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AMERICAN AGRICULTURAL LAW ASSOCIATION

INSIDE

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Concerns about the use of non-therapeutic antibiotics in food animals

The development of antibiotic resistant bacteria has rendered many antibiotics ineffective. Hospital-acquired bacterial infections resistant to at least one common antibiotic cause an estimated 63,000 deaths a year in the United States,[1] and antimicrobial resistance costs our healthcare system $4-5 billion annually.[2] These problems have raised a question whether antibiotic resistance developing out of the use of non-therapeutic antibiotics in agriculture unnecessarily reduces the effectiveness of antibiotics used to treat humans.[3] Legislation has been advanced to ban the use of non-therapeutic antibiotics administered to food animals.

Some scientists believe that antibiotic use in agriculture is adversely affecting antibiotic resistance of human pathogens.[4] Multiple antibiotics used in animal production have human analogues so are capable of selecting for resistance of human antibiotics.[5] Antibiotic resistance emerging from the use of antibiotics in food animals has spread to humans. For example, after appropriate testing by the Centers for Disease Control, the Food and Drug Administration took action and withdrew approval for the use of fluoroquinolones in the production of poultry in 2005.[6]

Given the costs of antibiotic resistance, calls for further action in limiting antibiotic use in agriculture may be expected. Evidence from Europe, where growth-promoting antibiotics were banned, shows it is possible to remove large quantities of antibiotics from the environment.[7] The European ban has also resulted in a decline in resistant bacteria in animals, meat products, and humans.[8]

Therapeutic and non-therapeutic use

The animal production industry relies on antibiotics for three major purposes: (1) treatment and control of infectious diseases, (2) prophylaxis to prevent diseases, and (3) non-therapeutic growth promotion.[9] The first is a therapeutic purpose whereby animals are treated for a known disease problem. The use of antibiotics for prophylaxis is to control the dissemination of infectious diseases within a group of animals to prevent disease. While some prophylactic uses of antibiotics are therapeutic (they prevent disease), other prophylactic uses are preventive measures during high-risk periods for

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Court authorizes eminent domain for farmland protection purposes

In yet another controversial case challenging governmental condemnation authority, a New York appellate court recently upheld the use of eminent domain for the purpose of farmland protection. *In the Matter of Aspen Creek Estates v. Town of Brookhaven*, 2007 NY Slip Op. 09583, 2007 WL 4246603 (N.Y.A.D. 2nd Dept. Dec. 4, 2007).

The conflict centers on a 39-acre parcel of land on Long Island, New York, located within the "Manorville Farmland Protection Area", a 500-acre working farm belt identified for protection by the Town of Brookhaven. In 2004, the Town had approached the prior owners about acquiring the parcel's development rights, which would legally restrict the property to open space and agricultural uses. The prior owners instead sold the land to Aspen Creek Estates for $1.4 million, a price that the Town did not match. Aspen Creek planned to develop the property for residential use.

Brookhaven then sought to purchase the development rights from the new owner, Aspen Creek. In a series of negotiations over a two year period, the Town eventually offered Aspen Creek as much as $4.004 million for the parcel's development rights – nearly half a million dollars more than the highest appraisal for the property. At the same time, Aspen Creek submitted approximately 30 different development plans for the parcel, each rejected by the Town.

Upon Aspen Creek's refusal of the $4.004 million offer, the Town announced its intent

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infectious diseases within a group of animals without a diagnosis of disease.

The use of antibiotics as a preventive measure in an entire herd or flock would be classified as non-therapeutic. Non-therapeutic use means the administration of antibiotics to an animal for purposes other than disease prevention or therapy. Antibiotics provided to animals for growth promotion usually involve a non-therapeutic use whereby antibiotics are administered to healthy animals at low concentrations in feed or through water.[10] Distinctions between growth-promoting and prophylaxis are difficult because the same agent prevents disease while promoting growth.

U.S. producers of swine, chickens, and cattle use approximately 24.6 million pounds of antimicrobials for non-therapeutic purposes each year.[11] They are using antibiotics for non-therapeutic purposes because of economic reasons. Antibiotics enhance feed efficiency and promote weight gain of animals.[12] They may increase weight gain in beef steers by six percent and hogs by ten percent.[13] Antibiotics administered at low concentrations also reduce mortality and morbidity and may improve reproductive performance.[14]

