Agricultural Law Update

VOLUME 7, NUMBER 12, WHOLE NUMBER 86 OCTOBER 1990

Official publication of the American Agricultural Law Association

INSIDE

IN FUTURE ISSUES

Compensation awarded for denials of section 404 dredge and fill permits

The United States Claims Court has ruled in two separate cases that U.S. Army Corps of Engineers' denials of Clean Water Act section 404 permits for plaintiffs' activities in wetlands constituted a Fifth Amendment taking and has ordered an award of just compensation in both cases. *Florida Rock Industries v. United States*, 21 Cl. Ct. 161, 1990 WL 103774 (Cl. Ct. 1990); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 1990 WL 103691 (Cl. Ct. 1990). Section 404 of the Clean Water Act requires that a person obtain a permit before discharging dredged or fill material into the waters of the United States, including wetlands, unless the person's activity fits into a specified exception to the permit requirement. 33 U.S.C. § 1344. In both cases, there was no question that a section 404 permit was required.

Prior to the Supreme Court's ruling in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), federal courts had blocked takings claims by evoking a navigable servitude doctrine, which was based in part on the power of Congress to regulate activities in navigable waters under the Commerce Clause. This doctrine precluded a private property right in navigable waters. In *Kaiser Aetna*, the Supreme Court ruled that although the navigable servitude was part of the Congressional power, it was not a separable interest of Congress in navigable waters sufficient to defeat an otherwise valid takings claim.

Since *Kaiser Aetna*, only one other case, *1902 Atlantic v. Hudson*, 547 F. Supp. 1381 (E.D. Va. 1983), has upheld a takings claim based on denial of a section 404 permit. In that case, the wetland at issue had originally been a dry highland not subject to the section 404 permit requirements. The wetland was excavated to provide fill for a highway overpass. The wetland was also isolated from navigable waters until an unknown person dug a ditch connecting the area to a tributary of a navigable waterway. In addition, there was no claim that the wetland was of any environmental value.

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Fourth Circuit and USDA Judicial Officer clash

The Judicial Officer of USDA recently issued a "Decision and Order on Remand" responding to the Fourth Circuit Court of Appeals decision in *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299 (4th Cir. 1990). The Judicial Officer (JO) announced that the decision of the court would not be followed in any other circuit because the court's conclusions "seem to be based on a serious misunderstanding of the livestock industry and as to the operation of livestock scales."

The original proceeding arose when USDA brought action against a market operator for alleged violation of the Packers and Stockyards Act arising out of charges of misweighing of hogs. The JO had adopted the initial order of the Administrative Law Judge (ALJ) suspending the market for ninety days, fining it $20,000, and ordering it to cease and desist from violating the Act.

The evidence presented related to discrepancy in weights, which USDA alleged were the result of false weighing in violation of 7 U.S.C. § 213(a), which prohibits stockyard operators from using "any unfair... or deceptive practice or device in connection with ... weighing of livestock." USDA also charged the market with a violation of 7 U.S.C. § 221 by issuing improperly completed scale tickets.

The ALJ found that the market had committed the violations but without bad motive or intent. Upon appeal to the JO the ALJ's findings were adopted, along with the recommended penalties, but, according to the Fourth Circuit, the JO "inferred from the record that Hutto had a financial motive to falsely weigh and that it wilfully violated the Act." 903 F.2d at 303.

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COMPENSATION AWARDED... DREDGE AND FILL PERMITS/CONTINUED FROM PAGE 1

In *Florida Rock Industries*, the Army Corps of Engineers denied an application for a section 404 permit to surface mine ninety-eight acres of Florida wetland for phosphate. The applicant brought a takings claim on the grounds that this action denied the applicant any viable economic use of the land. This is one of two grounds for finding a regulatory taking under a line of Supreme Court cases that has established that a taking occurs if a regulation either does not substantially advance a legitimate governmental interest or denies an owner economically viable use of his land. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 470 U.S. 480, 485 (1987).

The Army Corps of Engineers appealed an initial finding of a taking to the Federal Circuit on the grounds that the judge had improperly limited the measure of economic viability to immediate use of the land. *Florida Rock Industries v. United States*, 8 Cl. Ct. 160 (1985). On appeal, the Federal Circuit ruled that the value of the property, used to determine if there is any economic viable use of the property after denial of a permit, may be determined by examining a market made up of investors who are speculating on the property. The court added that these investors must be aware of the regulatory limits on the use of the property. *Florida Rock Industries v. United States*, 791 F.2d 893 (Fed. Cir. 1986).

On remand, the Claims Court found as a matter of fact that there was no group of knowledgeable speculators that could establish a market value for the land. The court determined that the value of the land was $10,500 per acre before denial of the permit and $500 per acre after denial. The court ruled that this diminution in land value was sufficient to establish that a taking had occurred.

