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INSIDE

IN FUTURE ISSUES

Claims Ct. asserts exclusive jurisdiction, ignoring Justice *and* Esch

In a decision that appears inconsistent with recent decisions of the U.S. Supreme Court, the U.S. Court of Appeals for the District of Columbia Circuit, and the U.S. District Court for the District of Arizona, the United States Claims Court has asserted exclusive jurisdiction in a case challenging the denial of federal farm program payments, and refused to transfer the case back to the federal District Court in Kansas. *Rieschick v. United States*, No. 528-88C, United States Claims Court, 1990 U.S. Cl. Ct. Lexis 402 (October 23, 1990).

In *Rieschick*, plaintiffs initially filed suit in the U.S. District Court in Kansas seeking judicial review of a regulation promulgated by the Secretary of Agriculture under the Dairy Termination Program ("DTP"), 7 U.S.C. § 1446(d), enacted as part of the Food Security Act of 1985 ("the Act"). Under the DTP, the Commodity Credit Corporation ("CCC") entered into contracts with eligible dairy producers who, in return for monetary payments from the government, agreed to cease milk production for five years by slaughtering or exporting their herds and not having any interest in milk or dairy cattle for the five-year period. In this manner, Congress hoped to permanently reduce the level of commercially marketed milk.

Payments to producers participating in the DTP were determined by multiplying the producer's prior milk production base (calculated pursuant to a formula) times the amount of the producer's bid per hundredweight of milk. However, 7 C.F.R. section 1430.455(c)(1) provided that the applicable production base would be reduced by 20,000 pounds for each cow transferred after January 1, 1986 for other than slaughter or export. USDA informally permitted producers to escape this provision by repurchasing the exact cattle previously sold.

Prior to passage of the Act, speculation surrounding the proposed DTP caused a decrease in the value of dairy cattle, including those owned by plaintiffs used to secure lines of credit at a local bank. As a result, the bank notified plaintiffs that their collateral was insufficient. Following unsuccessful efforts prior to the effective January 1, 1986 date of the Act to sell off cattle to reduce their debt to the bank, plaintiffs finally sold ten heifers on January 24 of that year.

Subsequently, plaintiffs bid into the DTP and claimed an applicable production base of 951,189 pounds of milk. Under 7 C.F.R. section 1430.455(c)(1), that base was reduced in the contract by 200,000 pounds (20,000 pounds for each of the ten heifers they sold after the January 1, 1986 effective date of the Act). This resulted in reducing plaintiffs' potential entitlement under the DTP by $45,000. When plaintiffs later learned of CCC's informal policy of permitting producers to escape the provisions of the regulation by repurchasing cattle sold after January 1, 1986, plaintiffs sought to

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Exhaustion of administrative remedies under Ag. Marketing Agreement Act

In *Saulsbury Orchards v. Yeutter*, No. 87-2955, slip. op. (9th Cir. Oct. 29, 1990), the United States Court of Appeals for the Ninth Circuit has emphatically reiterated the exhaustion of administrative remedies doctrine under the Agricultural Marketing Agreement Act. The Court of Appeals held that the exhaustion requirement may not be waived even if the administrative remedy would be inadequate and administrative delay has been unreasonable.

The plaintiff in *Saulsbury Orchards* is an almond handler subject to a marketing order promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act. The Act authorizes the Secretary to impose monetary assessments on almond growers and handlers subject to the marketing order to pay for production research, marketing research, and marketing promotions. *See* 7 U.S.C. § 608c(6)(I). The marketing order establishes an almond board which administers the order. The plaintiff contended that the marketing order violates the first amend-

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buy back the ten heifers they had previously sold, but were unable to do so. Plaintiffs then administratively appealed the reduction of their production base to the Deputy Administrator for State and County Operations. That appeal was denied.

Plaintiffs then filed suit in federal district court. Their complaint sought a declaratory judgment and injunctive relief under the Administrative Procedure Act, claiming that the promulgation of 7 C.F.R. section 1430.455(c)(1) was unlawful and that its application to their contract was arbitrary, capricious, and an abuse of discretion. In addition, plaintiffs sought "indirect" damages of $45,000, plus interest and costs, arising out of their claim for injunctive relief. The district court, however, found that plaintiffs' action was essentially a contract dispute regarding an amount in excess of $10,000, for which the U.S. Claims Court had exclusive jurisdiction under the Tucker Act, 28 U.S.C. §§ 1346 and 1491. Accordingly, the district court transferred the action to the Claims Court. The Government then moved for summary judgment on the merits. Plaintiffs moved to transfer the case back to the district court and, in the alternative, filed a cross-motion for summary judgment in their favor.

