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The Clinton administration's new wetland policies

Few environmental issues have generated more controversy in agriculture than the issues of what are wetlands and how should wetlands be protected. In an effort to reduce the controversy and improve wetland protection policies, the Clinton administration on August 24, 1993, unveiled a comprehensive package of improvements to the federal wetlands program.

The package includes proposed legislative and regulatory changes that will provide several benefits to agriculture and make an effort to reduce the red tape involved in wetlands regulation. At the same time, however, it backtracks on certain efforts of the previous administration to mitigate wetlands regulation.

On the next day, August 25, 1993, the administration followed with new Army Corps of Engineers ("Corps") and Environmental Protection Agency ("EPA") regulations to clarify ambiguities in the administration of section 404 of the Clean Water Act, primarily by modifying the definition of "discharge of dredged material" for purposes of section 404. 58 Fed. Reg. 45,008-45,038 (1993).

Section 404 (33 U.S.C. § 1344) regulates the discharge of dredged and fill material into "navigable waters" or "waters of the United States." Section 404 is at the heart both of the federal wetlands regulatory program and of much of the current controversy: it affects wetlands because these lands are classified by the Corps and EPA as navigable waters or waters of the United States; and the complicated process of obtaining section 404 permits for farm land classified as wetlands has been a sore point for many farmers.

The clarifying regulations were mandated by the settlement agreement reached last year in a case involving section 404, *North Carolina Wildlife Federation v. Tulloch*, Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992). As part of the settlement, the government agreed to modify its definition of "discharge of dredged material."

So important is section 404 to the overall regulatory scheme for our nation's waters and wetlands that the Federal Register publication of the few paragraphs of new regulations on section 404 was accompanied by twenty-seven densely-packed pages in the preamble of justifications and analysis for the administration's position.

Given the important policy implications of the new section 404 regulations, the need to issue them no doubt spurred the administration to announce the larger policy changes the previous day. Also, it is believed that the new administration and members of Congress have felt it important that the administration weigh in on the wetlands issue prior to consideration by Congress of the reauthorization of the Clean Water Act this fall.

The August 24 policy announcement will be followed up with the promulgation of

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Ch. 12 Bankruptcy extended and amended

On August 6, 1993, President Clinton signed a bill into law that extended the provisions of Chapter 12 of the Bankruptcy Code. Pub. L. No. 103-65 (1993). The new law provides for a five year extension of these provisions. Without this extension, Chapter 12 would have sunset on October 1, 1993.

In addition to providing for the five year extension, the new law amends one Chapter 12 provision. Section 1221 previously required the debtor to file his or her plan within 90 days after the order for relief is granted, that is, within ninety days after filing. 11 U.S.C. § 1221. The court was authorized to grant additional time to file the plan "if an extension is substantially justified." *Id.* Under the new law, the standard for granting an extension beyond the ninety day period is altered. The new standard provides for an extension when "the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." Pub. L. No. 103-65 (1993).

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implementing regulations and guidelines, probably along with recommended legislative changes as well, over the next few months. The August 25 regulations were to become effective on September 24, 1993. However, the National Association of Home Builders and several other land use groups filed suit in the federal district court in Washington, D.C., on the day prior to the publication of the regulations, challenging them on the basis that they represent an illegal expansion of regulatory authority by the Corps and EPA.

Agriculture and wetlands policy

Many farmers are directly affected by federal wetlands policies — specifically section 404 and the so-called "swampbuster" provisions of the Food Security Act of 1985 (16 U.S.C. §§ 3821-3824). Some 55 million acres in this country currently in crop production are land that has been converted from wetland.

Section 404, which is administered by the Corps and EPA, regulates activities that affect the land's wetland characteristics. In an effort to protect farmers from excessive wetland regulation, subsection (f)(1) of section 404 specifically provides that a broad category of "farming" activities are *not* to be prohibited or regulated under section 404.

However, that exception does not cover some other common land maintenance and development practices. As a result, the section 404 rules relating to discharges of dredged and fill material have affected many farmers trying to convert wetlands to agricultural land, or even just trying to maintain existing ditches or drainage systems.

In addition, farmers are subject to the "swampbuster" policy administered by the Soil Conservation Service ("SCS") of the USDA. Under these rules, farmers can lose eligibility for USDA programs for farming on converted wetlands covered by the policy. The fact that section 404 and swampbuster have differing approaches and administering agencies has been the basis for much of the farmers' complaints against federal wetlands policy.

The administration's August 24 announcement acknowledges farmers' concerns by recognizing the need to accommodate the needs of agriculture in developing the new wetland policies. The announcement states that "[t]he Administration recognizes the valuable contribution of agricultural producers to the Natino's economy and more generally to the American way of life. We also appreciate the challenges faced by farmers as they try to comply with wetlands regulations.... As a result, the Administration is committed to ensuring that Federal wetlands programs do not place unnecessary restrictions or burdens on farmers and other landowners, while providing necessary environmental safeguards."

