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The Bioenergy Farm Lease, Part 4: Incorporation of Evolving Standards

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As the bioenergy industry in the United States expands to meet increased demands for transportation fuel under the Renewable Fuel Standard and electrical power under state Renewable Portfolio Standards, farmers will seek the ability to grow dedicated, high yielding energy crops of a perennial nature on leased property. This is the fourth in a series of short articles intended to address a range of legal issues raised in a bioenergy farm lease. Our [first article](#) analyzed the necessity of long-term leasing provisions, flexible rental payments, and early termination clauses. Our [second article](#) discussed lease provisions related to the potential invasiveness concerns associated with some bioenergy crops. Our [third article](#) considered the possibility for rhizome reclamation as an added element of perennial biomass production. In this article, we examine the potential incorporation of evolving standards (e.g., regulations, sustainability standards) into bioenergy farm leases.

In an [earlier post](#), we discussed how the bioenergy farm lease should incorporate provisions such as good husbandry clauses and breed selection clauses to protect both parties to the lease and the environment from the potential invasiveness associated with a number of proposed bioenergy feedstocks. However, as knowledge advances and scientific and legal protocols evolve, well-crafted bioenergy farm leases should further incorporate novel regulations pertinent to the bioenergy crop so as to better achieve those same ends.

Good husbandry clauses, as we discussed at length in a previous post, are often inserted into leases, creating a duty for the tenant to farm the property in a manner consistent with a general standard of good husbandry.¹ Courts have typically interpreted good husbandry clauses as establishing a duty to protect the productivity of the farm and to prevent waste.² Researchers have noted, however, that these clauses do not necessarily evolve to best protect the particular interests of parties as time passes and knowledge of farming practices increases.³ For instance, one researcher observed that interpretations of good husbandry clauses have not always been aligned with sustainability practices and sometimes focus more on productivity than evolving stewardship standards.⁴ Rather than rely on historical standards to protect their respective financial and stewardship interests, landowners and operators should incorporate the requirements of modern, relevant regulations directly into their contracts.

For instance, if the bioenergy crop being grown is giant reed (*Arundo donax*)⁵ or Napier grass (*Pennisetum purpureum*),⁶ there are additional, unique considerations arising from the Renewable Fuel Standard (RFS2)⁷ that should be incorporated into the bioenergy farm lease to ensure marketability of the resulting harvest. As decided by the Environmental Protection Agency (EPA), approval of pathways for production of renewable fuel from these bioenergy crops requires, in combination with registration requirements outlined in 40 C.F.R. 80.1450,⁸ additional registration, recordkeeping, and reporting protocols designed to minimize the potential invasiveness of these crops.⁹ The EPA requires:

- Producers of renewable fuel made from giant reed or Napier grass submit a Risk Mitigation Plan (RMP) that demonstrates measures are being taken to prevent the spread of these species.¹⁰
- The RMP must incorporate approaches that the EPA already recognizes as effective.¹¹ These include Hazard Analysis Critical Control Point (HACCP¹²), a protocol which examines the phases of an invasive species pathway and identifies control and evaluation measures to reduce the likelihood of spread by the species.¹³
- The RMP should detail how the use of best management practices (BMPs¹⁴), such as those developed by the [Invasive Species Advisory Committee](#), [USDA](#), or, for giant reed, [by the State of Oregon](#), will be employed by the feedstock grower and how such practices will minimize the potential spread of the crop.¹⁵
- A third party auditor, apart from the feedstock grower and renewable fuel producer, must be employed to audit the monitoring activities and reporting done by the renewable fuel producer under the RMP on an annual basis as part of the producer or importer's fourth quarterly report.¹⁷
- Various other recordkeeping and reporting provisions.¹⁸

These requirements are placed on the **fuel producer** but must be **implemented** by the **biomass producer**. Accordingly, although the EPA acknowledges that the feedstock grower and the renewable fuel producer may be separate entities,¹⁹ such detailed requirements conflate the parties, or at a minimum require an intensely cohesive and communicative relationship between the two parties which significantly predates the sale of the biomass to the fuel producer.

Incorporation of the EPA's regulations into a bioenergy farm lease, however, could allow for independent tenant farmers (that is, farmers with no standing contract with a fuel producer) growing giant reed or Napier grass to sell their biomass to fuel producers. Such an arrangement would benefit landowners by protecting their property from invasion. These lease terms would benefit tenant farmers by enabling their entry into the bioeconomy, as fuel producers seeking biomass will require product that is compliant with the regulations. Accordingly, if a tenant farmer is growing either of these crops with the expectation of eventual sale into the biomass supply chain, they may want to negotiate bioenergy farm leases that incorporate the documentation and registration required by the EPA for a RIN qualification (or, in other words, incorporate the relevant regulation).

The latest EPA pathway resolutions for Arundo and Napier feedstocks are just one example of a regulation that could be incorporated into a bioenergy farm lease for a particular set of crops. As knowledge of best practices evolves and scientific recommendations and legal requirements change to keep pace, additional regulations that pertain to other bioenergy crops could become standard elements of leases to better protect the interests of both parties to a bioenergy farm lease.

