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INSIDE

IN FUTURE ISSUES

1988 FIFRA amendments

On October 25, 1988, President Reagan signed into law the most extensive amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) passed since 1978. The FIFRA Amendments of 1988, Pub. L. No. 100-532, extensively revise FIFRA's reregistration and indemnification provisions, and direct EPA to establish a regulatory program governing storage, disposal, and transportation of pesticides.

The reregistration provision previously found at FIFRA § 3(g) has been greatly expanded. The new provisions at FIFRA § 4 establish an elaborate five-phase process for reregistering all pesticides registered before November 1, 1984. EPA is expected to complete this task by 1997:

Phase 1: Between March 4, 1989 and October 24, 1989, EPA must list all active ingredients that must be registered.

Phase 2: Registrants must notify the Agency that they intend to re-register their products and to identify possible data gaps for these products. If a product's registrant does not notify EPA within three months from the date EPA publishes Phase 1 lists that they intend to reregister the product, the Administrator may issue a notice of intent to cancel the registration. If no registrant indicates an intention to reregister any product containing an active ingredient on the Phase 1 list, EPA may issue a notice of intent to cancel the registrations of all pesticides containing that active ingredient. The Agency must accept comments on these notices but they are not subject to a hearing.

Phase 3: Registrants reregistering their products have twelve months from the date EPA publishes Phase 1 lists to submit information regarding studies and data supporting a product's reregistration. The statute enumerates the kinds of information that must be submitted. Again, EPA may cancel a product's registration if its registrant does not meet Phase 3 deadlines.

Phase 4: EPA must review Phase 3 submissions and identify data requirements that have not been met. The Agency must complete this review in eighteen to thirty months, depending on the kind of pesticide product being reviewed.

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Highlights of Technical and Miscellaneous Revenue Act of 1988

The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) (Pub. L. No. 99-514) was signed by the President on November 10, 1988, shortly before this issue went to the printer. Brief highlights of some of the changes affecting agriculture follow.

Uniform Capitalization Rules

The Tax Reform Act of 1986 enacted I.R.C. §263A, generally requiring that direct and indirect preproductive period expenses of farm plants and animals be capitalized or added to inventory costs. Except for farm plants and animals produced by farm entities required by law to use the accrual method, only plants and production animals having preproductive periods exceeding two years are subject to the capitalization rules. An election out was provided, but only at the potential cost of slower tax depreciation and more ordinary income on the disposition of the producing plants and animals.

TAMRA § 6026 exempts farm animals, other than animals produced by the accrual-required entities, from the capitalization rules, regardless of the length of the preproductive period. The exemption is made effective only with respect to costs incurred after 1988. Farmers who did not elect out of the capitalization rules for 1987 and 1988 may want to consider adopting, for those years, the safe harbor guidelines provided by Notice 88-24 (1988 I.R.B. 6) with respect to cows held for breeding and dairy purposes. The deadline for adopting these safe harbor guidelines has been extended from October 3, 1988, to the due date, including extensions, of the 1988 return. Notice 88-113, 1988-42 I.R.B. 10.

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Phase 5: The Agency must conduct a thorough examination of all data submitted in support of reregistration. EPA must complete this Phase 5 review within one year after all Phase 4 data have been submitted to the Agency.

This extensive reregistration program will be funded in part by reregistration and maintenance fees. The statute imposes a reregistration fee of $150,000 for reregistration of food or feed use pesticides, and a fee of $50,000 to $150,000 for reregistration of nonfood or nonfeed use pesticides. The statute requires apportionment of reregistration fees among multiple registrants of an active ingredient, and provides an exemption from reregistration fees for small business registrants. Through September 30, 1997, each registrant must pay an annual fee to maintain their pesticide registrations: $425 for each registration up to fifty registrations and $100 for each additional registration. No registrant can be charged registration fees on more than 200 registrations.

The section 15 indemnification provision has been fundamentally revised. Previously, section 15 provided a general right of indemnification to any person who owned a pesticide product prior to the issuance of a notice of intent to suspend and subsequent cancellation of the pesticide's registration. Under the new law, pesticide producers may be indemnified only with Congressional approval. End users continue to be entitled to indemnification from EPA. For dealers and distributors, indemnification is limited to reimbursement from the party who sold them the pesticide.

A party who sells to a dealer or distributor can avoid reimbursement obligations by providing written notice at the time of sale that no reimbursement will be made. If a dealer or distributor could have received reimbursement from the seller, but the seller is insolvent or bankrupt, the dealer or distributor may still be indemnified by the United States government.

Section 19 of the amended act authorizes EPA to issue new regulations governing the storage, disposal, and transportation of suspended or cancelled pesticides and their containers. EPA may also require pesticide registrants to submit data regarding the safe storage and disposal of their products. By December 24, 1991, EPA must promulgate rules governing pesticide container design that will promote safe storage and disposal of pesticides and must also issue rules prescribing procedures and standards for the removal of pesticide residues from containers prior to disposal; compliance with these rules will be required by December 24, 1993. In addition, section 19 gives EPA new authority to order the recall of pesticides that ha[s] been suspended and cancelled whenev[er] the Administrator determines that such a measure is necessary to protect health or the environment. In the past, the Agency has had to depend on the voluntary efforts of registrants to recall such products.