In the other recent case, *Loveladies Harbor v. United States*, 21 Cl. Ct. 153, 1990 WL 103691 (1990), the Army Corps of Engineers denied a permit to drain and develop residential housing on 11.5 acres of New Jersey wetland. The tract was part of 250 acres of land, most of which was developed before state and federal laws required permits for wetland development. On motion for summary judgment, the court rejected the Army Corps of Engineers' argument that the economic viability test should be determined by the diminution in value of the whole 250 acres, which constituted the entire development, rather than the eleven and a half acres for which a permit was not issued. Although the court found that the property was worth $1,000 per acre after denial of the permit, for the highest and best uses of recreation and conservation, the court ruled that the diminution in value after denial was sufficient to constitute a taking. The court found that the gross value of the land before denial of the section 404 permit was $3,720.00.

In both cases, the Claims Court refused to apply the pubic nuisance exception to the requirement that compensation be provided for a regulatory taking. *See, e.g., Keystone Bituminous Coal Ass'n*, 470 U.S. at 485-493. In *Florida Rock Industries*, the court found that there was insufficient evidence that plaintiff's mining activity would contaminate nearby groundwater sources, including the Biscayne aquifer. The court did not consider the cumulative effects of additional phosphate mining in an area already heavily mined. In *Loveladies Harbor*, the court went further. After balancing the economic interest of the individual plaintiff against the government's interest in preventing the pollution caused by the proposed development, the court found that the denial of the permit did not substantially advance a legitimate government interest. The court appears to have mistakenly limited its inquiry into the government's interest in regulating wetland development by focusing on a single permit application rather than the entire regulatory scheme of the Clean Water Act.

—Martha L. Noble

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Agricultural Law Update

VOL. 7, NO. 14, WHOLE NO. 86 Oct. 1990

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Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313.

FOURTH CIRCUIT AND USDA JO CLASH/CONTINUED FROM PAGE 1

The Fourth Circuit focused on the issue of whether Hutto should have been given pre-suspension notice as required under 5 U.S.C. § 558(c) before the institution of agency proceedings. If the violation was "wilful," pre-suspension is not required. The court adopted the definition of "wilfulness" for purposes of this requirement as "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof." 903 F.2d at 304. Since the suspension was based on the JO's "inference" that the market intentionally violated the Act, the court searched the record for support for this determination and ultimately concluded that the "record is barren of any evidence, direct or indirect, to support these unwarranted speculative theories" and held that the "inference" was not supported by substantial evidence. 903 F.2d at 305. On this basis, the court set aside the ninety-day suspension. The finding that Hutto violated the provisions regarding improperly completed scale tickets was also reversed on the grounds that Hutto was not given proper notice.

As to the monetary penalty the court found that the JO had failed to explicitly consider two of the three factors required in 7 U.S.C. § 213(b): the size of the business involved and the effect of the penalty on the person's ability to continue in business. The JO had considered the third factor, gravity of the offense, before assessing the $20,000 penalty. Since the penalty was "not in accordance with law," this part of the order was vacated and remanded for reconsideration.

Upon remand, the JO, predictably, defended the finding of "wilful" violation and the use of the USDA Sanction Policy in this situation. He argues that his "inference" was that the market intentionally short-weighed the hogs and distinguishes this from the court's finding that he had "inferred" from the record that Hutto had a financial motive to falsely weigh. The JO contends that the court misunderstood the market's *motive* for short-weighing and that the circumstances found in the present case substantially

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Lender liability actions against FCS lenders: recent developments

In recent years, lender liability actions against agricultural lenders have become almost commonplace. *See generally* Bahls, *Termination of Credit for the Farm or Ranch: Theories of Lender Liability*, 48 Mont. L. Rev. 213 (1988) (analyzing agricultural lender liability and the supporting theories). However, three recent lender liability actions against Farm Credit System lenders have presented unique issues in addition to producing the more standard fare of mixed results.

In the first case, *Grant v. Federal Land Bank of Jackson*, 559 So. 2d 148 (La. Ct. App. 1990), *cert. denied*, 563 So. 2d 886, 887 (La. 1990), the unique issue was whether the receiver of the Federal Land Bank of Jackson was entitled to the protection of *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942), more commonly referred to as the "*D'Oench* doctrine." The court held that the protection applied.

In *Grant*, the plaintiffs filed a lender liability action against the FLB of Jackson and others, alleging that the FLB had breached an agreement that would have permitted them to sell certain mortgaged property and apply the proceeds to their debt with the bank. Subsequently, the FLB of Jackson was placed in receivership by the Farm Credit Administration, and REW Enterprises (REW) was appointed as the receiver.

