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New federal pesticide recordkeeping requirements

The 1990 farm bill amended the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) by directing the Secretary of Agriculture, in consultation with the Administrator of the EPA, to require certified applicators of restricted use pesticides to maintain records comparable to records maintained by commercial applicators of pesticides in each state. 7 U.S.C. § 136i-1. In April, 1993, the Secretary adopted final rules implementing the new recordkeeping requirement. 58 Fed. Reg. 19,022 (1993)(to be codified at 7 C.F.R. Part 110).

Under the Secretary's rules, certified applicators, both private and commercial, must maintain records of the application of restricted use pesticides. The records "can be handwritten on individual notes or forms, consist of invoices, be computerized, and or be maintained in recordkeeping books."

The records must be retained for two years from the date of the restricted use application and must be "maintained in a manner that is accessible by authorized representatives." The records must include the following information, all of which must be recorded within thirty days after the pesticide application:

(1) The brand or product name, and the EPA registration number of the restricted use pesticide that was applied.

(2) The total amount of the restricted use pesticide applied.

(3) The location of the application, the size of area treated, and the crop, commodity, stored product, or site to which a restricted use pesticide was applied. The location of the application may be recorded using any of the following designations:

(i) County, range, township, and section;

(ii) An identification system utilizing maps and/or written descriptions which accurately identify location;

(iii) An identification system established by a USDA agency such as the Agricultural Stabilization Conservation Service or the Soil Conservation Service, which utilizes maps and numbering system to identify field locations; and

(iv) The legal property description.

(4) The month, day, and year on which the restricted use pesticide application occurred.

(5) The name and certification number (if applicable) of the certified applicator who applied or who supervised the application of the restricted use pesticide.

(6) Applications of restricted use pesticides made on the same day in a total area of less than one-tenth (1/10) of an acre require the following elements be recorded:

(i) Brand or product name and EPA registration number;

(ii) Total amount applied;

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Court allows Chapter 12 direct payments

The District Court for the District of North Dakota recently held that a Chapter 12 debtor may directly pay creditors with impaired claims and avoid the trustee's percentage fee on these direct payments. *In re Wagner*, 159 B.R. 268 (D. N.D. 1993). At issue were appeals in four Chapter 12 cases, consolidated for purposes of determining the issue of trustees fees. In each case, the bankruptcy court had conditionally granted the motion to dismiss the case. The motions were based on an alleged failure to pay trustee's fees and were brought by the Chapter 12 trustee or the Minneapolis regional office of the U.S. Trustee.

In each case, the confirmed Chapter 12 plan contained ambiguous provisions on payments, but provided that "[t]o the extent the trustee is not involved and a direct payment is made, no fee will be paid." *Id.* at 272. The debtors in each case made payments to impaired creditors directly, bypassing the trustee and avoiding the payment of his percentage fee. Although the court found the payment language in the

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plans to be "convoluted, mixed, and unclear," the court noted that the language had been agreed to by the trustee and the creditors and, it had been approved by the bankruptcy court. The district court further found that it was reasonable for a farmer/debtor to interpret the language as allowing direct payments to impaired creditors without compensating the trustee for his percentage fee. Although the court indicated that if the issue arose in an objection to confirmation, it "may respond differently," the court likened the present actions as "attempts to put milk back in the bottle." *Id.* at 272; *See In re Fulkrod*, 973 F.2d 801, 802-3 (9th Cir. 1992) (cited in *Wagner*, 159 B.R. at 271-2). The court stated that it was "not inclined to require trustee fees to be paid when plans with the above language are already confirmed." *Id.* at 272. Thus, the court reversed that bankruptcy court's dismissal of the cases.

