INSIDE

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IN FUTURE ISSUES

Livestock farmers denied disaster relief

The United States Court of Appeals for the Fourth Circuit has affirmed a decision that denied livestock disaster relief funds to three farmers because each of the farmers' gross revenue exceeded the amount allowed pursuant to the regulations implementing two disaster relief programs, the 1998 Crop Loss Disaster Assistance and the Emergency Livestock Feed Assistance Programs. *McDaniels v. U.S.*, 300 F.3d 407, 412-13 (4th Cir. 2002).

In October, 1998, Congress established the Crop Loss Disaster Assistance Program ("CLDAP") and Emergency Livestock Feed Assistance Program ("LAP"). *See id.* at 408. Funds for these programs were appropriated through the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 ("the Appropriations Act"), Pub. L. No. 105-277, 112 Stat. 2681 (1998). *See id.* Congress provided $1.5 billion for the CLDAP to assist "'producers on a farm who have incurred losses in the 1998 crop due to disasters'" and $200 million for the LAP "'to make available livestock feed assistance to livestock affected by disasters.'" *Id.* (quoting 1999 Appropriations Act §§ 1102(b) & 1103, 112 Stat. 2681, 2681-43 & 2681-42). The Appropriations Act required that the Secretary distribute the disaster relief funds in a "'fair and equitable manner.'" *Id.* (quoting § 1101(a), 112 Stat. at 2681-42). The Appropriations Act also gave the Secretary the authority to determine the "'eligibility and payment limitation criteria.'" *Id.* (quoting § 1101(b)(3), 112 Stat. at 2681-42).

Congress instructed the Secretary and the Commodity Credit Corporation to issue "'such regulations as are necessary'" and "'[a]s soon as practicable after the date of enactment.'" *Id.* (quoting § 1133(a)), pursuant to Congress' instructions. *See id.* (citing 7 C.F.R. Parts 1477 and 1439). One of the regulations promulgated by the Secretary mandated that "no person may receive benefits 'who has gross revenue in excess of $2.5 million for the 1997 tax year.'" *Id.* (quoting 7 C.F.R. § 1477.106(f) (citing § 1439.11)). Gross revenue was defined as the "'total gross receipts of the person,' which are not to be reduced 'for costs, expenses or pass-through funds.'" *Id.* (quoting § 1477.106(f)). This definition stated that "[g]ross revenue includes the total income and total gross receipts of the person, before any reductions. Gross revenue shall not be adjusted, amended, discounted, netted or modified for any reasons. No deductions for costs, expenses or pass-through funds will be deducted from any calculation of gross revenue." *Id.* at 411 (citing § 1477.106(f)).

Section 1477.103 defined pass through funds as money "'that goes through, but does

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It's October 21st: do you know where your organic clients are regarding the new federal regulations?

More than 10 years ago Congress enacted legislation designed to address the growing confusion regarding the labeling and production of organic foods. Ultimately this legislation became Title 21 of the 1990 Farm Bill, entitled the Organic Food Production Act (OFPA). OFPA had the twin goals of creating uniformity to benefit consumers and to allow organic producers to sell their products with greater ease. 7 U.S.C. 6501.

Enacting the legislation proved far easier than writing the regulations that would implement the policy goals of the statute, but as of October 21, 2002, organic producers and handlers will be operating under federal regulations. The rules establish procedures, detail the operations of the National Organic Program (NOP), and set forth mechanisms for accreditation and removal of certifiers. 7 C.F.R. Part 205.100 *et seq.* The new regulations are not intended to be retroactive.

The federal government reported in the appendix to the final rules that there were at last count approximately 49 certifying bodies nationally. Some 13 of these certifying bodies are states. Most are private organizations. Many have different and potentially

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not remain in, a person's account, such as money collected by an auction house.'" *Id.* at 409. Section 1477.103 also provided that "persons who receive '50 percent or less of [their] gross receipts from farming and ranching' may still receive assistance, but only if their gross revenue 'from all sources' was less than $2.5 million." *Id.* (quoting § 1477.103).

Earl McDaniels, Randolph Lovett, and Alton Brown, plaintiffs, were livestock farmers in South Carolina. *See id.* at 409. In October, 1998, they applied to the Farm Service Agency ("FSA") for both the CLDAP and LAP disaster relief funds. *See id.* at 408-09. The FSA denied the plaintiffs' applications because it determined that they each exceeded the $2.5 million gross revenue limit set forth in 7 C.F.R. § 1477.106(f). *See id.* at 409.

