# Forty Years After NEPA's Enactment, It Is Time for a Comprehensive Farm Bill Environmental Impact Statement

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## Introduction

There are winners and losers in the modern American farm economy. This reality is in no small part due to U.S. farm policies enacted through generations of omnibus legislation known as Farm Bills. Winners include industrial agricultural giants, such as Cargill, that reap record profits on the strength of government-subsidized cheap inputs,[1] and incorporated holders of tens of thousands of acres that achieve vast economies of scale with GPS-equipped tractors and monocultures of commodity crops. The losers, familiar from press reports, are the individual farmers and workers behind the rapid contraction in the number of U.S. farms—a drop of over 85,000 from 1997 to 2002[2]—and the increase in average acreage, as well as victims of systemic barriers to family farm, sustainable, and organic operations. These outcomes are commonly attributed to U.S. farm policy's preference for monoculture production on huge acreages, which can have the unfortunate result of destabilizing rural communities.[3] Also among the losers are the industries and individuals that experience the negative environmental impacts of U.S. farm policy, including diminished water and soil quality, decreased biodiversity, dwindling freshwater resources, and increased greenhouse gas (GHG) emissions. This article addresses these damages and the failure of federal agencies to observe a law that might provide some measure of transparency, level-headed comparative analysis, and perhaps even mitigation: the National Environmental Policy Act of 1969 (NEPA).[4]

NEPA serves a critical policymaking function. It requires federal agencies that submit recommendations or reports on legislative proposals to pre-

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[1] Press Release, Cargill, Cargill Reports Fourth-Quarter and Fiscal 2008 Earnings (Aug. 19, 2008), *available at* http://www.cargill.com/news-center/news-releases/2008/NA3007599.jsp.

[2] Nat'l Agric. Statistics Serv., U.S. Dep't of Agric., 2002 Census of Agriculture 6 tbl.1 (2004), *available at* http://www.agcensus.usda.gov/Publications/2002/USVolume104.pdf.

[3] *See, e.g.*, Paul Roberts, The End of Food 17–26 (2008).

[4] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370e (2006).

pare an environmental impact statement (EIS) *before* the enactment of any "legislation and all other major Federal actions significantly affecting the quality of the human environment . . . ."[5] However, the U.S. Department of Agriculture (USDA) has submitted recommendations to Congress on successive Farm Bills and implemented the legislation for nearly forty years with only scattered, segmented gestures at NEPA compliance. At the same time, the scope and ecological impact of the Farm Bills have swelled in recent decades, making the need for NEPA analysis increasingly urgent. Initiated to assist recovery from the agricultural depression following World War I and the Dust Bowl that followed, the Farm Bills have gradually taken on the nature of an entitlement that the Congressional Budget Office estimates will cost $289 billion from 2008 through 2012.[6] Policymakers and taxpayers from across the ideological spectrum have questioned whether this is a worthwhile use of such enormous governmental resources.[7] Subjecting the Farm Bill to the EIS process will provide part of that answer.

This article describes how and why federal agencies should subject the Farm Bills to the EIS process by focusing, as an illustration, on the impacts best analyzed by existing research: those caused by corn overproduction and perpetuated by recent corn and ethanol subsidies. Part I describes current Farm Bill programs with demonstrated causal links to environmental and socioeconomic damages. Part II lays out the applicable standards for a NEPA challenge to a legislative enactment. The authors prefer and advocate for a voluntary EIS but acknowledge that applying NEPA to the next Farm Bill may take more than persuasion. Part III, therefore, develops a litigation strategy and concludes that the 2012 Farm Bill represents a ripe opportunity to turn to NEPA for science-based reform.

## I. The U.S. Farm Bill

### *A. Title I Commodities, the Conservation Reserve Program, and Ethanol*

The Food, Conservation, and Energy Act of 2008, commonly known as the 2008 Farm Bill, is the distant descendant of the Agricultural Adjustment Act of 1933,[8] which introduced the first commodity subsidies. Today, federal support for agricultural commodities—including corn, wheat, cotton, rice, soybeans, peanuts, sugar, and milk—is enacted through Title I of the

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[5] *Id.* § 4332(2)(C) (emphasis added).

[6] Letter from Peter Orszag, Dir., Office of Mgmt. & Budget, to Sen. Tom Harkin, Chairman, Comm. on Agric., Nutrition, & Forestry (May 13, 2008) (on file with the Harvard Law School Library).

[7] *See, e.g.*, Daniel Griswold, *Grain Drain: The Hidden Cost of U.S. Rice Subsidies*, 25 Cato Inst. Trade Briefing Paper Series (2006), *available at* http://www.freetrade.org/node/539; Sallie James & Daniel Griswold, *Freeing the Farm: A Farm Bill for All Americans*, 34 Cato Inst. Trade Pol'y Analysis (2007), *available at* http://www.gao.gov/new.items/d031148.pdf.

[8] Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31.

Farm Bill.[9] The current Farm Bill supports the production of agricultural commodities in three basic ways: direct payments, counter-cyclical payments, and marketing loans. Direct payments "are fixed annual payments based on historical production; they do *not* vary with current market prices or yields."[10] The government makes counter-cyclical payments to farmers for certain commodities when market prices fall below a target price—the payment amounting to the difference between the market price and the target. "Marketing loans are nonrecourse loans that farmers can obtain by pledging their harvested commodities as collateral."[11] These loans essentially provide farmers with income for their crops when farmers request the loans (generally when crop prices are low), enabling them to stockpile their products until prices are more favorable.[12] In this way, marketing loans establish a price floor for eligible commodities. Used correctly, government commodity reserves have the potential to stabilize domestic and international production and pricing, giving farmers economic breathing room to plant based on soil and conservation needs rather than brutal market realities.

The Farm Bill also offers some ecologically-minded support to American farmers through several acreage reduction programs. These include the Conservation Reserve Program (CRP), which encourages farmers to enter into ten-to-fifteen-year contracts to set aside historically cultivated acreage for native grasses, trees, filter strips, and buffer zones in exchange for annual rental payments and cost-share assistance for up to half of the cost of the conservation effort.[13] By 1990, farmers had taken 34 million acres out of production through the CRP,[14] and the 2002 Farm Bill raised the CRP enrollment limit to 39.2 million acres.[15]

The 2008 Farm Bill maintains the same basic structure as the 2002 Farm Bill and extends subsidies for most commodities through 2012,[16] when Congress will deliberate over a new agricultural legislation package. While the 2008 Farm Bill continues the CRP, it lowers its acreage limit to 32 million acres, a 19% reduction.[17] In addition, the 2008 Act marks the first occa-

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[9] Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 1001–1623(b), 122 Stat. 1651, 1664–1753.

[10] JIM MONKE, CONG. RESEARCH SERV., FARM COMMODITY PROGRAMS IN THE 2008 FARM BILL 6 (2008), *available at* http://farmpolicy.typepad.com/farmpolicy/files/crs_report_farm_commoidty_program_in_o8_fb.pdf.

[11] *Id.* at 12.

[12] *See id.*

[13] TADLOCK COWAN, CONG. RESEARCH SERV., CONSERVATION RESERVE PROGRAM: STATUS AND CURRENT ISSUES 1–2 (2008), *available at* http://www.nationalaglawcenter.org/assets/crs/RS21613.pdf; *see also* Allen H. Olson, *Federal Farm Programs—Past, Present, and Future—Will We Learn from our Mistakes?*, 6 GREAT PLAINS NAT. RESOURCES J. 1, 19 (2001).

[14] Olson, *supra* note 13, at 19.

[15] Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 2101, 116 Stat. 134, 238–39.

[16] *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, §§ 1001–1623(b), 122 Stat. 1651, 1664–1753 (Title I—Commodity Programs).

[17] *Id.* § 2101–11.

sion on which Congress approved major federal support for agricultural commodities and ethanol under the same legislation.

The predominant federal subsidy for ethanol production is the Volumetric Ethanol Excise Tax Credit (VEETC), which was enacted in 2004 as part of the American Jobs Creation Act.[18] The VEETC made gasoline suppliers eligible for a tax credit of $0.51 per gallon of ethanol blended into motor fuel.[19] The 2008 Farm Bill adjusts the VEETC by reducing the $0.51 per gallon credit to $0.45 per gallon beginning in 2009.[20] The 2008 Farm Bill also extends a tariff on ethanol imports until January 1, 2011.[21] Since introducing it in 1980, Congress had modified the tariff to incorporate two components: "a regular duty of 2.5% ad valorem; and a secondary duty of . . . 54 cents per gallon."[22] Because both ethanol imports and domestically produced ethanol qualify for the VEETC, the tariff offsets the tax credit benefit for ethanol imports; it then imposes an additional tax on imports to keep domestically produced ethanol artificially competitive. Overall, budget analysts expect the ethanol industry to receive a $5 billion boost from the VEETC in 2010.[23] As a result of federal support, domestic ethanol production amounted to nearly 9 billion gallons in 2008.[24] The 2008 Farm Bill's enactment of ethanol and agricultural subsidies under the same legislation is a key reason why the potential environmental impacts of this omnibus legislation (and those of successive Farm Bills) can no longer be ignored.