Exemption of prior converted land

The August 25 regulation that responded to the *Tulloch* settlement included a provision exempting approximately 53 million acres of prior converted cropland (lands drained and converted to agriculture before December 23, 1985) that no longer exhibit wetland characteristics from classification as navigable waters or waters of the United States for purposes of the Clean Water Act, thus exempting this land from regulation under section 404. This essentially puts the Corps regulatory program in sync with the SCS swampbuster program.

It should be noted, however, that the regulation does not exclude from section 404 coverage what are referred to in the preamble to the regulations as "farmed wetlands," land that otherwise might qualify because it had been converted to agricultural production prior to December 23, 1985. "Farmed wetlands" are defined as "potholes and playas with 7 or more consecutive days of inundation or 14 days of saturation during the growing season and other areas with 15 or more consecutive days (or 10 percent of the growing season, whichever is less) of inundation during the growing season." 58 Fed. Reg. 45,032 (1993).

Other elements of the new policies

√ The August 24 policy announcement states that the Soil Conservation Service will be designated as the lead agency for determining whether agricultural land is wetlands, for both Clean Water Act and swampbuster program purposes. Procedures on this will be developed jointly by the SCS, the Corps, EPA, and the Fish and Wildlife Service ("FWS"). With this change, farmers and their attorneys in the future will be able to utilize SCS appeal procedures to contest wetlands determinations.

√ The Corps, in coordination with EPA, SCS, and FWS, will develop a Nationwide General Permit, for section 404 purposes, for *discharges* associated with "minimal effects" and "frequently cropped with mitigation" *conversions* determined by SCS and FWS to qualify agricultural wetlands for exemption from swampbuster sanctions. The nationwide permit will provide greater certainty to farmers that they can rely on these SCS/FWS mitigation determinations — individual review by the Corps and EPA on these discharges generally will not be required.

√ The administration has committed itself to support full funding of the Wetlands Reserve Program ("WRP") of the Department of Agriculture. This is a pro-active program that remunerates farmers for restoring wetlands that were converted to cropland prior to 1985. Farmers put about 50,000 acres into the program in the first sign-up during July, 1992. The agricultural appropriations bill for fiscal year 1994 includes funds for an additional 75,000 acres. The administration will seek full funding of the program in the next fiscal year, which should bring the acreage in the program to 330,000 acres, and further expansion of the program in the 1995 farm bill.

√ To reduce the high level of controversy as to what exactly is included as wetlands, the administration will scrap both the 1989 delineation manual supported by environmental groups and opposed by others and the proposed 1991 amendments to the 1989 manual that was criticized by environmental groups, and wait for the National Academy of Sciences to complete its studies of the best approach to wetlands delineation. In the interim, the administration will use the 1987 manual, which it believes has increased confidence and consistency in identifying wetlands.

√ The administration will establish a new administrative appeal process for wetland determinations and permit

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New wetland policies/continued from page 1

denials under section 404.

It should be noted, however, that they also plan to require that section 404 permit applicants exercise their rights to appeal before initiating judicial action. This requirement will, of course, reduce over-reliance on law suits to resolve section 404 disputes. Also, it may serve to ensure the applicability to these cases of the exhaustion of administrative remedies doctrine, which was severely undercut in federal Administration Procedure Act appeals by the Supreme Court decision this last summer in *Darby v. Cisneros*, 1993 U.S. LEXIS 4246 (1993).

√ The new policies will impose a deadline of ninety days on Corps review and decision-making on landowners' section 404 permit applications.

While much in the August 24 wetlands announcement has yet to be implemented, it does lay out the "game plan" for the new administration's wetlands policy. Also, the prior converted wetlands exemption has, in effect, already been accomplished by promulgation of the August 25 regulations. In all, these constitute a significant wetlands regulation; but farm and environmental groups both will be watching closely how the game plan is implemented, and how Congress responds in the Clean Water Act reauthorization.

—John Sheeley and Phil Fraas, McLeod, Watkinson & Miller, Washington, D.C.

Ch 12 Bankruptcy/continued from page 1

After passage of the bill, Senator Grassley noted the particular importance of Chapter 12 given the "flood-devastated midwest," stating that "[c]urrent conditions underscore the unique nature of farming and the necessity of our Bankruptcy Code's recognition of those differences." Grassley expressed concern that as a result of the flooding, many midwest farmers would be forced to file for bankruptcy. If this prediction is accurate, at least farmers are now assured that Chapter 12 relief will continue to be available.

