



USDA Authority to Regulate On-Farm Activity

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Summary

In recent years, outbreaks of foodborne illnesses and subsequent product recalls have highlighted concerns about the current food safety system. Some have argued for a more comprehensive approach to the regulation of food products. Among the questions raised in the debate on the adequacy and potential improvements for the U.S. food safety system is the appropriate starting point of federal regulation. The current system provides regulation of various food products under differing systems of inspection and oversight. Advocates of a more comprehensive approach to food safety regulation say it could be achieved by a thorough system of oversight beginning at the point of production—on farms and ranches. Opponents of this approach argue that some proposals for on-farm oversight would impose too great a burden on small farms, would be too costly to implement, and in some cases may not be sufficiently linked to commerce to constitutionally justify congressional regulation.

The U.S. Department of Agriculture (USDA) has a major role in the U.S. food safety system through its inspection authority for meat and poultry products, but it also has authority to regulate the agricultural industry in other ways. This report will analyze the authority of USDA to regulate on-farm activities in the context of food safety. Specifically, the report will provide an overview of USDA statutory authorities related to on-farm activities, including the Animal Health Protection Act, the Plant Protection Act, the Agricultural Marketing Agreement Act of 1937, and the Agricultural Marketing Act of 1946. Although these statutes do not provide explicitly for USDA actions taken on farms, they do provide USDA broad general authority to protect animal and plant health and to enforce and implement marketing programs related to the quality and safety of agricultural food products. The report will also analyze the scope of USDA's authority to act on farms under these statutes. Because Congress's authority to enact these statutes falls under the Commerce Clause, the report will also analyze the question of whether USDA's authority applies to farms that do not directly participate in interstate commerce.

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Food safety in the United States is regulated mainly by the U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA) within the U.S. Department of Health and Human Services (HHS). Although the FDA is the federal agency primarily responsible for ensuring the safety of a vast majority of foods under the current system, the USDA is responsible for regulating meat, poultry, and some egg products, as well as being responsible for animal and plant health.¹

USDA's role in the food safety system is founded on its authority to regulate meat and poultry inspection and importation.² The Food Safety and Inspection Service (FSIS) within USDA is responsible for inspecting domestic and imported meat and poultry products under the Federal Meat Inspection Act³ and the Poultry Products Inspection Act.⁴ This role in inspection of meat and poultry generally begins beyond the farm at slaughter and processing facilities. This authority does not include direct regulation of on-farm practices related to animal health. However, as the next step in the food chain after the farm, the standards set for inspection may be seen to indirectly regulate the health of animals on the farm. The Egg Products Inspection Act may be interpreted similarly.⁵ In other words, these acts restrict acceptance of animals that do not meet health standards at slaughtering and processing facilities, which effectively require farms to maintain healthy livestock in order to sell their livestock for food processing.

Food safety regulation is not limited to processing plants. USDA has authority to exercise food safety oversight and enforcement on farms as well.⁶ Four statutes that provide the most significant authority related to on-farm activity and food safety are the Animal Health Protection Act, the Plant Protection Act, the Agricultural Marketing Agreement Act of 1937, and the Agricultural Marketing Act of 1946.

USDA Statutory Authorities Related to Farms and Farm Activities

Authority to Protect Animal and Plant Health

The Animal and Plant Health Inspection Service (APHIS) within the USDA is responsible for the protection of health of animals and plants from agricultural pests and diseases. Issues of animal and plant health are of interest not only in the food safety context, but also in trade matters and the agricultural industry generally. Outbreaks of disease among animals may lead to negative consequences for the U.S. agricultural system and also may have negative effects on international

¹ See CRS Report RL34167, *The FDA's Authority to Recall Products*, by Vanessa K. Burrows.

² For legal analysis of USDA's role in the inspection and importation process, see CRS Report RL34313, *The USDA's Authority to Recall Meat and Poultry Products*, by Cynthia Brougher and Geoffrey S. Becker.

³ 21 U.S.C. § 601 *et seq.*

⁴ 21 U.S.C. § 451 *et seq.*

⁵ 21 U.S.C. § 1031 *et seq.*

⁶ USDA is not the only agency with on-farm authority related to food safety issues. See CRS Report RL34612, *Food Safety on the Farm: Federal Programs and Selected Proposals*, by Geoffrey S. Becker; CRS Report RS22939, *FDA Authority to Regulate On-Farm Activity*, by Vanessa K. Burrows.

trade if U.S. agricultural resources are deemed unsafe for import and consumption in other countries.