### *B. Known Environmental Impacts*

It would be too massive an undertaking for a single article to catalog all of the socioeconomic, public health, and environmental impacts to which commodity subsidies contribute. It is also an oversimplification to assign specific impacts to commodity subsidies, which are interlocking pieces in a complex market reality. Such analysis is the proper role of an EIS. Therefore, this article focuses on how the 2008 Farm Bill contributes to the overproduction of corn as one example of an environmental impact worthy of an EIS. Collectively, ethanol subsidies, corn subsidies, and the CRP reduction provide farmers with powerful incentives to increase corn production.

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[18] American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 301, 118 Stat. 1418, 1459–63.

[19] *Id.*

[20] Food, Conservation, and Energy Act § 15331.

[21] *Id.* § 15333.

[22] *Renewable Energy Services: An Examination of U.S. and Foreign Markets, Under § 332(g) of the Tariff Act of 1990, Investigation No. 332-462: Hearing Before the U.S. Int'l Trade Comm.* 5 (2005) (statement of Larry Schafer, Vice President, Renewable Fuels Ass'n).

[23] Energy Info. Admin., Federal Financial Interventions and Subsidies in Energy Markets 2007, at 22 (2008), *available at* http://tonto.eia.doe.gov/FTPROOT/service/srcneaf(2008)01.pdf.

[24] Envtl. Prot. Agency, EPA-420-D-09-001, Draft Regulatory Impact Analysis: Changes to Renewable Fuel Standard Program 110–18 (2009) [hereinafter EPA, RFS2 Analysis], *available at* http://www.epa.gov/otaq/renewablefuels/420d09001.pdf.

Ethanol subsidies are a prime contributor to recent record-breaking corn plantings. Corn accounts for over 95% of U.S. biofuel production.[25] "Hence, the primary consequence of an increase in the demand for ethanol as a gasoline fuel additive is an increase in the demand for corn."[26] Corn ethanol would not be produced in the United States without corn and ethanol subsidies.[27] The 2008 Farm Bill extends direct payments for corn at a rate of $0.28 per bushel and counter-cyclical payments for corn at a target price of $2.63 per bushel.[28] Altogether, federal corn subsidies from 1995 to 2006 amounted to approximately $56.2 billion.[29]

Heightened demand for corn translates into higher corn prices. In early 2007, food industries that use corn products to feed their livestock complained that corn prices had reached $4 per bushel.[30] By July 2008, corn prices peaked at around $8 per bushel before falling again to around $4.[31] Corn prices at this level not only impact the food industry, but also encourage U.S. farmers to devote an unprecedented quantity of farmland to corn production.[32]

The current economic crisis has taken its toll on the ethanol industry.[33] However, ethanol production and corn plantings are expected to continue to grow despite economic difficulties.[34] "As of April 2009, there were 169 fuel ethanol plants operating in the U.S. with a combined estimated production capacity of 10.5 billion gallons per year,"[35] and these accounted for roughly 9% of the U.S. gasoline supply.[36] USDA estimates indicate that ethanol production consumed 4.1 billion bushels of corn in 2009, or roughly 33% of the

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[25] Thomas W. Simpson et al., *The New Gold Rush: Fueling Ethanol Production While Protecting Water Quality*, 37 J. OF ENVTL. QUALITY 318, 318 (2008).

[26] Joshua A. Byrge & Kevin L. Kliesen, *Ethanol: Economic Gain or Drain?*, REGIONAL ECONOMIST, July 2008, at 5, 7, *available at* http://www.stlouisfed.org/publications/re/2008/c/pdf/ethanol.pdf.

[27] John A. Sautter et al., *Construction of a Fool's Paradise: Ethanol Subsidies in America*, SUSTAINABLE DEV. L. & POL'Y, Spring 2007, at 26, 26.

[28] ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., 2008 FARM BILL SIDE-BY-SIDE: TITLE I: COMMODITY PROGRAMS, http://www.ers.usda.gov/farmbill/2008/titles/TitleIcommodities.htm (on file with the Harvard Law School Library).

[29] Envtl. Working Group, Farm Subsidy Database, http://farm.ewg.org/farm/region.php (on file with the Harvard Law School Library).

[30] *See* John Carey & Adrienne Carter, *Food vs. Fuel*, BUS. WK., Feb. 5, 2007, at 80, 80.

[31] Sue Kirchhoff, *Midwest Floods Send Corn Prices Soaring Past $8 a Bushel*, USA TODAY, June 17, 2008, *available at* http://www.usatoday.com/money/industries/food/2008-06-16-corn-prices-jump_N.htm; *see also* Simpson et al., *supra* note 25, at 319.

[32] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1054, AGRICULTURAL CONSERVATION: FARM PROGRAM PAYMENTS ARE AN IMPORTANT FACTOR IN LANDOWNERS' DECISIONS TO CONVERT GRASSLAND TO CROPLAND 20 (2007) [hereinafter GAO REPORT], *available at* http://www.gao.gov/new.items/d071054.pdf.

[33] *See* Clifford Krauss, *Valero Energy, the Oil Refiner, Wins an Auction for 7 Ethanol Plants*, N.Y. TIMES, Mar. 19, 2009, at B3.

[34] *See* ECON. RESEARCH SERV., U.S. DEP'T. OF AGRIC., WORLD AGRICULTURAL SUPPLY AND DEMAND ESTIMATES 1–2 (2009), *available at* http://www.cottonusa.org/files/economicData/WASDE-May-2009.pdf; EPA, RFS2 ANALYSIS, *supra* note 24, at 110–18; John M. Urbanchuk, *The Bright Future of Ethanol*, PHILA. INQUIRER, Apr. 15, 2009, at A15.

[35] EPA, RFS2 ANALYSIS, *supra* note 24, at 111.

[36] Clifford Krauss, *Big Oil Warms to Ethanol*, N.Y. TIMES, May 27, 2009, at B1.

national corn crop.[37] Government mandates and subsidies drive this rapid growth.[38] By the 2015–16 growing season, the ethanol industry is expected to produce 12 to 18 billion gallons of ethanol.[39]

The limit reduction on CRP enrollment exacerbates the problem. High commodity prices and high demand for corn provide farmers with an incentive to return land from expiring CRP contracts to corn production.[40] Past experience and future projections indicate that farmers will remove land from the CRP if that land can earn significantly more money in crop production.[41] Researchers project that as many as 2.9 million acres of conservation land may be diverted to corn production to meet the swelling demand for ethanol in the short term.[42] In 2009, U.S. farmers planted 87 million acres in corn, the second largest corn acreage in more than 60 years,[43] an area nearly the size of Montana. These new corn acres frequently come from pasture, a far better carbon sink, which dropped 42% from 60 to 35 million acres between 2002 and 2007.[44] Simultaneously, 28 million acres under CRP contracts are set to expire by 2010.[45] Overall, the Government Accountability Office (GAO) concludes that rising crop prices are a significant factor in farmers' decisions to convert pasture to cropland.[46] The following sections describe some of the environmental and socioeconomic impacts that are causally related to expanding corn production.

### 1. *Degradation of Terrestrial Ecosystems*

Farmers can increase the size of their corn crops in a number of ways that degrade the environment. Some grow corn on land from expiring CRP contracts, or from land previously used as pasture or fallow, or used for other crops such as cotton.[47] Conversion of grasslands to cropland degrades

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[37] EPA, RFS2 ANALYSIS, *supra* note 24, at 13; U.S. DEP'T. OF AGRIC., *supra* note 34, at 470–72.

[38] *See* Byrge & Kliesen, *supra* note 26, at 5; *see also* Frances B. Smith, *Corn-Based Ethanol: A Case Study in the Law of Unintended Consequences*, 6 COMPETITIVE ENTER. INST. ISSUE ANALYSIS 1 (2007), *available at* http://cei.org/pdf/5976.pdf.

[39] EPA, RFS2 ANALYSIS, *supra* note 24, at 11–12.

[40] Smith, *supra* note 38, at 13.

[41] *See id.*

[42] Simpson et al., *supra* note 25, at 319–20. EPA also concludes that corn and ethanol production threaten current USDA conservation programs. EPA, RFS2 ANALYSIS, *supra* note 24, at 707.

[43] Press Release, Nat'l Agric. Statistics Serv., U.S. Dep't Agric., U.S. Crop Acreage Down Slightly in 2009, But Corn and Soybean Acres Up (June 30, 2009), *available at* http://www.nass.usda.gov/Newsroom/2009/06_30_2009.asp.

[44] NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., 2007 CENSUS OF AGRICULTURE 16 tbl.8 (2009), *available at* http://www.agcensus.usda.gov/Publications/2007/Full_Report/usv1.pdf; Posting of Brian DeVore to Looncommons: A Blog on Minnesota's Environment, http://looncommons.org/2009/12/11/putting-pasture-out-to-pasture/ (Dec. 11, 2009, 18:29 CST) (on file with the Harvard Law School Library).

[45] COWAN, *supra* note 13, at 5.

[46] GAO REPORT, *supra* note 32, at 20.

[47] ECON. RESEARCH SERV., U.S. DEP'T. OF AGRIC., FDS-07D-01, ETHANOL EXPANSION IN THE UNITED STATES: HOW WILL THE AGRICULTURAL SECTOR ADJUST? 7–8 (2007) [hereinafter

terrestrial habitats, which can destabilize biodiversity: "[N]ative grassland provides habitat for wildlife and native species, including native grassland bird species, some of which are declining. The conversion of native grassland to other uses . . . can change the structure and function of habitat such that it no longer supports native wildlife species."[48] The Farm Service Agency (FSA) figures that agricultural practices negatively affect 380 species listed by the government as threatened or endangered.[49] Degradation of grasslands also undermines human activities that depend on ecosystem health. Although it is difficult to place precise monetary value on the benefits of the CRP, the National Resource Conservation Service estimates that the CRP generates an average of $1.4 billion per year through activities such as fishing and hunting on and around preserved lands.[50] This monetized value of CRP-related ecosystem services is a significant link between habitat reduction and impact on the human environment.

