The Federal Farm Bill and the Environment

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Every four to five years since the Roosevelt administration, the United States Congress has enacted legislation that is commonly referred to as “the farm bill,” the device by which we as a nation provide financial support to farmers who grow basic field crops (commodities) and to those who produce milk. Even when measured by federal standards, the support has been generous. For example, direct payments to farmers through the 1970s ran at about $3 billion per year, but by 1986 it was up to $26 billion. Since then the amount has varied, it ran at about $32 billion in 2000 and there is no indication that the numbers will abate. If we add to this direct federal support for agricultural research ($85 billion over the last thirty years), farm credit, crop insurance, and domestic and export sales, we are talking about some serious money.

To describe the farm bill as arcane is an understatement. But there are reasons to inquire whether there are links between the farm bill and the nation’s effort to husband the natural and human environment. The inquiry is sensible because farmland occupies roughly half of the land in the contiguous United States, and the manner in which farmers use the land and water is critical to the environment, public health, and the quality of life in rural communities. When we include forests, nearly 70 percent of the land is privately owned. Subsidies to the owners and operators of all these lands have the clear potential to influence how these lands are managed. There is reason to suspect that the wrong policy signals are being given, for as data and information collects, it becomes clear that farms and agricultural production are contributing significantly to both pollution and resource degradation. See, e.g., J.B. Ruhl, Farms, Their Environmental Harms, and Environmental Law, 27 ECOL. L.Q. 263 (2000).

Consider the following examples:

First, nearly one-third of the cultivated land in the U.S. is “highly erodible.” Billions of tons of soil erode each year from cropland, and anywhere from 25 percent to 40 percent of that soil is likely to reach a water body. This sediment is a carrier of other pollutants, especially pesticides, manure, and fertilizers.

Second, farms apply a yearly average of 750 million pounds of pesticides to crops. A significant portion of these move into the soil or travel with both surface and groundwater.

Third, farms release massive quantities of water runoff from fields, known collectively as “nonpoint sources of pollution.” Nonpoint source pollution from all sources accounts for 65 percent to 75 percent of the pollution in the nation’s most polluted waters, and farms are the major source of nonpoint water pollution nationally. In a farm state such as Iowa, nonpoint source pollution accounts for more than 90 percent of stream and river pollution, and that in a state where nearly all rivers are seriously degraded.

Finally, consolidation of farm fields and conversion of field agriculture to “factory” methods results in a continuing loss of habitat in and around farms. In addition, as farmers press to bring more marginal land into production there is also a steady loss of habitat.

Perhaps the most dramatic physical evidence of this intense agricultural activity is the development of a large “hypoxic” zone in the Gulf of Mexico. An area of the Gulf sometimes equal in size to New Jersey becomes depleted of oxygen every year because of the heavy flow of nitrogen and other nutrients down the Mississippi River. The Gulf’s so-called dead zone can only be corrected, according to some government reports, by reducing fertilizer use by 20 percent and restoring 5 million acres of wetlands.

All of this is hardly news. Five years before enactment of the Clean Water Act, an experienced observer anticipated the problem exactly:

I am convinced that both from a technical and from an economic point of view most point source pollution can and will be brought under control in this country in the next 5 to 10 years. As this happens, the problem of pollution from non-point or diffused sources will become our greatest challenge. In no area will the challenge be greater than in agricultural pollution. When we finally succeed in collecting and adequately treating our industrial and municipal wastes we will very likely find that many of our rivers are still dirty, unsafe, and unusable, perhaps because soil erosion makes the water muddy, or pesticide washoff harms the fish life, or reclamation return flow renders the downstream water so brackish as to be unfit for use.

James M. Quigley, Water Quality and Agriculture, in Agriculture and the Quality of Our Environment 134 (1967).

This is not to say that the farm bill is the reason for all of this, although it may be a significant contrib-

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Generalizations are risky; American agriculture is diverse as well as vast. Crops of every kind are produced in every kind of climate and by every kind of social and economic culture. Important parts of American agriculture, including meats, fruits and vegetables, have not, historically, been covered by the farm bill. Of course, important parts of agriculture not covered directly by the farm bill have received distinct and equally impressive subsidies. Foremost among these are federal irrigation projects such as those in the San Joaquin Valley, along the Columbia River, and across the West. These projects are the largest water users in the West, and the environmental problems that typically result from their operation are profound. See National Research Council, Irrigation-Induced Water Quality Problems: What Can Be Learned From the San Joaquin Valley Experience (1989).