The use of non-therapeutic antibiotics in the United States shows large quantities being used to stimulate growth that are not critical to the production of food products. Various experts argue that between eighty and ninety percent of agricultural antibiotic use may be unnecessary.[15] Studies in Scandinavian countries where animal growth promoters have been banned suggest that a ban of non-therapeutic antibiotics might have minor impacts on productivity.[16] Sweden began to eliminate the use of antimicrobial growth promoters in animals in 1986.[17] During the next ten years, Denmark, Norway, and Finland imposed similar bans. The European Union Council decided in 1998 to end approval of the use of four antibiotic growth promoters administered to food animals.[18] The noted four Scandinavian countries reduced their use of animal antibiotics by approximately 27-65 percent.[19]

Various groups in the United States have urged the ban of non-therapeutic antibiotics in animal production since 1980. Recently, House Bill 962 and Senate Bill 549 have been introduced "to preserve the effectiveness of medically important antibiotics used in the treatment of human and animal diseases."[20] Under these proposals, there would be a phased elimination of non-therapeutic use of some antibiotics used as animal growth promoters. Underlying the bills is the assumption that animal antibiotics should only be allowed for non-therapeutic use if there is a reasonable "certainty of no harm to human health due to the development of antimicrobial resistance."[21]

Withdrawing non-therapeutic applications

The anticipated consequences of withdrawing non-therapeutic applications of antibiotics may be projected from the experiences of several European countries that have already instituted bans. The absence of non-therapeutic antibiotics reduced the total use of animal antibiotics, caused more animals to suffer from disease, and reduced the levels of antibiotic-resistant bacteria.[22] The European experiences suggest that three significant production issues might be considered when evaluating the merits of banning non-therapeutic antibiotics: (1) increases in animal feed costs, (2) changes in animal production and management practices, (3) and increases in disease and therapeutic use of antibiotics.

The agricultural industry has strongly objected to proposals that would limit the use of antibiotics. The elimination of non-therapeutic antibiotics used in animal production would require more feed and require adjustments in production practices. Due to concerns that these adjustments would result in increased costs and interfere with economical animal production practices, producers have opposed any changes. The pharmaceutical industry opposes a ban due to concerns about reductions in sales of antibiotics.

Perhaps the largest two concerns with a proposal to eliminate antibiotics as growth promoters are the need for more feed and to feed animals for longer periods. Under a ban, production of animal products will involve increased feed and housing costs.[23] American producers of swine and poultry would be the most affected, as these two species of animals use the greatest quantities of non-therapeutic antibiotics. One research study suggests that a complete ban of antibiotics for growth promotion in the swine industry would cost grower/finisher pork producers $1.37 to $6.05 per animal.[24] However, a separate study projected that hog producers may be losing money by using antibiotics.[25] Because the use of antibiotics has contributed to larger supplies of pork, prices are lower than they would be in the absence of the use of non-therapeutic antibiotics. The elimination of non-therapeutic antibiotics was projected to result in a decrease of the number of hogs being marketed accompanied by higher pork prices.

The need for non-therapeutic antibiotics for poultry production is even less clear. A major study found that the costs of administering growth-promoting antibiotics were greater than the costs of increased feed necessary for birds to reach the desired weight for marketing.[26] The researchers concluded that the elimination of non-therapeutic antibiotics would not be accompanied by decreased profits. Therefore, although increased feed costs would undoubtedly accompany the elimination of non-therapeutic antibiotics, they are not impediments to profitable production. Rather, profitable production would become more closely associated with a producer's success at controlling diseases.

In addition to concern about production costs, animal producers argue that the elimination of non-therapeutic antibiotics would be accompanied by additional disease therapy costs.[27] Moreover, these costs would require changes in production practices and would affect producers differently. The increased risk of animals contracting a disease in the absence of non-therapeutic antibiotics would lead to new management, biosecurity, and disease-control practices. Each producer would need to adjust his or her operation to minimize the risk of animals contracting a disease. Producers who were successful in avoiding an outbreak of disease would have lower costs. Producers who were unsuccessful in controlling disease would have greater costs and would suffer an economic disadvantage.

Uncertainties about structuring production practices to control disease contribute to the opposition of proposals that would ban non-therapeutic antibiotics.[28] Some producers might want to adopt technology to improve sanitation and air quality in build-

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ings housing confined animals. Other producers might need to improve their oversight of manure management practices. The addition of manure storage facilities or the adoption of new waste treatment practices could curtail the numbers of antibiotic-resistant bacteria entering water sources and food products.[29] Improved management techniques and biosecurity practices might enable producers to eliminate some of the advantages that are currently attributed to using non-therapeutic antibiotics. A ban of non-therapeutic antibiotics would be expected to lead to the more efficient production of animals for food.[30]

Producers also posit the argument that the elimination of non-therapeutic antibiotics would increase the need for therapeutic antibiotics to fight disease outbreaks. While this is a valid concern, the evidence from Europe suggests it is groundless. Although some European producers experienced disease problems after non-therapeutic antibiotics were banned and needed to administer therapeutic antibiotics, total use of antibiotics in animal production decreased.[31] Moreover, there was a reduction in the animal reservoir of resistant bacteria. Thus, it is doubtful that a ban of non-therapeutic antibiotics would result in a greater total use of antibiotics.

