

Agricultural Management Committee Newsletter

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MESSAGE FROM THE CHAIR

Alan Sachs

**Chair, Agricultural Management Committee
Beveridge & Diamond, L.C.
Baltimore, Maryland**

As I take over the reins as chair of this committee from Brandon Neuschafer, the legal issues raised by agricultural management and the environment continue to touch on one of the most fundamental questions of our era: how can we most successfully and sustainably feed and fuel our world? I am pleased to present another Agricultural Management Committee newsletter focusing on a number of related issues. First, a rising star from the Section, Dorian Slaybod (a Section student member), provides a summary of biofuel vs. food issues at home and abroad, surveying a range of international initiatives. Next, vice chairs Martha Noble and Leon Geyer sum up the conservation and biofuel-related aspects of the latest farm bill. Updating an issue profiled in our last newsletter, vice chairs Tom Redick and Shawna Bligh report in detail on the Draft Standard for Trial Use (SCS-001) proposed for sustainable agriculture. Fourth in line, Tom Redick reports on insurance issues in biotech crops. Lastly, Jessica Hayes (a Section student member) writes about sustainability standards addressing biofuels.

From March 13-16, 2008, our Section gathered at the 37th Conference on Environmental Law in Keystone, Colorado. Among other highlights, our committee assisted with the plenary session discussion on how the

U.S. Supreme Court in recent years has played a major role in resolving difficult questions of regulatory authority arising under the environmental laws. Of additional note, one of the “Best Papers” generated from this meeting touches on the subject of wetlands degradation, an issue many farmers and agricultural attorneys consider critical to preventing liability under the Clean Water Act. *See*, Sharon M. Mattox, *The 404(b)(1) Guidelines: Overview and New Developments*, available at http://www.abanet.org/environ/programs/keystone/2008/bestpapers/Mattox_Keystone2008.pdf. The posting of “Best Papers” from meetings is a new feature that many members have found helpful to their practices.

The 16th Section Fall Meeting in Phoenix, Arizona in September, included more content from our committee of interest to members. This includes a session on the food vs. fuel debate, which featured American Farm Bureau Federation economist Terry Francl among other top speakers on this issue. In another session co-sponsored with the Environmental Impact Assessment Committee, Nancy Bryson, The Bryson Group PLLC, addressed biotech crop issues arising under the National Environmental Policy Act (NEPA).

Lastly, I commend to you the benefits, including intellectual growth, social networking, and career development, of active involvement in various Section committee activities. We offer opportunities to write, assist in program planning, and other tasks that can only enhance your practice in this area. Active committee members and vice chairs consistently report that their practices are benefited—and in some cases,

**Agricultural Management
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Thomas P. Redick, Editor**

In this issue:

Message from the Chair
Alan Sachs 1

A Lack of Consensus: The World's
Conflicting Policies on Biofuels
Dorian Slaybod 2

The 2008 Farm Bill: Retaining the Conflicts
Over Food, Energy, and Conservation
*Martha Noble and
Leon Geyer* 6

Update on the ANSI SCS-001 Sustainable
Agriculture Standard-Setting Process
*Thomas P. Redick and
Shawna Bligh* 12

Insuring Producers of Biotech Crops and
Commodities Shipments: Comparing
Europe and North American Approaches
Thomas P. Redick 16

Voluntary Standards for Sustainable
Agriculture and Biofuels
Jessica Hayes 23

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built from the ground up—by the information shared and relationships formed by participation. Please join us in an activity and enhance your practice, as well as those of your fellow committee members.

**A LACK OF CONSENSUS: THE WORLD'S
CONFLICTING POLICIES ON BIOFUELS**

**Dorian Slaybod
Law Student, Ohio State University**

In a time when not only fuel prices continue to rise, but food prices are escalating as well, countries' concerns regarding self-sufficiency in food are increasing exponentially. These problems are being compounded by the fact that the Earth's climate is changing, introducing new responsibilities with respect to limiting society's carbon footprint and its reliance on fossil fuels. Unfortunately, the most immediate hope for relief for the world's energy crisis is also the same finite resource that has been invariably used to quench the world's hunger. Food is now at the center of a tug-of-war match, with both food and fuel pulling with equal fervor.

The ultimate goal is shared by the global powers: find a sustainable fossil fuel alternative while securing a means of feeding the world's growing population. In the short-term, however, the goals and means are as numerous as they are conflicting, and are becoming ever more contentious. Biofuel technology is currently in its first generation, and without precedent, a clear direction regarding its evolution remains unpredictable. Hopefully the disagreements about biofuel development and crop allocation will subside as the advancement of technology decreases its effect on world food sources. In the meantime, however, biofuel supporters remain hopeful about its potential, yet uncertain as to its future.

UN Conference on World Food Security

During the first week of June, representatives from over 180 countries met in Rome, Italy, to address the challenges of higher food prices, climate change and

bioenergy. Titled the “High-Level Conference on World Food Security,” sponsored by the Food and Agriculture Organization of the United Nations, governments from around the world met in order to reach some sort of agreement regarding the current food-fuel debate. While the intentions behind the conference were good, countries brought their own nationalistic concerns with little intention to compromise. The United States’ Agriculture secretary, Ed Schafer, strongly endorsed biofuels, while Brazil’s president, Luiz Inácio Lula da Silva, asserted that Brazilian biofuels were superior to American ones. Elisabeth Rosenthal & Andrew Martin, *Leaders Speak of Their Own Issues at a Conference Addressing Food Shortages*, N.Y. TIMES, June 5, 2008, available at <http://www.nytimes.com/2008/06/05/world/05food.html?th&emc=th>. The meeting thus became a muddled political debate instead of a formulation of objectives; even the underlying facts about biofuels’ impact on food price were debated. The United States said only 2 to 3 percent of the global increase in food prices was attributable to competition from biofuels, while other countries claimed that the figure was far higher. *Id.*

By the end, a resolution was adopted calling on all countries to help developing countries obtain necessary food and to help them obtain proper agricultural cultivation techniques. See *Declaration of the High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy*, June 5, 2008, available at http://www.fao.org/fileadmin/user_upload/foodclimate/HLCdocs/declaration-E.pdf. The only real mention of biofuels came as a final note under “Medium and Long-term Measures.” The declaration gave no clear or sound endorsement. Instead, it simply called for further research and investigation in order to determine whether or not biofuels are sustainable and in accordance with the three pillars of sustainable development (Social, Environmental, & Economic). *Id.*

While no significant objectives were decreed during the convention, the process and outcome provided much insight into how the world currently views biofuels. The declaration establishes food as a much higher priority than fuel on the global agenda. This is not

surprising. According to the Food and Agriculture Organization of the United Nations (FAO), of an estimated 860 million people in the world today that suffer from hunger, about 830 million live in developing countries. FAO, *High-Level Conference on World Food Security: the Challenges of Climate Change and Bioenergy* (June 3-5, 2008), <http://www.fao.org/foodclimate/hlc-home/en/>. The United Nations has been very sympathetic to this statistic and has been trying to perpetuate agricultural productivity before it gets more involved with biofuels, especially when many countries still blame biofuels for rising food prices.

United States Policy Divide

The American problem is very similar to the global debate. How do you allocate a finite amount of resources that serve both food and energy needs? The debate in the United States has become distinctly American, however, due to the involvement of large commercial interests and the focus on a flagship heartland crop: corn.

America is the world’s largest exporter of corn and at center stage of this important domestic crop debate are two groups that have long been intertwined with daily American life. The National Corn Growers Association (NCGA) and the Grocery Manufacturers Association (GMA) have been battling in recent years in both lobbying and public opinion arenas about how to apportion corn harvests. U.S. corn growers believe they cannot make a living without the government ethanol subsidies and that there are many other reasons why food prices have been rising, such as rising inflation and labor costs. The grocery manufacturers, meanwhile, believe that the increase in ethanol production is largely responsible for the recent escalation of food prices and needs to be curbed.

The situation has become a series of high-profile name calling with both sides citing contrary factual reports. While the ethanol industry admits it is somewhat responsible, it refutes the notion that the increase in ethanol production is the main culprit behind rising food prices. The NCGA states that corn is still relatively inexpensive. *Corn and Food Prices: For the Record*, Corn Commentary, Volume 15, Number 15, Apr. 18,

2008, available at <http://www.ncga.com/news/CC/Volume15/ccVol15n15.asp>. They cite a U.S. Department of Labor statistic that says that an 18-ounce box of Corn Flakes breakfast cereal only contains about 12.9 ounces of milled field corn, which costs approximately 6 cents per \$3 box at the prevailing price of \$4.30 a bushel. *Id.* Feedstock costs are higher, but NCGA claims that the overall percentage is low. *Id.* They say that for approximately every 2.6 pounds of corn to produce a pound of beef, corn represents only 22 percent of the total cost. *Id.*

Despite the seemingly low corn price statistics cited by the NCGA, the GMA still has plenty of factual findings to justify their unease about the increased corn allocation for ethanol. There are a series of reports that claim that corn shares carry a bulk of the responsibility for rising corn prices. The International Food Policy Research Institute in Washington stated that biofuel production accounts for a quarter to a third of the recent increase in global commodity prices and the FAO predicted late last year that biofuel production would increase food costs by 10 to 15 percent. Andrew Martin, *Fuel Choices, Food Crises and Finger-Pointing*, N.Y. TIMES, Apr. 15, 2008, available at <http://www.nytimes.com/2008/04/15/business/worldbusiness/15food.html?pagewanted=1&th&emc=th>. The former Agriculture Department chief economist, Keith Collins, released a report in late June that said that recent projections have been underestimating food price increases and as much as half of the sharp increase in corn prices over the last few years is due to the demands of ethanol production. Keith Collins, *The Role of Biofuels and Other Factors in Increasing Farm and Food Prices*, June 19, 2008, available at <http://www.foodbeforefuel.org/files/Role%20of%20Biofuels%206-19-08.pdf>. These rises are only going to increase if corn production increases, which it is likely to do considering production is only at about half the level of the government mandate. *See id.*

This past December, Congress passed the Energy Independence and Security Act of 2007 (EISA) which mandated a large increase in biofuel production. With this mandate in place, the GMA will have little ability to impede the current effects it believes biofuel production

is having on food prices. The act plans on increasing the renewable fuels standard continually for the next two decades. It would take the current standard of 5.4 billion gallons to 9 billion gallons by the end of this year, all the way to 36 billion gallons by 2022. Phillip Fras, *Biofuel Provisions of the Energy Independence and Security Act of 2007*, AGRIC. MGMT. COMMITTEE NEWSL. (ABA Sec. of Env't, Energy, and Resources), Apr. 2008, at 19. This initiative to broaden the use of renewable fuels, including ethanol, is "just the starting point." *Id.* at 24. It is already receiving some strong open dissent, however, and there are attempts to repeal the act within just its first year after enactment.