The basic structure of contemporary farm support programs can be traced to the historic legislation of the New Deal era. The early Agricultural Adjustment Act of 1933 provided direct benefit payments to farmers who entered into agreements to adjust their production based on individual farm allotments. The purpose was to improve the price of commodities, and a processing tax was levied to generate revenue to pay for the benefits. This legislation was struck down by the Supreme Court in the historic decision, United States v. Butler (Hoosac Mills), 297 U.S. 1 (1936), and was hurriedly replaced by The Soil Conservation and Domestic Allotment Act of 1936, 49 Stat. 1148 (1936), which introduced a different tactic to sidestep the Supreme Court's objections. The new legislation called for the submission of "adjustment" (conservation management) plans, oriented to soil and water conservation objectives and for payment to farmers on submission of proof that plans had been completed. Funds for execution of the conservation measures on farms were provided directly by Congress, rather than through a dedicated processing tax. This new approach meant a change from a price objective to an income objective.

By enacting the new law Congress acquired authorization for making direct payments to farmers, but it did so on the basis of the more popular soil conservation objective rather than the less popular one of deliberately raising prices.

The 1936 soil conservation law was, however, a short-term expedient and was followed by The Agricultural Adjustment Act of 1938, 52 Stat. 31 (1938), in which Congress attempted more comprehensive legislation for adjustment of agricultural production and support of on-farm income. The new act retained the soil conservation features of the 1936 Act and beefed up the system of conservation administration through county and state committees. It then put in place a comprehensive system of policies on production control (to enhance price) and price supports (to enhance income). This new law survived constitutional scrutiny in the familiar decision of Wickard v. Filburn, 317 U.S. 111 (1942), in which a Commerce Clause challenge was brought by a farmer who faced penalties for producing wheat in excess of the marketing quota established for his farm. The Court recognized that the legislation had been drafted in the context of "ruinously low prices resulting from the excess supply. . . ." In its opinion the Court described the circumstances that gave rise to the legislation in language which, with a few relatively minor adjustments, can describe the situation today:

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Importing countries have taken measures to stimulate production and self-sufficiency. The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed in part at least to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government. In the absence of regulation the price of wheat in the United States would be much affected by world conditions.

317 U.S. at 126, 63 S. Ct. at 89-90. Although the economic depression of the 1930s concluded, the farm legislation has been regularly revised and renewed. The key ingredients of the early legislation remain in place: (1) income supplements to farmers; (2) attempts to stimulate price by controlling production; and (3) employing soil conservation as the rationale for supplemental payments to farmers.

Key provisions of current farm legislation would be recognizable in substance to those who wrote the farm legislation of the 1930s. Although nomenclature changes, the familiar ingredients remain the same. Target prices are politically determined price levels. If market prices for specific commodities fall below these target prices, the federal government makes up the difference through cash payments based on the his-
toric production level of each farm. Some form of non-
recourse loan is also found. With these, politically
determined government loan rates are the prices a
farmer receives at harvest for such commodities as
cotton, rice, corn, soybeans, wheat, other feedgrasses,
and sugar. If the market price is below the loan rate at
the end of the contract period (usually nine or ten
months), the government essentially buys the com-
modity at the loan rate (i.e., the government has “no
recourse” upon default when the price at harvest is
below the loan rate). An inevitable part of these price
and income support programs is an attempt to restrict
production through some sort of acreage reduction pro-
gram, or crop “set-aside.” Since the 1930s, the period-
ic farm legislation has continued the policy distinction
between “commodity programs” and “conservation,”
each topic usually occupying separate titles. This is of
more than organizational significance. Farmers were
eligible to receive price and income support payments without any
requirement that they participate in conservation programs, and conser-
vation was viewed historically as a voluntary undertaking. This pat-
tern was altered just slightly in the 1985 farm bill when Congress
responded to renewed public con-
cern about soil erosion and water
runoff with four new provisions.
First, a Conservation Reserve
Program was created. It provided
annual payments to landowners and
operators who voluntarily contract-
ed to retire highly erodible and
other environmentally critical lands
from crop production for a period
of ten years. Second, a Conservation Compliance
Program required that producers who grow commodi-
ties on highly erodible land implement USDA-
approved soil conservation plans or lose eligibility for
price support and other commodity program benefits.
Third, a new “Sodbuster” program required that
farmers who convert highly erodible land to cropland
for the production of commodities do so under an
approved erosion control plan or forfeit their eligibi-
ity for the government programs. Fourth, the
“Swampbuster” program barred farmers who drain
wetlands to grow crops from receiving payments. This
new idea of “cross compliance” between the commodi-
ty and conservation programs was, by farm bill mea-
ures, a bold step but, except for the CRP, has not been
amplified in succeeding farm bills.
The most recent effort by Congress and the
President passed under the name of The Farm Security
a nutshell, it provides the familiar categories of pay-
ments to farmers who grow the commodity crops
(wheat, feed grain, cotton, rice, oilseeds): direct pay-
ments, counter-cyclical payments and marketing (non-
recourse) loans. The Act is, however, unique in the
absolute munificence of its financial terms.
There are also separate price and income support
programs for sugar, peanuts, and dairy products. The
latter lumbers forward under a system of “federal milk
marketing orders” (FMMOs) that was established in the
1930s when milk producers (prior to effective refriger-
ation) had no alternatives to selling their milk to local
handlers and were often captive to unfair buying prac-
tices and subject to highly variable seasonal demand and
supply. FMMOs are regulations to level the playing field
while also ironing out seasonal income variations. An
FMMO, which covers only Grade A fluid milk (about 95
percent of milk production), is a geographically defined
fluid milk demand area. Within each region, handlers’
milk sold in the milk marketing order is “pooled” to
generate a uniform average price, called the blend price. FMMOs set
monthly minimum prices for differ-
ent uses of milk employing a com-
plex system. The resulting blend
price becomes the minimum that
handlers must pay producers. The
essential ingredient is, however,
direct federal support. Whenever
the price of milk drops below a
politically specified level, the USDA
immediately begins to purchase
cheese, butter, and nonfat dry milk
until the price rises, thus assuring a
floor beneath the FMMOs.