Concluding concerns

While researchers have made numerous projections about the need to terminate the use of non-therapeutic antibiotics, they still lack a body of evidence that clearly identifies a superior strategy. Data are still being gathered on health issues involving the use and non-use of non-therapeutic antibiotics.[32] Scientists have a lot to learn as analytical methods to evaluate antibiotics in the environment have only been developed in the last ten years. This means that most uses of non-therapeutic antibiotics were approved before any credible research existed on the risks that they may pose to the environment.[33] The elementary and incomplete information of health effects and antibiotic resistance means that regulators might want to require updating the approvals of antibiotics as superior information is gathered.

Banning the use of non-therapeutic antibiotics administered to food animals might slow the development of antibiotic-resistant bacteria. Governments have a choice of eliminating non-therapeutic antibiotics to respond to potential health problems associated with antibiotic resistance or to allow their use. The European Union and the United Sates have weighed the risks differently. Some information exists that a ban could exacerbate human and animal health problems due to increases in foodborne illnesses or more sick animals. Because the pharmaceutical and agribusiness industries oppose the elimination of non-therapeutic antibiotics, Congress has declined to ban non-therapeutic antibiotics.

Furthermore, opposition to eliminating the use of non-therapeutic antibiotics may be misguided. A ban of non-therapeutic antibiotics should not lead to less agriculture but rather different types of production facilities and management practices.[34] A ban would encourage superior production practices that minimize disease. Conversely, producers who employ management practices that are conducive to disease would be penalized with increased disease-therapy costs.[35] By rewarding producers who are most successful in avoiding outbreaks of disease, a ban might lead to more efficient animal production.

—Terence J. Centner, Professor, The University of Georgia

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Update on 2008 Farm Bill development

By Anne Hazlett

Every four to six years, federal farm policy is renewed in an omnibus piece of legislation known as the "farm bill." At present, the United States Congress is in the midst of reauthorizing the current farm bill which was written in 2002. Covering a wide range of subject areas, the measure sets policy and includes funding for commodity price and income support, conservation, credit, research, rural development, trade, and nutrition programs.

Background

Deliberations over the next farm bill began in 2006 when both the House and Senate Agriculture Committees held hearings in Washington and across the country. The House Agriculture Committee completed its version of the measure (H.R. 2419) in mid-July of last year, with the House of Representatives passing the bill on July 27th. The Senate Agriculture Committee approved its version (S. 2302) in late October, with passage by the full Senate on December 14, 2007. Formal conference negotiations between the two chambers are expected to begin later this month.

Titles of primary interest to production agriculture

Both the House and Senate measures are written to govern farm policy through 2012 and make predominantly similar changes to existing law and programs. In the commodity title, both bills continue the safety net framework of the 2002 farm bill with the direct payment, countercyclical program, and marketing loan program. Both versions make adjustments to target prices and loan rates. The measures increase target prices for five commodities (wheat, barley, oats, soybeans, and other oilseeds) and slightly reduce the target price for cotton. The Senate bill also increases the target price for sorghum and adds dry peas, lentils, and chickpeas to the countercyclical program.

With respect to marketing loans, the House and Senate bills increase loan rates for wheat, barley, oats, minor oilseeds, and wool while decreasing the rates for dry peas and lentils. Further, both measures make reforms to administration of the marketing loan for cotton. Savings from these changes as well as the target price reduction are then used to fund an economic assistance package for the struggling domestic textile industry under which textile manufacturers can get assistance for construction or modernization of facilities and equipment.

Anne Hazlett is Counsel to U.S. Senator Saxby Chambliss, Senate Agriculture Committee

In addition to the traditional safety net, the House and Senate bills both create a revenue option for commodity program participants. The House bill offers a revenue-based countercyclical program as a replacement for the current countercyclical program, which is based on price. Centered on national revenue levels, this option would replace only the existing countercyclical payment, leaving direct payments and marketing loans unchanged. The option would be available for the 2008 crop year.

By contrast, the Senate bill offers a state-level "average crop revenue" (ACR) option that is an entire replacement for the traditional safety net. Specifically, the program replaces traditional direct payments and non-recourse marketing loans with a $15 per-acre direct payment that is made regardless of the crop enrolled and a recourse loan. Participation in the ACR is optional, but once a producer chooses to participate, the election cannot be reversed. The program would begin in the 2010 crop year.