The governor of Texas, Rick Perry, asked the Environmental Protection Agency in July to temporarily waive the regulatory effects of the bill in order to allow more corn feedstock to be provided for food production. David Streitfeld, *Uprising Against the Ethanol Mandate*, N.Y. TIMES, July 23, 2008, available at <http://www.nytimes.com/2008/07/23/business/23ethanol.html?th&emc=th>. Legislation has also been introduced in the Senate, sponsored by John McCain and eleven other senators, to freeze the ethanol mandate at its current level. *Id.* It, therefore, remains to be seen whether the EISA will take its full-intended effect, and whether ethanol production in the United States will continue to grow at the same rate as it has been in recent years.

Roadblocks to World Development

Biofuel production has hit some recent snags in several countries around the world, impeding its development and producing some bad publicity. After the drastic tropical storm that occurred this past May in Myanmar, the *Wall Street Journal* reported that grain stockpiles were dwindling because of the military's previous jatropha drive. Myanmar has held a policy of plowing over large tracts of rice and vegetable farms in order to plant jatropha, which is an inedible plant used for making biodiesel. After the spring cyclone, the country had a hard time feeding itself due to its agricultural practices, which led to the public controversy over the government's refusal to accept Western aid. While the debacle was mostly caused by the Myanmar's

government's resistance to relief, it began with a choice of fuel over food, and will likely serve as an admonition for other countries which wish to adopt the same priority.

China is also rethinking the use of biofuels. Its biofuel industry almost immediately excelled, but the government has decided to take an active role in scaling back its production. They are worried about the overuse of corn and the growing need for food for its citizens. The problem in China over grain availability is particularly acute because of the low per capita availability of arable land to feed its vast population. Antoaneta Bezlova, *Biofuels Eat Into China's Food Stocks*, ASIA TIMES, Dec. 21, 2006, available at http://www.atimes.com/atimes/China_Business/HL21Cb03.html. The problem is further compounded by the fact that China currently lacks the technology to broadly harvest biofuel from other crops other than corn. *Id.* While China featured many "green" ideas during the Beijing Olympics, it will lag in biofuel technology for fear of depriving food from the largest population in the world.

Role for Biotech Crops?

On July 24, 2008, a news release announced that the "Alliance for Abundant Food and Energy" which will promote the idea that innovation in agriculture can sustainably meet the growing global demand for food and renewable forms of energy. Founding members of the Alliance include the Archer Daniels Midland Company, DuPont, John Deere, Monsanto, and the Renewable Fuels Association. These companies see innovation as the answer, including use of biotech crops, which helped farmers meet the world's 13 percent increase in demand over past decade using only 6 percent more land.

There is a role for biotech crops in meeting food/fuel demand around the world. A recent report by the International Service for the Acquisition of Agri-biotech Applications showed that farmers in twelve developing countries planted biotech crops in 2007, which for the first time in history outnumbered the amount of industrialized nations exploring the same biofuel technology. The Associated Press, *Developing*

Countries Grew More Biotech Crops in '07, Feb. 14, 2008, available at <http://www.nytimes.com/2008/02/14/business/worldbusiness/14biotech.html?ref=science>. So while the world remains hesitant towards further biofuel development, key players in the supply chain and government remain open-minded about biofuel's potential and the role of research into emerging agricultural technologies.

Conclusion

It has become a consensus that the world must find an alternative to oil. Its reservoir is limited and its effect on the environment is problematic. While the UN meeting agreed on that much, it failed to accomplish much more. Biofuel exploration remains a happenstance venture with all countries wary of its possible negative influence on food supplies. The technology is still in its first generation, however, so there remains much hope. Cellulosic biofuels and fuels made from waste materials are still in their early development stages. Both would not impose the same threat to food availability that ethanol currently does. As technology advances, so too will the solidarity advance among nations in finding a renewable oil alternative. It is reasonable for the world to be initially hesitant to adopt policies that would risk food availability. In time, however, the risk should recede and alternative fuel production will advance.

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THE 2008 FARM BILL: RETAINING THE CONFLICTS OVER FOOD, ENERGY, AND CONSERVATION

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On June 18, the federal Food, Energy & Conservation Act of 2008 (2008 Farm Bill) was signed into law. Public Law No. 110-246. Congressional debate over the 2008 Farm Bill was shaped by the Energy Independence & Security Act of 2007 (EISA), which significantly increased incentives for the production of agrofuels—liquid biofuels produced from agricultural crops. Agrofuels were touted by many, including President Bush, as a panacea for U.S. dependence on foreign fossil fuels, as a means to alleviate global warming from increased greenhouse gas emissions, and as a new market for U.S. commodity crop farmers, who would no longer need to turn to U.S. taxpayers for crop subsidies. The EISA incentives, combined with recent price spikes in world oil prices and a doubling of global food prices over the last three years, have sparked heated public debate over agrofuel policy.

The debate is couched primarily in terms of food v. fuel, with the ultimate question of how much agricultural land and other resources should be diverted from food production to the production of feedstock for liquid transportation fuel. As domestic and international food prices rise, anti-hunger advocates have called for a reduction in U.S. biofuel incentives and those of other countries, which divert food and feed resources into agrofuel production. The conflict also divided players within the U.S. agriculture sector. Many dairy, livestock, and poultry associations, faced with spiking feed grain prices, called for a decrease in biofuel incentives. They were joined by the Grocery Manufacturers of America and others reliant on high

fructose corn syrup and other commodity crop inputs. But corn and soybean producer associations, reveling in record prices for their commodities, called for leaving current incentives in place.

Also at issue in the farm bill debate over agrofuels was the size and management of the Conservation Reserve Program (CRP), a farm bill measure that pays landowners who voluntarily retire environmentally sensitive acreage from row crop production and establish conserving uses on the land. The CRP provides significant habitat for wildlife. In defending the CRP, conservation, environmental, and sustainable agriculture organizations also raised concerns about the environmental impacts of plowing up large amounts of uncultivated land, especially for corn production that uses high levels of synthetic nitrogen and pesticides.

This article first reviews the renewable fuel standard (RFS) in title II of the EISA and policy drivers for U.S. agrofuel production, other than the federal farm bill. It then turns to the 2008 Farm Bill debate over U.S. agrofuel policy, food assistance anti-hunger measures, and conservation policy. The article concludes with a look at developments in the agrofuel conflict since enactment of the 2008 Farm Bill.

2008 Farm Bill Prelude: The EISA Renewable Fuel Standard

During 2007, the EISA and farm bill reauthorization moved through Congress simultaneously. The EISA reached the finish line first and was signed into law on Dec. 19, 2007. Pub. L. 110-140, 121 Stat. 1492 (2007). Title II of the act, entitled “Energy Production through the Increased Production of Biofuels,” included a dramatic five-fold increase in a national RFS and other measures intended to increase biofuel production. The RFS, administered by the Environmental Protection Agency (EPA), requires that U.S. transportation fuel include a minimum amount of biofuel, with regulation and enforcement aimed at fuel refiners, blenders, and importers. 42 U.S.C. § 7545(d); for a detailed article on the RFS, see Phillip L. Fraas, *Biofuel Provisions of the Energy Independence and Security Act of 2007*, AGRIC. MGMT. COMMITTEE NEWSL. (ABA Sec. of Env’t,

Energy, and Resources), Apr.2008, at 19, *available at* <http://www.abanet.org/environ/committees/agricult/newsletter>.

The EPA administrator is authorized to suspend part of the RFS if its implementation would severely harm the economy or environment of a state, region, or the entire country or if the EPA administrator determines that there is inadequate domestic supply of renewable fuel to meet the RFS. 42 U.S.C. § 7545(o)(7).

The RFS established in the Energy Act of 2005 provided that 7.5 billion gallons of renewable fuel be blended into U.S. transportation fuel by 2012. In 2007, however, U.S. production of fuel ethanol alone reached about 6.5 billion gallons and projections for fuel ethanol production in 2008 exceed 7.5 billion gallons. *See*, Green Car Congress, *US Fuel Ethanol Production Up 47% in May from Year Prior* (July 31, 2008), *available at* <http://www.greencarcongress.com/2008/07/us-fuel-ethanol.html>. In response to rising oil prices and concerns about U.S. dependence on foreign energy sources, Congress revised the RFS in the EISA to require a total of 36 billion gallons of renewable fuel in 2022, with 15 billion gallons of “conventional biofuel” and 21 billion gallons of “advanced biofuel.” The RFS renewable fuel standard for 2009 is 9 billion gallons.

Most of the RFS “conventional biofuel” will be met with ethanol produced from corn kernel starch, which is currently the feedstock for about 95 percent of U.S. ethanol. Current projections estimate that about one-half of the U.S. corn crop will be needed to meet the 15 billion gallon RFS for conventional biofuel. The vision for “advanced biofuel” feedstock is primarily cellulosic plant material from a wide array of crops and crop residues, forest sources, waste streams, and other cellulosic sources to be converted to ethanol. Cellulosic ethanol production has reached a demonstration stage but is not yet near commercial scale production at a cost competitive with fossil-based fuels.