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Support for Conservation

Although voluntary on-farm conservation has been
a part of every farm bill since 1936, the package of
conservation options in the 2002 farm bill is diverse,
novative, and generous. The new law calls for the
largest investment in conservation in the history of
recent farm bills—$17.1 billion in new money—or a
total of more than $21 billion altogether. While small
in relation to the nearly $99 billion committed in the
bill to commodity support programs, the program is a
strong one, as a listing of some of the titles suggests.
The Conservation Reserve Program (CRP) is a “set-
aside” or crop-reduction program familiar in commodity
support legislation that pays farmers and landowners to
voluntarily take erodible or marginal land out of produc-
tion. Annual rental payments and cost-share assistance
are provided to landowners who contract to retire their
land for ten to fifteen years and place it in resource-con-
serving cover crops such as native grass or trees.

(Continued on page 36)
Federal Farm Bill
(Continued from page 5)

qualify the land must be “environmentally sensitive,” and landowners bid competitively based on a combination of rental value and public interest criteria measured by an Environmental Benefits Index. The CRP is the single largest conservation program. Enrollment was capped at 36.4 million acres up to 2002, but the new farm bill increases the acreage cap to 39.2 million acres, creates a 1 million acre program for isolated wetlands, and requires the USDA to promulgate a rule to achieve a balance of conservation interests in soil erosion, water quality, and wildlife habitat in determining the acceptability of CRP contract offers.

Closely associated with the CRP is a Wetlands Reserve Program (WRP), and the 2002 farm bill reauthorizes it with an overall enrollment cap of 2.275 million acres, with an annual enrollment cap of 250,000 acres. In exchange for selling a permanent or thirty-year conservation easement, or entering into a cost-share restoration agreement, landowners receive direct payments. Applications for participation also are ranked according to criteria based on potential environmental benefits.

An Environmental Quality Incentives Program (EQIP) was added to farm legislation in 1983 and was reauthorized in 2002, with renewed emphasis. This program provides direct cost assistance to farmers and ranchers who comply with state and federal environmental regulations and otherwise reduce threats to or harm resulting from grazing lands on wetlands, forest, and wildlife habitat. The stated goal is to “promote agricultural production and environmental quality as compatible goals.” The 2002 farm bill provides increasing funding, with 60 percent of program money to go to livestock growers and 40 percent to crop growers, with a $450,000 (l) cap on payments to any single recipient.

A Wildlife Habitat Incentives Program (WHIP) is reauthorized. This is another voluntary program for landowners who want to develop and improve wildlife habitat primarily on private land. The program provides both technical assistance and up to 75 percent cost-share assistance to establish and improve fish and wildlife habitat. Targeting wildlife habitat projects, the program directs support to conservation-minded landowners who are unable to meet the eligibility requirements of other farm bill conservation programs.

A set-aside program that is new with the 2002 farm bill is the Grasslands Reserve Program, which aims to protect native grasslands that have “potential to serve as habitat for animal or plant populations of significant ecological value if the land is restored.” Landowners can apply for ten-, fifteen-, or twenty-year contracts, or thirty-year or permanent easements.