Despite growing trade concerns over current policy, neither the House nor the Senate legislation change the planting restriction which prevents producers from planting fruits, vegetables, and wild rice on program crop base acres. However, both bills create a pilot program that will allow processing tomatoes to be grown on base acres in Indiana. In addition, the Senate bill gives participants in the ACR program additional flexibility by allowing producers to grow fruits and vegetables for processing on up to 10,000 acres in the certain states.

On the subject of payment limitations, both the House and Senate farm bill make historic changes to current law. The measures eliminate the so-called "3-entity rule," which allows individuals to increase their payments by having multiple ownership interests; require "direct attribution" of payments to a natural person instead of to a corporation, partnership, or other business entity; and significantly reduce the Adjusted Gross Income limit for receiving payments. Both bills also eliminate the current limit on benefits from the marketing loan program. The House bill raises the limit on direct payments. The Senate legislation keeps the current limit on direct payments but lowers the limit on countercyclical payments. The Senate bill also preserves a separate payment limit for peanuts while the House bill combines this limit with other commodities. Finally, in the area of conservation programs, the House bill sets an overall fiscal year payment limit of $60,000 for any single conservation program and $125,000 for all but three programs.

The House and Senate farm bills each provide significant new funding for specialty crops. Both measures reauthorize the specialty crop block grant program established in 2004 that gives state departments of agriculture a grant to enhance local specialty crop production. They also put resources into promotion of organic production by reauthorizing the National Organic Cost-Share Program and providing funding for data collection on organic crops as well as cost-share assistance for producers that want to convert from conventional to organic production methods. Lastly, both pieces of legislation support the specialty crop sector by dedicating funding to farmers market promotion, technical assistance to address export barriers, and diagnostic research centers.

In conservation, the House and Senate measures reauthorize current programs while making some tweaks and improvements to make them work better for producers. The bills increase funding levels for several popular programs and create new areas of emphasis within the programs such as forestry and pollinator habitat as well as set geographic priorities such as the Chesapeake Bay. Of particular interest to many in the conservation community, the House and Senate make substantial but very different changes to the Conservation Security Program, an incentive-based program created in the 2002 farm bill that rewards producers who adopt certain management practices. The House bill would prevent new sign-ups until fiscal year 2012 and then collapse the current three-tier structure to pay participants only a single stewardship enhancement payment. The Senate bill instead would replace the current program with a new Conservation Stewardship Program where participants would be paid to address resources of concern at a threshold level of environmental quality.

Both bills also create several new programs to address emerging environmental issues. For example, looking ahead to the increasing interest in climate change and carbon credit trading, the House and Senate bills each have provisions on market-based approaches to farm conservation. The House language would establish an Environmental Services Board and provide grants to support the development of market-based approaches for trading environmental goods and services in the private sector. Similarly, the Senate legislation would direct the Department of Agriculture to develop a framework, including standards and procedures, to help producers and landowners participate in environmental services markets.

In the energy title, both bills expand and extend several programs from the 2002 farm bill but place a new focus on developing cellulosic ethanol production. For example, the House and Senate both establish a new program to stimulate and facilitate the production, harvest, storage, and processing of

cellulosic feedstock for energy production. Funding levels for the programs in this title differ between the two versions. In addition to this program, the House and Senate measures further support renewable energy production through various grant and loan provisions, research and demonstration projects, education efforts, studies, and pilot projects.

Other major provisions

Beyond these titles of primary interest to production agriculture, other major provisions and related issues to be considered in conference include:

· Livestock- animal welfare and inspections, competition and marketing, state-inspected meat and poultry, and country-of-origin labeling

· Trade and international food assistance- international food aid, export market development, and export credit guarantee programs

· Nutrition- level of benefits to food stamp recipients, eligibility standards for food stamp benefits, fresh fruit and vegetable snack program, privatization of state food stamp administration, farmers market nutrition programs, local purchase requirements for school meals, and emergency food assistance

· Credit- lending for beginning and socially-disadvantaged farmers and ranchers, increased lending limits, term limits on guaranteed loans, a pilot program for beginning producers, and compensation for minority farmers under the *Pigford* decision

· Rural development- broadband development, definition of "rural area", assistance for rural hospitals and child-care facilities, rural water projects, and rural business development

· Research- structure of agriculture research management, and research funding levels

· Forestry- forest resource planning, emergency forestry restoration assistance and open space conservation

· Miscellaneous- crop insurance reform, disaster assistance, food safety, cloned animals, agricultural security and greater technical assistance for socially-disadvantaged farmers and ranchers.

What's next?