The Act further requires EPA to study ways to encourage or require the return, refill, and reuse of pesticide containers; development of pesticide formulations that leave less residue in containers; and use of bulk storage facilities to reduce the number of pesticide containers requiring disposal. This study must be conducted in consultation with other federal agencies, state agencies, industry groups, and environmental organizations. EPA must report its findings to Congress by December 24, 1990.

The amendments also expand EPA's enforcement powers. The agency is now authorized to enter, at reasonable times, any place where cancelled or suspended pesticides are held in order to determine compliance with FIFRA section 19's storage, disposal, transportation, and recall provisions. Under the new provision, any commercial applicator of a restricted-use pesticide or any person (other than a registrant, applicant f[or] registration, or producer) who distributes or sells pesticides and knowingly violates any provision of FIFRA may face imprisonment of not more than one year and/or a fine of not more than $25,000. —*Sandra A. Hoffman*

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AALA Editor Linda Grim McCormick
188 Morris Rd
Toney, AL 35773

Contributing Editors, Sandra A. Hoffman, Washington, D.C., Lonnie Beard, University of Arkansas, Fayetteville, AR, Terence J. Centner, University of Georgia, Athens, GA, Linda Grim McCormick, Toney, AL

State Reporter: William H. Rice, Montpelier, VT

For AALA membership information, contact Mason E. Wiggins, Jr., Heron, Burchette, Ruckert and Rothwell, Suite 700, 1025 Thomas Jefferson St. N.W., Washington, D.C. 20007

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 188 Morris Rd., Toney, AL 35773

HIGHLIGHTS OF TAMRA OF 1988 / CONTINUED FROM PAGE 1

Diesel fuel tax

Diesel fuel used for farming purposes is exempt from the federal diesel fuel excise tax. Previously, farmers could make tax-free purchases, but a 1987 law eliminated the tax-free purchases after March 31, 1988, and effectively required that farmers pay the tax and then request a refund. Refund claims could be made in conjunction with the income tax return for the particular year or earlier if the fuel taxes paid exceeded $1,000 during any one or more of the first three quarters of a taxable year.

TAMRA §3001 restores the ability of farmers to make tax-free purchases of diesel fuel, and is effective for sales after 1988. Farmers who paid the tax on purchases during 1988, but after March 31, 1988, are entitled to a special refund of those taxes, with interest. The Treasury Department was given thirty days after the enactment date to issue guidance on the special refund procedure.

Depreciation

TAMRA § 6028 provides that the 150% declining balance method of depreciation will apply to depreciable farm property that is placed in service after 1988 and that previously qualified for the 200% declining balance method.

TAMRA §6027 makes single purpose agricultural or horticultural structures placed in service after 1988 ten-year property (instead of seven-year) for depreciation purposes, with exceptions for certain structures constructed, reconstructed, or acquired pursuant to a written contract binding on July 14, 1988, or if the construction or reconstruction began by July 14, 1988.

TAMRA §6029 makes fruit or nut-bearing trees and vines placed in service after 1988 ten-year property with only straight line depreciation available.

Disaster payments

TAMRA §6033 provides that payments received under the Disaster Assistance Act of 1988 may qualify for the special one-year income deferral rule of I.R.C. §451(d).

Livestock sold on account of drough[t]

TAMRA §6030 provides that the special one-year income deferral rule of §451(e) for livestock sold on account of drought may be available with respect to livestock held for draft, breeding,

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dairy, or sporting purposes, regardless of holding period, effective for disposi-ions after 1987.

ancellation of indebtedness .ncome

TAMRA §10014 makes technical corrections to I.R.C. §108. The amount of cancellation of indebtedness income that can avoid recognition under the special rule in I.R.C. §108(g) is limited to no more than the sum of the farmer's "adjusted tax attributes" and bases in "qualified property." The change relates back to the effective date of the 1986 Act changes. TAMRA §1019.

– Lonnie Beard

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks:

1. FmHA; Agricultural Credit Act of 1987; implementation; correction. 53 Fed. Reg. 39014.

2. FmHA; Analyzing credit needs and graduation of borrowers (SFH loans); final rule; effective date 11/14/88. 53 Fed. Reg. 39739.

3. FmHA; Implementation of salary offset; federal employees; final rule; effective date 11/2/88. 53 Fed. Reg. 44177.

4. FCA; System institutions; reorganization authorities; final rule; effective date 10/5/88. 53 Fed. Reg. 39079. "Sets forth requirements governing the development of proposals for the merger of certain federal land bank associations and production credit associations and timetables for the submission of merger proposals to the affiliated banks and to he FCA."

