, FL, IL, KY, MD, MO, NH, *NJ, NY, NC, PA, VA, WV	*15
Correlative Rights	DE, HI, IA, MN, *NJ, VT	*6
Restatement (Second) of Torts Reasonable Use	MI, OH, WI	3
Prior Appropriation	AK, CO, ID, KS, MT, NV, NM, ND, OR, SD, UT, WA, WY	14
Reasonable Use/Correlative Rights	CA, OK, NE, TN	4
No Common Law	SC	1

**New Jersey common law as it pertains to groundwater is unclear. We included it in both the Reasonable Use and Correlative Rights totals.*

It is also important to note that while withdrawing large amounts of groundwater from underground aquifers may impact surface waters, many states use a different common law water rights system to regulate groundwater allocations and uses than the one used for surface water.[57] The application of different common law rules likely originated from a misunderstanding of the connection between surface and ground waters. However, some states have begun to consider the connectivity of surface water and groundwater by applying the same common law concept to each and managing them in an integrated manner. States that are most effective in regulating groundwater withdrawals and uses tend to consider the interconnection with surface waters.

a. Absolute Ownership

Under the absolute ownership rule, an overlying landowner can withdraw an unlimited amount of groundwater from the aquifer below their land and put it to any use. Under this rule, a groundwater use right is a property right. Thus, the landowner may "intercept the groundwater which would otherwise have been available to a neighboring water user and may even monopolize the yield of an aquifer without incurring liability."[58]

[57] *Id.*

[58] Teresa N. Lukas, *When the Well Runs Dry: A Proposal for Change in the Common Law of Ground Water Rights in Massachusetts*, 10 B.C. Envtl. Aff. L. Rev. 455, 469 (1982).

The doctrine originates from the English rule set forth in *Acton v. Blundell*.[59] In *Acton*, the Court of Exchequer held that a landowner has a property interest in groundwater, and what is "his is his alone from the heavens to the depths of the earth."[60] This property interest gave the landowner the legal right to take and use as much groundwater as they wanted without incurring liability. As a result, there was very little government regulation over the diversion and use of groundwater.

The absolute ownership rule was initially used in a majority of states prior to the early 1900s.[61] However, the absolute ownership rule posed challenges by threatening the groundwater supply and leaving landowners without legal remedies for harms suffered by unlimited pumping by a neighboring landowner.[62] As a result, many states have moved away from the absolute ownership rule in its traditional form, instead opting for the reasonable use rule or correlative rights approach.[63] States that do continue to adhere to the absolute ownership rule have generally modified it to create an exception where an overlying landowner is liable for pumping groundwater in a willfully malicious or injurious manner.[64] Additionally, many of these states have enacted some type of registration or permitting system to prevent unregulated withdrawals. Texas is the only state that continues to follow the rule of capture in its traditional form (applies outside of special management areas).

States following: CT, GA, IN, LA, ME, MA, MS, RI, TX

b. Reasonable Use (American Rule)

More than a dozen states modified the rule of capture by adding "reasonable use" criteria to resolve conflicts between competing well owners.[65] A series of conflicts between cities that sunk high-capacity wells in rural areas to extract groundwater for use in the city led to the creation of the reasonable use rule.[66] Courts imposed a reasonableness restriction on all pumpers to protect farmers from unfair competition.[67]

Under the reasonable use doctrine, an overlying landowner may withdraw an unlimited amount of groundwater from beneath their land, even if to the detriment of a neighboring landowner,

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[59] 152 Eng. Rep. 1223 (Ex. Chamb. 1843).

[60] Acton v. Blundell, 12 M. & W. 324 (1843).

[61] *Who Owns the Water?*, *supra* note 36, at 4.

[62] GETCHES ET AL., *supra* note 27, at 228 (noting that the absolute ownership doctrine "leads to premature depletion of the resource and leaves groundwater users at the mercy of nearby high-capacity pumpers.").

[63] *Who Owns the Water?*, *supra* note 36, at 1.

[64] *Id.* at 4.

[65] Ronald Kaiser & Frank F. Skiller, *Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas*, 32 Tex. Tech. L. Rev. 249, 266 (2001).

[66] DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 4:8 (2020)

[67] *Id.* (citing Volkmann v. City of Crosby, 120 N.W.2d 18 (N.D. 1963) and Martin v. City of Linden, 667 So.2d 732 (Ala. 1995)).

qualified by the requirement that the use of the groundwater be "reasonable."[68] Traditionally, groundwater use is *per se* reasonable if it is made on the overlying land.[69] "The rule is essentially the rule of absolute ownership with exceptions for wasteful and off-site use."[70]

This provides a right holder with a legal remedy for harm suffered from the pumping of a neighboring landowner if the withdrawal and use is found to be unreasonable. "Reasonableness" is broadly construed and generally means that pumping can be done for any "beneficial use," meaning any use that is not wasteful and that has a reasonable relationship to the overlying land.[71] However, because land ownership is the source of the use right under this rule, off-site uses are categorically deemed unreasonable, regardless of how beneficial the use is.[72]

With a few exceptions, this doctrine is predominantly applied in the eastern United States[73] Many of the states that adhere to this doctrine have enacted some registration or permitting system to monitor withdrawals and ensure that the subsequent use is reasonable.

States following: AL, AZ, AR, **CA, FL, IL, KY, MD, MO, NE, NH, *NJ, NY, NC, **OK, PA, **TN, VA, WV

**Common law unclear*
***Also follows Correlative Rights*

c. Correlative Rights

The correlative rights doctrine allocates the use of groundwater based on land ownership of land above a basin or aquifer.[74] However, owners of land over a single aquifer or basin are each limited to a reasonable share of the total supply.[75] This rule was first recognized in *Katz v. Walkinshaw*, where the California Supreme Court held that in times of shortage, the amount of groundwater that an overlying landowner can withdraw is limited to a "fair and just proportion of the underlying supply."[76] The "fair and just proportion" of an overlying owner has traditionally been determined by the ratio of land owned overlying the aquifer[77]

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[68] THOMPSON ET AL., *supra* note 8, at 472.

[69] *See, e.g.,* Martin v. City of Linden, 667 So.2d 732 (Ala. 1995); Higday v. Nickolaus, 469 S.W.2d 859 (Mo. Ct. App. 1971); Finley v. Teeter Stone, Inc., 248 A.2d 106 (Md. 1968); Willis v. City of Perry, 60 N.W. 727, 730 (Iowa 1894).

[70] Lukas, *supra* note 57, at 484.

[71] THOMPSON ET AL., *supra* note 8, at 472.

[72] Corwin W. Johnson, *What Should Texas Do About the Rule of Capture?*, *in* 100 YEARS OF THE RULE OF CAPTURE: FROM EAST TO GROUNDWATER MANAGEMENT 12 (2004).

[73] GLENNON, *supra* note 13, at 30.

[74] GETCHES ET. AL, *supra* note 27, at 229.

[75] *Id.*

[76] 74 P. 766, 772. (Cal. 1903).

[77] Tehachapi-Cummings Water Dist v. Armstrong, 122 Cal. Rptr. 918, 924-25 (Ct. App. 1975).

In California surplus groundwater may be used on lands that do not overlie the aquifer.[78] The doctrine of prior appropriation governs conflicts between non-overlying users.[79] However, a non-overlying user is subordinate to an overlying owner regardless of priority relative to the non-overlying user.[80] However, this aspect of California's allocation scheme has been rejected by other jurisdictions adopting correlative rights.[81]

In contrast with reasonable use and absolute ownership, the correlative rights doctrine does not vest ownership rights in the water or recognize an unlimited right to pump.[82] Rather, the correlative rights doctrine maintains that the power to allocate water resources is held by the courts.[83] Therefore, overlying owners and non-overlying users have co-equal or correlative rights in the reasonable, beneficial use of groundwater.[84] "The most important distinguishing feature of the correlative rights doctrine, however, is its recognition that adjoining lands may be underlain by a common, shared aquifer."[85]

States following: **CA, DE, HI, IA, **NE, MN *NJ, **OK, **TN, VT

**Common law unclear*
***Also follows Reasonable Use Rule*

d. Restatement (Second) Of Torts Reasonable Use

The Restatement (Second) of Torts approach to groundwater management combines the traditional English rule of absolute ownership with the American reasonable use rule.[86] However, the Restatement considers the nature of the competing uses and the relative burdens imposed upon each user and it attaches no special significance to the use of the water on overlying land.[87] It attempts to provide specific criteria for comparing the reasonableness of competing uses of groundwater.[88] Under the doctrine, a well owner is not liable for withdrawal of groundwater unless the withdrawal:

(a) unreasonably causes harm to a neighbor by lowering the water table or reducing artesian pressure;

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[78] *See* Santa Maria v. Adam, 149 Cal. Rptr. 3d 491, 502 (Cal. Ct. App. 2012).
[79] TARLOCK, *supra* note 65, at § 4:14.
[80] *Katz*, 74 P. at 772.
[81] GETCHES ET. AL, *supra* note 27, at 229.
[82] Steven J. Levine, *Ground Water: Louisiana's QuasiFictional and Truly Fugacious Mineral*, 44 La. L. Rev. 1123, 1135 (1984).
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] Water Systems Council, *supra* note 36, at 5.
[87] GETCHES ET AL., *supra* note 27, at 236.
[88] Kaiser & Skiller, *supra* note 61 at 264.