—*Susan A. Schneider, Hastings, MN*

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Federal Register in brief

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

1. INS; Expiration of the Replenishment Agricultural Worker program; proposed rule. 58 Fed. Reg. 64695.
2. FCIC; Late planting agreement option; applicability to crops insured; final rule; effective date December 10, 1993. 58 Fed. Reg. 64872.
3. FCIC; Late planting agreement option and preventing planting endorsement; final rule; effective date December 10, 1993. 58 Fed. Reg. 64873.
4. FCIC; Mutual consent cancellation; final rule; effective date December 21, 1993. 58 Fed. Reg. 67303.
5. FCIC; Late and preventing planting for various crop endorsements; interim rule; effective date November 30, 1993; comments due February 22, 1994. 58 Fed. Reg. 67630.
6. FCIC; Notice of termination of the Standard Reinsurance Agreement, and Agency Sales, and Service Contract; effective date June 30, 1994. 58 Fed. Reg. 68628.
7. FCIC; Termination of the standard reinsurance agreement; effective date June 30, 1994. 58 Fed. Reg. 68628.
8. FGIS; U.S. standards for flaxseed, mixed grain, oats, rye, sunflower seed and triticale; advance notice of proposed rulemaking; comments due February 15, 1994. 58 Fed. Reg. 65939.
9. FmHA; Agricultural Credit Improvement Act of 1992; guaranteed loan and loan mediation programs; interim rule with request for comments; comments due February 15, 1994. 58 Fed. Reg. 65871.
10. FmHA; Receiving and processing applications for farmer program loans· interim rule. 58 Fed. Reg. 68717.
11. FmHA; Providing additional notice to Indian tribes and tribal members; lease with option to purchase farmer program farm real estate properties; interim rule. 58 Fed. Reg. 68722.
12. FmHA; Borrower training; interim rule; comments due April 29, 1994. 58 Fed. Reg. 69190.
13. FmHA; Loan assessment, market placement, and seasoned direct loan borrowers graduation to loan guarantee program; proposed rule; comments due February 28, 1994. 58 Fed. Reg. 69274.
14. CCC; Non-emergency haying and grazing on conservation reserve program grasslands; advance notice of proposed rulemaking. 58 Fed. Reg. 66308.
15. FCA; Organization, general provisions, and disclosures to shareholders; miscellaneous amendments; proposed rule. 58 Fed. Reg. 68069.
16. IRS; Limitation on the use of cash receipts and disbursement method of accounting; final and temporary regulations; effective date December 27, 1993. 58 Fed. Reg. 68297.
17. USDA; Department of the Interior; Water rights under the Wilderness Act; notice with request for comments; comments due April 1, 1994. 58 Fed. Reg 68629.
18. APHIS; Animal welfare; licensing and records; proposed rule; comments due February 28, 1994. 58 Fed. Reg. 68559.
19. APHIS; Animals destroyed because of brucellosis; proposed rule. 58 Fed. Reg. 68561.

—*Linda Grim McCormick, Toney, AL*

The judicial review of ASCS decisions

Most final ASCS determinations concerning a producer's eligibility for federal farm program benefits are judicially reviewable. Generally, judicial review is taken from a determination of the ASCS National Appeals Division (ASCS NAD or NAD) or, less commonly, the ASCS Administrator. While the recent United States Supreme Court decision of *Darby v. Cisneros*, 113 S. Ct. 2539 (1993), raises the possibility of seeking judicial review prior to exhausting the available ASCS administrative remedies, rarely will that alternative be the more prudent course. Also, it will become unavailable if the current ASCS administrative appeal process is changed to meet the standards for requiring the exhaustion of administrative remedies set forth in *Darby*. Accordingly, this article assumes that judicial review is sought for an ASCS NAD determination. It is intended to briefly address several of the more basic and practical aspects of judicial review of NAD determinations.

Typically, judicial review of ASCS NAD determinations in the federal district courts occurs through cross-motions for summary judgment. Thus, assuming that the producer will be the first movant for summary judgment, the producer's attorney typically can expect to prepare the following:

- a complaint;
- (possibly) a reply to the government's counterclaim if the producer owes the government a debt arising from federal farm program payments that has not already been satisfied through administrative offset or other means;
- a motion for summary judgment and a memorandum in support of the motion (and in most jurisdictions, a statement of material, undisputed facts and proposed conclusions of law);
- a response to the government's motion for summary judgment (because the

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If you desire a copy of any article or further information, please contact the Law School Library nearest your office.

—Drew L. Kershen, Professor of Law, The Univ. of Oklahoma, Norman, OK

Pesticide recording requirements/ continued from page 1

(iii) Location must be designated as "spot application"; and

(iv) The date of application.

