

Clean Water and concentrated animal feeding operations (CAFOs)

For years, the leading agricultural environmental issue was wetlands. Farmers, ranchers, and their agricultural organizations worried greatly about the scope, the application, and the enforcement of section 404 of the Clean Water Act and the wetlands provisions of federal farm legislation to their fields and pastures. They worried greatly that environmental organizations would use wetlands laws and regulations to gain land use control over their agricultural lands.¹

By contrast, Clean Water Act section 402 NPDES and delegated-state equivalents had very little impact on farmers and ranchers. Exemptions from the definition of point source for return flows from irrigation² and stormwater runoff from agricultural lands³ buffered agriculture from the NPDES system. Only concentrated animal feeding operations (CAFOs) met the definition of a point source. Even with respect to CAFOs, the EPA and states defined CAFOs in such a way that most farmers and ranchers did not worry that they had to apply for an NPDES permit for their livestock operations.⁴

Beginning in the early 1990s, farmers' and ranchers' complacency about section 402 began to change. Federal appellate courts decided two cases that applied section 402 to a feedlot and a dairy, respectively.⁵ Moreover, a rural donnybrook between small dairies and large dairies in Erath County, Texas resulted in the EPA for the first time ever issuing a general permit applicable to CAFOs.⁶

Then along came hogs. Hogs became the focal point for environmental disputes under the Clean Water Act, land use disputes about rural zoning and nuisances, and social disputes about corporate agriculture. Indeed, several state regulators have publicly stated that if there were no social disputes about corporate agriculture, hogs would just be another farm animal.⁷ Instead, the passions generated by hogs, similar to the passions in the Erath County donnybrook, have created a battle royale in state after state. While large-scale livestock production continues to be the major focus of legal activity, growing concern over the chronic impacts to water quality of diffuse sources of livestock pollution, including small-scale livestock production, is also generating significant interest in new CWA policies and programs.

From its beginning several years ago, the Special Committee on Agricultural Management recognized the significance of livestock production. On behalf of the

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The agriculture provisions of the 1999 Omnibus Appropriations Bill

On October 19, 1998, Congress passed H.R. 4328, "Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 1999." President Clinton signed this bill into law on October 21, 1998.¹ Regulations implementing the changes have not yet been adopted by USDA, but the Secretary of Agriculture is directed to issue the necessary regulations "as soon as practicable."² In this article, the bill will be referred to as the "1999 Omnibus Bill." [This is a continuation of the coverage of the 1999 Omnibus Appropriations Bill that began in the January 1999 issue of the *Agricultural Law Update*]

Chapter 12 bankruptcy extension

Chapter 12 of the Bankruptcy Code, which allows for bankruptcy reorganization of family farms, was enacted in 1986 as a temporary law that was due to expire or "sunset" on October 1, 1998. Although Congress failed to re-authorize Chapter 12 prior to October 1, the 1999 Omnibus Bill included a provision that extended Chapter 12 for six months.³ The extension is retroactive, meaning that it applies back to October 1, 1998. Chapter 12 will continue to be available to farmers through April

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1, 1999. Any cases that are filed on or before April 1, 1999, will be allowed to proceed under the existing Chapter 12 provisions.⁴

Conservation programs

The 1999 Omnibus Bill and the accompanying Conference Report include a number of provisions affecting USDA conservation programs. These provisions are briefly described here.

Funding for the Environmental Quality Incentives Program is limited to \$174 million.⁵

Enrollment in the Wetlands Reserve Program is limited to 120,000 acres.⁶ Thirty-year easements are now exempt from payment limitations for the Wetlands Reserve Program.⁷ Acceptance of bids for the Wetlands Reserve Program may now be "in proportion to landowner interest expressed in program options."⁸

The 1999 Omnibus Bill did not adopt a pilot program for haying and grazing on Conservation Reserve Program (CRP) land.⁹ This program was included the

Senate version of the bill.

The Conference Report expresses the expectation that the Secretary will provide a two-year extension for CRP participants to complete pruning, thinning, and stand improvement of trees on lands subject to a CRP contract.¹⁰ The improvements would otherwise have to be completed in 1998 or 1999.