After acknowledging that, with the exception of pre-award contract challenges, it has no jurisdiction over suits for injunctions or declaratory judgments (citing *U.S. v. King*, 395 U.S. 1 (1969)), the Claims Court stated that "when the 'prime objective' or 'essential purpose' of the complaining party is to obtain money from the federal Government (in an amount in excess of $10,000), the Claims Court's exclusive jurisdiction is triggered." The court proceeded to hold that plaintiffs' suit was really a contract action for money, not a true action for declaratory relief challenging a federal regulation. The court thus rejected plaintiffs' effort to transfer the case back to the district court in Kansas, and then proceeded to grant the Government's motion for summary judgment on the merits.

In denying plaintiffs' motion to transfer, the Claims Court held that the Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), was not applicable. In *Bowen*, the Supreme Court expressly ruled that not all suits seeking monetary relief from the federal government are necessarily suits seeking "money damages," cognizable exclusively in the Claims Court. The Court pointed out the "long-recognized... distinction between an action at common law for damages— which are intended to provide a victim monetary compensation for an injury to person, property or reputation— and an equitable action for specific relief which may include an order... for the 'recovery of specific property or *monies*....'" 484 U.S. at 893 (citations omitted, emphasis in original). Since Massachusetts was not requesting monetary compensation for a *legal wrong*, but rather specific relief for the very thing it was deprived of, i.e., Medicaid grant funds, the Supreme Court ruled that the relief sought was not for money *damages*, and that the Tucker Act, accordingly, did not preclude the district court from assuming jurisdiction.

Two recent cases seeking declaratory judgments and injunctive relief from the denial of federal farm program benefits have followed the *Bowen* rationale. *See Esch v. Yeutter*, 876 F.2d 976, 977-85 (D.C. Circuit 1989) and *Justice v. Lyng*, 716 F. Supp. 1567, 1568-69 (D. Arizona 1988). While the Claims Court in *Rieschick* sought to distinguish *Bowen* by arguing that the plaintiffs' claim was for purely "retroactive relief, not based on a money-mandating statute, but rather on a contract," those distinctions seem to ignore the real issue *Bowen* requires be addressed— whether the relief sought is for money *damages*. Interestingly, the decision in *Rieschick* does not even mention, let alone seek to distinguish, the D.C. Circuit's decision in *Esch* or the Arizona District Court's opinion in *Justice*.

—Alan R. Malasky, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.

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ment by compelling it to advertise and the due process clause by virtue of control of the Board by the California Almond Growers Exchange, a cooperative which markets more than half of the state's almonds.

In April 1987, Saulsbury Orchards administratively challenged the constitutionality of the marketing order under 7 U.S.C. section 608c(15)(A). The petition was dismissed by an Administrative Law Judge on the grounds that constitutional issues are not cognizable under section 608c(15)(A). On appeal, the Judicial Officer of the Department of Agriculture held that the petition was moot on unrelated grounds. The Judicial Officer suggested, however, that the constitutional issues could be addressed in a section 608c(15)(A) proceeding. Following the Judicial Officer's pronouncement, the ALJ heard the amended petition. In June 1990, he ruled that the marketing order does not violate the first amendment. While these administrative proceedings were underway, Saulsbury Orchards filed a complaint in federal district court for the Eastern District of California alleging that the marketing order was unconstitutional.

The United States Supreme Court has held that the Agricultural Marketing Agreement Act strictly requires plaintiffs to exhaust administrative remedies before seeking judicial review in the federal courts. *See United States v. Ruzicka*, 329 U.S. 287 (1946). Saulsbury Orchards argued that *Ruzicka* was distinguishable because (1) it involved only the assertion of affirmative defenses to an enforcement action brought by the Secretary of Agriculture, and (2) it did not involve constitutional issues.

The Court of Appeals found both arguments unpersuasive. First, the court of appeals held that though "*Ruzicka* arose in the context of an enforcement action under Section 608a [of the Agricultural Marketing Agreement Act],... its principles apply with equal force to [actions brought by growers and handlers]." Second, it held that Congress authorized the Secretary of Agriculture to hear constitutional challenges to marketing orders. The court noted that failure to apply the doctrine would "deprive the court of the benefit of the views of those possessed of day-to-day experience in administering [marketing orders]."

Finally, Saulsbury Orchards argued that the exhaustion doctrine should be waived because there is no adequate administra-

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Section 1631: developments in farm products — case law

The following discussion of the case law involving section 1631 is a continuation of the in-depth article that appeared in the November issue of *Agricultural Law Update*. As of September 1, 1990, only two reported cases substantively involved section 1631.

Federal question jurisdiction

In November 1986, several Arkansas rice farmers sold their rice crops to Bearhouse, Inc., a rice broker. Bearhouse, Inc. immediately sold the rice to several milling companies who wrote the checks to National Bank of Commerce, the inventory financier of the rice broker. Bearhouse, Inc., however, failed to pay the farmers, choosing instead to file for bankruptcy. The farmers filed suit in the Western District of Arkansas, claiming that section 1631 gave them a security interest in the rice sold to Bearhouse and that the milling companies and the bank had therefore converted the farmers' rice. The milling companies and the bank responded with a motion to dismiss on the ground that the federal court lacked subject matter jurisdiction over this conversion claim. *Cullipher v. Lindsey Rice Mill, Inc.*, 706 F. Supp. 35 (W.D. Ark. 1990). Judge Morris Arnold denied the motions, correctly ruling that the farmers' claim to a security interest under section 1631 raised federal questions.