2. *Degradation of Aquatic Ecosystems*

The expansion of corn acreage contributes to degraded aquatic ecology through introduction of excessive nitrogen and phosphorus to aquatic ecosystems.[51] Corn typically needs more fertilizer than any other major crop[52] and only absorbs 40–60% of the nitrogen[53] and approximately 40% of the phosphorus that growers apply to it.[54] Fertilizer runoff directly affects the human environment by making drinking water hazardous and increasing the cost of water treatment.[55]

A much-studied impact of nitrogen and phosphorus loading from the Upper Mississippi River Basin (UMRB) is the creation of hypoxia in the Gulf of Mexico—a roughly 8,000-square-mile area popularly known as the "Dead Zone."[56] Fertilizers have a similarly deleterious effect on coastal waters as on land: an overabundance of fertilizer runoff causes immense algae

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USDA, ETHANOL EXPANSION], *available at* http://www.ers.usda.gov/Publications/FDS/2007/05May/FDS07D01/fds07D01.pdf.

[48] GAO REPORT, *supra* note 32, at 8.

[49] FARM SERV. AGENCY, FINAL PROGRAMMATIC IMPACT STATEMENT ON THE CONSERVATION RESERVE PROGRAM 2-62 (2003) [hereinafter EIS ON THE CRP].

[50] COWAN, *supra* note 13, at 7; *see also* EIS ON THE CRP, *supra* note 49, at 2-89 to -92, -98.

[51] EPA, RFS2 ANALYSIS, *supra* note 24, at 705–12.

[52] MARY BOOTH, ENVTL. WORKING GROUP, DEAD IN THE WATER (2006), http://www.ewg.org/reports/deadzone (follow p. 3 hyperlink) (on file with the Harvard Law School Library).

[53] Simpson et al., *supra* note 25, at 320.

[54] Paul Faeth & Suzie Greenhalgh, *Policy Synergies between Nutrient Over-enrichment and Climate Change*, 25 ESTUARIES 869, 869 (2002).

[55] COMM. ON WATER IMPLICATIONS OF BIOFUELS PROD. IN THE U.S., NAT'L RESEARCH COUNCIL, WATER IMPLICATIONS OF BIOFUELS PRODUCTION IN THE UNITED STATES 31–32 (2008) [hereinafter COMM. ON WATER IMPLICATIONS], *available at* http://www.nap.edu/catalog.php?record_id=12039 (follow "Download Free PDF" hyperlink).

[56] Hypoxia is " the condition in which dissolved oxygen is below the level necessary to sustain most animal life—generally defined by dissolved oxygen levels below 2 [milligrams per liter]." COMM. ON ENV'T & NATURAL RES., NAT'L SCI. & TECH. COUNCIL, AN INTEGRATED ASSESSMENT OF HYPOXIA IN THE NORTHERN GULF OF MEXICO 7 (2000), *available at* http://

blooms, the decomposition of which diminishes oxygen levels in ocean waters.[57] Marine life cannot survive in this area, creating "[t]he greatest pollution threat to coastal marine life today . . . ."[58] The scientific consensus is that agricultural pollution from the UMRB is a principal cause of the Dead Zone.[59]

Agricultural pollution also harms the industries that rely on healthy fish and shellfish populations as a source of revenue.[60] The environmental degradation has a cascade effect beyond the areas that suffer directly: broader impacts include localized overfishing due to concentration of fish populations in smaller areas, damage to marine habitats, decreased reproduction rates, increased mortality rates in shoreline areas, and reduced fish growth rates due to restrictions on the food supply.[61] The collective effects of enhanced hypoxia could eventually trigger the collapse of the Gulf fishing industry and ultimately the Gulf ecosystem itself.[62]

Increases in corn acreage and conversion of field crops to row crops also contribute to soil erosion, another phenomenon with direct impacts on aquatic ecosystems. As farmers switch from field crops to corn and return CRP lands to cropland, they remove buffer zones that obstruct pollution and sediment runoff between cropland and waterways. Sediment runoff carries fertilizer and pesticides into aquatic ecosystems,[63] obstructs the path of sunlight to aquatic plants, clogs fish gills, covers spawning areas for aquatic animals,[64] and disrupts sport fishing by reducing desirable fish populations and the depth of rivers and streams.[65] The cost of dredging to keep waterways passable also carries an annual cost of tens of millions of dollars or more.[66] Runoff has been a stubborn impediment to water quality improve-

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oceanservice.noaa.gov/products/hypox_final.pdf; *see also* Kent Garber, *On the Increase: Wastelands in the Water*, U.S. News & World Rep., June 16, 2008, at 26, 26.

[57] Pew Oceans Comm'n, America's Living Oceans: Charting a Course for Sea Change 2 (2003), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceans_final_report.pdf. *See generally* Comm. on Env't and Natural Res., *supra* note 56.

[58] Pew Oceans Comm'n, *supra* note 57, at 2; *see also* EIS on the CRP, *supra* note 49, at 2-15.

[59] *See* N.N. Rabalais et al., *Hypoxia in the Northern Gulf of Mexico: Does the Science Support the Plan to Reduce, Mitigate, and Control Hypoxia?*, 30 Estuaries & Coasts 753, 754 (2007); *see also* Eugene H. Buck, Congr. Research Serv., Marine Dead Zones: Understanding the Problem 4–7 (2007), *available at* http://cnie.org/NLE/CRSreports/07Aug/98-869.pdf; Comm. on Water Implications, *supra* note 53, at 30–31.

[60] *See* EIS on the CRP, *supra* note 49, at 2-18.

[61] Buck, *supra* note 59, at 8.

[62] Mary L. Belefski & Larinda Tervelt Norton, *Hypoxia in the Gulf of Mexico: A Historical and Policy Perspective*, 12 Tul. Envtl. L.J. 331, 338 (1999).

[63] *See* Comm. on Water Implications, *supra* note 55, at 13, 30.

[64] Michelle Perez et al., Envtl. Working Group, Trouble Downstream: Upgrading Conservation Compliance 15 (2007), *available at* http://www.ewg.org/files/EWG_Compliance_wholereport.pdf.

[65] *See* Comm. on Water Implications, *supra* note 55, at 30; Great Lakes Comm'n, U.S. Army Corps of Eng'rs, The Potential Impacts of Increased Corn Production for Ethanol in the Great Lakes-St. Lawrence River Region 28 (2007), *available at* http://www.glc.org/tributary/pubs/documents/EthanolPaper121807FINAL.pdf.

[66] *See* Great Lakes Comm'n, U.S. Army Corps of Eng'rs, *supra* note 65, at 28.

ment nationwide, in part because the Clean Water Act provides relatively weak tools for limiting this kind of pollution. Over the long-term, erosion also diminishes soil quality and its ability to sustain agricultural production altogether.[67]

### 3. *Climate Change*

Climate change will likely trigger an unprecedented ecological and economic disaster in America's breadbasket.[68] Greater certainty about the greenhouse gas (GHG) impact of biofuel is therefore essential to good farm and climate policy. Life cycle analysis studies vary widely in their conclusions about GHG emissions from corn ethanol, while system-wide accounting may further alter our understanding of biofuel's carbon footprint.[69] In a life cycle analysis, researchers track the energy inputs from all of the processes that contributed to the development of a product throughout its entire lifespan. For corn ethanol, lifecycle analysis commonly includes: (1) emissions from agricultural inputs in the growing and harvesting processes, including those from nitrogen and phosphorous fertilizers, pesticides, herbicides, and energy and fuel consumption; (2) emissions from energy and fuel consumed to transport the corn to biorefineries; (3) energy and fuel consumed to convert corn to ethanol at biorefineries; and (4) the burning of ethanol as transportation fuel.[70]

Though some studies conducted prior to 2008 have found a net reduction of GHG emissions for ethanol production and use, most do not control for changes in land use.[71] Taking land use changes into account can significantly (and controversially) alter the results of the analysis. The theoretical GHG reduction that results from ethanol use depends on the premise that "growing biofuel feedstocks removes carbon dioxide from the atmosphere," rather than the notion that burning ethanol releases fewer GHG emissions than gasoline does.[72] However, lifecycle GHG emissions from ethanol production and use may match or exceed those from production and use of

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[67] *See* EIS ON THE CRP, *supra* note 49, at 2-7.

[68] *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

[69] *See* Hongli Feng et al., *Greenhouse Gas Impacts of Ethanol from Iowa Corn: Life Cycle Analysis versus System-wide Accounting* 24 (Ctr. for Agric. & Rural Dev., CARD Working Paper No. 08-WP 461, 2008), *available at* http://www.card.iastate.edu/publications/DBS/PDFFiles/08wp461.pdf; Timothy Searchinger et al., *Use of U.S. Croplands for Biofuels Increases Greenhouse Gases Through Emissions from Land-Use Change*, 319 SCIENCE 1238, 1238 (2008).

[70] Feng et al., *supra* note 69, at 3–4.