5. FCA; Funding and fiscal affairs, loan policies and operations; minimum capital adequacy standards; final rule; 53 Fed. Reg. 39229.

6. FCA; Federal Agricultural Mortgage Corporation; agricultural real estate loans, secondary market; proposal rule. 53 Fed. Reg. 39609.

7. FCA; Regulatory Accounting Practices; final rule. 53 Fed. Reg. 40049. "The regulations authorize Farm Credit institutions to use RAP for certain interest rate evaluations and extend the use of RAP until 1992."

8. FCA; Organization; conservatorships and receiverships; proposed rule. 53 Fed. Reg. 43897.

9. CCC; Tree Assistance Program; final rule; effective date 10/13/88. 53 Fed. Reg. 40015. "These regulations set forth standards for determining losses and payments, applicable payment limitations, and other program provisions [in regard to the Tree Assistance Program authorized by the Disaster Assistance Act of 1988]."

10. CCC; Emergency Livestock Assistance; interim rule; effective date 8/26/88. 53 Fed. Reg. 40206. "Regulations implementing livestock emergency provi-ons of the Disaster Assistance Act of 1988."

11. CCC; Forage Assistance Program; interim rule; effective date 10/20/88. 53 Fed. Reg. 41309. "These regulations set forth standards for determining losses, effective cost-share rates, payments limitations. . . ."

12. APHIS; Swine identification; final rule; effective date 11/14/88. 53 Fed. Reg. 40378. "Mandates that all swine in interstate commerce be identified and that records concerning the swine identification be maintained."

13. APHIS; Horse protection regulations; interim rule; effective date 10/24/88. 53 Fed. Reg. 41561.

14. EPA; Food additive regulations concerning pesticide residues; procedural regulations; proposed rule; comments due 12/19/88. 53 Fed. Reg. 41126.

15. EPA; Regulation of pesticides in food; addressing the Delaney Paradox Policy Statement; notice; 53 Fed. Reg. 41104.

16. USDA; Rural labor; Immigration Reform and Control Act of 1986; definitions; proposed rule. 53 Fed. Reg. 41339. "Reexamines whether the commodity "sod" meets the definition of "other perishable commodities" in light of . . . *Heriberto Morales v. Lyng*, Civ. Action No. 87-C-20522. . . . [A]lso reexamines whether field work in the production of sod is "seasonal.""

17. USDA; Rural labor; IRCA of 1986; SAWs; temporary residence; proposed rule. 53 Fed. Reg. 41603. "This proposed rule redefines seed as it applies to lettuce seed."

18. ASCS; Dairy indemnity payment programs; interim rule; effective date 11/1/88; comments due 1/3/89. 53 Fed. Reg. 44001.

– Linda Grim McCormick

Milk marketing order amendments

A federal district court has ordered the Secretary of Agriculture to include proposals on frequency payments in a hearing on milk marketing orders in *National Farmers Organization, Inc. v. Lyng*, Civil Action No. 88-1718 (D.D.C. August 3, 1988).

The Department of Agriculture had announced that it was considering conducting a multi-issue hearing concerning proposed amendments to three milk marketing orders. Pursuant to a request for proposals for amendments, plaintiff National Farmers Organization (NFO) submitted proposals regarding the fre-

(continued on page 7)

AG LAW CONFERENCE CALENDAR

Tax week at Penn State.

Dec. 5-8, J.O. Kelley Conference Center, University Park, PA.

Topics include: government farm program issues; commodity certificates; dairy termination and passive losses

Sponsored by Penn State University College of Agriculture.

For more information, call 814-865-7656.

Penn State income tax institutes.

Dec. 5-6, State College.

Dec. 13-14, Edinboro, PA, and Wilkes-Barre, PA.

Dec. 15-16, Danville, PA.

Topics include: passive losses; agricultural tax update

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1989 Penn State area tax meetings.

Jan. 3, 1989, Bedford, PA; Jan. 4, 1989, Uniontown, PA; Jan. 5, 1989, Butler, PA; Jan. 6, Indiana, PA; Jan. 10, Warren, PA; Jan. 11, Mercer, PA; Jan. 12, DuBois, PA; Jan. 13, Centre County, PA; Jan. 17, Tamaqua, PA; Jan. 18, Quakertown, PA; Jan. 19, Lancaster, PA; Jan. 20, Chambersburg, PA; Jan. 24, Lewisburg, PA; Jan. 25, Honesdale, PA; Jan. 26, Tunkhannock, PA; Jan. 27, Wellsboro, PA.

Topics include: preproductive costs, investment credit carryover, dealing with recaptures

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For more information, call 814-865-7656

Non-point water quality concerns.

Dec. 11-12, Marriott Hotel, New Orleans, LA.

Topics include: status report on federal, state, and local water quality laws, examination of the approaches for providing clean water in presence of agricultural, industrial, municipal, and recreational activities

Sponsored by the American Society of Agricultural Engineers

For more information, call 616-429-0300

Conference for employers of farm labor.