Certified applicators who apply restricted use pesticides in states where they are required to maintain records on applications of restricted use pesticides comparable to those for commercial applicators and who maintain these records in accordance with the state requirements are not subject to the federal rules quoted above. All certified applicators, however, "shall, upon oral request and presentation of credentials by an authorized representative, make available to the authorized representative the records ... and permit the authorized representative to copy any of the records." The regulations define an "authorized representative" as "[a]ny person who is authorized to act on behalf of the Secretary or a State lead agency for the purpose of surveying records required to be kept...." Restricted use pesticide records must also be provided to assist with medical treatment to a person who may have been exposed to the pesticide.

Congress has directed the Secretary and the EPA Administrator to survey the records maintained by certified applicators "to develop and maintain a data base that is sufficient to enable the Secretary and the Administrator to publish annual comprehensive reports concerning agricultural and nonagricultural pesticide use." Conceivably, the records might also be used by the certified applicator to defend against liability claims brought by third parties alleging pesticide misuse.

Persons who violate the recordkeeping requirements are subject to a fine of not more than $500 for the first offense. Subsequent offenses are subject to a fine of not less than $1,000 for each violation, "except that the penalty shall be less than $1,000 if the Secretary determines that the person made a good faith effort to comply...."

On a related matter, the EPA has published a compliance guide to the worker protection standards for agricultural pesticides. These standards may apply in addition to the new pesticide recordkeeping requirements. The publication, entitled *The Worker Protection Standard for Agricultural Pesticides—How to Comply: What Employers Need to Know*, is available for purchase for $8.50 from the U.S. Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328 (202-783-3238). At least one mail-order farm supply merchant is selling that publication at a reduced price.

—Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN

Federal hazardous material transportation regulations pose new challenges to agricultural operations

By Jo Anne Hagen

The United States Department of Transportation (DOT) proposes to extend its authority over hazardous materials transportation. The proposal was published July 9 as Hazardous Materials Docket HM200 (HM200), 58 Fed. Reg. 36,920 (1993). If adopted as proposed, HM200 will have a serious impact on intrastate and local farm transportation operations.

The federal hazardous materials regulations are complex and require special knowledge and training. HM200 has the potential to radically alter common, everyday farm transportation operations and increase the cost of doing business for farmers and farm support services.

HM200 is the result of the Congressional mandate handed the DOT. It closes the loop on uniform regulation for hazardous material (hazmat) transportation. With the reauthorization of the Transportation Safety Act of 1974, Pub. L. No. 93-633, tit. I, section 102, 88 Stat. 2156 (1975)(codified at 49 U.S.C. sections 1801-1812 (1976)), Congress, faced with mounting criticism of hazmat regulation and enforcement, required the DOT to undertake certain rulemakings. The mandate included harmonization of U.S. and international regulations, registration of hazardous materials shippers and carriers, establishment of a carrier safety rating system, and nationwide uniformity of regulation.

HM200 provides that uniformity by extending authority for hazmat regulation to the only area that the federal regulations do not now embrace, intrastate highway transportation. The DOT has authority over interstate transportation by highway; all transportation by rail, water, or air; and intrastate transportation of hazardous substances and hazardous wastes. While the current regulated population is substantial, it is suggested that including all intrastate transportation operations under the federal umbrella will mean inclusion of a far greater number of new regulated entities than either Contress or the DOT imagined or intended.

An important and related attribute of the Hazardous Materials Transportation Uniform Safety Act of 1990 [HMTUSA] was the establishment of a rigid federal preemption test to assure uniformity of hazardous materials regulations. Combined with the extension of federal authority to intrastate traffic, the agricultural community faces a real challenge. Agriculture and local delivery services have traditionally enjoyed exception from the full scope of state regulation. HM200 expressly states that there will be no exemption for agriculture and small business. Collaterally, farmers must be concerned about enhanced liability arising as a result of being federally regulated. Finally, an important issue will be whether farm operations are considered "in commerce" for it is only under that condition that hazmat rules apply to transportation.

Hazardous materials

What are the hazardous materials transportation regulations, and why are they so important? Hazardous materials are substances or materials that have been determined by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety and property when transported in commerce. 49 C.F.R. 171.2(a). The definition of hazardous materials covers all manner of common products, from charcoal to car batteries, insecticides to signal flares, jet fuel to kerosene, disinfectants, pesticides, fertilizers, and hundreds of thousands of chemical products, many of them common consumer goods.