McDaniels owned a one-third interest in a tobacco warehouse that had tobacco sales in excess of $10 million in 1997. *See id.* Lovett owned a two-thirds interest in a tobacco warehouse that had tobacco sales in excess of $10.7 million in 1997. *See id.* Brown owned 100 percent of the stock in a warehouse that had tobacco sales in 1997 of $3.3 million. *See id.*

The money used to purchase the tobacco was paid to these warehouses and deposited in the warehouses' bank accounts. *See id.* at 409-10. Payments made to McDaniels's warehouse were made to the warehouse partnership. *See id.* The partnership then distributed the net proceeds to the tobacco owners, minus sales commissions. *See id.* For Lovett's and Brown's warehouses, the warehouse owners "advanced the purchase price to the tobacco owners and then billed the purchasers for the advance plus a sales commission." *Id.* at 410. Regardless of the specific transactional process used, the auction sales proceeds for each warehouse passed through its bank account. *See id.*

The FSA denied the plaintiffs' application for disaster benefits because "each farmer had gross revenue that exceeded $2.5 million, when pass-through funds from tobacco auctions at [the] warehouses in which they had an interest were included." *Id.* The farmers appealed the FSA's determination to the USDA National Appeals Division ("NAD"). *See id.* They argued that "because they never took title to the bailment tobacco sold from their warehouses on behalf of third party producers, it was erroneous to treat the proceeds of bailment tobacco as revenue." *Id.* The USDA NAD affirmed the FSA's determination. *See id.* The NAD Director subsequently affirmed the FSA and NAD determinations. *See id.*

The plaintiffs then sought judicial review of the NAD Director's final decision. *See id.* The district court ruled that the Secretary properly denied disaster relief to each of the plaintiffs because the revenue each farmer derived from the warehouse sales of tobacco exceeded the $2.5 million gross revenue limit pursuant to § 1477.106(f). *See id.* The district court also ruled that "the Secretary's regulations were reasonable and 'a permissible construction of the 1998 Act.'" *Id.* The plaintiffs appealed the district court's decision to the U.S. Court of Appeals for the Fourth Circuit. *See id.*

The plaintiffs conceded that the regulations required the Secretary to deny them disaster assistance as long as the pass-through funds derived from the tobacco auction sales were included in calculating the plaintiffs' gross revenue. *See id.* However, they argued that "the regulations themselves exceed[ed] the Secretary's statutory authority, which require[d] the Secretary to distribute the benefits in a 'fair and equitable manner.'" *Id.*

The plaintiffs also argued that the regulations were "unreasonable, arbitrary, and capricious because they include[d], as a

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REGULATIONS/C*ontinued from page 1*

conflicting requirements for farm products to be certified as organic. Although some states such as California had established regulatory schemes for organic production, many did not. In the absence of a national or state regulatory scheme, many private companies filled the need for certification. Since organic produce does not look any different from conventional produce, some third-party method of certification became necessary to prevent consumer fraud. As the organic market boomed, certification became even more important.

With the establishment of the NOP, the USDA envisions an enforcement scheme with multiple actors including the USDA, accredited certifying agents, and, where applicable, approved State Organic Programs. 7 U.S.C. 6503. Although individual states may establish State Organic Programs, the federal government has clearly occupied the field. 7 U.S.C. 6503. If the USDA approves the proposed state regulations, States may enact regulations that are more restrictive than the federal ones. 7 U.S.C. 6506, 7 C.F.R. Part 205.620. States establishing State Organic Programs may not enact regulations that would be discriminatory against the substance of the Act. 7 U.S.C. 6507, 7 C.F.R. Part 205.621 & Appendix.

States may set their own level of involvement in the National Organic Program. A state may establish a State Organic Program upon approval by the USDA. States must have several elements in place to be approved by the USDA. First, the state must come up to the level of the National Organic Standards. Then, if the state wants to impose more restrictive requirements, the USDA must approve them. In addition, States must set forth procedures for dealing with non-compliance as well as mediation procedures. 7 C.F.R. Part 205.602, and 205.663. The governing state official would have to apply to the USDA to be accredited as a certifying agent, as described in section 2115(b) of the OFPA. 7 U.S.C. 6514(b). States also are preempted under sections 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the state programs have been submitted to, and approved by, the Secretary of Agriculture as meeting the requirements of the OFPA.

States can have additional requirements that organic operations in the state would have to meet to be certified. 7 U.S.C. 6507(b)(2). But these state-imposed requirements must be approved by the Secretary of Agriculture and must meet several criteria. The additional requirements must help further the purposes of the OFPA, must be consistent with the OFPA, and must not discriminate against organic commodities produced in other States. 7 U.S.C. 6507.