Another program that is new in 2002 is the so-called Conservation Security Program (CSP). Potentially it is the most significant of all of the conservation programs, marks the sharpest deviation from farm bill precedent, and may, in fact, anticipate the form of future farm support legislation. CSP is unique in that Congress enacted it with no funding cap. Thus, it is more similar to the price/income commodity support programs, which are entitlement programs open to all who qualify. Any farmer or rancher can develop a Conservation Security Plan and seek approval from the USDA. An annual payment will be calculated including a per-acre base payment, cost share for conservation practices, and enhanced (bonus) payments. The farmer or rancher will then sign a Conservation Security Contract. Each CSP contract will be required to address one or more “resources of concern.”

The 2002 farm bill also continues the Farmland Protection Program (FPP) that addresses the issue of inappropriate conversion of prime farmland and productive farms to nonfarm uses. When a state or local government initiates a farmland protection program, federal matching funds are provided for the purchase of conservation easements or other interests that will protect the land from conversion. Participating landowners must implement conservation plans for any highly erodible land. The farmland protected also must be part of a sustainable agricultural community, have access to markets, and be in an area in which productive agricultural land predominates.

The Farm Bill and the Environment

Although care is required when offering generalizations about a subsidy program as large as the federal farm bill, it is possible to build an argument that the farm subsidy program is inconsistent with the objective of sustainable natural resource man-
The oft-claimed goal of preserving family farms is perhaps the biggest failure of farm policy.

larger farms to swallow up smaller producers. Thus the sound argument exists that the farm programs actually sponsor the demise of the family farm.

The farm programs also fail to encourage those whose production methods are most consistent with a healthy environment. Ranching, for example, is the practice of harvesting natural grasses for feeding to cattle, bison, or sheep. Yet ranchers are virtually ignored by traditional farm legislation. So much the worse, a financially strapped rancher is enticed to plow up invaluable native grass in order to qualify for largesse as a “commodity producer.”

Sponsors of farm legislation also trumpet the goal of rural development—enhancing the quality of economic and social society in rural areas. The failure of farm programs here is even more pronounced than in the case of smaller farms. By every economic measure, rural America is in decline. Whether the measure is farm jobs, off-farm jobs, number of farmers, rural poverty, children’s health, or education, the fact is that the real problems of rural life are not within the reach of the current farm programs. See Environmental Defense, Food for Thought: The Case for Reforming Farm Programs to Preserve the Environment and Help Family Farmers, Ranchers and Foresters (2001), and Congressional Research Service, The 2002 Farm Bill: Overview and Status (July 3, 2002).

As noted, even the conservation programs sponsored by the farm bill must be viewed with a jaundiced eye. They are skewed from the outset because they are, in their largest part, voluntary. Thus, participating landowners tend to be those who already are inclined toward responsible land management. The “bad actors,” who often are also in possession of land that most requires conservation practices, proceed as usual. Conservation programs also do not undertake to moderate the overall intensity of agricultural production, nor do they effectively establish priorities that assure that help goes to the areas and lands that contribute the most to pollution and soil loss.

The CRP provides one example. As the most recent example of a farm program land set-aside, its size is impressive. The CRP pays landowners to take cropland out of production. The primary goal is to protect lands that are prone to erosion by removing them from the plow. The associated goals of improved water quality, better wildlife
vested cropland acres by only 2 million acres. By 1997, however, the CRP-enrolled acres reduced total harvested cropland acres by only about one-half—a slippage rate of 49 percent. More noticeable is the fact that for every $1 increase in the average CRP payment, the amount of acreage planted to major crops increased by 981. In the words of the draft EIS:

[T]he potential for slippage in the CRP program is high. Slippage is beneficial in that cropland supply is largely maintained. Slippage is adverse, however, to the extent that environmental benefits of retiring the land long term are reduced. Land that replaces the CRP enrolled land likely has lower productivity than the CRP land. If it did not, it would have been cropped previously.

Draft EIS, at 5-85. The CRP can also be criticized for its potentially ephemeral environmental benefits. Annual expenditures to support the payments are large, and the environmental benefits are wholly dependent on continued enrollment. Should the ten-year contracts be allowed to lapse, or should market conditions cause farmers to decline contract renewal, the lands will be plowed, returned to (ever-more) intense crop production, and the environmental harm will be as before. In fact, it will be worse because the lands brought into production during CRP will, in the most likely case, continue in production as well.