(b) exceeds the owner's reasonable share of the annual supply or total score of groundwater; or

(c) has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.[89]

"Reasonableness" is determined using a balancing test weighing a number of factors.[90] For example, "[i]t seems to require that a[n] [owner's] well be reasonably efficient in light of the type of use."[91] The second restriction employs a correlative rights concept as another foundation of liability.[92] The final restriction considers administration of groundwater use along with surface appropriation frameworks.[93]

States following: MI, OH, WI

e. Prior Appropriation

Under the doctrine of prior appropriation, a groundwater user acquires the legal right to use groundwater by being the first to divert it and put it to a (broadly defined) "beneficial use" in a manner consistent with state rules.[94] The hallmark of this doctrine is "first in time, first in right."[95] Once the user has made a diversion and puts the water to beneficial use, the user has a perfected water use right. Prior appropriation protects investments in wells and other businesses that are based on an expectation of a water supply.[96]

A pumper's place in the priority system is determined by the date of withdrawal. Many states use a registration or permitting system to formally establish a user's position. The right holder is generally permitted to pump as much groundwater as can be put to beneficial use, subject to their place in the priority system. However, the right does not extend to amounts of groundwater that exceed what can be beneficially used.[97] In times of shortage when there is not enough groundwater to

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[89] RESTATEMENT (SECOND) OF TORTS § 858 (1979).

[90] Section 850A of the Restatement (Second) of Torts provides:

[f]actors that affect the determination [of reasonableness] include the following: (a) The purpose of the use, (b) the suitability of the use to the watershed or lake, (c) the economic value of the use, (d) the social value of the use, (e) the extent and amount of harm it causes, (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other, (g) the practicality of adjusting the quantity of water used by each proprietor, (h) the protection of existing values of water uses, land, investments, and enterprises, and (i) the justice of requiring the user causing harm to bear the loss.

[91] GETCHES ET AL., *supra* note 27, at 237.

[92] *Id.*

[93] *Id.*

[94] GLENNON, *supra* note 13, at 16.

[95] Chennat Gopalkrishnan, *The Doctrine of Prior Appropriation and Its Impact on Water Development: A Critical Survey*, Am. J. Econ. & Soc. 61, 67 (1973).

[96] GETCHES ET AL., *supra* note 27, at 231 (citing *Farmers Inv. Co. v. Bettwy*, 558 P.2d 14, 21 (Ariz. 1976))

[97] Kaiser & Skiller, *supra* note 61 at 263-64.

satisfy the needs of all users, the appropriator who later acquired the water right (junior appropriator) must yield to the right holder who made the diversion first (senior appropriator).[98]

Under this approach to groundwater management, the groundwater belongs to the state. The trend has been to recognize groundwater as a public resource, as opposed to private property. [99] The state then places rules, requirements, limits, and conditions on groundwater withdrawals and uses to protect groundwater supplies and the other users' rights. States are increasingly replacing common law procedures for determining groundwater use rights with legislative processes, such as registration schemes and permitting systems.[100]

The doctrine of prior appropriation tends to be adhered to in western states, where the climate is more arid and fewer tracts of land are adjacent to bodies of surface water. The comparative scarcity of groundwater in the west makes this system attractive because it provides users with "secure property rights."[101] In reality, however, these states' systems are "prior appropriation in name only."[102] A strict application of prior appropriation is unworkable and inconsistent with the nature of the resource.[103] Under a pure prior appropriation system "a senior groundwater appropriator theoretically could demand that no pumping be allowed because virtually any new pumping causes some effect on existing wells."[104]

States following: AK, CO, ID, KS, MT, NV, NM, ND, OR, SD, UT, WA, WY

[98] GLENNON, *supra* note 13, at 16.
[99] Johnson, *supra* note 68, at 14.
[100] WILLIAM GOLDFARB, WATER LAW 45 (2d ed. 1988).
[101] GLENNON, *supra* note 13, at 19.
[102] Dan Tarlock, *An Overview of the Law of Groundwater Management*, 21 Water Res. Rsch 1751, 1752 (1985).
[103] *Id.*; GETCHES ET AL., *supra* note 27, at 231.
[104] GETCHES ET AL., *supra* note 27, at 231.

Table 2 summarizes key aspects of the groundwater allocation doctrines.

Table 2: Key Aspects of Groundwater Allocation Doctrines

Groundwater Allocation	Basis of Right	Withdrawal Amount	Liability	Off-tract Use
Absolute Ownership	Land ownership	Unlimited	No, unless malicious or wasteful	Yes
Reasonable Use	Land ownership	"Reasonable" for beneficial use	Yes, if unreasonable amount or off-tract use	No
Correlative Rights	Land ownership	Proportional share based on ratio of land owned overlying aquifer	Yes, if exceeding share and injurious	No, unless surplus
Restatement of Torts Reasonable Use	Land ownership	"Reasonable" for beneficial use	Yes, if unreasonable amount and injurious	Yes, if reasonable and no harm
Prior Appropriation	"First in time, first in right"	Specific amount based on priority for beneficial use	No, unless interfering with reasonable pumping level of other users	Yes

B. MANAGING GROUNDWATER WITHDRAWALS

While there has been a trend towards legislative reform in groundwater management policies, commentators have noted that the process has been disorganized.[105] Groundwater statutes evolved independently from surface water statutes due to the complexity of groundwater as a resource[106]. Furthermore, groundwater statutes differ from state to states.[107]

1. Legal Source of Authority

The legal source of authority for securing a water use right varies by state. Some states allow for a property right to use groundwater to arise largely from common law principles (ex: CA and TX). However, in most states, a pumper must comply with the state's comprehensive statutory and regulatory schemes in order to obtain a use right. A minority of states take a hybrid approach, where

[105] THOMPSON ET AL., *supra* note 8, at 495 (citing Joseph W. Dellapenna, *Legal Classifications*, *in* 2 WATERS AND WATER RIGHTS § 19.05 (Amy K Kelley Ed., 3rd ed. 2017).

[106] *Id.*

[107] *Id.*

a pumper obtains a use right under common law principles but must follow statutory procedures to exercise that right (ex: CO and AZ).

2. Managing Agency/Regulatory Department

While each state is ultimately authorized to manage the groundwater within its boundaries, each state differs in how they allocate that authority. In some states, groundwater is managed entirely at the state level. In other states, the authority to regulate groundwater withdrawals and uses is allocated to local governments and agencies.

3. Special Management Areas

Many states have designated certain areas as "special management areas" (label differs by state). Groundwater withdrawals and uses in these areas are generally subject to different procedures or more stringent standards. These are generally areas that the state legislature has set aside to allow for more localized control in order to protect the aquifers from being over-appropriated.

Special management areas are prevalent in the western U.S., where groundwater is less available. In all southwestern states, groundwater that is withdrawn from a special permitting area must be put to beneficial use. However, what constitutes "beneficial use" varies by state. Some states provide a broad definition, while others expressly articulate uses that are considered "beneficial." Additionally, some state laws in special management areas require that the use of the groundwater be "reasonable." Most states will consider an existing user's rights when determining whether to permit a proposed withdrawal in these areas. A minority of southwestern states with special management areas require a determination of the impact that a proposed withdrawal would have on an ecosystem before issuing a use right.[108]

There are 12 states without any type of special management designation or with designations only applicable to protecting the groundwater quality and preventing pollution (GA, IL, KY, MA, ME, MI, MO, ND, NH, RI, TN, VT).

4. Management of Wells

Each state has different rules and procedures that allow a groundwater user to obtain the right to divert and use groundwater. This is most often accomplished through one or a combination of the following: registration, permitting, and adjudication.

[108] For example, in Utah, the State Engineer is directed to consider the impact that a proposed withdrawal will have on "the natural streams and environment" (§ 73-3-8(1)(b)).

a. Registration

In total, there are 30 states that have some type of registration requirement: AL, AR, CT, HI, IL, IN, KY, LA, MA, MI, MO, MT, NE, NV, NH, NJ, NY, NC, OH, OR, PA, RI, SC, SD, TN, TX, VA, WV, WI, WY. Of these states, only 5 have some type of registration requirement, but no permitting requirements (AL, LA, MO, TN, WV).