Hazmat law

Hazmat law is over a century old, periodically spurred to new regulatory heights when hazmat disaster strikes. Over the past twenty years, hazmat disasters have resulted in some of the most newsworthy events of their respective decades: an airline crash at Boston's Logan Airport caused by mislabled containers of nitric acid, the derailment of phosporus-bearing cars and subsequent evacuation of Miamisburg, Ohio, the ecological devastation of the Exxon Valdez in Alaska and the Southern Pacific derailment in California.

Hazardous material regulations require those who transport or cause such materials to be transported must package, mark, label, separate, segregate and load, transport, document, train, and provide emergency response assistance under the specific tenets of 49 C.F.R. parts 100-180. Persons who manage hazmat operations for chemical manufacturers, distributors, and transporters must have a command of chemistry, logistics, emergency response techniques, risk assessment, and understand how the rules apply to specific operations. And, while the original vision for hazmat regulation was protection from acute hazards, e.g., explosivity, flammability, and toxicity, the list of regulated substances now includes materials with no acute hazards and substances with chronic hazards or those that are environmentally threatening.

State exemption

Intrastate agricultural operations are often shielded by state law from compliance with the more onerous operational details of hazmat law. Although all states have adopted 49 C.F.R., many states have carved out special exception for local distributors and agricultural operations. It appears that these exceptions will disappear if those operations come under federal regulations.

Iowa law is representative of the exceptions provided for agriculture when transporting otherwise regulated substances. Iowa excepts the following activities from state regulation:

(1) Cargo tank motor vehicles with a capacity of four thousand gallons or less used to transport gasoline, which were manufactured between 1950 and 1979 and are in compliance with the American Society of Mechanical Engineers specification in effect at the time of manufacture,

(2) drivers of intrastate commercial vehicles in operation prior to January 1, 1988, are excepted from the federal requirements for physical and medical qualification,

(3) retail dealers of fertilizers, petroleum products and pesticides are excepted from the regulations covering hazardous materials carriage by public highway when delivering products to farm customers within a 100-mile radius of their retail place of business,

(4) vehicles with a maximum gross weight of five tons or less are excepted from the requirments of placarding and carrying hazardous materials shipping papers if the hazardous materials are clearly labeled. Iowa Code Ann. section 321.450 (West 1987 and Supp. 1993).

Jo Anne Hagen is a third year law student at Drake University Law School and is Distribution Compliance Manager with Hach Company, Ames, Iowa.

Consequences of elimination of exceptions

What would elimination of these exceptions portend for intrastate shippers and carriers? If there are no comparable federal exceptions granted, farmers, farm supplies, and those engaged in related activities will be subject to these minimum obligations:

✔ Know and understand the types of chemicals being offered or accepted for transportation and classify them according to the regulations. The classification step is the first step in hazmat regulation. All other requirements are predicated upon the classification.

✔ Know how to use the Code of Federal Regulations and monitor the Federal Register or be provided with expert knowledge of these rules by some outside source. Hazmat rules are very dynamic. Recently, the DOT rewrote hazmat law in a major rulemaking known as HM181. Performance Oriented Packaging Standards, 52 Fed. Reg. 16,482-01 (1987). HM181 has a six-year implementation period, and because the rulemaking is so vast, amended rules are being published at an alarming rate. For example, the latest publication is HM181F, part of which revised the loading, separation, and segregation requirements for hazmat transportation. Performance Oriented Packaging Standards, Miscellaneous Amendments, 58 Fed. Reg. 37,629 (1993).

✔ Procure appropriate packaging. Packagings include boxes, bags, drums, cargo tanks, bulk containers, bottles and all of the packaging materials required for hazmat transportation, such as nonreactive absorbents, void fill, water-proof barriers, and separators. Under the new regulations (HM181), packagings must be performance tested after October 1, 1994, when the material packaged with requires such testing.

✔ Mark and label packages in accordance with the regulations. Hazmat rules are very specific as to the size, color, durability, and design of labels. Markings must conform to the regulatory definition, desing, size, and content.

✔ Provide shipping papers that accurately describe the hazardous materials in the description sequence mandated by the rules.

✔ Placard vehicles when placardable quantities of hazardous materials are being transported. Placarding is of special importance because drivers of placarded vehicles must maintain a commercial drivers license and have a hazardous materials endorsement. Such drivers are subject to the federal requirements for physical and medical qualification and may be subject to substance testing under federal law. Placarding also predicts shipper and/or carrier registration with the DOT and appropriate insurance coverage.

