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U.S. Supreme Court Limits the Reach of Wetlands Law

On January 9, 2001, the U.S. Supreme Court, in a 5 to 4 decision, ruled that the U.S. Army Corps of Engineers overstepped its authority when it tried to regulate land use on isolated sites, including ponds used by migratory birds. This Supreme Court decision Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al., 531 U.S. 1 (2001), effectively limits the reach of wetlands law.

The Suit Challenging the Corps' Jurisdiction Over Certain Wetlands

The case involves a consortium of 23 suburban Chicago municipalities that joined to purchase a 533-acre parcel to use as a landfill for disposal of nonhazardous solid waste. The site had been mined for sand and gravel for three decades up until about 1960, after which the remnant excavation trenches evolved into a scattering of permanent and seasonal ponds of varying sizes (i.e., from under one-tenth of an acre to several acres) and depth (i.e., from several inches to several feet) that were visited by migratory birds. The municipality consortium sued the Army Corps of Engineers after the agency asserted jurisdiction over the abandoned site pursuant to its "Migratory Bird Rule," and refused to issue the consortium the necessary Section 404(a) Clean Water Act permit to develop the property.

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The Baseline Debate: What's It All About?

Introduction

Farm policy debates this year have taken on the character of a budget policy seminar. Agricultural groups are discussing such arcane budgetary concepts as the current-policy baseline and whether it is an adequate basis for future Congressional decisions. As usual in farm policy, billions of dollars are at stake even when the issues are obscure.

The current baseline for future farm program spending is billions of dollars less than the actual amounts spent in the past three years. The reason for this disparity is that under budget rules, baselines do not assume a continuation of one-year-at-a-time emergency aid, of the type that Congress has used recently to supplement spending under the current farm bill. Now farm groups fear that future policies will be constrained – and perhaps provide insufficient resources – if the baseline stays as it is.

This article examines the agricultural baseline and some of the questions that have been raised about it.

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In this particular case, the Corps of Engineers had initially concluded that it had no jurisdiction over the site because it contained no “wetlands,” or areas which support “vegetation typically adapted for life in saturated soil conditions” (33 C.F.R. 328.3(b)(1999)). However, after the Illinois Nature Preserves Commission informed the Corps that a number of migratory birds had been observed at the site, the Corps reconsidered and ultimately asserted jurisdiction over the site pursuant to subpart (b) the agency’s “Migratory Bird Rule.” The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements. Thus, on November 16, 1987, the Corps formally “determined that the seasonally ponded, abandoned gravel mining depressions located on this project site, while not wetlands, did qualify as ‘waters of the United States’.”

The Supreme Court Limits the Scope of the Corps’ Wetlands Jurisdiction

However, in this most recent decision, the Supreme Court held that the Corps of Engineers’ regulations extending the definition of “navigable waters” under the Clean Water Act to include intrastate waters used as habitat for migratory birds exceeded the authority granted to the Corps pursuant to the Act. Therefore, the court found that the abandoned sand and gravel pit containing ponds used by migratory birds was not subject to the Corps’ jurisdiction under the Clean Water Act.

The Supreme Court justices split the decision along ideological lines, as often is the case involving the issue of federalism. The court’s five-member conservative majority, lead by Chief Justice William Rehnquist, voted to limit federal power, while its moderates and liberals championed federal involvement. Joining the chief justice were Justices Sandra Day O’Conner, Antonin Scalia, Anthony Kennedy and Clarence Thomas.

Writing for the majority, Chief Justice Rehnquist said Congress intended federal regula-

tion only for wetlands that were contiguous to other U.S. waters. The court determined that permitting federal jurisdiction over and regulation of the Illinois pond site pursuant to the “Migratory Bird Rule” would result in a “significant impingement of the States’ traditional and primary power over land and water use.” The chief justice concluded that in order to rule for the Corps, the court would have to find that the agency’s jurisdiction extended “to ponds that are not adjacent to open water”, and that the text of the Clean Water Act “will not allow this.”

In writing a lengthy opinion for the four dissenting justices, Justice John Paul Stevens noted that “the protection of migratory birds is a well-established federal responsibility” and argued that “no one disputes that the discharge or fill into ‘isolated’ waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations.” After the ruling, former Environmental Protection Agency Administrator Carol Browner also warned that the ruling “weakens America’s ability to protect its wetlands.”