Breakdown by common law doctrine:

Absolute dominion: 6 states
Reasonable use: 13 states
Correlative rights: 2 states
Restatement of Torts (Second) § 858: 3
Prior appropriation: 5
Reasonable use/correlative rights: 1
States without common law: 1

Some of these states require a groundwater facility or withdrawal to be registered with the regulating agency if it has the *capacity* to withdraw a certain amount over a threshold amount. The applicable threshold varies by state. Several states with registration systems in place, all of which are east of the Mississippi River, set the threshold at a capacity to divert groundwater at a rate of 100,000 gallons/day, regardless of whether an actual diversion of that amount is made (AL, IL, IN, MO, NJ, NH, WI). Other states have lower thresholds (in descending order, based on threshold):

- Louisiana, Arkansas: wells with a capacity to pump 50,000 gallons/day (Arkansas exempts any well below this from its registration process)
- Montana: wells exempt from the permitting process with a maximum pump rate of 35 gallons/minute and maximum volume of 25 acre-feet/year
- Kentucky: exempts withdrawals made at a constant rate with an average withdrawal rate of 10,000 gallons/day

Other states require registration for wells that make *actual* diversions above a certain threshold.

North Carolina and Tennessee require registration based on an amount withdrawn in a day (at least 100,000 gallons/day, and at least 10,000 gallons/day, respectively). Other states require a well to be registered if it withdraws either a certain amount of groundwater in a given month or averages a certain rate. These states are (in ascending order, based on threshold):

- Michigan: withdrawals of more than 100,000 gallons/day averaged over any 30-day period
- West Virginia: withdrawals of more than 300,000 gallons/day averaged over any 30-day period
- South Carolina: withdrawals of more than 3 million gallons/month

New Hampshire merges the two by requiring a well to be registered if it withdraws over 20,000 gallons/day, or 600,000 gallons over 30 days.

Several states require registration for certain existing diversions, potentially exempting these wells from other permitting and reporting requirements (CT, HI, MA, OR).

Some states either specifically require registration in special management areas or have the potential to require registration if the need arises (TX, NV, OH, VA, WI).

States with different registration rules include: New York, where agricultural withdrawals can either be registered or reported; Rhode Island, where registration is required for the installation of the well, but not for the withdrawal; and South Dakota, where wells that are exempt from the permitting process have the option to register in order to document the location of their well and its output.

i. Exemptions/Exceptions

Most states exempt wells withdrawing groundwater for certain uses from registration requirements. Some of the more common exempted uses include:

- Agricultural uses (KY, NJ, NC,[109] TN, WV)
- Domestic uses: This typically requires that the well be on a property that serves a single family, or a small number of families, and that the water be used for non-commercial purposes (AR, KY, MI, SC)
- Existing uses (AR, NE, NJ, NY)
- Emergency uses (NH, NY, SC, TN)
- Temporary withdrawals (AL, MI, NH, TN)

Wyoming is the only state that does not exempt any wells or groundwater uses from its registration procedures.

b. Permitting

The majority of states (44) have some type of permitting scheme in place (all except AL, LA, MO, RI, TN, WV).

A groundwater withdrawal permitting regime requires a would-be user to obtain a permit before constructing the well or diverting groundwater. The state legislature may specify whether compliance with the permitting regime is mandatory or discriminatory. The majority of western states use a permit system where a prospective user must submit an application for the right to divert and use groundwater. Permit requirements differ by state. Some states require a user to have a permit

[109] Withdrawal must be less than 1 million gallons/day. N.C. GEN. STAT. § 143-215.22H(b1).

before making a withdrawal anywhere in the state, while others require a user to have a permit only in a special management area.

Many states require a groundwater user to have a permit if they are extracting groundwater from a well in an amount or at a rate above a certain threshold, regardless of what the water will be used for. This can be done either by only regulating withdrawals over a threshold amount or by exempting users withdrawing groundwater in amounts below the threshold. States differ in the duration of time that the amount of water withdrawn is measured over.

- Gallons/day
    - 5,000 gallons/day: AK, MD, WA
    - 10,000 gallons/day: KY,[110] MN[111]
    - 25,000 gallons/day: IA
    - 50,000 gallons/day: AR, CT, DE, ME[112]
    - 57,600 gallons/day (equals 40 gallons/minute): NH, VT
    - 100,000 gallons/day: GA, MA, NJ, NY, WI
    - 144,000 gallons/day: ME[113]
    - 2 million gallons/day: MI
- Gallons/minute
    - 15 gallons/minute: CO
    - 18 gallons/minute: SD
    - 35 gallons/minute: AZ, MT
- Gallons/month
    - 2 million gallons/month: WI

Some states require a groundwater user to have a permit in a legislatively designated special management area, regardless of the amount withdrawn (AZ, AR, HI, IL, NM, SC). Other states require a prospective user to obtain a permit in special management areas when the user withdraws an amount or at a rate above a certain threshold.

- Gallons/day
    - 10,000 gallons/day: PA
    - 20,000 gallons/day: MS
    - 100,000 gallons/day: IN, NC
- Gallons/minute
    - 20 gallons/minute: MT
    - 50 gallons/minute: CO, NE

[110] Note: withdrawal must be made at "a relatively constant rate." 401 KY. ADMIN. REGS. 4:010(2).

[111] Appropriation cannot total over 1 million gallons/year. Minn. Stat. § 103G.271(4)(a).

[112] If withdrawal is within 500 feet of a body of water or at least 75,000 gallons during any week. ME. STAT. TIT. 38, § 480-B(9-A)(A)(1).

[113] If withdrawal is over 500 feet from a body of water, or at least 216,000 gallons during any week ME. § 480-B(9-A)(A)(2).

- Gallons/month
    - 300,000 gallons/month: VA

Some states give local agencies in special management areas the authority to impose permit requirements or more stringent permit requirements (CA, MN, TX). Additionally, groundwater pumpers in states that are part of the Great Lakes Compact may be subject to additional permitting requirements. Finally, a state may subject a user to its permitting regime based on how the groundwater will be used. For example, both Nebraska and New York require that a pumper have a permit when the water will be used for irrigation, regardless of how much will be withdrawn.

i. Exemptions/Exceptions

A state may choose for wells withdrawing certain amounts of groundwater or putting the withdrawn water to certain uses to be exempt from standard permitting requirements. Exempt groundwater uses vary by state. Utah and Wyoming are the only two states that require a permit for all withdrawals, without exception. Common exemptions include:

- Withdrawals for domestic purposes[114]
- Withdrawals for agricultural purposes[115]
- Emergency withdrawals[116]
- Temporary or nonrecurring withdrawals[117]
- Certain existing water rights may be grandfathered in so as to not require a permit[118]

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[114] Examples include: AK (ALASKA ADMIN. CODE TIT. 11, § 93.040(D)), AR (ARIZ. REV. STAT. § 15-22-302(A)), CO (2 COLO. CODE REGS. § 4.2.18 SAYS THAT A PERMIT IS NEEDED UNLESS IT'S FOR A SMALL CAPACITY WELL; COLO. REV. STAT. § 37-90-105(1)(A) DEFINES A DOMESTIC WELL AS A SMALL CAPACITY WELL), FL (FLA. STAT. § 373.219(1)), HI (HAW. REV. STAT. § 174C-48(A)), ID (IDAHO CODE § 42-227), KS (KAN. STAT. ANN. § 82A-705), KY (KY. REV. STAT. ANN. § 151.140), ME (ME. STAT. TIT. 38, § 470-C(2)), MD (MD. CODE ANN., ENVIR. § 5-502(B)(1)), MI (MICH. COMP. LAWS § 324.32727(1)(H)), MN (MINN. STAT. § 103G.271 SUBD. 1 (B)(1)), MS (MISS. CODE ANN. § 51-3-7(1)), NV (NEV. REV. STAT. § 534.315(1)), ND (N.D. CENT. CODE § 61-04-02), OK (OKLA. STAT. TIT. 82, § 1020.3), OR (OR. REV. STAT. § 537.545(1)(D)), SC (S.C. CODE ANN. § 49-5-70(A)(4)), SD (S.D. CODIFIED LAWS § 46-5-8), TX (TEX. WATER CODE ANN. § 36.117(B)(1)), VT (VT. STAT. ANN. TIT. 10, § 1418(B)(2)), WA (WASH. REV. CODE § 90.44.050).

[115] Examples include: CO (2 COLO. CODE REGS. § 4.2.18 says that a permit is needed unless it's for a small capacity well; COLO. REV. STAT. § 37-90-105(1)(b) defines a domestic well as a small capacity well), KY (KY. REV. STAT. ANN. § 151.140), ME (ME. STAT. TIT. 38, § 470-C(10)), MD (MD. CODE ANN., ENVIR. § 5-502(b)(2)), NJ (N.J. STAT. ANN. § 7:19-1.4(a)(1) states that this chapter does not apply to agriculture and horticulture uses), NY (N.Y. ENVTL. CONSERV. LAW § 1501(7(E)), NC (N.C. GEN. STAT. § 143-215.22H(B1)), VT (VT. STAT. ANN. TIT. 10, § 1418(B)(3)).