Congress has provided significant incentives for U.S. biofuel production in addition to the RFS. A federal Volumetric Ethanol Excise Tax Credit (VEETC)

provides a tax credit to fuel blenders for ethanol blended with gasoline. 26 U.S.C. § 6426(b)(2)(A). There is also a tax credit for the installation of fueling stations to expand consumer access to biofuels. The United States also imposes a 54-cent per gallon tariff on imported ethanol, aimed primarily at sugar-based ethanol from Brazil. In addition, the Energy Policy Act of 2005 ordered the phase-out by 2014 of MTBE, a gasoline additive which polluted groundwater. Oil refiners have turned to ethanol as a gasoline additive to meet oxygenate requirements met previously by MTBE. States have also developed a wide array of incentives for biofuel production. *See, e.g.*, L. Leon Geyer, Phillip Chong & Bill Hxue, *Ethanol, Biomass, Biofuels and Energy: A Profile and Overview*, 12 DRAKE J. AGRIC. L. 61 (2007).

The overall result of these federal and state incentives is a corn ethanol boom. From early 2006 to 2008, the number of ethanol plants operating in the U.S. increased from ninety-five to 161, with another forty-two plants under construction and seven plants undergoing expansion. Iowa alone now has an estimated thirty-one ethanol refineries operating with fourteen more under construction or expansion. *See*, Iowa Renewable Fuels Association, *Production Begins at VeraSun Energy’s Ethanol Plant in Hartley*, Aug. 18, 2008, <http://www.iowarfa.org/nr081808.php>. The U.S. corn crop has increased to historic highs, with corn planted on land previously devoted to soybeans, cotton, grazing, or conservation uses. Many farmers have dropped soybeans from a corn-soybean rotation and shifted to continuous corn production. The U.S. Department of Agriculture (USDA) estimates that between 30 and 32 percent of the U.S. corn crop will be used for ethanol production in 2008, up from 18 percent in 2007.

The 2008 Farm Bill

Trade and Tax Biofuel Provisions

A new twist in the process for the 2008 Farm Bill was the involvement of Congressional committees with jurisdiction over budget and tax measures. On the House side, any increases in the overall budget for the farm bill had to be offset with decreases elsewhere in

the budget. Leaders of the House Ways and Means Committee and the Senate Finance Committee insisted that they be involved directly in shaping the farm bill because of their jurisdiction over its funding. As a result, the final 2008 Farm Bill includes Title XV covering “Trade and Tax Provisions” which amended incentives for biofuels as follows:

- Section 15331: The Volumetric Ethanol Excise Tax Credit for ethanol blended into gasoline is reduced from 51-cents per gallon to 45-cents per gallon for calendar years beginning after 2008, unless the EPA administrator determines that less than 7.5 billion gallons of ethanol (including cellulosic ethanol) has been produced or imported in the United States during the calendar year.
- Section 15333: The 54-cent gallon tariff on fuel ethanol imports is extended from Jan. 1, 2009 to Jan. 1, 2011.
- Section 15321: A new cellulosic biofuel producer tax credit is included for up to \$1.01 per gallon for biofuel producers, available through Dec. 31, 2012, with an estimated cost of \$403 million over the 10-year farm bill budget window.
- Section 15322: The Secretary of the Treasury, in consultation with the USDA Secretary, the Secretary of Energy and the EPA administrator, is directed to enter into an agreement with the National Academy of Sciences to produce a comprehensive analysis of scientific findings on biofuels. The analysis is to consider current use and projections for biofuel production; the maximum amount of biofuels production from U.S. forests and farmlands; the domestic effects of biofuel production on fuel price, land use changes; land prices in rural and suburban communities; environmental changes due to changes in crop acreage, fertilizer use, runoff, water, emissions from vehicles using biofuels and other factors; the price of feed; selling price of grain crops and forest products; exports and imports of grains and forest products; impact on taxpayers, through cost or savings to commodity crop payments; and the expansion of refinery capacity.

Incentives for Biofuel Production

The 2008 Farm Bill’s Energy Title provides a new and revised farm bill program incentives for biofuel production from agriculture, forest, and other sources. The bill adopts the EISA distinction between “conventional biofuel” and “advanced biofuel.” Some of the farm bill incentives exclude ethanol from corn and other row crop commodities which are eligible for farm bill subsidy payments under the Title I of the farm bill. Among the new or revised Energy Title measures are:

- Section 9002: Biofuels Infrastructure Study. The legislation directs USDA to conduct of study of the infrastructure needs associated with the expanding production and use of biofuels, to be conducted jointly with the Departments of Energy and Transportation and EPA.
- Section 9003: Biorefinery Assistance providing \$320 million in mandatory funding for loan guarantees for commercial and pre-commercial biorefineries to produce advanced biofuels, as well funding for grants for demonstration-scale biorefineries. There is also authority to appropriate additional funds.
- Section 9004: Repowering Assistance providing mandatory funding of \$35 million for payments to encourage existing biorefineries to replace fossil fuel heat or power units with new biomass energy systems or to produce energy from biomass for plant operations. Additional funds are authorized for appropriation.
- Section 9005: A Bioenergy Program for Advanced Biofuels that directs USDA to make payments to support and ensure an expanding production of advanced biofuels. Mandatory funding of \$300 million is provided and additional funds are authorized for appropriation.
- Section 9011: A Biomass Crop Assistance Program (BCAP) that directs USDA to establish BCAP project areas in which potential biomass crop producers and a biomass user facility have agreed to produce and use biomass crops for conversion to advanced biofuels or bioenergy. Agricultural

producers in a BCAP project area may contract with USDA to receive payments for up to 75 percent of the costs of establishing perennial and forest biomass crops. The USDA Secretary can also make annual payments in subsequent years to help to compensate for lost opportunity costs until crops are established. The program also provides for cost-share payments for the harvest, storage, and transport of biomass crops to user facilities at a rate to match the biomass sale price, up to \$45 per dry ton. The bill provides such mandatory funds as are necessary to carry out the program. Corn and other crops eligible to received payments under the farm bill commodity programs and invasive or obnoxious plants are not eligible for BCAP payments.

- Section 9012: A Forest Biomass for Energy measure that authorizes \$15 million annually for research on the use of low-value forest biomass for energy.

In addition, the farm bill's Title 1 support program for sugar is amended to assure that sugar imports do not result in increased forfeitures of U.S. sugar. The USDA Secretary is directed to purchase sugar to avoid forfeitures under sugar price support loans and to sell that sugar to bioenergy producers. Under the plan, sugar would be integrated into corn ethanol facilities.

Conservation Measures

The ramped up production of corn for ethanol production pressured Congress to lower the overall acreage allowed in the CRP from 39.2 million acres to 32 million acres in 2010, 2011, and 2012. This acreage reduction was in part acknowledgment that higher prices for corn are driving up land rental values. Over 27 million acres of CRP land is scheduled to come out of long-term contracts and many landowners are not re-enrolling sensitive acreage in order to take advantage of the high rental rates.

With large amounts of uncultivated land coming into corn production, conservationists also called for significant strengthening of the standards to control soil

erosion and farm field runoff under the conservation compliance provisions of the farm bill commodity programs. Farmers who do not meet the conservation compliance in a given crop risk losing numerous farm bill program benefits including commodity program payments. None of the proposals to strengthen conservation compliance were included in the final bill. The 2008 Farm Bill does include a modest provision allowing governors in five states with acreage in the Prairie Pothole National Priority Area to opt-in to protection of native sod that has never been tilled. If a governor opts in to the provision, crops grown on untilled, native sod would not be eligible for the first five crop years of planting for crop insurance, noninsured crop assistance, or noninsured crop disaster assistance. 2008 Farm Bill Section 12020 (codified at 7 U.S.C. Section 1508(o)).

Nutrition Programs

In the face of escalating food prices, anti-hunger advocates were successful in longstanding attempts to increase the purchasing power of the food stamp program, whose name was changed to the Supplemental Nutrition Assistance Program. The food stamp program rules for determining program benefits requires households to subtract a standard deduction for non-food essentials from their income. This standard deduction had been frozen at \$134 per month for households with three or fewer members. The 2008 farm bill increases this standard deduction to \$144 in 2009 and indexes it to inflation in subsequent years. In addition, the bill provides an additional \$50 million for The Emergency Food Assistance Program (TEFAP), increases its funding from \$140 million to \$250 million in FY2009 and links further increases to the food prices in the Thrifty Food Plan, so that funding will keep pace with food price increases. The Thrifty Food Plan is used to determine food stamp allotments as well. For more on the Thrifty Food Plan, see <http://www.frac.org/pdf/thriftyfoodplan.pdf>

Subsequent Developments

The 2008 Farm Bill in combination with the EISA RFS reset priorities for agrofuel production, nutrition

assistance, and agricultural conservation. But the relative importance of these priorities continues to be tested by subsequent administrative actions and questioned in congressional hearings.

Texas Petition to Suspend Part of the RFS

On April 25, in the midst of congressional action on the 2008 Farm Bill, the governor of Texas submitted a petition requesting that under the authority provided in the EISA, the EPA administrator waive 50 percent of the RFS mandate for the production of ethanol from grain from September 2008 through August 2009. The waiver would reduce the RFS mandate for that period from 9 billion gallons to 4.5 billion gallons. The governor contended that the RFS has resulted in higher feed and food prices, causing hardship to the state's livestock industry and the population in general. *Texas Petition Letter posted at <http://www.epa.gov/otaq/renewablefuels/rfs-texas-letter.pdf>*. EPA opened a comment period on the request for the RFS waiver and received over 15,000 comments. 73 Fed. Reg. 29,753 (May 22, 2008).