At present, portions of the current farm bill have been extended through March 15, 2008. Should the conference be unsuccessful in finishing its negotiations before this extension expires, further extension of the 2002 law will be necessary to prevent farm policy from reverting to the Agriculture Adjustment Act of 1938 and the Agriculture Act of 1949. Provisions of these permanent laws are temporarily superseded by each farm bill. In practice, their application to current day agriculture markets would be extremely difficult as their provisions are considerably different than present policy.

Leadership in the House and Senate Agriculture Committees has expressed a strong desire to complete the bill by the March deadline. In many parts of the country, planting season will soon be underway for the 2008 crop. Moreover, in addition to planting considerations, lawmakers are under further pressure to complete the bill before the Congressional Budget Office releases an updated budget baseline for the legislation. The updated baseline will likely provide less money than the current baseline being applied to the pending farm bill measures because high market prices have continued to reduce the cost of the farm programs.

To date, staff of the House and Senate Agriculture Committees have been meeting on a daily basis to work through as many differences as possible before any formal meetings of the farm bill conference are scheduled with House and Senate members. However, lawmakers face several challenges in completing conference negotiations in this window of time. First, the House and Senate bills use substantially different funding mechanisms to pay for new spending. The House bill offsets new spending with amendments to the tax code that would limit certain benefits for foreign-based firms. The measure also changes the timing of corporate taxes as well as the structure of fees assessed and royalties paid to oil and gas interests. By contrast, the Senate-passed farm bill contains a set of tax provisions related to energy, conservation, and agriculture. Thus, beyond resolving policy differences between the two bills, members of the farm bill conference face a significant task in finding a way to marry the two funding approaches.

Second, to date, the Administration has indicated it would likely veto the House or Senate farm bill if it were presented to the President for signature. The Administration is particularly concerned about the revenue and tax-related provisions in both bills–also contending the overall cost of the bill is too expensive. Beyond funding concerns, the Administration has stated that neither measure goes far enough in reforming current farm policy. Specifically, the Administration would like to see application of a $200,000 average Adjusted Gross Income test for farm program payment eligibility. Finally, the Administration has expressed concern about whether the House and Senate policies would be compliant with rules set under the World Trade Organization.

As lawmakers continue to work, there is growing pressure from the agriculture community to complete a bill as soon as possible. Just days after the bill passed the Senate last December, a group of 35 different commodity organizations wrote to the Committee leadership in both chambers urging the conference committee to negotiate the legislation as quickly as possible. Most recently, delegates at the American Farm Bureau Federation annual meeting unanimously approved a resolution in favor of swift passage of a new bill and in opposition to an extension of current law. While such actions make clear that there is a strong support for a new farm bill this year, the path forward remains uncertain.

AUTHOR'S NOTE: If you or any of your clients would like information about a specific issue under consideration in this Farm Bill debate, please don't hesitate to contact me at: anne_hazlett@agriculture.senate.gov or (202) 224-8812.

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ted to the Secretary of Agriculture by the National Organic Standards Board from October 30, 2000 through March 3, 2005, adding nine substances. 72 Fed. Reg. 70479 (Dec. 12, 2007).

The Organic Foods Production Act of 1990 requires a five-year sunset review of the exempted or prohibited use of substances under the National Organic Program (NOP). The AMS has announced the sunset review of 11 exempted substances and 1 prohibited substance added to the National List on November 3 and 4, 2003. The announcement establishes November 3, 2008, as the date by which the sunset review and renewal process must be concluded. 72 Fed. Reg. 73667 (Dec. 28, 2007).

PEAS. The FCIC has issued proposed regulations which amend the Common Crop Insurance Regulations; Dry Pea Crop Insurance Provisions to include the insurability of additional types of dry peas, to offer winter coverage, to allow replanting payments, and to make chickpeas insurable under the Dry Pea Crop Provisions rather than the Dry Bean Crop Provisions. The changes will apply for the 2009 and succeeding crop years. 73 Fed. Reg. 3411 (Jan. 18, 2008).

SUGAR. The CCC has issued the final 2006-crop cane state allotments and company allocations to sugarcane and sugar beet processors for the period from October 1, 2006 through September 30, 2007 (fiscal year 2007). This notice also publishes the 2007-crop (fiscal year 2008) cane state allotments and company allocations based on an 8.450 million short tons, raw value overall allotment quantity of domestic sugar. This applies to all domestic sugar marketed for human consumption in the United States from October 1, 2007, through September 30, 2008. 73 Fed. Reg. 1314 (Jan. 8, 2008).