—Susan A. Schneider, Hastings, MN

CONFERENCE CALENDAR

Ninth Annual Farm, Ranch, and Agri-Business Bankruptcy Institute
October 7-9, 1993, Lubbock Plaza Hotel, Lubbock, TX
Topics include: Bankruptcy fraud, Chapter 12 liquidating plans, new case update
Sponsored by: West Texas Bankruptcy Bar Association, Texas Tech University School of Law, Association of Chapter 12 Trustees.
For more information, call 1-806-762-5281

Eighth Circuit rules on setoff of CRP payments

In the recent case of *In re Gerth*, 991 F.2d 1428 (8th Cir. 1993), the Eighth Circuit addressed the issue of setoff of Conservation Reserve Program (CRP) payments in a Chapter 12 bankruptcy. The Agricultural Stabilization and Conservation Service (ASCS) objected to the debtor's reorganization plan and filed a motion for relief from the automatic stay, claiming that it was entitled to setoff the annual CRP payments due to Gerth against the debt owed to the government.

Section 553 of the Bankruptcy Code authorizes setoff if three criteria are met. 11 U.S.C. §553. First, the creditor must owe a debt to the debtor that arose before the commencement of the case. Second, the creditor must have a pre-petition claim against the debtor. Third, the debt and the claim must be mutual obligations. *Gerth*, 991 F.2d at 1431.

The debtor in *Gerth* argued that neither the first nor the third requirement for setoff was met. He argued that when the CRP contract was assumed as an executory contract in the Chapter 12 bankruptcy, a post-petition obligation was created. Accordingly, the ASCS should not be entitled to setoff its pre-petition claim against a post-petition obligation. The debtor further argued that the pre-bankruptcy debtor and the post-bankruptcy debtor-in-possession were different entities. The debtor thus argued that the mutuality of parties requirement was not met. Although the bankruptcy court rejected the debtor's mutuality argument, it denied setoff based on the executory contract argument. For a review of the bankruptcy court decision, see *In Depth: Farm Program Contracts as Executory Contracts*, 9 Agric. L. Update 4 (Mar. 1992) (with Christopher R. Kelley). The district court affirmed the bankruptcy court.

The Eighth Circuit reversed the lower courts in part, holding that the assumption of an executory contract does not change the pre-petition or post-petition nature of the underlying obligation. The court stated that the "mere assumption of an executory contract does not alter when the obligations under the contract arose." *Id.* at 1432. The court further noted that when the debtor assumes the contract, he or she assumes both "the benefits and the burdens of the contract." *Id.*, at 1432-33.

The court next turned to the nature of the underlying contractual obligation. The court held that under the CRP contract, the obligation is "absolutely owed" to the debtor as of the time the contract is signed. In so holding, the court discussed the case law that has developed around the "absolutely owed" concept, noting that a debt could still be "absolutely owed" even though it was "contingent, unliquidated, or unmatured when the [bankruptcy] petition was filed." *Id.*, at 1433 (citations omitted). *But see*, *In re Gore*, 124 B.R. 75,78 (Bankr. E.D. Ark. 1990) (holding that the debt is not "absolutely owed" because the government's obligation to pay accrues only upon the annual performance of debtor's obligations). Applying this to the CRP contract at issue in *Gerth*, the court found the contract to be an "exchange of mutual promises" that created an obligation as of contract signing. *Gerth*, 991 F.2d at 1433.

The court further noted that in assuming the CRP contracts, the debtor agreed to "accept and assume the responsibilities contracted for under his contract." *Id.* at 1432 (quoting the bankruptcy court order regarding the affirmance of the contract). Included in the assumed contract is reference to the federal regulation that allows for ASCS setoff. The court found that "[b]y assuming the contract, Gerth also assumed the burden of the right of setoff." *Id.* at 1433, note 4.

On the issue of mutuality, the court affirmed the bankruptcy court and held that the debtor and the debtor-in-possession were not different entities, and thus, the mutuality requirement for setoff was met. *Id.* at 1435-36.

For these reasons, the Eighth Circuit court remanded the case to the bankruptcy court for further consideration of the government's motion for relief from the automatic stay. Judge Heaney dissented, stating that he would have affirmed the bankruptcy court's "well-reasoned opinion." *Id.* at 1436. Judge Heaney also noted that under sections 362 and 553, the debtor's plan could still be confirmed if the bankruptcy court determines that allowing setoff would preclude confirmation. *Id.*

—Susan A. Schneider, Hastings, MN

Publication announcement

TITLE: Statutory Agricultural Liens: Rapid Finder Charts
AUTHOR: Martha L. Noble
SUBJECT: Statutory Agricultural Liens: Rapid Finder Charts compiles and tabulates the main provisions of statutory agricultural liens in each of the fifty states. The Charts encompass statutory liens that attach to agricultural products, including crops, fruits and vegetables, livestock, fish, or timber, and liens that attach to farm equipment and production inputs.
AVAILABLE FROM: NCALRI, School of Law, University of Arkansas, Fayetteville, AR 72701; call 501-575-7646.
COST: $35.00

The agricultural provisions in the Omnibus Reconciliation Act of 1993

By Phil Fraas

After much debate this last summer and several razor-thin votes, Congress approved and the President signed into law the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), Pub. L. No. 103-66, Aug. 10, 1993, ___ Stat.___.