[116] Examples include: CO (in designated basins: 2 Colo. Code Regs. § 4.2.18 says that a permit is needed unless it's for a small capacity well; Colo. Rev. Stat. § 37-90-105(1)(b) defines a well used exclusively for firefighting purposes as a small capacity well), NH (N.H. Rev. Stat. Ann. § 488:11 states that this chapter doesn't apply to a discrete withdrawal arising from an emergency event), NY (N.Y. Envtl. Conserv. Law § 15-1501(7)(a)), SC (S.C. Code Ann. § 49-5-70(A)(1)), VT (Vt. Stat. Ann. tit. 10, § 1418(b)(1)).

[117] Examples include: KY (401 Ky. Admin. Regs. 4:010 sec. 1 (3): permit may be required if withdrawal is made at irregular basis at irregular rate and the water withdrawn represents a significant portion of the available water supply), MI (Mich. Comp. Laws § 324.32723(13)(b)), NH (N.H. Rev. Stat. Ann. § 485-C:2(IX-a) exempts short-term withdrawals from being classified as a "large groundwater withdrawal").

[118] Examples include: AZ (Ariz. Rev. Stat. § 45-462), AR (Ark. Code Ann. § 15-22-905(1)(A)), CT (Conn. Gen. Stat. § 22a-368(b)), MT (Mont. Code Ann. § 85-2-306(4)-(5)).

Interestingly, in determining the amount of groundwater that a user withdraws and whether it is sufficient to warrant a permit, at least one eastern state (Massachusetts) exempts nonconsumptive uses from these calculations.[119]

c. Adjudication

Vested rights typically require adjudication, where the court decrees the existence of the right. This process results in the definition and confirmation of an existing water right. Adjudication was typically how an appropriator obtained a water use right prior to the establishment of specific agencies that were tasked with defining water rights. One issue with this approach is that the decision of a court applies only to the individual litigants and not to the entire water system.

5. Continued Compliance (Monitoring and Reporting)

Once a pumper obtains the right to appropriate groundwater, there are typically continuing obligations on the user. Some states require groundwater uses to be reported for all groundwater users (AR and HI).

a. For Registered Wells

The vast majority of states with registration procedures require that registrants submit reports. The contents of these reports and the frequency of reporting varies by state. States that require some type of reporting for all registrants include: AL, AR, CT, HI, IL, IN, MA, MO, NH, NC, OH, PA, SC, TN, WV, WI. A small number of states have no reporting requirements for registered wells (RI, SD, WY). Some states require reporting for registered wells in special management areas or give the local regulating department the authority to require users to submit reports (LA, NE, SC, TX). Virginia and West Virginia have thresholds for which a registrant withdrawing groundwater in amounts that exceed must submit information. Michigan has a threshold below which a registrant is subject to less stringent requirements. Finally, Montana requires the well driller to submit a report, not the groundwater user.

b. For Permitted Wells

Some states require all groundwater users who have obtained a permit and are not exempt from the permitting process to report certain information, regardless of the amount of groundwater withdrawn or the use to which it was put.[120] Additionally, a state may choose to vest local agencies

[119] Mass. Gen. Laws ch. 21G, § 4 ("for purposes of determining whether a withdrawal is in excess of the threshold volume, any withdrawal of water for a nonconsumptive use. . . shall not be counted in the volume of water withdrawn.")

[120] Examples include: DE (7 Del. Admin. Code § 5.5.3), GA (GA. CODE ANN. § 12-5-987: every person required to get a permit shall file a certified statement of quantities of water used and withdrawn; GA. COMP. R. & REGS. 391-3-2-.08(1)), KY (KY. REV. STAT. ANN. § 151.160(1)), ME (if within 500 feet of a lake or pond) (ME. STAT. TIT. 38 § 470-B),

with the authority to impose reporting requirements on permits.[121] Other states may require certain uses to be reported, such as groundwater used for agricultural purposes.[122] Finally, some states impose thresholds that differ from the threshold requiring a permit and mandate that groundwater users that exceed the threshold limits report their uses:

- 10,000 gallons/day: MD, VA
- 20,000 gallons/day: MS
- 30,000 gallons/day: AK
- 50,000 gallons/day: ME (if more than 500 feet from a lake or pond)
- 100,000 gallons/day: FL

A state may also choose to exempt certain uses from being subject to its reporting requirements, such as groundwater used for domestic uses, farm uses, or irrigation.

6. State Regulation of Large Groundwater Withdrawals

There are a variety of ways that states regulate wells that withdraw large quantities of groundwater. Below are summaries of the rules and regulations that each state has in place regarding large groundwater withdrawals. These summaries are not a comprehensive collection of a state's rules and are meant to serve as a starting point.

Alabama (Reasonable Use): Alabama employs a system of registration and reporting for withdrawals exceeding a certain threshold. Any well with a capacity to withdraw at least 100,000 gallons/day is required to register and report their withdrawals.[123] Additional limitations are imposed in capacity stress areas as to the maximum amount of groundwater that can be withdrawn.[124]

Alaska (Prior Appropriation): Alaska has a permitting system for wells exceeding certain statutory thresholds. A groundwater use permit is required for any withdrawal of a "significant" amount of groundwater.[125] A significant withdrawal is statutorily defined as: (1) more than 5,000 gallons in one day from a single source, (2) the regular use of more than 500 gallons/day from a single source for more than 10 days/year, (3) more than 30,000 gallons/day for non-consumptive use from a single source, or (4) any other use that may affect the rights of other appropriators.[126] The DNR is required to issue notices when considering applications for appropriations of 5,000 gallons/day or more.[127]

MA (Mass. Gen. Laws ch. 21G, § 11), MI (MICH. COMP. LAWS § 324.32707(1)), MN (MINN. STAT. § 103G.281 subd. 3), NJ (N.J. STAT. ANN. § 58:1A-8(d); N.J. ADMIN. CODE § 7:19-2.14(a)(3)), NY (N.Y. ENVTL. CONSERV. § 15-1501(6)), OH (OHIO REV. CODE ANN. § 1521.30), OK (OKLA. STAT. TIT. 82, § 1020.12; OKLA. ADMIN. Code § 785:30-5-9), SC (S.C. CODE ANN. § 49-5-90(A)), WI (WIS. STAT. § 281.34(5)(E)).

[121] California is an example (local agencies administer permits and impose conditions, such as reporting, into them).

[122] Examples include: MD (MD. CODE REGS. 26.17.06.06(D)(1)), NY (N.Y. ENVTL. CONSERV. LAW § 15-1504(1)(B)).

[123] ALA. CODE § 9-10B-20.

[124] § 9-10B-21.

[125] 11 ALASKA ADMIN. CODE § 93.035(A).

[126] § 93.035(b).

[127] *Fact Sheet: Water Rights in Alaska*, ALA. DEP'T OF NAT. RES. (July 2018), http://dnr.alaska.gov/mlw/factsht/wtr_fs/Fact-Sheet-Water-Rights-in-Alaska.pdf.

Arizona (Reasonable Use): Arizona regulates groundwater withdrawals in special management areas by requiring that all wells obtain a permit, subject to certain exemptions.[128] Exemptions include withdrawals for non-irrigation use[129] from wells with a maximum pump capacity not exceeding 35 gallons/minute.[130] However, exempted withdrawals may not exceed 10 acre-feet/year, unless the groundwater is used for domestic purposes or stock watering.[131] Arizona allows special management areas to set the maximum withdrawal amount (the goal of most is "safe yield") through the use of local management plans.[132] Reporting is required for all non-exempt wells in special management areas.

Arkansas (Reasonable Use): Arkansas regulates large quantity withdrawals as the rule, and exempts low-capacity wells. Registration is required for wells with a maximum potential flow rate of more than 50,000 gallons/day, excluding individual wells exclusively used for domestic purposes.[133] These wells must then report their usage.[134] A permitting scheme is used in the state's special management areas for withdrawals in excess of 50,000 gallons/day.[135]

California (Reasonable Use/Correlative Rights): California has delegated regulatory authority over groundwater withdrawals to local groundwater sustainability agencies.[136] These local agencies then adopt groundwater management plans, which provide for the regulation of groundwater withdrawals.

Colorado (Prior Appropriation): Colorado manages large-scale groundwater withdrawals geographically, based on where the groundwater is located. In designated basins, a permit is needed for large capacity wells.[137] A large capacity well is defined as "any well which is permitted to put designated groundwater to beneficial use provided the said permit is not for a small capacity well."[138] A small capacity well is exempt, and includes: (1) wells with a withdrawal rate not exceeding 50 gallons/minute and used for no more than three single-family dwellings (exception: does not include irrigation on more than one acre of land), (2) livestock wells not exceeding 50 gallons/minute, (3) wells used in one commercial business not exceeding 50 gallons/minute, (4) certain wells used for observation purposes, (5) wells used exclusively for firefighting purposes, and (6) certain monitoring

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[128] ARIZ. REV. STAT. § 45-152(A).

