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NEW FEDERAL CAFO REGULATIONS

by Terence J. Centner*

The long-anticipated federal revisions to regulations governing CAFOs in response to the *Waterkeeper* decision[1] have been adopted and are set forth in the Federal Register.[2] The 2008 Final Rule tracks earlier proposals by the Environmental Protection Agency that had been available for public comment.[3] These changes become effective on December 22, 2008.

For producers, the Final Rule removes the former "duty to apply" for a National Pollutant Discharge Elimination System (NPDES) permit. Instead, only CAFOs that discharge or propose to discharge need to apply for a permit.[4] This is anticipated to mean that many poultry producers will not need to secure NPDES permits.

At the same time, the Final Rule recognizes the benefit of allowing CAFOs to voluntarily seek certification that they do not discharge.[5] This option provides protection for CAFOs who may have an "accidental discharge." An unpermitted CAFO that is certified would not be liable for failing to apply for a permit prior to the accidental discharge.[6] Of course, any discharge without a permit is a violation of the Clean Water Act. Given the expense and novelty of certification, few CAFOs may select this option.

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A TWISTING PATH TOWARD A NATIONAL STANDARD FOR SUSTAINABLE AGRICULTURE

by Thomas P. Redick* and Shawna Bligh**

This article summarizes the tortuous history and recent progress toward adoption of the proposed national standard on sustainable agriculture under the auspices of the American National Standards Institute ("ANSI"). The Draft Standard for Trial Use ("DSTU") called *Sustainable Agriculture Practice Standard for Food, Fiber, and Biofuel Crop Producers and Agricultural Product Handlers and Processors* (SCS-001) (hereinafter "SCS-001 Draft Standard") was proposed by Scientific Certification Systems ("SCS") the drafter and principal promoter of the SCS-001 Draft Standard. If it becomes an American National Standard under ANSI, it can then become an International Standard under the International Organization for Standardization in Geneva, Switzerland.

Background – Initial Drafting and Conception of a National Standard

The SCS-001 Draft Standard is largely based on a prior voluntary standard (not under

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The Final Rule clarifies how the agricultural stormwater discharge exemption applies to Large CAFOs without NPDES permits.[7] Consistent with the *Waterkeeper* decision, unpermitted Large CAFOs with precipitation-related discharges must land apply manure in accordance with site-specific nutrient management practices that ensure utilization of the nutrients.[8] Moreover, the Final Rule imposes requirements on unpermitted CAFOs with agricultural stormwater discharges. These CAFOs must maintain documentation of their nutrient management plans (NMPs).[9]

On the issue of submitting NMPs to permitting authorities, *Waterkeeper* found that the absence of such plans violated the Clean Water Act and the Administrative Procedure Act.[10] The 2008 Final Rule specifies that an application for an NPDES permit (and corresponding state permits) must include an NMP incorporating limitations and standards required by nine elements delineated in the federal regulations.[11]

CAFOs obtaining authority to discharge under a state's general permit are subject to new provisions.[12] The regulations recognize that states may use general permits but clarify that the nutrient management and public participation requirements of the Clean Water Act apply to "notices of intent."

With respect to NMPs, the Final Rule requires that each notice of intent under a general permit must include the information required for a permit.[13] The Final Rule supports the decision rendered by the Michigan Court of Appeals in *Sierra Club Mackinac Chapter v. Department of Environmental Quality*.[14] Because an applicant's effluent limitations are set forth in NMPs, the only way a permitting agency can ascertain compliance with the Clean Water Act is to review each applicant's plans for handling nutrients.[15] The terms of a general permit are insufficient for authorizing discharges; rather, sufficient information contained in an NMP is required to be part of a notice of intent.

Under *Waterkeeper*, it was noted that permitting agencies must review NMPs.[16] The Final Rule provides that administrative review of an NMP is also required before issuing a notice of intent under a general permit.[17] This will increase the burdens of some state permitting agencies.

Another issue involves the opportunity for meaningful public review of the provisions of a notice of intent under a general permit. Public participation in the development and enforcement of effluent limitations involves the availability of notices of intent. The Final Rule requires permitting authorities to "notify the public of the [authority's] proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit."[18]

More detailed provisions about the information required in NMPs are delineated in expanded regulations of the Final Rule. The terms of an NMP must include the "field-specific rates of application properly developed ... to ensure appropriate agricultural utilization of the nutrients."[19] Two approaches to express rates of application are offered: a linear approach and a narrative rate approach. State permitting authorities may want to consider expanding their rules to fully accommodate these alternative approaches.

The EPA recognized that permittees will need to make changes to nutrient management plans. New provisions set forth requirements concerning changes, and differentiate changes that are substantial from those that are not substantial.[20] Permittees are required to notify permitting authorities of changes. The permitting authority must review all changes, and offer the public an opportunity to review and comment on substantial changes.

The EPA clarified the issue of whether water-based effluent limitations (WQBELs) apply to agricultural stormwater discharges. Since these discharges are exempt from the definition of "point source," they are not subject to the Clean Water Act's permitting requirements.[21] However, a state might adopt additional water quality controls that could include regulations governing agricultural stormwater discharges.