After the case proceeded beyond the pleading stage, the facts showed that all the sales occurred in November 1986, one month prior to section 1631 becoming effective as federal law. When these facts were established, Judge Arnold properly ruled that section 1631 was not relevant to deciding the dispute between the farmers and the millers and bank. Once section 1631 issues evaporated from the case, the farmers' claims were reduced to state conversion claims, and Judge Arnold ultimately dismissed the case for lack of subject matter jurisdiction. Despite this ultimate disposition, the *Cullipher* case is an important reminder that much farm products litigation in the future is federal litigation through federal question subject matter jurisdiction for the federal courts.

The substantive claim raised by the farmers in *Cullipher* was left unresolved. Does section 1631 give farmers who sell farm products to elevators, processors, packers, or other farmers a security interest in the farm products? The answer is "no."

Section 1631(d) explicitly preempts the farm products exception of UCC section 9-307(1). Hence, section 1631 changes the legal rights that secured parties of farm products collateral have under the UCC against buyers, commission merchants, or selling agents. In the House Report on the bill that ultimately became section 1631, however, the Committee stated that "the bill would not preempt basic state-law rules on the creation, perfection, or priority of security interests." H.R. Rep. No. 271, 99th Cong., 1st Sess., pt. 1 at 110 (1985).

In light of this legislative history directly contrary to the farmers' claim in the *Cullipher* case, section 1631 does not give the farmer (or anyone else) a security interest against the farm products involved in a farm products transaction. The farmers in *Cullipher* had a security interest against the rice sold to Bearhouse, Inc. only if they had properly taken a security interest in accordance with the Arkansas UCC. *See, In re Samuels & Co., Inc.*, 526 F.2d 1238 (5th Cir. 1976). In other words, section 1631, unlike the statutory trusts of the Packers & Stockyards Act and the Perishable Agricultural Commodities Act, is not a source of protection for farmers in situations where the elevator, processor, packer, or others who purchased the farm products go bankrupt before paying the farmers.

The implied repeal of other federal laws

Section 1631(d) says that "notwithstanding any other provision of Federal ... law", buyers, commission merchants, and selling agents take free of a security interest in farm products unless the secured party has given actual notice in accordance with PNS or CNS. Section 1631's implied repeal impact of other federal law is just beginning to emerge from the shadows.

On February 7, 1986, the FDIC took over the Johnson County Bank of Tecumseh, Nebraska. One loan the FDIC acquired was to Steven Wehmer, a farmer, who had pledged livestock as collateral for the loan. From January 9, 1986 through January 8, 1987, Wehmer sold hogs through the Bowles Livestock Commission Company. The auction house paid Wehmer the proceeds, but Wehmer did not use the hog proceeds to repay the loan. To recover the amount of the sale, the FDIC filed a conversion claim against the auction house as commission agent for Wehmer. *FDIC v. Bowles Livestock Commission Company*, 739 F. Supp. 1364 (D. Neb. 1990).

For the period from January 9, 1986 through February 7, 1986 (the date of the bank's failure), the court held that Johnson County Bank had waived its security interest in the hogs sold by Wehmer. The court reached this decision on the basis of the course of dealing between the bank and Wehmer, finding that the Johnson County Bank had given UCC section 9-306(2) "or otherwise" authorization to the sales. As authorized sales, the auction house had not committed the tort of conversion, which requires that the plaintiff prove an unauthorized sale.

For the period from February 7, 1986 through December 23, 1986, the court found that the FDIC was not bound by the course of dealing between the Johnson County Bank and Wehmer. Rather, the court ruled that the FDIC was entitled to a federal common law rule to govern the issue whether the FDIC by its own course of conduct had authorized the hog sales by Wehmer. By applying federal common law, the court protected the FDIC from the Nebraska Supreme Court decision that allowed security interests to be impliedly waived based on course of dealing. *Farmers State Bank v. Farmland Foods, Inc.*, 225 Neb. 1, 402 N.W.2d 277 (1987). The court then held that the federal common law rule was that the auction house was strictly liable in tort to the FDIC, and the FDIC's course of dealing with Wehmer was irrelevant to that strict liability.

Finally, for the period from December 23, 1986 (the day section 1631 became effective) through January 8, 1987, the court ruled that section 1631(d) replaced the federal common law rule that would otherwise have applied to the FDIC. Under section 1631, the FDIC, just like any other secured party, must give actual notice. As all farm products were produced in Nebraska, the FDIC was required to file EFSs in the Nebraska CNS. Because the FDIC did not file EFSs as required, subsection 1631(d) immunized the auction house from tort liability for the sales that occurred after section 1631's effective date.