[71] Union of Concerned Scientists, The Truth about Ethanol, http://www.ucsusa.org/clean_vehicles/fuel_economy/ethanol-frequently-asked-questions.html (on file with the Harvard Law School Library); *see also* NAOMI PEÑA, PEW CTR. ON GLOBAL CLIMATE CHANGE, BIOFUELS FOR TRANSPORTATION: A CLIMATE PERSPECTIVE 11 (2008), *available at* http://www.pewclimate.org/docUploads/BiofuelsFINAL.pdf; Searchinger et al., *supra* note 69, at 1238.

[72] Searchinger et al., *supra* note 69, at 1238.

gasoline.[73] If farmers convert grasslands or forest to cropland, then the ethanol emerging from that corn crop may be a net contributor to climate change because the grasslands or forest were greater carbon sinks than the cornfield can be.[74] Even absent changes in land use, it is unclear that ethanol reduces GHG emissions. Ethanol production requires a substantial input of fossil fuels,[75] and some studies conclude that ethanol production consumes substantially more energy than it yields.[76] Recent studies have found that nitrous oxide ($N_2O$) released from nitrogen fertilizer is a serious concern because its global warming potential is roughly 300 times that of carbon dioxide, and agriculture is the main source of anthropogenic $N_2O$ emissions.[77]

In May 2009, the U.S. Environmental Protection Agency (EPA) released a draft report evaluating the GHG impacts of biofuel, as mandated by the Energy Independence and Security Act of 2007 (EISA), to determine whether or not biofuel meet the GHG reduction requirements of EISA for different categories of renewable fuel.[78] The final rule, expected to be published in 2010, will provide new scientific guidance in the debate, and could contribute to a Farm Bill EIS. It is in this context—replete with controversy about how to analyze a vast quantity of relevant scientific data and turn it into good policy—that we turn to NEPA, a law designed for precisely this sort of complex environmental policy question. Astonishingly, comprehensive NEPA analysis has never been applied to the Farm Bill.

## II. The National Environmental Policy Act of 1969 (NEPA)

NEPA is "commonly regarded as the most significant environmental law on the planet,"[79] and overall, the statute is a success, as several examples indicate. NEPA litigation forced USDA to employ a biological insecticide instead of carbaryl—which increases the risk of cancer in children when

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[73] *Id.*

[74] *Id.*; *see also* Union of Concerned Scientists, *supra* note 71.

[75] *See*, *e.g.*, Douglas G. Tiffany, *Economic and Environmental Impacts of U.S. Corn Ethanol Production and Use*, 5 Regional Econ. Dev. 42, 44–46 (2009), *available at* http://research.stlouisfed.org/publications/red/2009/01/Tiffany.pdf.

[76] L. Leon Geyer et al., *Ethanol, Biomass, Biofuels and Energy: A Profile and Overview*, 12 Drake J. Agric. L. 61, 71–72 (2007); David Pimentel, *Ethanol Fuels: Energy Balance, Economics, and Environmental Impacts are Negative*, 12 Nat. Resources Res. 127, 127 (2003), *available at* http://www.ethanol-gec.org/netenergy/neypimentel.pdf.

[77] M.P. Dusenbury et al., *Nitrous Oxide Emissions from a Northern Great Plains Soil as Influenced by Nitrogen Management and Cropping Systems*, 37 J. Envtl. Quality 542, 542 (2008); *see also* Faeth & Greenhalgh, *supra* note 54, at 871; Jason Hill et al., *Environmental, Economic, and Energetic Costs and Benefits of Biodiesel and Ethanol Biofuels,* 103 Proc. Nat'l Acad. Sci. 11206, 11207 (2006).

[78] EPA, RFS2 Analysis, *supra* note 24.

[79] William H. Rodgers, Jr., *Defeating Environmental Law: The Geology of Legal Advantage*, 15 Pace Envtl. L. Rev. 1, 14 (1997); *see also* Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. Envtl. L.J. 333, 333 (2004).

ingested—to control the Gypsy Moth population in South Salem, Oregon.[80] It also led to the cancellation of tritium production nuclear reactors in the early 1990s; the denial of a license to construct a hydroelectric dam on the scenic Penobscot River in Maine; and the abandonment of dredging in Arkansas, ultimately saving a critical bird habitat.[81] Although driven by litigation, these outcomes reflect the success of the EIS process in shifting policy outcomes. The 2012 Farm Bill provides an opportunity to build on this history of success. The following sections parse NEPA's EIS requirement and demonstrate why an EIS should be required for the Farm Bill.

### *A. NEPA Requires a Farm Bill EIS*

#### 1. *Overview of NEPA's EIS Requirement*

NEPA explicitly states that its purpose is to prevent damage to the environment and to encourage ecological harmony and understanding.[82] To that end, NEPA's "action forcing" provision, § 4332(2)(C), provides that all federal agencies must "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on . . . the environmental impact of the proposed action . . . ."[83] NEPA does not stipulate any particular result; rather, the preparation of an EIS is a procedural requirement.[84] Agencies are not, however, free to disregard the findings of an impact statement.[85] Rather, agencies must take a "hard look" at a policy's significant environmental effects before taking any action.[86] Justice Stevens, writing for a unanimous Court in 1989, reasoned that "by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[87] The D.C. Circuit has also recognized that "the basic thrust of NEPA is to require consideration of environmental effects of pro-

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[80] E-mail from John Bonine, Professor of Law, Univ. of Or. Sch. of Law, to John-Mark Stensvaag, Professor of Law, Univ. of Iowa Coll. of Law (May 3, 2005) (on file with the Harvard Law School Library).

[81] ROBERT G. DREHER, GEORGETOWN ENVTL. LAW & POLICY INST., NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT 4–6 (2005), *available at* http://www.law.georgetown.edu/gelpi/research_archive/nepa/NEPAUnderSiegeFinal.pdf.

[82] 42 U.S.C. § 4321 (2000).

[83] *Id.* § 4332(2)(C). "Environmental impact statement means a detailed written statement as required by section [4332](2)(C) of the Act." 40 C.F.R. § 1508.11 (2007).

[84] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–51 (1989).

[85] Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1117–18 (D.C. Cir. 1971).

[86] *See*, *e.g.*, Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983); Kleppe v. Sierra Club, 427 U.S. 390, 409 n.21 (1976).

[87] *Methow Valley Citizens Council*, 490 U.S. at 349.

posed agency action long enough before that action is taken so that important agency decisions can meaningfully reflect environmental concerns."[88]

NEPA also established the Council on Environmental Quality (CEQ), which was later empowered to interpret and issue regulations governing NEPA's requirements.[89] CEQ regulations provide guidance on whether an agency should prepare an EIS.[90] If an agency is uncertain whether an EIS is required, then that agency must prepare an environmental assessment (EA). An EA is a highly abbreviated version of an EIS conducted for the purpose of determining whether an EIS is necessary.[91] Should an agency determine that the environmental effects of a given policy are not significant, then that agency must issue a Finding of No Significant Impact (FONSI) outlining the reasons why the policy will not have a significant impact.[92] Otherwise, the agency must conduct a full EIS. To conserve resources, however, many agencies have approved exemptions, or "categorical exclusions," for certain categories of standard policies that have consistently been found to have no significant impact.[93]

### 2. *The Farm Bill is a Proposal for Legislation*

NEPA is not limited to administrative actions, but also imparts a duty on agencies to prepare EISs for proposals for legislation, such as the Farm Bill.[94] The D.C. Circuit explained: "The impact statement is . . . for the guidance of [Congress and the President], and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration . . . ."[95] NEPA's legislative EIS requirement also enables public participation in the decision-making process.[96] As Judge Wright of the D.C. Circuit opined, "NEPA establishes the [EIS] requirement for proposals for legislation in part to ensure that the public has an opportunity to participate meaningfully in decisionmaking at the administrative and legislative levels."[97]

The breadth of legislation that has been subject to an EIS dispute ranges from the North American Free Trade Agreement (NAFTA)[98] to the construc-

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[88] Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973).

[89] *See* 42 U.S.C. §§ 4342, 4344 (2006); Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977).

[90] 40 C.F.R. § 1501.4 (2007).

[91] *Id.* § 1508.9.

[92] *Id.* § 1508.13.

[93] *See* 7 C.F.R. § 799.10 (2008); 40 C.F.R. § 1508.4.

[94] *See* 40 C.F.R. § 1508.17 (defining the meaning of "legislation" in the context of NEPA's EIS requirement).

[95] Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 835 (D.C. Cir. 1972).

[96] Izaak Walton League v. Marsh, 655 F.2d 346, 365 (D.C. Cir. 1981) (citing Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975)).

[97] *Izaak Walton League,* 655 F.2d at 365.

[98] The U.S. District Court for the District of Columbia found that that NAFTA requires an EIS. Pub. Citizen v. Office of the U.S. Trade Representative, 822 F. Supp. 21, 29 (D.D.C. 1993), *rev'd on other grounds*, 5 F.3d 549 (D.C. Cir. 1993).

tion of a particular lock and dam.[99] Generally, a legislative EIS does not require a justification for its scope, which should simply match the scope of the proposal for which it is being prepared.[100] The EIS for the Energy Independence Act of 1975 provides an instructive example of an appropriately tiered programmatic EIS and evidences a precedent in support of NEPA review of omnibus legislation.[101] "A programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program. The thesis underlying programmatic EISs is that a systematic program is likely to generate disparate yet related impacts."[102] Agencies may offer a "tiered" analysis to tackle complex national policies in a single EIS (or series of related EISs) by presenting the impact calculus in a general manner first, and subsequently referencing these overall findings within the context of each specific component of the overall policy analysis.[103]

Even so, there is often uncertainty as to the appropriate scope of an EIS. Federal courts have consistently held that NEPA does not allow division of a larger federal action into smaller pieces to diminish the apparent impact described in an EIS, a practice referred to as "piecemealing" or "segmentation."[104] Segmentation is a particular concern for a Farm Bill EIS, where so many interlocking programs have developed over time. To avoid segmentation, USDA could create tiers within the EIS by analyzing the Farm Bill's environmental and socioeconomic effects generally, and then make references to that general discussion in each individual policy action. Although this Article focuses on the cumulative impacts of corn subsidies, ethanol subsidies, and CRP reduction, an adequate Farm Bill EIS should evaluate the full suite of Farm Bill programs, at least to the EA level.