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Property valuation may be reduced by proximity to livestock operation

In Nebraska, land and buildings are valued at their fair market value for purposes of property taxation. Residential and commercial real estate is valued at 92-100% of actual value (i.e. farm market value), and agricultural real estate is valued at 74-80% of actual value. Neb. Rev. Stat. 77-5023(3). Fair market value for property tax valuation purposes may be determined by (1) comparative sales, (2) income, or (3) cost. Neb. Rev. Stat. 77-112. In *Livingston v. Jefferson County Board of Equalization*, 10 Neb. App. 934 (2002), the Nebraska Court of Appeals ruled that the county board of equalization erred in not considering a rural residence's proximity to a swine farrowing facility in determining the residence's valuation.

The taxpayer started a swine farrowing operation in 1990. In 1999 the taxpayer built a house approximately 3/4 of a mile from his farrowing facility at a cost of $328,649. In 2000, the county valued the house (excluding the land) at $399,321. The taxpayer objected to this valuation for three reasons. First, the house was approximately 3/4 of a mile from a swine farrowing facility with 5,200 sows. Second, the tax payer had obtained an easement to apply hog manure to cropland across the road from the house. Third, the house was not served by a public road but by a private road that at times could be used only with a four-wheel drive vehicle. The taxpayer's appraiser discounted the value of the house (based on comparable sales) by 30% for livestock odors and 10% for its remote location.

The county board of equalization refused to modify its property valuation, and the county was upheld by the state Tax Equalization and Review Commission (TERC). Both the county and TERC refused to consider the effects of livestock odors and the residence's remote location as being factors that would affect the property's market value.

Normally there is a legal presumption

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Depending on the perspective of the viewer, the new regulatory scheme could either be viewed as essentially a federal one subject to some modest input by states or it could be seen as a very flexible approach designed to achieve national uniformity and allow for significant state control.

Not all organic producers need to be certified. The statute provided an exemption for small agricultural producers. If the gross agricultural income from organic sales totals $5,000 or less annually, the enterprise would be exempt from certification. 7 U.S.C. 6505 7 C.F.R. Part 205.101(a)(1).

Exemption from the requirement that organic operations be certified does not mean that the operation will be exempt from other applicable regulations. For example "small farm operations" must still comply with the applicable requirements of subpart C regarding production, handling, and labeling requirements of the NOP regulations. 7 C.F.R. Part 205.310. One very important caveat is that while an exempt or excluded entity may be identified as organic, it may neither be labeled as certified organic nor sold with the USDA Organic seal placed on it. 7 C.F.R. Part 205.310.

Handlers of organic products could seek exemption in various ways. For example, section 205.101 of the regulations provide that in addition to the $5,000 or less exemption, retail food establishments that handle but do not process organic food would be exempt. 7 C.F.R. Part 205.101(2). Also, handling operations that handle only agricultural products that contain less than 70% organic are exempt as well. 7 C.F.R. Part 205.101(3). However, the same scheme applies to handlers that applies to producers—an exemption from certification does not carry with it an exemption from regulation. For example, exempt handling organizations must retain records sufficient to show that the organic ingredients were produced and handled organically. 7 C.F.R. Part 205.101.

A producer seeking to argue issues related to organic production will encounter one big difference after the regulations take effect. The federal government will now control the judicial appeals process. In the past, the appeals process was determined either by the private entity from which the grower received his or her certification or by the state government.

State organic parties proposed that jurisdiction in court challenges to the new program should lie in state courts. 7 C.F.R. Part 205.100 et seq Appendix. There was some logic to this in that if the state elected to form a state organic program, the state directors of agriculture would be the ones enforcing the new program. However, the federal government declined the request to relinquish jurisdiction to state courts. Instead, the appeal process runs through the federal courts in the district in which the certified operator is located. 7 C.F.R. Part 205.668(b).

The new regulations were also supposed to help organic producers more easily export their goods into the global market. The regulations address legal issues involved in international trade in organic products. The Secretary of Agriculture may allow organic products to be imported and exported. 7 C.F.R. Part 205.300. Imported organic products must meet U.S. standards to enter the U.S., and exported organic products must conform to the destination country's requirements. 7 C.F.R. Part 205.300. European Union requirements are found in various documents including the EU Council Regulations of 2092/91 and 1804/1999. U.S. export requirements envision a scheme where a U.S. exporter might be allowed to comply with the different organic requirements for the destination country. However, the export product would then have to be labeled "export only."