This legislation contained two of the three major elements of President Clinton's $500 billion deficit reduction effort: revenue-raising tax increases and reductions in entitlement spending. The third goal in the deficit reduction plan — cuts in discretionary spending accounts — is being accomplished through the various appropriations bills that are moving through Congress now.

OBRA included in title I substantial revisions to several USDA's farm programs. Since farm programs that support prices or protect farmer income are mandatory spending or "entitlement" programs, OBRA contained changes to effect cost savings in these programs. It also included a number of revenue-raising assessments against agricultural program users to provide additional funds for deficit reduction.

Overall, the agricultural provisions in title I of OBRA have been projected by the Congressional Budget Office ("CBO") as saving $3.011 billion in fiscal years 1994 through 1998.

Farm program expiration dates

The 1990 farm bill (the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, Nov. 28, 1990, 104 Stat. 3359-4078) made all the commodity programs expire at essentially the same time — at the end of the 1995 crop year. During the debate this year on OBRA, the House proposed to uniformly extend the 1990 farm bill programs to 1998, which is the last year covered by OBRA. However, during the Senate-House conference on the bill, the exigencies of the legislative process forced the conferees to scramble specific commodity program expiration dates. Some conferee decisions in this regard were dictated by the was CBO calculated projected savings, others by the need to comply with the so-called "Byrd Rule."

The Byrd Rule, which governed Senate debate on OBRA and required a super majority of the Senate (60 votes) to overrule, effectively forced the deletion of all provisions that did not directly trigger budget savings, including some of the agriculture provisions that extended the various individual commodity programs.

The end result of OBRA, as finally enacted, is an inconsistent mixture of program expiration dates. Here is where the programs now stand under OBRA:

- The wheat, feed grains, rice, extra long staple cotton, and oilseed programs still expire at the end of the 1995 crop year.
- Most of the dairy program elements were extended one year to 1996.
- Substantial parts of the upland cotton and peanut programs, and the sugar and wool and mohair programs, were extended through the 1997 crop, as were the general rules governing payment limitations, bases and yields, and advance deficiency payments.
- The honey program was extended to 1998.

The agriculture committees of Congress will have their hands full in 1995 in getting all the commodity programs back on the same schedule.

Changes in programs for deficiency payment commodities

0/92 and 50/92 Programs

OBRA converts the current 0/92 program for wheat and feed grains to a 0/85 program, and the 50/92 program for upland cotton and rice to a 50/85 program, effective for the 1994 through 1997 crops. Disaster situations and certain minor crop plantings will be exempted from the changes.

Generally, to receive deficiency payments on wheat, feed grains, upland cotton, or rice, the farmer must plant the farm's permitted acreage to the commodity. Under the 0/92 and 50/92 programs, farmers are allowed to keep their permitted acreage fallow or devoted to alternative crops and still receive program payments on up to 92% of the permitted acreage. For wheat and feed grains, the farmer can let the entire acreage lie fallow; while for cotton and rice, the farmer must plant at least 50% of the acreage. Under the OBRA change, the permitted acreage eligible for payment under these land set-aside programs will be reduced from 92% to 85%

(Estimated savings: $297 million; sections 1101-1104 of OBRA.)

Eliminate GATT trigger language

OBRA eliminated the "GATT trigger" language on acreage reduction programs ("ARP's") for certain deficiency payment commodities. An ARP requires farmers who are growing one of the deficiency payment commodities (wheat, feed grains, cotton, and rice) to set aside from production a specified percentage of his or her acreage base in order for the crop to be eligible for deficiency payments and other program benefits. Farmers receive no payments on the ARP acreage itself.

Under preexisting law, enacted as part of the previous reconciliation bill (the Omnibus Budget Reconciliation Act of 1990, Pub. L. No.101-508, title I, Nov. 5, 1990, 104 Stat. 1388 — 1388-14), the Secretary of Agriculture could waive the specified minimum ARP percentages if no GATT agreement was reached by the target date — June 30, 1992. Also, the Secretary could consider waiving all other agricultural budget savings enacted in 1990 reconciliation if the GATT agreement was not in place by June 30, 1993. Obviously, both target dates came and went without a GATT agreement.

OBRA eliminated the GATT triggers in 1990 reconciliation, allowing USDA not to comply with the ARP minimums and to consider waiving other budget items in 1990 reconciliation. The effect is to reestablish mandatory minimum ARPs for the 1994 and 1995 crops of wheat and corn. OBRA also deleted a provision of law mandating ARPs for two other target price feed grains — grain sorghum and barley.