Jan. 16-17, 1989, Thompson's Dairy Bar, Clarks Summit, PA.

Feb. 8-9, 1989, Ramada Inn, Kennett Square, PA.

Feb. 14-15, 1989, Holiday Inn, Gettysburg, PA.

Topics include: employment of migrant and seasonal agricultural workers; Penn Seasonal Farm Labor Act, employee health and safety rules and regulations

Sponsored by Penn. State University College of Agriculture

For more information, call 814-865-9547 or 814-865-7656

Hazardous wastes, superfund, and toxic substances.

Dec. 1-3, Westin Hotel, Washington, D.C.

Topics include: groundwater, pesticides, and non-point source pollution

Sponsored by ALI-ABA and Environmental Law Institute

For more information, call Alexander Hart, 215-243-1630 or 1-800-CLE-NEWS.

Hazards of the workplace revisited

by John C. Becker

Since writing on this subject for the December, 1985 issue of the *Agricultural Law Update,* quite a bit of activity has taken place at both the state and federal level. To most employers, a key problem is deciding which rules must be followed. To those employers who are subject to provisions, and those who advise them, I trust this information will shed some light on an otherwise murky question.

In this two-part article, I offer an explanation of what a typical farm or agribusiness employer must do to comply with various statutes and regulations that focus on hazards in the workplace. In the first part of the article, I will discuss the provisions of the OSHA Hazard Communication Standard, 29 CFR Section 1910.1200 et seq. In the second part of the article, which will be published in a later issue of the *Agricultural Law Update,* I will offer an explanation of the employer's obligations under title III of the 1986 Superfund Amendments and Reauthorization Act (SARA). 42 USC Section 11001 et. seq. (West, 1988 Supp.).

Background

The involvement of the Occupational Safety and Health Administration of the United States Department of Labor in this field dates back to 1974 when the National Institute for Occupational Safety and Health recommended that the Secretary of Labor promulgate a standard requiring employers to inform employees of potentially hazardous materials in the workplace. In 1981, the Department of Labor published a proposed rule entitled "Hazard Identification" 46 Fed. Reg. 4412-53 (1981). This standard was to be applicable to employers in Division D, Standard Industrial Classification Codes 20-39, which include only employers in the manufacturing sector. This proposal was withdrawn by the Secretary on February 12, 1981 for further consideration of available alternatives. On March 19, 1982, the agency again published notice of proposed rule making entitled "Hazard Communication" 47 Fed. Reg. 12091. As in 1981 proposal, this proposal was limited to employers in the manufacturing sector.

On November 25, 1983, the standard was published in its final form. 48 Fed. Reg. 53279 (1983), codified at 29 CFR Section 1910.1200. As originally proposed, employers were to be in compliance with the standard by May 25, 1986, including initial training for all current employees, 29 CFR Section 1910.1200(j)(3). In the interim between publication of the final rule and its effective date for employers, a number of states chose to pass their own legislation to regulate an employer's obligation to disclose information to employees, and in some cases to the general public as well. In some of these states, challenges arose to the state legislation on grounds that the existence of the OSHA standard preempted the field. Cases such as *N.J. State Chamber of Commerce v. Hughey,* 774 F.2d 587 (3rd Cir. 1985) and *United Steelworkers v. Auchter,* 763 F.2d 728 (3rd Cir. 1985) held that the OSHA standard preempted hazard communication rules in states that enacted their own plans that applied to employers who were also subject to the OSHA standard. Since production agriculture and agricultural service industries did not fall under Division D Standard Industrial Classification Codes 20 through 39, such employers were not concerned with the preemption issue. State law was the only issue they faced, and in some cases, state law did not regulate agricultural employers.

Auchter, however, went beyond the preemption issue and raised questions about coverage limited to only the manufacturing sector. *Auchter,* after considering the Secretary's argument of agency discretion to initiate coverage in limited areas, directed the Secretary to reconsider the application of the standard to employers in other sectors. He was to order its application to other sectors, unless the Secretary could state reasons why such application would not be feasible. 773 F.2d 728, at 739.

In November, 1985 the agency issued its notice of proposed rule making that sought to generate public comment on extension of the Hazard Communication Standard to sectors other than the manufacturing sector. 50 Fed. Reg. 48794 (1985). By May, 1987 no further action was taken by the agency and the Third Circuit ordered OSHA to issue a final standard within 60 days to expand the scope of industries covered, unless it could be demonstrated that such an expansion would not be feasible. *United Steelworkers v. Pendergrass.* 819 F.2d 1263 (3rd Cir. 1987). On August 24, 1987 the final rule extending the Hazard Communication Standard to most nonindustrial sectors was issued. 52 Fed. Reg. 31877. Under this rule, the expanded standard was to become effective on May 23, 1988. Prior to this date a temporary stay was granted by the Third Circuit in a case titled *Associated Builders and Contractors, Inc. v. Secretary of Labor,* CA3 No. 88- 3345. On June 24, 1988, the Third Circuit granted a motion in this case for an emergency stay of the expanded standard. 18 BNA OSHR 459 (1988). On July 8, 1988 the Court clarified this stay by specifying that the stay applied only to the construction industry. On July 22, 1988, OSHA issued its notice of enforcement of the expanded hazard communication standard. 53 Fed. Reg. 27679. In this notice OSHA stated that beginning August 1, 1988 it would check for compliance with the Hazard Communication Standard in all programmed inspections in covered non-manufacturing industries.