No agency, however, has issued an EA/FONSI or EIS for the Commodity Title of any Farm Bill for forty years. In past years, agencies voluntarily prepared EISs for omnibus agricultural and energy legislation such as the Agricultural Act of 1970[105] and the Energy Independence Act of 1975.[106] In addition, certain subsets of agricultural programs have been subjected to the EIS process, such as the 2002 Farm Bill's reduction of the CRP's enrollment limit.[107] Agricultural policy, however, has changed dramatically since the 1970s, and these previous EISs are too dated and narrow to accurately de-

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[99] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Callaway (*Atchison II*), 431 F.Supp. 722 (D.D.C. 1977).

[100] *See* 40 C.F.R. § 1506.8(b)(1) (2007).

[101] FED. ENERGY ADMIN., DES 75-2, DRAFT ENVIRONMENTAL IMPACT STATEMENT ON THE ENERGY INDEPENDENCE ACT OF 1975 AND RELATED TAX PROPOSALS 1-1 (1975).

[102] Found. on Econ. Trends v. Heckler, 756 F.2d 143, 159 (D.C. Cir. 1985) (quoting Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n, 677 F.2d 883, 888 (D.C. Cir. 1981)); s*ee also* Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976).

[103] 40 C.F.R. § 1502.20 (2007).

[104] *See* W. Chi., Ill. v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 650 (7th Cir. 1983).

[105] U.S. DEP'T OF AGRIC., USDA-ASCS-ES (Leg) 73-3, DRAFT ENVIRONMENTAL STATEMENT ON THE EXTENSION OF THE AGRICULTURAL ACT OF 1970 (1973).

[106] FED. ENERGY ADMIN., *supra* note 101.

[107] *See* EIS ON THE CRP, *supra* note 49.

scribe the cumulative, synergistic effects of contemporary commodity subsidies. An EIS that investigates the entire Farm Bill is therefore urgently needed to facilitate a national conversation on farm programs that may well result in more ecologically and socially balanced farm policy. A *prospective* EIS that evaluates proposed policy enactments is preferable, so that established program commitments and market stability are upheld.

3. *The Farm Bill Significantly Affects the Quality of the Human Environment*

CEQ regulations provide that the "[h]uman environment shall . . . include the natural and physical environment and the relationship of people with that environment. . . . This means that economic or social effects are not intended by themselves to require preparation of an [EIS]."[108] Thus, an EIS must investigate and disclose a proposed action's foreseeable, significant, and cumulative ecological consequences and may also consider public health and socioeconomic effects.[109] A "cumulative" impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[110] Courts have also recognized cumulative effects as fulfilling NEPA's "significant impact" requirement.[111]

The test for significance provides a critical threshold in disputes concerning impact statements—or the lack thereof—for projects with diffuse or questionable environmental consequences. Whether an impact qualifies as "significant" depends on the context of the project and the intensity of the potential environmental and economic consequences.[112] There can be little doubt that the Farm Bill significantly affects the quality of the human environment. Although more analysis is necessary, the evidence linking current agricultural policy to significant, quantifiable damage to the environment and public health is powerful. While the effects of a single tariff, tax credit, or subsidy payment might go unnoticed, in the aggregate, federal farm programs contribute to habitat destruction, water pollution, soil erosion, and climate change.[113]

4. *No Categorical Exclusion Should Apply*

Under CEQ regulations, each agency and sub-agency must issue its own NEPA regulations to supplement those issued by the agencies above.

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[108] 40 C.F.R. § 1508.14 (2007).

[109] *See* Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 106–07 (1983) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976)); 40 CFR §§ 1508.7–1508.8.

[110] 40 C.F.R. § 1508.7.

[111] *See* Hanly v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972).

[112] 40 C.F.R. § 1508.27.

[113] *See supra* Part I(B).

Federal support for ethanol production is not categorically excluded from NEPA's EIS requirement. FSA regulations, however, do categorically exclude "commodity income and support,"[114] and USDA interprets that regulation to exclude the Commodity Title of the Farm Bill from NEPA review.[115]

That interpretation, however, is incorrect. First, under FSA regulations, environmental evaluations determine whether an EA or EIS is needed.[116] These regulations also mandate that the agency prepare an environmental evaluation "of proposed legislation, a new program, [or] . . . a major change in a program"[117] that "might have significant impacts on the environment."[118] Each new Farm Bill begins as proposed legislation and constitutes a major change in a program. FSA regulations also provide that legislative proposals and changes to or concerns with ongoing programs will generally trigger the NEPA analysis.[119]

Second, FSA regulations require environmental evaluations even for the programs that it lists as categorically excluded "where the presence of extraordinary circumstances or other unforeseeable factors indicate that some other level of environmental review may be appropriate."[120] Given the environmental impacts to which present farm programs contribute, it is possible to make a prima facie argument that the Farm Bill exceeds this threshold.

Third, "[i]f an environmental evaluation indicates that [a categorically excluded] action will significantly affect the quality of the human environment, the preparation of an [EA] and/or an EIS will be necessary."[121] Fourth, FSA must conduct NEPA analysis when it "receives notice that an ongoing program may have a significant adverse impact."[122] Breaking past FSA's environmental evaluation stage, then, may require as little as notice, but could potentially necessitate litigation.

Finally, USDA regulations indicate that its sub-agencies must continually "scrutinize their activities to determine continued eligibility for categorical exclusion."[123] It is likely that FSA and USDA's scrutiny of the categorical exclusion of the Commodity Title is inadequate given the grave nature of the harms that many analysts have linked to the Farm Bill. NEPA

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[114] 7 C.F.R. § 799.10(b)(2)(x) (2008).

[115] *See*, *e.g.*, Implementation of the Farm Program Provisions of the 1996 Farm Bill, 61 Fed. Reg. 37,544 (July 18, 1996) (indicating that Title I of the 1996 Farm Bill is excluded from NEPA review); Marketing Assistance Loans and Loan Deficiency Payments for the 2006 Through 2007 Crop Years, 71 Fed. Reg. 32,415 (June 6, 2006) (to be codified at 7 C.F.R. pts. 1421 and 1427) (indicating that certain commodity support for the 2006–07 growing season is exempt from NEPA review); *see also* Jennifer Hoffpauir, Note, *The Environmental Impact of Commodity Subsidies: NEPA and the Farm Bill*, 20 FORDHAM ENVTL. L. REV. 233, 242–43 (2009).

[116] *See* 7 C.F.R. §§ 799.4(a), 799.10(c).

[117] *Id.* § 799.4.

[118] *Id.* § 799.3.

[119] *See id.* § 799.9(b).

[120] *Id.* § 799.10(c).

[121] *Id.* § 799.10(d).

[122] *Id.* § 799.10(c).

[123] *Id.* § 1b.3(c) (2008).

analysis for commodity subsidies is long overdue, according to the terms of FSA and USDA's own regulations.

### *B. Makeup and Preparation of a Farm Bill EIS*

An EIS must include a detailed evaluation of each of the significant environmental consequences of a proposed action. This must include consideration of reasonable alternative courses of action and their environmental effects, as well as strategies that could mitigate the suggested policy's undesirable impacts.[124] The alternatives and mitigation measures must be feasible, but the fact that an alternative will entail legislative action does not justify its exclusion from an EIS.[125] Agencies under whose jurisdiction an action falls, as well as agencies with special expertise in the areas implicated by the policy, should cooperate in EIS preparation.[126] If more than one federal agency is involved, one "lead agency" supervises the preparation of the EIS.[127]

A Farm Bill EIS will require the cooperation of several agencies, with USDA acting as lead agency. Other participating agencies should include the Department of Energy, which generally enforces biofuel policies; the Treasury Department, and specifically the Internal Revenue Service division, which administers the Volumetric Ethanol Excise Tax Credit; and U.S. Customs and Border Protection, which enforces the import duty for fuel ethanol.[128] Federal agencies concerned with climate, the environment, fisheries, and land use (such as the Environmental Protection Agency, U.S. Geological Survey, and National Oceanic and Atmospheric Administration) may also participate in acquiring relevant data and analyzing cumulative environmental impacts, particularly global warming.

## III. Litigation Strategy

"That courts must play a cardinal role in the realization of NEPA's mandate is beyond dispute."[129] Legal scholars, however, describe NEPA's EIS requirement for legislative proposals as a "forgotten clause."[130] In fact, only a handful of cases "have even considered whether the total failure of an

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[124] *See* 40 C.F.R. § 1502.14 (2007).

[125] *See* City of Angoon v. Hodel, 803 F.2d 1016, 1021–22 (9th Cir. 1986) (citing Natural Res. Def. Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972)).