(Estimated savings: $586 million; section 1301.)

Cotton stocks-to-use target

OBRA changed the stocks-to-use target in the program for the 1995 through 1997 crops of upland cotton. Under the 1990 farm bill, the ARP program for cotton must be implemented for any crop so as to result in a ratio of carryover stocks to total disappearance of cotton of 30%. That ARP trigger percentage has been reduced to 29.5% for 1995 and 1996 crops, and to 29% for the 1997 crops.

(Estimated savings: $175 million; section 1101(1)(5).

Dairy program

CCC price support purchases

OBRA mandates adjustments in the CCC purchase prices for butter and nonfat dry milk (milk powder). To support the price of milk, CCC offers to purchase dairy products in the open market at prices established at levels high enough to ensure that dairy farmers, in turn, will

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receive a price for their marketings that is at the price support level. In this legislation, CCC is required to pay no more than 65 cents per pound for butter and no less than 103.4 cents per pound for milk powder in operating its purchase program. Those figures should ensure that less butter is acquired by the CCC, thus reducing federal expenditures given the surplus of butter that already exists.

(Estimated savings for all dairy provisions, including this one, extension of reconciliation assessments, and the restriction on bST: $254 million; section 1105.)

Reconciliation assessments

Under the 1990 reconciliation Act, each hundredweight (cwt.) of milk marketed by producers is subject to a reduction in price, the proceeds of which are paid into the CCC, as a budget reduction measure to partially offset the cost of the milk program. The average amount of the reductions for each of the calendar years 1991-1995 is about 10 cents per cwt. This requirement had been scheduled to expire at the end of 1995, but OBRA extended the reduction in price requirement to 1997, at a specified reduction rate of 10 cents per cwt., subject to the bST provision described below.

Restriction on sale of bST

OBRA provides for a short moratorium on the sale for commercial agricultural purposes of synthetically produced bovine growth hormone, bovine somatotropin ("bST") during the ninety days following the date that the Food and Drug Administration approves an application for the use of bST. During this same ninety days, the rate of the reconciliation reduction-in-prices to which milk producers are subject will be reduced by 10% of what it otherwise would be.

Tobacco program

Domestic content requirement

OBRA imposes a new requirement that domestic manufacturers of cigarettes certify annually the percentage of imported tobacco used in their cigarettes. It also provides for penalty assessments and domestic purchase requirements when foreign tobacco content exceeds 25%.

For any year in which the amount of foreign tobacco exceeds 25%, the manufacturer will have to pay a marketing assessment on the excess at a rate equal to the difference between the domestic market price for tobacco and the price for imported tobacco. In addition, any manufacturer that uses more than 25% foreign tobacco will be required to purchase, from the grower cooperatives, an amount of domestic tobacco equal to that excess, with the purchases split evenly between flue-cured and burley tobacco. The Secretary of Agriculture could reduce the domestic content percentage in any year following a year in which there is a disastrous loss of the domestic crop of tobacco and pool inventories have been depleted, to reflect the reduced availability of domestic supplies.

Several countries that export tobacco to the United States have already expressed concern about this provision of OBRA, arguing that it violates the rules in Article III of GATT prohibiting domestic content programs.

(Estimated savings for all tobacco provisions, including this one, the marketing assessment requirements, and the extension of quota floor: $29 million; section 1106).

Marketing and no-net-cost assessments on importers

New marketing assessments for deficit reduction purposes are imposed on importers of tobacco. Prior to enactment of OBRA, there already was a deficit reduction assessment made on marketings of domestically produced tobacco for which price support is provided equal to one percent of the price support rate. Under OBRA, effective for the 1994 through 1998 crops, importers will pay a comparable assessment on imported tobacco.

OBRA also imposes a new requirement that importers of flue-cured and burley tobacco pay no-net-cost assessments on their imports comparable to those charged to producers and first purchasers on domestic tobacco. No-net-cost levies are used to reimburse the CCC for net losses incurred in operating the tobacco price support program.

Extension of quota reduction floors

OBRA has extended to the 1994-1996 marketing years the proviso that the Secretary cannot set the annual national marketing quote for either flue-cured or burley tobacco at less than 90% of the quote established for the preceding marketing year. However, the Secretary would have discretion in marketing years 1995 and 1996 to waive the minimum if the Secretary determines that its use would cause inventories of the kind of tobacco involved to exceed 150% of the reverse stock level.

Crops affected by assessments or fees

Sugar crops

OBRA extends the marketing assessment program for sugar crops established for the 1991-1995 crops as a budget reduction measure in the 1990 reconciliation Act. The authority for assessments is extended to fiscal year 1998 (the marketing year for the 1997 crop); and the assessment rate is increased by one tenth to 1.1% of each of the price support loan rates — beginning in 1995.