The receiver, REW, defended on the grounds that it was protected by the *D'Oench* doctrine. Under the *D'Oench* doctrine, as it has evolved since its initial articulation by the United States Supreme Court, "a debtor will be estopped from asserting in a suit on a note any separate agreement between the lender and borrower which contradicts the written terms of the loan documentation." *Grant*, 559 So. 2d at 152. The doctrine precludes defenses such as "lack of consideration, fraud by bank officials, agreements made in good faith by borrowers, and assertions that course of dealing has altered loan documents." *Id.*

The *D'Oench* doctrine's protection has been extended from its initial availability to the Federal Deposit Insurance Corporation (FDIC) to the Federal Savings & Loan Insurance Corporation (FSLIC) and to a receiver appointed by the Securities Exchange Corporation for an insolvent financial services organization. *Grant*, 559 So. 2d at 151. REW, the Jackson FLB's receiver, claimed it was sufficiently similar to the FDIC and the FSLIC to permit it to enjoy the doctrine's protection.

The *Grant* court agreed with REW's position. It reasoned that REW was "essentially functioning as the FDIC or FSLIC would function as receivers, the failed land bank is a federal banking institution regulated by a federal authority, and that authority appointed REW as receiver...." *Grant*, 559 So. 2d at 153.

In the second case, *Zwemer v. Production Credit Ass'n of the Midlands*, 792 P.2d 245 (Wyo. 1990), the issue was whether the plaintiffs were judicially estopped from asserting their lender liability claim because they did not disclose the claim on their personal property schedule in a separate Chapter 11 bankruptcy. The court held that they were estopped from asserting their claim. However, that holding was sharply criticized in two separate dissents.

Prior to filing for bankruptcy, the Zwemers had been sued by the PCA. The Zwemers counterclaimed with a lender liability action. The Zwemers then filed for Ch. 11 bankruptcy protection. On their bankruptcy personal property schedules and disclosure statement, the Zwemers did not list their counterclaim.

After obtaining relief from the automatic stay, the PCA filed an amended complaint against the Zwemers, alleging, among other things, that the Zwemers were judicially estopped from asserting their counterclaim because they failed to properly disclose it in the bankruptcy proceedings.

Adopting its previous characterization of judicial estoppel as "an expression of the maxim that one cannot blow hot and cold in the same breath," the court concluded that the Zwemers had maintained a position in the bankruptcy action that was inconsistent with the position that they maintained in the PCA's action against them on their loan obligations. *Zwemer*, 792 P.2d at 246-47 (citation omitted).

The dissenting justices were sharply critical of the majority's conclusion. Two of the dissenters opined that the Zwemers' omissions on the bankruptcy schedules were "probably nothing more than... inadvertent," and that the doctrine of judicial estoppel was being applied "inversely," and that "[j]ustice depends upon more than smoke and mirrors." *Zwemer* 792 P.2d at 248 (Thomas, J. and Urbigkit, J., dissenting).

In the third case, *Federal Land Bank Ass'n of Tyler v. Sloane*, 793 S.W.2d 692 (Texas Ct. App. May 31, 1990)(1990 Tex. App. LEXIS 1345), unlike the prior two cases discussed here, the plaintiffs in the trial court, the Sloanes, partially succeeded in their lender liability claim. That claim, based on the assertion that the FLBA had negligently misrepresented that the Sloanes' loan application had been approved, successfully avoided the defense of the statute of frauds.

The Sloanes testified at trial that they had been orally informed by the FLBA that their application for financing of two chicken houses had been approved. Subsequently, but prior to the construction of the chicken houses, the Sloanes were advised in writing that the financing had been denied. They sued for a variety of damages and losses, including mental anguish and lost profits.

Although the jury's award of lost profits was reversed, certain of the awards, including the award for mental anguish, were either reformed or affirmed. However, a central issue was whether the action was barred by the statute of frauds.

The court held that the statute of frauds was inapplicable because the Sloanes were neither suing on an alleged oral contract to loan money nor was their suit a contract action disguised as an action in tort. Instead, they were suing on the negligent misrepresentation that their loan application had been approved, and the damages they sought were "separate and distinct from those which would have been sought had a breach of contract action been pursued." *Sloane*, slip op. at 6-7.

—Christopher R. Kelley

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Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* during the month of September, 1990.

1. EPA; Notification to Secretary of Agriculture of a proposed regulation for the certification of pesticide applicators. 55 Fed. Reg. 36297.

2. PSA; Amendment to certification of central filing system— Oklahoma; effective date 9/5/90. 55 Fed. Reg. 37341.

3. APHIS; Animal welfare; standards; correction to 55 Fed. Reg. 33448. 55 Fed. Reg. 38004.

4. FmHA; IRS offset; effective date 8/3/90. 55 Fed. Reg. 38035.

5. USDA; Debt Collection Act; implementation; final rule; effective date 10/22/90. 55 Fed. Reg. 38661.

6. Farm Credit System Insurance Corporation; premiums, computation and payment; proposed rule. 55 Fed. Reg. 39634.

—Linda Grim McCormick

State and federal organic food certification laws: coming of age?

