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INSIDE

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Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- International trade and the future of farm programs

Energy Policy Act tax incentives

The tax title to the Energy Policy Act of 2005,¹ Title XIII, contains a lengthy list of provisions, many of which affect rural America. The following touch upon the highlights of the provisions of greatest significance to farmers, ranchers and other rural residents.

Extension of credit for biodiesel

The biodiesel fuels credit,² authorized in the American Jobs Creation Act of 2004,³ was set to expire for sales and uses after December 31, 2006.⁴ However, the Energy Policy Act of 2005 has extended the credit two more years such that the credit is now set to expire for sales and uses after December 31, 2008.⁵

Small agri-biodiesel producer credit

An additional credit (in addition to the biodiesel mixture credit⁶ and the biodiesel credit⁷) has been authorized, effective on the date of enactment of the Energy Policy Act, which was August 8, 2005.⁸ The new credit, the "Small Agri-Biodiesel Producer Credit," is limited to producers where production capacity does not exceed 60,000,000 gallons per year.⁹ The credit is 10 cents per gallon of qualified agribiodiesel for a producer, with a limit of 15,000,000 gallons per year.¹⁰ For pass-through entities such as a partnership, trust or S corporation, the limits are applied at the entity level and also at the partner or similar level.¹¹

Section 45 credit and agricultural cooperatives

The Energy Policy Act provides that, in the case of an eligible cooperative organization, any portion of the credit authorized by I.R.C. § 45 (the credit for electricity produced from renewable resources), the credit, at the election of the cooperative, can be apportioned among patrons of the organization on the basis of the amount of business done by the patrons during the year.¹² The amount of the credit apportioned to patrons is reduced from the cooperative's credit and is included in the patron's income tax calculations for the year of the patron ending on or after the last day of the payment period for the taxable year of the

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Federal Register summary from August 6 - September 2

ASIAN LONGHORNED BEETLE. The APHIS has adopted as final regulations amending the Asian longhorned beetle regulations by removing portions of Cook and DuPage Counties, IL, from the list of quarantined areas and removing restrictions on the interstate movement of regulated articles from those areas. The regulations were based on a determination that the Asian longhorned beetle no longer presents a risk of spread from those areas and that the quarantine and restrictions are no longer necessary. 70 Fed. Reg. 46-65 (Aug. 9, 2005).

BRUCellosis. The APHIS has adopted as final regulations which change the classification of Florida to brucellosis-free. 70 Fed. Reg. 47078 (August 12, 2005).

ESTIMATED TAXES. The IRS has adopted as final regulations which eliminate regulations made obsolete by changes to the estimated tax rules in 1984. The 1984 statutory changes eliminated the requirement for the filing of estimated tax

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cooperative.¹³

To be eligible for such pass-through treatment, the cooperative must be owned more than 50 percent by agricultural producers.¹⁴

Energy-efficient commercial building deduction

The Energy Policy Act of 2005 adds a new deduction to the Internal Revenue Code, I.R.C. § 179D, which authorizes a deduction of \$1.80 per square foot of the building over the deductions claimed for the building in all prior taxable years.¹⁵ The term "energy efficient commercial building property" means depreciable property which is located in the United States, is installed as part of the interior lighting systems, the heating, cooling, ventilation and hot water systems or the building envelope; and is within the scope of Standard 90.1- Conditioning Engineers and the

Illuminating Engineering Society of North America.¹⁶ The new law requires that the total annual energy and power costs be reduced by 50 percent or more.¹⁷ If that requirement is not met, the deduction is reduced from \$1.80 to 0.60 per square foot provided the project meets the energy-saving targets established by the Secretary of the Department of Energy.¹⁸

For public buildings, the deduction is to be available to the "person primarily responsible for designing the property."¹⁹

For all property, the income tax basis is to be reduced by the amount of the deduction allowed.²⁰

The deduction is available for property placed in service after December 31, 2005.²¹ The credit is set to terminate for property placed in service after December 31, 2007.²²

New energy efficient homes

The 2005 law adds another new credit, the New Energy Efficient Home Credit.²³ The credit is a maximum of \$2,000 for homes with annual heating and cooling energy consumption at least 50 percent below the standards of the International Energy Conservation Code²⁴ or is a manufactured home conforming to the requirements of the Federal Manufactured Home Construction and Safety Standards.²⁵ The credit is \$1,000 for manufactured homes where the annual reduction is 30 percent, rather than 50 percent.²⁶

The credit is available to "eligible contractors"²⁷ with that term defined as "the person who constructed the qualified new energy efficient home" or a manufactured home producer.²⁸ It would appear that an owner-built home would be considered an "eligible contractor" but that will likely not be known for sure until further guidance is published in regulations or otherwise.