The court did not address the broader constitutional issue of whether Congress overstepped its authority under the Commerce Clause by passing the wetlands law. Prior to the decision by the Supreme Court, the Court of Appeals for the Seventh Circuit held: 1) that the Migratory Bird Rule is a reasonable interpretation of the Clean Water Act, and 2) that Congress has authority under the Commerce Clause to regulate intrastate waters. Since the Supreme Court found that the provisions of Section 404 could not be fairly extended to protect the habitat for migratory birds (and thus overruled the Seventh Circuit on this issue), it did not need to address the potential Commerce Clause issue.

What is a Wetland?

Wetlands are found in a variety of forms throughout the United States. In the most general terms, a wetland is a place periodically saturated with water. But depending on the specifics of the location, they can be quite wet, like a coastal marsh, or they can appear high and dry

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most of the year. Wetlands are known by various names in different regions as swamps, marshes, fens, potholes, playa lakes, or bogs. Wetlands can act as natural filters that help improve the quality of water supplies, recharge ground water, provide natural flood control, and support a wide variety of fish, wildlife and plants.

The Clean Water Act

According to Chief Justice Rehnquist, Congress passed the Clean Water Act for the stated purpose of restoring and maintaining “the chemical, physical, and biological integrity of the Nation’s waters.” (33 U.S.C. 1251(a)). In doing so, Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator” of the EPA in the exercise of authority under this statute.

The Basis of Federal Wetlands Regulation

Established in 1972, the Clean Water Act, with its Section 404 (33 U.S.C. 1344), is the basis for federal wetlands regulation. The Clean Water Act Section 404 program is administered jointly by the Department of the Army and the Environmental Protection Agency. This portion of the Clean Water Act provides the basic legislation that protects wetlands from dredging, filling, and other development activities.

When Congress enacted the Clean Water Act, it authorized the Army Corps of Engineers to issue permits for the discharge of dredged and fill material into waters of the United States, and left it up to the Corps to define “waters of the United States.” Through administrative regulations and judicial interpretation, the Corps and the EPA expanded the scope of this definition to include wetlands.

The Corps has a three-part test requiring wetlands-type vegetation, soils, and hydrology all

to be present in order to have a site considered as wetlands and thus subject to federal regulation. Such regulated wetlands are currently identified using technical criteria contained in a wetland delineation manual issued by the Corps in 1987. The Corps applies the manual criteria in evaluating about 25,000 cases each year to determine whether they are subject to the jurisdiction of the Section 404 program.

The Current Wetland Regulatory System

Wetlands are regulated by several federal agencies, including the Environmental Protection Agency, the Department of Agriculture, and the Army Corps of Engineers. The objective of the current regulatory system is to avoid further losses of wetlands, either by preserving existing wetlands or replacing wetlands that cannot be preserved. With few exceptions, wetlands losses were the result of legal activities authorized by permit or exemptions under existing law.

In the eyes of the law, a wetland is a wetland, whether it was created by God or man. If large areas of wetlands are legally filled, new wetlands must be created in order to reach the stated goal of “no net loss” of wetlands. In recent years, both state and federal regulators have placed greater emphasis on the mitigation of wetlands impacts by requiring the restoration, creation, or permanent preservation of some wetlands in exchange for the right to fill others.

The Corps and the EPA exempt “prior converted lands” (wetlands modified for agricultural practices before 1985) from Section 404 requirements. Otherwise, the Section 404 program applies to agricultural lands. Unfortunately, federal wetlands regulations have been the bane of many farmers in recent years, particularly those who have run afoul of the Corps of Engineers and the other agencies involved in overseeing and interpreting the wetland rules.

The wetlands provisions established in the conservation title of the 1985 Farm Bill are referred to as the “swampbuster” provisions, which today are administered by USDA’s Natural Resources Conservation Service. Swamp-

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buster is a disincentive program that indirectly protects wetlands by making farmers who drain wetlands ineligible for federal farm program benefits.

Exercise of Jurisdiction Under Section 404 of the Clean Water Act

Section 404(a) of the Clean Water Act regulates the discharge of dredged or fill material into “navigable waters.” Thus, Section 404(a) clearly grants the Corps authority to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”

The Clean Water Act defines “navigable waters” as “waters of the United States”(33 U.S.C. 1362(7)), and the Corps’ regulations define such waters to include intrastate waters, “the use, degradation or destruction of which could affect interstate or foreign commerce” (33 C.F.R. 328.3 (a)(3)). In 1986, the Corps attempted to clarify its jurisdiction, stating – in what has been dubbed the “Migratory Bird Rule” – that Section 404(a) extends to intrastate waters that provide habitat for migratory birds (51 Fed. Reg. 41217).