Gordon G. Bones

Producers have responded to consumer demand and premium prices offered for organically grown food by increasing acreage devoted to its production. As the supply and demand for this produce have increased, so have the complexity and sophistication of standards designed to ensure organic integrity.[1]

As a means of providing the producer with guidance in growing organic food, and to protect the consumer from misleading statements and fraudulent advertising, producers have formed self-governing organizations or associations.[2] Members of such associations must comply with specific production and labeling practices.

Over the decade of the 1980's, the organic produce industry has grappled with defining organically grown food, standardizing production methods, and instituting record-keeping requirements, labeling procedures, and enforcement methods.[3] Many associations have sponsored organic food certification legislation at the state level to further legitimize, enhance, or supplant their own labeling programs. Washington, Texas, and Colorado have established certification programs operated directly by the state government.[4] Four other states have adopted statutes whereby the state government cooperates with independent certification entities.[5] Twelve states have certification programs consisting of organic labeling statutes and regulations.[6] The state-operated program in Texas and California's labeling act are discussed below.

State organic food certification programs

The Texas certification program

Texas administers a very comprehensive certification scheme.[7] The Texas Organic Certification Act merely authorizes the Texas Department of Agriculture (TDA) to establish a program to promote natural, lean, organically grown products. More specific organic food standards are contained in state regulations. The current program became operative June 15, 1988.

The Texas Administrative Code defines organic farming as "a system of ecological soil management that relies on building humus levels through crop rotations, recycling organic wastes, and applying balanced mineral amendments, and that uses, when necessary, mechanical, botanical, or biological controls with minimum adverse effects on health and the environment." Organic food is defined as "food that is produced under a system of organic farming and that is processed, packaged, transported and stored so as to retain maximum nutritional value without the use of artificial preservatives, coloring or other additives, ionizing radiation, or synthetic pesticides."

As a means of fostering the soil's organic content, specific tillage, crop rotation, and manuring management techniques are required. TDA may also require testing of soil for off-farm sources of heavy metals, herbicides, or other suspect contaminants introduced by application of manure. Production practices are characterized as permitted, prohibited, or regulated, with differing areas of geographical application. Soil amendments, fertilizers, and growth regulators are thus classified. TDA is responsible for fertility testing and monitoring, crop management, post-harvest handling, the handling and processing of organic crops, and residue testing.

The farm must first be certified to grow organic produce. Whole farms are certified upon documentation that the applicant will manage a farm for organic production. The documentation consists of a three-year farm plan submitted to TDA that must include (1) a three-year rotation plan for each field, as applicable; (2) a three-year plan to stabilize nutrients in the soil of each field; and (3) a 25-foot buffer zone to separate land managed organically from other cultivated agricultural land. Farm units or fields must obtain this same documentation. However, in addition to the above requirements, the applicant must describe methods used to avoid contamination of organically managed fields.

Each whole farm, farm unit, or other production unit must keep a record of field-by-field fertilization, cropping, and pest management; if a crop is produced from more than one field, records must show the source of shipment by date, lot, bin, or shipment number. Organic produce and other produce grown on the same farm must have separate records for organically grown and conventionally grown produce. Tissue, forage, and chemical residue tests may be reviewed by TDA as necessary to assure the integrity of the produce.

Texas allows producers to apply for use of the TDA "Certified Organic" and the "Organic Certification Pending—Transitional" logos. A producer who has satisfied all certification requirements except passage of time from use of synthetic chemicals must market under the transitional label. The applicant requesting certification must submit verifying documents and be inspected by TDA to become eligible to use the logos.

Retailers and distributors of organically grown food must complete detailed applications verifying that they have procedures to prevent commingling of Texas certified organic produce with other conventionally grown produce. Retailers must also be able to trace TDA-certified products back to the producer or supplier. Distributors must agree to sell Texas certified products only to certified retailers.

Formal inspection by the TDA is not required prior to certification, but retailers and distributors are subject to unannounced, informal inspection. Once certified, retailers and distributors are given a certificate of approval. This approval must be conspicuously displayed in each store where such food is offered for sale.

TDA has authority to make inspections of certified producers, processors, retailers, distributors, and applicants for certification. Unannounced inspections may be conducted in cases of suspected violations of standards. Written or oral complaints are investigated and remedial actions taken. TDA must maintain the records of all complaints, investigations, and remedial actions for four years. This administrative record may become a part of the review record of any proceeding involving a certified person or an applicant for certification.