The credit is part of the general business credit,²⁹ requires a reduction in basis of the property,³⁰ and is effective for homes acquired after December 31, 2005, and before January 1, 2008.³¹

Appliance credit

The Energy Policy Act of 2005 has added another new credit, the Energy Efficient Appliance Credit.³² The credit is available to producers of appliances and is available for dishwashers, clothes

washers and refrigerators.³³

Depreciation of natural gas lines

The Energy Policy Act of 2005 allows natural gas gathering lines to be treated as seven-year property for depreciation purposes.³⁴ The enactment confirms decisions by the Sixth³⁵ and the Eighth³⁶ Circuit Courts of Appeal which allowed depreciation over seven years rather than the 15-years as determined by the Internal Revenue Service.

Alternative motor vehicle credit

Effective for vehicles placed in service after December 31, 2005, an alternative motor vehicle credit is allowed which is the sum of (1) qualified fuel cell motor vehicle credit, (2) advanced lean burn technology motor vehicle credit, (3) qualified hybrid motor vehicle credit, and (4) qualified alternative fuel motor vehicle credit.³⁷

The credits allowed cannot exceed the regular tax reduced by other credits over the tentative minimum tax for the year.³⁸ Moreover, the credits are treated as a general business credit if the vehicle is subject to an allowance for depreciation.³⁹

Qualified fuel cell motor vehicle credit

The credit is—

(1) \$8,000 if GVW (gross vehicle weight) is not more than 8,500 pounds (\$4,000 for vehicles placed in service after 2009).

(2) \$10,000 if GVW is more than 8,500 pounds but not more than 14,000 pounds.

(3) \$20,000 if GVW is more than 14,000 pounds but not more than 26,000 pounds.

(4) \$40,000 if GVW is more than 26,000 pounds.⁴⁰

The amount of the credit for passenger automobiles and light trucks is increased by—

(1) \$1,000 if the vehicle achieves at least 150 percent but less than 175 percent of the 2002 model year city fuel economy (MYCFE). The MYCFE is based on vehicle inertia weight and miles per gallon and is different for passenger automobiles and light trucks.⁴¹

(2) \$1,500 if the vehicle achieves at least 175 percent but less than 200 percent of the 2002 MYCFE.

(3) \$2,000 if the vehicle achieves

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AALA Editor.....Linda Grim McCormick

2816 C.R. 163, Alvin, TX 77511
Phone: (281) 388-0155
E-mail: apamperedchef@ev1.net

Contributing Editors: Robert A. Achenbach, Eugene, OR; Neil E. Harl, Iowa State University; Phyllis J. Marquitz, The Dickinson School of Law; Phill Jones.

For AALA membership information, contact Robert Achenbach, Interim Executive Director, AALA, P.O. Box 2025, Eugene, OR 97405. Phone 541-485-1090. E-mail RobertA@aglaw-assn.org.

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 2816 C.R. 163, Alvin, TX 77511, 281-388-0155.

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at least 200 percent but less than 225 percent of the 2002 MYCFE.

(4) \$2,500 if the vehicle achieves at least 225 percent but less than 250 percent of the 2002 MYCFE.

(5) \$3,000 if the vehicle achieves at least 250 percent but less than 275 percent of the 2002 MYCFE.

(6) \$3,500 if the vehicle achieves at least 275 percent but less than 300 percent of the 2002 MYCFE.

(7) \$4,000 if the vehicle achieves at least 300 percent of the 2002 MYCFE.