Farm Groups Weigh-in on the Supreme Court Decision

This case has been followed closely by agricultural, business and environmental communities. In fact, wetlands regulations continue to be considered by many to be among the most important issues confronting farmers. On the other hand, environmental activists contend that federal protection of water bodies used by migratory water fowl makes economic sense.

The American Farm Bureau Federation, the North Dakota Farm Bureau Federation, and the National Cattlemen’s Beef Association filed an *amicus curie* (“friend of the court”) brief with the Supreme Court arguing that the Corps of Engineers cannot rely on the “Migratory Bird Rule” to assert jurisdiction over isolated wetlands. The court agreed with assertions that the Corps’ jurisdiction was without authority under the Clean Water Act.

These agricultural organization filed a brief in this case because a ruling against the solid waste agency could have had an adverse impact on the farmers and ranchers – if the lower court’s interpretation of the Clean Water Act to allow the regulation of isolated bodies of water whenever migratory birds are present, was allowed to stand. The Seventh Circuit decision could have required agricultural producers to obtain a permit for activities related to farm ponds, watering troughs, and other water bodies on their property.

EPA Administrator Browner Issues New Regulation on Dredging Operations

After the Supreme Court decision, former EPA Administer Browner issued a new regulation under the Clean Water Act to tighten up on dredging operations related to wetlands. Browner claimed that the new dredging regulation addresses “a major regulatory loophole in the Clean Water Act by clarifying the types of activities that can harm wetlands, streams, and other waters, and are subject generally to Clean Water Act regulation.”

The new regulation modifies the definition of “discharge of dredged material” in order to clarify what types of activities the EPA and the Corps believe are likely to result in discharges that should be regulated. The Corps and the EPA regard the use of mechanized earth moving equipment to conduct land-clearing, ditching, channelization, in-stream mining, or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material, unless project-specific evidence shows that the activity results in only “incidental fallback.” The new rule also provides a definition of what constitutes “non-regulable incidental fallback,” which the EPA says is consistent with a recent District of Columbia Circuit court decision.

Conclusions

The Supreme Court has significantly reined in the federal government’s authority to regulate the nation’s water. The court found that

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the Army Corps of Engineers' decision to claim jurisdiction over isolated ponds and wetlands because of the presence of a few migratory birds was an unauthorized and unwarranted expansion of the Clean Water Act that was beyond Congressional intent in crafting the statute. Thus, this decision effectively prevents the federal government from asserting the right to regulate any body of water no matter how small just because birds lands on a site.

The court rightly determined that Congress had not consented in the development of the Corps of Engineers' rule extending its authority to intrastate waters used by migratory birds. This case reaffirms that federal governmental agencies cannot arbitrarily move to expand their water regulations, and keep millions of acres of additional acres of agricultural land from falling under the jurisdiction of the Corps of Engineers.

However, this decision will heighten the interest among environmental activists to push for new Congressional legislation to expand laws that protect wetlands, as already evidenced by EPA's quick response to the Supreme Court decision with new regulations. According to the Environmental Defense Fund, a broad interpretation of this ruling by environmental regulators means that 20 to 25% of the nation's water will have lost federal protection.

Since the court based its ruling on an agency's improper extension of a federal law provided by Congress, it did not reach the Constitutional question of whether Congress could exercise its authority under the Commerce Clause to regulate such sites (i.e., the court did not have to address whether the federal government or the states have jurisdiction over such sites). This means that the door is left open for Congress to take legislative action in the future to overturn the effects of this decision.

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Randy Green, from Page 1**What is a Baseline?**

A budgetary baseline is really a starting point. It is a tool that allows Congress and the President to judge the effects of policy changes they may be considering. The Congressional Budget Office (CBO) writes: "Budgetary baselines provide the Congress with information about what the fiscal future might look like under a set of assumptions that includes no changes in policy. Baselines are intended as a neutral reference point for measuring what might happen if policy changed." CBO also explains why baselines are important (and sometimes politically sensitive): "The same proposal can appear to increase or decrease spending or revenues depending on the particular baseline used as a benchmark."

A budgetary baseline projects spending and revenues into the future, assuming present policies to continue, and modifying the numbers to account for projected change in such relevant variables as U.S. population, gross domestic product, interest rates, inflation and unemployment.