FDIC v. Bowles Livestock Commission Company brings home the point that section 1631 impliedly repeals other federal law with which it conflicts. In the *Bowles* case, section 1631 impliedly repealed the federal common law relating to the tort of conversion and adversely affected the legal position of a federal agency. However, section 1631's impact on other federal law will not always be limited to the legal rights of federal agencies. Other secured parties who claim protection under federal laws (such as the Bankruptcy Code) must now also take into account the implied-repeal impact of section 1631.

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Overview of state regulation of biotechnology

by Paul Elihu Stern

Introduction

Many states have enacted legislation to regulate the use of organisms that have been genetically manipulated through the modern techniques of biotechnology. At the same time, the federal government has been developing regulations for the very same activities. Many argue that no new risks are demonstrated by the new techniques to warrant any special regulatory procedures. Still, there are public perceptions of risk. Furthermore, both state and federal governments are influenced in their oversight of biotechnology by a public that is unwilling to accept broad conclusions of safety about new innovations. Thus, there remain questions whether special regulations are needed for biotechnological techniques and which regulatory bodies should administer those special regulations, if they are appropriate.

Why should biotechnology be regulated? Should technical and commercial products created through the use of biological processes, such as recombinant DNA and similar molecular techniques, be treated differently from products created by traditional technologies? Recombinant DNA and similar biotechnological techniques allow scientists to make precise, controlled genetic manipulations of organisms.[1] Traditional crosses of crop plants involve the movement of large amounts of genetic information, including many unwanted genes that must be later selected out. These crosses have not attracted special regulation. Why do the more controlled, precise methodologies deserve greater regulatory scrutiny than the relatively crude, traditional methods of genetic breeding?

Recombinant DNA has provided scientists with the ability to cross species boundaries, that is, to move genetic information from one species of organism into another. This ability has aroused concern and caution from its earliest discoveries.[2] Early work involving these modern scientific processes was carried out within the confines of laboratories, and safety was insured by the National Institutes of Health Guidelines for Research Involving Recombinant DNA Molecules."[3]

Rapid progress of the science and growth of commercial ventures based on the technology drew regulatory attention from the federal government. The Office of Science and Technology Policy (OSTP), Executive Office of the President, published the Coordinated Framework for Regulation of Biotechnology, Announcement of Policy and Notice for Public Comment,[4] to direct the federal government in insuring public safety of biotechnology as greater commercialization of products and expanded applications such as field testing were approached. Several federal agencies have drafted proposals to implement the Coordinated Framework, but only one (the Animal and Plant Health Inspection Service) has established a final rule[5] that applies to biotechnological activity.

State governments have reacted in a variety of ways to the uncertainty of the federal system, some regulating biotechnology through direct legislation, others formally applying existing laws and policies, and still others relying on the federal system or simply not addressing the issues.

Field testing is the most significant subject of regulation today. Indeed, taking innovative research organisms outside of the security of laboratory structures into the environment raises new questions. The Office of Technology Assessment (OTA), Congress of the United States, has concluded that field tests do not pose such new questions of risk to warrant their delay.[6] The National Academy of Sciences has concluded:

> -There is no evidence that unique hazards exist either in the use of R-DNA techniques or in the movement of genes between unrelated organisms.
> -The risks associated with the introduction [into the environment] of R-DNA-engineered organisms are the same in kind as those associated with the introduction of unmodified organisms and organisms modified by other methods.[7]

However, "there are reasons to continue to be cautious."[8] OTA points out that uncertainties may arise in the future, but that "some questions can be answered only with practical experience."[9] While biotechnology has not provided us with the basic ability to manipulate genes, it has provided us with new tools to manipulate genes with great precision and speed.[10] Decisions for regulating these new techniques must, therefore, weigh the costs and potential benefits.[11]

Several issues have guided regulatory responses to biotechnological development. Safety is the first issue addressed by regulation. Still, since there have been no direct demonstrations that experimentation with modern biotechnological techniques, whether in the laboratory or in the environment, presents greater risks than experimentation with traditional or older techniques. The second important issue addressed by regulation of biotechnology is an attempt to avoid imposing any undue burden on development of the industry and ensuing commercialization of its products. The third issue prevalent in biotechnology's regulation has been public notice and comment. Finally, the openness that is required by the social climate today must be balanced against the need for industry to maintain a certain level of secrecy in order to preserve commercial efficacy of new products. Thus, provisions of biotechnological regulation must accommodate protection of confidential business information. State, as well as federal, biotechnology regulation involves balancing the needs for safety assurance and public participation with the practical need to avoid undue hindrances to legitimate scientific and business development.

What the states have done

Eight states have legislation aimed at controlling activities involving the processes of biotechnology. Many other states have examined the need for a regulatory response to biotechnological developments, including possible legislation. Most states with significant biotechnological operations within their borders do feel it is important to keep a close watch on the federal scene as well as to monitor the progress of the industry in their states. Others have chosen to rely completely on federal regulations and oversight to address the questions posed by advances in biotechnology.