Livestock pricing and trade provisions

Livestock Price Reporting Pilot Program

The 1999 Omnibus Bill requires the Secretary to conduct a 12-month pilot program for mandatory reporting of procurement prices in the beef and lamb industries.¹¹ This limited pilot program is a compromise coming out of stronger livestock price reporting provisions passed by the Senate. Only those involved in trading a "significant share" of the national market are covered by the program. The covered trades include domestic or imported cattle for immediate slaughter, fresh muscle cuts of beef, domestic or imported sheep, and fresh or frozen muscle cuts of lamb. Feeder cattle price information is specifically excluded by the Conference Report language.¹²

The Secretary is required to report the findings from the pilot program no more than six months after the program conclusion.¹³ No information collected through the program may be disclosed until the report is submitted. In addition to the pilot program for mandatory price reporting, the Secretary is directed by the Conference Report to "take steps" to increase voluntary price and volume reporting of beef and lamb sales.¹⁴

The Secretary is also to conduct a 12-month pilot investigation of streamlined electronic system for collecting export data for fresh or frozen muscle cuts of meat food products.¹⁵

Report on interstate distribution of state-inspected meat

The Conference Report directs the Secretary to make a report by March 1, 1999, to the House and Senate Appropriations Committees with recommendations on lifting the statutory ban on interstate distribution of state-inspected meat.¹⁶

Dairy pricing

The 1996 FAIR Act required the Secretary to undertake consolidation and reform of the federal milk marketing orders.¹⁷ The 1999 Omnibus Bill requires the Secretary to submit to Congress between February 1, 1999, and April 4, 1999, a final rule implementing that consolidation.¹⁸ The 1999 Omnibus Bill requires that the actual changes not take effect until October 1, 1999.

The 1999 Omnibus Bill includes a provision requiring that whenever the Sec-

retary announces a basic formula price (BFP) for milk, he must include an estimate of per hundredweight costs of production, including transportation and marketing costs, in different regions of the United States.¹⁹

Discrimination at USDA

The 1999 Omnibus Bill includes a waiver of the statute of limitations for many discrimination complaints related to USDA credit, commodity, or disaster programs.²⁰

Two-year extension for filing civil actions based on eligible complaints of discrimination

No civil action filed within two years of the enactment of the 1999 Omnibus Bill will be barred by the statutory limitations period if the action seeks relief related to discrimination alleged in an eligible complaint.²¹ "Eligible" complaints are any complaints not related to employment that were filed with USDA before July 1, 1997, and that allege that discrimination in USDA farm loan programs, housing programs, commodity programs, and/or disaster assistance programs occurred between January 1, 1981, and December 31, 1996.²² The word "filed" is not defined in the statute for this purpose. We are hoping that the Department will interpret this broadly to include any form of communication that can be documented, either in official USDA documents or by affidavit.

Option to seek agency review of discrimination complaint

Instead of filing a civil action, farmers may choose to file an administrative action. The statute gives farmers up to two years from the enactment of the 1999 Omnibus Bill to request a hearing on the record regarding their "eligible" complaint.²³ (The wording in this section of the law is unclear—it is possible that this section also allows new complaints to be filed for a period of up to two years after enactment—but the language is too confusing to be sure.²⁴) Following the hearing on the record, the agency is required to provide the complainant with "such relief as would be afforded under the applicable statute... notwithstanding any statute of limitations."²⁵ The 1999 Omnibus Bill lists some of the substantive statutes which may govern the disposition of complaints, including the Equal Credit Opportunity Act.²⁶ The agency is required "to the maximum extent practicable" to conduct an investigation, issue a written determination, and propose a resolution within 180 days of a request for a hearing.²⁷

The 1999 Omnibus Bill makes it clear that complainants who opt for the on-the-record hearing discussed above and

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are denied the requested relief will have 180 days after the denial to seek judicial review of the agency decision.²⁸

Compensatory damages for discrimination based on disability

The 1999 Omnibus Bill provides for compensatory damages to be paid to farmers who filed a disability discrimination complaint after January 1994 related to USDA farm loan programs or activities.²⁹ The complaint must have resulted in a finding that the farmer was subjected to discrimination and the farmer must have sought compensatory damages while the case was pending. Unlike the other discrimination provision of the 1999 Omnibus Bill, this section does not waive the statute of limitations.

USDA required to make report on Indian agriculture

The Conference Committee directed USDA to report to Congress by February 1, 1999, "on the progress made within Indian agriculture, Federal inter-agency coordination, and the level of Indian usage of Federal programs and initiatives outlined to benefit Indian agriculture."³⁰

Crop insurance provisions

The 1999 Omnibus Bill changes the law for setting fees for catastrophic (CAT) crop insurance protection.³¹ Beginning with the 1999 reinsurance year, producers cannot be required to pay more than \$50 per crop as an administrative fee for CAT coverage. Earlier in 1998 Congress had passed a law allowing CAT fees to be the greater of \$50 per crop or 10 percent of the coverage received.³² This is no longer effective for the 1999 reinsurance years and thereafter.

The Conference Committee specifically noted that "risk management tools are limited for livestock producers."³³ USDA's Risk Management Agency is directed by the Committee to report to Congress on feasibility of a crop insurance program for livestock producers' forages and native pastures.