Another issue raised by *Waterkeeper* involved the required technology to address fecal coliform from CAFOs. The Clean Water Act requires the use of best conventional control technology for fecal coliform. EPA affirmatively found that the limitations provided in the 2003 CAFO Rule set forth the mandated technology so that more stringent limitations for fecal coliform are not required.[22]

ENDNOTES

[1] Waterkeeper Alliance, Inc. v. EPA, 399 F.3d at 497 (2d Cir. 2005).

[2] 73 Fed. Reg. 70418–86 (Nov. 20, 2008).

[3] 71 Fed. Reg. 37743–87 (June 30, 2006); 73 Fed. Reg. 12321–40 (Mar. 7, 2008).

[4] 73 Fed. Reg. 70480 (to be codified at 40 CFR § 122.23(d)(1)).

[5] *Id*. at 70481–82 (to be codified at 40 CFR § 122.23(i)).

[6] *Id*. at 70482–83 (to be codified at 40 CFR § 122.23(j)).

[7] *Id*. at 70434–37.

[8] *Id*. at 70481 (to be codified at 40 CFR § 122.23(e)(1)).

[9] *Id*. at 70481 (to be codified at 40 CFR § 122.23(e)(2)).

[10] Waterkeeper,Alliance, Inc. v. EPA, 399 F.3d at 499-503.

[11] 73 Fed. Reg. 70480 (to be codified at 40 CFR § 122.21(i)(1)); 40 CFR § 122.42(e)(1)(i-ix).

[12] *Id*. at 70483 (to be codified at 40 CFR § 122.28(b)(2)(vii)).

[13] *Id*. at 70480-81 (to be codified at 40 CFR §§ 122.21(i)(1)(x), 122.23(d)(2)); see also 40 CFR § 122.42(e).

[14] 747 N.W.2d 321, 332 (Mich. Ct. App. 2008).

[15] See Terence J. Centner, Courts and the EPA Interpret NPDES General Permit Requirements for CAFOs, 34 *Env. Law* __ (2008).

[16] Waterkeeper Alliance, Inc. v. EPA, 399 F.3d at 498-99.

[17] 73 Fed. Reg. 70481 (to be codified at 40 CFR § 122.23(h)).

[18] *Id*.

[19] *Id*. at 70483–84 (to be codified at 40 CFR § 122.42(e)(5)).

[20] *Id*. at 70484–85 (to be codified at 40 CFR § 122.42(e)(6)).

[21] *Id*. at 70458.

[22] *Id*. at 70463–64.

ANSI) called "Veriflora," which sets environmental and labor standards for flower production. SCS certifies producers and handlers of flowers as an independent third party verification body, and it hopes that "the VeriFlora® certification standard will be incorporated into the Draft American National Standard for Trial Use for Sustainable Agriculture (SCS-001)" with SCS making income from certification.[1] Like Veriflora, the SCS-001 Draft Standard promotes a non-GMO, organic and fair trade (i.e., fair labor) standard for agriculture that exceeds nearly all existing organic and non-organic practices in US agriculture.

Coming from the high-profit margin world of floriculture, where growers were slow to adopt it, the SCS-001 Draft Standard faces potential opposition from mainstream commodity agriculture – a challenge the promoters admitted from the outset. In 2006 and 2007, SCS held a series of invitation-only outreach meetings with environmentalists, organic and labor advocates, and some progressive wine-makers (i.e., the Lodi Winegrape Consortium) who were working with the EPA. Some of the groups consulted later complained that they were not given a voice in drafting the standard or testing it out in practice.[2]

The Standards-Developing Organization ("SDO") that was chosen by SCS to administer the process of developing this standard is the Leonardo Academy of Madison, Wisconsin. The Leonardo Academy took over this project from a prior SDO, the National Sanitation Foundation ("NSF") in Ann Arbor, Michigan. NSF and another agricultural SDO, the American Society of Agricultural and Biological Engineers ("ASABE"), are the leading SDOs in the ANSI community for food and agriculture, with thousands of standards under their auspices. Having found no home with the established SDOs, SCS chose the new and uniquely "environmental" SDO, the Leonardo Academy, which gives 25% of the votes on all of its Committees to "environmentalists" (a procedure not used by the other agricultural SDOs).

In autumn 2007, the Leonardo Academy, which calls itself "The Sustainability Experts," accepted this project, with expenses paid by SCS. Compared to other SDOs with experience in food and agriculture (e.g., NSF or ASABE), Leonardo lacked deep knowledge of agriculture and the relevant stakeholders to invite directly to participate. This gap in its agricultural knowledge would later swamp Leonardo in a flood of objections arising from choices made in notifying stakeholders and selecting the Standards Committee.