The first state to regulate the environmental testing of biotechnologically derived organisms was Hawaii in 1988. Section 321-11.6 of the Hawaii Revised Statutes requires applicants for federal permits and approvals of field testing of genetically modified organisms to submit copies of their applications to the Hawaii Department of Health. These applications are reviewed by a committee that had already been appointed by resolution of the legislature in 1987 to review state needs and address potential health and environmental impacts of releases into the environment of genetically modified organisms.[12] Hawaii's approach does not involve direct regulation of biotechnology but it allows the state to remain aware of significant developments which are captured by the federal system and address

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them when appropriate. Intrastate activity and other operations that might fall outside the federal structure must be picked up by existing law.

The state of Maine also entered the regulatory scene early for environmental applications of biotechnology. The Maine legislature established the Commission on Biotechnology and Genetic Engineering in 1988.[13] The commission was designed to serve as a resource to the state government on matters involving biotechnology and genetic engineering. The commission is granted several specific, nonexclusive powers to conduct research and other evaluations concerning the adequacy of existing policies over biotechnology and the need for further state actions.

The Maine commission is granted the power to establish standards for permits for the release into the environment of by-products of biotechnology and genetic engineering, but no specific authority is delineated for immediate control over biotechnological activities. Confidentiality is protected for information pertaining to ongoing experimentation, unless the commission finds a compelling reason to make it public. The law does grant potentially widespread powers, but there are no indications that they will be invoked.

In 1987, New York added Article 32-A, "Recombinant DNA Experiments," to its Public Health Law.[14] The law does not specifically address environmental applications, but it requires anyone in possession of recombinant DNA and anyone engaged in production of recombinant DNA to obtain a certificate from the Commissioner of Health. The law directs use of the NIH Guidelines to be enforced through regulation by the Commissioner of Health. While this law does not specifically address field testing or other environmental releases, it does not appear to be limited to laboratory work, and certification from the Commissioner of Health should be required. Like the Hawaii situation, New York is afforded a means to monitor biotechnological activities. Existing legal authority must be relied on to address any state interests not covered by federal regulation.

The most comprehensive biotechnology law is the North Carolina Genetically Engineered Organisms Act,[15] enacted in 1989. It regulates the release into the environment and commercial use of genetically engineered organisms. Permits are required for the release into the environment, sale, offer for sale, or distribution for release into the environment of genetically engineered organisms. The act is generally overseen by a Genetic Engineering Review Board, and administered by the Commissioner of Agriculture. Public notice is required prior to releases into the environment of genetically engineered organisms, and the public is authorized to request public hearings.

Regulations have been issued to implement the North Carolina act.[16] The regulations establish two classes of permits for releases and commercial uses of genetically engineered organisms: general permits and limited permits. The Department of Agriculture may by regulation establish classes of activities, referred to as general permits, for which limited permits will not be required. In fact, several categories are already included. According to the regulations, applications are to be made by presenting to the Department of Agriculture copies of submissions to federal agencies, where applicable. Where there is no federal submission, application procedures will be prescribed by the Board.

The Commissioner of Agriculture may issue permits based on the federal review and approval of a proposed release, if it is determined that federal regulation of the release sufficiently protects agriculture, public health, and the environment in North Carolina. Thus, the fear of duplicating the regulatory burden is addressed by alleviating the need for separate state submission requirements. This provision, along with the determination of classes of activity for general permits, directly and rationally eases the concern of industry that an undue regulatory burden is being placed on it. The commissioner must make a decision to grant or deny a permit application within seventy-five days of receipt unless a public hearing is held, in which case he has 105 days. It is therefore hoped that the North Carolina law will be effective in the timely and appropriate issuance of permits for biotechnological products.

Public notification is also a major concern of the North Carolina rules. The Department of Agriculture is required to draft public notice for the receipt of permit applications along with a brief description for the proposed releases or commercial uses. This notice shall be mailed to anyone who has requested it, and shall be published in local and state newspapers and mailed to county administrators where the release will occur. If the Commissioner determines that significant public interest and justification exist to hold a public hearing, 30-day notice is required to be published in local newspapers. Anyone may request a hearing by filing a written request within 30 days of the application notice date. Although the Commissioner of Agriculture must apparently make the final determination to hold a public hearing upon a determination of the public interest, the regulations appear to involve the public meaningfully in the issuance of permits for genetically engineered organisms.

Section .0400 of the regulations addresses the issues of confidential business information. The rule respects confidential business information, but certain persons are specifically given access. All those involved in the review of permit applications have access to confidential business information, with precautions to prevent conflicts of interest. In addition, persons engaged in the review of the effects of a proposed release of a genetically engineered organism may request access to confidential business information. The North Carolina law affords protection of confidential information to insure the integrity of the commercial process, but permits certain members of the public access to that material to provide adequate public input into the process.