Notes

¹ Edward Cox, A Lease-Based Approach to Sustainable Farming, Part II: Farm Tenancy Trends and the Outlook for Sustainability on Rented Land, 16 DRAKE J. AGRIC. L. 5 (2011).

² Id.

³ Other areas of tort law have embraced change in a manner that the good husbandry clause has not. For instance, in *The T. J. Hooper*, 60 F.2d 737 (2d Cir. N.Y. 1932), the court held that the standard of seaworthiness was not dependent on statutory enactment or unchanging standards—rather, the standard changes with advancing knowledge and experience. Cases such as this—venerable and veteran though it may be—provide a line of reasoning which suggests that good husbandry clauses may one day be held to encompass current sustainability standards and novel farming practices (such as the growth of bioenergy crops).

⁴ Cox, *supra* note 1.

⁵ Arundo is a genus of tall perennial reed-like grasses. Arundo donax is the largest member of the genus and is among the largest of the grasses, growing to a height of 8 m. This species is believed to be native

to freshwaters of eastern Asian, but has been cultivated throughout Asia, southern Europe, north Africa, and the Middle East for thousands of years and has been planted widely in North and South America and Australasia in the past century. It was intentionally introduced to California from the Mediterranean in the 1820s in the Los Angeles area as an erosion control agent in drainage canals, and was also used as thatching for roofs of barns, sheds, and other buildings. GARY BELL, *PLANT INVASIONS: STUDIES FROM NORTH AMERICA AND EUROPE* 103-113 (1997).

⁶ Napier grass, also known as elephant grass, is a tropic bunchgrass with high rates of growth and biomass production. Xin-Ming Xie, Xiang-Qian Zhang, Zhao-Xia Dong & He-Rong Guo, *Dynamic Changes of Lignin Contents of MT-1 Elephant Grass and its Closely Related Cultivars*, 35 *BIOMASS AND BIOENERGY* 1732 (2011).

⁷ 40 C.F.R. §§ 80.1100-80.1167 (2012).

⁸ The RFS program regulations specify the types of fuels eligible to participate in the RFS renewable fuel program, as well as the procedures by which producers of these fuels may generate Renewable Identification Numbers (“RINs”) for the qualifying renewable fuels they produce through approved fuel pathways. See 40 C.F.R. 80.1400-80.1468.

⁹ Environmental Protection Agency, *Regulation of Fuels and Fuel Additives: Additional Qualifying Renewable Fuel Pathways Under the Renewable Fuel Standard Program; Final Rule Approving Renewable Fuel Pathways for Giant Reed (Arundo donax) and Napier Grass (Pennisetum purpureum)*, 78 Fed. Reg. 41,703 (July 11, 2013) (to be codified at 40 C.F.R. pt. 80).

¹⁰ *Id.* at 41,709. As an exception to the rule, the fuel producer could demonstrate that an RMP is not needed because under the circumstances giant reed or Napier grass does not pose a significant threat of spread beyond the planting area.

¹¹ *Id.* at 41,710.

¹² See <http://www.habitat.noaa.gov/pdf/HACCP%20Training%20Manual.pdf> (last visited November 15, 2013).

¹³ Environmental Protection Agency, *Regulation of Fuels and Fuel Additives: Additional Qualifying Renewable Fuel Pathways Under the Renewable Fuel Standard Program; Final Rule Approving Renewable Fuel Pathways for Giant Reed (Arundo donax) and Napier Grass (Pennisetum purpureum)*, 78 Fed. Reg. at 41,710.

¹⁴ The EPA suggests that BMPs include: the development and implementation of mitigation strategies and plans to minimize escape and other impacts; incorporation of desirable traits into the crop (e.g., sterility or reduced seed production); development and implementation of dispersal mitigation protocols prior to cultivation of biofuel plants in each region or ecosystem; development of multiyear eradication protocols for rapid removal of biofuel crops if they disperse beyond desired crop rotation period; and development of plans for early detection and rapid response. *Id.* at 41,711.

¹⁵ Environmental Protection Agency, *Regulation of Fuels and Fuel Additives: Additional Qualifying Renewable Fuel Pathways Under the Renewable Fuel Standard Program; Final Rule Approving Renewable Fuel Pathways for Giant Reed (Arundo donax) and Napier Grass (Pennisetum purpureum)*, 78 Fed. Reg. at 41,711.

¹⁶ *Id.*

¹⁷ *Id.* These include, but are not limited to: a certification on renewable fuel production reports that the feedstock was grown, harvested, transported, and stored in compliance with an RMP or from the land the EPA has determined will not create a significant likelihood of spread beyond the planting area; summaries included in producers’ quarterly reports of the types and quantities of these feedstocks used throughout the quarter, as well as maps of the land from which the feedstocks used on the quarter were harvested; a letter documenting the feedstock grower’s compliance with all of the relevant federal, state, regional, and local requirements related to invasive species; a copy of all state and local growing permits held by the feedstock grower; and a communication plan for notifying relevant authorities if the feedstock is detected outside the intended planting area.

¹⁸ *Id.* (“EPA is requiring the use of a third party auditor, independent of the feedstock grower and renewable fuel producer”) (emphasis added).

Issued by Author Elise C. Scott, Lauren D. Quinn, and [A. Bryan Endres](#)
Department of Agricultural and Consumer Economics
University of Illinois