Notifying the Public of the Standard

The Leonardo Academy chose to continue using the "Draft Standard for Trial Use" procedure, which NSF had initiated in 2007. The DSTU process does not use the formal notification system under ANSI, the Project Initiation Notification System or "PINS," which uses a preset list for notification and involves identification of relevant stakeholders followed by direct notice to them. While environmental groups and organic advocates were invited to informational meetings by SCS, the first public meeting in Berkeley California was held with no direct notice to mainstream agricultural organizations, such as the American Farm Bureau and various producer or input-specific groups such as the American Soybean Association, the Fertilizer Institute, etc.

This lack of direct notice, which would not have occurred if PINS had been used, proved problematic for many materially interested stakeholders. In late October 2007, representatives of mainstream agriculture were alerted, on a few day's notice, of the need to attend the first public meeting discussing this standard on October 28-29th in Berkeley, California. Attendees soon realized that SCS and its supporters were attempting to impose as a national standard for "sustainable agriculture" in the US (and ultimately, as an international standard at the ISO) a non-GMO, organic standard. Various letters were sent to the Leonardo Academy and ANSI objecting to the secretive approach taken to-date in developing this standard.

As is noted above, the Leonardo Academy was chosen by SCS to handle the SCS-001 Draft Standard, in part, for its lack of existing contacts in agriculture. Leonardo's lack of agricultural standard-setting experience also meant lack of "conflicts of interest" of the sort SCS probably perceived in the American Society of Agricultural and Biological Engineers, which was given a copy of the SCS-001 Draft Standard to review in mid-2007 before the Leonardo Academy. Given this lack of knowledge of agriculture, it did not occur to the Leonardo Academy to directly notify the major trade associations in agriculture. Moreover, despite loud protests from certain producers who would not be able to attend the meeting, the Leonardo Academy scheduled its second major informational meeting on February 28, 2008, during the "Commodity Classic".

The lack of notice and refusal to reschedule the final informational meeting led to a formal appeal seeking withdrawal of the SCS-001 Draft Standard. On March 26, 2008, the American Soybean Association, the US Soybean Export Council and the National Association of Wheat Growers complained to the Leonardo Academy of inadequate notice to the mainstream agricultural community. Various other stakeholders raised the same issue in their appeals.

In Leonardo Academy's "Response to Appeal" it denied that the organic-only text of the SCS-001 Draft Standard would mislead the public into thinking this SCS-001 Draft Standard sought only to define sustainable organic agriculture. The Leonardo Academy acknowledged the need for additional notice, however, and moved the deadline for applying to the Standards Committee back several months, from the initial deadline of April 7, 2008 to July 28, 2008.

On June 6, 2008, the USDA sent the Leonardo Academy and ANSI a letter objecting to the exclusion of mainstream commodity agriculture while favoring certain specialty, floral, and organic sectors. The USDA's strongly worded letter demanded action to bring the SCS-001 Draft Standard in line with 1990 Farm Bill's definition of sustainability.[3]

USDA has a broad-range program called "Sustainable Agriculture Research and Education," which funds innovative agriculture, but does not exclude biotech or agricultural chemical/fertilizer inputs. USDA particularly noted that the rules of the Leonardo Academy provide 25% of the seats on the Standards Committee to "environmentalists," and 25% each

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to "users," "producers," and "general interest," which could lead to bias toward a "precautionary approach" to biotech crops and chemicals, including fertilizer.

The Leonardo Academy responded to the USDA on June 24, 2008, stating that biotech crops are excluded from the SCS-001 Draft Standard in recognition of "a precautionary approach that permeates other sustainability labeling standards around the world." However, this is inaccurate, as most agricultural sustainability standards do not exclude GMOs, and the one cited by Leonardo in the same letter to the USDA—the Roundtable on Sustainable Biofuels—is explicitly technology-neutral as to the use of biotech crops, not excluding them but stating that they should "improve productivity and maintain or improve social and environmental performance."[4] Leonardo Academy further notes that SCS-001 is a draft standard and the Standards Committee can make changes to the draft standard, stating "[w]e anticipate a vigorous debate on this point."

This precautionary approach is not reflected in agricultural standards emerging from the World Wildlife Fund ("WWF"). WWF and other leading US-based environmental groups have reversed past opposition to the use of biotech crops, and now suggest that they can be part of "sustainable agriculture" if they meet certain metrics.[5] This is a historic break from past opposition. Other environmental groups, such as Environmental Defense and Natural Resources Defense Council are opting for similar technology-neutral positions on sustainable agriculture and stated their opposition to a proposed non-GMO US national standard on "sustainable agriculture," such as the SCS-001 Draft Standard in a letter to the Leonardo Academy dated September 24, 2008.

Selection of a Standards Committee

The SCS-001 Draft Standard took its first step toward approval on July 28, 2008, when the Secretariat (i.e. administrator) of the SCS-001 Draft Standard on Sustainable Agriculture, the Leonardo Academy, published the list of members of the Standards Committee. A floral industry newsletter touted the strong representation – 8 of 58 votes – of floral industry interests on the Standards Committee. Several of the SCS-001 Draft Standards Committee members representing the floral industry are producers of flowers that are certified under the SCS Veriflora standard.[6]

At present, the ratios on the Standards Committee are weighted toward the floriculture and organic industry interests, with "environmentalists" making up at least 21% and possibly 27% of the SCS-001 Standards Committee.