Introducing its new baseline estimates, CBO provides more detail:

The baseline serves as a neutral benchmark that the Congress can use to measure the effects of proposed changes in spending and revenue policies. It is constructed following rules that are set forth in law ... Those laws generally instruct CBO (and the Administration's Office of Management and Budget) to project federal spending and revenues by assuming that current policies remain the same.

For revenues and mandatory spending, section 257(b) of the Deficit Control Act requires baseline projections to assume that current laws continue without change. In most cases, the laws governing revenues and direct spending are permanent, and the

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projections incorporate the effects of anticipated changes in the economy, demographics, and other relevant factors to which those laws are linked.

In a footnote to this section, CBO notes that there are differences in how the baseline treats new and old spending programs, especially when the programs have an expiration date:

[T]he Deficit Control Act also specifies that expiring spending programs are assumed to continue if they have current year outlays greater than \$50 million and were established on or before the date of enactment of the Balanced Budget Act of 1997 (BBA). Programs established after enactment of the BBA are not automatically continued in the baseline.

CBO and the Office of Management and Budget (OMB) publish baselines each winter, with an update during the summer. These baselines include both mandatory and discretionary spending. **Mandatory spending** comprises programs that provide a statutory benefit level to all qualifying recipients and generally do not need annual appropriations in order to continue. Mandatory programs include entitlements such as Social Security and Medicare, as well as programs that are not technically entitlements but work much the same way, such as farm programs under the Commodity Credit Corporation (CCC).

Discretionary spending is provided through annual appropriation acts. Research grants and federal employee salaries are examples of discretionary spending items within the U.S. Department of Agriculture. In projecting discretionary spending, CBO is instructed by law to assume future annual adjustments equal to the projected rate of inflation.

What is the Agriculture Baseline?

Under Congressional budget laws, all spending is categorized into “functions.” For example, most of the spending we are concerned with in this article is part of “Function 350: Agriculture.” **Budget functions** allow Congress and the public to see how much money the government is spending for broad, common purposes, regardless of which federal agency is actually doing the spending.

Most budget functions include both mandatory and discretionary spending. For example, Function 350 includes the mandatory CCC programs as well as discretionary spending on research, rural development and other programs.

Some federal agencies carry out spending in more than one budget function. To take the CCC as an example again, most of its budget is part of Function 350. However, some – the Conservation Reserve Program and other mandatory conservation spending – is part of Function 300: Natural Resources and Environment.

Current discussions of farm program baselines and spending revolve around the CCC and related accounts. The CBO provides tables describing these accounts and the U.S. Department of Agriculture not only assists in creating the OMB baseline for the same accounts but also publishes a comparable table in its publication *Agricultural Outlook* each month, and sometimes updates the table between issues of that publication on its web site.

So the farm program baseline that is relevant to this year’s budget debates is –

- All mandatory spending;
- Mostly under Function 350 but partly under Function 300.

Table 1 shows the outlays of the CCC. The various columns show –

- Actual spending for the 15 fiscal years through 2000;
- USDA’s most recent (January 16, 2001) publicly available projections for spending in

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2001 and 2002; and

- CBO’s new baseline (January 2001) projections for 2001-2006.

**Table 1
COMMODITY CREDIT
CORPORATION OUTLAYS
ACTUAL & PROJECTED⁹**

Year	CCC Outlays (Actual)	CCC Outlays (USDA Projection 1/16/01)	CCC& Related (CBO 12/00 Baseline)
1986	25,810		
1987	22,408		
1988	12,461		
1989	10,523		
1990	6,471		
1991	10,110		
1992	9,738		
1993	16,047		
1994	10,336		
1995	6,030		
1996	4,646		
1997	7,256		
1998	10,143		
1999	19,223		
2000	32,265		
2001		20,441	19,262
2002		13,067	12,268
2003			11,145
2004			11,069
2005			10,719
2006			9,916
1986-2000 Average	13,564		

One problem in comparing these outlays is that from 1997 onward, they include the Conservation Reserve Program (CRP) and other mandatory conservation programs, whereas the numbers before 1997 do not, since these programs and their predecessors were not part of the CCC at that time. Below, we discuss average outlays in various periods with and without what we call a

“conservation adjustment.” This somewhat arbitrary adjustment adds, to each year before 1997, the simple average of 1997-00 outlays for the CRP and other conservation programs.