Miscellaneous ag provisions

The 1999 Omnibus Bill did not adopt provisions included in the Senate bill which would have provided statutory relief for producers who inadvertently planted ineligible bean crops in violation of Production Flexibility Contract (PFC) eligibility requirements. (Many producers had planted garbanzo beans and similar bean crops not realizing that those crops are classified as vegetables and are therefore ineligible for PFC acreage calculations). Rather than provide statutory relief, the Conference Report "urges" the Secretary to "exercise reasonable treatment of producers in order to avoid harmful consequences."³⁴

The 1999 Omnibus Bill did not adopt

provisions included in the Senate bill which would have required country-of-origin labeling for fresh produce and meat. Instead, the Conference Report directs the General Accounting Office (GAO) to conduct a comprehensive study on the effects of mandatory country-of-origin labeling on fresh produce importers, producers, consumers, and retailers.³⁵ The Conference Report similarly directs the Secretary to conduct a comprehensive study on the effects of mandatory country-of-origin labeling on meat importers, exporters, livestock producers, consumers, packers, processors, distributors, and grocers.³⁶ The reports on the studies must be submitted to Congress within six months after enactment of the 1999 Omnibus Bill.

The 1999 Omnibus Bill did not adopt provisions included in the Senate bill which would have established a new Office of the Small Farms Advocate within USDA. Instead, the Secretary is directed to better manage existing programs "to encourage policy considerations within existing programs . . . that promote the needs of small farm operators and that may help reverse the unwarranted decline in small farm operations."³⁷

The 1999 Omnibus Bill did not adopt a change in the definition of "family farm" which was included in the Senate bill.³⁸

The 1999 Omnibus Bill eliminated funding for both the Fund for Rural America and the Conservation Farm Option program established by the 1996 FAIR Act.³⁹

Tax provisions

The 1999 Omnibus Bill includes tax provisions which are known together as the "Tax and Trade Relief Extension Act of 1998." You should be aware that a number of changes made by this Act will affect tax liabilities for farmers and ranchers. These changes are discussed only briefly here. Farmers and ranchers should consult tax professionals for assistance in understanding how the changes will affect their individual tax obligations.

Self-employed may deduct 100 percent of health insurance costs starting in 2003

The Tax and Trade Relief Extension Act of 1998 increases the percentage of health insurance expenses that may be deducted by self-employed individuals. The allowable deduction is increased to 60 percent in 1999 through 2001, 70 percent in 2002, and 100 percent in 2003 and later years.⁴⁰

Three-year farm income averaging made permanent

Federal tax law allows a farmer to choose to compute his or her current year tax liability by averaging, over the previ-

ous three-years, all or a portion of the taxable income attributable to the farm business.⁴¹ Prior to the enactment of the 1999 Omnibus Bill, this provision was only authorized for years 1998-2000.⁴² The Tax and Trade Relief Extension Act of 1998 permanently extends authority for this farm income averaging provision.⁴³

Production flexibility contract payments taxed in year received

The 1996 FAIR Act allows producers to choose whether to receive half of their annual Production Flexibility Contract (PFC) payment on December 15 or January 15 of the fiscal year that the payment is due.⁴⁴ The option to receive an advance payment in December can have tax results for producers, even if they choose to receive the advance payment in January. The Emergency Farm Financial Relief Act of 1998 allows producers to receive their entire 1999 PFC payment at any time after October 1, 1998.⁴⁵ This statutory option, could have had tax implications for producers even if they did not choose to take early payment on the contract.

The Tax and Trade Relief Extension Act of 1998 provides that a producer's legal option to take early payments must be disregarded in determining the taxable year for PFC payments.⁴⁶ PFC payments are to be included in gross income for the taxable year in which they are actually received.

Five-year carryback available for farm net operating losses

Federal tax law generally allows businesses to carry a net operating loss back two years and forward 20 years to offset taxable income in those years. Farmers are able to carry the net operating loss back three years if the loss is due to a Presidentially-declared disaster.

The Tax and Trade Relief Extension Act of 1998 provides a special five-year carryback period for farm net operating losses, regardless of whether the loss was incurred in a Presidentially declared disaster area.⁴⁷

¹ The legislation is known as Public Law 105-277. Statute-at-Large designations have not yet been made. The text of the bill can be found in the Congressional Record for October 19, 1998.

² 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1133.

³ 1999 Omnibus Bill, Div. C, Other Matters, Title I, § 149.

⁴ The bill language refers to "the period beginning on October 1, 1998, and ending on April 1, 1999." 1999 Omnibus Bill, Div. C, Other Matters, Title I, § 149. We are interpreting this language to keep Chapter 12 alive through April 1, 1999, rather than ending on March 31, 1999, but there is some ambiguity. Farmers seeking to file as the end of March 1999 approaches should confirm the end date for the Chapter 12 extension.