Mainstream interests that were excluded from the Standards Committee filed appeals challenging the Leonardo Academy's decision in selection of the Standards Committee. Given the evident bias toward organic and floral interest in the selection of the Standards Committee, appeal briefs challenging the selection suggest that at least five major agricultural industry sectors were completely excluded.[7]

In addition, there is a long line of producer commodity groups, including those representing the interests of alfalfa, wheat, and pear commodity groups, as well as the U.S. Soybean Export Council ("USSEC"), that were denied a seat on the Standards Committee. Certain groups feel under-represented, even if "friends" on the Standards Committee will work hard to give them a voice. As a result, USSEC and other groups have filed complaints with the Leonardo Academy objecting to the exclusion of mainstream agricultural stakeholders, in particular chemical and fertilizer manufacturers.

USDA Challenges Accreditation of Leonardo Academy

After exchanging correspondence and holding a teleconference with the Leonardo Academy, which led to the unfortunate reference to a "precautionary approach" to biotech crops, in August 2008, USDA filed an appeal directly with the American National Standards Institute, challenging the accreditation of the Leonardo Academy. This appeal seeks the "death penalty" to the Leonardo Academy as an ANSI standard-setting organization, essentially taking away its right to set standards under ANSI. Attorneys close to the case suggest that Leonardo's biggest mistake was telling the USDA that the SCS-001 Draft Standard excludes GMOs" because it would bring this "precautionary approach" to US soil for the first time, by proposing it as a national standard. The Leonardo Academy cited international standards for sustainability that ostensibly excluded GMOs – including the Roundtable on Sustainable Biofuels, which is known to be "technology-neutral" as are other international standards created under supervision of the World Wildlife Fund (WWF).

The USDA suggests that Leonardo Academy's bias led to a pattern of excluding representatives from trade associations focused on certain inputs (e.g., fertilizers, agricultural—chemicals, etc.) and major agricultural sectors that are users of crops (e.g., livestock, biofuels, and processors). This action would be consistent with an organic-only standard, but if this SCS-001 Draft Standard purports to cover conventional US agricultural production, it raises red flags. No standard purporting to cover all sectors of the agricultural community can arbitrarily exclude biotech crops, fertilizers, peat moss, and most chemicals, when those are required to maintain high yields, particularly in times of food scarcity.

USDA's appeal to ANSI stated that it was "supportive of stakeholder appeals" and questions whether the June 24, 2008 letter from the Leonardo Academy has the required neutrality since the letter "further substantiates our view that [the Leonardo Academy] is acting as a proponent for the current proposed standard rather than as a neutral facilitator of the process." The USDA intends to seek a hearing on this accreditation appeal in 2008, with many mainstream agriculture groups expressing support for continuing this appeal, while allowing the Standards Committee to work to redefine the vision, scope, and need for SCS-001 Draft Standard. When this article was sent to press, the hearing was set for December 17, 2008 in Washington, D.C.

Organic Advocates Demand Withdrawal of Standard

The positions of various groups were staked out in letters posted at the "perishable pundit" blog, with organic interests defending the ANSI process and other stakeholders, including USDA, expressing concerns.[8]

One of the more surprising developments, which was sent to the authors in early August, was an anti-SCS-001 letter from the National Campaign for Sustainable Agriculture ("NCSA") that criticized the SCS-001 Draft Standard for ignoring the economic viability of the standard on small to medium growers, and calling on Standards Committee members to withdraw, or reorient the SCS-001 Draft Standard to general principles that address these growers' concern. These sustainable

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agriculture groups stated their concerns with the SCS-001 Draft Standard's "genesis, organizational development and potential for serious harm to the very interests it purportedly aims to protect" and suggested that they were "unconvinced of the need for or merit of a new and broad sustainable agriculture standard beyond already existing ecolabels addressing sustainability in the farm and food sector."

Most tellingly, the NCSA letter suggested it might be impossible to define this concept for eco-labeling. "As scientists continue to demonstrate in countless ways, ecosystems in which agricultural practices operate are extremely versatile and dynamic. Creating static, universal 'sustainable agriculture' standards cannot meet the ever-changing and geographically different ecological conditions that govern agriculture. In our view, it is better to retain sustainable agriculture as a statement about goals and objectives rather than to try to capture it at one moment in time."

Within five days, the Leonardo Academy replied to NCSA's letter, urging them to apply to participate in the standards development process through participation in subcommittees or as observers. Leonardo promised "[t]o support broad participation in the standard development process, observers will be able to sit in on the Standards Committee meetings, and Leonardo Academy will make participation by conference call available to both Standards Committee members and observers. We are also currently seeking funding to provide additional support to standard development participants."