The 15-year period 1986-2000 includes years in which surpluses were large, prices low and CCC outlays high, as well as years in which – often because of weather – stocks were tight, farm prices high and CCC outlays low. The three five-year periods 1986-90, 1991-95 and 1996-2000 correspond roughly to the past three farm bills, though each period includes some outlays attributable to the prior farm bill.

- For the 15-year period, outlays averaged \$13.564 billion, or \$15.309 billion with a conservation adjustment.
- For the three five-year periods, average actual outlays were \$15.535 billion for 1986-90, \$10.452 billion for 1991-95 and \$14.707 billion for 1996-2000.

Recent Congressional emergency spending – discussed in more detail in the next section – has increased outlays substantially in both 1999 and 2000. If these years are omitted –

- The 1986-98 average for outlays was \$11.691 billion, or \$13.167 with a conservation adjustment – in each case about \$2 billion per year less than the average for the full 15-year period.

Spending under the current Federal Agriculture Improvement and Reform (FAIR) Act has occurred in 1996 and the subsequent fiscal years. Looking just at the FAIR Act –

- Average 1996-01 spending was \$15.662 billion, or \$15.953 billion with a conservation adjustment for 1996.

Average spending under the FAIR Act has not been dramatically higher than under past farm bills. It was just about the same as the average for 1986-90, a period which also included some years of extremely low farm prices and other years when prices were high. FAIR Act spending has averaged only about \$600 million more than average spending for the entire 15-year period

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(\$15.953 billion vs. \$15.309 billion) when conservation spending is taken into account.

However, the FAIR Act average includes two years of much lower-than-average spending, 1996 and 1997, one year of middling spending levels (1998) and two years in which spending exploded – 1999 at more than \$19 billion, and the all-time record of 2000 at \$32 billion.

The 2000 fiscal year number is somewhat misleading, because that year actually saw emergency payments (“Market Loss Assistance” or MLA payments) for both the 1999 and 2000 crops. Each set of payments was about \$5.5 billion, so if the 2000-crop payment had been made in the 2001 fiscal year instead, spending in 2000 would have fallen and spending in 2001 would have risen by the same amount, bringing each year’s outlays to \$26-\$27 billion.

To see why farm groups are concerned about the CCC baseline, consider the future projections in Table 1. Although spending has risen to \$19 billion in 1999 and \$32 billion in 2000 and will reach approximately \$20 billion in 2001, the CBO baseline forecasts substantial declines in the baseline from 2002 onward. CBO sees average 2002-06 annual outlays of \$10.589 billion, with further declines to the \$7-\$8 billion range in 2007-11 (not shown in the table).

By contrast, 1999-2001 annual average spending has been almost \$24 billion. This means that the CBO baseline is less than half, on average, of what Congress has spent on farm programs in the most recent three fiscal years.

The basic reason that the baseline is so much lower than recent spending is that Congress has passed emergency spending add-ons in annual appropriations bills, and these ostensibly one-time spending events are not included in the baseline. We discuss this topic in the next section.

Emergency Spending: Not in the Baseline

For the 1998, 1999 and 2000 crops, Con-

gress has enacted emergency assistance, with the majority of the aid in the form of Market Loss Assistance (MLA) payments for wheat, feed grains, cotton and rice. These MLA payments were proportional to – and made in the same manner as – the decoupled Production Flexibility payments under the Agricultural Market Transition Act (AMTA payments). Other emergency spending provided assistance for livestock producers, disaster aid for crop producers, income support for non-AMTA crops and other benefits.

For the three fiscal years 1999-2001, the major categories of emergency agricultural appropriations resulted in outlay increases that will average \$7.6 billion a year. These outlays generally corresponded to the 1999, 2000 and 2001 crops. (As noted earlier, the MLA payments for both the 1999 and 2000 crops were bunched into the 2000 fiscal year, but other payments, such as those for oilseeds, are projected to be made in 2001.)

The baseline does not assume that such payments will be made in the future. They are not part of the underlying FAIR Act, so under statutory budget rules, CBO does not assume that they will continue.

Instead, in constructing its CCC baseline, CBO assumes continuation of the FAIR Act, with AMTA payments equal to those made in the final year (2002) of that Act. Furthermore, CBO assumes a continuation of marketing loan rates at their current level. (Outlays vary from year to year because projected prices vary, thus increasing or decreasing outlays for marketing loans. Outlays for AMTA payments do not vary in the baseline.) The agency makes similar assumptions about continuation of conservation programs.