The USDA's on-farm authority includes authority to monitor animal health, which would assist in government efforts to prevent the spread of some diseases from animals to human populations (e.g., bovine spongiform encephalopathy, or "mad cow disease"). Although there has been some concern about an April 2009 outbreak of influenza A(H1N1), initially dubbed "swine flu" because it contained genetic material from flu strains that normally circulate in swine, USDA has confirmed that "there is no evidence of the 2009-H1N1 virus in U.S. swine."⁷ The virus, however, is not a foodborne illness, meaning that it is not transmitted by consumption of certain foods like pork and pork products. Under authority currently in place, USDA may monitor or take other protective actions to prevent outbreaks of such diseases, whether they pose a foodborne or airborne risk to the health of other animals or humans.

Animal Health Protection Act

Congress enacted the Animal Health Protection Act (AHPA) as part of the 2002 farm bill in order to protect animal health through the prevention and control of animal diseases and pests.⁸ AHPA generally authorizes USDA to prohibit or restrict the importation, exportation, or entry of animals into interstate commerce if it determines such action is necessary to prevent the introduction or dissemination of any pest or disease of livestock.⁹ The AHPA also generally authorizes USDA to hold, seize, quarantine, or destroy any animal that is in interstate commerce and is believed to be carrying or have been exposed to any pest or disease of livestock.¹⁰

Most of USDA's authority under AHPA relates to animals moving in interstate commerce, but the AHPA specifically permits USDA to take some actions without explicitly requiring that the animal be in interstate commerce at the time. USDA is authorized to take protective actions such as seizing, treating, or destroying animals if the USDA determines that "an extraordinary emergency exists because of the presence in the United States of a pest or disease of livestock."¹¹ For such emergencies, the presence of the pest or disease must threaten U.S. livestock and the protective action must be necessary to prevent the spread of the threat.¹² USDA is also authorized to make inspections and seizures under the AHPA at any premises, including farms, if it obtains a warrant showing probable cause to believe there is an "animal, article, facility, or means of conveyance regulated under [the AHPA]."¹³ This inspection authority supplements USDA's authority to make warrantless inspections of any person or means of conveyance moving in interstate commerce that is believed to be carrying an animal regulated by AHPA.¹⁴

⁷ *Hearing to Discuss the 2009 H1N1 Virus Before the Subcomm. on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies of the S. Comm. on Appropriations*, 111th Cong. (May 7, 2009) (statement of Tom Vilsack, Secretary, U.S. Dep't of Agriculture). In May 2009, H1N1 was discovered in swine from a Canadian herd, apparently transmitted from an infected person who worked on the farm with the swine, leading to questions about the health of U.S. swine. *See id.*

⁸ 7 U.S.C. § 8301 *et seq.*

⁹ 7 U.S.C. §§ 8303-8304.

¹⁰ 7 U.S.C. § 8306.

¹¹ 7 U.S.C. § 8306(b).

¹² *Id.*

¹³ 7 U.S.C. § 8307(c).

¹⁴ 7 U.S.C. § 8307(b).

The AHPA also provides broad authority to USDA for detection, control, and prevention of the introduction and spread of outbreaks of animal diseases and pests. AHPA authorizes USDA to “carry out operations and measures to detect, control, or eradicate any pest or disease of livestock (including ... diagnostic testing of animals), including animals at a slaughterhouse, a stockyard, or other point of concentration.”¹⁵ AHPA also expanded APHIS’s authority to protect against the introduction of plant and animal disease and “otherwise improve the capacity of the [APHIS] to protect against the threat of bioterrorism.”¹⁶ APHIS used this authority to implement a voluntary system of animal tracking known as the National Animal Identification System, which allows for registration of premises where livestock and poultry are raised or housed, identification of animals with unique identifier information, and tracking of identified animals.¹⁷

Plant Protection Act

The Plant Protection Act (PPA), enacted in 2000, provides protections similar to the AHPA but specifically applies to plants, rather than animals.¹⁸ The PPA was enacted to control and prevent the spread of plant pests for the protection of the agriculture, environment, and economy of the United States by regulating plant pests and noxious weeds that are in or affect interstate commerce.¹⁹ The PPA defines plant pests as certain organisms “that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product.”²⁰ It defines noxious weeds as “any plant or plant product that can directly or indirectly injure or cause damage to crops ... , livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.”²¹ Under the PPA, the USDA has authority to prohibit or restrict the movement of plants and plant products in interstate commerce if it determines such action would be necessary to prevent the introduction or spread of plant pests or noxious weeds.²² APHIS has used the PPA to monitor genetically engineered crops that may cause negative effects on other agricultural products.