On Aug. 7, EPA Administrator Stephen Johnson announced that he was denying the petition, stating that Texas had not proved that the RFS was doing economic harm. He added that in his opinion the RFS has strengthened energy security and America's farming communities. The RFS will remain at 9 billion gallons of ethanol and biodiesel in 2008 and 11 billion gallons in 2009. In making the determination on the waiver request, EPA set a high bar requiring that the RFS not just be a significant contributor to severe economic harm but that it must be the cause of severe economic harm. EPA also opined that the waiver determination is solely within the discretion of the EPA administrator, who could choose to retain the RFS even it is the sole cause of severe economic harm. The agency, noting that the Texas petition was the first RFS waiver request under the EISA, also provided guidance on how it will deal with future RFS waiver requests. EPA choose not to address environmental concerns raised in public comments on the Texas petition, noting that agency will be evaluating environmental issues in the upcoming rulemaking to implement the EISA. *See EPA, Notice of Decision*

Regarding the State of Texas Petition for a Waiver of a Portion of the Renewable Fuel Standard, 73 Fed. Reg. 47,168 (Aug. 13, 2008).

Request to President to Suspend the Ethanol Tariff

Efforts are also underway seeking suspension of the 54-cent per gallon tariff on imported ethanol. On July 2, a coalition of thirty-six food processor associations, livestock and poultry associations and tax reform groups submitted a letter to President Bush requesting that he use emergency authority under the Constitution, the National Emergencies Act, Tariff Act of 1930, Trade Expansion Act of 1962, and the International Emergency Economic Powers to suspend the duties and quotas on imported ethanol used as a motor fuel additive. The action, focused on the 54-cent per gallon tariff on ethanol, requests that duties and tariffs remain suspended until such time that Congress has an opportunity to allow it to expire, discontinue its collection or at minimum until crop conditions significantly improve. Copy of letter on the Web at <http://www.meatami.com/ht/a/GetDocumentAction/i/39806>.

USDA Actions to Open the Conservation Reserve Program for Increased Agriculture Production

Since the beginning of 2008, in the face of increased livestock feed prices coupled with high returns for corn acreage, USDA has been under pressure to use its administrative authority to open more CRP land to agricultural production. *See, e.g.*, letter from over 100 commodity, livestock, food processing and meatpacking organizations to USDA Secretary Schafer urging that he allow a penalty free, early out option this year for CRP acreage that is not environmentally sensitive, posted on the Web at <http://www.meatami.com/ht/a/GetDocumentAction/i/39169>.

In May, USDA announced a Critical Feed Use initiative under which 24 million acres of CRP land would be open to haying and grazing in 2008 at the end of the primary bird nesting season. USDA relied on its legislative authority to modify CRP contracts and

required CRP contract holders to pay a \$75 modification fee to participate in the program. The agency estimated that 18 million tons of forage worth \$1.2 billion could be generated under the initiative. The National Wildlife Federation challenged the initiative in a Washington state federal district court on the grounds that USDA had failed to comply with the National Environmental Policy Act (NEPA) by not preparing an Environmental Assessment or Environmental Impact Statement for the initiative. The lawsuit was resolved on July 24, when the judge issued a permanent injunction finding that USDA had violated NEPA. The judge's order did allow participants to continue in the Critical Feed Use Initiative if they had received permission from USDA to hay and graze before a temporary restraining order was issued on July 8 and they had made an investment of at least \$4,500 in preparation for haying or grazing in reliance on the USDA permission. *National Wildlife Federation v. Schafer*, (U.S. District Court, W.D. Washington, Case No. CV08-1004-JCC)(Order Entering Permanent Injunction, July 24, 2008)(posted on the Web at <http://www.nwf.org/nwfwebadmin/binaryVault/FinalInjunctionAndOrder.7.24.08.pdf>).

On July 29, USDA Secretary Schafer announced that he would not authorize penalty-free early cancellation of Conservation Reserve Program (CRP) contracts in 2008. His statement explaining the decision noted that despite severe flooding in the Midwest, the 2008 corn crop is expected to be the second largest on record. Many livestock and poultry growers, particularly those who do not grow their own forages or feed grains, had called for a penalty-free early out of CRP because of soaring feed grain prices. But Secretary Schafer cited late summer decreases in the cash price of corn and soybeans as one of the rationales for denying penalty-free early outs.

In addition, Schafer stated that, even without penalty-free early outs, under provisions of the 2008 Farm Bill and the terms of existing CRP contracts, total CRP acreage will drop without any further action by USDA. The 2008 Farm Bill lowered the total number of acres allowed in CRP in 2010, 2011 and 2012 from 39.2 million acres to 32 million acres. Currently, the program has an enrollment of 34.7 million acres.

Acreage in CRP contracts scheduled to expire in the next few years includes 1.1 million CRP acres scheduled to expire on Sept. 30 this year, 3.8 million acres on Sept. 30, 2009, and 4.4 million acres on Sept. 30, 2010. Schafer also noted that some CRP landowners were choosing to cancel their CRP contracts and incur the penalty of repaying CRP benefits in order to reap the benefits of high grain prices. In spring of 2008, the number of acres withdrawn early from the CRP before contract expiration was 50 percent higher than in 2007.

Congressional Hearings on Biofuels

Members of Congress have responded to the controversy of agrofuel policy with various proposals to amend the EISA RFS, including a proposal to freeze the RFS for corn-based ethanol at this year's level of 9 billion gallons. S. 3031. In addition, Congressional committees have held biofuel hearings both before and after the 2008 Farm Bill's enactment. On May 6, the U.S. House Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce held a hearing to discuss issues, implementation and opportunities for the new RFS. Witnesses from EPA, Natural Resources Defense Council, Renewable Fuels Association, National Petrochemical and Refiners Association, KL Process Design Group LLC, Grocery Manufacturers Association, National Corn Growers Association, POET LLC. and Oxfam America testified on issues including ethanol's energy balance, eliminating the ethanol import tariff, and the impact of biofuel production on food prices. On June 12, the Senate Committee on Energy and Natural Resources held a hearing to discuss the relationship between U.S. renewable fuels policy and food prices. On July 24, the Subcommittee on Conservation, Credit, Energy and Research of the House Agriculture Committee held a hearing on the Renewable Fuel Standard Implementation and Agricultural Producer Eligibility. Major issues included defining the term "renewable biomass" and determining on which land biomass crops should be grown. EPA has also been charged with creating methods and standards for assessing the long-term environmental impacts and greenhouse gas emissions of each of four categories of renewable fuels, including cellulosic ethanol and other advanced

biofuels. Witness testimony is posted on the Web at <http://agriculture.house.gov/hearings/statements.html>. On Aug. 18, the Senate Agriculture Committee held a field hearing in Nebraska on Food, Feed, and Fuel Production: Today and Tomorrow.

Conclusion

The 2008 Farm Bill has some measures intended to address the agrofuel issue of food v. fuel but the signals are mixed. The tax credit for ethanol was lowered slightly and many biofuel program incentives were redirected from corn ethanol to future “advanced biofuels.” A future comprehensive study on the impacts of biofuel production on food prices, agricultural land resources, and the environment was authorized. But, in the meantime, Congress approved a significant cut in CRP acreage and significant increases in food stamp and hunger program funding. Conflicts over food v. fuel have continued at the administrative level since the 2008 Farm Bill’s enactment and it is likely that the next Congress and a new administration will be quickly immersed in the food v. fuel v. conservation conflicts in 2009.

UPDATE ON THE ANSI SCS-001 SUSTAINABLE AGRICULTURE STANDARD-SETTING PROCESS

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In our last issue, James Andreasen and Christopher McDonald provided a summary and background information about the proposed Agricultural Sustainability Standard. See, James H. Andreasen and Christopher M. McDonald, *Standard Setting and the New Draft ANSI Agricultural Sustainability Standard*, AGRIC. MGMT. COMMITTEE NEWSL. (ABA Sec. of Env’t, Energy, and Resources), Apr. 2008, at 10, available at <http://www.abanet.org/environ/committees/agricult/newsletter/>. This article updates the progress toward adoption of the *Sustainable Agriculture Practice Standard for Food, Fiber, and Biofuel Crop Producers and Agricultural Product Handlers and Processors* (SCS-001), which was proposed by the American National Standards Institute (ANSI). Scientific Certification Systems (SCS), is the drafter and principal promoter of the SCS-0001 standard.

On July 28, 2008, 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. The SCS-001 Standards Committee (Committee) held its first meeting on Sept. 25-26 in its hometown of Madison, Wisconsin.

Observers may still apply to attend and observe committee meetings and applications for subcommittees. While Sept. 22, 2008 was the deadline, this will likely be extended.

While the Draft Standard on Sustainable Agriculture (Standard) purports to cover the entirety of production agriculture (e.g., food, fuel, fiber, etc.) the make-up of the Standards Committee membership had a curious



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The Agricultural Management Committee welcomes the participation of members interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, or identifying authors or issues, please contact the editor, Thomas P. Redick at thomasredick@netscape.net.

emphasis on organic and floral members. The apparent lack of “balance” in the Standards Committee could prove troublesome going forward, if the scope of the proposed standard is not narrowed by committee vote to take biofuels, livestock, GM crops, and other subject matter out of the scope. In fact, 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 the U.S. Department of Agriculture (USDA), expressing concerns. *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>.

There appears to be a pattern of excluding inputs (e.g., fertilizers, agricultural chemicals) and major agricultural sectors that are users of crops (e.g., livestock, biofuels, and processors), which, while consistent with an organic-only standard, raise red flags if the Standard is covering all sectors of the agricultural community. At least five industry sectors are completely excluded, including: (i) fertilizers, (ii) agricultural-chemicals; (iii) livestock; (iv) biofuels; and (v) processors. 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. These groups are under-represented, even if friends on the Standards Committee work to give them a voice.