[126] *See* 40 C.F.R. § 1501.6 (2007).

[127] *Id.* § 1501.5.

[128] For more information on import duties, see Brent D. Yacobucci, Cong. Research Serv., CRS Report No. RL3320, Fuel Ethanol: Background and Public Policy Issues (2008), *available at* http://www.nationalaglawcenter.org/assets/crs/RL33290.pdf.

[129] Found. on Econ. Trends v. Heckler, 756 F.2d 143, 151 (D.C. Cir. 1985).

[130] *E.g.*, Silvia L. Serpe, Note, *Reviewability of Environmental Impact Statements on Legislative Proposals after* Franklin v. Massachusetts, 80 Cornell L. Rev. 413, 413 (1995); Ian M. Kirschner, Note, *NEPA's Forgotten Clause: Impact Statements for Legislative Proposals*, 58 B.U. L. Rev. 560, 560 (1978).

agency to prepare an EIS for a legislative proposal can be challenged."[131] The position of the District Court for the District of Columbia, though, is relatively clear: "[T]he . . . EIS requirement for legislative proposals is enforceable by a private right of action, and that private right of action includes challenges to the adequacy of, as well as to the absence of, an EIS . . . ."[132] The D.C. Circuit subsequently upheld this principle, finding:

> Judge Richey's reasoning in [*Atchison II*] persuasive and conclusive. . . . [A legislative EIS] is "intended by Congress to provide detailed environmental information to the public to permit them to participate in a meaningful way in further decisionmaking both at the administrative and legislative levels. In this way, NEPA was intended to ensure that both Congress and the public will be advised of the predicted consequences of the proposed legislation and the alternatives thereto, and they will therefore be able to act responsibly thereon."[133]

The fundamental question is how best to achieve a programmatic Farm Bill EIS. If persuasion fails, a lawsuit targeting the 2008 Farm Bill could challenge either entire titles of the legislation or a narrower group of programs with related impacts. Any suit would likely involve a challenge to the FSA's categorical exclusion to the Commodity Title. Success would likely necessitate a programmatic Farm Bill EIS, to be conducted as a practical matter before the enactment of the succeeding Farm Bill. The following sections analyze the major legal issues that would arise in NEPA litigation against USDA for failure to conduct an EIS for the 2008 Farm Bill.

### *A. Failure to Conduct a Farm Bill EIS is "Arbitrary & Capricious"*

A federal court will review the decision to forego an EIS under the Administrative Procedure Act's (APA) "arbitrary and capricious" standard.[134] Under this standard, a court may reverse an agency's decision

> if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [if the decision] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[135]

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[131] Atchison, Topeka & Santa Fe Ry. Co. v. Callaway, 431 F.Supp. 722, 726 (D.D.C. 1977).

[132] *Id.*

[133] Natural Res. Def. Council v. Lujan, 768 F.Supp. 870, 878 (D.D.C. 1991) (quoting *Atchison II*, 431 F.Supp. at 727–28).

[134] Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97–98 (1983) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415–17 (1971)).

[135] Citizens for Alternatives v. U.S. Dep't of Energy, 485 F.3d 1091, 1098 (10th Cir. 2007); Sierra Club v. Bosworth, 510 F.3d 1016, 1023 (9th Cir. 2007).

It seems unlikely that USDA's defense of its categorical exclusion for federal commodity support will withstand scrutiny even under this deferential standard. To defend its exclusion, USDA cannot make a post-hoc rationalization.[136] Moreover, prior to the exclusion's enactment, the agency must have engaged in a scoping process that considers the excluded policy's cumulative impacts on the environment.[137]

> This has emphatically not been done with regard to the commodity subsidies, since the categorical exclusion was promulgated prior to . . . changes . . . in the several farm bills since 1980. The scope of the environmental impacts cannot possibly have been considered when the full scope of the commodity programs was then unknown.[138]

Finally, because categorical exclusions are, by definition, reserved for policies that have an insignificant environmental impact, USDA will have the burden of documenting that the effect of its commodity support is actually insignificant.[139] And as discussed above, significance is the threshold question in a NEPA case.[140] The categorical exclusion also fails to account for the effects of ethanol subsidies, which compound those of corn and other commodity subsidies. USDA's failure to document the implicitly alleged lack of significant environmental impact for its flagship legislation undermines any deference argument. The tougher questions here involve justiciability, particularly mootness and standing.

### *B. Mootness*

A case becomes moot if "'there is no reasonable expectation . . .' that the alleged violation will recur . . . and . . . interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."[141] Plaintiffs in a NEPA lawsuit concerning the 2008 Farm Bill would likely encounter the argument that such an action is moot because: (1) the 2008 Farm Bill is a completed act; and (2) previous EISs and EAs have already considered the programs in question. The burden of proving a case moot, however, is "heavy,"[142] and plaintiffs are likely to prevail against each of these mootness claims.

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[136] *See Bosworth*, 510 F.3d at 1026.
[137] *Id.*
[138] Hoffpauir, *supra* note 115, at 264.
[139] *Bosworth*, 510 F.3d at 1026 (citing Alaska Ctr. for Env't. v. U.S. Forest Serv., 189 F.3d 851, 859 (9th Cir. 1999)); s*ee also* 40 C.F.R. § 1508.4 (2007).
[140] Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998).
[141] County of L.A. v. Davis, 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).
[142] *W.T. Grant Co*., 345 U.S. at 633.

### 1. *The 2008 Farm Bill's Prior Enactment Does Not Moot a NEPA Action*

An action to enforce the EIS requirement for a legislative proposal is not moot simply because Congress has already enacted the legislation in question. Rather, the District Court for the District of Columbia has held that a NEPA suit filed prior to congressional enactment of a proposal for legislation is not ripe and constitutes judicial interference in the legislative process.[143] To avoid such interference, "redress of [a] plaintiff's grievance [under NEPA] must await definitive Congressional action."[144]

Furthermore, "[a] NEPA case may not be moot if completed phases of a federal agency action can be operated to reduce environmental effects, or if future phases of an action have not yet begun."[145] In *Environmental Defense Fund v. Tennessee Valley Authority*, the Sixth Circuit articulates this principle unambiguously:

> The congressional mandate is clear. Federal officials are to appraise *continuously* all of their activities . . . . They are to coordinate hitherto separate operations so that undesirable environmental effects may be perceived and minimized. Subject only to the limitation of practicability, they are to *strive constantly* to improve federal programs to preserve and enhance the environment.[146]

In *Tennessee Valley Authority*, plaintiffs successfully challenged TVA's failure to perform a legislative EIS for an annual budget appropriation. Analogy to the agricultural subsidies is apt because subsidy payments, like appropriations, are awarded yearly. Similarly, in *West v. Secretary of the Department of Transportation*, the Ninth Circuit held that a NEPA suit against a multi-stage highway interchange project was not moot because the project could be tailored to minimize undesirable environmental effects.[147] Even if the policy were completely enacted with a single pen stroke, that may still "not necessarily preclude the possibility of an equitable decree making right some part of the wrong."[148] Because subsidy payments fluctuate and are awarded on a yearly basis, plaintiffs could argue that they constitute a policy with multiple phases that can be modified to reduce negative environmental and economic effects.

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[143] Chamber of Commerce v. Dep't of Interior, 439 F. Supp. 762, 768 (D.D.C. 1977).

[144] *Id.*

[145] RONALD E. BASS ET AL., THE NEPA BOOK: A STEP-BY-STEP GUIDE ON HOW TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT 177 (2d ed. 2001) (citing West v. Sec'y of the Dep't of Transp., 206 F.3d 920 (9th Cir. 2000)).

[146] Envtl. Def. Fund v. Tenn. Valley Auth., 468 F.2d 1164, 1174 (6th Cir. 1972) (emphasis added). The court concluded that annual appropriations requests constitute "proposals for legislation" within the meaning of NEPA, and as such, each request requires an EIS. *Id.* at 1182.

[147] *See West*, 206 F.3d at 924–26.

[148] Pa. Envtl. Council, Inc. v. Bartlett, 454 F.2d 613, 626 (3d Cir. 1971).

### 2. *Prior EAs and EISs Do Not Moot a NEPA Action*

No agency has issued a programmatic EA/FONSI or EIS for the 2008 Farm Bill. Since 1970, though, various agencies have released several EISs and EAs that are germane to the programs at issue in this Article.[149] However, the presence of prior studies and even EISs does not necessarily moot a NEPA enforcement action. There are two main reasons for this.

First, "a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions."[150] This duty applies "even after release of an EIS."[151] CEQ regulations instruct agencies to supplement EISs if "substantial changes [have been made] in the proposed action that are relevant to environmental concerns; or . . . [if t]here are significant new circumstances or information relevant to environmental concerns . . . ."[152] No comprehensive EA or EIS has attempted to balance the benefits and harms of the environmental and economic impacts of any Farm Bill since 1970. Agricultural policy has changed substantially since then, and there are "significant new circumstances" that are "relevant to environmental concerns."[153] In particular, the 2008 Farm Bill is the first to extend biofuel and commodity supports in the same Act, providing the substantial change necessary to meet this test.

Second, NEPA's EIS requirement applies to "expansion or revision of ongoing programs."[154] Plaintiffs may properly argue that each successive Farm Bill constitutes such an expansion and revision. The CRP and subsidies for commodities were set to terminate at the close of the 2007 growing season. They would have expired but for the 2008 Act, which extends federal agricultural support to 2011–12. The 2008 Farm Bill also revises the CRP's total acreage limit downward by 7.2 million acres. These are notable revisions of ongoing programs that trigger the need for fresh NEPA analysis.