Standards Committee First Meeting

The Standards Committee held its first meeting on September 25-26 in its hometown of Madison, Wisconsin. This initial meeting culminated in near-consensus vote that the meeting should start from general principles, and set aside the SCS-001 Draft Standard to use as a "reference" document along with other relevant standards and initiatives.

At the September meeting, the Interim Chair, James Barrett of University of Florida, Environmental Horticulture Department,[9] reacted to a critical letter dated September 24, 2008 from several environmentalist members of the Standards Committee. In response to that letter's suggestion that too little basic discussion had occurred going into the production of the SCS-001 Draft Standard, Mr. Barrett changed the agenda to allow for breakout sessions on September 25, 2008 to discuss the vision and scope of the SCS-001 Draft Standard.

As is noted at the beginning of this article, this breakout session, followed by discussion, culminated in a near-consensus vote that the meeting should start from general principles, and set aside the SCS-001 Draft Standard, using it only as a "reference" document along with other relevant standards and initiatives. Work in drafting a standard will commence only after the vision and scope are defined and further outreach takes place, which is anticipated to occur within the next 6 months. Toward that end, six Task Forces will begin working on the following issues:

1) Mission and Principles. Review and define mission vision and principles.

2) Needs Assessment. Gather current data about the value, market demand, and potential uses for a sustainable agriculture standard.

3) Reference Documents. Gather, catalog, and compare all relevant standards.

4) Methodologies. Indicators for environmental, social, and financial sustainability.

5) Funding. Identify and seek funds for full stakeholder participation in the process.

6) Outreach. List all missing stakeholders and propose ways to engage them.

All Standards Committee members are asked to join one of the six Task Forces. Efforts will be made to allow observers to participate.

Standards Committee Officer Elections

On October 20, 2008, the Standards Committee took its first vote in the chair election conducted via the "Google Group" that has been formed. On October 31, 2008, the Standards Committee provided a pleasant surprise to mainstream agriculture interests by selecting as chair a noted pro-biotech scientist, Marty D. Matlock of the University of Arkansas, who responded by stating: "[s]ustainable production of agricultural food, fiber and fuel is the one of the most challenging issues our generation faces. There may be as many as 9.5 billion people coming to dinner by 2050. The decisions we make today will determine how we feed them and their children, how we eat tomorrow and throughout the 21st century." The grower selected as Vice-Chair, Ron Moore of Moore Farms, who is also on the board of the American Soybean Association, stated "[a]ll sectors of agriculture must work together on a final standard that is socially responsible, environmentally sound, and economically viable today and in the future for the production of low cost, high quality food, feed, fiber, and fuel."[10]

The Secretary, Will Healy and Vice Secretary, Grace Gershuny hail from floral and organic sectors, respectively. Ms. Gershuny expressed the Organic Trade Association viewpoint that "organic agriculture has been at the leading edge of sustainability" in agriculture. The setting aside of the SCS-001 Draft Standard and election of these officers sets the stage for a national dialogue on the proper scope, metrics, and stakeholder set for creation of a national standard on sustainable agriculture.

ENDNOTES

[1] SCS Website, available at www.scscertified.com/csrpurchasing/veriflora/ (site visited October 17, 2008).

[2] See, Cliff Ohmart, *Rough Start for National Standards, Wines & Vines*, (Jan. 2008) available at http://findarticles.com/p/articles/mi_m3488/is_1_89/ai_n24354453/pg_2

[3] The 1990 Farm Bill concept of sustainability in agriculture provides for:

- Satisfaction of human food and fiber needs;
- Enhancement of environmental quality and the natural resource base upon which the agricultural economy depends;
- Making the most efficient use of nonrenewable resources and on-farm resources and integrate, where appropriate, natural biological cycles and controls;
- Sustaining the economic viability of farm operations; and
- Enhancement of the quality of life for farmers and society as a whole.

See, Food, Agriculture, Conservation, and Trade Act of 1990 (FACTA), Public Law 101-624, Title XVI, Subtitle A, Section 1603 (Government Printing Office, Washington, DC, 1990) NAL Call # KF1692.A31 1990; See also comments at National Agricultural Library available at www.nal.usda.gov/afsic/pubs/agnic/susag.

[4] Roundtable on Sustainable Biofuels, Version Zero, Standard for Sustainable Biofuels (August 13, 2008) http://www.wilsoncenter.org/news/docs/brazil.roundtable.EPFLen.pdf (last visited December 3,

2008) ("¶11.e. The use of genetically modified: plants, micro-organisms, and algae for biofuel production must improve productivity and maintain or improve social and environmental performance, as compared to common practices and materials under local conditions.")