A "new qualified fuel cell motor vehicle" is defined as a motor vehicle "propelled by power derived from one or more cells which convert chemical energy directly into electricity by combining oxygen with hydrogen fuel which is stored on board the vehicle..."⁴² The definition limits the credit to vehicles the original use of which commence[s] with the taxpayer, the vehicle is acquired for use or lease by the taxpayer and not for resale and the vehicle is made by a manufacturer.⁴³

New advanced lean burn technology motor vehicle credit

The credit amount is \$400 to \$2,400 based on a percentage of the 2002 MYCFE. The credit may be increased by the "conservation credit amount" which is based on lifetime fuel savings and ranges from \$250 to \$1,000.⁴⁴

A "new advanced lean burn technology motor vehicle" is defined as a passenger automobile or light truck with an internal combustion engine "designed to operate primarily using more air than is necessary for complete combustion of the fuel" and incorporates direct injection.⁴⁵

New qualified hybrid motor vehicle credit

The credit amount (for a passenger automobile or light truck) with a GVW of not more than 8,500 pounds is based upon the fuel economy and the conservation credit for an advanced lean burn technology motor vehicle or the applicable percentage of the qualified incremental hybrid cost of the vehicle, ranging from 20 percent to 40 percent.⁴⁶

The term "new qualified hybrid motor vehicle" is defined as a motor vehicle which "draws propulsion energy from on board sources of stored energy which are both ... an internal combustion or

heat engine using consumable fuels ... and a rechargeable energy storage system."⁴⁷

New qualified alternative fuel motor vehicle credit

The credit is based on a percentage of the incremental cost of a new qualified alternative fuel motor vehicle placed in service during the year, of 50 percent (plus 30 percent if certificated under the Clean Air Act).⁴⁸ The incremental cost is specified in the statute, based on GVW, and ranges from \$5,000 to \$40,000.⁴⁹ The term "alternative fuel" means compressed natural gas, liquefied natural gas, liquefied petroleum gas, hydrogen or any liquid at least 85 percent of the volume of which consists of methanol.

—Neil E. Harl, *Iowa State University*

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¹ Pub. L. No. 109-58, 109th Cong., 1st Sess. (2005).

² See Harl, *Handling the New Biodiesel Fuels Credit*, 16 *Agric. L. Dig.* 65 (2005).

³ Pub. L. 108-357, 118 Stat. 1418 (2004). See Harl and McEowen, *American Jobs Creation Act of 2004: A Summary of Selected Provisions*, 15 *Agric. L. Dig.* 161, 163-164 (2004).

⁴ I.R.C. § 40A(e).

⁵ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1344, amending I.R.C. § 40A(e).

⁶ I.R.C. § 40A(b)(1)(A).

⁷ I.R.C. § 40A(b)(2).

⁸ I.R.C. § 40A(b)(5), added by Pub. L. No. 109-58, § 1345, 109th Cong., 1st Sess. (2005).

⁹ I.R.C. 40A(e)(1).

¹⁰ I.R.C. § 40A(b)(5)(A), (C).

¹¹ I.R.C. § 40A(e)(3).

¹² I.R.C. § 45(e)(11)(A)(i).

¹³ I.R.C. § 45(e)(11)(B).

¹⁴ I.R.C. § 45(e)(11)(D).

¹⁵ I.R.C. § 179D(b), added by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1331(a), 109th Cong., 1st Sess. (2005).

¹⁶ I.R.C. § 179D(c).

¹⁷ I.R.C. § 179D(c)(1)(D).

¹⁸ I.R.C. § 179D(d)(1).

¹⁹ I.R.C. § 179D(d)(4).

²⁰ I.R.C. § 179D(e).

²¹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1331(d), 109th Cong., 1st Sess. (2005).

²² I.R.C. § 179D(h).

²³ I.R.C. § 45L, added by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1332, 109th Cong., 1st Sess. (2005).

²⁴ I.R.C. § 45L(c)(1)(A).

²⁵ I.R.C. § 45L(c)(2).

²⁶ I.R.C. § 45L(c)(3).

²⁷ I.R.C. § 45L(a)(1).

²⁸ I.R.C. § 45L(b)(1).

²⁹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1332(b), 109th Cong., 1st Sess. (2005).

³⁰ I.R.C. § 1016(a)(33).

³¹ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1332(f), 109th Cong., 1st Sess. (2005); I.R.C. § 45L(g).

³² I.R.C. § 45M, added by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1334, 109th Cong., 1st Sess. (2005).

³³ I.R.C. § 45M(b)(1).

³⁴ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1326, 109th Cong., 1st Sess. (2005), adding I.R.C. § 168(i)(17).