Critical questions about the farm crisis: causes and remedies*

By Otto Doering and Phil Paarlberg

Just over a year ago everything seemed settled. The new Freedom to Farm legislation ended farm programs as we knew them, eliminating acreage restriction on crops that could be planted, eliminating supply control with land set asides, and providing "transition" payments to farmers that were fixed amounts in contrast to the counter cyclical target payments that increased under prices were low. Freedom to Farm passed because prices were high, exports were supposed to increase over the next decades, and agribusiness consultants claimed that increased land in production (no set-asides and a smaller CRP) would not reduce prices, just create more jobs. Times were good. For 1996 wheat land owners and producers got almost \$2 billion in payments under Freedom to Farm compared to less than 40 million they would have received under the old program. Corn land owners and producers received a little over \$5 billion in payments in 1996 and 1997 instead of just a little over \$1 billion under the old program.

What a change today. The Asian financial crisis, declining exports, big crops in the bins, and a good '98 harvest have lowered prices. Gloom replaces optimism. Exports of agricultural products by the United States for fiscal 1998/99 are forecast at 52 billion dollars, 4 billion dollars lower than in 1997/98. Freedom to Farm payments looked good with high prices, but with low prices producers feel the decline in government support under the new program.

Did Asia do it?

Many believe the economic problems in Asia caused most of our commodity price problem. During the 1990s, Asia emerged as a major market for U.S. agricultural products. However, many of the factors causing the recent financial crisis, like overextended credit, had initially boosted economic growth and fueled agricultural imports. In the summer of 1997, this house of cards collapsed (see Coyle, McKibbin, Wang, and Lopez, Choices, 4th Qtr. 1998).

While serious for most U.S. export commodities, the price impacts to this point have not been as large as the media portrays. The Asian problems have not been the major cause of the decline in

U.S. agricultural prices. Using the elasticities the Economic Research Service used to analyze effects of the Uruguay Round trade agreement, the devaluations and falling aggregate demand in Asia resulted in a short-run 4.1 percent drop in the wheat price, a 3.7 percent drop in the coarse grains price, and a 10.2 percent fall in the soybean price. We estimate that the devaluations and falling national income reduced the price of beef 1.5 percent, pork by 9 percent, and poultry by 5 percent. Rice, in contrast, shows a much larger price effect, falling 29.9 percent. Except for rice, these Asia-specific impacts are much smaller than the overall price declines observed, and rice has other mitigating factors that have reduced even its large overall price decline. A recent analysis using a global macroeconomic model with an agricultural sector supports these small price impacts (Stoekel, Fisher, McKibbin, and Borrell).

Why might price declines be smaller than expected? First, the Asian countries most severely affected were neither major agricultural importers nor exporters. Of the Asian Tigers (Korea, Malaysia, Indonesia, Philippines, Thailand, Hong Kong, and Taiwan), only Korea was a large importer of U.S. agricultural products, with a market share of 5 percent, and Korea received over 1 billion dollars in General Sales Manager (GSM) credit guarantees. The remaining 6 nations combined accounted for 13 percent of U.S. agricultural exports. Of these, the most severely affected, Indonesia, Thailand, and Malaysia, buy only small amounts of agricultural goods. Rice is again a different story, with Indonesia and Thailand being important importers or exporters. Data for Japan and China through May 1998 do not show a large fall in trade. Japan shows a small, but persistent, drop in purchases from the United States during the past two years. Except for December 1997 and May 1998, Chinese purchases are at or above year earlier levels. The data for the Asian Tigers show monthly purchases of U.S. agricultural commodities fell sharply, starting in the fall of 1997, but as small customers the impact is modest.

Adverse impacts of the Asian crisis may worsen. For the 1998/99 year, the problems experienced by the Asian Tigers could spread. Japan alone accounts for roughly 18 percent of U.S. agricultural exports—our largest single export market. Japan's current recession follows years of low growth. Nearly half of

its exports go to the weakened markets in Asia. The Japanese banking system holds extensive bad debts, and past attempts to stimulate domestic demand failed. In China, which accounts for 3 percent of U.S. agricultural exports, slowed economic growth and unmet reforms may force a currency devaluation to boost exports. Competitive devaluations by other Asian nations may follow. Latin America and Brazil in particular, which are large buyers of U.S. agricultural goods and rival exporters of some, are experiencing currency and financial problems related to the Asian Crisis.

If the Asian problems have not been the major cause, how do we account for the sharp fall in commodity prices? Weather and the production response to the high prices of 1996 both weigh in. Despite the strong *El Nino* in 1997/98, expectations of short global food supplies failed to materialize. Production of all grains worldwide rose from 1,872 million tons in 196/97 to 1,889 million tons in 1997/98. With excellent crops in South America and the United States, world oilseed production rose from 261 million tons in 1996/97 to 287 million tons in 1997/98. Production forecasts for 1998/99 continue to be positive. Current forecasts for the United States show record or near record production. USDA projects world grain production to fall only slightly in 1998/99 to 1,879 million tons and estimates world oilseed production to remain at a high level as the U.S. soybean crop offsets a return to normal crops in South America.