CBO had little if any choice about whether to include emergency spending such as MLA payments in its baseline. The agency would appear to be precluded from doing so by the rules (including statutory rules) under which it operates. However, on the merits, arguments can be made both for and against including emergency spending in baseline projections.

Richard Pasco, from Page 8The Argument For:

The purpose of baselines is to project current policy. Current policy should be understood to include not only what Congress did in 1996, when it passed the FAIR Act, but what Congress has actually done since. Current policy should represent the actual level of benefits that Congress has, in fact, determined are appropriate for agriculture during this period. Obviously, that level of benefits far exceeds the fixed payments provided under the FAIR Act.

Congress may have acted wisely or unwisely, rightly or wrongly, in supplementing AMTA payments with billions of dollars in additional aid. That is a question of policy, not baseline. From the perspective of deciding future policies, the baseline should take as a starting point actual current policy, and the present baseline does not do that. Instead, by projecting future outlays much lower than present levels, the baseline represents an unreasonable assumption that farm programs should be squeezed down significantly.

Instead of being a benchmark from which to judge policy proposals, the baseline risks becoming a determinant of policy: The only farm programs which would appear to “fit” the baseline numbers are those that either scale back benefits dramatically, or shift benefits away from direct taxpayer outlays, e.g., through strict supply controls and high price supports. It is unlikely that either of these extremes represents a reasonable policy choice for Congress in the next farm bill.

The Argument Against:

It is rational to construct a baseline from those policies which Congress has enacted in multi-year statutes that originated in the committees of jurisdiction – not from policies enacted on a year-to-year basis as amendments to appropriation bills. Indeed, to proceed on the latter basis, the baseline would have to consider as long-term policy some emergency appropriations that were not debated by either house of Congress, but were

added without separate votes or extensive discussion by House and Senate appropriations conferees.

A one-time emergency appropriation – even when it is repeated for three years – does not justify assuming similar spending for future years. The emergency appropriation, by definition, lasts only one year. By its own legal terms, it is *not* permanent – so it is inappropriate for budget analysts to assume it to be so.

To turn the level of benefits implied by 1999-2001 emergency spending into a permanent baseline, CBO would have to assume that either –

- Congress would act in each succeeding year of a 10-year period to provide MLA payments, calling each successive act an emergency; or
- Congress would enact a new farm bill with total benefit levels far higher than those in the last farm bill it enacted.

The first assumption strains credulity. Surely a 10-year string of successive unforeseen emergencies requiring ad hoc appropriations would be a bit much to swallow even for a Congress enjoying ever-growing budget surpluses. And the second assumption would defeat a central purpose of baseline construction, by calling something a continuation of current policy when it really reflected a radical change in the underlying statute that gives rise to that policy.

Of course, the second assumption – that Congress enacts a new farm bill substantially more generous than the FAIR Act, or at least one that operates quite differently – is not at all implausible, as an outcome rather than a starting point. It is, in fact, probably more plausible – *as an outcome* – than a simple continuation of the FAIR Act. However, outcomes represent decisions to be made by elected lawmakers, not unelected budget analysts.

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**The Congressional Budget Process
and the Baseline**

Earlier, we discussed several ways to classify spending – as mandatory or discretionary, by function, etc. Now another way of dividing up spending becomes relevant: by Congressional committee.

A certain amount of spending each year is allocated, under the Congressional budget resolution, to each spending committee. This means that if the House or Senate agriculture committees approve new legislation that would change mandatory spending, it will be measured against the sums under their control. Of course, these sums include the mandatory (but not the discretionary) portions of Function 350 (Agriculture), and some mandatory parts of Function 300 (Natural Resources and Environment) as noted above. They also include the large budgets for Food Stamps and other nutrition programs.

The agriculture panels' allocations include all of the CCC baseline we have been considering. When the committees write new farm legislation, the spending consequences will be measured against those sums they are allocated under the budget resolution. If the committees passed a new farm bill with benefits closer to the level of 1999-2001 than to the baseline, the CBO cost estimate on the bill (its "score," in budget parlance) would exceed the committees' allocation by billions of dollars.

There would be both formal and informal consequences. Formally, Congressional "pay-go" rules allow a point of order to be made against legislation that exceeds a committee's allocation, and a super-majority (60 votes in the Senate) is required to override the point of order. The "pay-go" rules are among the chief means of enforcing budgetary discipline.