³⁵ *Saginaw Bay Pipeline Co. v. United States*, 338 F.3d 600 (6th Cir. 2003).

³⁶ *Clajon Gas Co., LP v. Comm'r*, 354 F.3d 786 (8th Cir. 2004).

³⁷ I.R.C. § 30B(a).

³⁸ I.R.C. § 30B(g)(2).

³⁹ I.R.C. § 30B(g)(1).

⁴⁰ I.R.C. § 30B(b)(1).

⁴¹ I.R.C. § 30B(b)(2)(B).

⁴² I.R.C. § 30B(b)(3)(A).

⁴³ I.R.C. § 30B(b)(3)(C), (D), (E).

⁴⁴ I.R.C. § 30B(c)(2)(B).

⁴⁵ I.R.C. § 30B(c)(3)(A).

⁴⁶ I.R.C. § 30B(d)(2).

⁴⁷ I.R.C. § 30B(d)(3)(A).

⁴⁸ I.R.C. § 30B(d)(2).

⁴⁹ I.R.C. § 30B(d)(3).

Federal Register/Cont. from page 1 returns, but retained the requirement for payment of estimated taxes. The regulations also provide guidance for joint return filers and nonresident alien individuals required to make estimated tax payments. **70 Fed. Reg. 52299 (Sept. 2, 2005).**

FIRE ANTS. The APHIS has issued interim regulations amending the imported fire ant regulations by designating as quarantined areas all of one county in Arkansas and all or portions of 18 counties in Tennessee. As a result of this action, the interstate movement of regulated articles from those areas

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Right to farm issues in Pennsylvania: arriving at Act 38

By Phyllis J. Marquitz

After almost a decade of attempts to strengthen the existing agriculture protection laws, Pennsylvania Act 38 was passed on July 6, 2005. The new Act combines significant regulatory and legislative changes intended to protect agriculture interests while also addressing concerns with odor control and manure application.

Development pressures on Pennsylvania agriculture

From the picturesque Amish farms of Lancaster County to the mushroom farms that produce 350 million mushrooms per year, the Commonwealth is historically and economically tied to agriculture. Pennsylvania, like most Mid-Atlantic states, faces development and land use pressures that sometimes clash with its agriculture industry. In the U.S., urban sprawl engulfs over 1.2 million acres of farmland per year.¹ This sprawl, especially in Pennsylvania, brings with it new landowners who are unaccustomed to country life and are largely unwilling to deal with its shortcomings.²

Pennsylvania's Right to Farm Law was enacted in 1982 to alleviate some of the development pressures and nuisance suits brought against farms.³ With 2,584 individual municipalities regulating health, safety, and welfare, there have been several ordinances drafted that restrict expansion of agriculture operations or attempt to exclude "corporate" farms.

Pre-existing right to farm and nutrient management laws

Phyllis J. Marquitz is the Interim Director of the Penn State Agricultural Law Resource and Reference Center located at The Dickinson School of Law. She would like to thank Jennifer Beidel for providing much of the background research for this piece.

The Right to Farm Law in Pennsylvania protects farming operations against local ordinances by prohibiting the municipalities from defining "normal agriculture operations" as public nuisances (with exceptions for direct adverse effects on public health and safety).⁴ However, there are no clear penalties for municipalities that fail to comply with the Right to Farm Law. The lack of explicit language for remedial measures might explain the courts' reluctance to deprive municipalities of their regulatory powers, even when ordinances exceed their boundaries.⁵ If an agricultural operation can be shown to have a "direct adverse effect" on public health and safety, a municipality can include the operation as a defined nuisance.⁶

The Pennsylvania Nutrient Management Act contains some express provisions limiting local ordinances.⁷ The legislative language is clear; state law preempts local law involving manure storage and application practices.⁸ This allows other regulation not specific to application or storage to be drafted by local governments.

Both laws attempt to protect and regulate agriculture at the state level. With no available legal remedies for an individual if the local government deliberately creates laws in these restricted areas, some municipalities draft ordinances that tread on (or very close to) these issues. A farmer would then have to challenge the ordinance in court, fronting litigation costs on their own.