## *C. Standing*

### 1. *Statutory Basis: The Administrative Procedure Act*

NEPA did not create a private right of action.[155] Plaintiffs have therefore come to rely on the APA, which provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial

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[149] *E.g.*, FED. ENERGY ADMIN., *supra* note 101; U.S. DEP'T OF AGRIC., *supra* note 105.

[150] Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1023 (9th Cir. 1980); *see also* Natural Res. Def. Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).

[151] Ass'n Concerned About Tomorrow, Inc. v. Dole, 610 F. Supp. 1101, 1112 (N.D. Tex. 1985) (citing *Warm Springs Dam Task Force*, 621 F.2d at 1023–24).

[152] 40 C.F.R. § 1502.9(c) (2007).

[153] *Id.*

[154] Andrus v. Sierra Club, 442 U.S. 347, 363 n.21 (1979).

[155] Pub. Citizen v. Office of the U.S. Trade Representative, 5 F.3d 549, 551 (D.C. Cir. 1993).

review thereof."[156] Even though a Farm Bill EIS concerns a legislative proposal, federal courts have consistently held that the lack or inadequacy of a legislative EIS is "agency action" within the meaning of the APA.[157]

The APA imposes two burdens that a plaintiff must satisfy to establish a cause of action. First, the plaintiff must show that the injury of which she complains falls within NEPA's "zone of interests."[158] The environmental injuries caused by the Farm Bill are exactly "of the sort that NEPA was 'specifically designed' to protect."[159] Second, the right of action only extends to "final agency action[s]."[160] "To determine when an agency action is final . . . . [t]he core question is whether the agency has completed its decisionmaking process . . . ."[161] The 2008 Farm Bill became law in June 2008, so there is no doubt that the action is final.

2. *Constitutional Requirements*

To establish Article III standing, a plaintiff must usually demonstrate: (1) that she has suffered an injury in fact, which is "concrete and particularized"; (2) a causal connection between the defendant's conduct and the injury; and (3) that a favorable decision will likely redress the injury.[162]

*a. Injury in Fact*

Two conflicting standards govern the degree to which a NEPA plaintiff must show an injury to establish standing: the D.C. Circuit approach[163] and the Ninth Circuit approach.[164] The D.C. Circuit applies "more exacting scrutiny" to injury analysis when the policy in question is not site-specific.[165] Therefore, a plaintiff litigating to compel a Farm Bill EIS will want to bring suit in a circuit that employs the more sensible Ninth Circuit approach.

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[156] 5 U.S.C. § 702 (2006).

[157] Atchison, Topeka & Santa Fe Ry. Co. v. Callaway, 431 F.Supp. 722, 729 (D.D.C. 1977) ("[P]ursuant to 5 U.S.C. § 702, plaintiffs are entitled to judicial review of the agency's alleged failure to prepare an adequate EIS to accompany its proposed legislation."). *See generally* Natural Res. Def. Council v. Lujan, 768 F.Supp. 870 (D.D.C. 1991).

[158] Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990).

[159] Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 665 (D.C. Cir. 1996); *see* 42 U.S.C. § 4321 (2006).

[160] 5 U.S.C. § 704 (2006).

[161] Franklin v. Mass., 505 U.S. 788, 796–97 (1992).

[162] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Usually, the injury must also be "imminent." *Id.* In a suit in which the plaintiff seeks to enforce a procedural right, however, standing analysis will not focus on imminence of injury, but rather whether the injury is "personal and particularized" and was caused by the defendant. *Fla. Audubon Soc'y*, 94 F.3d at 664 (citing *Defenders of Wildlife*, 504 U.S. at 572 n.7).

[163] The Eighth and Eleventh Circuits also prefer this rule. *See* Citizens for Better Forestry v. U.S. Dep't. of Agric., 341 F.3d 961, 974 (9th Cir. 2003).

[164] The Seventh and Tenth Circuits employ the same standard as the Ninth Circuit. *See Citizens for Better Forestry*, 341 F.3d at 974; Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 451–52 (10th Cir. 1996) (indicating that the 10th Circuit rejects the D.C. Circuit's approach).

[165] *Fla. Audubon Soc'y*, 94 F.3d at 667.

A NEPA plaintiff in the Ninth Circuit must demonstrate that: (1) the defendant violated a procedural rule; (2) the procedural rule protects the plaintiff's concrete interests; and (3) it is reasonably probable that the challenged action will threaten those concrete interests.[166] The procedural violation in this instance is the absence of an adequate EIS. To satisfy the concrete interests test, the plaintiff must establish a geographic nexus with the alleged environmental harm.[167] Plaintiffs, however, "need not assert that any specific injury will occur in any specific national forest that their members visit. 'The asserted injury is that environmental consequences might be overlooked' as a result of deficiencies in the government's analysis under environmental statutes.' "[168] After the plaintiff asserts a concrete interest, the Ninth Circuit requires a demonstration that a substantive injury to that interest is reasonably probable.[169] The plaintiff must distinguish herself as "a person with a direct stake in the outcome of a litigation . . . [as opposed to] a person with a mere interest in the problem."[170]

A significant difference between the two circuits' standards lies in the level of specificity to which the plaintiff must show the substantive injury. The D.C. Circuit's approach places an undue evidentiary burden on NEPA plaintiffs who challenge programs with widespread ecological and economic harms[171] by requiring them to show that it is "substantially probable" that the procedural injury results or will result in a substantive injury.[172] In an action concerning the lack or inadequacy of an EIS, the full extent of the injury is not known to the plaintiff, but is necessarily speculative. This is precisely why the Ninth Circuit only requires plaintiffs to demonstrate that an injury to their concrete interests is *reasonably* probable.[173] To oblige a NEPA plaintiff to validate an environmental injury to a substantial degree is to require her to implement the very environmental investigation that she seeks from the defendant agency in the first place.[174]

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[166] *Citizens for Better Forestry*, 341 F.3d at 969–70.

[167] *Id.* at 971.

[168] *Id.* at 971–72 (quoting Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355 (9th Cir. 1994) (internal quotation marks omitted)).

[169] *Citizens for Better Forestry*, 341 F.3d at 972.

[170] United States v. Students Challenging Regulatory Agency Procedures (*SCRAP I*), 412 U.S. 669, 689 n.14 (1973) (indicating that such "direct stakes" have included "a fraction of a vote . . . a $5 fine . . . and a $1.50 poll tax").

[171] Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 665–66 (D.C. Cir. 1996); *see also SCRAP I*, 412 U.S. at 688.

[172] *Fla. Audubon Soc'y*, 94 F.3d at 665.

[173] *See, e.g.*, Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 452 (10th Cir. 1996). The D.C. Circuit approach requires that a plaintiff show that an injury is "substantially probable." *Fla. Audubon Soc'y*, 94 F.3d at 665.

[174] *Citizens for Better Forestry*, 341 F.3d at 972 (quoting City of Davis v. Coleman, 521 F.2d 661, 670–71 (9th Cir. 1975)); *Fla. Audubon Soc'y*, 94 F.3d at 672 (Buckley, J., concurring).

*b. Causation*

As the D.C. Circuit Court has held, "[t]o prove causation, a plaintiff seeking the preparation of an EIS must demonstrate that the particularized injury that the plaintiff is suffering or is likely to suffer is *fairly traceable* to the agency action that implicated the need for an EIS."[175] To simplify matters, "[t]he causation question concerns only whether plaintiffs' injury is dependent upon the agency's policy, or is instead the result of independent incentives governing . . . third parties' decision-making process."[176] Additionally, once a NEPA plaintiff has established injury in fact, the causation requirement is relaxed.[177]

Litigation to compel a Farm Bill EIS meets these requirements because the chain of causation is direct and well documented, as discussed above.[178] Still, the complaint would have to address certain arguments that have been successful in the past. In *Florida Audubon Society*, for example, the D.C. Circuit dismissed on causation grounds a case with similar facts but a different legal theory:

> Appellants in this case premise their claims of particularized injury and causation on a lengthy chain of conjecture. In brief, appellants contend that the tax credit will cause more ETBE production, which in turn will cause more ethanol production, which consequently will cause more production of the corn . . . necessary for ethanol, which will then cause more agricultural pollution, which, as this pollution is likely to occur on farmland bordering wildlife areas appellants visit, is also likely to harm the areas visited by appellants.[179]

No longer a "chain of conjecture," a substantial body of current analyses now link federal agricultural support to degradation of the environment and the public health. For example, the Government Accountability Office (GAO) released a report in 2007 entitled *Farm Program Payments Are an Important Factor in Landowners' Decisions to Convert Grassland to Cropland*.[180] To reach its conclusion that there is a causal connection between agricultural subsidies and the recent increase in conversion of grassland to cropland, the GAO calculated that the price of corn increased by more than 66% from September 2006 to January 2007 due mainly to the demand for corn-ethanol made competitive by federal subsidies.[181] This

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[175] *Fla. Audubon Soc'y*, 94 F.3d at 669 (emphasis added).

[176] *Citizens for Better Forestry*, 341 F.3d at 973 n.8 (quoting Idaho Conservation League v. Mumma, 956 F.2d 1508, 1517–18 (9th Cir. 1992)); *accord* Wilderness Soc'y v. Griles, 824 F.2d 4, 18 (D.C. Cir. 1987).