—Robert P. Achenbach, AALA Executive Director

Eminent domain/ cont. from p. 1
to acquire title to the property pursuant to New York's Eminent Domain Procedure Law ("EDPL"), N.Y. EDP §101 *et seq*. (1995). Cited as the purposes for the use of eminent domain were preserving open space and agricultural resources; preserving prime agriculture as an important component of the local economy; ensuring the retention of scenic vistas, a bucolic and rural character and the sale of fresh, locally-grown produce; and protecting the Manorville Farmland Protection Area as the largest contiguous belt of working farmland in the Town. Brookhaven completed an Environment Assessment for the proposed eminent domain action, as required by the State Environmental Quality Review Act ("SEQRA"), N.Y. Env. Art. 8 (1995). The assessment concluded that the acquisition of the property would not have a significant impact on the environment.

Aspen Creek sought review of the Town's actions by the New York Appellate Division Court Second Department, alleging that the town committed procedural and substantive violations of both EDPL and SEQRA, and that EDPL is unconstitutional as applied in its case. In a split decision, the majority held in favor of the Town of Brookhaven, dedicating most of its decision to the issue of whether the condemnation would serve a "public purpose" as required by EDPL. Noting that a public purpose is broadly defined under New York law, the court examined the town's intentions to enable residents to enjoy locally grown produce, scenic views and a pristine landscape, and to maintain the area's farming heritage. The preservation of farmland for these reasons would undoubtedly confer benefits upon the public, reasoned the majority. In addition, the court pointed out that farmland protection is consistent with the state's declared policy to foster the agricultural industry and preserve open space, natural resources, and agricultural lands. On several occasions, the court pointed to the community's support for farmland protection as evidence that the condemnation served a public purpose, referring specifically to a bond initiative approved by Brookhaven voters that set aside $120 million for the preservation of open space and farmland and to supportive testimony by community residents at public hearings for the condemnation.

The court was not receptive to Aspen Creek's attempt to tie the case to the highly visible *Kelo* case decided by the U.S. Supreme Court. *Kelo v. New London*, 545 U.S. 469 (2005). Aspen Creek relied on *Kelo* to challenge the purpose of the taking and the town's intent for the taking, claiming that the true purpose was to bestow private rather than public benefits. A number of factors were raised in support of this bad faith argument—the town's lack of a formal development plan for the area, its dramatic increase to over $4 million as the offering price after being unable to purchase from the prior owner at $1.4 million, its offer to allow Aspen Creek's owner to build up to three homes on the property for personal use, plans to lease the land to a farmer who would allegedly gain financially from the arrangement, and a positive effect that protection of the area would have on the value of already existing homes. These outcomes raised doubts as to the real motives for the taking, according to Aspen Creek.

Carefully responding to each of Aspen Creek's assertions, the majority determined that the private gains from the condemnation were "incidental benefits" that did not invalidate the town's dominant purpose of protecting the land for the public good. While acknowledging that there was not a formal plan for the town's Manorville Farmland Protection Area, the court drew a distinction between the need for a plan when developing property versus when protecting land, and concluded that *Kelo* did not require the existence of a comprehensive development plan for a condemnation that protects land. The court also reasoned that the town and county's recent expenditures of over $8 million to preserve land within the Manorville Farmland Protection Area substantiated a genuine desire and intent to preserve the land. The increase to over $4 million for the development rights were justified by an appraisal and a recent bond enactment, which provided the town access to more funds for the purchase. The court also noted that the town's consideration of allowing Aspen Creek a few building sites on the property indicated a required willingness to negotiate a voluntary sale rather than an undermining of its farmland protection purpose.

The procedural issues raised by Aspen Creek met unfavorable rulings as well. Of interest is Aspen Creek's argument that the town did not properly address the environmental effects of the proposed condemnation action. New York's SEQRA requires an agency to examine a proposed action for potential environmental impacts. Brookhaven conducted an environmental assessment and concluded that the taking would not create environmental harm. While Aspen Creek raised in oral argument the possibility of farm pesticide use on the property—an argument that elicited a few questions from the justices—the majority noted that Aspen Creek failed to assert any significant potential for environmental harm that could result from the taking. Rather, the court agreed with the town that the continued farm use of the property, a use that had been in place for several generations, would beneficially impact the environment.

Justice Lifson issued a dissenting opinion. While agreeing with the majority's conclusions on Aspen Creek's procedural challenges, Justice Lifson disagreed on the town's true motivation for taking. Relying on *Kelo* and several New York decisions, the justice reached the "inescapable conclusion that this taking was pretextual and is, therefore, forbidden by the federal constitution." Several factors were relevant to the dissent's rationale, beginning with the town's lack of a formal plan for the Manorville Farmland Protection Area. *Kelo* requires that an entity have a recognizable plan, argued Justice Lifson, and the *Kelo* court placed much emphasis on the need for a record clearly demonstrating that a condemnation is in accordance with a comprehensive master development plan. This requirement for a development plan could not be negated by a taking whose supposed purpose is to prevent development and preserve the land.