The first permit application under the North Carolina Genetically Engineered Organisms Act has only recently been received. The provisions of the law attempt a rational balance of competing interests in biotechnological development. By providing for state authority to issue permits for environmental releases and commercial uses of genetically engineered organisms, the law addresses the perceived public safety issues. At the same time, a significant effort is made through general permits and the acceptance of existing data used in federal reviews to avoid overly burdensome regulation. The public is given adequate opportunity to participate in the process, and due respect is paid to confidential business information. While efforts are made in the North Carolina Biotechnology Act to avoid overregulation and duplication, the law should catch any activities that might fall through the federal regulatory net.

Minnesota,[17] Oklahoma,[18] Illinois,[19] and Wisconsin[20] have all enacted legislation within the last two years providing specific state authority to regulate field uses of genetically engineered organisms. The Minnesota and Oklahoma statutes provide state authority to issue permits for certain activities involving the release into the environment of genetically engineered organisms. The Illinois and Wisconsin laws

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take a different approach.

The Illinois and Wisconsin statutes are essentially identical. The Wisconsin law applies to releases of organisms into the environment for which the Coordinated Framework, *supra,* requires notification, approval, permit, license, or other determination by the USDA or the EPA.[21] Notification is to be made to either the Department of Natural Resources for releases subject to the federal EPA, or to the USDA, Trade and Consumer Protection for releases subject to the USDA. The notification consists only of the material submitted to the federal regulator. The Wisconsin statute does require notification to the local governing bodies and provides for public comment. The reviewing department is required to send notice of receipt of the information to local government authorities where the release is to take place. (In the Illinois law, the burden of this notice is upon the person proposing the release.[22]) If the reviewing department prepares a formal comment to the federal regulator, it may hold an informational meeting, provide opportunity for public comment, request information from the applicant, conduct a technical review, and seek assistance from the University of Wisconsin or the Department of Health and Social Services. No criteria are included for determining when the reviewing agency should provide comment to the federal regulators nor when public or outside assistance should be sought in providing that comment.

The Wisconsin law provides for protection of confidential business information, which is tied to the determination of confidentiality made by the federal regulator.

This approach seems only to provide the state with a means to double check the federal system. The potential burden on industry appears slight. The public interest to be involved in the process is potentially short-changed, since no provisions for public input are triggered until the state decides to become involved. Then, public hearings are held at the discretion of the state agency with no guidelines for invoking them. Existing legal authorities must be used to protect legitimate public interests not addressed adequately by the law and to assert any state control over intrastate or other activity not covered by the federal agencies.

Florida has taken a different legislative approach to biotechnology. Other than for plant pests, the legislature has not examined the need for regulation. The Florida plant pest law,[23] was amended in 1988 to give the Division of Plant Industry, Florida Department of Agriculture and Consumer Services, specific authority to regulate the movement of genetically engineered plants and plant pest organisms. Florida has not felt a need to regulate biotechnology to any greater extent.

No other states have legislated biotechnology to date. The legislatures of California, New Jersey, Texas, Vermont, and Washington have considered specific legislation for the release of genetically modified organisms. Hawaii and New York have contemplated additional biotechnology legislation that has not been enacted. The states of Hawaii, Maine, California, South Dakota, New Jersey, and Alabama all have committees or commissions that examine issues surrounding biotechnological progress for state agencies.

Conclusion

We have yet to see a genetically modified organisms that poses a risk greater than that of a naturally occurring organism. The unique dangers of biotechnology have not been demonstrated. Although the most respected scientists of the United States have determined that biotechnological techniques are not inherently more dangerous than traditional genetic manipulations, lingering perceptions of risk have led to special regulations of the new scientific processes.

The federal government has developed a Coordinated Framework for Regulation of Biotechnology, and numerous reports, articles, and review of the need for regulation of biotechnology have been printed. The United States Department of Agriculture has issued plant pest regulations for the "Introduction of Genetically Engineered Organisms or Products" and has developed "Proposed Guidelines For Research Involving The Planned Introduction Into The Environment Of Organisms With Deliberately Modified Hereditary Traits." The United States Environmental Protection Agency has drafted proposed rules for small scale field testing of certain genetically modified microorganisms in the environment. The NIH has operated an oversight system under the Guidelines for Research Involving Recombinant DNA Molecules since 1976.

Eight states have legislation regulating biotechnology; five others have considered bills in their legislatures; and six states have official committees to advise government agencies on biotechnology policy.

Numerous offices, committees, guidelines, laws, and regulations have been established for the oversight and regulation of the techniques of biotechnology within both state and federal governments. This has occurred even though the National Academy of Sciences and others have concluded that there is "no conceptual distinction" between genetic modification through these modern techniques and genetic modification through classical methods.[24] Biotechnological research has not produced any new dangers in the laboratory; no serious accidents have been reported in the use of biotechnological techniques.[25] The NIH guidelines have been relaxed over time to exempt ninety-five percent of laboratory experiments from oversight.[26] Irrespective of the foregoing, the use of these new organisms in the environment has incited renewed concerns for safety. Therefore, our government leaders are watching progress carefully.