Further, OBRA makes important technical changes in the marketing penalty provisions of law applicable when marketing allotments are in effect — as they have been for the fourth quarter of fiscal 1993 — to avoid inadvertent double-counting of sugar marketed or the application of penalties to marketings done without knowledge that the sugar would exceed a person's allocation (such as marketing done prior to the imposition of mid-year allocations). The need for the technical changes became apparent when the fourth quarter 1993 allotments were announced and USDA attorneys determined that USDA was going to have to assess penalties against sugar cooperatives for unintended violations. Somehow, these technical changes avoided deletion from OBRA under the Byrd Rule.

(Estimated savings: $12 million; section 1107).

Oilseed crops

Under the 1990 reconciliation Act, loan origination fees were to be assessed on the 1991-1995 oilseed crops as part of the budget reduction effort. The fee has been applied to oilseed crops put under loan with USDA and was equal to 2% of the price support loan rate for the oilseed on the quantity put under loan. OBRA terminates the loan origination fee program at the end of the 1993 crop, but also lowers the minimum soybean loan rate from $5.02 to $4.92 per bushel and the minor oilseed loan rate from 8.9 cents to 8.7 cents per pound beginning with the 1994 crop.

(Estimated savings: $159 million; section 1108.)

Peanuts

OBRA has extended to the 1996 and 1997 crops of peanuts the marketing assessment on peanuts established under the 1990 reconciliation Act for the 1991-1995 crops. The amount of the assessment — previously set at 1% of the support rate for peanuts — is gradually

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increased beginning with the 1994 crop. By 1997, it will be 1.2% of the support rate.

OBRA also applies to all peanut handlers, whether or not they have entered into the peanut marketing agreement, an assessment that heretofore has been applied to only peanut handlers under the agreement.

(Estimated savings: $6 million; section 1109.)

Honey and wool

The honey and wool/mohair programs are currently under attack in Congress, with some members having proposed to kill the programs entirely. The attacks on these two programs really started during the OBRA debate, and as a result of that debate, the programs were scaled back by OBRA while not eliminated entirely. The changes noted below may become moot to the extent current efforts to kill the programs succeed.

Honey

OBRA gradually reduces the minimum loan rate for honey from the current 53.8 cents per pound to 47 cents per pound by the 1998 crop year. It also gradually reduces the maximum payments allowable in any crop year to a person under the honey program. Producers receive payments in the form of honey marketing loan benefits and loan deficiency payments. The per-person payment limitation will be set at $125,000 for the 1994 crop (as authorized in the 1990 farm bill), but then it will be decreased to $50,000 by 1997.

OBRA also terminates, at the end of the 1993 crop, the marketing asssessment program for honey (which assessment has been 1% of the honey support level) established as a budget reduction measure in the 1990 reconciliation Act.

(Estimated savings: $24 million; section 1110.)

Wool and mohair

OBRA gradually reduces the maximum amount of wool and mohair program incentive payments a producer can receive annually. Producers are provided price support through these incentive payments (which make up the difference between market levels and the support price); and under OBRA, the incentive payment limitation will be set at $125,000 for 1994 (as authorized under the 1990 farm bill) but then, as with honey, will be decreased to $50,000 by 1997.

OBRA also eliminates the marketing assessment on wool and mohair program incentive payments under the 1990 reconciliation Act, which assessment has been equal to 1% of the program incentive payment, effective beginning in crop year 1993.

(Estimated savings: $48 million; section 1111.)

Other budget cuts

Market Promotion Program

Minimum funding for the Market Promotion Program ("MPP") is extended by OBRA to fiscal year 1997, but beginning in 1994, the required minimum is reduced from $200,000,000 to $110,000,000.

(Estimated savings: $405 million; section 1302.)

ECARP

OBRA has revised goals for enrollment of land into the Environmental Conservation Acreage Reserve Program ("ECARP") to scale back spending. It limits the enrollment of land in the Conservation Reserve Program ("CRP") to not more than 38 million acres through calendar year 1995. Under prior law, the goal for enrollment by 1995 had been from 40 to 45 million acres. Also, it deleted the requirement of prior law that the Secretary of Agriculture reserve 1 million acres for enrollment during calendar year 1994, but kept that requirement for 1995.

Further, OBRA changed the requirement for enrollment in the Wetlands Reserve Program ("WRP") to a minimum of 330,000 acres by the end of calendar 1995 and a minimum of 975,000 acres through the year 2000. Under prior law, the requirement was for the Secretary to attempt to enroll up to 1,000,000 acres by the end of 1995.

(Estimated savings: $469 million; section 1402.)