On June 6, 2008, 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 rules of the Leonardo Academy provide 25 percent of the seats on the Standards Committee to “environmentalists,” and 25 percent each to “users,” “producers,” and “general interest.” At present, the ratios on the Standards Committee are weighted toward the floriculture industry and organic industry interests, with “environmentalists” making up 21 percent of the committee.

The USDA’s strongly worded letter demanded action to bring the Standard in line with 2008 Farm Bill’s definition of sustainability. This letter is summarized in the attached chronology. 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 that criticized the Standard for ignoring the economic viability of the Standard on small to medium growers, and calling on Standards Members to withdraw, or reorient the Standard to general principles that address these growers’ concern.

Chronology of the SCS-001 Standard

April 11, 2006

Scientific Certification Systems (SCS), the drafter and principal promoter of the SCS-0001 standard, meets with wine producers who wish to pilot test the draft Standard. The wine producers are carefully integrating agricultural chemicals to manage their environmental footprint. SCS had no further discussions with wine producers regarding the pilot test of the Standard, which SCS announces to the world as the “first organic sustainable standard.”

April 13, 2007

The National Science Foundation (NSF) published the Draft Standard for Trial Use (DSFTU). The DSFTU was announced in ANSI’s Standards Action. However, unlike other DFSTU’s posted in ANSI’s Standards Action, no Web link to the draft Standard was provided. One ANSI director who works for a major trade association in Washington, D.C. says “we thought this was only for organic producers.” Yet, no action is taken. NSF and SCS go their separate ways due to “policy differences” and SCS has to find another ANSI Standards Development Organization (SDO).

August 2007

SCS holds notification session with NGOS, which many environmental groups (including Natural Resources Defense Council, World Wildlife Fund

(WWF), etc.) attend, while mainstream commodity groups are not invited.

September 2007

The Leonardo Academy in Madison, Wisconsin becomes the first SDO to mandate that 25 percent of participants of the Standards Committee represent “environmentalists.” While knowing little of agriculture, SCS finds the lack of “conflicts” enticing and charges the Leonardo Academy with overseeing and facilitating the DSFTU into an ANSI standard.

October 2007

Kickoff meeting in Berkeley, California, for potential applicants to the Standards Committee. While mainstream commodity groups are not invited, they learn of this from WWF.

Feb. 4, 2008

In response to questions regarding whether the Standards is a purely organic standard, Linda Brown of SCS clarifies that the Standards will apply to sectors of the agricultural community.

March 26, 2008

The U.S. Soybean Export Council (USSEC) and other parties bring appeals to the Leonardo Academy objecting to the lack of notice to mainstream agricultural producers.

April 2, 2008

The Leonardo Academy extends the application deadline for the SCS-001 Standards Committee to May 23, 2008 and makes greater effort at expanding awareness of the opportunity to participate in the draft standard process.

May 6, 2008

USSEC writes to the Leonardo Academy demanding a reply to its appeal, which the Leonardo Academy should have replied to by April 24, 2008.

May 16, 2008

The Leonardo Academy writes the USSEC and suggests that an “acceptable way to address these issues” is through re-announcement of the the DFSTU for SCS-001 in the May 16, 2008 ANSI *Standards Action* to ensure that all materially affected parties are aware of the draft Standard and are provided the opportunity to participate in the standard development process. The Leonardo Academy also provides an additional extension of the application deadline for participation on the Standards Committee to July 7, 2008.

May 6, 2008

USDA Deputy Secretary Charles Conner sends a letter to the Leonardo Academy asking it to appoint three USDA observers.

June 6, 2008

USDA Deputy Secretary Charles Conner sends a letter to the Leonardo Academy alerting it to inconsistencies between the draft Standard and U.S. domestic and international policies. He cites to the Farm Bill’s definition of sustainable agriculture, which 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.

USDA has a broad-ranging program called “Sustainable Agriculture Research and Education.” which funds innovative agriculture, but does not exclude biotech or agricultural chemical/fertilizer inputs as the draft Standard does.

June 24, 2008

The Leonardo Academy responds to USDA’s June 6, 2006 letter by stating it is a “neutral facilitator” and includes “Attachment 1” which addresses the “mischaracterization” concerning the draft Standard’s enshrinement of organic agriculture as the “best practice” starting point for sustainable agriculture.

In what has to be an affront to USDA, Michael Army, from the Leonardo Academy, stated that while “Circular A-119 provides that agency representatives may serve as members of voluntary consensus bodies, . . . I am concerned that the course set out in your letter is not consistent with ANSI rules and procedures and the directive to avoid the appearance of undue influence by a federal agency.” While apparently welcoming USDA participation on one hand, the Leonardo Academy then rejects the request by USDA to send observers due to the “undue influence” risks it perceives.

The Leonardo Academy responds further 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”; Leonardo Academy further notes that SCS-001 is a draft standard, and the committee can make changes to the Draft Standard, stating “We anticipate a vigorous debate on this point.”

July 7, 2008

The deadline for filing applications passes, with the Leonardo Academy reportedly receiving 175 applications. Unfortunately, key stakeholders involved in USDA’s sustainable agriculture program, such as the Sustainable Agriculture Coalition, did not apply.

Moreover, the leading environmental NGO involved in certifying over twenty major agricultural commodity groups, the World Wildlife Fund, did not apply, despite being among the lucky folks who got direct outreach from SCS in the early days of promoting this Standard to organic and environmental interests in 2007.

July 21, 2008

After consultation with the Leonardo Academy on June 25, 2008, Deputy Secretary Charles Conner writes ANSI CEO, Joseph Bhatia, to register opposition to standard development process. He states “we are supportive” of stakeholder appeals, yet 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.”

July 28, 2008

The Leonardo Academy announces the members of the Standards Committee, with floral and organic interests significantly outweighing other sectors of the agricultural community, including producers/processors in commodity groups who trade billions of dollars annually, and feed the vast majority of the world’s animals and people. The list of members of the Standards Committee includes an outnumbered minority of mainstream agriculture interests, including the American Soybean Association, the National Corn Growers Association (NCGA), and the Corn Refiners Association. These commodity groups have openly endorsed the farm bill’s definition of “sustainable agriculture.” These entities may assist excluded groups in overcoming the stated bias toward the “precautionary approach.”

Despite receiving applications from highly qualified representatives, there are no representatives from major industry sectors that are potentially materially affected by the draft Standard, including: (i) biofuels, (ii) fertilizer, (iii) pesticides, and (iv) livestock on the Standards Committee. These interests had 30 days to initiate appeal of their rejection under the Leonardo Academy’s complaint procedures.

Aug. 7, 2008

A floral industry newsletter touted the strong representation—eight votes of fifty-eight—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.

Aug. 14, 2008

A number of sustainable agriculture groups called the “National Campaign on Sustainable Agriculture” (NCSA) send the Leonardo Academy a letter stating their concerns with the draft Standard’s “genesis, organizational development and potential for serious harm to the very interests it purportedly aims to protect” and suggest that they “are 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.”

Aug. 15, 2008

The Leonardo Academy sets Sept. 25-26 in its hometown of Madison, Wisconsin, for the first meeting of the Standards Committee.

Aug. 20, 2008

The Leonardo Academy promptly replies to the NCSA letter, urging them to apply to participate in the standards development process through participation in subcommittees or as observers. Leonardo states “[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.”

The Sept. 8, 2008 *Food & Chemical News* quotes the chair of a task force, which is forming, to address this Standard (Russell Williams, regulatory relations director for the American Farm Bureau Federation),

that this “informal conventional agriculture task force” remains concerned about the makeup of the Standards Committee. Mr. Williams, along with Kenneth McCauley, representing the NCGA, and Ronald Moore, representing the American Soybean Association, were chosen to serve on the committee. “We hope the apparent bias [against conventional agriculture] is only superficial,” Williams says, however “We’ll reserve judgment until we get there.”

Sept. 11, 2008

USDA files appeal directly to the American National Standards Institute’s Executive Standards Council asking it to “withdraw the accreditation as a Developer of American National Standards of the Leonardo Academy” and that SCS-001 Draft Standard be “withdrawn from further consideration as a DSTU or as the basis for an American National Standard.” Among other grounds, USDA states that: “Leonardo’s practices and actions with respect to the DSTU are not consistent with the expectations of an ANSI accredited Standards Developing Organization. The standards development process defined and implemented by Leonardo, to date; (1) contains provisions that are unfair to materially affected entities, i.e. major agricultural interests, (2) is unsuitable for national use as many of its proposed provisions are so diverse that consensus on how they should be defined will be impossible to achieve, (3) and is contrary to the public interest as provisions of the DSTU are in conflict with existing federal regulations and would require an impossibly uniform application of varying State regulations and requirements.”

On Sept. 25-26, 2008, the first meeting of the Standards Committee for the SCS-001 Draft Standard for Trial Use on Sustainable Agriculture was held in Madison, Wisconsin. The interim chair, James Barrett of University of Florida, Environmental Horticulture Dept. (also a partner in Visions Group, LLC, <http://www.superfreshmarketing.com/visionsgroup/who-we-are.html>), in response to a letter from several environmentalist members of the Standards Committee, changed the agenda to allow for breakout sessions on Sept. 25 to discuss the vision and scope of this standard.

This culminated in near-consensus vote that the meeting should start from general principles, and set aside the SCS-001 standard to use as a “reference” document along with other relevant standards and initiatives. Work to begin in drafting a standard will commence only after the vision and scope are defined and further outreach takes place, no sooner than 4 to 6 months from the close of the meeting. 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—current data about the value, market demand, and potential uses for a sustainable agriculture standard.
3. Reference documents task force—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.

The permanent chair election will be conducted via the “Google Group” that has been formed, and efforts will be made to allow observers to participate.