[129] Non-irrigation is defined to include growing crops on 2 acres of land or less. § 45-402(23)(a).

[130] § 45-454(A) and (B).

[131] § 45-454(B)(2).

[132] JANICK F. ARTIOLA AND KRISTINE UHLMAN, ARIZONA WELL OWNER'S GUIDE TO WATER SUPPLY 9 (2009), https://wrrc.arizona.edu/sites/wrrc.arizona.edu/files/az1485.pdf.

[133] *Water-use Registration*, ARK. DEP'T OF AGRIC., https://www.agriculture.arkansas.gov/natural-resources/divisions/water-management/groundwater-protection-and-management-program/water-use-registration/ (last visited Mar. 7, 2021).

[134] ARK. CODE § 15-22-302(a).

[135] § 15-22-905(3).

[136] *See* Cal. Water Code § 10720.

[137] COLO. DIV. OF WATER RES, SYNOPSIS OF COLORADO WATER LAW 3 (2016).

[138] 2 COLO. CODE REGS. § 4.2.18.

wells.[139] In non-designated basins, a prospective user must apply for a permit to appropriate groundwater from a non-exempt well.[140] An exempt well is one with flow rates of 15 gallons/minute or less for in-house use and outside use only for domestic animals.[141] In both designated and non-designated basins, wells must report if they are not exempt from permitting requirements.

Connecticut (Absolute Dominion): Connecticut employs a permitting and reporting scheme for wells above a certain threshold. A permit is required for withdrawals of more than 50,000 gallons/day.[142] Annual reporting is required for consumptive uses of water by permit holders.[143]

Delaware (Correlative Rights): Delaware regulates groundwater withdrawals through the use of a permitting scheme, applicable to wells exceeding a statutorily prescribed threshold. All withdrawals over 50,000 gallons/day must obtain a permit.[144] Annual reporting is required by permit holders.[145] The state can control the amount of water that is withdrawn by setting a maximum allowable withdrawal rate in the permit.[146] The maximum amount of groundwater that a permit holder can withdraw is 20 acre-inches/year, but not more than 10 acre-inches/month.[147]

Florida (Reasonable Use): The state has delegated its regulatory authority to local agencies. Florida is divided into five water management districts (WMDs), with each district having the authority to administer state water law. A WMD may require that an appropriator acquire a permit, subject to reasonable conditions.[148] However, a WMD is restricted from imposing its permitting requirements on wells that provide for the domestic consumption of water by individual users.[149] Each WMD has imposed a permitting regime in its district, so each appropriator must have a permit.[150] Each WMD is authorized to impose reasonable conditions as to the amount and rate of groundwater withdrawn. Annual reporting is required for permit holders who are authorized to withdraw more than 100,000 gallons/day.[151]

Georgia (Absolute Dominion): Georgia subjects wells above a certain threshold to its permitting and reporting requirements. A permit is required for any user who withdraws more than 100,000 gallons/day for any purpose.[152] Annual reporting is required for permit holders.[153]

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[139] COLO. REV. STAT. § 37-90-105(1).
[140] § 37-90-137(1).
[141] § 37-92-602.
[142] *See* CONN. GEN. STAT. §§ 22a-368, 22a-377(a)(1).
[143] § 22a-368a(b).
[144] 7 DEL. ADMIN. CODE § 1.2.
[145] § 5.5.3
[146] § 5.5.2.
[147] Del. Code Ann. tit. 7, § 6010(h)(1).
[148] Fla. Stat. § 373.219(1).
[149] § 373.219(1).
[150] Northwest Florida WMD: Fla. Stat. § 40A-2.041(1), Suwannee River WMD: § 40B-2.041(1), St. Johns River WMD: § 40C-1.602, Southwest Florida WMD:§ 40D-2.04, South Florida WMD: § 40E-2.041(1).
[151] § 373.223(6).
[152] Ga Code Ann. § 12-5-96.
[153] § 391-3-2-.04(11)(i).

Hawaii (Correlative Rights): Hawaii regulates all groundwater withdrawals in special management areas, subject to certain exceptions. In general, a water use permit is required to extract groundwater in designated water management areas.[154] However, no water use permit is needed for individual domestic users.[155]

Idaho (Prior Appropriation): Subject to certain exceptions, all groundwater users must obtain a permit prior to making a withdrawal.[156] Domestic users are exempted from the permitting process.[157] A "domestic purpose" is statutorily defined as withdrawal for individual use, irrigation of less than half an acre of land, and any other associated purpose so long as the withdrawal is not more than 13,000 gallons/day, and any other use so long as the total use is not more than .04 cubic-feet/second or 2,500 gallons/day.[158] Unlike other western states, exempt uses in Idaho are also exempt from reporting requirements.[159]

Illinois (Reasonable Use): Illinois uses the term "high-capacity well" to encompass large-scale withdrawals of groundwater. A high-capacity well is statutorily defined as a well "located on property where the rate or capacity of groundwater withdrawal of all wells on the property is at least 100,000 gallons during any 24-hour period."[160] When a user "proposes to develop a new point of withdrawal that is a high capacity well, the land occupier or person must notify the District before beginning construction on the well. The District then must notify other local units of government with water systems who may be impacted by the proposed withdrawal. The District then reviews . . . the proposed point of withdrawal's effect upon other uses of the water."[161] Registration with the local District is required for high-capacity wells.[162] These wells must participate in the Illinois Water Inventory Program and submit an annual report.[163] A maximum withdrawal amount may be placed upon high-capacity wells by the Department of Agriculture if the District has investigated and recommended a limit.[164]

Indiana (Absolute Dominion): A significant water withdrawal facility (SWWF) is defined as any well, or combination of wells, capable of pumping at least 100,000 gallons/day, regardless of how much water is actually pumped.[165] A SWWF must be registered[166] and must report groundwater

[154] Haw. Rev. Stat. § 174C-48.
[155] § 174C-84.
[156] Idaho Code § 42-217.
[157] § 42-227.
[158] § 42-111.
[159] §§ 42-221(K)(1), 42-701(7).
[160] 525 Ill. Comp. Stat. § 45/4.
[161] § 45/5.
[162] § 45/5.1.
[163] § 45/5.3.
[164] § 45/5.1.
[165] Ind. Code § 14-25-7-15(a).
[166] § 14-25-7-15(c).

usage.[167] An additional permitting regime is imposed in special management areas. A permit is required in restricted use areas for all new users or those withdrawing more than 100,000 gallons/day.[168] Liability is imposed on the owner of an SWWF, as state statute requires that the owner provide "timely and reasonable compensation to persons who own nonsignificant groundwater withdrawal facilities if there's failure or substantial impairment of those facilities" that can be tied to the SWWF.[169]

Iowa (Correlative Rights): In Iowa, a permit is required for withdrawals that exceed 25,000 gallons/day.[170] Additional permitting requirements are imposed on high-capacity wells and wells used for irrigation purposes.[171] Iowa uses the term "high-capacity well" to encompass any well expected to have a pump capacity at or above 500 gallons/minute.[172] The state allows for a degree of local control, as each aquifer has a different limit on the amount of groundwater that can be withdrawn or the rate that it can be withdrawn at.

Kansas (Prior Appropriation): Kansas regulates large-scale groundwater withdrawals by exempting smaller uses. All wells, except for domestic uses on 2 acres of land or less, are required to obtain a permit.[173] Permit holders must report their usage.[174]

Kentucky (Reasonable Use): Kentucky regulates large groundwater withdrawals by using a permitting and reporting regime for withdrawals above a certain threshold, subject to certain exemptions. A permit is required for facilities with a withdrawal rate of more than 10,000 gallons/day.[175] A permit may be required if the withdrawals are made on an "irregular basis and at an irregular rate" "if the water withdrawn represents a significant portion of the available water supply or collection of data is necessary for water resource planning purposes."[176] The quantity of groundwater to be withdrawn is managed by setting a maximum quantity and rate in the permit.[177] Exempt uses include domestic and agricultural uses (including irrigation).[178] Permit holders must submit reports regarding their water usage.[179]

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[167] § 14-25-7-15(e).

[168] Governed by IND. CODE § 14-25-3-6.

[169] § 14-25-4-17.

[170] *See* IOWA ADMIN. CODE R. 567-50.2.

[171] Iowa Source Link, *Private Water Well Construction Permit,* https://www.iasourcelink.com/licensing/detail/private-water-well-construction-permit.

[172] Water Use/Allocation Permitting – High Capacity Well – 2015, Technical Bulletin 23.1.

[173] KAN. STAT. ANN. §§ 82a-705, 82a-728 (Domestic rights, defined as "those held for household purposes" do not require a permit).

[174] § 82a-732.