The OSHA Hazard Communication Standard

To comply with this standard, an employer would have to do these things:

1. Determine which materials in the workplace are hazardous. 29 CF Section 1910.1200(e)(1)(i).
2. Obtain and file a material safety data sheet, MSDS, for each hazardous chemical. Id. Section 1910.1200(g)(1).
3. Develop and implement a *written* hazard communication program for the employer's workplace. Id. Section 1910.1200(e)(1).
4. Ensure that the labels or other forms of warning used on containers of hazardous materials meet the requirements of the standard. Id. Section 1910.1200(f)(5).

The first obligation can be met by surveying the workplace to identify chemicals and other materials used in the business and locating MSDS's for all products that have been identified as hazardous. The MSDS is important, for the employer may rely on the information on the sheet to make the hazard determination. Separate tests of materials need not be made, if reliance is placed on the MSDS information. Id. Section 1910.1200(d)(1).

If the manufacturer did not send an MSDS with the material, a request should be made to obtain a copy. Manufacturers, importers, and distributors are under are separate obligation to provide this information. Id. Section 1910.1200(g).

If the employer does not have an MSDS for the material, the employer can also check certain lists of recognized hazardous materials to determine if the

John C. Becker is Associate Professor of Agricultural Law at The Pennsylvania State University, University Park, PA.

material is considered hazardous. These lists include one prepared by OSHA, 29 CFR section 1910, subpart Z, and the list of substances and physical agents in the work environment prepared by the American Conference of Government Industrial Hygienists (ACGIH) which have been assigned a permissible exposure limit or a threshold limit value. More detailed investigations can be made by referring to published lists of cancer causing materials or research reports of animal or human studies that have identified materials that pose a physical health hazard. As this evaluation is detailed, time consuming, and difficult for most people to do, the common way to meet the determination requirement will be to rely on the manufacturer's MSDS.

The second requirement is to gather the MSDS's and retain them in the records of the employer. Id. Section 1910.1200(g)(1). The purpose of retaining the documents is to satisfy the requirement that employees who request copies of the MSDS can have ready access to them at any time during the work day. Id. Section 1910.1200(h)(1)(iii). The MSDS information will also be needed to comply with the employer training requirement.

The third requirement details an employer's obligation to develop and implement a *written* hazard communication program for the workplace. Id. Section 1910.1200(e). The standard requires that this program cover topics such as labeling and label warnings, information from MSDS's, and the employee training program. In addition, the plan must provide a list of hazardous chemicals known to be present in the workplace. This list must use references or terms that are consistent with the description found on the MSDS for the product. In addition, the plan must identify the method the employer will use to inform employees of the hazards they face in performing nonroutine tasks, such as cleaning containers or equipment that uses hazardous materials, and the hazards associated with unlabeled pipes in the work area. An employer's plan must also identify the method the employer will use to inform others who come onto the workplace, such as outside contractors or visitors, of hazards found in the workplace. Each employee is given the opportunity to request a copy of the employer's written plan.

In regard to the labeling provisions of the written plan, the employer should focus on these requirements found in the Hazard Communication Standard:

* Chemical manufacturers, importers, and distributors must ensure that chemicals leaving their workplace are tagged or marked with the identity of the hazardous chemical, appropriate warnings for the hazard that is associated with the particular product, and the name and address of the manufacturer, importer or distributor. Id. Section 1910.1200(f)(1).
* Employers must ensure that each container of hazardous chemicals in the workplace is labeled in a way that identifies the hazardous material in the container and carries an appropriate warning for the hazard posed by that material. Id. Section 1910.1200(f)(5).
* Employers need not label portable containers that are filled from labeled containers, if the material in the portable container is immediately used by the employee who performed the transfer. Id. Section 1910.1200(f)(5).
* The employer must ensure that the label is legible, in English, and prominently displayed on the container. If the employer has employees who do not speak English, the employer can translate the label information into a language the workers' understand, but it must also be presented in English. Id. Section 1910.1200(f)(9).