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Section members are now able to view the newsletter *Trends* in .pdf format in the Section Members Only portion of the Section Web site. Issues dating back to September/October 2006 are archived. As a Section member you have access to view *Trends* after logging onto the Web site with your ABA Member ID number and password.

INSURING PRODUCERS OF BIOTECH CROPS AND COMMODITIES SHIPMENTS: COMPARING EUROPE AND NORTH AMERICAN APPROACHES

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This article sums up the current state of insurance for producers and shippers of biotech crops, who are demonstrating the insurability of such crops wherever they are in widespread use—and not subject to discriminatory liability standards. In the “crop insurance” sector where farmer’s crop failures are insured, preferential treatment is given to certain biotech crops that have lower failure rates. For third-party liability coverage, however, there are some signs that insurance for biotech crops may be harder to obtain—particularly where anti-biotech discriminatory laws create more liability risks for users of biotech crops.

Unfortunately for growers who seek the benefits of innovative plant breeding, activists and nations engaged in the contentious debate over introduction of biotech crops do not mention that the discriminatory anti-biotech laws they promote are the cause of liability incurred by growers and shippers, sometimes triggering food recalls and environmental remediation where no genuine risk to people or the environment is present. Anti-biotech activists have used the lack of insurance for this type of liability as a reason to bar the planting of biotech crops in some overseas production zones—while U.S. growers reap the economic and environmental benefits of these crops.

While certain insurers are busy insuring various aspects of biotech crop production, they are not involved in the public policy debate or international negotiations. Most troubling, participants in meeting of the Convention on Biological Diversity have selectively polled certain insurers (e.g., certain “reinsurers” based in the European Union (EU) who provide second-tier coverages for massive liability risks). Asking vague questions about future liability risks from such insurers will generally give the misleading impression that insurance is not generally available for biotech crops.

In contrast, an actual grower or shipper seeking coverage for the type of harm that biotech crops can cause (e.g., an allergic reaction) can secure third-party liability coverage. Crop insurance for loss of the grower's crop from drought, etc., will be easier to insure in parts of the United States. The same easy access to reasonably-priced insurance should be true for third-party liability insurance as well, as this article will discuss, if nations do not impose strict and discriminatory liability upon biotech crops.

Insuring Production of Biotech Crops in the United States

Biotech crops are eminently insurable in U.S. commodity agriculture. Since crop failure risks are reduced, insurers have been attracted to these crops, offering an entire package that is quite profitable due to the lower incidence of claims made overall, from crop insurance to third-party coverage. Under the circumstances, it is surprise to see anyone making the broad assertion—common among EU observers whose blinders are on—that there is nowhere any coverage available for biotech crops.

Insuring Growers

Growers of biotech crops are much beloved by the major carriers for growers in the United States, for the simple reason that: (1) they have few if any third-party claims for using biotech crops (in fact, the reduction in pesticide use reduces the risk of spray-drift pesticide nuisance cases), and (2) these biotech crops make less use of the crop insurance provided to growers who do not meet their production targets (crop insurance is a tool for protecting farmers from weather and other troubles outside their control).

In terms of crop insurance, some biotech crops are demonstrating lower crop failure rates, which can justify lower premiums for growers seeking coverage of this economic risk. The Federal Crop Insurance Corporation made headlines in late 2007 with the news that farmers may pay lower premiums by planting Monsanto's "YieldGard Plus with Roundup Ready Corn 2" or "YieldGard VT Triple technology" from Monsanto Company. Western Agriculture Insurance

Company sells this as the "Biotech Yield Endorsement" which recognizes the higher level of productivity seen with these hybrid corn varieties, which resist insects and proprietary herbicides (sometimes more than one herbicide for a single plant, giving growers the ability to kill off the weeds that are more likely to be killed by a particular herbicide). This is a pilot program offered in Illinois, Indiana, Iowa, and Minnesota, with plans to expand to other states if this proves successful. Country Insurers, based in Bloomington, Illinois, has issued thousands of policies to growers of biotech crops with success using level premiums, as has Rain & Hail LLC, based in Johnston, Iowa (<http://www.rainhail.com>).

In August 2008, the U.S. Department of Agriculture (USDA) announced that it was expanding this risk management program that lowers crop insurance costs for producers planting certain biotech corn seeds. The program went beyond the 2008 pilot program, with more states opening up for Monsanto corn products and other corn hybrids from Pioneer Hi-Bred, Syngenta, and Dow AgroSciences. Producer can plant certain corn hybrids and qualify for crop insurance premium reductions in some states. The lower crop insurance premiums will begin for the 2009 crop year. For details on various companies' programs, see Monsanto press release, *available at* <http://monsanto.mediaroom.com/index.php?s=43&item=628>. DuPont's press release, *available at* <http://onlinepressroom.net/DuPont/NewsReleases/> and Syngenta's press release, *available at* http://www.syngenta.com/en/media/mediareleases/en_080820.html.

In the third-party liability setting, however, there may not be premium discounts for the same biotech crops. Insurers may see too much uncertainty inherent in third-party liability risks, given the history to date of food recalls and remediation driven by the inherently discriminatory U.S. regulatory system (which must "approve" biotech crops while others—even non-GMO (genetically modified organism) herbicide-resistant varieties of the same commodity crop—need not apply for USDA approval). Third-party liability insurance may reflect this dichotomy, since companies concerned about liability risks may write exclusions

(i.e., deny coverage) or require an endorsement (charge extra for coverage) where certain risks of biotech crops justify this. For example, specialized industrial or pharmaceutical crops that cannot commingle with food create risks of “bodily injury” that are subject to endorsements, requiring payment of additional premiums.

In Europe, where few biotech crops are grown—and there is an increasingly hostile regulatory and liability approach to their straying their bounds—the insurance industry has been thoroughly cowed by activists’ selling both scare stories about biotech crops and the higher-priced organic or non-GMO substitutes. The EU has not seen through the protectionism and misleading use of scientific data. Despite the United States-Canada-Argentina 2006 victory at the World Trade Organization rejecting the EU’s defense of its failure to approve biotech crops, the EU remains slow in getting crop approve. In Spain, where growers are increasingly adopting biotech corn, insurers may find profitable business in grower third-party liability coverage. Spain, unlike other EU nations, has not passed a “coexistence” law that penalizes producers of biotech crops with fees, liability, and other burdens.

Insuring U.S.-Origin Commodities Export Shipments

Crop insurance and third-party liability insurance are actively being sold, while grain shippers who have long relied on insurance for risks of loss are finding insurance harder to get for biotech crops entering the grain trade without full marketing approval in overseas markets. To reach market successfully, they have to reach their intended markets—including those in Europe, Japan, and other major markets that have regulatory approval and GM labeling requirements in place. Given those requirements, the shipments obtaining insurance are those who take steps to avoid unapproved biotech crops (or avoid approved biotech crops to a specified tolerance) and need insurance to cover the potential for being turned away for having the wrong biotech crop present.

Gerald Sullivan, with the internationally-oriented insurance brokerage, the Sullivan Group in Los

Angeles, California, has brokered deals for insuring delivery of grain to the EU and other markets using various underwriters, including Lloyds of London. With the London press questioning the safety of GMOs on the front page almost daily, Lloyds of London was wary about providing insurance for GM soybeans to Europe, but they would insuring non-GMO shipments and those soybean shipments with GMOs that were approved for import. Lloyds’s underwriters are attracted to coverage that is dependent on certifiable compliance with identity preserved processes that keep unwanted soybeans from commingling with the export shipment. The shipper that can document, validate, and certify the process gets coverage, similar to what it gets for avoiding other unwanted biological entities—diseases or other pathogens that can be controlled by good agricultural management. Gerald J. Sullivan, *Risk Management Controls and Insurance for Agricultural Biotechnology*, Summary of ABA-CAST-AALA-Croplife Third Roundtable on Biotechnology, (May 1999), available at http://web.utk.edu/~bwan/liability_and_labeling_of_geneti.htm (site visited Feb. 8, 2008).

The Sullivan Group has suggested that coverage for biotech crop shipments is going to be less likely to be granted if more markets create barriers to trade—including restrictions that could impact all soybean exports. With insurance, however, such ships of crops that contain enhancements provided by biotechnology will help to feed the growing world population. These contracts have worked with non-GMO soybeans, which are produced to certified identity-preserved standards. The same concept of identity preservation applies for crops that are present in biotech crop shipments, but which lack regulatory approval in the market where the shipment is headed. The same concepts of certified compliance to an industry standard can be applied to allow insurance for biotech crop exports, in an age where increasing scrutiny is applied to traces of unapproved genetic events.

Lack of market access for some biotechnology crops, especially corn, has become a concern for some producers. Given the resistance to buying biotech grain in Europe, Japan, and other markets, more contracts

with U.S. growers call for non-GMO grain for the export market, liability experts warn producers need to be very cautious about signing any type of non-GMO “certification” of genetic purity with a grain dealer or processor, since the producer may be held responsible for rejection of the grain shipment with all the attendant costs (which may include food recalls or even environmental remediation in the importing nation). The producer’s “contamination” source might have been in the seed, or a neighbor’s pollen, or shared equipment—all factors that may be beyond the producer’s effective control. These are the sort of unpredictable but potentially devastating risks that insurance arose to cover—and it should be insurable if the risk is predictable enough to be “rated” (i.e., premiums set at the right level to pay claims and still return a profit). When in doubt, producers should seek the advice of an attorney or other risk management professional. See, e.g., *Risk Management Techniques for IP Shippers and Customers*, presentation available at <http://www.mnshippers.org/html/news.cfm?ID=542>.

With proper process controls in place, the insurance industry will be able to provide rejection insurance for years to come. Local health authorities reject things for various reasons. Using a certified identity preservation process that can clear the testing on foreign shore allows use of standard marine insurance coverages, with an endorsement for rejection insurance. The rejection coverage pays claims for a shipment that is rejected at the foreign port of entry where unwanted GMO content is discovered despite compliance with certified processes. Such shipment-rejection insurance pays freight costs from port to port and back (or destruction of contents, if applicable), cargo handling, and interest costs, along with other miscellaneous costs—restoring the shipper to the pre-export economic position.