Although much has changed with the new organic regulations' arrival on the scene, much in the regulation of food remains unchanged. The federal government is still very involved in regulating food production. 7 U.S.C. 6519 (f). Federal powers under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspections Act (21 U.S.C. 451 *et seq.*), the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*) the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*) the Environmental Protection Agency (EPA) and the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*) remain as they were before the new federal organic regulations.

Buffer zone requirements for crops of organic producers remain murky. The regulations require distinct, defined boundaries and buffer zones to prevent the unintended application of a prohibited substance to an organic field. But, the regulations do not set precise limits. 7 C.F.R. Part 205.202. Instead the details are left to the discretion of the individual producers and their certifying agent. Genetically modified organism cross-pollination contamination in corn resulted in a flurry of legal activity. Compelling market requirement of avoiding cross-pollination will certainly give growers an incentive to keep their organic corn far away from the GMO varieties.

Information on the National Organic Program may be obtained on the web site at http://www.ams.usda.gov/nop/. In addition Richard Mathews, Program Manager may be contacted at USDA-AMS-TMP-NOP, Room 4008-South Building 1400 and Independence Avenue, SW Washington, DC 20250-0020. The phone is (202) 720-3252 and the fax is (202) 205-7808. Emails may be sent to NOPWebmaster@usda.gov.

—Rich Schell J.D., Palatine, IL

White House announces plan to further regulate genetically-modified crops

By Anne Hazlett

On August 2nd, the White House Office of Science and Technology Policy ("OSTP") published a notice of proposed federal actions to further regulate plants derived from biotechnology. *Proposed Federal Actions to Update Field Test Requirements for Biotechnology Derived Plants and To Establish Early Food Safety Assessments for New Proteins Produced By Such Plants*, 67 Fed. Reg. 50578 (Aug. 2, 2002). In its proposal, OSTP detailed steps that the Bush administration intends to take to enhance the existing coordinated framework for genetically-modified crops between the Environmental Protection Agency ("EPA"), Department of Agriculture ("USDA"), and Food and Drug Administration ("FDA"). Specifically, the notice outlines new duties that will be undertaken with regard to field test requirements and early food safety assessments for new proteins introduced into plants. *Id.* Such measures will address only those crops derived from biotechnology that are intended for food and feed use. *Id.*

Current oversight of agricultural biotechnology by the federal government

Federal regulation of agricultural biotechnology products can be traced back to 1986 when the Reagan administration adopted the "Coordinated Framework for Regulation of Biotechnology." *See Statement of Policy: Foods Derived From New Plant Varieties*, 51 Fed. Reg. 23302 (June 26, 1986); *Food Biotechnology in the United States: Science, Regulation, and Issues*, Congressional Research Service, at 6 (Jan. 2001). The framework identified EPA's Office of Pesticide Programs, USDA's Animal Plant Health Inspection Service ("APHIS") and the Department of Health and Human Services' FDA as lead agencies to coordinate oversight activities. *Food Biotechnology Report* at 6. It also advised that genetically engineered products would be regulated according to their characteristics and novel features, and not by their method of production. *Id.* The framework further stated that new biotechnology products would be regulated under the existing web of federal statutory authority and regulation. *Id.*

Under the coordinated framework structure, FDA is responsible for regulating food and feeds in the market that have been modified through genetic engineering. *Id.* FDA policy is based on the agency's authority under the Federal Food, Drug and Cosmetic Act ("FFDCA") and requires that genetically-engineered foods meet the same safety standards as those required of other foods. *Statement of Policy: Foods Derived from New Plant Varieties; Notice*, 57 Fed. Reg. 22984-85 (May 29, 1992). FDA treats substances intentionally added to food through genetic engineering as food additives if they are significantly different in structure, function, or amount from substances currently found in food. *Id.* at 22985. Under the FFDCA, substances that are food additives may be used in food only in accordance with an authorizing regulation. *Id.*

APHIS regulates importation, interstate movement, and the environmental release of plants, animals, and other organisms that have been altered or produced through genetic engineering and that have the potential to create pest problems in domestic agriculture. *Food Biotechnology Report* at 11. For new plants that could become pests, APHIS issues permits for field tests or for other forms of release into the environment. *Id.*; 7 C.F.R. part 340.4. In reviewing a permit application, the agency prepares an environmental assessment in which it evaluates the probable environmental impact of the release. *Food Biotechnology Report* at 11. The permit application process requires that the biotechnology developer disclose information about the development of the plant and the control measures that will be in place during transport and field testing. 7 C.F.R. part 340.4.