In regard to information obtained from MSDS's, the Hazard Communication Standard requires chemical manufacturers and importers to include specific information on the MSDS. This information includes the following items (Id. Section 1910.1200(g)(2):

* The chemical and common name of the substance.
* If the material is a mixture, the chemical and common name of each chemical in the mixture.
* The physical and chemical characteristics of the hazardous chemical, such as its flash point and vapor pressure.
* The physical hazards of the chemical, including its potential for fire, explosion, or chemical reaction.
* The health hazards of the chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to it.
* The chemical's primary routes of entry into the body.
* OSHA's permissible exposure limit to the hazardous substance, or a limit used or recommended by other organizations or the manufacturer or importer of the chemical.
* An indication whether the hazardous material has been identified as a potential cause of cancer.
* Procedures for the safe handling of the hazardous material, including, hygiene, clean-up of spills and leaks, and safety precautions during repair.
* Personal protective equipment that should be worn, safe work practices, and any other control measures that should be taken when using or handling the material.
* Emergency first aid measures for exposure to the hazardous material.
* The date the MSDS was prepared or the last change made to it.
* The name, address, and telephone number of the chemical manufacturer, importer, employer or other responsible party that prepared or distributed the MSDS and who can provide additional information about it, if necessary.

From an MSDS, an employer can obtain a wealth of information that is needed to comply with the Hazard Communication Standard. This makes the MSDS a very important document to get and retain. The Hazard Communication Standard requires manufacturers and importers to ensure that the information found in the MSDS accurately reflects scientific evidence used to make the statements. Id. Section 1910.1200(g)(5). Copies of the MSDS are to be provided with the initial shipment of the material and with the initial shipment after an MSDS is updated. Id. Section 1910.1200(g)(6), (7). The documents can be sent with the material or separately from it prior to, or at the time of shipment.

In regard to the employee information portion of the written plan, Section 1910.1200(h)(1), the employer must inform employees of the requirements of the standard, any operations in the work area where hazardous chemicals are present, and the location and availability of the written hazard communication plan, including the required lists of hazardous chemicals and the MSDS's. The employee training portion of the plan, Id. Section 1910.1200(h)(2), is designed to provide employees with specific information at the time they are assigned to a particular work area and whenever a new hazard is introduced into the area. These requirements are more detailed and include these items:

* Methods of detecting the presence of a hazardous chemical in the workplace,

(continued on next page)

such as monitoring devices, visual signs, odor of released chemicals, etc.
* The physical and health hazards of the chemicals in the work area.
* Measures employees can take to protect themselves from these hazards, including safe work and handling practices, emergency procedures and personal protective equipment.
* The details of the written hazard communication plan developed by the employer, including the labeling system, MSDS, and how employees can obtain and use the appropriate hazard information.

The fourth requirement of the standard deals with labeling requirements. These have been outlined above to include the obligation to ensure that containers are properly labeled when received and relabeled if the material is transferred to other containers. Id. Section 1910.1200(f)(1), (5), (6), (7), (8), (9). In addition, labeling requirements are part of the hazard communication plan since labels provide important user information that is needed in day to day use and as part of the training program. Id. Section 1910.1200(e)(1).

Under other applicable OSHA regulations, 53 Fed. Reg. 38164, to be codified at 29 CFR Section 1910.20(d)(1)(ii), employers are required to maintain records of employee exposure to toxic or harmful substances for periods of at least 30 years. Employee medical records, which can include employment questionnaires or job histories that list occupational exposures, must be maintained for the length of employment plus 30 years thereafter, Id. Section 1910.20(d)(i). MSDS's need not be retained for a specified period as long as some record of the identify of the chemical substance or agent, where it was used, and when it was used is retained for at least 30 years, Id., Section 1910.20(d)(1)(ii)(B).

Interesting questions are being raised regarding OSHA's approach to agricultural employers. Under current appropriation law, such as H.R. 3058, October 14, 1987, the Department of Labor is prohibited from obligating or spending its funds to issue, administer, or enforce its rules and standards against any person who is engaged in a farming operation that does not maintain a temporary labor camp and that employs ten or fewer non-family employees.

Instructions issued by the OSHA office of General Industry Compliance Assistance, indicate that for purposes of this exemption, family members of farm employers are not counted as employees when determining number of employees. Query, would the same rule apply to family partners in a partnership and family shareholders in a farm corporation? The instruction also indicates if the temporary labor camp is unoccupied at the time of inspection, and is expected to remain unoccupied during the subsequent 12 month period, it will be considered inactive and, therefore, in the exempt category.

While this prohibition seems straightforward, confusion has arisen by reason of the approach some have taken interpreting it, especially in a local where state law has been preempted by the OSHA rule. Simply stated, some argue that the appropriation prohibition acts as a jurisdictional limitation on OSHA's authority. If it has no jurisdiction over the small farmer, then for preemption purposes there is no need for preemption. Therefore, state law applies to such employers. Carried to its logical conclusion, this approach would lead to the situation where some employers in agriculture are subject to the OSHA standard while others may be subject to state law if such laws exist. The central issue in this approach is concluding that the appropriation law prohibition is on the same par as a specific exemption under the OSH Act. 29 USC 651 (West, 1985).