Even if a legitimate plan existed for purchasing the property, the justice noted that the town's actions varied from the supposed acquisition plan. An action that Justice Lifson would have found more consistent with the plan would have been a matching by Brookhaven of Aspen Creek's $1.4 million offer when it purchased the property from the prior owner. The town's later increase to over $4 million for the property in less than two years raised questions as to its true motivations, as did the town's willingness to allow limited residential development in the alleged protection area if Aspen Creek sold the property—an action contrary to preservation of the property. The justice also disagreed with the majority's conclusion that the farmer who would rent the property would receive only an incidental benefit from the condemnation. The farmer would be the only actual beneficiary of the economic use of the property, thereby making the private benefit significantly disproportionate to the "ephemeral" public benefit, said Justice Tifson.

On January 22, 2008, Aspen Creek filed both a Motion for Reargument before the Second Department Appellate Court and an alternative request to appeal to the New York Court of Appeals.

—Peggy Kirk Hall, Director of Agricultural and Rural Law, The Ohio State University

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Federal Register/Cont. from p. 7
system works and how producers may participate in the NAIS. 72 Fed. Reg. 71873 (Dec, 29, 2007).

ORGANIC FOOD. The AMS has adopted as final regulations amending the USDA National List of Allowed and Prohibited Substances regulations to reflect recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board on August 17, 2005, adding one substance, sucrose octanoate esters. 72 Fed. Reg. 69569 (Dec. 10, 2007).

The AMS has adopted as final regulations amending the USDA National List of Allowed and Prohibited Substances regulations to reflect recommendations submit-

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New web-based calculator helps evaluate quality of jobs

When approached by a prospective industry, community leaders are often faced with a tough question: Will the new business produce local jobs that are worth the incentives requested?

The Northwest Area Foundation launched a Web-based tool to help communities get answers. The Wage & Benefits Metric was designed to help users evaluate the quality of jobs a new or existing business brings to a community. Users can determine if the proposed jobs will offer wages and benefits that allow individuals and families to be self-sustaining within the local economy. This metric puts previously hard-to-calculate information a few keystrokes away from community decision makers.

The Wage & Benefits Metric uses a point-based system that measures income level. Attributes of the proposed jobs, such as pay rates, are entered into the metric, producing a chart with points. The total score determines whether it is a three star job: full-time with benefits; two star: full-time without benefits or part-time with benefits; or a one star: part-time jobs without benefits. That information can then be compared to the county's median income or the average wage needed to meet basic needs.

In addition to the calculator, the Wage and Benefits Metric can be used to analyze and track trends in community job growth that can be stored in a database for use over time. Users can quickly and easily create presentation-quality charts and tables which can be printed in hardcopy or placed in Power Point presentations.

The Web-based tool includes step-by-step instructions and offers a quick calculator with no login or password requirement for one-time users. No additional software installation is required.

The Wage and Benefits Metric is being made available to a larger market after more than two years in development and field-testing by more than 130 organizations and businesses. Testers found the tool had value in helping organizations understand the economic value of jobs in their region.

A project of the Northwest Area Foundation, the Wage and Benefits Metric was coordinated by the Montana Community Development Corporation. The tool can be accessed at www.jobmetric.nwaf.org. For more information and or a demonstration, please contact Chris Allen at Chris@chrisallenassociates.com, 406-370-0780.

—Janie Hipp, CSREES/USDA

Federal Register summary from November 18, 2007 to January 18, 2008

ANIMAL WELFARE. The APHIS has issued proposed regulations which amend the Animal Welfare Act regulations regarding transportation of live animals other than marine mammals by removing the current ambient temperature requirements for various stages in the transportation of those animals and replacing those requirements with a single performance standard under which the animals would be transported under climatic and environmental conditions that are appropriate for their welfare. The regulations currently require that ambient temperatures be maintained within certain ranges during transportation, but animals may be transported at ambient temperatures below the minimum temperatures if their consignor provides a certificate signed by a veterinarian certifying that the animals are acclimated to temperatures lower than the minimum temperature. This proposal would make acclimation certificates for live animals other than marine mammals unnecessary. 73 Fed. Reg. 413 (Jan. 3, 2008).

BRUCELLOSIS. The APHIS has adopted as final regulations amending the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Idaho from Class A to Class Free. 72 Fed. Reg. 67635 (Nov. 30, 2007).