EPA regulates "plant-incorporated protectants" ("PIPs"), which are plants that produce pesticides within their tissues, under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") and the FFDCA. *Food Biotechnology Report* at 14. Under FIFRA, EPA assesses the risk that the pesticide substance in the plant poses to human health as well as the environment. *Id.* It will approve registration of a substance for a particular use so long as that use will not cause unreasonable adverse effects on the environment. 7 C.F.R. part 152.112. If the plant producing the PIP is also a food crop, EPA must further establish a tolerance, or "safe," level for the pesticide residue under § 408 of the FFDCA. *Id.* In the case of any unregistered pesticide or any registered pesticide being tested for an unregistered use, EPA is also responsible for issuing an experimental use permit ("EUP") for field testing. 7 C.F.R. part 172.3.

The OSTP case for increased federal oversight

Over the past decade, the use of crops derived from biotechnology has increased substantially. 67 Fed. Reg. at 50578. For example, in 1994 approximately 7,000 acres were planted under 593 USDA field test authorizations. *Id.* In 2001, by contrast, 57,000 acres were planted under 1,117 authorizations. *Id.* During that year, approximately 88 million acres were planted in the United States to biotechnology crops and 130 million acres were planted worldwide. *Id.*

Beyond an increase in acreage, the focus of biotechnology development efforts has also changed. *Id.* In the past, biotechnology research has focused on developing plants that express traits for improved agronomic properties, such as pest resistance and herbicide tolerance. *Id.* Today, an increasing emphasis of the research and development work in biotechnology is directed towards adding traits to plants that benefit the consumer, such as enhanced nutrition and pharmaceutical properties, and traits that produce substances like industrial enzymes not intended for consumption as food or feed. *Id.*

As a result of these developments, OSTP believes that seed production and commodity handling systems will face increasing pressure to meet food and feed safety standards. *Id.* Further, OSTP contends that while the expansion of biotechnology crops is expected to result in net benefits to producers, consumers, and the environment, the federal government must continue to provide appropriate regulatory oversight. *Id.* Such oversight should include adjusting federal regulatory requirements in a manner that is consistent with scientific developments and industry trends. *Id.*

In its August notice of proposed federal actions, OSTP focused its regulatory update agenda on two areas: field testing requirements and food safety assessments. With respect to field testing requirements, OSTP maintains that while existing requirements have been appropriate for the current development and commercialization trends in agricultural biotechnology, federal regulations must anticipate future activities. *Id.* As the number and diversity of field tests increase, there is a greater likelihood that cross-pollination caused by pollen drift from field tests to commercial fields or commingling of seeds produced in field test plots with commercial seeds will occur. *Id.* Cross-pollination could then result in intermittent, low levels of genes derived from biotechnology and gene products appearing in commerce without going through the applicable regulatory review. *Id.*

In updating the regulatory process, OSTP further contends that early food safety assessments are necessary for new proteins being produced by biotechnology plants that are intended for food or feed use. *Id.* at 50578-50579. By eliminating the concern that a new protein would cause an allergic reaction or could be a toxin, the government can nullify worries that a new protein engineered into field-tested plants may be found in commercial seed, commodities, food, or feed. *Id.* at 50579.

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Proposed federal actions

OSTP's proposed actions will be implemented through the coordinated actions of FDA, USDA, and EPA. *Id.* In developing this proposal, OSTP has relied on three common principles. First, the level of confinement under which a field test of a plant derived from biotechnology is conducted should be consistent with the level of environmental, human and animal health risk associated with the introduced protein and trait. *Id.*

Second, if a trait or protein presents an unacceptable risk or the risks cannot be determined adequately, field test confinement requirements should be rigorous to restrict out-crossing and commingling of seed. *Id.* The occurrence at any level of biotechnology-derived genes and gene products from these field tests should be prohibited in commercial seed, commodities, and processed food and feed. *Id.*

Third, even if a trait or protein does not present an unacceptable risk to the environment or public health, field test requirements should still minimize the occurrence of out-crossing and commingling of seed from these field tests. *Id.* However, intermittent, low levels of biotechnology-derived genes and gene products from such field tests could be found acceptable based on data and information indicating the newly introduced traits and proteins meet the applicable regulatory standards. *Id.*

FDA

FDA would publish for comment draft guidance on procedures to address food and feed safety concerns arising from the presence of intermittent, low levels of non-pesticidal proteins in food or feed made from biotechnology crops. *Id.* The guidance would focus on biotechnology crops that are under development for food and feed use but have not yet gone through FDA's premarket consultation process. *Id.* In addition, it would be limited to non-pesticidal proteins that have not been previously evaluated by FDA and that are new to a particular crop. *Id.*