✔ Provide a 24-hour emergency response telephone number either personally or thorugh an emergency service.

✔ Train all persons who affect hazardous material transportation to understand the regulations (general awareness), to perform tasks acequately and accurately (function specific) and unsure safe handling and emergency response (safety training).

✔ Be subject to federal enforcement activity. The minimum penalty for each violation per day in the federal scheme is $250. A common packaging problem, mislabeling a bottle in a box, can produce seven different violations, valued for enforcement purposes at the minimum of $250 for each violation multiplied by the number of days the violation has been in transportation.

The DOT may impose a fine of up to $25,000 per day per violation, and criminal penalties are also available.

A discussion with enforcement officials and insurers in Iowa produced a possible minimum cost of compliance as shown below:

Item	Annualized Cost
Federal Registration Fee	300
Initial and Recurrent Training	100
Contracted Emergency Phone	350
Insurance	3000
One-Time Cargo Tank Refurbishing	5000
Total Initial Outlay	8750
Annual Outlay	3750

Additional expenses would be anticipated for labor and material costs, e.g., specification packaging, labels, placards, shipping papers, and similar commodities required for compliance.

"In commerce"

Despite the abundance of rules inherent in hazmat transportation, the ultimate test may require defining what, as applied to agriculture, does "in commerce" mean. Hazardous materials rules apply only to persons transporting or causing transportation of hazmat in commerce. Thus, while the manufacturer of consumer products that are also hazardous materials is subject to the federal hazmat regulations related to shipping those products from the factory to the grocer, the housewife who purchases regulated materials is not subject to those same requirements when transporting the products following purchase from the grocer.

Where do farm operations fall relative to the "in commerce" test? Do hazardous materials that would otherwise be considered consumer items regress to their as-manufactured hazmat identities if purchased and transported for on-farm rather than household use? The term "in commerce" is undefined as it pertains to farm operations, but has an important impact on farm trnasportation. Unresolved issues include: who may transport farm supplies; what types of vehicles must be employed; how are products packaged, what type of emergency response information must be maintained at the farm and on the vehicle?

The collateral issue of enhanced liability is equally important. Will farmers be subject to a higher standard of care because of their regulated status? Failure to comply with the hazardous materials regulations is a per se violation. However, a violation is not necessary to impose liability, and even absent a violation, hazardous materials transportation activities have been held to fall short of a reasonable standard of care. *Blasing v. P.R.L. Hardenberg Co*, 94 N.W.2d 697 (Minn. 1975).

The shipper or transporter who is regulated knows or should know that the activity is considered dangerous enough to require regulation. While regulatory com-

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pliance is mandatory, risk analyses reveal that other choices, some of them economically burdensome, may be necessary to prevent allegations of negligence.

Whether or not strict tort liability is available for injury arising from the transportation of hazardous materials is questionable when the transporter involved is a common carrier obligated to accept public shipments. *Actiesselskabet Ingrid v. Central Railroad*, 216 F.2d 72 (2nd Cir.); *cert. denied*, 238 U.S. 815 (1914). The agricultural transporter, who may be both shipper and carrier, faces the questions of negligence and perhaps strict liability, but lacks the common carrier's excuse.

A most perplexing question is what benefits will be derived from applying complex regulations such as these to relatively simple, individual agricultural operations? Statistical information on hazmat transportation incidents collected by the DOT does not include state or local accident information unless the accident was one reportable under the federal rules. Because most chemical transportation in the context of individual farm operations, although it may involve hazardous materials, does not include materials the release of which triggers a federal reporting requirement, the answer to the question may not be available unless and until this population is federally regulated.

But HM200 is by no means a done deal. There is ample opportunity for agriculture to understand the magnitude of federal hazmat regulation and interact with the DOT to assure the perceived benefit of such regulation is realized. It is suggested that agriculture might encourage the DOT to broaden the very narrow regulatory exceptions that now exist to the benefit of the agricultural community. Such exceptions may encompass commonly transported chemicals used in routine farm operations in volumes and packagings that may realistically be encountered in such activities. Certainly, thought must be given to identifying when farm activities are in commerce for purposes of the hazmat regulations, and consideration be extended to the derivative effects of the regulations such as the requirement for increased insurance coverage, the availability of cost-effective training, and the practicalities of enforcement on so large and diverse a group.