Informally, a farm bill that appeared to spend much more than the baseline might be significantly more difficult to pass, regardless of Budget Act procedures. Those who opposed it – from the right or the left – would be able to argue

that the agriculture committees had not exercised their fiscal duties in crafting the legislation.

These considerations may be among the reasons farm groups have taken such an interest in the baseline. As we have seen, though, changing the actual baseline is probably not an option.

However, there is a simpler way to bring agreed spending parameters into closer conformity with actual recent experience. Congressional budget resolutions do not have to confine their spending levels to baseline amounts; otherwise, there would be no reason to have a budget resolution. Enacted budget-resolution totals for some spending and revenue categories always differ from the corresponding numbers in the baseline, because the Congressional budget committees assume that the committees of jurisdiction will make policy changes that lead to different spending or revenue totals. For example, a budget resolution can assume enactment of a tax cut – something sure to be debated in this year's budget – and adjust expected revenues accordingly.

In the same way, the 2002 budget resolution (which will be written this spring) could increase the amounts devoted to CCC and the other mandatory agricultural accounts. The last two budget resolutions have done precisely that for another part of Function 350 spending, crop insurance. These budget resolutions created a "reserve fund" – an accounting device that walled off the spending increase until and unless the sums were added to a bill originating in the agriculture committees.

The budget committees could create another reserve fund this year if they chose – though they need not do so in order to increase CCC spending. In any case, nothing prevents them from putting more money into agriculture, except the knowledge that this money cannot then be used for other things.

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How Much Money?

If the budget committees wish to increase farm spending, they will of course have to agree on an amount. We noted earlier that for 1999-2001, MLA payments and other major categories of emergency agricultural appropriations resulted in outlay increases of, on average, \$7.6 billion a year. Farm lobbyists have privately discussed significantly higher annual increases from current baseline levels.

It probably is not possible to arrive at a single point estimate for how far the current baseline diverges from reasonable assumptions about appropriate farm spending levels. A variety of questions need to be answered.

- The recent emergency appropriations included crop and livestock disaster assistance. Should future policies assume continuation of these programs, or reliance on crop insurance and similar established risk-management programs?
- The appropriations also expanded the universe of supported commodities well beyond the traditional list. Benefits flowed to crops such as apples that have not traditionally gotten cash payments. Do these producers want to create new federal payment programs for themselves? Does Congress think it is a good idea?
- New initiatives could arise from the perceived needs of various commodities. Should Congress offer assistance to offset higher fuel and related input prices? What about assistance to offset the cost of compliance with environmental regulations, or as compensation for positive conservation measures?

Depending on how these questions are answered, the “right” number could be less than \$7.6 billion, but it could also be quite a bit more. In the table below, we show what the CBO baseline outlays would look like if Congress decided to add \$7.5 billion, \$10 billion or \$15 billion a year. We show projections through 2009 since that year would correspond to another seven-year farm bill like the FAIR Act.

Table 2
EFFECT OF HYPOTHETICAL
SPENDING INCREASES
ON CCC PROJECTED OUTLAYS
(\$ Million)

Fiscal Year	Actual Spending (98-00) or CBO Forecast (00-09)	Spending with \$7.5 Billion Add-On	Spending with \$10 Billion Add-On	Spending with \$15 Billion Add-On
1998	10,143	NA	NA	NA
1999	19,223	NA	NA	NA
2000	32,265	NA	NA	NA
2001	19,262	NA	NA	NA
2002	12,268	19,768	22,268	27,268
2003	11,145	18,645	21,145	26,145
2004	11,069	18,569	21,069	26,069
2005	10,719	18,219	20,719	25,719
2006	9,916	17,416	19,916	24,916
2007	8,330	15,830	18,330	23,330
2008	7,313	14,813	17,313	22,313
2009	7,874	15,374	17,874	22,874

Obviously, our hypothetical “add-ons” result in large outlays. Adding \$7.5 billion would produce numbers that do not differ greatly from long-term average spending. Adding \$10 billion or \$15 billion would produce a series of projected spending levels higher than any which have been sustained over long periods in the past, though not as high as the (anomalous) \$32 billion of 2000.

There is nothing magic about any of the hypothetical spending levels. Presumably, the budget committees may consider not just what has been spent on emergency aid but also what a reasonable spending level might be for more permanent policy under the next farm bill. The baseline debate will also be, in part, a policy debate, which is perhaps as it should be.