[175] KY. REV. STAT. ANN. § 151.140; 401 KY. ADMIN. REGS. 4:010.

[176] 401 KY. ADMIN. REGS. 4:010.

[177] KY. REV. STAT. ANN. § 151.170(1).

[178] § 151.140.

[179] § 151.160.

Louisiana (Absolute Dominion): Registration is required for all wells that withdraw more than 50,000 gallons/day.[180] Users must provide usage information.[181] A large volume well is defined as a well "with an 8 inch or greater diameter screen size or a well that by itself or in conjunction . . is capable" of withdrawing 1,500 gallons/minute."[182] It is not immediately clear if there are specific rules or regulations applicable to large volume wells.

Maine (Absolute Dominion): Maine legislation requires a "significant groundwater user" to obtain a permit.[183] A significant groundwater user is one withdrawing at least 75,000 gallons/week or 50,000 gallons/day if the withdrawal is located within 500 feet of a body of water, or a withdrawal of at least 216,000 gallons/week or 144,000 gallons/day if the withdrawal is over 500 feet away from a body of water.[184] Additionally, "if a proposed activity includes a significant groundwater well, the applicant must demonstrate that the activity will not have 'an undue unreasonable effect on waters of the State.'"[185] Annual reporting is required for withdrawals exceeding the statutorily prescribed thresholds.[186]

Maryland (Reasonable Use): Subject to certain exceptions, every groundwater user must obtain a permit in Maryland.[187] Certain domestic uses, agriculture uses of less than 10,000 gallons/day (with some exceptions), and withdrawals of less than 5,000 gallons/day (not including use for a public water system, or uses within a water management strategy area) are exempted.[188] Semi-annual reporting is required for permit holders when a permit is issued for an average withdrawal of more than 10,000 gallons/day.[189]

Massachusetts (Absolute Dominion): In Massachusetts, a permit is required for withdrawals over 100,000 gallons/day.[190] These users may then be required to report their groundwater withdrawals.[191]

Michigan (Restatement Second of Torts § 858): Michigan requires that large quantity water withdrawals be registered.[192] A large quantity withdrawal is defined as a withdrawal with an average totaling over 100,000 gallons/day in any consecutive 30-day period.[193] Registration is not required for owners of a noncommercial well on certain residential properties (either a single-family residential property, or a multi-family residential property not exceeding four residential units on three acres or

[180] LA. STAT. ANN. § 3094(A)(1)-(2) (*see* § 3092(5) for definition of ground water user).
[181] §§ 38:3091-3097.
[182] LA. ADMIN. CODE. TIT. 43, § 103.
[183] ME. STAT. TIT. 38, § 480-C(4).
[184] § 480-B, 9-A(1)-(2).
[185] § 480-D(1).
[186] § 470-D.
[187] MD. CODE ANN. ENVIR. § 5-502.
[188] MD. CODE ANN. ENVIR. § 5-502.
[189] MD. CODE REGS. 26.17.06.07.
[190] MASS. GEN. LAWS CH. 21G, §§ 4, 7.
[191] MASS. GEN. LAWS ch. 21G, § 11.
[192] MICH. COMP. LAWS § 324.32705(1).
[193] § 324.32701(aa).

less) and seasonal withdrawals of 2 million gallons/day in any consecutive 90-day period to supply a common distribution system.[194] Compliance with a permitting system is required for users proposing to withdraw over 2,000,000 gallons/day, and certain other large withdrawals that will be used to supply a common distribution system.[195] Reporting is required for registered users and permit holders.[196] However, the reporting requirements are less stringent for registered users withdrawing less than 1,500,000 gallons/year.[197] If a groundwater dispute has been declared, liability is imposed on the owner of a high-capacity well, in which case, the owner must provide compensation "if there is a failure or substantial impairment of a small-quantity well" and either "the failure or substantial impairment was caused by the groundwater withdrawals of the high-capacity well" or if the small-quantity well was constructed before or after a certain date.[198] A high-capacity well is defined as "1 or more water wells associated with an industrial or processing facility, an irrigation facility, or a farm that, in the aggregate from all sources and by all methods, have the capability of withdrawing 100,000 or more gallons of groundwater in 1 day."[199] A small-quantity well is defined as "1 or more water wells of a person at the same location that, in the aggregate from all sources and by all methods, do not have the capability of withdrawing 100,000 or more gallons of groundwater in 1 day."[200]

Minnesota (Correlative Rights): Minnesota uses a permitting and reporting system to manage groundwater withdrawals, subject to certain exemptions. Under the minimum use exemption, a permit is not needed for withdrawals of less than 10,000 gallons/day, so long as the amount withdrawn does not exceed 1 million gallons/year.[201] Additionally, a well is exempt if the water is used to supply the domestic needs of less than 25 people.[202] However, an exempt well may still be required to obtain a permit if it is located in a groundwater management area.[203] A permit holder must annually report the total amount of water that was appropriated.[204] Additional requirements are placed on proposed withdrawals that will exceed 2 million gallons/day for consumptive use. Legislative approval is needed, along with a determination from DNR that there are adequate resources.

Mississippi (Absolute Dominion): A permit is required for all withdrawals,[205] except those made for domestic uses.[206] However, the Board may require permits for exempt wells in a water caution area for withdrawals of water in excess of 20,000 gallons/day.[207] Annual reporting is required for owners and operators of wells that withdraw over 20,000 gallons/day.[208]

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[194] *See* § 324.32705(2).
[195] § 324.32723(1)(a).
[196] § 324.32702(1).
[197] § 324.32707(8).
[198] § 324.31706.
[199] § 324.31701(k).
[200] § 324.31701(q).
[201] MINN. STAT. § 102G.271.
[202] § 102G.271.
[203] § 103G.281.
[204] *Id.*
[205] MISS. CODE ANN. § 51-3-5.
[206] § 51-3-7.
[207] § 51-3-7.
[208] 11-1 MISS. CODE R. § 1.4(E)(2).

Missouri (Reasonable Use): Missouri regulates "major water users." State statute defines a major water user as one with a capacity to withdraw at least 70 gallons/minute or 100,000 gallons/day.[209] These users must register their wells prior to making a withdrawal.[210] Reporting is required for registered wells. The failure of a major water user to register their withdrawals is a nuisance under state law.[211]

Montana (Prior Appropriation): Montana regulates withdrawals of large quantities of groundwater by exempting smaller withdrawals. Every new use is required to obtain a permit prior to construction.[212] Exempt wells are defined as those outside of a stream depletion zone with a maximum pumping rate of 35 gallons/minute and a maximum volume of 10 acre-feet/year,[213] so long as the water is used for domestic, irrigation, stock, or industrial purposes.[214] However, exempt wells may still need a permit to appropriate groundwater in a controlled groundwater area.[215] The combined appropriation by multiple wells exceeding 10 acre-feet/year requires permit, regardless of flow rate.[216] Additional requirements are imposed on appropriations of 4,000 or more acre-feet/year and 5.5 or more cubic-feet/second. These appropriators must prove the regular permit criteria,[217] and that the use of water is reasonable.[218] Appropriations greater than 3,000 acre-feet/year require legislative approval, unless the water will be used for irrigating croplands owned and operated by the applicant.[219]

Nebraska (Reasonable Use/Correlative Rights): Nebraska only regulates large quantity groundwater withdrawals in special management areas. All wells in these areas must have a permit, except for single water wells designated and built to pump 50 gallons/minute or less.[220]

Nevada (Prior Appropriation): Nevada regulates large quantity groundwater withdrawals through a permitting process by exempting certain smaller wells. Unless exempt, a permit is required for all groundwater withdrawals.[221] An exempt well is a domestic well diverting less than 2 acre-feet/year, with a flow rate below 1,800 gallons/day, and serving not more than three single-family dwellings.[222]

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[209] MO. REV. STAT. § 256.400(4).
[210] § 256.410.
[211] § 256.415.
[212] MONT. CODE ANN. § 85-2-301(1).
[213] § 85-2-306(3)(a)(iii).
[214] Water Policy Interim Committee, Jason Mohr, Final Report to the 66th Montana Legislature (Draft), *The Exemption at 45: A Study of Groundwater Wells Exempt From Permitting* 2 (July 2018).
[215] § 85-2-306(2).
[216] § 85-2-306(3)(a)(iii).
[217] § 85-2-311(3)(a).
[218] Factors to consider when evaluating reasonableness can be found at § 85-2-311(3)(b).
[219] § 85-2-317.
[220] NEB. REV. STAT. § 46-735(1).
[221] NEV. REV. STAT. § 533.325.
[222] § 534.315(8).