The California certification program

California's certification program[8] varies significantly from the state-operated regulatory scheme in Texas. State involvement in the California program is more limited. The existing law is the Organic Foods Act of 1979, which became effective January 1, 1981. The governing statute is found in the Health and Safety Code, within the Sherman Food, Drug, and Cosmetic law. The primary purpose of the statute has been to set a basic standard for the labeling of food as "organic."

Under the present act, the label "organic," "organically grown," "naturally grown," "wild," "ecologically grown," or "biologically grown" may be used if pesticide residue on produce does not exceed ten percent of the level regarded as safe by the Food and Drug Administration.[9] The residue allowance is included to take care of the problem of drift from neighboring fields and the incorporation of residual chemicals left in the soil from past

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production practices. The above labels may be used only if the raw agricultural commodity is produced, stored, processed, and packaged without application of synthetically compounded fertilizers, pesticides, and growth regulators.

The statute specifies that the term "certified" be used only if the name of the organization providing such certification is listed on the label. Growers and processors of organic food must comply with record-keeping, two years of record retention, and record inspection procedures. Growers and processors must make records available to the State Department of Health Services (DHS).

Wholesale or retail distributors are generally not subject to the record-keeping requirements unless they are engaged in the manufacturing, packaging, or labeling of organically grown commodities. Current California law only requires that the distributor, in good faith make the same representations as were supplied to him in writing, printed advertising, or labeling.

Meat, fish, and poultry must be produced without chemicals or drugs that regulate or stimulate growth or tenderness. Antibiotics are allowed for treatment of a specific malady only, provided that they are used more than ninety days before slaughter. The final sixty percent of the sale weight of the animal must be the result of unmedicated feed that meets organically grown certification requirements.

It is unlawful to advertise or make representations with respect to raw agricultural commodities, processed food products, or meat, poultry, fish or milk as being organically grown if in fact they are in violation of the record-keeping and labeling provisions. Violation of the record-keeping provision is not made expressly unlawful in the Act. However, violation of "any provision" of the Sherman Food, Drug, and Cosmetic Act is a misdemeanor.

In practice, California has not funded enforcement, and few violators have been prosecuted. The growth of the organic foods industry in California has created potential for significant violations of the Sherman, Drug, and Cosmetic Act, which includes Organic Labeling Act provisions. For this reason, Assembly Bill 2012 was introduced in March 1989 at the request of the certified organic food industry, in particular California Certified Organic Farmers.

California's state legislature passed the Organic Foods Act of 1990 on August 31, 1990 as AB 2012.[10] It was signed by Governor Deukmejian on September 22, 1990. The bill was designed primarily to enforce existing standards. In addition, the roles and authority of the Department of Food and Agriculture (CDFA) and DHS in enforcement are clarified by the legislation.

Producers, handlers, and processors of organic foods are required to register with CDFA, DHS, or the county agriculture commissioners as specified. The new law requires only producer registration. Registration fees up to $2,000 per organization provide funding for enforcement of the organic standards, civil penalties, and the investigation of complaints. A violator of the act could be subjected to a civil penalty of $5,000 per violation.

Detailed record-keeping and disclosure requirements related to the production, handling, and processing of organic foods are contained in the bill. Release of these records is limited. Upon public request, CDFA, DHS, and the county agriculture commissioners must obtain and provide records listing growing methods and substances used in the production, processing, and distribution chain.

Certification by producer organizations remains voluntary, but such organizations now register with the appropriate agencies and file a certification plan. The period allowed for transition from conventional to organic farming is increased from one to three years and thereby is consistent with the transition period in the federal organic certification proposal. This provision will be phased in during 1995 and 1996. The bill requires livestock producing organic meats or dairy products to be fed one hundred percent organic feed, a level much higher than the current sixty percent requirement.

A thirteen-member advisory board will be appointed by the Director of CDFA to assist in implementing the law's provisions. Specifically, the board will rule on materials that may be used in growing organic food. The board will be composed of one wholesaler, one retailer, one consumer, one technician, and six organic producers.

The California Department of Health Services will continue to investigate violations. However, the pesticide enforcement branch of CDFA will have investigatory and rule-making jurisdiction in some instances. Violations will be referred to the Attorney General for enforcement.

Sponsors of AB 2012 have maintained that the high demand for organic foods has created a seller's market and greater opportunities for fraud and misrepresentation to consumers. Organic sales exceed $500 million annually, and there are 90,000 acres farmed using organic methods. Critics of AB 2012 question the lack of public agencies' authority to certify products, the practicality of certain administrative procedures, and the tolerance levels set for pesticide residue in produce. The percent of EPA pesticide tolerance is set at ten percent of the amount approved by FDA. Many opponents of the bill find the ten percent tolerance level for pesticide contamination unacceptable and argue that most conventional produce has residues of less than ten percent of EPA tolerance levels.