It is the combination of these negative forces that has so sharply reduced agricultural prices and called into question the decision to adopt the Freedom to Farm legislation. Since the middle 1990s, the world has added around 150 million tons to the average level of annual world grain output. The concern now is that the economic problems in Asia will spread to other major markets for U.S. agricultural goods—in Japan and in Latin America—while global food supplies remain at record levels. If this happens, recovery will be a 3-5 year process.

Is such an outcome likely? There is little to support the idea that recovery in Asian economies will boost demand before early in the next century (only a year or two away). What about adjusting output? Arguments for and against a quick supply response can be mustered. Even the authors disagree.

Paarlberg sees a drop in global supply occurring within the next few years.

Otto Doering, Professor, Purdue University; Phil Paarlberg, Associate Professor, Purdue University.

With Freedom to Farm, U.S. farmers will react to market signals and will abandon marginal lands. The European Union has the ability and will use set-asides to cut area. Other exporters, like Argentina and Australia, are more open to world prices than in the 1980s and will adjust. Also weather can play a role. Already Russia appears to have a crop disaster, and the United States is extending concessional sales to that nation. We could move substantial food aid to the former Soviet Union this winter (but Congress appears unwilling). Looking at our past experience, *La Nina* could cut U.S. crop yields by 10 percent or more. A 10 percent decrease in U.S. coarse grains yields translates into an output loss of around 25 million tons, well above the 10 million tons of coarse grains exports some have estimated lost due to the economic problems in Asia.

Doering has a different review. He argues that farmers have few alternatives and so production is very price inelastic.

It will take several years of low prices to cut production. Actual policy reforms resulting from the Uruguay Round were limited, and most countries continue to protect farmers while severing the link between domestic prices and world prices. Those nations will not adjust production. In nations where reforms did occur, governments will intervene to support farm prices or farm incomes. Relying on weather to cut output is a risky strategy given the recent experience with *El Nino*, which was also supposed to tighten world food supplies. At least one *La Nina* event was associated with a 20 percent yield increase in the United States.

Is Freedom to Farm a failure?

Freedom to Farm has done what it was supposed to do, and it has done it very well. It removed planting and acreage restrictions, gave farmers production signals from commodity markets rather than from price supports, and stabilized government program expenditures at fixed amounts that can be counted on for budgetary purposes. The problem is that the 1996 optimism about demand for commodities has not panned out, prices have gone down, and with low prices, Freedom to Farm does not pump as much extra cash to landowners and producers as the old programs would have.

What are the issues and alternatives now?

On September 2, 1998, Senator Tom Harkin, in the political rhetoric of an outspoken critic of the FAIR Act, said

"There are two things we can do to save the '96 Farm Bill." He wanted to uncap loan rates and "for this year only" institute a farmer-held reserve. Farmers had freedom to farm, according to Harkin, but they needed "freedom to market"—in this context a farmer-held reserve to hold grain off the market until prices are higher. He concluded that "we are facing a farm crisis in America unlike anything we have seen before in a long time."

Congress was already laying out alternatives to deal with the farm financial problem when Harkin spoke. With the October 1998 omnibus spending bill, Congress made available large disaster payments (\$2.58 billion) to producers who suffered extreme weather and other crop and livestock losses. In addition, Congress made Fair Act payments that would normally be made in 1999 available to farmers in 1998. This belies the claim of keeping expenditures predictable. Will Congress let landowners and producers go through 1999 without additional payment? Not likely.

Under the FAIR Act, the Loan Deficiency Payment (LDP) still does provide a safety net under prices. If markets fall below a very low fixed loan rate, the government will pay the farmer the difference between the loan rate and the market price. Unlike the old program, the government does not take title to grain and accumulate stocks. The FAIR Act set the loan very low to prevent outlays except in extremely low price situations like we had late this summer. However, it does provide a low level of counter cyclical support and can trigger substantial government payments.

In the pre-election budget compromise, Congress also voted an additional "one-time" payment to FAIR Act program farmers of over \$3 billion. If farmers took just the first half of their 1999 transition payments the end of 1998 and locked in LDP payments at the early fall commodity prices, the Federal commodity and conservation expenditures might look like this?

1998 Freedom to Farm Transition Payments	@\$5.7 billion
First half 1999 transition payments payable in Nov.-Dec. '98	@\$2.7 billion
CRP and other conservation payments	@\$2.0 billion
Special disaster and market loss assistance	@\$5.9 billion
Estimated potential LDP payments	@\$2.5 billion
	<hr/> \$18.8 billion

This is a big increase over the \$5.7 billion FAIR Act transition payments and the \$2.0 billion conservation payments that would have been paid in a normal year. The political issue is that many want even more government payments in low price years—the extreme example being the \$26 billion expenditure in 1986 during the Farm Financial crisis.