Crop insurance

OBRA requires the Federal Crop Insurance Corporation ("FCIC") to take certain specified steps to improve the actuarial soundness of the program, and to achieve, by October 1, 1995, a projected overall loss ratio of 1.1. Budget savings are projected to result from these actions because USDA subsidizes excess losses incurred by FCIC in its operations.

(Estimated savings: $501 million; section 1403.)

Rural Electrification Association

The only Rural Electrification Administration ("REA") provision included in OBRA will allow electric loans made by the Federal Financing Bank and guaranteed by REA to be refinanced or prepaid with a penalty significantly lower than the penalties that currently exist for such actions. In addition, any penalty for prepayment could be financed.

The House and Senate conferees also had reached agreement on several other REA provisions that would have significantly restructured the REA electric and telephone loan programs. However, due to the Byrd Rule, all of these provisions were removed from the bill. It is expected that an effort will be made later this year or next year to enact these provisions in another legislative vehicle.

(Estimated savings: $1 million; section 1201.)

Recreation fees

OBRA authorizes the Secretary of Agriculture to charge entrance or admission fees at recreation and scenic areas administered by the Secretary and impose user fees for recreation activities on Department of Agriculture lands.

(Estimated savings: $44 million; section 1401.)

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* in September, 1993.

1. FGIS; Prohibition on adding water to grain; proposed rule; comments due 12/2/93. 58 Fed. Reg. 41439.

2. CCC; 1994 Feed Grain Acreage Reduction Program; proposed rule. 58 Fed. Reg. 41641.

3. CCC; Upland Cotton User Marketing Certificate Program; interim rule. 58 Fed. Reg. 42841.

4. CCC; Price support loan requirements; Farmer Owned Reserve Program eligibility requirement; interim rule. 58 Fed. Reg. 45039.

5. BLM; Grazing Administration; advance notice of proposed rulemaking. 58 Fed. Reg. 43208.

6. FmHA; 5-year applicant loan eligibility certification by county committee; interim rule. 58 Fed. Reg. 44745.

7. FmHA; Appraisal of farms and leasehold interests; interim rule. 58 Fed. Reg. 44748.

8. Corps of Engineers; Clean Water Act; U.S. and navigable waters definition; discharge of dredged or fill material, prior converted croplands policy; final rule. 58 Fed. Reg. 45008.

—Linda Grim McCormick, Toney, AL

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environmental degradation. *See generally*, Butcher, Easterline, Frarey, Gill & Jones, Livestock and the Environment: Emerging Issues for the Great Plains, presented at Conservation of Great Plains Ecosystems, Current Science, Future Options, Kansas City, MO, April 7-9, 1993. The "planned intervention" program embodied in amended section 201.026 of the Texas Agriculture Code provides a viable alternative to exclusive reliance on command-and-control regulation of CAFO pollution.

—Larry Frarey, Tarleton State University, Stephensville, TX

"Planned intervention" for CAFO pollution abatement in Texas

Recently passed Texas Senate Bills 502 and 503 represent a significant shift in agricultural pollution abatement efforts affecting concentrated animal feeding operations (CAFOs). Texas Session Law, 73rd Legislature, ch. 54 § 1 (West 1993)(to be codified at V.T.C.A., Agriculture Code section 201.026 *et seq*; V.T.C.A., Water Code §§ 26.0135-36, 26.121, 26.1311). Under the new law, CAFOs sufficiently small to avoid obtaining a Texas Water Commission (TWC) discharge permit answer directly to the Texas State Soil and Water Conservation Board (TSSWCB) in determining compliance with state water quality regulations. *See* 31 TAC § 321.33 (1989). The new program is intended to induce pollution abatement by small, unpermitted CAFOs while avoiding undue economic hardship.

The impetus for the alternative compliance program is perceived environmental degradation in Texas' largest dairy region, Erath county. From 1980 to 1989, the number of dairy cows in Erath County increased by 148 percent. Texas Institute for Applied Environmental Research (TIAER), Livestock and the Environment: Interim Report to the Joint Interim Committee on the Environment, 72nd Texas Legislature 55 (1992). Today, an estimated 60-70,000 cows produce over 1 million tons of manure annually. R. Jones, L. Frarey, A. Bouzaher, S. Johnson & S. Neibergs, Livestock and the Environment: A National Pilot Project, Detailed Problem Statement 15 (1993). A 1992-'93 TWC inspection program found significant disparity between the number of permitted and unpermitted Erath County dairies complying with TWC regulations requiring structural best management practices (BMPs), e.g., waste water containment structures and diversions. TWC regulations require dairies with 250 milking head or more to obtain a waste water discharge permit. 31 TAC § 321.33 (1989). TWC reports that out of eighty-eight permitted dairies only ten (11%) exhibited "major deficiencies." TWC, Confined Animal Feeding Operations Erath County, Dairy Outreach Program (undated six-page fact sheet). In contract ninety-four (69%) of the county's 137 unpermitted dairies had "major deficiencies." *Id.* Thus, unper-mitted dairies represent a significant portion of potential CAFO pollution sources in Erath County.