Although the possibility for adverse consequences has not been enhanced by the new techniques, and classical techniques also hold risk of adverse effects, we are not so trusting today of the scientific community. It is, perhaps, the very abilities that will prove to make the new biotechnological techniques safer than traditional methods that cause public concern. The very precision and speed with which a scientist now can operate triggers distrust and a social desire to keep a careful watch on scientific progress. The new capabilities do not present unique risks, but the possibilities of altering, for example, the standard way crops are grown, the traditional method by which milk is produced, and the currently acceptable manner by which livestock is raised have created the need for a regulatory structure.

In response to this situation and the unsettled federal system, the states have attempted in various ways to provide public assurance that the issues are being addressed. This response provides the mechanisms to address safety issues in the future that are not now apparent and provides the states with a rational method to encourage commercial and scientific progress in the face of public skepticism.

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[1] Committee on the Introduction of Genetically Engineered Organisms into the Environment, *Introduction of Recombinant DNA-Engineered Organisms into the Environment: Key Issues* (Washington: National Academy Press, 1987) p. 11.

[2] *See,* Stern, *Agricultural biotechnology: new regulations, Agricultural Law Update,* July 1990, pp. 4-7.

[3] 41 Fed. Reg. 27902 (1976).

[4] 51 Fed. Reg. 23,302 (1986).

[5] 52 Fed. Reg. 22,892 (codified at 7 C.F.R. Parts 330 and 340).

[6] Office of Technology Assessment, New Developments in Biotechnology, Field Testing Engineered Organisms: Genetic and Ecological Issues (Washington: U.S. Government Printing Office, 1988), p. 4.

[7] *Supra* note 1, at 22. *See also* National Research Council, *Field Testing Genetically Modified Organisms: Framework for Decisions* (Washington: National Academy Press, 1989).

[8] *Supra* note 6, at 4.

[9] *Id.*

[10] *Id.* at 5.

[11] *Id.*

[12] Hawaii House Resolution 193.

[13] Me. Rev. Stat. Ann. tit. 7, §§ 231 et seq. (1990 Supp.).

(continued on page 7)

[14] N.Y. Pub. Health Law §§ 3220 et seq. (McKinney 1985).

[15] N.C. Gen. Stat. §§ 106-765 et seq. (1989 Supp).

[16] Title 2 N.C. Admin. Code Ch. 48, Subchapter 48E.

[17] Minn. Stat. Ann. §§ 116C.01 et seq. (West 1990 Supp.).

[18] Oklahoma Agriculture Biotechnology Act, Okla. Stat. tit. 2, §§ 2011 et seq. (1990 Supp.).

[19] Illinois Public Act 86-306, Ill. Ann. Stat. Ch. 111 1/2 §§ 7601 et seq. (Smith-Hurd 1990 Supp.).

[20] Wis. Stat. Ann. §§ 146.60 et seq. (West 1990 Supp.).

[21] Wis. Stat. Ann. at § 146.60(1)(e).

[22] Ill. Ann. Stat. Ch. 111 1/2 at § 7604.

[23] Fla. Stat. Ann. §§ 581.011 et seq. (West 1990 Supp).

[24] *supra* note 7 at 2.

[25] Henry I. Miller, *Risk-Based Oversight of Experiments in the Environment*, Science, 26 Oct. 1990, p. 490.

[26] *Id.*

A Lawyer's Guide to Payment Limitations

The National Center for Agricultural Law Research and Information (NCALRI), in cooperation with the Agricultural Law Committee, General Practice Section, American Bar Association, announces the publication of *A Lawyer's Guide to Payment Limitations*. The Guide covers the payment limitations rules for the 1989-1995 crop years, including the changes made by the 1990 farm bill.

Over 200 pages in length, the Guide is designed to be useful to attorneys and producers alike. It refers throughout to the statutes and regulations governing payment limitations, as well as to the *ASCS Handbook for State and County Operations* chapter on payment limitations, 1-PL.

The Guide was written by Christopher R. Kelley, a staff attorney at NCALRI, and Alan R. Malasky, a partner in the Washington, D.C. law firm of Arent, Fox, Kintner, Plotkin & Kahn.

A Lawyer's Guide to Payment Limitations is the second volume in the NCALRI/ABA practice guide series to the law of federal farm programs.

A Lawyer's Guide to Payment Limitations became available on December 15, 1990. It may be purchased for $20.00, postpaid, from NCALRI, School of Law, University of Arkansas, Fayetteville, AR 72701 (501) 575-7646. Persons having questions concerning the Guide or its contents are encouraged to call or write NCALRI.

—Christopher R. Kelley, NCALRI

AG LAW CONFERENCE CALENDAR

Penn State Area Tax Meetings
Jan. 2, Tunkhannock, Jan. 3, 4, Lewisburg, Jan. 8, DuBois, Jan. 9, Butler, Jan. 10, Indiana, Jan. 11, Bedford, Jan. 15, Tamaqua, Jan. 16, Franconia, Jan. 17, Lancaster, Jan. 18, Chambersburg, Jan. 22, Wellsboro, Jan. 23, Warren, Jan. 24, Edinboro, Jan. 25, Mercer.
Topics include: estate-gift tax and farm transfers; small business-farm problems and solutions; '91 tax law update.
Sponsored by Penn State University.
For more information, call 1-814-863-4580.