Proposed federal organic food certification legislation

SB 2830

State certification programs differ widely and have been one cause of consumer confusion as to the validity of one state program over another. In addition, producers have been unable to obtain guidance in growing organic produce for interstate distribution. Therefore, federal legislators have recognized the importance of establishing consistent national standards for organic food production.[11]

As a means of implementing uniform national standards, Vermont's Senator Leahy introduced the Organic Foods Production Act of 1990. A hearing on the Act was held before the Subcommittee on Research and General Legislation on March 22, 1990.[12]

Though Leahy's bill was never passed, Title XVI of the Senate version of the 1990 farm bill incorporates many provisions of the Organic Foods Production Act of 1990. The primary purposes of SB 2830 are to coordinate the efforts of private organizations and the government, to set federal organic certification and labeling standards, to provide enforcement provisions, and to coordinate state and/or private organic farming programs.

Certified organic food must be food produced (1) from acceptable production materials, (2) on land that must have been farmed organically for a period not less than three years, (3) in accordance with a site-specific farm plan. The term organic would signify that the produce has been grown without use of synthetic chemicals and is not a claim that the produce itself is residue free.

In general, food certified under the program must be produced from natural materials rather than synthetic materials. The Secretary of Agriculture is to establish a National List of approved and

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prohibited substances which are acceptable for organic production. SB 2830 explicitly lists certain synthetic ingredients which may be used in the production of organic food under specific circumstances. In contrast, the National List may also exclude natural substances determined to be harmful to human health or the environment and inconsistent with organic farming. The Secretary may not include exemptions for synthetic substances other than those recommended for the National List by the National Organic Standards Board.

A producer may obtain an organically produced label only if the agricultural product is "produced on an organically certified farm and handled only through an organically certified handling operation." A certifying agent inspects farming practices and handling operations of an organization or individual who has applied to the USDA for accreditation. Either a state employee or a private entity may be a certifying agent. Thus, the current private or state organization engaged in certification could continue functioning under this legislation. Raw and processed produce, as well as meats, would be certified under the program.

A thirteen member National Organic Standards Board would be appointed by the Secretary of Agriculture. This Board would develop and monitor standards and formulate the Proposed National List of approved and prohibited materials. The Board would serve as an advisor to the Secretary of Agriculture, who would make decisions based on these recommendations. Organic standards would not be fully implemented until September, 1992.

A producer will be unable to obtain the USDA organically produced label for his products within the first three-year period. No special "transition label" is available during the period between use of conventional practices and organic production as is available in Texas.

The legislation does not preempt existing organic certification programs and allows new states to enact their own cercation programs. A state organic certification program may have more restrictive requirements than the federal standards.

However, interstate commerce must not be impeded by any state action and, therefore, state action is limited in that (1) the Secretary must approve state organic certification programs and determine their quality and consistency with the purposes of SB 2830; (2) all organic produce must contain the USDA "organically produced" label, although an additional organic label indicating the state of origin and the certifying agent of such produce may also be affixed as long as no claims of superior quality are made; and (3) a state is prohibited from discriminating against another state's organic products if those out-of-state products have the USDA "organically produced" label affixed, despite the fact that one state has more restrictive standards.

Enforcement responsibilities would be shared by the Secretary, appropriate state officials, and the certifying agents. Verification procedures have been considered essential to the enforcement of organic standards. Provisions of this legislation require audit trails; extensive producer, handler, and processor record keeping; farm visits; and unannounced inspections. Most compliance assessments would be made by certifying agents. However, state and federal officials would have oversight responsibilities.

In extreme circumstances, products from organically certified farms would be exempt from this legislation if subject to federal or state emergency pest or disease treatment programs. Though such farms will generally not lose their certification, the products would be required to meet the applicable residue requirements for organically produced food. An exemption from certification is also provided producers whose gross agricultural income totals $5,000 or less annually.

HR 3950

The House Agriculture Committee did not include organically grown food labeling and certification language in the original version of HR 3950. However, on August 1, 1990, Congressman Pete De Fazio (D.-Ore.) offered a floor amendment to HR 3950, which was accepted by a narrow margin.

Senate-House Conference Committee

Senator Leahy's influence in the Senate-House Conference Committee prevailed. During compromise negotiations, Leahy agreed to the House version because it contained the essential organic food labeling and certification provisions as described above.

The reconciled legislation includes the establishment of an organic standards board, the national list, enforcement, and administrative appeal provisions. However, use of the USDA certification label, the organic promotion advisory committee, and the transition label demonstration programs were omitted.

There was significant debate over the meat and poultry versions of the Bill. A compromise was reached so that meat and poultry could be organically certified, but the USDA must establish organic standards through the notice and rulemaking process.