The issues joined

The cusp of the debate that resulted in the Clinton veto of the Ag Appropriations Bill on October 7, 1998, revolved around:

1. The distribution as well as the amount of the payments
2. The extent to which agricultural programs return to being counter cyclical entitlements subject to large outlays during bad times.

Clinton, with Daschle looking over his shoulder, vetoed the Ag. Appropriations Bill, H.R. 4101, "because it fails to address adequately the crisis now gripping our Nation's farm community." The message also stressed the inadequate "safety net" of Freedom to Farm and supported Daschle and Harkin's proposal to lift the cap on the marketing loan. Clinton said, "I firmly believe and have stated often that the Federal Government must play an important role in strengthening the farm safety net."

The Daschle and Harkin debate also questioned the beneficiaries of the transition payment. Freedom to Farm puts the landowner in the best position to capture the transition payments and capitalize them into the value of the land (Schertz & Johnston). The equity concern, while it has been raised, will not likely be addressed directly. Congress has been unwilling to have agricultural programs means tested like other income transfer programs, or to really tackle the large farm versus small farm issue. Congress' traditional solution pumps some money to most parties and very liberal amounts to a few.

Lifting the cap on the marketing loan is exactly what the Republican leadership (especially Dick Armey, who dislikes farm programs more than almost anything else) wanted to avoid at all costs. That is one reason the GOP leadership rushed to move the 1999 Freedom to Farm payments ahead to 1998 and approved the disaster and market loss assistance payment to farmers—to keep the structure of Freedom to Farm. Lifting the cap would destroy the discipline of fixed payments and take us back to the counter cyclical payments of old without supply control.

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The decision for now—does it settle the issues?

In the pre-election rush, Congress has spoken. The market-based character of the FAIR Act itself has been preserved, but Congress has gone beyond the program and increased income transfers to agriculture. Congress also proved again it is unable to enforce discipline on crop insurance—allowing those who did not take the required crop insurance under Freedom to Farm to receive the disaster payments if they promise to take subsidized crop insurance for the coming two years. Where does this leave us?

1. The income transfers beyond the Freedom to Farm program will dampen the market-based supply response that might otherwise have occurred in the United States (proving Doering right for the wrong reasons).

2. However, Freedom to Farm payments and added government transfers fall below the payments that probably would have been made under the old program.

3. Congress demonstrated again that it can hardly resist sending aid to disasters—making subsidized crop insurance that much more difficult to sell.

4. This year proves that the FAIR Act will be challenged when prices are low, and foretells a real debate in 2002 when the FAIR Act expires—unless, of course, prices are very high in 2001 and 2002. If it so chooses, the Commission on 21st Century Production Agriculture may have an opportunity to suggest another course. Income insurance anyone (Harrington and Doering)?

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Special Committee, this author prepared this summary of recent significant legal events relating to CAFOs.

Federal actions

In October 1997, Vice-President Gore announced the Clean Water Initiative to improve and strengthen water pollution control under the Clean Water Act (CWA).⁸ In response to the Clean Water Initiative, USDA and EPA have proposed a Unified National Strategy for Animal Feeding Operations.⁹ The major thrusts of the Strategy are voluntary planning through Comprehensive Nutrient Management Plans (CNMPs), increased regulatory permitting (with the intention of increasing from the approximately 2,000 CAFOs with CWA permits to an additional 15,000 to 20,000 CAFOs with CWA permits by the year 2005), and increased financial and technical assistance to the livestock sector to meet the goals of the Strategy.¹⁰ In addition, EPA has announced that a long-term action on its unified agenda is to revise the existing effluent guidelines for beef, dairy, poultry, and swine operations.¹¹

In line with the Clean Water Initiative, EPA and the National Pork Producers Council (NPPC) agreed to a voluntary Compliance Audit Program (CAP) for swine producers. The program has two prongs. Prong one is an on-farm environmental assessment. The NPPC has developed and copyrighted a comprehensive assessment framework for pork producers through which trained, certified personnel will conduct environmental assessments.¹² Prong two is the Final Report by the pork producer to the EPA (or participating state agency) whereby the producer reveals the results of the assessment and commits to correcting any violations or deficiencies that the assessment revealed. In return for the self-revelations, the EPA and participating states agree to lessen the sanctions that could have been imposed upon the producer under the CWA.¹³

During 1998, EPA also proposed to reissue the EPA Region 6 NPDES general permit for CAFOs. The comment period on the proposed reissuance expired October 12, 1998 but as of early December the EPA had not published a final decision.¹⁴ Furthermore, EPA delegated to Texas, through the Texas Natural Resources Conservation Commission (TNRCC), NPDES authority, including NPDES authority over CAFOs.¹⁵