"Planned intervention" to abate CAFO pollution describes an effective balance between voluntary BMP adoption by agricultural producers under the direction of farm-services agencies, and regulatory programs to coerce "bad actors" into environmental compliance. Purely voluntary agricultural pollution abatement programs produce incomplete abatement due to the presence of "bad actors" who will not voluntarily implement pollution abatement BMPs. *See* Logan, *Agricultural Best Management Practices: Implications for Groundwater Protection*, 5 Groundwater and Public Policy 6 (1991). On the other hand, command-and-control regulation is ineffective in controlling agricultural nonpoint source (NPS) pollution. CAFOs apply solid and liquid manure to crop and pasture land. Storm runoff from that land is extremely difficult to regulate through site inspection, even if regulatory resources were substantially increased. A combination of voluntary and regulatory pollution abatement efforts as a "planned intervention" program shows promise for cost-effective CAFO pollution abatement.

Texas Senate Bill 503, the majority of which will be codified under section 201.026 of the Texas Agriculture Code, expressly provides for a direct link between voluntary BMP adoption under TSSWCB and TWC regulatory programs where voluntary pollution abatement efforts break down. Since 1985, section 201.026 of the Texas Agriculture Code has provided that TSSWCB "shall plan, implement, and manage programs and practices for abating agricultural and silvicultural nonpoint source pollution." Amended section 201.026 directs TSSWCB to establish a "water quality management plan certification program" in areas identified as "having or having the potential to develop agricultural or silvicultural nonpoint source water quality problems." TSSWCB must handle complaints concerning agricultural nonpoint source pollution, and, where a problem is verified, "develop and implement a corrective action plan to address the compliant." This alternative dispute-resolution mechanism is important for suspected polluters and complainants alike since it provides an early alternative to high-cost litigation. In the event a pollution problem persists, "the [TSSWCB] shall refer the complaint to the Texas Natural Resource Conservation Commission." (As of September 1, 1993, TWC will combine with other state agencies as the Texas Natural Resource Conservation Commission.) Thus, amended section 201.026 clearly outlines a "planned intervention" strategy for agricultural NPS pollution abatement. However, for the strategy to function effectively, the outline provided in section 201.026 must be completed in some detail.

TSSWCB is currently drafting rules and formulating a memorandum of understanding with TWC to insure that "planned intervention" produces intended results. Several issues must be clarified, including time frames for voluntary BMP implementation and manifestation of water quality improvement, as well as the criteria for successful pollution abatement absent which TWC will conduct regulatory activity subsequent to voluntary efforts. With regard to TSSWCB jurisdiction over CAFOs, TSSWCB must reference the touchstone of its authority under section 201.026--agricultural NPS pollution. For example, TSSWCB could define NPS pollution in general terms, and include thereunder a statement to the effect that "a feedlot/concentrated animal feeding operation is an agricultural nonpoint pollution source subject to TSSWCB jurisdiction when the operation is not required to obtain an individual discharge permit under TWC regulations." By defining agency jurisdiction over CAFOs by exclusion rather than designation of a specific number of animals, TSSWCB respects TWC's regulatory authority to require an individual permit of any CAFO, regardless of the number of animals confined at the facility. See 31 TAC § 321.33(b)(1989). The term "feedlot/concentrated animal feeding operation" is defined in TWC regulations. 31 TAC § 321.32 (1989).

Under amended section 201.026, TSSWCB has the opportunity to oversee a comprehensive micro-watershed agricultural pollution abatement program. In a micro-watershed exhibiting actual or potential agricultural NPS pollution, TSSWCB can assist local conservation districts to organize all landowners into a consortium, including permitted CAFO operators, crop farmers and owners of any other potential agricultural pollution source. *See* N. Bushwick Malloy, Ideas for the Livestock Compact 1 (1992)(unpublished draft, National Center for Food and Agricultural Policy). Consortium members can meet to identify micro-watershed pollution sources and recommend corrective action. Local districts and TSSWCB would then coordinate technical assistance and cost share financing through the United States Department of Agriculture's Soil Conservation Service and Agricultural Stabilization and Conservation Service. Amended section 201.026 provides substantial state cost share funding for agricultural NPS pollution abatement, as well. Once pollution abatement BMPs are implemented, the micro-watershed consortium is uniquely positioned to monitor the progress of pollution abatement efforts and suggest modifications as the abatement program progresses. TSSWCB need request the intervention of TWC only in the event owners of agricultural nonpoint pollution sources refuse to implement "corrective action plans."

As CAFOs in all livestock production sectors proliferate nationwide because of economies of scale, policymakers must promote innovative agricultural NPS pollution abatement programs to control

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Agricultural Law Update

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