DISASTER ASSISTANCE. The FSA has adopted as final regulations governing the 2007 Emergency Agricultural Assistance programs: the Crop Disaster Program (CDP) and a 2005-2007 Livestock Indemnity Program (LIP). For CDP, the program applies only to 2005, 2006, and 2007 crop producers who chose to have a federal crop insurance plan of insurance or Noninsured Crop Disaster Assistance Program coverage for the year of loss and suffered damage due to a natural disaster. Eligible crops for 2007 must have been planted prior to February 28, 2007. For LIP, the program applies only to livestock producers in counties designated as a major disaster or emergency area by the President or those declared a natural disaster area by the Secretary of Agriculture. Counties designated disasters by the President may be eligible even though agricultural loss was not covered by the designation if there has been an FSA administrator's physical loss notice covering such losses. The natural disaster declarations by the Secretary or designations by President must have been issued after January 1, 2005 and before February 28, 2007. Counties contiguous to such counties will also be eligible. 72 Fed. Reg. 72863 (Dec. 21, 2007).

DISASTER ASSISTANCE. The FSA has issued proposed regulations governing the Dairy Disaster Assistance Payment Program III, as authorized by the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28. The proposed program would provide $16 million in assistance for producers in counties designated as a major disaster or emergency area by the President, or those declared a natural disaster area by the Secretary of Agriculture. Counties declared disasters by the President may be eligible, even though agricultural loss was not covered by the declaration, if there has been an FSA Administrator's Physical Loss Notice covering such losses. The natural disaster declarations by the Secretary or the President must have been issued after January 1, 2005, and before February 28, 2007. Counties contiguous to such counties are also eligible. 72 Fed. Reg. 65889 (Nov. 26, 2007).

GENETICALLY MODIFIED ORGANISMS. The APHIS has announced that it intends to prepare an environmental impact statement in connection with making a determination on the status of the Monsanto Company and Forage Genetics International alfalfa lines designated as events J101 and J163 as regulated articles. This notice identifies potential issues and alternatives that will be studied in the environmental impact statement and requests public comment to further delineate the scope of the issues and regulatory alternatives. The announcement follows a ruling in *Geertson Seed Farms, Inc. v. Johanns,* 2007 U.S. Dist. LEXIS 14533 (N.D. Calif. 2007) and *Geertson Farms, Inc. v. Johanns,* 2007 U.S. Dist. LEXIS 21491 (N.D. Cal., 2007) where the court held that an environmental impact statement was required because the plaintiffs demonstrated that the GE alfalfa could contaminate non-GE varieties even with the buffer zones and result in a significant environmental impact. 73 Fed. Reg. 1198 (Jan. 7, 2008).

NATIONAL ANIMAL IDENTIFICATION SYSTEM. The APHIS has announced that it is making available for review and comment a revised version of the National Animal Identification System Program Standards and Technical Reference document. A previous program standards document was originally made available in May 2005. 72 Fed. Reg. 68554 (Dec. 5, 2007).

NATIONAL ANIMAL IDENTIFICATION SYSTEM. The APHIS has announced that it has prepared and issued a revised version of the National Animal Identification System (NAIS) User Guide that was originally released in draft form in November 2006. The revised User Guide contains the most current information on how the

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION

Membership Renewals
All members should have received a 2008 membership renewal notice. Please send in your renewals by February 15 to avoid the cost of sending reminders. If you know of someone who would benefit from membership in the AALA, I can send you a brochure on the AALA with a membership form. RobertA@aglaw-assn.org.

2007 Conference Handbook on CD-ROM
Didn't attend the conference in San Diego but still want a copy of the papers? Order the entire written handbook plus the 1998-2007 past issues of the *Agricultural Law Update* on CD. The files are in searchable PDF with an interactive table of contents that is linked to the beginning of each paper. Order for $45.00 postpaid from AALA, P.O. P.O. Box 835, Brownsville, OR 97327 or e-mail RobertA@aglaw-assn.org. Copies of the printed version are also available for $90.00. Both items can also be ordered using PayPal or credit card using the 2006 conference registration form on the AALA web site.

2008 Conference
Planning for the 2008 Symposium is already underway, with new President-elect Maureen Kelly Moseman seeking topic ideas and speakers for the meeting in Minneapolis, MN on October 24-25, 2008 at the downtown Marriott. The Marriott is located near the light rail system which connects downtown to the airport, the Mall of America and other local attractions. We will be working with the Minnesota Bar Ag. Section to provide the best all around experience for attendees. Mark your calendars now so we can have a record attendance.

Change of Address and phone/fax numbers for AALA Executive Director's office:
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Robert P. Achenbach, Jr, AALA Executive Director