The comment deadline for this docket expired on October 13, 1993. However, DOT officials, as late as November 1993, were still receiving comments, and it is likely that this issue, as the effects become more widely realized, will and should, become the target of heightened scrutiny by farmers, farm groups, and farm-state legislators.

Judicial review of ASCS decisions/ continued from page 2

government's motion may also be coupled with alternative motions to dismiss or to remand the action to the agency, responses to those motions may also be necessary); and

- a reply to the government's response to the producer's motion for summary judgment (often combined with the response to the government's motion).

The complaint should be carefully drafted. The defendant will be the Secretary of Agriculture because of the Secretary's ultimate responsibility for the ASCS's actions; jurisdiction will be premised on 28 U.S.C. §§ 1331 and 1337; the district court's authority to issue a declaratory judgment is found at 28 U.S.C. §§ 2201 and 2202; and the government's sovereign immunity is waived by the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706.

Notwithstanding the Federal Rules of Civil Procedure's concept of "notice pleading," drafting a complaint that tells the "whole story" has several advantages. First, a detailed complaint more fully informs the court of the facts and issues involved. Second, a detailed complaint usually is met with a more detailed answer, thus allowing early warning of any unanticipated weaknesses in the producer's position.

Finally, drafting a detailed complaint can save some time and effort in the preparation of summary judgment pleadings. For example, typically one of the more time consuming and tedious tasks in preparing the memorandum in support of a motion for summary judgment is explaining to the court how the particular farm program works, accompanied by references to the applicable statutes and regulations. If the complaint already contains a relatively complete statement of the relevant facts and program provisions, that material can be modified for inclusion in the memorandum, thus allowing more time for development of arguments.

Judicial review is generally confined to the administrative record. After the complaint is filed, the government will file and serve certified copies of the administrative record. The administrative record should be reviewed immediately to make sure that it is complete.

The administrative record will be paginated. In the briefing to the court, the statements of fact should be supported by references to the administrative record.

If the producer has led a good life and is generally blessed with good fortune, the government might be willing to discuss settlement at some point. One of the problems with settling ASCS cases is having to deal with the U.S. Attorney's office and the USDA Office of General Counsel (OGC).

An Assistant U.S. Attorney (AUSA) usually will be the only government attorney on the pleadings. Behind the scenes, however, will be either a regional and/or Washington, D.C., OGC attorney. Occasionally, the AUSA and the OGC attorney will play roles approaching the "good cop, bad cop" routine. In most cases, the attorney that you will have to convince to settle the case will be the regional OGC attorney and/or that attorney's supervisor in Washington, D.C. If the agency is willing to settle, the AUSA will usually go along.

The government's willingness to settle will likely depend on a variety of factors, not the least of which will be the strength of the producer's case. Possible "soft" spots are cases involving the pre-1989 crop year payment limitation rules at 7 C.F.R. pt. 795,[1] cases where the determination was based on an USDA Office of Inspector General (OIG) report, and cases where the equities favoring the producer are compelling. Settlements that require the ASCS to make payments to the producer as opposed to allowing the producer to keep payments already made can be more difficult. While settlements usually do not come easily, persistence sometimes has its rewards.

Before reaching the application of the appropriate standard(s) of review to the ASCS NAD's decision, a threshold issue is likely to be whether the particular determination is reviewable under the APA. The government frequently invokes 5 U.S.C. § 701(a)(2) in an attempt to preclude review.

5 U.S.C. § 701(a)(2) is a narrow exception to the general principle that all agency action is reviewable. *See* 5 U.S.C. § 702. Section 701(a)(2) precludes judicial review to the extent that "agency action is committed to agency discretion by law."

Congress frequently gives the Secretary considerable discretion in implementing the federal farm programs. Just because an agency's action is discretionary, however, does not mean that it is unreviewable. The APA contemplates that most exercises of discretion are judicially reviewable under the "abuse of discretion" standard of 5 U.S.C. § 706(2)(A). Thus, the producer's task is to rebut any claim that review is precluded under § 706(a)(2) and to establish that the Secretary's exercise of discretion in the particular case is reviewable under the "abuse of discretion" standard of § 706(2)(A).