[5] See, e.g., Jane Earley (WWF-US), Certifying Sustainable Soy, ABA SEER International Environmental Law-Agricultural Management Committees Joint newsletter (August, 2006) (citing "technology neutral" approach taken in Roundtable on Responsible Soy, a standard overseen by WWF-US) www.abanet.org/environ/committees/agricult/newsletter/aug06/agmgmt0806.pdf

[6] The floral industry newsletter "Green Talks" reports that "Floriculture has eight representatives on the committee: Hans Brand, B&H Flowers, Inc.; Mark Yelanich, Metrolina Greenhouses, Inc.; Will Healy, Ball Horticultural Co.; Tom Leckman, Sierra Flower Trading; Ximena Franco-Villegas, Asocoflores; Jacques Wolbert, MPS-ECAS; Stan Pohmer, Pohmer Consulting; and Dr. James Barrett, University of Florida. **While that may seem like a small number, it's actually a significant representation compared to some other crop sectors**. Overall, only 12 producers sit on the committee. Add to that 12 users (customers), 12 environmentalists and 22 general interest representatives." Green Talks, *Sustainable Ag Standard News*, (August 7, 2008) http://www.ballpublishing.com/index.aspx (Emphasis added). Connections to SCS and Veriflora® abound in this group. It is also worth noting that the Committee application from the largest floral trade association in the US – the Society of American Florists (Peter Moran) was rejected in favor of these eight representatives. Even within the floriculture sector, SCS-001 Committee favors SCS and lacks balance.

[7] Excluded groups include: (i) fertilizers, (ii) agricultural-chemicals; (iii) livestock; (iv) biofuels; and (v) processors. In response, the Leonardo Academy points to a few individuals (American Farm Bureau, California Seed Association, American Soybean Association, Corn Refiners Association and National Corn Growers Association) as sufficient representation. With the floriculture industry touting its "eight votes" and twice that number in organic advocates, it is understandable that major commodity groups having many fewer votes feel an imbalance tilting toward floral and organic voters.

[8] See USDA letter to the Leonardo Academy at http://www.perishablepundit.com/index.php?date=7/25/08#5; see also Markon letter available at http://www.perishablepundit.com/index.php?date=03/06/08; see also Di Matteo letter at http://www.perishablepundit.com/index.php?date=03/12/08&pundit=4.

[9] Mr. Barrett is a partner in Visions Group, LLC, which is a certifier for the SCS' "Veriflora" standard that is a nearly verbatim version of SCS-001. He did not reveal any bias toward SCS positions in his handling of the opening meeting.

[10] Leonardo Academy Press Release, *Standards Committee Officers Selected to Lead Progress of National Sustainable Agriculture Standard* (November 3, 2008), available at http://www.leonardoacademy.org/pressreleases/PR110308-StandardsCommitteeOfficersSelected.pdf (site visited November 3, 2008).

RECENT FEDERAL FARM REGULATIONS - provided by James Dean*

E-Verify rule finalized, most food producers and ag suppliers exempted[1]

Last week, the Department of Homeland Security (DHS) released the final rule that would require all federal contractors and subcontractors to participate in the E-Verify system; the final rule exempts nearly all food and agricultural products that fall within the definition of "commercially available off the shelf" (COTS) items. Suppliers of COTS items are exempt from the rule, which requires use of the E-Verify system to establish that employees are citizens or legal residents of the United States.

In addition, federal contracts for food and agricultural products shipped as bulk cargo, such as grains and produce, are exempt. Subcontractors who provide only supplies such as food are also exempt from the rule.

On August 11th of this year, the NCFC submitted comments on the original version of the proposed E-Verify rule. With input from a Legal, Tax and Accounting Committee Working Group, NCFC pointed out that the new requirements were overly broad and could potentially impose burdensome requirements on some sectors of agriculture, due to the rapid pace required for harvesting agricultural products.

The final rule addresses these concerns by exempting food products under the COTS exemption; in addition, DHS directly addressed a question raised by NCFC in regards to the rule's possible application to cooperatives and whether the co-op's members should be considered subcontractors subject to this rule. DHS ruled that the farmer-members are subcontractors, and exempt from the regulation under both COTS and supplier exemptions.

The final rule will become effective January 15, 2009; the full text can be found online at http://origin.www.gpoaccess.gov/fr/.

[1] Reprinted from the November 21, 2008 *NCFC Update* (National Council of Farm Cooperatives).

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EPA amendments to spill prevention rule[2]

The Environmental Protection Agency (EPA) has released a final regulation amending certain requirements under the Spill Prevention, Control, and Countermeasures (SPCC) rule. The information can be found on the EPA web site at http://www.epa.gov/oilspill.

The amendments do not remove any regulatory requirement for owners or operators of facilities in operation before August 16, 2002, to develop, implement and maintain an SPCC Plan in accordance with the SPCC regulations then in effect. Such facilities continue to be required to maintain their Plans during the interim until the applicable date for revising and implementing their Plans under the new amendments.

EPA also announced a proposed rule to extend the compliance dates for all facilities to November 2009 and to establish new compliance dates for farms (November, 2009), certain qualified farms (November, 2010) and marginal oil production facilities (November, 2013) subject to SPCC. The revised dates should allow owners or operators the opportunity to fully understand the regulatory amendments offered by revisions to the SPCC rule promulgated in 2006 and 2008.