Randy Green, from Page 11**Conclusion**

Both Congress and farm groups could, of course, continue to rely upon annual appropriations measures to compensate farmers for low prices and other vicissitudes. But a debate over appropriate spending levels does offer some benefits.

- A higher budget allocation to the agriculture committees would protect their legislative products against budget-related points of order, the primary means of enforcing budget resolution limits.
- A higher allocation structured as a reserve fund would probably strengthen the authorizing (agriculture) committees' hand against the appropriators, since if such a fund followed precedent, only the authorizing committees would be able to tap it.
- From the authorizers' standpoint, the whole exercise might return more farm policy authority to them, in contrast to recent years in which the appropriations committees have – somewhat involuntarily – taken on the role of making many farm program decisions.
- A higher allocation that was followed by multi-year authorizing legislation – either a new farm bill or some intermediate law to bridge the gap – would stand a better chance of establishing a new, and higher, baseline going forward.

“Building a baseline” is, of course, a two-edged sword. Long-term legislation that creates future baseline will, for the same reason, be assigned a higher cost by the budget score keepers.

That may, however, present much less of a problem now than in prior years. The chairman of the Senate Budget Committee has recently noted the enormous size of 10-year cumulative surplus projections, some \$5.679 trillion from 2002-2010. Subtracting the Social Security trust fund surplus still leaves \$3.191 trillion in surpluses over the next 10 years, including \$118-138 billion in 2002. These forecasts already assume a slowing economy. Even factoring in a recession

would cut the 10-year surplus projection by only 5.4%.

Obviously, there will be many claimants in line for this money. A tax cut – increasingly probable after favorable recent comments by Federal Reserve Chairman Alan Greenspan – will consume a sizable amount of the available funds. But the evidence of recent years suggests that Congressional sympathy for farmers remains strong, and that the chief means of expressing this sympathy is to send money. That does not mean the sky is the limit for farm program spending, but it does suggest a budget debate over these programs will probably result in a healthy spending level.

What policies should go along with the money is, of course, another issue. The budget resolution will only put limits on spending, not write a farm bill. That daunting task lies ahead, and will still face Congress whether the baseline is large or small.

(See Page 13 for Notes)

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NOTES

1. Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2001-2010*, January 2000, p. 9.
2. *Ibid.*
3. Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2002-2011*, January 2001, p. 5f.
4. *Ibid.*
5. *Ibid.*, p. 6.
6. Congressional Budget Office/Natural and Physical Resources Cost Estimates Unit, "CBO December 2000 Baseline for Programs of the Commodity Credit Corporation and Federal Crop Insurance Corporation with Supply and Demand Projections," January 18, 2001.
7. U.S. Department of Agriculture/Economic Research Service, *Agricultural Outlook*, various issues; Farm Services Agency/Budget Division, <http://www.fsa.usda.gov/dam/bud/Table%2035/pr2ers35.pdf>
8. Both CBO's baseline and, when it is published, USDA's baseline will give the reader projections through 2011. After 2006, total projected spending remains below the projected 2002-06 average, at \$7-\$8 billion per year. The Projections in millions of dollars, are 2007, \$8,330; 2008, \$7,874; 2009, \$7874; 2010, \$8014; and 2011, \$8,000.
9. David Orden, Robert Paarlberg, Terry Roe, *Policy Reform in American Agriculture*, Chicago: The University of Chicago Press, 1999, p. 62 (1986); U.S. Department of Agriculture, *Agriculture Outlook*, various issues, Table 35 (1987-99); U.S. Department of Agriculture, <http://www.fsa.usda.gov/dam/bud/Table%2035/pr2ers35.pdf> (2000-02); CBO/NPRCEU, *op. cit.* (2001-2006).
10. A more complete approach would be to add in the actual outlays for the CRP during this period, as well as the discretionary outlays for the various annually-funded conserva-

tion programs that were consolidated into the Environmental Quality Incentives Program in 1996. This would not change the reported numbers much.

11. The Agricultural Market Transition Act is the first title of the FAIR Act. This part of the act is often called Freedom to Farm.
12. U.S. Department of Agriculture, <http://www.fsa.usda.gov/dam/bud/Table%2035/pr2ers35.pdf>
13. Sen. Pete V. Domenici, "The Budget Outlook: Senate GOP Conference," January 5, 2001.

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