New Hampshire (Reasonable Use): New Hampshire uses a registration and reporting system to regulate smaller groundwater withdrawals,[223] but imposes an additional permitting scheme on large groundwater withdrawals. A large groundwater withdrawal is statutorily defined as any withdrawal of 57,600 gallons/day, except for short-term uses.[224] Approval from the Board is needed for large groundwater withdrawals.[225] Notice of these withdrawals must be provided to "the governing bodies of each municipality and each supplier of water within the potential impact area of the proposed withdrawal."[226] The Board is required to ensure that the proposed withdrawal will not have an "unmitigated impact."[227] Many of the factors that the Board is required to analyze involve consideration of the interconnection between groundwater and surface flows.

New Jersey (Reasonable Use or Correlative Rights): New Jersey regulates groundwater withdrawals that exceed a certain threshold. Registration is required for any well with the capacity to divert over 100,000 gallons/day, but that diverts less.[228] A permit is required for users withdrawing over 100,000 gallons/day for a period of more than 30 days in a 365 consecutive day period.[229] The maximum diversion quantity will be specified in the permit.[230] Both registered users and permit holders must report.[231]

New Mexico (Prior Appropriation): New Mexico regulates groundwater withdrawals by designating areas as declared groundwater basins, and then by imposing a permitting scheme in these areas.[232] The entire state has been designated as a declared groundwater basin. While permit applications are presumptively granted for minimal domestic uses, these uses are not exempted from complying with the state's permitting requirements.[233] A domestic use is defined as the irrigation of one acre or less of non-commercial land and other domestic uses.[234]

New York (Reasonable Use): New York regulates withdrawals over a certain threshold with a permitting system. A permit is required for all wells with a capacity to withdraw at least 100,000 gallons/day.[235] Annual reporting is required for permit holders and for any user withdrawing groundwater for agriculture purposes at an average rate of over 100,000 gallons/day in any consecutive 30-day period.[236]

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[223] Registration and reporting are required for users withdrawing over 20,000 gallons/day (averaged over a 7-day period) or over 600,000 gallons over any 30-day period. N.H. REV. STAT. ANN. § 488:3 (registration). § 488:6 (reporting).

[224] § 485-C:2(IX-a). Short-term use is defined as "the temporary, non-routine withdrawal of groundwater at a specific geographical location over a period of one year or less." § 485-C:2(IXIII-b).

[225] § 485-C:21(II).

[226] § 485-C:14-a.

[227] Factors found at § 485-C:32(V-c).

[228] N.J. ADMIN. CODE § 7:19-2.18.

[229] N.J. STAT. ANN. §§ 58:1A-5(a), 58-1A-6, 58:1A-7(a).

[230] § 58:1A-8(b).

[231] *See* §§ 58:1A-8(d) 7:19-2.14(a) for permits and § 7:19-2.18(b) for registered wells.

[232] N.M. STAT. ANN. § 72-12-3(A).

[233] N.M. CODE R. § 19.27.5.9(D).

[234] N.M. STAT. ANN. § 72-12-1.1.

[235] N.Y. ENVTL. CONSERV. § 15-1501.

[236] § 15-1504.

North Carolina (Reasonable Use): All withdrawals of at least 100,000 gallons/day must be registered.[237] A permit is required in order to make withdrawals in excess of 100,000 gallons/day in a capacity use area.[238] The groundwater user is then subject to more frequent reporting requirements. If an area is designated as a capacity use area, the Commission is required to adopt "provisions establishing a range of prescribed pumping levels or maximum pumping rates."[239]

North Dakota (Prior Appropriation): A permit is required for all withdrawals, unless exempted.[240] Exempt uses include: domestic uses of less than 12.5 acre-feet/year;[241] livestock uses of less than 12.5 acre-feet/year; and fish wildlife, or other recreational uses of less than 12.5 acre-feet/year.[242] Annual reporting is mandatory.[243]

Ohio (Restatement Second of Torts § 858): Registration is required for all facilities with a capacity to withdraw at least 100,000 gallons/day.[244] A permit is required for withdrawals resulting in the consumptive use of an average of more than 2 million gallons/day over a 30-day period.[245] Annual reporting is required for both registered users[246] and permit holders.[247]

Oklahoma (Reasonable Use/Correlative Rights): Oklahoma regulates large withdrawals by requiring a permit for all withdrawals, and by then exempting smaller amounts for certain uses.[248] Domestic uses are exempted,[249] defined as uses for household purposes, for farm and domestic animals up to normal grazing capacity of the land and for irrigation of three acres or less.[250] The maximum amount of groundwater that can be withdrawn is the user's proportionate share of the maximum annual yield (MAY)[251] allocated to the landowner on a per-acre basis.[252] An annual report of the amount used is required for all permit holders.[253]

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[237] N.C. GEN. STAT. § 143-215.22H.

[238] § 143-215.15.

[239] § 143-215.14.

[240] N.D. CENT. CODE § 61-01-03.

[241] A domestic use is defined as a use of water by a single individual, family, or household (includes irrigation of land not exceeding 5 acres) for non-commercial purposes. § 61-04-01.1(4).

[242] § 61-04-02.

[243] John Patch, *North Dakota Water Rights Administration*, N.D. STATE WATER COMM'N, https://westernstateengineers.files.wordpress.com/2015/10/patch2014fall.pdf (last visited Mar. 7, 2021).

[244] OHIO REV. CODE ANN. § 1521.23(A).

[245] § 1521.23.

[246] § 1521.23(C).

[247] § 1521.30.

[248] OKLA. STAT. TIT. 82, § 1020.7; OKLA. ADMIN. CODE § 785:30-1 and -2.

[249] § 1020.3; *see* OKLA. ADMIN. CODE § 785:30-1 and -2 for what uses are included.

[250] § 1020.1(2).

[251] *See* § 1020.5.

[252] *Id.*

[253] § 1020.12; OKLA. ADMIN. CODE § 785:30-5-9.

Oregon (Prior Appropriation): Oregon regulates large withdrawals by requiring a permit for all withdrawals,[254] and then by exempting smaller amounts and certain uses. Exemptions from the permitting process include: domestic uses up to 15,000 gallons/day, stock watering, lawn watering up to half an acre, and small industrial or commercial uses up to 5,000 gallons/day.[255] The Department may require any groundwater user, either permitted or exempt, to submit information about the well use.[256]

Pennsylvania (Prior Appropriation): Pennsylvania uses a registration and reporting system to track large quantity withdrawals. Registration is required for all facilities that withdraw or use more than 10,000 gallons/day over a 30-day period.[257] Additionally, registration is required for users of any amount of groundwater in critical water planning areas.[258] Registered users must annually report their withdrawals and use.[259] A permit is required for all new or increased withdrawals of 10,000 gallons/day in the Delaware or Susquehanna River basins.

Rhode Island (Absolute Dominion): Registration is required for the construction of the well, but not for the withdrawal. Wells constructed for domestic consumption or personal farming use are exempt.

South Carolina (no common law): South Carolina generally requires all wells to register and report.[260] Additionally, South Carolina imposes a permitting scheme in capacity use areas for withdrawals over 3,000,000 gallons/month.[261]

South Dakota (Prior Appropriation): A permit is required for any well, with certain exemptions.[262] Domestic uses are exempted,[263] defined as a withdrawal that does not exceed 18 gallons/minute or a peak diversion rate of 25 gallons/minute for individual farm/household use, or irrigation of a non-commercial area of one acre or less.[264] An application for a "large scale appropriation" (withdrawal of groundwater in excess of 10,000 acre-feet/year) must be presented to the legislature by the Board for approval.[265] No volume of groundwater withdrawn may be greater than three acre-feet/year (does not apply to permits to appropriate water for irrigation from the Missouri River). Limits have been set for certain uses. If water is to be used for irrigation, the rate cannot exceed one cubic-foot/second for

[254] OR. REV. STAT. § 537.140 says what must be included in permit application. *See* § 537.615 for permit application requirements.
[255] § 537.545.
[256] § 537.543(3).
[257] 25 PA. CONS. STAT. § 110.201.
[258] *Id.*
[259] § 110.301.
[260] S.C. CODE ANN. § 49-5-20.
[261] § 49-5-60.
[262] S.D. CODIFIED LAWS § 46-1-15.
[263] § 46-5-8.
[264] § 46-1-6(7).
[265] § 46-5-20.1.

each 70 acres, and the volume can't exceed two acre-feet/acre on land for a specified time each year.[266] For domestic uses, the rate cannot exceed 25 gallons/minute.[267]

Tennessee (Reasonable Use and/or Correlative Rights): Registration is required for withdrawals of 10,000 gallons or more on any day from any water source.[268] Certain groundwater uses are exempted (agriculture, emergency uses, nonrecurring uses, or water bought from a utility/industry).[269] Registered users must report their withdrawals.