Filling in the loopholes

In an example cited by Governor Rendell in 2004, a family in Granville Township, Bradford County, operated a dairy farm for a number of years and decided to add a hog-finishing operation to their business. The township, in response to the family's efforts enacted an ordinance prohibiting any manure storage within 1,500 feet of a public road, property line, well, or other body of water.⁹ The ordinance would have prevented all future

expansion of animal agriculture within the township. Although the township was notified that its proposed ordinance was more restrictive than the Nutrient Management Act allows, it enacted the ordinance anyway. With no recourse provided in the language of the Act, the Attorney General's office and the Pennsylvania Department of Agriculture were unable to act on the farmer's behalf. The only option was for the farmer to personally sue the township; he was successful in court but incurred \$80,000 in legal fees.¹⁰

On December 31, 2003, Governor Rendell vetoed House Bill (H.B.) 1222, which contained a paragraph entitled "Exceptions to Governmental Immunity". It included language allowing for the imposition of liability, including attorney's fees, to be assessed against municipalities that enacted "unauthorized" ordinances governing "normal agriculture operations".¹¹ The veto was unsuccessfully challenged in state court based on its timeliness. After the Supreme Court of Pennsylvania upheld the veto, the parties went back to the table to create legislation addressing the effect of unauthorized ordinances on agriculture.

The Agriculture Communities and Rural Environmental Initiatives (ACRE), were unveiled in August 2004 after joint efforts from the House and Senate Agriculture Committees and the Secretaries of Agriculture and Environmental Protection. The proposal combined regulatory and legislative changes that included farm management regulation and an Agriculture Review Board to hear concerns on the legality of ordinances. The Review Board was to be made up of the Secretaries of Agriculture, Environmental Protection, and Community and Economic Development, along with the Dean of Pennsylvania State University's College of Agricultural Sciences, and an executive appointee.¹²

Act 38

The final draft of the ACRE bill did not include the Review Board, and instead had challenges directly referred to the Pennsylvania Attorney General's office (AG).¹³ When the Governor signed the bill into law as Pennsylvania Act 38 of 2005, the definitions of "normal agricultural operations" remained the same as found in the Right to Farm Law, and defined an "unauthorized local ordinance" as an ordinance enacted or enforced by a local government that (1) prohibits or limits a normal agriculture operation unless the local government has expressed or implied authority to adopt the ordinance and is not prohibited or preempted by the existing state law or (2) restricts or limits the ownership structure of a normal agricultural operation.¹⁴

The Act allows only the owner or operator of an agricultural operation to request the AG review the ordinance. The AG may then bring legal action and may request further expert consultation. A decision will be made within 120 days on whether the AG will bring action on an ordinance it believes is "unauthorized". If it is challenged, the Commonwealth Court may appoint "masters" to conduct hearings and report findings to the President Judge. The Commonwealth Court alone may invalidate an ordinance. If the AG does not pursue action, the individual may challenge the ordinance in court independently, at their own expense. Act 38 allows the Commonwealth Court to assess reasonable attorney fees and other litigation costs incurred by a plaintiff if the Court determines the government acted in "negligent disregard to the law". However, if the Court finds that the plaintiff's claim was frivolous or lacked substantial justification, it may award those costs to the local government.¹⁵ The AG must report the number of reviews requested annually to the General Assembly.

Act 38 also adds a requirement to the Nutrient Management Act increasing setback requirements to 100 feet from

surface water unless a vegetative buffer of 35 feet is in place.¹⁶ It creates a new requirement for odor management plans for new or expanded animal agriculture operations. Regulations will be drafted to create standards for odor management plans and odor management plan specialists. There is also a provision for voluntary odor management plans.¹⁷

Conclusion

The compromises in Act 38 must now be applied to actual ordinances and developed into tangible odor regulation. The agriculture industry's goal of putting more teeth in the Pennsylvania agriculture protection laws has come to pass, but the pressures of rural development continue at the local government level across the state. Pennsylvania must continue to balance its largest industry¹⁸ and its desire for farmland preservation in the Commonwealth with environmental and municipal concerns. Act 38 speaks to add to that balance.

Editor's Note: Direct inquiries to the Pennsylvania Attorney General regarding Act 38 may be directed to ACRE, Office of Attorney General, Strawberry Square, 15th Floor, Harrisburg, PA 17120.