Additionally, the EPA announced a final rule that vacates the July 17, 2002 definition of "navigable waters" and restores the definition of "navigable waters" that EPA promulgated in 1973, in accordance with an order issued by the United States District Court for the District of Columbia (D.D.C.) in *American Petroleum Institute v. Johnson*, 571 F. Supp.2d 165 (D.D.C. 2008). This final rule does not amend the definition of "navigable waters" in any other regulation that has been promulgated by EPA.

[2] Reprinted from November 21, 2008 NCFC Update (National Council of Farmer Cooperatives)

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Final rules on Dairy Forward Pricing Program[3]

As mandated by the 2008 Farm Bill, USDA has established a program for dairy producers and cooperatives to enter into forward price contracts. Participation in the dairy forward pricing program is voluntary and the program does not change any existing contract among handlers and producers or cooperatives. The final rule re-establishes the Dairy Forward Pricing Pilot Program, which was in effect from September 2000 through December 2004. Forward price contract may be entered into under the program until September 30, 2012, and may not extend beyond September 30, 2015.

[3] Reprinted from November 21, 2008 NCFC Update (National Council of Farmer Cooperatives

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STATE ROUNDUP - INDIANA - *Webb v. Schleutker* - by Ashley Schweizer

When a farm couple divorces, who gets the government program payments? Is it the husband, the wife or both? What happens if there are crops growing in the field that have not been harvested at the time of the divorce? Who receives the income from those crops? These are just a few of the issues facing courts today when the husband and wife who own the family farm choose to go their separate ways. An Indiana case, *Webb v. Schleutker,* 891 N.E.2d 1144 (Ind. Ct. App. 2008), answers some of these questions and in the process outlines the law of Indiana regarding these questions in order to provide guidance to state courts that may be faced with these issues in the future.

The Respondent/Appellant Mr. Webb and the Petitioner/Appellee Ms. Schleutker were married for about 27 years when Ms. Schleutker filed for divorce. The couple had three children, and Mr. Webb was a farmer while Ms. Schleutker was a homemaker and employee at Pioneer Hi-Bred International, Inc. Mr. Webb had a degree in agricultural economics from Purdue University. The couple's marital assets included the marital residence, farmland, farm equipment, and a hedge account. Ms. Schleutker filed for divorce from Mr. Webb on August 9, 2005.

The Superior Court of Madison County ordered all of the marital assets to be put into one pot in accordance with Indiana law and divided equally among the parties. When Ms. Schleutker filed the divorce petition on August 9, 2005, there were crops growing in the fields. The trial court held that these crops were marital assets and ordered them to be put into the pot. *Id*. However, the trial court ordered that the value of the crops would be offset by Mr. Webb's labor in farming the crops. The court held that the value of the crops would be reduced by $70,000, which was the value of Mr. Webb's skill and labor. *Id*. at 1148-49. The trial court also ordered that government farm program payments through the USDA's farm income and commodity price support programs were also marital assets. The trial court awarded Mr. Webb the marital residence and the farmland, but ordered him to pay Ms. Schleutker $270,000, which represented a property equalization payment. Mr. Schleutker was allowed to remain in the marital home for three months after Mr. Webb paid that amount. Both parties appealed the trial court's ruling. *Id*. at 1148.

Mr. Webb claimed that the trial court abused its discretion when it held that the crops growing in the field and the USDA program payments were marital property. *Id*.

Ms. Schleutker argued that the trial court abused its discretion by ordering that the value of the crops be offset by Mr. Webb's labor. *Id*.

The first issue the appellate court addressed was the trial court's holding that the crops growing in the fields were marital assets. The Court of Appeals of Indiana acknowledged that this is an issue of first impression in Indiana although other jurisdictions (Illinois, Iowa, Missouri, Nebraska, and South Dakota) have addressed the issue and ruled that growing crops can be considered marital assets. The appellate court opined that in Indiana marital assets are identified at the time the divorce petition is filed. *Id*. at 1149. After considering the rulings from other jurisdictions, the court held that in Indiana, growing crops that have not been harvested at the time the divorce petition was filed are marital assets. They are to be placed into the marital pot for division. *Id*. at 1149-50.

The court then took up the second issue of the government program payments. In this case, the payments consisted of $59,995 from the USDA in the form of Conservation Security Program payments and a federal subsidy. The federal subsidy payments were counter-cyclical and loan-deficiency payments, which are paid to the farmer when the government expects a low market rate for corn and soybeans. *Id*. at 1150. The court opined that "USDA payments are part and parcel of the value of the crops." *Id*. The court then stated that "[e]ven if we were to consider the USDA payments as income separate from the value of the crops, these payments would still be included in the marital pot." *Id*. Mr. Webb did not receive all of his payments for 2005 until the next year, 2006. Even though the divorce petition was filed before all of the government payments were received, the court ordered that all of the payments, regardless of whether they were received in 2006, were to be put into the marital pot for division. The court reasoned that "[t]he USDA payments were earned by the work done with the crops in 2005 but not fully received until 2006." *Id*.