Environmental law
Feb. 14-16, 1991, Hyatt Regency, Washington, D.C.
Topics include: Superfund Amendments and Reauthorization Act of 1986; Clean Water Act and wetland developments; enforcement proceedings and citizens' suits.
Sponsored by: ALI-ABA.
For more information, call 1-800-CLE-NEWS.

Pollution liability: managing the challenges of coverage and defense in 1991
Jan. 17, 1991, satellite video.
Topics include: the CGL policy, the property policy, the environmental impairment liability policy, and the excess, umbrella and reinsurance policies.
Sponsored by ALI-ABA.
For more information, call 1-800-CLE-NEWS.

Federal Register *in brief*

The following is a selection of matters published in the Federal Register in November, 1990. Please be aware that the issues for Nov. 15 and Nov. 29 were missing when this compilation was made.

1. FmHA; Receiving and processing applications, securing credit reports on initial farmer program and single family housing loan applications; final rule; effective date 12/3/90. 55 Fed. Reg. 46187.

2. EPA; Certification of pesticide applicators; proposed rule; comments due 3/8/91. 55 Fed. Reg. 46890.

3. CCC; Loan and purchase programs; transportation assistance refunds; notice; effective date 11/14/90. 55 Fed. Reg. 47500.

4. USDA; IRCA; SAWs; Temporary residents; fruits, vegetables, and other perishable commodities; final rule; effective date 11/23/90. 55 Fed. Reg. 48831.

—Linda Grim McCormick

NCALRI opening

The National Center for Agricultural Law Research and Information (NCALRI) at the University of Arkansas School of Law is soliciting applications for a full-time staff attorney position. This position is federally funded, non-tenure track, and will carry adjunct appointment with the law faculty with some teaching responsibilities. Review of applications will commence January 1, 1991.

Research Staff Attorney. The staff attorney engages in research, both short- and long-term, in agricultural law. Excellent communication skills and demonstrated writing ability with a broad background in agricultural law required. J.D. required; LL.M., M.B.A. (agribusiness), or M.A. (agriculture or environmental sciences) desirable.

Send applications to:
John D. Copeland, Director
NCALRI, School of Law
University of Arkansas
Fayetteville, AR 72701

The University of Arkansas is an equal opportunity/affirmative action institution.

—John Copeland, Director, NCALRI

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tive remedy for its complaint. The plaintiff asserted that even if it prevailed in the administrative proceedings, the Secretary could not award monetary damages. The court of appeals found this argument unpersuasive also. According to the court, "[i]f the ultimate determination of the administrative proceeding emanating either from the Secretary of Agriculture or from the federal courts through the statutory right of appeal, should substantiate [appellant's] challenges to the marketing orders, then refund of any assessments found not to have been due would be in order." Thus, the plaintiff would not suffer irreparable harm from application of the exhaustion requirement. Moreover, the court went on to assert that "where a statute specifically requires exhaustion, it implies 'something more than simply a codification of the judicially developed doctrine of exhaustion, and may not dispensed with merely by a judicial conclusion of futility.'"

The court of appeals was sympathetic to the plaintiff's frustration with the processing of its administrative petition by the Department of Agriculture, however. The court noted that it was "appalled by the failure of the Secretary to deal expeditiously with the substantial grievances alleged in the complaint...." The court of appeals remanded the case to the district court for a determination under 5 U.S.C. section 706(1) of whether the Secretary's action on the administrative petition had been unreasonably delayed and if so "to order the secretary to expedite final disposition of the administrative proceeding."

—John Harbison, San Diego, CA.

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Ad Hoc Legislative Support Committee

At the Board of Directors' Annual Meeting in October, the ad hoc Legislative Support Committee of the AALA was authorized to proceed in the implementation of a pilot project. This project will test the possible role of the AALA as advisor to policymakers on certain narrowly defined projects, relying upon the expertise of its membership in the area of agricultural law.

Committee members for the 1990-1991 term are:

Committee Chairperson:

Ms. Susan A. Schneider
National Center for Agricultural Law Research and Information
Leflar Law Center
University of Arkansas
Fayetteville, Arkansas 72701
(501) 575-5045; (501) 575-7647

Board Liaison:

Ms. Sarah Vogel
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Department of Agriculture
600 E. Blvd.
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Committee Members:

Mr. Del Banner
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Mr. Chuck Culver
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University of Arkansas
Fayetteville, Arkansas 72701

Ms. Pat Jensen
Executive Director
Legislative Water Commission
Room 54-G
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St. Paul, Minnesota 55155

Further information and requests for additional input from the membership will be announced in future issues of the *Update*. Members who wish to review a copy of the proposal for the pilot project should contact committee chairperson, Susan A. Schneider.