To establish this insurance in the U.S. chain of commodity commerce, producers need to deploy an identity preservation process that meets the insurer’s needs for certainty of operation, i.e., a mature, time-tested, documented system. In addition, the testing process in the EU or other target market should be equally mature—agreed standards that are reliable in outcome.

The insurance industry emphasis on process approaches, not inconsistent outcome testing, is consistent with the goals stated in some importing markets. For example, the New Zealand Food Safety Authority (NZFSA) suggests a “move away from relying on testing at the border to recognizing programs and systems operating in exporting countries.” This will provide more confidence that imported food meets New Zealand standards or is produced under controls equivalent to New Zealand’s domestic controls.

Insuring Biotech Crops Grown in the EU

In a 495-page report prepared by the European Commission, the authors cite various barriers to third-party liability insurance for biotech crops. In Austria, one of the most GMO-wary nations in the EU, “damage caused by GMOs is usually not covered by third party insurance.” *Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops*, European Centre of Tort and Insurance Law (Bernhard Koch ed., Apr. 2007) available at http://ec.europa.eu/agriculture/analysis/external/liability_gmo/annex1.pdf (citing Article 7 p. 7 of the model insurance conditions for third party liability insurance 2005 of the Austrian Insurance Association). Denmark goes a step further, creating a fund that biotech crop producers must pay into, which is then used to compensate non-biotech growers for harm, including loss of marketability. *Id.* at 106, n. 12. The Finnish government has compulsory environmental insurance for any operator whose activities pose a “material risk” to the environment, and this does not appear to cover GMOs—yet—that is apparently a “loophole” that “should be rewritten in a more consistent and comprehensive way” to make GMOs part of compulsory environmental insurance. *Id.* at 153.

Since only a few biotech crops are even authorized for commercial planting in the EU (e.g., some corn or maize), there is more legal activity writing laws to discriminate against them than there is planting of the crops, at present. It is surprising to hear that GM crops would be able to find anyone willing to give them insurance, since European insurance company spokespeople compared GM crops to Thalidomide,

asbestos, etc. *UK organization finds no insurance for biotech crops*, Cropchoice (Oct. 7, 2003) available at www.newfarm.org/international/news/1003/100603/uk_no-ins.shtml

A French working group on coexistence reported that the insurance industry will be able to insure the risk of biotech dissemination (not “contamination” which is barred under pollution exclusions) provided that coexistence rules are clearly set. They said that they only insure against risks that are quantifiable. *See*, USDA GAIN Report, *New Zealand* (Dec. 22, 2006), GAIN Report Number: NZ6014, available at www.fas.usda.gov/gainfiles/200612/146269830.pdf (site visited Feb. 8, 2008). Frankly, anyone asking an insurer the loaded question “will you insure X?” in advance will get a guarded answer, just as clients asking attorneys their opinion in advance without the facts of a claim before them. Indeed, when actually given the claims, there are signs that insurers will insure growers and biotech seed companies who have insurance for government-mandated recalls, subject to the usual haggling over exclusions and other coverage issues.

For example, in one recent EU-driven recall of a seed impurity in canola (a biotech trait not yet approved for EU planting), the U.S. agricultural attaché in Berlin reported that a local German canola seed company could have insurance for a claim of approximately one million Euros, in defense of claims made by farmers whose fields were plowed under after the government found they had fields sown with the impure seed. *See, e.g.*, Bobby Richey Jr., *Biotech Traces in German Rapeseed Seeds*, USDA GAIN Report No. GM7042, (July 9, 2007) available at www.fas.usda.gov/gainfiles/200709/146292339.doc; *see also*, *Traces of an EU unapproved biotech event found in conventional rapeseed variety in Germany*, Seedquest (Sept. 14, 2007) available at <http://www.seedquest.com/News/releases/2007/september/20355.htm> (sites visited Feb. 8, 2008). Investigators wonder where the seed impurity could have come from, since biotech canola field trials were over 130 kilometers from the seed production area. Also, the seed company had tested its seed batches twice for this trait—with negative results—only to have German

authorities find the trait at the trace level of 0.03 percent. Testing experts report that such low levels for testing make it possible for a “needle in the haystack” to go undetected at times.

Given the low tolerances involved and the inability to prevent this with testing, insurance can and should step in to cover this potential risk. Since the EU and other regulatory bodies are prone to overreaction, however—destroying the fields in question rather than just making biofuels of them—the cost of the risk once it materializes can be quite high, relative to the money made in the sale of seed. A small German seed company that has a few claims of one million euros each may find it harder to obtain insurance at a reasonable cost.

Environmental Impacts and Liability for Biotech Crops

In the relatively biotech-friendly United States, certain courts have recently entered decisions that raise the liability risks for the growers of biotech crops and the companies selling seed. In 2003, Craig Culp, a spokesman for the Center for Food Safety (an activist group that equates “organic” with “sustainable” agriculture) in Washington, D.C., suggested that any insurers expressing concern were justified, since a minor shift in “the regulatory landscape” in the United States could suddenly lead to claims, with insurers “paying out a lot of money because of genetic contamination.” Kristen Philipkoski, *Food Biotech Is Risky Business*, *Wired* (Dec. 1, 2003), available at <http://www.wired.com/medtech/health/news/2003/12/61096>.(site visited Feb. 2, 2008)).

In 2007, the same Center for Food Safety may have changed the “regulatory landscape” in the United States by successfully suing to stop Monsanto’s Roundup Ready™ alfalfa (RR alfalfa) pending a more thorough environmental impact assessment. *See*, *Geertson Seed Farms v. Johanns*, Preliminary Injunction Order at www.centerforfoodsafety.org/pubs/136 Preliminary Injunction Order.pdf (site visited Dec. 19, 2007). In a ground-breaking decision, the court entered a permanent injunction during planting season. Granting summary judgment on plaintiff’s

National Environmental Policy Act (NEPA) claim, the court found that the Animal and Plant Health Inspection Service failed to assess significant impacts and ordering it to prepare an Environmental Impact Statement (EIS).

The EIS could take over a year, and it must specifically consider the economic impacts to organic and conventional alfalfa, as well as the possibility of Roundup herbicide resistant in weeds. Because this injunction halted planting of widely sold RR alfalfa seeds after March 30, 2007, the court's decision had much broader, immediate impacts than the parallel NEPA decisions in field trials. District Court Judge Breyer granted plaintiffs' motion for summary judgment because of the potential for significant environmental impact from RR alfalfa, which would disperse pollen for miles and "contaminate" organic and conventional alfalfa, particularly in seed producing areas in the northwestern United States.

If the landmark decision in *Geertson* is not overturned on appeal, it certainly causes a change in the regulatory landscape, which might make common law liability for "contamination" recoverable in some settings. While this case involved NEPA and not common law liability, some commentators see a possible linkage in the "duty" of biotech seed companies to avoid commingling with crops bound for export or specialty markets like organic or non-GMO.

This is a complex legal nexus to establish however, and the nexus was rejected in a similar factual setting by a Canadian court applying common law principles and citing some U.S. caselaw. *See, Hoffman & Beaudoin v. Monsanto Canada*, 2005 SKQB 225, appeal dismissed, 2007 SKCA 47 (summary judgment for defendants on common law claims of organic canola farmers alleging economic loss without physical injury to crops via pollen drift or post-harvest commingling). The Canadian court considers approval for planting from the federal government sufficient to rule out liability. This might similar to the federal preemption defense that is recognized in some U.S. cases.

The Cartagena Protocol and EU "Leadership" in Generating Liability Risks

Countries around the world are making it more difficult to accept biotech crops, as the parties to the Cartagena Protocol on Biosafety (Biosafety Protocol) begin implementing requirements mandating the listing of genetic events (particular biotech crop traits are given codes to allow detection and tracking, via an online clearinghouse that lists these codes and information about the crops). Unfortunately, most parties do not have agreed testing standards yet, but they will take the necessary steps to put them in place over the next several years. This might mean more recalls and plowed-up fields like the German canola farmers—and claims in millions of whatever currency applies.

The future of agricultural biotechnology, in terms of export agriculture, is going to be shaped by the ongoing negotiation and implementation of the Biosafety Protocol, particularly Article 18.2(a) (traceability of "Events" in commodities shipments) and Article 27 (liability for biotech crops and other biotech organisms, including possible economic loss and trade disruption liability). The EU and its "like-minded" nations among the Biosafety Protocol parties are contemplating an international liability protocol that could have broad scope, strict liability, and reversal of the burden of proof—all of which could lead a grain shipper to end up holding significant exposure for delivering the wrong genetic event to an overseas market that has laws penalizing biotech crop commingling.

There is not much need to pass international liability standards, since nations are already carrying laws on their books that address harm to the environment or human health. Biotech-specific liability laws are confined to nations and localities that seek to gain marketing advantage by going completely "non-GMO" in production of certain crops. EU-wide laws do not single out biotech crops for causing property damage—that is left to EU Member States, who have conceived a variety of approaches to penalizing biotech crops for pollen drift or other mixing with organic and traditionally-bred crops. The EU Member

States each have their own domestic law of liability. For example, Denmark created a publicly funded compensation scheme for growers who claim biotech crops rendered their non-GMO crops unmarketable (at the 0.9 percent tolerance set for GM food labeling under EU law). Denmark recognizes the insurability of biotech crops, since it hopes that this compensation will be supplanted in the future by private insurance, when the time-limited arrangement expires after five years of operation.