Conclusion

Consumers question whether synthetic fertilizers, pesticides, growth regulators, or livestock feed additives have been used in growing food sold as organically produced. Organically grown standards should provide some guarantee of the integrity of food certified, labeled, and marketed as such. Texas and California have developed and enforce extensive programs.

Organically grown food legislation is likely to survive Conference Committee at the federal level. Significant budget appropriations are not needed to fund food labeling and certification programs. Such revenue-neutral legislation has received favor in these budget-conscious times. Therefore, the organic food provisions of the 1990 Farm Bill are expected to be noncontroversial when the Conference Committee returns the legislation to the Senate and House for final approval. The uniform national standards that would be implemented by the federal legislation would complement the organic food laws enacted throughout the nation.

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[1] Kendall, *Farmers Must Ensure Organic Purity*, The New Farm, V. 10, p. 32, n.4 (1988).

[2] California Certified Organic Farmers (CCOF), Santa Cruz, California is the most active state entity. The Organic Foods Production Association of North America (OFPANA), Belchertown, Massachusetts is recognized as the primary national spokesman for the organic food industry.

[3] National Agricultural Library, USDA, Organic Certification, SRB 90-04, at 2-3.

[4] Wash. Rev. Code § 15.86.020 (1989); Tex. Agric. Code Ann. § 12.0175 (Vernon 1990); Col. Rev. Stat. § 35-11.5-102 (1989).

[5] Minn. Stat. Ann. § 31.92 (1989); N.H. Rev. Stat. Ann. § 426.6 (1989); Ohio Rev. Code Ann. § 901.3-8 (Baldwin 1990).

[6] Cal. Health & Safety Code § 26469 (1989); Iowa Code Ann. § 190B.1 (West 1989); Me. Rev. Stat. Ann. tit. 7, § 551 (1989); Mont. Code Ann. § 50-31-103 (1989); Neb. Rev. Stat. § 81-2, 234 (1989); N.H. Rev. Stat. Ann. § 426.6 (1989); N.D. Cent. Code § 4-38-01 (1990); Or. Rev. Stat. § 616.406 (1989); S.D. Codified Laws Ann. § 39-23-1 (1989); Wis. Stat. § 97.09 1988).

[7] Tex. Agric. Code Ann. § 12 (Vernon 1990); Tex. Admin. Code tit. 4, § 18 (1990).

[8] See generally Cal. Health & Safety Code §§ 26000-26851 (West 1989).

[9] See *id.* § 26569.12; 40 C.F.R. § 180.0 - 180.1035. EPA merely sets tolerance levels for pesticide residues. FDA is charged with monitoring and enforcing those limits.

[10] AB 2012, 1989-90 Leg., Reg. Sess., California.

[11] S. 2830, 101st Cong., 2d Sess. § 1602 (1990).

[12] S. Rep. No. 357, 101st Cong., 2d Sess. 289 (1990).

exceed the customary basis for inferring wilful and intentional shortweighing.

Whether the court is correct in its reading of the JO's "inference" or not, the JO's finding of intentional short-weighing would seem to be consistent with USDA's Sanction Policy. In previous cases, the Department has used the following definition for a "wilful" violation: a violation is wilful, within the meaning of the term in a regulatory statute, if the violator 1) "intentionally does an act which is prohibited,— irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements." *In re Shatkin*, 34 Agric. Dec. 296 (1975).

By this definition, a finding of intentional short-weighing would seem to be a finding of "wilful" violation, thus, the pre-suspension notice under 5 U.S.C. § 558(c) would not be necessary. The question really focuses on the issue of whether the JO's conclusion is supported by substantial evidence, and it is on this point that the JO strongly disagrees with the court.

The JO also takes issue with the court's conclusion that he did not consider all three statutorily mandated factors in assessing the monetary penalty. The initial decision had made reference to the financial statement of Hutto, and, given its strength, apparently the JO concluded that no elaboration was necessary. The court disagreed.

Another major point of contention has to do with the court's conclusion that the market's various acts constituted a single violation because the acts occurred contemporaneously and could not be found to be more that one unfair or deceptive "practice" or false weighing. 903 F.2d 306. The JO strongly rebuts the view that only one violation occurs when a person falsely weighs each of several drafts of livestock and indicates that this view will not be followed in cases not reviewable by the Fourth Circuit. The JO cites a series of cases in which the same unfair practice in a number of separate transactions served as the basis for penalties for each occurrence.

An underlying current in this case is the court's concern with the "USDA Sanction Policy" as outlined in previous cases and attached as an appendix to the JO's original order. The court, in a footnote, refers to the language of this policy as "didactic and punitive" in tone (903 F.2d 304, fn 8) and refers to the Sixth Circuit's observation in *Parchman v. United States Department of Agriculture*, 852 F.2d 858 (6th Cir. 1988) of the JO's "near approach" to a breach of the line between judging and prosecuting. 903 F.2d 305.