Due to litigation pressure,¹⁶ the EPA has more heavily emphasized water quality standards, particularly on a watershed basis, under section 303(d) of the Clean Water Act. To achieve these water quality standards, the EPA is working closely with the states to develop lists of

impaired waters required under section 303 of the Act, and to complete the total maximum daily loads (TMDLs) of pollutants that stream segments can handle while, at the same time, meeting assigned water quality standards.¹⁷ The EPA has also begun the process for developing numeric water quality standards for nutrients that are often associated with livestock production.¹⁸ The TMDL program must take into account CAFOs and nonpoint sources in the agricultural sector if EPA's goals are to be achieved.¹⁹

State activities

Oklahoma amended its CAFOs law in 1998 to focus its odor and clean water efforts specifically on poultry and swine. In one bill, Oklahoma enacted three laws regulating poultry: the Registered Poultry Feeding Operations Act (a permit system); the Poultry Waste Transfer Act (transfer of poultry waste out of designated watersheds); and the Poultry Waste Applicators Certification Act (controls on land application of poultry litter).²⁰ As for swine, Oklahoma toughened its statutory requirements for permits and operation of licensed managed feeding operations (LMFOs), which by definition are large swine operations. With the enactment of these toughened requirements, the Oklahoma legislature lifted a moratorium that it had imposed on the issuance of permits for new swine operations.²¹

Colorado voters on November 3, 1998 adopted a ballot initiative, Amendment 14, that created a statutory regulatory scheme for large swine operations.²² Amendment 14 created a regulatory scheme for swine operations similar to that adopted in Oklahoma. On November 3, 1998, South Dakota voters adopted a state constitutional amendment, Amendment E, that prohibits corporations, limited partnerships, business trusts, or limited liability companies from acquiring any legal, beneficial, or other interest in real estate and from engaging in crop or livestock production. Amendment E creates an exemption for family farm corporations or family farm syndicates.²³

The Mississippi legislature imposed a moratorium beginning February 28, 1998 on the issuance of permits for swine operations (new or expanded) until January 1, 2000.²⁴ In addition, the legislature expanded the rural zoning authority of county Boards of Supervisors relating to swine CAFOs, if counties enacted their zoning ordinance prior to June 1, 1998.²⁵ At least 35 of Mississippi's 82 counties took advantage of this new zoning authority.²⁶ However, a federal court has now enjoined the enforcement of these ordinances in three counties.²⁷ Finally for Mississippi, the Department of Environmental Quality has proposed that new

⁵ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 726.
⁶ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 730.
⁷ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 751 (amending 16 U.S.C. § 3837(c)(1)).
⁸ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 752 (adding 16 U.S.C. § 3837(b)(2)(C)).
⁹ Conference Report at H11300.
¹⁰ Conference Report at H11302.
¹¹ 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1127(a).
¹² Conference Report at H11303.
¹³ 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1127(a).
¹⁴ Conference Report at H11301.
¹⁵ 1999 Omnibus Bill, Div. A, Agriculture, Title XI, § 1127(b).
¹⁶ Conference Report at H11295, H11301.
¹⁷ 1996 FAIR Act, § 143.
¹⁸ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 738.
¹⁹ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 739.
²⁰ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741.
²¹ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(a).

²² 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(e).
²³ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(b).
²⁴ The language provides: "The complainant may, in lieu of filing a civil action, seek a determination on the merits of the eligible complaint by the Department of Agriculture if such complaint was filed not later than 2 years after the date of enactment of this Act." 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(b). The confusion is generated by the fact that "eligible complaint" is defined as: "a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997, and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996..." 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(e).
²⁵ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(b)(1), (2).
²⁶ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(d). The Equal Credit Opportunity Act is found at 15 U.S.C. §§ 1691 et seq.
²⁷ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(b)(3).
²⁸ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 741(c).
²⁹ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 742.
³⁰ Conference Report at H11291.
³¹ 1999 Omnibus Bill, Div. A, Agriculture, Title VII,

§ 748.
³² Act of June 23, 1998, Pub. L. No. 105-185, Title V, Subtitle C, § 532, 112 Stat. 581.
³³ Conference Report at H11295-96.
³⁴ Conference Report at H11301.
³⁵ Conference Report at H11301.
³⁶ Conference Report at H11302.
³⁷ Conference Report at H11301.
³⁸ Conference Report at H11301.
³⁹ 1999 Omnibus Bill, Div. A, Agriculture, Title VII, § 740.
⁴⁰ 1999 Omnibus Bill, Div. J, Tax and Trade Relief Extension Act of 1998, Title II, § 2002.
⁴¹ 26 U.S.C. § 1301.
⁴² Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 933(c).
⁴³ 1999 Omnibus Bill, Div. J, Tax and Trade Relief Extension Act of 1998, Title II, § 2011.
⁴⁴ 1996 FAIR Act, § 112(d)(2) (codified at 7 U.S.C. § 7212(d)(2)).
⁴⁵ The Emergency Farm Financial Relief Act of 1998, Pub. L. No. 105-228, § 2 (codified at 7 U.S.C. § 7212(d)(3)).
⁴⁶ 1999 Omnibus Bill, Div. J, Tax and Trade Relief Extension Act of 1998, Title II, § 2012.
⁴⁷ 1999 Omnibus Bill, Div. J, Tax and Trade Relief Extension Act of 1998, Title II, § 2013.
 — Karen R. Krub, Farmers' Legal Action Group, Inc., St. Paul, MN