An extensive discussion of § 701(a)(2) is beyond the scope of this article. A good place to begin research on § 701(a)(2) is with an ASCS case the government will cite because the government won it, *North Dakota ex rel. Bd. of Univ. & School Lands,*

914 F.2d 1031 (8th Cir. 1990). There, the Eighth Circuit followed the United States Supreme Court's interpretation of § 701(a)(2) in *Webster v. Doe*, 486 U.S. 592 (1988). Under *Webster v. Doe*, "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," the agency's action taken pursuant to that statute is not reviewable. In other words, there is no review when there is "no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

In the typical case, there are at least three possible approaches to the government's argument that the determination is not reviewable by virtue of § 701(a)(2):

■ The "Distinguish/Find 'Law to Apply'" Approach: Distinguish the cases working against reviewability and find standards or "law to apply" in the applicable statute or regulations;

■ The "*Esch v. Yeutter*, etc." Approach: Observe how the courts in *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1991); *Golightly v. Yeutter*, 780 F. Supp. 672 (D. Ariz. 1991); *Lucio v. Yeutter*, 798 F. Supp. 39 (D.D.C. 1992); *Jones v. Espy*, No. CIV. A. 90-2831-LFO, 1993 WL 102641 (D.D.C. Mar. 17, 1993); *Doane v. Espy*, No. 91-C-852-C (W.D. Wis. July 20, 1993), *appeal filed*, No. 93-2911 (Aug. 6, 1993), and the many other courts that have reviewed ASCS decisions worked around the government's argument and follow their lead; and/or

■ The "Congress Said Otherwise" Approach: In *Nickels v. Espy*, No. 92 C 3766, 1993 WL 265468 (N.D. Ill. July 13, 1993), the court resolved the issue by holding that a provision of the 1990 ASCS NAD legislation, 7 U.S.C.A. § 1433e(d) (West Supp. 1993), effectively overrode § 701(a)(2) by providing that "[f]inal decisions of the Department of Agriculture under the process provided in this section *shall be reviewable* by a United States court of competent jurisdiction" (emphasis supplied). (The APA is not jurisdictional; thus, § 701(a)(2) does not deny jurisdiction that otherwise exists).

Establishing that the ASCS decision is reviewable is only a quarter of the battle. The remaining three-quarters is showing that the agency acted improperly by either

(1) acting contrary to a statute or regulation (*see* 5 U.S.C. §§ 706 & 706(2)(A), (C), (D));

(2) acting unreasonably (arbitrarily and capriciously) in

(a) interpreting an ambiguous statute or regulation (*see Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)) or

(b) making findings of fact and drawing conclusions from those findings (*see* 5 U.S.C. § 706(2)(A)); or

(3) abusing its discretion (*see* 5 U.S.C. § 706(2)(A)).[2]

The APA's standards of review favor the government. To make matters worse for those who challenge agency action, deference is accorded an agency's interpretation of ambiguous statutes and regulations. *See, e.g., Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Udall v. Tallman*, 380 U.S. 1 (1965). Broadly speaking, so long as the agency acted reasonably, the government wins. Accordingly, in the final analysis, the challenge is to avoid receiving a decision such as the following:

> Although plaintiffs [the producers] raise some persuasive arguments, and may in fact have a stronger basis for their contentions than do defendants [the government], this court can only look to the administrative agency's decision and determine if it was arbitrary and capricious. There is factual and legal support for the administrative agency's findings, and therefore its findings cannot be considered arbitrary and capricious.

Olenhouse v. Commodity Credit Corp., 807 F. Supp. 688, 693 (D. Kan. 1992).

Of course, to prevail under the applicable standards, the producer must skillfully and convincingly explain to the court how the ASCS acted improperly in resolving the dispute at issue. This may require showing how the agency misinterpreted or misapplied the law, how it failed to consider or give due weight to evidence favorable to the producer, how it gave undue weight to evidence against the producer, how it treated similarly situated producers more favorably, and demonstrating any other factor indicating that the agency's findings and conclusions were unreasonable or contrary to law.

The broad range of potential issues in ASCS NAD determinations makes it difficult to offer general suggestions as to how to best proceed under the APA's standards of review. Perhaps the only generally applicable consideration is the need to clearly and completely explain the dispute to the court. Because the federal farm program rules are arcane, complex, and often require a considerable investment of time to understand, they must be explained in a way the court can readily understand and appreciate. Ideally, the program rules should be explained in such a way that the court will not defer to the presumed expertise of government counsel for guidance. Such an explanation is particularly important in cases where the NAD determination is being challenged on the grounds that the ASCS failed to follow the terms of an unambiguous statute or regulation, where the ASCS's interpretation of an ambiguous statute or regulation is being challenged as unreasonable, or where the challenge is based on the ASCS's enforcement of a substantive rule that is found neither in a statute nor a regulation.