Texas (Absolute Dominion): Texas has allocated the authority to manage large groundwater withdrawals to local groundwater conservation districts (GCDs). A permit is required for large withdrawals in these areas. However, GCDs cannot regulate wells extracting less than 25,000 gallons/day, wells supplying the domestic needs of 10 or less families on more than 10 acres, among other exceptions.[270] Otherwise, there are no state-wide registration, permitting, or reporting requirements. Texas is the only state (outside of GCDs) that still adheres to the English rule of absolute ownership in its traditional form. Thus, an appropriator can take as much water as they'd like and put it to any use without incurring liability, regardless of any harmful effects that the pumping may have on a neighboring landowner.[271] This is problematic because it results in practically unregulated pumping, which could potentially undercut conservation efforts in other states. Furthermore, the inability of GCDs to regulate smaller withdrawals could result in detrimental effects on the groundwater if the impact of those wells are considered in the aggregate.

Utah (Prior Appropriation): Without exception, a permit is required for all groundwater withdrawals in Utah.[272] The State Engineer can set limits on maximum annual withdrawals in areas where water management plans have been issued.[273]

Vermont (Correlative Rights): Vermont regulates groundwater withdrawals over a certain threshold by using a permitting and reporting system. A permit is required for withdrawals over 57,600 gallons/day (40 gallons/minute for 24 hours). Annual reporting is required for permit holders and for commercial and industrial uses that have a monthly average of 20,000 gallons/day.

Virginia (Reasonable Use): Virginia has enacted a permitting system in groundwater management areas for withdrawals of at least 300,000 gallons in any 30-day period.[274] Every user withdrawing an

[266] § 46-5-6.
[267] § 46-1-6(7).
[268] TENN. CODE ANN. § 69-7-304.
[269] *ID.*
[270] TEX. WATER CODE ANN. § 36.117(B).
[271] Sipriano v. Great Springs Water of America, 1 S.W.3d 75 (Tex. 1999).
[272] UTAH CODE ANN. § 73-3-1.
[273] § 73-5-15.
[274] VA. CODE ANN. § 62.1-258.

average of 10,000 gallons/day (or who withdraws over one million gallons/month for irrigation) must submit an annual report.[275]

Washington (Prior Appropriation): Washington regulates groundwater withdrawals by requiring that every appropriator apply for and receive a permit,[276] subject to certain exemptions. Permit holders must then report their usage. Exemptions from the permitting process include domestic and industrial uses of less than 5,000 gallons/day, groundwater used for irrigating non-commercial areas less than half an acre, and stock watering.[277] However, the Department of Ecology may still require exempt users to submit information about their water usage.

West Virginia (Reasonable Use): West Virginia requires all large quantity users to register their withdrawals.[278] A large quantity user is defined as "any person who withdraws over 300,000 gallons of water in any 30-day period," excluding water withdrawn for farm use.[279]

Wisconsin (Restatement of Torts § 858): There is a general set of requirements for all wells, and additional requirements imposed on high-capacity wells in Wisconsin. A high capacity well either has the capacity to withdraw more than 100,000 gallons/day or, when taken with all of the other wells on the same property, has a capacity to withdraw more than 100,000 gallons/day.[280] Residential wells and fire protection wells are excluded from this definition,[281] with residential wells being those with a pump capacity of 100,000 gallons/day or less and used primarily to supply water to a single-family or multifamily home.[282] Registration is required for new and existing high capacity wells.[283] Additionally, high capacity wells "with a water loss of more than two million gallons per day must also comply with the standards in Wis. Stat. § 281.35."[284] A permit is required for a well that proposes to make consumptive withdrawals at an average of more than two million gallons/day in any 30-day period.[285] Annual reports are required for high capacity wells.[286] For high capacity wells that are located in a groundwater protection area, have a water loss of more than 95% of the amount of water withdrawn, or potentially have a significant environmental impact on a spring, the DNR must review the application for the well.[287] In 2011 Wisconsin Supreme Court held that Wisconsin's permitting framework "provides the DNR with the discretion to undertake the environmental review it deems necessary for all proposed high capacity wells, including the authority and a general duty to consider

[275] 9 VA. ADMIN. CODE §§ 25-200-30, 25-200-40.
[276] WASH. REV. CODE § 90.44.050.
[277] § 90.44.050.
[278] W. VA CODE § 22-26-3(C).
[279] § 22-26-2.
[280] WIS. STAT. § 281.34(1)(B).
[281] *Id.*
[282] WIS. STAT. § 281.34(1)(EM).
[283] PAUL G. KENT, WISCONSIN WATER LAW IN THE 21ST CENTURY: UNDERSTANDING WATER RIGHTS AND REGULATIONS 177 (2013).
[284] *Id.* at 181.
[285] § 281.35.
[286] WIS. ADMIN. CODE NR § 856.30(2).
[287] WIS. STAT. § 281.34(4)(A).

the environmental impact of a proposed high capacity well on waters of the state" under Wisconsin's public trust doctrine."[288] However, there is a conflict between the implied duties of environmental protection stated by the Wisconsin Supreme Court in *Lake Beula* and Wisconsin Act 21, which was enacted just prior to the *Lake Beula* decision.[289] In 2016, Wisconsin Attorney General Brad Schimel issued an opinion stating that the Wisconsin Supreme Court in *Lake Beula* did not interpret or apply Act 21 and "much of the Court's reasoning in *Lake Beula*. . . is no longer controlling."[290] In 2020, the current Wisconsin Attorney General, Josh Kaul, rescinded Schimel's 2016 opinion,[291] after a circuit court held *Lake Beulah* still governed DNR review of high-capacity well permit applications.[292] The circuit court's decision is currently pending before the Wisconsin Supreme Court for resolution.[293]

Wyoming (Prior Appropriation): Registration and permitting procedures must be followed, without exception. Wells for stock and domestic uses may not withdraw at a rate greater than 25 gallons/minute.[294] The State Board of Control may designate areas and impose water restrictions where: (1) the use of groundwater is approaching a use equal to the current recharge rate; (2) groundwater levels are declining or have declined excessively; (3) conflicts between users are occurring or are foreseeable; (4) waste is occurring or may occur; or (5) other conditions exist or may arise that require regulation to protect the public interest.[295]

Great Lakes Compact: In addition to state laws, large quantity groundwater withdrawals in certain states may be subject to additional regulations based on the state's status as a party to the Great Lakes-St. Lawrence River Basin Compact (Public Law 110-342). The Compact is a legally binding agreement among the eight states that border the Great Lakes (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin) and two Canadian provinces (Ontario and Quebec).[296] Each of the state legislatures has ratified the compact, and it was signed into federal law in 2008.[297]

The Great Lakes Compact is an international agreement as to how new or increased surface water or groundwater withdrawals from the Great Lakes basins will be regulated. The Compact recognizes that "the landscape . . . constitute[s] a single system that must be managed as such" in order to preserve the Great Lakes.[298] Under the Compact, each party has signaled their commitment to "manage water

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[288] Lake Beulah Management District v. DNR, 2011 11 54, ¶ 39

[289] 2011 Wisconsin Act 21 states that "No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement or threshold is explicitly required or explicitly permitted by statute or by a rule that has promulgated."

[290] State of Wis. Dep't of Justice, OAG-01-16, Opinion Letter on the Application of Wis. Stat. § 227.10(2m) to the Issuance of High-Capacity Groundwater Well Withdrawal Permits ¶ 16 (May 10, 2016).

[291] State of Wis. Dep't of Justice, Opinion Letter on the Continuing Validity of OAG-01-16 (May 1, 2020).

[292] *See* Clean Wisconsin, Inc. v. DNR, No.16-CV-2817 (Wis. Cir. Ct. Dane Cty.) (consolidated).

[293] *See* Clean Wisconsin, Inc. v. DNR, Nos. 2016AP1688, 2016AP2502, unpublished certification (WI App Jan. 16, 2019).

[294] WYO. STAT. § 41-3-907.

[295] WYO. STAT.§ 41-3-912(A).

[296] *Who Owns the Water?*, *supra* note 36, at 9.

[297] *Id.*

[298] *Water Law Explanation*, MICH. DEP'T. OF ENV'T. QUALITY, https://www.michigan.gov/documents/deq/Water_Law_Explanation_626093_7.pdf (updated June 22, 2018).

within their jurisdictions similarly and annually report their water use and regulation to a central body."[299] The default threshold for regulating withdrawals is set at 100,000 gallons/day, averaged over a 90-day period.[300] Council approval is required for any new or increased consumptive use of 5 million gallons/day or greater averaged over a 90-day period.[301]

III. CONCLUSION

Withdrawing large amounts of groundwater is essential for agricultural irrigation. However, these large withdrawals have the potential to over appropriate the underlying aquifer. With regulatory authority over groundwater allocated to the several states, a piecemeal framework works to protect the aquifers. Several states have enacted comprehensive regulatory regimes over these high-capacity wells. With varying degrees of efficacy, these frameworks help the state to manage and track large quantity withdrawals. Protection of groundwater supplies from over appropriation by high-capacity wells is a collective concern and responsibility.

[299] *Id.*
[300] *Who Owns the Water?*, *supra* note 36, at 9.
[301] *Id.*