The PPA authorizes USDA generally to hold, quarantine, treat, or destroy any plant, plant pest, or noxious weed that is moving or has moved in interstate commerce if it deems such action necessary “to prevent the dissemination of a plant pest or noxious weed that is new to or not known to be widely prevalent or distributed” in the United States.²³ USDA may also order owners of plants, plant products, plant pests, or noxious weeds that are determined to threaten plant health to treat or destroy them.²⁴ USDA’s ability to impose remedial measures under this authority is limited, though. That is, USDA may not require that a plant, plant product, plant pest, or

¹⁵ 7 U.S.C. § 8308.

¹⁶ 7 U.S.C. § 8320.

¹⁷ See APHIS’s animal ID website at http://animalid.aphis.usda.gov/nais/about/nais_components.shtml. See also CRS Report RS22653, *Animal Identification: Overview and Issues*, by Geoffrey S. Becker.

¹⁸ 7 U.S.C. § 7701 *et seq.*

¹⁹ 7 U.S.C. § 7701.

²⁰ 7 U.S.C. § 7702(14).

²¹ 7 U.S.C. § 7702(10).

²² 7 U.S.C. § 7712.

²³ 7 U.S.C. § 7714(a).

²⁴ 7 U.S.C. § 7714(b).

noxious weed be destroyed or exported if the Secretary believes there is a less drastic, feasible and adequate alternative available to prevent dissemination of the threat.²⁵

In addition to the general authority to prevent the spread of plant pests and noxious weeds, USDA also has emergency authority under PPA. For USDA to act under its emergency authority, it must find “that the measures being taken by the State are inadequate to eradicate the plant pest or noxious weed” after consulting with the governor of the affected state.²⁶ Under the PPA, if USDA determines that “an extraordinary emergency” exists, it may hold, seize, quarantine, treat, or destroy any plant, plant product, or premises that it “has reason to believe is infested with the plant pest or noxious weed.”²⁷ Like the limitation under its general authority to impose remedial measures, the USDA is prohibited from destroying or exporting anything under its emergency authority if there is a less drastic, feasible action “that would be adequate to prevent the dissemination of any plant pest or noxious weed new to or not known to be widely prevalent or distributed [in] the United States.”²⁸

Authority to Enforce Marketing Orders and Implement Marketing Programs

Although the AHPA and PPA may provide more significant sources of authority for USDA to take regulatory actions on farms, other statutes provide USDA with oversight authority related to farm activities and food safety. The Agricultural Marketing Service (AMS) within the USDA oversees programs related to the standardization and marketing of agricultural products. The Agricultural Marketing Agreement Act of 1937 and the Agricultural Marketing Act of 1946 authorize programs that may involve oversight of producers regarding food quality and safety.

Agricultural Marketing Agreement Act of 1937

The Agricultural Marketing Agreement Act of 1937 (AMAA)²⁹ authorizes USDA to issue marketing orders that legally bind processors, associations of producers, and others engaged in the handling of certain agricultural commodities or products thereof.³⁰ The AMAA provides a list of terms and conditions that may be included in marketing orders. Orders must include at least one of the possible terms and conditions provided by statute, and may not include other terms and conditions not provided by statute.³¹ The possible terms and conditions include regulating the amount, grade, size, or quality of the marketed commodity; regulating the containers used for packaging, transportation, sale, and handling of the marketed commodity; and requiring inspection of any commodity or product.³² Thus, depending on what terms and conditions are included in a marketing order, the order may create legally binding requirements relating to food quality and safety.

²⁵ 7 U.S.C. § 7714(d).

²⁶ 7 U.S.C. § 7715(b).

²⁷ 7 U.S.C. § 7715(a).

²⁸ 7 U.S.C. § 7715(d).

²⁹ 7 U.S.C. § 601-614, 671-74.

³⁰ 7 U.S.C. § 608c(1).

³¹ 7 U.S.C. § 608c(6).

³² For a complete list of terms and conditions that may be included in marketing orders, *see* 7 U.S.C. § 608c(6).

Commodities eligible to be regulated by marketing orders include milk, fruits, vegetables, and nuts.³³ The orders are limited to the regulation of any commodity or product “in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.”³⁴

USDA also has enforcement powers under the AMAA to ensure that entities covered by the marketing orders comply with the terms and conditions set forth.³⁵ USDA may investigate individuals or entities that it believes may be in violation of provisions of orders created under the AMAA. USDA may also conduct hearings on the matter in order to determine whether to refer the matter to the Department of Justice (DOJ) for enforcement.