In its guidance, FDA would encourage biotechnology developers to submit safety information on any non-pesticidal protein engineered into a food or feed crop once the field testing is at a stage of development where there is concern that proteins produced in the field-tested plants may be found in commercial seed, commodities, food, or feed through cross-pollination or commingling. *Id.* FDA would be principally interested in data and other information addressing potential toxicity and allergenicity. *Id.* Once the information is submitted, FDA would conduct an evaluation and provide developers with a written response as to whether the protein is acceptable or unacceptable from a food or feed safety standpoint. *Id.* Regardless of the finding, FDA would still expect developers to conduct a complete consultation with FDA prior to actually marketing food or feed from the plant. *Id.*

Both the submission and response would be made available on FDA's website. *Id.* The agency would maintain a list on its website, consistent with confidentiality requirements, of all proteins it has evaluated and considered acceptable or unacceptable. *Id*.

Since this guidance would be focused only on new non-pesticidal proteins and their potential toxicity or allergenicity, FDA would not expect multiple submissions for the same protein from the same source gene. *Id.* Nor would the agency expect submissions for proteins moved within the same species of crop as such movement would not raise new toxicity or allergenicity issues for the resulting food or feed product. *Id.*

EPA

EPA would publish guidance to address two issues. First, EPA would revise the process for obtaining agency review of the safety issues associated with intermittent, low level residues of PIPs in food. *Id.* Second, the agency would provide guidance on containment controls that a person should employ when conducting experimental field trials in order to minimize the potential occurrence of unapproved PIPs in food. *Id.*

As to safety assessment, EPA would encourage biotechnology developers to seek approval for residues of PIPs in food very early in the research and development process if there is a likelihood that the pesticide will be in food through gene flow. *Id.* Under § 408 of the FFDCA, EPA is required to determine whether there is a reasonable certainty of no harm from aggregate exposure to the pesticide. *Id.* To make this safety determination, EPA must issue a rule permitting the residues of the PIP to be present in food, even if the PIP is only found at low levels. *Id.* The proposed EPA guidance would advise a developer seeking such an approval to submit PIP-specific information sufficient to establish the PIP's safety with respect to toxicity, allergenicity, and other pesticidal properties. *Id.*

With respect to field testing, EPA would address the regulation of PIPs under FIFRA, which requires a developer to obtain an EUP prior to conducting field research with a pesticide. *Id.* In particular, EPA would provide guidance on the circumstances under which the agency would "reasonably anticipate" that PIP residues would be present in food, and therefore require an EUP. *Id.* Further, EPA would describe the containment controls for experimental field trials that would be appropriate to minimize the potential for gene flow to commercial seed or commodity production fields under circumstances in which those responsible for the field trials would not anticipate residues. *Id.* at 50579-50580. In making these revisions, EPA would coordinate its approach with other federal agencies. *Id.* at 50580.

USDA

USDA would strengthen its field-testing controls for permits on those bioengineered traits that are not intended for commodity uses, such as pharmaceuticals, veterinary biologics, and industrial products. *Id.* The potential for exposure would be mitigated through several additional safeguards, including overall confinement procedures, performance standards, and monitoring/auditing practices that ensure that outcrossing or commingling of non-commodity traits with seeds and commodities is prevented. *Id.*

In addition, USDA would also propose to amend its biotechnology regulations at 7 C.F.R. part 340 so as to provide criteria under which regulated articles may be allowed in commercial seed and commodities if they pose no unacceptable environmental risk. *Id.*

Conclusion

OSTP's August announcement outlining earlier safety assessments for future biotechnology developments has been welcomed by a variety of interests. In an August 5th press release, CropLife America President Jay Vroom stated: "CropLife America applauds the Aug. 2 White House announcement outlining earlier safety assessments for future, unique crop biotechnology developments as evidence that the coordinated framework adequately safeguards human health and the environment and can be enhanced to accommodate new technologies." Press Release, "CropLife America Commends Bush Administration's Move to Bring the Coordinated Framework into the 21st Century," CropLife America, August. 1, 2002, http://www.croplifeamerica.org.

Similarly, the American Seed Trade Association has issued a statement supporting the proposal: "To maintain consumer confidence and to realize the maximum benefit to producers, consumers and the environment from the commercialization of biotech derived products, advancements in technology, marketing and regulations must remain consistent." ASTA Chief Executive Officer Richard Crowder further stated that the proposal "will help ensure that science based regulations and technol-

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ogy move together," and that the changes will "provide additional confidence in biotech derived products for customers of the seed industry and for feed and food product users, domestically and internationally." Press Release, "ASTA Supports Administration's Biotech Field Test and Food Safety Proposal," American Seed Trade Association, Aug. 5, 2002, http://www.amseed.com/news.