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CAFOs be required to obtain either an air pollution control permit or a multimedia (water and air) permit in order to strengthen odor control.
 The courts of Iowa and Minnesota decided cases disputing the use of local land use laws in cases involving swine operations. The Iowa Supreme Court ruled that local political subdivisions had limited authority to regulate swine operations through local ordinances.²⁸ By contrast, the Minnesota Court of Appeals affirmed a local ordinance regulating the odor of a swine operation.²⁹
 The Iowa Supreme Court ruled on September 23, 1998 that the Iowa statutory immunity from nuisance suits for agricultural operations resulted in a taking of neighbors' private property rights to a common law nuisance remedy. The court declared the immunity unconstitutional.³⁰

Special Committee on Agricultural Management Programs

In light of the importance of these issues relating to CAFOs, SONREEL has requested the Special Committee to present three educational programs on CAFOs in 1999.
 • At the Keystone Conference in Keystone, Colorado in March 1999, the Special Committee has helped design and organized a general session—"The Administration's Clean Water Act Initiative: Political Packaging or a Paradigm Shift?" The session will focus on watershed planning under section 303(d) of the Clean Water Act for a hypothetical Bliss River. As part of the watershed planning,

participants will address issues relating to CAFOs and agriculture generally.
 • In May 1999, in Minneapolis at the conference facilities of the Whitney & Dorsey law firm, the Special Committee will host its second Roundtable on Environmental Issues in Animal Feedlots. This Roundtable focuses solely on federal and state developments concerning CAFOs.
 • The Special Committee has proposed a break-out session on CAFOs, entitled "Animal Feeding Operations and the Environment," to take place at the Fall 1999 SONREEL meeting. If accepted, the break-out session will include information from the all-day May Roundtable in order to acquaint the non-agricultural lawyer with CAFO issues.
 — Drew L. Kershen, Earl Sneed Centennial Professor of Law, University of Oklahoma, College of Law.

¹For general discussion of these issues, read eg, Comment, *Saving the Wetlands from Agriculture: An Examination of Section 404 of the Clean Water Act and the Conservation Provisions of the 1985 and 1990 Farm Bills*, 7 J. Land Use & Envtl. L. 299(1992); Comment, *Protecting Wetlands Through the Clean Water Act and the 1985 and 1990 Farm Bills: A Winning Trio*, 28 U. Tol. L. Rev. 867 (1997).
²³33 U.S.C. §§ 1311(1)(1), 1362(14) (1998).
³Id. § 1362(14).
⁴Id. See also, 40 C.F.R. § 122.23 and Appendix B to Part 122 (1998). Appendix B gives the detailed definition of CAFOs but also states, "Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25 year, 24-hour storm event."

⁵*Car v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991); *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.2d 114 (2nd Cir. 1994) *cert. denied* 514 U.S. 1082 (1995), *overruling* 834 F. Supp. 1422 (W.D. N.Y. 1993).
⁶EPA, *NEDES General Permit for Discharges From Concentrated Animal Feeding Operations*, 58 F.R. 7610 (Feb. 8, 1993; eff. March 10, 1993). For information about the Brath County damybrook, read eg Helen Thompson, *Stirk Big*, 21 Tex. Mon. 66 (Aug. 1993).
⁷David Shorr, Director, Mo. Dept. Natural Resources as reported in *Law and Policy for Feedlots: A Report of the AEA-Special Committee on Agricultural Management Roundtable on Environmental Issues in Animal Feedlots* < <http://www.cest-science.org/9711aba2.htm> >; Paul Stauder, Off. Att'y Gen. Minn., *State Animal Feeding Regulations*, 19th An. Mg. & Educ. Symp., American Agricultural Law Assoc. (Oct. 1998).
⁸62 Fed. Reg. 60448 (Nov. 7, 1997).
⁹63 Fed. Reg. 50192 (Sept. 21, 1998).

Pesticide drift law compilation

A compilation of state statutes and regulations related to pesticide drift has been prepared by Theodore A. Feitshans, J.D., Department of Agricultural and Resource Economics, North Carolina State University. The compilation includes statutes and regulations covering drift directly as well as others, such as financial responsibility, that implicate drift only indirectly. The compilation is contained in two volumes. Order and billing information is available from Copytron, telephone (919) 233-6862; fax (919) 233-6871.
 —Theodore A. (Ted) Feitshans, North Carolina State Univ., Raleigh, NC.