Agricultural Marketing Act of 1946

The Agricultural Marketing Act of 1946 (AMA) authorizes the USDA to promulgate regulations related to agricultural markets and standards.³⁶ The AMA does not provide specific regulatory authority to USDA, but it does authorize USDA “to inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce” under regulations to be prescribed by the Secretary of Agriculture.³⁷

USDA has used its authority to develop voluntary programs to allow agricultural producers “to help promote and communicate quality and wholesomeness to consumers.”³⁸ These programs allow interested producers to use third-party audits to certify that their products meet buyer specifications. An example of such a program includes AMS’s Good Agricultural Practices and Good Handling Practices Audit Verification Program, which allows the food industry to use third-party audits to verify the conformance of producers to best practices on the farm. Although the USDA does not have a direct role in the testing and verification programs, the agency facilitates a process that provides heightened protections for consumers.

USDA Regulation of On-Farm Activity

USDA’s role in the current food safety system appears to focus on inspections during production, but USDA appears to have authority under numerous statutes to regulate at least some on-farm activities. Although this authority does not explicitly provide for oversight of farm operations, the statutory language does not explicitly prohibit USDA from carrying out its authority on farms. Thus, it appears that USDA may apply its statutory authority to on-farm activities, if the on-farm activity is one that is generally covered by the relevant statute. The statutory authorities discussed in this report generally require that exercise of the authority provided be linked to products in interstate commerce. In the debate over food safety regulation on the farm, some have raised

³³ 7 U.S.C. § 608c(2). Marketing orders and agreements are established and governed by federal regulations. *See* 7 C.F.R. Parts 900 – 1599.

³⁴ 7 U.S.C. § 608c(1).

³⁵ 7 U.S.C. § 608a(7).

³⁶ 7 U.S.C. § 1621 *et seq.*

³⁷ 7 U.S.C. § 1622(h).

³⁸ More information on grading, certification, and verification programs generally may be accessed through USDA’s Agricultural Marketing Service website, *available at* <http://www.ams.usda.gov>.

arguments that on-farm activities may not be sufficiently linked to commerce to justify congressional regulation. As a result, USDA's authority to implement programs related to food safety on farms before the agricultural products in question actually enter commerce has become an issue.

Although it might seem obvious that agricultural products sold in stores are a part of commerce, one may question whether USDA would be authorized to take actions under these statutes on farms that do not sell their products, but rather are self-sufficient. It is likely that any farm would be subject to USDA's regulatory authority in the context of these statutes because of Congress's broad authority to act under the Commerce Clause of the U.S. Constitution.

The Constitution empowers Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."³⁹ The U.S. Supreme Court has found that the Commerce Clause allows for three categories of congressional regulation: the channels of interstate commerce; the instrumentalities of interstate commerce; and "those activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce."⁴⁰

One of the Court's most expansive Commerce Clause rulings, *Wickard v. Filburn*, concerned Congress's ability to regulate the production and consumption of homegrown wheat.⁴¹ The Court held that economic activities, regardless of their nature, could be regulated by Congress if the activity "asserts a substantial impact on interstate commerce."⁴² In *Wickard*, a farmer challenged a monetary penalty he received for growing wheat in excess of a quota established by the USDA to regulate wheat prices, arguing that the wheat never went to market but was grown and consumed on his own farm and thus outside the scope of interstate commerce. Although the Court recognized that one family's production alone would likely have a negligible impact on the overall price of wheat, if combined with other personal producers, the effect would be substantial enough to make the activity subject to congressional regulation.⁴³ Although the Court has arguably narrowed its interpretation of Congress's authority under the Commerce Clause in recent decades, the Court has indicated as recently as 2005 that *Wickard v. Filburn* is still good law, holding that Congress can regulate purely intrastate activity that is not "commercial" if it concludes that failure to regulate the activity would undercut the interstate market.⁴⁴

The relevant on-farm statutes, particularly the AHPA and the PPA, include provisions that generally apply to agricultural products in interstate commerce, which *Wickard* indicates would include items still on the farm. They also include some provisions that authorize USDA to inspect agricultural products at any time, including when on a farm, to control pests and diseases that might affect agricultural commerce generally. Thus, it seems that USDA's authority to regulate animals, plants, and other agricultural products on the farm itself is a proper exercise of authority and a valid interpretation of the authority delegated by Congress.

³⁹ U.S. CONST. art. I, § 8, cl. 3 and 18.

⁴⁰ See *United States v. Lopez*, 514 U.S. 549, 558-59 (internal citations omitted).

⁴¹ 317 U.S. 111, 114 (1942).

⁴² *Id.* at 125.

⁴³ *Id.*

⁴⁴ See *Gonzales v. Raich*, 545 U.S. 1 (2005). Cf. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

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