Producer's counsel should also carefully explain the facts of the dispute to the court, taking every opportunity in the argument to note the deficiencies in the NAD determination's recitation of what occurred or in its explanation of its basis for making its findings of fact. Similarly, where the determination's explanation of how it reached its conclusions is cryptic or nonexistent, those deficiencies should be noted to bolster the argument that the result was arbitrary and capricious or an abuse of discretion.

Litigating ASCS disputes presents unique challenges. Nevertheless, the judicial review of ASCS determinations ensures that individual producers have been treated properly and, in a larger sense, encourages the ASCS to fairly and equitably administer the federal farm programs.

—Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN

[1]The pre-1989 crop year payment limitation regulations found at 7 C.F.R. pt. 795 did not completely set forth the rules that the ASCS applied. Instead of appearing in the regulations, some of the substantive rules appeared only in the 5-CM *ASCS Handbook* volume. This omission recently proved fatal to the ASCS's reliance on the *Handbook's* rules in *Jones v. Espy*, Civ. A. No. 90-2831-LFO, 1993 WL 102641, 1993 U.S. Dist. LEXIS 3285 (D.D.C. 1993). All of the ASCS's substantive rules that appear only in the *ASCS Handbook* volumes are potentially subject to challenge under *Jones v. Espy*. For that reason and others, the ASCS recently began an internal review of its *Handbook* volumes. *See* USDA, ASCS, *Report of Policy and Regulatory Review Task Force: Phase I* (Aug. 25, 1993).

[2]Agency action found to have been taken "without observance of procedure required by law" may also be set aside. 5 U.S.C. § 706(2)(D). A finding of procedural irregularity, however, usually results only in a remand to the agency. While a remand may be desirable in some cases, such as when the producer wants to supplement the administrative record, a remand can also lead to a better supported and reasoned determination against the producer.

CONFERENCE CALENDAR

Agricultural Law Section Seminar
February 18, 1994, U. of Minn. Landscape Arboretum
Topics include: agricultural estate planning update; agricultural business law issues; federal agricultural legislative initiatives
Sponsored by: Minnesota State Bar Association. For more information, call 1-612-443-2460.

See page 8 for CRP Conference information.

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA's co-sponsorship of important conference

The American Agricultural Law Association is pleased to be one of the co-sponsors of **When Conservation Reserve Program Contracts Expire: The Policy Options**, a two-day conference in February on the future of the CRP.

The Conference will be held February 10-11, 1994 at the Renaissance Hotel in Arlington, just minutes on the Metro or by cab from the National Airport.

Topics and speakers include: The genesis of the CRP (Norm Berg); The CRP in a time of change (Senator Patrick Leahy); The public interest in the CRP (Gary Margheim, Art Allen, Geoffrey Grubbs, Bob Moulton, and Robert Young); The CRP's niche in the administration's environmental agenda (Secretary Mike Espy); Costs and benefits of the CRP (Mike Dicks, Richard Johnson); The farmer's perspective on the future of the CRP (five farmers); National survey of CRP contract-holders (Tim Osborn); The CRP's niche in agricultural conservation and environmental agendas (Ken Cook, Judy Olson, Charles Hassebrook, Chandler Keys); The future of federal cropland retirement programs (Harold Breimeyer); Perspectives (Al Berner, Dave Miller); Environmental protection via conservation compliance and related technologies (Paul Johnson); Perspectives (Doug Deininger); Buying more environmental protection with limited dollars (Ralph Heimlich); Perspectives (Roy Roath, Robert Wolcott); Which cropland to retire (Jeff Zinn); Perspective (Ron Reynolds); Preserving the benefits on CRP acres after contract expiration; Perspectives (Jo Clark); New approaches to environmental protection on agricultural land (Representative Glenn English; Perspectives (Betty Plummer, Duane Sand); Coordinating agricultural conservation (Sandra Batie); Socioeconomic factors affecting farm-level implementation of conservation policies, North Central Region Committee 149 Symposium.

For further information on the program or to register, call (515) 289-2331 or 1-800-THE SOIL.