The biotechnology industry took a large step forward toward self-insurance and arbitration of claims, with a “Compact” announced during Biosafety Protocol negotiations under Article 27 of the Biosafety Protocol. Through this historic proposed self-insurance plan, the six biggest biotech corporations presented their own liability scheme in an effort to take the wind out of the sails of Biosafety Protocol parties who distrusted these companies (Monsanto, Dupont, Syngenta, Bayer, BASF, and Dow Agrosiences) and saw a need for strict, binding international liability rules. Under the Compact, a joint fund supported by payments from biotech seed companies would pay compensation in case of damage to biological diversity that is caused by GM crops.

Biosafety Protocol liability negotiations failed in 2008 to reach a legally binding agreement under the time allotted, leaving open for now the question of liability for transboundary movement of biotech crops. An agreement to continue negotiating the liability law past its 2008 deadline was reached at the Fourth Meeting of the Parties (MOP4) in Bonn, Germany. Japan, which was blocking consensus at the MOP4 meeting, with the silent approval of New Zealand, Peru, Paraguay, and other nations, will host the next Meeting of the Parties. The terms of liability and the details of the Compact will continue to be negotiated further over the next two years.

Conclusion

While activists cite the potential for health or environmental effects as the root cause of “uninsurability” or prohibitively costly premiums for biotech crop liability insurance, the higher cost of

insurance appears directly and solely related to discriminatory laws, in most instances where biotech crops are not as readily insured as similar non-GMO crops. For those who would deny biotech crops any right to exist, passing laws that dry up sources of liability insurance is a powerful means to reach an end (i.e., biotech crop bans). In a world that does not discriminate against biotech crops through strict liability laws, insurance will generally be available.

VOLUNTARY STANDARDS FOR SUSTAINABLE AGRICULTURE AND BIOFUELS

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Biofuels have suddenly rocketed to the forefront of the national discussion with special attention on the energy and agriculture sectors. Biofuels are loosely defined as any fuel derived from an agricultural crop. *See* Scientific Certification Systems, 2007, Draft sustainable Agriculture Standard (SCS-001). Biomass energy from agricultural products is difficult to quantify and can come from direct burning of agricultural products or wastes for heat, electricity conversion, gasification and liquidation. *See* 19 GEO. INT’L ENVTL L. REV. 673. The growth and harvesting of biomass for electricity generation and other types of energy have significant environmental effects. *Id.* As the biofuels industry continues to grow and receive notice both nationally and internationally, standards to regulate and guide the industry are being developed. One effect of the 2007 Energy Independence and Security Act is to further encourage the production of biofuels, with a central focus on ethanol, and increasing pressure on corn production. *See* Energy Independence and Security Act CRS Report for Congress, Dec. 21, 2007.

In an effort to develop standards regulating biofuels production and processing that encourage sustainable agriculture, many standard developing organizations (SDO) have begun to set out voluntary standards. This

article summarizes several standards being used and developed. Significant efforts to develop standards are being made by the American Society of Agriculture and Biological Engineers (ASABE), the American Society of Testing and Materials (ASTM), and the International Standards Organization (ISO). There is an excellent article in the April 2008 Agriculture Management Committee Newsletter detailing the new draft ANSI agricultural sustainability standard SCS-001 written by James H. Andreasen and Christopher M. McDonald. Additional groups are working on alternative standards and include the Keystone Center, the International Union for Conservation of Nature (IUCN) Round Table on Sustainable Biofuels, the World Wildlife Fund (WWF), the Council for Sustainable Biomass Production (CSBP), and the Sustainable Agriculture Network (SAN). The American National Standards Institute (ANSI) reviews possible standards developed by these or other organizations and may approve them as ANSI standards. ANSI is the “preeminent U.S. consensus standards organization and is authorized by law to represent the U.S. in international standards development forums.” See James Andreasen and Christopher McDonald, *Standard Setting and the New Draft ANSI Agricultural Sustainability Standard*, AGRIC. MGMT. COMMITTEE NEWSL. (ABA Sec. of Env’t, Energy, and Resources), Apr. 2008, at 11.

ANSI Standards

The ASABE has developed standards for soil conservation, farm energy use, and other industry standards. ASABE’s standards are proprietary and they do not offer certification. Standards are developed by members of industry, research institutions, government, and academia. The SW-225 Conservation Systems standard for Soil and Water Resource Management guides agricultural soil conservation including guidance on irrigation, decreasing runoff, and soil dynamics. SW-23 concerns industrial agricultural drainage outlets specifically. The ASABE’s standards project X612 guides farm energy use. Farms are encouraged to perform energy audits through the U.S. Department of Agriculture and the Natural Resources Conservation Service (NRCS). ASABE has also developed a Quality Management

Systems for Crop Production standard approved by ANSI (ANSI X9000).

ASTM has also developed a wide range of proprietary, non-certification standards. Two main committees are developing standards applicable to biofuels. The first, the DO-2 Committee, is developing standards for fuel testing and blending for ethanol and biodiesel. This committee has developed a standard practice for evaluating and reporting environmental performance of biobased products. The second major committee developing industry standards for biotechnology is ASTM Committee E-48 which has published forty standards for classifications, guides, practices, specifications terminology, and testing materials for biotechnology. There are also subcommittees under E-48 working on biofuel issues. Subcommittee E-48.05 is focused on the design and evaluation of fuel ethanol manufacturing facilities and biomass conversion. This subcommittee has developed testing methods for characterizing wood, grass, and other cellulosic materials like switch grass, and sets out practices for converting cellulosic feedstocks to fuels. Subcommittee E-48.02 has developed sixteen standards characterizing and identifying biological terms for industry. Subcommittee E48-.03 has created eight standards for unit processes and validation, providing tests, and measurements.

International Standards

While standards are being developed for U.S. biofuel producers, standard development activity on the international level is also growing. Early this year the United States, Brazil, and the European Union released a joint White Paper on internationally compatible biofuel standards, finding considerable alignment between international standards. *Internationally Compatible Biofuel Standards*, White Paper, Tripartite task force, Brazil, E.U. and U.S.A., Dec. 31, 2007. The ISO has developed a host of standards for biofuel production and processing. The ISO offers certification, and their standards are proprietary. The International Accreditation Forum (IAF) accredits the ISO, evaluating and endorsing third party entities involved in the certification or standardization process. The ISO has 103 members and fifty-three participating

countries. More developed countries often have greater representation and some standards may be neglectful of the differing needs of less developed ISO member countries with regard to the environmental sustainability and agricultural practices. The standards are meant for industrial scale use, not retail level. The ISO has developed the ISO 9000 standard, applicable to any business process, which encourages quality management. The ISO 14000 is also a broad standard requiring environmental management processes for any agricultural operations that touch the environment. A third broad standard the ISO has recognized is the ISO 26000, a standard of social corporate responsibility. This standard could have far reaching effects for promoting the sustainable practices of corporations. Corporate Social Responsibility (CSR) is an evolution in the approach towards sustainable development. <http://www.iisd.org/standards/csr.asp>. This overarching principle applies equally to participants in the biofuels industry including seed growers, farmers, producers, processors, scientists, and energy companies.

The ISO has three Technical Committees (TC) that develop and publish standards related to biofuels; TC-27 is a technical committee for all solid mineral fuels. A proposal for solid biofuel standards was made in 2007 and subsequently the TC-238 was created. TC-238 develops standards relating directly to solid biofuels, however has not published any standards. http://www.iso.org/iso/standards_development/technical_committees/. TC-28 is the Petroleum Products and Lubricants technical committee and now has a subcommittee dedicated to liquid biofuels, TC-SC7, which also has yet to publish any standards. *Id.* TC-SC 7 has three subcommittees: one for biodiesel, one for bioethanol, and one joint venture with TC34/SC11 on Input/output quality for feedstocks and fatty acid esters used in biodiesel. *Id.* ISO TC-34 is focused on food products and includes subcommittees on food safety, fair trade practices, genetically modified organisms and derived products, and oleaginous seeds and fruits and oilseed meals, which are produce oil. ISO's new proposed "sustainable agriculture" standard, TC-234, would exclude GMO feeds and GMO fish; U.S. opposition is forming to this draft, which was proposed by Norway.

A related standard is ISO 22000 which governs Food Safety Management Systems. Although a few of these standards are food based they apply to producers of crops which can be used for both food and energy uses.

Non-ANSI Standards

There are also a number of non-ANSI standards and guides. An example is the Keystone Center which does not provide certification, and does not receive accreditation. Keystone Center uses a multi-stakeholder process to create measurable criteria for sustainable agricultural resource management. It has developed metrics for topsoil use and quality, fuel efficiency, reduced water per-crop, yield, reduced nitrogen use in the soil, biodiversity, and ability to meet global demand. The IUCN Roundtable on Sustainable Biofuels is developing standards to offer certification for transport biofuels. www.iucn.org. The WWF has developed commodity specific roundtables to improve supply chain efficiency for several crops, including soy. www.worldwildlifefund.org. The Council for Sustainable Biomass Production is in the early stages of developing non ANSI standards for cellulosic ethanol and biodiesel. csbp.org.

Although there are many organizations developing standards, sufficient standards for soil and water conservation are lacking. In addition neither effects on global food production, nor the detrimental effects of more monocrop agriculture are fully considered. Crops formerly used for food production are now dedicated to sometimes inefficient fuel production. *See* 16 *TRANSATLANTIC L. & CONTEMP. PROBS.* 633. A recent report from the National Research Council indicates that ethanol from corn production may have a large negative impact on the U.S. water supply. *See* 8 *SUSTAINABLE DEV. L. & POL'Y* 53. In the future we can also watch for new causes of action under the Energy Independence and Security Act of 2007. *See* CRS Report for Congress, Dec. 21, 2007.

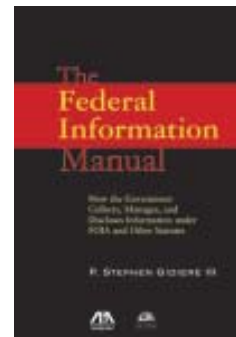
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