¹ Alan Gregory, *Who Bought the Farm?*, *The Standard Speaker*, available at <http://www.msnbc.msn.com/id/3765154/> (last visited Aug. 11, 2005).

² See, e.g., Kent Fleming, *Farming in the Shadow of the City*, in 1989 Yearbook of Agriculture: Farm Management 308, 322-24 (Deborah T. Smith ed., 1989).

³ Act of June 10, 1982, Pub. L. No. 454, No. 133. "Protection of Agricultural Operations from Nuisance Suits Act."

⁴ *Id.* Section 953(a)

⁵ Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. Rev. 1694 (1998).

⁶ 3 Pa. Cons. Stat. Ann. § 953 (West 2005).

⁷ 3 Pa. Cons. Stat. Ann. § 1717 (West 2005).

⁸ *Id.*

⁹ Governor's Veto Statement, H.B. 1222, 2003 Gen. Assem. Reg. Sess. (Pa. 2004) [hereinafter Veto].

¹⁰ *Id.*

¹¹ Pennsylvania H.B. 1222, 2003 Gen. Assem. Reg. Sess. Printer No. 3127

¹² Pennsylvania H.B. 1646, 2005 Gen. Assem. Reg. Sess. Printer No. 2433

¹³ Pennsylvania H.B., 1646, 2005 Gen. Assem. Reg. Sess. Printer No. 2303

¹⁴ *Id.* at §312

¹⁵ *Id.* at §317

¹⁶ *Id.* at §507, to take effect January 2, 2006

¹⁷ *Id.* at §508

¹⁸ The agricultural industry is the largest in terms of total revenue. *AgImpacts: The Role of Production Agriculture in the Local Economy*, Pennsylvania State University, at <http://agimpact.aers.psu.edu> (last visited August 30, 2005).

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For more information, call Robert Achenbach, 541-302-1958.

Bt10 slips into the stream of commerce

Last March, Swiss agbiotech company Syngenta AG announced that it had accidentally sold U.S. farmers an unapproved type of genetically modified (GM) corn seed. And it had done so for four years. Farmers could have planted approximately 37,000 acres of the GM corn, according to the company's estimate.

How did this happen? Syngenta had developed two strains of corn, Bt10 and Bt11, engineered to express *Bacillus thuringiensis* toxin protein as a pesticide. The company obtained approval to sell Bt11 for food and feed use and for cultivation in the United States, Canada, Argentina, Japan, South Africa, and Uruguay. Syngenta also acquired approval for food and feed use in the European Union, Switzerland, Australia, New Zealand, Taiwan, the Phillipines, China, Russia, and Korea. Somehow, Bt10 seeds – retained for research – became inserted into five Bt11 seed production lines, which were sold to U.S. farmers beginning in 2001.

The error surfaced after the company overhauled its quality control program to screen products with a DNA-based test, instead of relying on field observations and examinations of certain proteins. The Bt10 contamination probably eluded earlier tests for a simple reason: Bt10 and Bt11 are difficult to distinguish. Physically identical, Bt10 and Bt11 express the same Bt toxin protein and contain a herbicide tolerance marker gene for selection. Although Bt10 has an extra, inactive antibiotic resistance marker gene, Syngenta says the main difference between Bt10 and Bt11 is that their genomes contain novel genes in different chromosomal locations.

After the discovery of the mix-up, Syngenta informed the Environmental Protection Agency, the Food and Drug Administration, and the U.S. Department of Agriculture. This was in mid-December 2004. By the end of March 2005, the EPA and USDA concluded that Bt10 contamination does not raise concerns about the environment or human and animal health.

All Bt10-tainted plantings and seed stock have been identified and destroyed or otherwise contained. Farmers must buy new Bt11 corn seed every

year, so Bt10 should not be sown again. Yet a lingering problem remained. Syngenta suggested that Bt10 might have slipped into the food supply and international export channels. It had.

In early April, a European Union representative told reporters that about 1,000 tons of food and feed products containing Bt10 are thought to have entered the food chain in Europe. It wasn't until late March that the European Commission learned about the Bt10 error, a delay that increased aggravation with the United States over GM crops.