To varying degrees, each of the conservation programs initiated by the farm bill is subject to this type of critique. For example, the EQIP program is intended to provide financial help to farmers who implement successful conservation practices. However, it too is voluntary and, therefore, not targeted at the lands or farms that pose the greatest threat to soils and waters. In the 2002 farm bill, 60 percent of the EQIP money must go to livestock producers with a benefit cap at a generous $450,000. Critics of this program can, with some assurance, charge that the likely beneficiaries will be large confined animal feeding operations that want subsidies for their liquid waste storage and handling facilities, and that this facilitates the very intensive agricultural practices that are at the source of agricultural pollution.

As has been the case throughout the history of the farm bill, conservation programs are first and foremost alternative devices for channeling money to farmers. Many of these programs generate wonderful short-term, localized benefits to the natural environment. As water quality in agricultural rivers continues to deteriorate and as trade negotiations pressure the United States to reduce direct subsidies to agriculture, the emphasis on wealth transfers in support of conservation and rural development will enjoy continuing emphasis. By themselves, and in their current form, they are an insufficient platform for a sustainable agriculture.

This brief essay focuses on the farm bill and its effect on the environment. While the farm bill cannot, by itself, correct all of the harmful practices, it is certainly the place to begin. Farm price and income supports must be “decoupled” from the general practice of measuring a farmer’s money payment by the amount of grain or pounds of cotton produced, or even by the amount of acres capable of producing. Such programs must minimize the extent to which they encourage production beyond market capacity and beyond the sustainable capacity of individual fields and farms. There are...
many ways to do this. Income supports could be limited to a maximum amount of production per farmer. Cropland not now under tillage could be denied payments. Financial support could be provided not just to commodities but to all crops, with emphasis given to crops that generate conservation benefits, such as those that complete a healthy rotation. It is particularly important to provide support to the inherently sustainable grass-based production, such as that of ranchers, and shifts to grass-based agriculture must be rewarded. Current programs perversely drive landowners away from grass and pasture. Finally, all farmers, as a pre-condition to receipt of financial support, could easily be required to demonstrate present compliance with a whole-farm conservation plan. See J.H. Davidson, Conservation Plans in Agriculture, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,501 (2001). Indeed, this idea lurks in the new farm bill under the name of the Conservation Security Act, which goes further and suggests that the only entitlement available should be to all farmers who are in compliance with established principles of conservation land and water management.

At the least, the conservation compliance mechanisms of the price and income support programs must be strengthened to the point where they represent a meaningful restraint. The Swampbuster program has produced loopholes at every level and of every kind. The Sodbuster program subjects farmers to only minimal limits, and the penalties for noncompliance have been reduced. Cross-compliance is now on the verge of becoming toothless. Many of the features of the conservation programs themselves are inconsistent with the concept of sustainable management. As noted, the CRP is a short-term program. For it to have a long-term payoff, we will need a device with which we target and retain in the CRP those lands which, if returned to cultivation, are most likely to degrade habitat, soils and waters; critical are those in or affecting flood plains and riparian zones. Other CRP lands should be subjected to careful conservation plans before being returned to the plow.

The authors of the conservation programs also must be sensitive to the potential for these programs to subsidize and enhance the very practices that harm the environment. For example, as noted, the EQIP program provides large subsidies for "manure management," thus facilitating the further growth of livestock in confined feedlots. Not only does the program favor large producers, it drives animal production away from practices most consistent with public health and clean water. Perhaps the inherent flaw of the conservation programs is that they represent an abandonment by Congress of the "polluter pays" principle as applied to this vast sector of the national economy. While federal pollution control statutes generally have required industries to internalize environmental costs, field agriculture is exempted by Congress, which has chosen instead to lay-off the cost of this vast pollution on the public, present and future.

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Point Source Discharge?

(Continued from page 8)

begin with (as the Corps' and EPAs regulations recognize is the case for plowing), it is wholly outside the scope of Section 404 and thus cannot be "recaptured." Moreover, even if applicable to plowing, neither element of the recapture statute is satisfied by simply plowing previously ranched agricultural land in its natural state to plant new crops.

In conflict with this two decades of regulations and guidance, the Corps issued public guidance for the first time on December 12, 1996—developed specifically for and targeted directly at the Borden Ranch due to past disputes—distinguishing "deep ripping" from other

33 U.S.C. § 1344(0)(2). On its face, the statute requires two elements for "recapture" of any discharges from an otherwise exempt activity: (1) a new use to which the waters were not previously subject, and (2) consequent and intended impairment of flow or reduction in reach of navigable waters. It is important to keep in mind that if an activity does not "discharge" or "add" pollutants to waters from a point source to