On its face, this approach has a number of problems. Historically, the appropriation prohibition first appeared some years after the OSH Act was passed, but no effort was made to amend the OSH Act at that time. In its recurring form, the prohibition applies only to the appropriation that is the subject of the specific bill. Once the appropriation is exhausted, so is the prohibition, at least until the next appropriation bill. If the next appropriation does not contain the prohibition, then the agency is no longer constrained by it and full enforcement can proceed. Under such a situation, it seems clear that there is no relationship between the appropriation prohibition and the underlying authority of the Department of Labor. All this aside, a disturbing part of this approach is that its advocates have been found in OSHA itself!

Further complication of this issue arises from the Environmental Protection Agency's proposed rule creating worker protection standards for agricultural pesticides, Vol. 53 Federal Register No. 131, pp. 25970 et. seq. The agency's authority to issue regulations has been in existence for some time and it has exercised it to establish re-entry times for fields treated by certain pesticides and required warnings for entry into fields already treated or those about to be treated, 40 CFR Section 170.3, 170.5. The proposed revision to the standard is much more detailed and includes provisions for new areas such as training, personal protective equipment, decontamination and cholinesterase monitoring.

On August 8, 1988, OSHA issued a notice of proposed rule making and notice of public hearing, Vol. 53, Federal Register, No. 152, pps. 29822-29856. In the history statement of this notice, OSHA stated its primary concern is that the protection afforded by the hazard communication standard is actually provided to all employees. If this protection is afforded by the regulations of another Federal agency, then under section 4 (b)(1) of the OSH Act, 29 USC 653(b)(1), the OSHA standard would not apply. See also *Organized Migrants in Community Action, Inc. v. Brennan*, 520 F.2d 1161 (D.C. Cir. 1975). In regard to the regulation of workers exposed to pesticides, OSHA summed up its assessment of the present situation as falling into one of three groups. The first group includes applicators of restricted use pesticides who are certified to do so. OSHA concluded that EPA has exercised statutory authority to protect such workers. The second group includes workers exposed to non-restricted use pesticides. For this group some of the EPA regulations benefit the workers, such as labeling requirements. Other aspects, however, such as training and access to material safety data sheets, are not covered by EPA regulations but are part of the OSHA standard. In the second group, OSHA sought public comment on the question of which agency should regulate this group. The third group of workers are those who are incidentally exposed to pesticides after their application. In the third group, OSHA felt this group was clearly under its jurisdiction and the hazard communication standards apply to them. Comments on the proposed rule were due in Washington on or before October 7, 1988 and the hearing was scheduled for November 15, 1988 in Washington, D.C.

It would be fair to say that some employers have been interested in these issues for a long time. These employers may have already implemented programs to disclose information and instruct workers on safety and first aid procedures. To an employer of this type, the presence of a regulation requiring an employer to act is useful because it identifies action to be taken. For other employers, however, the presence of the regulation and the threat of penalties for violation are the only incentives for complying with yet another burden on the employer. Perhaps the largest group, however, is that group which is honestly trying to do what the regulations require, but which can't seem to resolve the nagging question of which rules to follow. If the regulating agencies present an appearance of confusion on the question of which rules apply, some of these employers may conclude that if the agencies themselves cannot decide what to do, there is little risk attached to noncompliance with either standard. In such a situation, employees are at risk since information they can use and apply is not being given them. The group that is most in need of these protections should not be put in jeopardy while these questions are debated.

MILK MARKETING ORDER AMENDMENTS / CONTINUED FROM PAGE 3

quency of payments from milk handlers to milk producers.

NFO's proposals called for handlers to pay milk producers three times a month. The objective of the proposals was to protect producers from financial loss due to the rising tide of bankruptcies among milk handlers. During the time period between payments, the milk producers are in the position of extending unsecured credit to the milk handlers.

The Administrator of the Agricultural Marketing Service decided to not include NFO's proposals in the hearing notice. In correspondence to NFO, the Administrator cited limited support for such a change from industry representatives.

In federal district court, NFO challenged the decision of the Department of Agriculture to exclude mention of the frequency of payment proposals as arbitrary and capricious. Two different grounds were advanced. First, the Department of Agriculture was treating NFO's proposals differently than other proposals in requiring a higher standard of support. Second, the decision not to include the proposals in the hearing notice was premised on irrelevant or inadequate information.

The court found that the exclusion of the frequency of payment proposals from the draft notice of hearing was a patently arbitrary action unrelated to the applicable federal statute and regulations. The Secretary of Agriculture was ordered to include NFO's proposals in the hearing and to provide notice to all interested parties of these proposals. – *Terence J. Centner*

Patronage-sourced income from CCC storage credits

A district court has found that CCC storage and handling credits paid to a cooperative may qualify under section 1382(b) of the Internal Revenue Code as patronage-sourced income in *Caldwell Sugars Co-op, Inc. v. United States*, 692 F. Supp 659 (1988).