The third issue the Court of Appeals addressed was the valuation of the marital property. Ms. Schleutker argued that the trial court was wrong to offset the value of the growing crops by the value of Mr. Webb's skill and labor. *Id*. at 1148. The Court of Appeals stated that the standard by which the trial court's order is reviewed is abuse of discretion. This is deferential to the trial court because the trial court's order will be upheld so long as there is "sufficient evidence and reasonable inferences" to support its decision. *Id*. at 1151. After upholding the trial court's valuations of the farm equipment, the real estate, and hedge account and explaining its reasons for doing so, the court took up Ms. Schleutker's claim regarding the valuation of the growing crops. *Id*. at 1151-53. The court stated that "the value of growing crops is their value in matured condition less reasonable expenses." *Id*. at 1153. The Court of Appeals held that the trial court did not abuse its discretion by subtracting $70,000 from the value of the crops, which represented the value of Mr. Webb's labor in farming those crops. *Id*. at 1153.

The appellate court ruled the trial court did not abuse its discretion in making its findings that marital assets include growing crops and government program payments, including payments not received until after the petition is filed, if they are for crops farmed during the marriage. *Id*. at 1150. The Court of Appeals also affirmed the trial court's ruling that the value of the growing crops would be decreased by the value of Mr. Webb's labor. *Id*. at 1153.

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Exploring Options for an Agricultural Law Program in African Universities

I. *Objective*. About 30 years ago, Neil Hamilton forcefully made the case for the need to introduce Agricultural Law as part of the curriculum in law schools in the United States. Today, Agricultural Law has "taken its place in the intellectual firmament" (Harl). I am following the trail of these leaders to make a similar call in the context of Sub-Saharan Africa.

I have two main objectives in sending this announcement to the members of the American Agricultural Law Association:

1. To invite participation, solicit ideas and recommendations looking into options for introducing Agricultural Law curriculum into law school and agricultural Economics programs in countries in Sub-Saharan Africa.

2. To request that AALA members who know of interested individuals in Sub-Saharan Africa to submit contact information to me so I can include them in database network.

No doubt the introduction of Agricultural Law programs is the responsibility of African institutions themselves. We will need a partnership between Africans, academics and practitioners in the United States and Europe to achieve this objective.

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AMERICAN AGRICULTURAL LAW ASSOCIATION
P.O. Box 835
Brownsville, OR 97327

Exploring Options for an Agricultural Law Program in African Universities -

(cont. from page 7)

II. *Proposal*

1. Invitations have been sent out to interested scholars from Africa to participate in a conference that explores options for Agricultural Law curriculum development.

2. A proposal for the conference will be prepared in collaboration with interested participants from African universities.

3. Place and date of conference will be jointly decided by those who have expressed interest in this effort.

III. *Justification* Agricultural growth is key to reducing poverty in Africa. African countries can no longer ignore the legal and regulatory contexts in agricultural development planning to promote growth given the impact of global forces (governance, food prices, bioenergy, water, climate change, food safety, trade, etc). The proposed program seeks to fill this void.

IV. *Contact* If you are interested in this effort and wish to participate, please send e-mail to:

Fred Boadu, PhD.; J.D.
Professor, Texas A&M University
phone: 979-845-4410
e-mail: f-boadu@tamu.edu

From the Executive Director:

Membership Renewals

2009 membership renewal letters have been mailed to those who have not already renewed for 2009. Please check your personal information carefully, especially your e-mail address. I can provide current members with an Excel spreadsheet of the current members' directory; send requests to RobertA@aglaw-assn.org.

2008 Conference Handbook on CD-ROM

Didn't attend the conference in Minneapolis but still want a copy of the papers? Get the entire written handbook on CD. The file is in searchable PDF with an active-linked table of contents that is linked to the beginning of each paper. Order for $45.00 postpaid from AALA, P.O. Box 835, Brownsville, OR 97327 or e-mail RobertA@aglaw-assn.org Copies of the printed version are also available for $90.00. Both items can also be ordered using PayPal or credit card using the 2008 conference registration form on the AALA web site.

AALA Update

If you are still receiving the AALA *Agricultural Law Update* in the printed format, remember that the *Update* is available by e-mail, often sent up to a week before the printed version is mailed. The e-mail version saves the association substantial costs in printing and mailing. Please send an e-mail to RobertA@aglaw-assn.org to receive a sample copy and to change your subscription to e-mail.

2009 Annual Conference

Mark your calendars now for October 16-17, 2009 when the AALA will hold its 30th Annual Agricultural Law Conference in Williamsburg, VA. President-elect Ted Feitshans is already looking for ideas for presentations and speakers. If you would like to help with a presentation, contact Ted at ted_feitshans@ncsu.edu.

New Member Survey

A new survey has been uploaded on to the AALA web site. This survey focuses on the annual conference issues such as location and extra-conference activities. The AALA board will use the results to guide it in making future conference location choices. You will need to log in as a current member. Please send me an e-mail, RobertA@aglaw-assn.org, if you need a reminder as to your username (your last name) and/or password (your member number).

Robert P. Achenbach, Jr., AALA Executive Director