EU Member States backed a Commission proposal to require U.S. corn gluten feed and brewers grain to be certified Bt10-free. Since a validated Bt10 detection method did not yet exist, the new measure acted as a ban until EU regulators approved a new test. By the end of April, the EU's Joint Research Center did endorse a new DNA-based test for the unauthorized Bt10 and ended the short-lived ban. Now, shipments of U.S. maize gluten feed and brewers grain must include an analytical report concluding that the product does not contain Bt10.

By May 29, about 290 tests for Bt10 had been conducted on EU-bound maize products. One test caught a contaminated shipment of Ireland-bound corn gluten feed, and U.S. officials sent a warning before the ship arrived. Irish authorities took steps to ensure that the consignment would not enter the feed chain.

Around the same time, an American shipment tainted with Bt10 cropped up in Japan, the biggest buyer of U.S. corn. Japanese officials promised to test every U.S. vessel when it arrived and asked the United States to conduct its own tests of corn shipments before they left port. Although the United States requested a one percent tolerance threshold for Bt10 contamination, the Japanese government allows no exceptions to the zero tolerance rule on crops for human consumption.

Allocating responsibility with a baseball bat

GM crop contamination events tend to bring up the question of assigning costs. A USDA official told Reuters

that his agency would not pay fees for performing Bt10 tests on Japan-bound corn at U.S. ports. Rather, private exporters or Syngenta would have to foot the bill. In 2000, the outbreak of Aventis CropScience's StarLink corn also raised the issue of who bears the responsibility for an accidental contamination with crops containing a genetically engineered trait.

Strict liability theory could provide a solution for assigning responsibility. Strict liability is a type of liability without fault in which a person engages in an "abnormally dangerous" activity. Factors that a court may consider in determining whether an activity is abnormally dangerous include whether the activity involves a high degree of risk of harm, whether the gravity of the harm that may result from the activity is likely to be great, and whether the activity carries risk that the exercise of reasonable care cannot eliminate. A legislature can also define a certain type of activity as one evoking strict liability.

In 2005, California Assemblyman John Laird (D-Santa Cruz) introduced the Food Integrity and Farmer Protection Act, which would enable farmers to collect damages for an unintentional contamination with GM crops. The manufacturer of a GM plant or seed would be liable for the contamination of a farm product, facility, or other property of any farmer, grain and seed cleaner, handler, or processor. The law would supply a manufacturer with a defense if a farmer or another party caused the contamination deliberately or by gross negligence. The bill is on hold until 2006.

Other states have tread down this path. The Vermont Senate, for instance, approved similar legislation in April ("Liability Resulting from the Use of Genetically Engineered Seeds and Plant Parts"). If enacted, GM seed manufacturers would be liable for any damages suffered by farmers. Yet the House Agriculture Committee voted unanimously in May against bringing the bill to the full House. Massachusetts and Hawaii legislatures also introduced strict liability bills in 2005. Neither passed

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muster. Why do lawmakers show so little enthusiasm for strict liability?

Earlier this year, the Montana Senate mulled over legislation that would make manufacturers of GM wheat seed liable for damages resulting from the seed's introduction into the state. Opponents of the bill, including two of Montana's largest farm groups, argued that such a law would discourage companies from bringing genetically improved seed to Montana. A representative of the Montana Grain Growers Association asserted that, if enacted, the legislation would create a moratorium on the development of new technology for the state. Others voiced concern that the law would chill seed research by start-up companies and at Montana State University. "Probably dead" is the official status of the bill.

A strict liability bill also came up for discussion in the Hawaiian Senate this year; it has been deferred indefinitely. Echoing arguments from Montana, the state Board of Agriculture opposed the bill, arguing that it would limit the state's ability to explore new technology.

When Vermont Senator Robert Starr (D-Essex/Orleans) discussed his state's GM crop contamination legislation with the *Times Argus*, he said that "the dog in this bill is strict liability." Starr compared an implementation of the strict liability provision to "killing a fly with a baseball bat."

Legislators appear unwilling to accept the possible consequences of a strict liability law as a means to protect farmers. An alternative to assigning costs for a realized risk of GM crop contamination would be to minimize the risk in the first place.