The charges in issue paid by the CCC arose under the "reseal" program for extensions of CCC loan maturity dates. The government claimed, following Revenue Ruling 70-25, that storage and handling payments under the "reseal" program were income derived from doing business with the CCC.

The district court disagreed. Following *Cotter and Company v. United States*, 765 F 2d 1102 (Fed. Cir. 1985), and other decisions, the court found that the payments were patronage income rather than incidental income from business done with the government. Thus, the payments paid to member patrons as patronage dividends did not have to be taken into account in determining the taxable income of the cooperative. – *Terence J. Centner*

STATE ROUNDUP

VERMONT. *Agricultural legislation.* The 1988 session of the Vermont General Assembly focused heavily on so-called "growth" issues because of the perception that Vermont was rapidly losing its farms to development pressures.

In order to provide assistance, the legislators enacted Act 200. That Act deals primarily with the land use planning process. It also contains several important agricultural programs, including: a one-year dairy subsidy, a working farm tax abatement program, and an agricultural land development rights acquisition program. The General Assembly also enacted Act 203, which includes a new loan program designed to help stabilize farm debt.

DAIRY INDUSTRY INCOME STABILIZATION PROGRAM. A subsidy of up to $5,000.00 per dairy farm is provided to eligible farmers who can show net farm income of less than $32,000.00 and membership in a regional marketing cooperative. Payments will be made in two installments based on $.50 per hundred pounds of production. $7,500,000.00 was appropriated to pay for the program.

Participating farmers are required to grant the State Housing and Conservation Board a right of first refusal on their farms. This right may be exercised if the farmer receives an offer to buy the farm while it is enrolled in the program.

WORKING FARM TAX ABATEMENT PROGRAM. Most of the property taxes on actively worked farmland are reduced in return for a commitment to keep the land in production for five years. No taxes are levied on farm buildings. Farmers enrolled in the program are liable only for taxes for municipal services, and their land must be assessed at its current use value. They are not responsible for paying school taxes. Municipalities are reimbursed by the state for subsequent lost tax revenues.

In order to be eligible, a farmer must receive at least fifty percent of his income from farming operations. Eligible land may consist of cropland, pasture, land under and around farm buildings, and other land, such as forestland or wetland, that is contiguous to eligible cropland or pasture. It must meet the agricultural lands criteria of the applicable municipal or regional plan. Houses and house sites may not be enrolled in the program.

In the event the farm land is converted to a non-farm use within five years of receiving a payment, tax benefits received under the program must be repaid to the state. The State Housing and Conservation Board also has a right of first refusal to purchase converted farmland.

1988 FARM TAX REIMBURSEMENT PROGRAM. This is a temporary program to reimburse non-dairy farmers for a portion of their property taxes paid during the 1988 tax year. It will be superceded by the Working Farm Tax Abatement Program in 1989.

Benefits for each land owner are capped at $5,000.00, and net farm income must be $32,000.00 or less. The land eligibility requirements are identical to those provided in the Working Farm Tax Abatement Program. Farmers who sell land involved in the program within one year of receiving tax reimbursement payments must repay those benefits. In addition, the State receives the right of first refusal on land that is converted to non-farm uses for a ? that period.

AGRICULTURAL LAND DEVELOPMENTS RIGHTS ACQUISITION PROGRAM. The Housing and Conservation Board received $20,000,000.00 in appropriations for use, in part, for the purchase of interests in agricultural land. The Commissioner of Agricultural has been given the responsibility for developing a program to acquire development rights in agricultural lands. The Commissioner will make recommendations to the Board on land acquisitions.

FAMILY FARM DEBT STABILIZATION PROGRAM. Private banks in Vermont have agreed to provide up to $20,000,000.00 to the Vermont Industrial Development Authority for financing the Family Farm Debt Stabilization Program. The money will be provided at a relatively low interest rate for commercial transactions. in return, the State has agreed to guarantee that the banks are repaid.

Farmers may obtain refinancing for existing agricultural operating loans under the program. Some funding will also be available for new financing. Agricultural operating loans include money borrowed for the purchase of farm machinery and equipment, livestock, poultry, furbearing and other farm animals, fish, birds, bees, tools, seed, fertilizer, silos, horticultural and silvilcultural supplies, or for the payment of annual farm operating expenses.

Interest rates will be based on the cost of the money to the Authority reduced by two percentage points. In addition, wherever possible, the Authority will attempt to take advantage of the Farmers' Home Administration Guarantee Program, which could result in an additional two percent reduction in interest rates.

Successful applicants must establish proof of Vermont residency, verification that the applicant is a full-time farmer, that the loan will result in a positive cash flow within a reasonable time and for the duration of the loan, and inability to obtain credit from commercial or agricultural lending sources at reasonable rates.

– *William H. Rice*

219 New York Avenue
Des Moines, Iowa 50313

agricultural law update

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Department of Agricultural Economics
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404-542-0756

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North Platte, NE 69103
308-532-7110