At the same time, however, environmental and food safety advocates are not convinced that the OSTP proposal goes far enough to protect the public interest. In an August 3rd *L.A. Times* story, Jane Rissler, a spokesperson for the Union of Concerned Scientists, stated: "I fear that if the FDA approach remains voluntary it will end up protecting industry more than people and the environment. Industry will be able to go to FDA to get an OK if it fears it has not contained a new protein, so it won't be liable for introducing a protein into the food supply." Elizabeth Shogren, *New Testing Policy Proposed for Altered Crops: Biotech Industry Applauds the White House Plan, But Food Safety Advocates and Environmentalists Say It May Not Go Far Enough*, L.A. Times, Aug. 3, 2002.

The public comment period for OSTP's proposed federal actions closed on September 30th. Any comments submitted will be directed to the individual agencies involved in updating the coordinated framework for federal oversight of biotechnology. OSTP hopes to have a final rule in place by early 2003.

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component of gross revenue, pass-through funds for bailment tobacco sales even though the farmers 'neither owned title to the tobacco nor had a right to the proceeds from the bailment sales.'" *Id*. The plaintiffs asserted that if pass-through funds had been excluded from the gross revenue calculation, then they would have qualified for the CLDAP and LAP disaster assistance funds. *See id.* In making these arguments, the plaintiffs pointed out that the Secretary did not provide an explanation of why pass-through funds were included in the gross revenue calculation. *See id.*

The Fourth Circuit first examined whether the regulations should be given controlling weight. *See id.* The court stated that "'[w]hen it appears that Congress delegated authority to [an] agency generally to make rules carrying the force of law,' we give great deference to an 'administrative implementation of [the] particular statutory provision.'" *Id.* at 411 (quoting *United States v. Mead Corp.*, 553 U.S. 218, 226-27 (2001)). The court also stated that the first question "'is whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter.'" *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1987)). The court explained that "[e]ven if Congress' intent is ambiguous, we defer to the agency's construction of the statute, asking only 'whether the agency's answer is based on a permissible construction of the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). The court added that "when Congress delegates authority to an agency 'to elucidate a specific provision of [a] statute by regulation[,] [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (quoting *Chevron*, 467 U.S. at 843-44) (and citing *Mead*, 533 U.S. at 227).

The Fourth Circuit noted that Congress delegated authority to the Secretary to distribute the CLDAP and LAP disaster relief funds in a "'fair and equitable manner,'" to determine "'eligibility and payment limitation criteria,'" and to do this without public notice and comment. *Id*. (quoting § 1101(a), § 1101(b)(3) (citing § 1133)). The court observed that, based upon this statutory authority, the Secretary determined that the $2.5 million gross revenue amount would limit eligibility for CLDAP and LAP disaster relief funds. *See id.* The Fourth Circuit concluded that "[i]n this case, we cannot imagine how Congress could have been more clear in its delegation of authority to the Secretary." *Id.*

The court next examined the plaintiffs' argument that the regulations were "arbitrary, capricious, or manifestly contrary to the statute" because they were not "'fair and equitable'" and because the Secretary "did not provide an explanation for the eligibility criteria." *Id.* at 411-12. The Fourth Circuit rejected this argument, noting that Congress expressly authorized the Secretary not to provide an explanation of the eligibility criteria by authorizing the Secretary not to resort to public notice and comment requirements contained in the Administrative Procedures Act. *See id.* at 412 (citing 5 U.S.C. § 553(c) (stating that "'a concise general statement of [a regulation's] basis and purpose'" is required only "'[a]fter consideration of the relevant matter presented' during the comment period")).

The court explained that "[e]ven though reasonable minds might differ as to whether eligibility criteria based on gross revenue–as distinct from net income, assets, or net worth–were the best choice to measure a farmer's economic strength and therefore need for relief, there can be no doubt that the basis chosen for eligibility was reasonable." *Id.* The court also explained that "[g]ross revenue is an economic measure of the size of a farmer's operations, just as are net income, assets, and net worth." *Id.* The court stated that "[w]hile gross revenue may overstate the size of an operation because its net income may be only a small portion, net income could be just as imprecise, failing to identify a large operation that is managed poorly or in which substantial individual incomes are sheltered as items of cost." *Id.* The court also stated that although more accurate definitions of economic strength could have been created, "with more precise definitions come the disputes over appropriate accounting methods and other similar issues." *Id.* at 412-13.