[177] Nuclear Info. & Res. Serv. v. NRC, 457 F.3d 941, 950 (9th Cir. 2006) (quoting Cantrell v. City of Long Beach, 241 F.3d 674, 682 (9th Cir. 2001)).

[178] *See supra* Part II(B).

[179] *Fla. Audubon Soc'y*, 94 F.3d at 666.

[180] GAO Report, *supra* note 32.

[181] *Id.* at 4.

study addresses the *Florida Audubon Society* court's primary issue with the plaintiffs' inability to "demonstrate[ ] that individual corn or sugar farmers in these areas will affirmatively respond to the tax credit by significantly increasing production."[182]

The World Trade Organization's (WTO) Appellate Body relied on the same approach in deciding the dispute between the United States and Brazil over U.S. subsidies for upland cotton in the 2002 Farm Bill.[183] The Appellate Body upheld the WTO Panel's finding that "it is reasonable to conclude that without these subsidies the level of [U.S.] upland cotton acreage and production would likely be significantly lower."[184] In the face of a number of assertions by the United States challenging the links between subsidy payments, farmers' planting decisions, and economic injury to Brazil, the Appellate Body concluded that the chain of causation—supported by economic models, government reports, and statistics—is sound.[185] While the Appellate Body's analysis is not controlling in a U.S. court, federal courts should nonetheless see the ruling as indicative of current trends in scientific and economic thought confirming the chain of causation between federal subsidies, planting decisions, and injury.

According to the logic of these recent authoritative causation analyses, the Farm Bill's incentive structure is therefore a but-for cause of injurious third-party actions. The D.C. Circuit Court reasons that the "mere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice."[186]

*c. Redressability*

The redressability requirement for plaintiffs claiming a procedural right, such as in NEPA litigation, is greatly relaxed.[187] Such a plaintiff "never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result."[188] The redressability requirement in a procedural injury case is lower than in others because a favorable ruling will correct the procedural violation. In the context of the Farm Bill, this means that NEPA plaintiffs need *not* show that a

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[182] *Fla. Audubon Soc'y*, 94 F.3d at 667.

[183] Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶¶ 363-74, WT/DS267/AB/RW (June 2, 2008), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm.

[184] *Id.* at ¶ 363.

[185] *Id.* at ¶ 448(c); *see also id.* at ¶ 381.

[186] Nat'l Wildlife Fed'n v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988) (citing Meese v. Keene, 481 U.S. 465 (1987)); *see also* Tel. & Data Sys., Inc. v. FCC, 19 F.3d 42, 47 (D.C. Cir. 1994); Heldman v. Sobol, 962 F.2d 148, 156 (2d Cir. 1992); *Fla. Audubon Soc'y*, 94 F.3d at 679–80 (Rogers, J., dissenting) ("There is no *per se* rule that intervening acts by a third party break[] the chain of causation.").

[187] Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992).

[188] Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94–95 (D.C. Cir. 2002) (quoted in Mass. v. EPA, 127 S. Ct. 1438, 1453 (2007)).

favorable ruling would lead to the repeal or reduction of the target agricultural policies.[189]

Only a limited number of remedies are available, however, as NEPA provides no sanctions. Plaintiffs generally seek an injunction against the violating substantive policy while agencies prepare an EIS. As Justice Marshall once noted, enjoining a policy after its enactment for the lack or inadequacy of an EIS "does nothing to further early consideration of environmental factors. And . . . [this practice] invites *post hoc* rationalizations rather than the candid and balanced environmental assessments envisioned by NEPA."[190] Furthermore, "NEPA does not require the impossible. Nor would it require, in effect, a moratorium on all projects which had an environmental impact while awaiting compliance . . . ."[191] Given the scope of the ethanol and commodity subsidies already in continuous operation, a court may be reluctant to grant an injunction.

The alternative is a motion for declaratory judgment, which would create a duty to prepare a Farm Bill EIS. "[D]eclaratory relief, even when granted without injunctive relief . . . suffices to rectify . . . NEPA violations . . . ."[192] Because subsidies are ongoing, declaratory relief would not be futile. Declaratory relief for plaintiffs challenging the 2008 Farm Bill would likely come just in time to influence the next Farm Bill. The Supreme Court has recognized this as an advantage of the legislative EIS process:

> [D]eclaratory relief . . . would likely aid the legislative process. First, it would enable interested parties, both governmental and nongovernmental, to participate more fully and effectively in the process. Second, it would enable the Congress to know before voting on the authorizing legislation whether the final EIS complies with NEPA . . . .[193]

A Farm Bill EIS—with its emphasis on public dialogue, scientific analysis, and broad participation in the policy-making process—would provide badly needed data for reform of policies whose impacts reach further than many people realize.

3. *Possible Plaintiffs*

NEPA plaintiffs must be chosen carefully, but it will be feasible to find appropriate parties to challenge the Farm Bill. The Farm Service Agency's 2003 EIS for the CRP indicates that "[w]ildlife viewing, hiking, hunting,

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[189] *See Fla. Audubon Soc'y*, 94 F.3d at 674 (Rogers, J., dissenting).

[190] Kleppe v. Sierra Club, 427 U.S. 390, 415–16 (Marshall, J., concurring in part, dissenting in part).

[191] Envtl. Def. Fund, Inc. v. U.S. Army Corps of Engineers, 325 F. Supp. 749, 758 (E.D. Ark. 1971) (quoted in Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1121 n.28 (D.C. Cir. 1971)).

[192] Chamber of Commerce v. Dep't of Interior, 439 F. Supp. 762, 768 (D.D.C. 1977).

[193] Atchison, Topeka & Santa Fe Ry. Co. v. Callaway (*Atchison II*), 431 F. Supp. 722, 727 n.5 (D.D.C. 1977).

and fishing are just some of the activities in which Americans participate that are directly related to wildlife populations and habitat."[194] Any of a number of organizations that focus on outdoor recreation, conservation, and ecological preservation throughout the Mississippi River Basin, as well as Gulf fishing interests, could likely demonstrate a sufficiently particularized injury. For example, both the Izaak Walton League of America and Ducks Unlimited (DU) are dedicated to the conservation and appreciation of America's wildlife habitats, which their members enjoy recreationally.[195] "Conversion of grasslands and wetlands to corn for ethanol" is interfering with DU members' recreational activities such as fishing, bird watching, hunting, and simple enjoyment of the aesthetic value of wetland habitats.[196] The National Audubon Society also indicates that intensification of agriculture is a major threat to bird species.[197] Cities such as Des Moines, Iowa, whose drinking water is severely affected by non-point source agricultural pollution,[198] would likely satisfy the elements of standing as well.

## Conclusion

The legal principles articulated here make clear that litigation is a viable option with a reasonable chance of success. Of course, plaintiffs must be selected, legal arguments crafted, and target programs of NEPA litigation chosen with care given the parties that may perceive a threat from the EIS process, such as corporations that profit from the cheap inputs provided by current farm policy. The authors present these arguments in the hope that litigation will prove unnecessary. Relevant agencies in the Obama Administration may voluntarily initiate an EIS for the next Farm Bill.

The best possible outcome of such a voluntary endeavor would be a reorientation of U.S. farm policy around an improved set of data and a genuinely democratic public input process—the functions of a comprehensive EIS. In recent history, farm law has not resulted in the kind of stable framework for agricultural production, pricing, and environmental protection that would reward the best farming methods. A Farm Bill EIS could facilitate creative thinking about new policies to avoid ecological degradation without harming the United States' agricultural economy. For example, ethanol subsidies, which encourage an over-reliance on corn production, place farmers

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[194] EIS on the CRP, *supra* note 49, at 2-61.

[195] The Izaak Walton League of America, Who We Are, http://www.iwla.org/index.php?id=9 (on file with the Harvard Law School Library); Ducks Unlimited, Today, Tomorrow & Forever: The DU Story, http://www.ducks.org/Aboutdu/default.aspx (on file with the Harvard Law School Library).

[196] *Decline in Bird Populations: Hearing Before the Subcomm. on Fisheries, Wildlife, and Oceans of the H. Comm. on Natural Resources*, 110th Cong. (2008) (statement of Dale D. Humburg, Chief Biologist, Ducks Unlimited).

[197] National Audubon Society, USDA Abandons Plan to Put Habitat Into Production, http://www.audubon.org/campaign/farmBill.html (on file with the Harvard Law School Library).

[198] *See* Perry Beeman, *Critics Ask Why State Failed to Warn About Toxic Algae*, Des Moines Register, Sept. 26, 2008, at 1A.

at the mercy of the constantly fluctuating oil and gasoline market. Perhaps a more sensible approach would be to tie federal support for ethanol to a gasoline price target.[199] A stabilized farm production and pricing infrastructure, something farm policy to date has failed to achieve, is essential to also having a stabilized ecological and environmental framework in agriculture. "[S]ometimes alternatives are much better, and sometimes government has to be dragged, kicking and screaming, to use them. NEPA suggests a faith (perhaps unwarranted) that if the government looked at the alternatives in the first place it might actually choose the better ones."[200] In that faith, the authors offer this analysis.

[199] *See* Robert Hahn & Caroline Cecot, *The Benefits and Costs of Ethanol: An Evaluation of the Government's Analysis* 19-20 (AEI-Brookings Joint Center, Working Paper No. 07-17, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027692&rec=1&srcabs=1082079.

[200] E-mail from John Bonine, *supra* note 80.