The USDA issued several penalties to Syngenta for the Bt10 affair: a \$375,000 fine for moving Bt10 material through interstate commerce without a permit, and a requirement for the company to sponsor a training conference on compliance with USDA biotech crop regulations. One of the conference goals is to develop best management practices that should prevent contamination of novel genes from GM plants. If such standards were devised, then simple negligence may suffice to allocate re-

Nebraska ag worker compensation statute

The purpose of the Nebraska worker compensation program is to provide no-fault compensation to employees injured on the job. Traditionally farm and ranch workers have been exempted from Nebraska worker compensation statutes, despite the fact that agriculture is one of Nebraska's most dangerous industries. For many years the supreme court has interpreted the farm and ranch worker exemption narrowly in order to provide worker compensation protection to as many injured agricultural workers as possible. This attitude was reflected in *Larsen v D B Feedyards*, 264 Neb 483, 648 N.W.2d 306 (2002), in which the Nebraska Supreme Court ruled that a cattle feedlot was not entitled to the farm and ranch laborer exemption where 50-75% of the cattle in the feedlot were being custom-fed. See 19(9) *Agricultural Law Update* at 7 (Aug. 2002).

In response to the *Larsen* decision, the 2003 Nebraska Unicameral amended the worker compensation statute to require agricultural employers of at least 10 employees to provide worker compensation insurance. Exempt agricultural employers must provide notice to employees that they are not covered by worker compensation insurance when the employees are hired.

Ag worker compensation insurance

requirement. Agricultural operations that employ (a) 10 or more nonrelated full-time employees (b) at one or more locations (c) for 13 or more calendar weeks per calendar year must carry worker compensation insurance. Neb. Rev. Stat. §48-106(2)(d) (2004). Agricultural employers who employ only family members are not subject to worker compensation requirements. Id. §48-106(2)(c).

Losing exempt status: the new employee notice requirement. Ag employers who are exempt from worker compensation requirements must still take certain steps to retain their exempt status. Exempt employers must notify all new employees in writing at the time they are hired that the employees are not protected by worker compensation insurance. Failure to do so makes the employer liable for worker compensation claims made by non-notified new employees. Id. §48-106(7). It is recommended that new employees sign a form acknowledging receipt of the no-coverage notice. The notice requirement was added by senators who opposed the worker compensation ag exemption. Surprisingly the notice requirement has not yet been repealed.

—J. David Aiken, Professor Water and Ag Law Specialist, University of Nebraska, Lincoln, NE

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will be restricted. **70 Fed. Reg. 45523 (Aug. 8, 2005).**

SOCIAL SECURITY TAX. The IRS has issued proposed regulations which implement changes to application of FICA tax to agricultural workers made by legislation in 1987 and 1988. Under the Acts, wages are from agricultural labor if less than \$150 per employee or

Bt10/Cont. from page 3

sponsibility for any future GM crop contamination.

—Phill Jones, reprinted with permission from the July 2005 ISB News Report

less than \$2,500 paid by one employer to all agricultural laborers. The \$2,500 test does not apply to a seasonal worker, defined as one who is employed in agriculture as a hand-harvest laborer and is paid on a piece rate basis, who commutes daily from a permanent residence to the farm where employed, and who has been employed in agriculture less than 13 weeks during the preceding calendar year. The proposed regulations reflect these statutory changes. **70 Fed. Reg. 50228 (Aug. 26, 2005).**

—Robert Achenbach, AALA Director

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

From the Executive Director:

Annual Conference: The 2005 Annual Agricultural Law Symposium is on October 7 & 8, 2005 at the Marriott Country Club Plaza in Kansas City, MO. Last minute registrations will be accepted but please either fax your registration or call me to let me know the registration is coming. I will be leaving for Kansas City on October 5. Walk-in registration will be possible, but I cannot guarantee a spot for lunch or a handbook at the site.

The conference brochure contains a reminder about the 2005 Membership Recruitment Program and three membership brochures. If you recruit a non-member to attend the 2005 conference, you will receive four chances in a drawing to win \$345.00, the cost of a member registration to the conference. You can request additional conference brochures from me. Be sure to add your name to the conference registration form for any non-member you recruit for the conference.

If your firm would like to sponsor one of the food breaks, breakfasts, lunches or the Friday evening reception, please let me know.

Update Articles: I want to encourage all members to submit articles, long and short, for this newsletter. Such articles are valuable to informing our members about the regional issues facing agricultural law. See the submission information on page 2 above.

Robert Achenbach, Exec. Dir.
RobertA@aglaw-assn.org
541-485-1090