The views of the JO with regard to the deterrent effects of the severe sanction policy of USDA are well known. The policy is extensively set forth in *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268 (1987) *aff'd.* 841 F.2d 1451 (9th Cir. 1988). The JO has clearly stated that the USDA will continue to apply the policy in cases where the violations are serious, flagrant, repeated, and intentional. *See, In re Spencer Livestock Commission Co.*, 46 Agric. Dec. 268 (1987); *aff'd.* 891 F.2d 1451 (9th Cir. 1988); *In re Samuel Esposito*, 38 Agric. Dec. 613 (1979); *In re Shatkin*, 33 Agric. Dec. 296 (1975).

Dissatisfaction with the JO's application of this policy is evident in the Fourth Circuit in the present case; in *Parchman v. USDA*, 852 F.2d 858 (6th Cir. 1988), in the Sixth Circuit; and in *Farrow v. USDA*, 760 F.2d 211 (8th Cir. 1985), in the Eighth Circuit. *Hutto* represents another round in this continuing saga.

—J.W. Looney, Professor of Law, University of Arkansas School of Law, Fayetteville, AR.

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STATE ROUNDUP

MINNESOTA. *DTP and state law of conversion.* In *Dairy Farm Leasing Company v. Haas Livestock Selling Agency*, 458 N.W.2d 417 (1990), Dairy Farm Leasing Company (DFLC), a lessor of dairy cows, sued Haas for conversion. DFLC had leased twenty cows to the Clarks who apparently enrolled eighteen of the cows in the Dairy Termination Program (DTP). Those eighteen cows were consigned to Haas "for slaughter only." DFLC was listed as the owner on the consignment slip, and Haas remitted the sale price to DFLC. DFLC sued for conversion.

The first issue addressed by the Minnesota Court of Appeals was whether the trial court's finding that the cows were enrolled in the DTP was clearly erroneous. There was no direct evidence of enrollment, only the hearsay evidence that the cattle were branded with an X, as required by the DTP, and the fact that the consignment sheet was marked "for slaughter only." It was Haas' practice to accept dairy cattle "for slaughter only" only if the cattle were enrolled in the DTP. The appeals court could not say the inference of enrollment was clear error.

The second issue was whether the DTP preempted state conversion law. Haas maintained that the DTP made it impossible for it to hold the cattle for DFLC and also comply with the DTP by slaughtering or exporting the cattle within a certain time frame.

The court held that Haas' reliance on the DTP was misplaced, that it applied only to "producers" and "purchasers." Haas, as a sales agent, was neither.

The court listed actions Haas could have taken to solve its dilemma: (1) call DFLC to get permission; (2) refuse to accept consignment without DFLC's permission; (3) request special permission from the government to retain the cattle. The preemption argument did not succeed and the court was free to apply the state law of conversion.

The trial court had apparently concluded that there was no conversion because DFLC received all it was entitled to since the cows had been enrolled in the DTP. The appellate court pointed out that legally the cows could have been sold for export. Since DFLC was denied the right to sell them for export, Haas' sale amounted to a conversion.

—Linda Grim McCormick

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Agriculture Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Report on the Annual Conference. More than 210 practitioners, educators, government officials, industry representatives, and guests met in Minneapolis, October 5-6, 1990, at the American Agricultural Law Association's Eleventh Annual Meeting and Education Conference.

Over forty-two speakers addressed a wide range of topics including international agricultural law, agricultural business and estate planning, ethics in agricultural law, agricultural resources in the 1990's, agricultural finance and insurance, and the legal issues in alternative uses of agricultural land.

Don Pedersen delivered the presidential address on the current work of the AALA and its plans for the future. Friday's luncheon address was delivered by Dr. J.C. (Clare) Rennie on Canadian farm policy.

Professor John Davidson was awarded this year's "Distinguished Service Award."

George R. Massie reported that the AALA Job Fair, held concurrently with the Annual Meeting, served 47 applicants and 17 law firms and employers.

Neil Hamilton is the Association's President-elect. Margaret R. Grossman, University of Illinois, assumed her duties as President. Joining the Board of Directors are newly elected members Ann Stevens and Thomas Lawler. Retiring Board members are Terence Centner and Drew Kershen. We wish to thank them for their outstanding service to the AALA.

Ann Stevens announced the winner of the Student Writing Competition, Martin Troshynski, who wrote a paper entitled "Corporate Ownership Restrictions and the U.S. Constitution."

Next year's Annual Meeting will be held November 1-2, 1991 at the Colony Square Hotel, in Atlanta, GA.