The court added that:

> The choice of measuring a farmer's economic strength by gross revenue can rationally be justified as a way to 'allow relief to be made available quickly, and effectively, within the limits of the funding available for this program.' Using gross revenue as the basis for eligibility eases the administrative burden of calculating each farmer's income. Lumping pass-through funds with revenue reduces the likelihood of sellers manipulating the structure of their transactions to convert non-deductible costs of goods sold into deductible pass-through funds. And, as perhaps the most objective criterion available, it avoids the possibility of inefficient farmers benefitting more than efficient ones, as well as the potential for manipulating income through creative accounting.

Id. at 413 (quoting 64 Fed. Reg. 18553, 18554 (Apr. 15, 1999)).

The Fourth Circuit concluded that using gross revenue without any deductions, including pass-through funds, was a rational application of the Secretary's authority to distribute the CLDAP and LAD disaster funds in a fair and equitable manner. *See id.*

The dissent maintained that because the Secretary did not provide any reasons for its decision to include pass-through funds in the calculation of gross revenue, the case should be remanded back to the Secretary so that the Secretary could provide a statement of reasons for its decision. *See id.* at 413-15. The dissent opined, "[t]hat an agency must give some statement of explanation for its actions is a basic precept of administrative law. As the Supreme Court admonished in *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463

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Valuation/Cont. from p. 3
that county officials have properly valued property for property tax purposes. A county board of equalization need not present evidence regarding its valuation. In this case, the Court of Appeals concluded that the taxpayer had successfully overcome this legal presumption that the county's valuation was correct. The court determined that it was reversible error for the county and TERC to refuse to consider the effects of the swine facility, the manure easement, and the house's remote location on its property value. The fact that the swine facility was owned by the taxpayer did not mean that the nearness of the swine facility could not be a factor in determining the residence's property value.

The court also ruled that the county board of equalization and TERC erred in refusing to consider whether the taxpayer had "overbuilt," i.e. spent more on his residence than he could realistically expect to receive if the house were sold. The taxpayer testified that he would be lucky to receive $200,000 for the house (which probably was accurate, given its remote location and the swine odors). The court quoted an example where a house costing $150,000 and built in a neighborhood where the average house was worth $75,000, would likely have a property value of less than its $150,000 cost because the house was "overbuilt" (or too expensive) for the neighborhood.

The county failed to produce any evidence (1) that the taxpayer's house was not overbuilt and (2) that the swine odors would not affect the property value. The court of appeals ruled that (1) failure to consider whether the house was overbuilt and (2) failure to consider the impact of hog odors on property value were reversible error. The court noted that these factors certainly would come into play when the house was sold, and would certainly influence the price paid after negotiations between a willing buyer and a willing seller. The court quoted Nebraska livestock nuisance decisions as proof that the presence of hog odors could affect what a willing buyer would be willing to pay for the house, given the presence of hog odors. The court ordered the county to consider the impacts of hog odors and remote location in valuing the taxpayer's property.

"It was arbitrary for the [county] Board and TERC to ignore the effect that the hearby hog facility would have on the house's fair market value in the ordinary course of trade. No reasonable fact finder could conclude that in the real estate marketplace, a potential buyer would not notice, and react economically, to having a large hog facility very nearby while living in a remote location."

Commentary. It will be interesting to see whether this decision encourages taxpayers living near livestock facilities to seek property tax reductions due to the impact of livestock odors on the value of their residence. The Nebraska Sierra Club is holding workshops on how to take advantage of this court ruling. Clearly many livestock producers who live near their feeding operations could be in a position to seek a lower property valuation due to livestock odors. Taxpayers seeking lower property valuations due to livestock odors would as a minimum need a property valuation from a licensed appraiser regarding the impact of livestock odors on the residence property value.

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Disaster relief/Cont. from p. 6
U.S. 29 (1983), 'the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and the choice made.'" *Id.* at 413 (quoting *State Farm*, 463 U.S. at 43 and *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

The dissent was unpersuaded by the majority's reasoning that the Secretary was not required to provide reasons for its decision because Congress authorized the Secretary to make its determinations without resort to the notice and comment requirements of § 553(c) of the Administrative Procedures Act. *See id.* at 414. The dissent stated that:

> ... even assuming that, *under section 553(c)*, a statement of basis and purpose is required only if notice and comment is mandated–a conclusion, incidentally, not required by the text of that provision–it does not follow (as the majority believes it does) that the agency's decision may be upheld in the absence of any stated justification. *The Secretary still must provide reasons for his decision in order to survive arbitrary and capricious review under section 706(2)(A) of the APA.*

Id. (emphasis supplied).

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