

Living with Major Questions: *West Virginia* Leaves Opportunity for USDA in Farm Bill Commodity Subsidies

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DOI: <https://doi.org/10.15779/Z38251FM4M>
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* Thanks to Holly, Bob, Becky, Grayson, Oleg, Geraldine, Sierra, Scott, Tanya, Amaya, Evan, and all the rest.

INTRODUCTION

West Virginia v. EPA captured the nation's attention.¹ Long before the U.S. Supreme Court released its opinion, popular media outlets warned that *West Virginia* could hamstring the federal government, already considered a climate laggard by activists, in driving climate policy.² Within the legal community, the moniker "*West Virginia*" grew synonymous with suspense around the future of administrative law and agency power.³ At the end of June 2022, after months—years—of anticipation, the Supreme Court applied the "Major Questions" Doctrine (MQD) to EPA's Clean Power Plan.⁴ The majority elevated the MQD to new prominence as a judicial tool that allows federal judges more leeway to overturn agency action.⁵ As a result, uncertainty now lingers over how boldly federal agencies can interpret their statutory mandates as they endeavor to address climate change and other cross-cutting issues without the luxury of clear legislative language directing them to do so.⁶

1. *West Virginia v. EPA* (*West Virginia*), 142 S. Ct. 2587 (2022).

2. For a cross-section of major media attention, see, e.g., Robert Barnes & Dino Grandoni, *In EPA Supreme Court Case, the Agency's Power to Combat Climate Change Hangs in the Balance*, WASH. POST (Feb. 25, 2022), <https://www.washingtonpost.com/politics/2022/02/25/supreme-court-epa-west-virginia/>; Maxine Joselow, *Supreme Court's EPA Ruling Upends Biden's Environmental Agenda*, WASH. POST (June 30, 2022), <https://www.washingtonpost.com/climate-environment/2022/06/30/epa-supreme-court-west-virginia/>; David G. Savage, *Supreme Court Rules for Coal-Producing States, Limits EPA's Power to Fight Climate Change*, L.A. TIMES (June 30, 2022), <https://www.latimes.com/politics/story/2022-06-30/supreme-court-rules-for-coal-producing-states-limits-epas-power-to-fight-climate-change>; Coral Davenport, *Republican Drive to Tilt Courts Against Climate Action Reaches a Crucial Moment*, N.Y. TIMES (June 19, 2022), <https://www.nytimes.com/2022/06/19/climate/supreme-court-climate-epa.html>.

3. See, e.g., Jean Chemnick, *Supreme Court Climate Case Might End Regulation*, E&E NEWS (June 13, 2022), <https://www.eenews.net/articles/supreme-court-climate-case-might-end-regulation/> (exemplifying legal media attention about how *West Virginia* might impact administrative and regulatory law).

4. See *infra* Subpart II.A for a fuller discussion of the EPA action underlying *West Virginia*.

5. See *infra* Subpart II.B for a discussion of the Major Questions Doctrine. While the *West Virginia* Court pointed to a string of prior cases that ostensibly supported an MQD, *West Virginia* marked the beginning of a new era for the doctrine. It was the first time a majority opinion expressly invoked the MQD. See *West Virginia*, 142 S. Ct. at 2610 ("[T]his is a major questions case."). For prior caselaw, none discussing the MQD directly, see generally *FDA v. Brown & Williamson*, 529 U.S. 120 (2000); *Gonzales v. Oregon*, 546 U.S. 243 (2005); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *Alabama Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485 (2021); *Nat'l Fed. of Indep. Bus. v. Occupational Safety and Health Admin.*, 142 S. Ct. 746 (2021) (*per curiam*).

6. Justice Gorsuch's concurrence in *West Virginia*, which expresses interest in resuscitating the nondelegation doctrine, compounds this uncertainty. The nondelegation doctrine goes one step beyond the MQD, dictating that some there are powers Congress may not delegate to agencies at all, no matter how clear the statutory language used. See *West Virginia*, 142 S. Ct. at 2616–26. However, this Note's scope is confined to the MQD.

The Court's bind on agencies turned out to be looser than some feared,⁷ but it came at an inopportune moment.⁸ *West Virginia* was litigated amid momentum in the Biden administration to drive climate policy through executive action and agency rulemaking.⁹ Absent a nimble Congress, agencies sought to promulgate climate-oriented rules by leveraging existing statutory authority in innovative ways.¹⁰ When the Court released *West Virginia*, agencies from the Environmental Protection Agency (EPA) to the Securities and Exchange Commission to the Federal Energy Regulatory Commission were contemplating new ways to address climate change within their respective regulatory domains.¹¹ After *West Virginia*, these actions appear vulnerable.¹²

Against this backdrop of post-*West Virginia* uncertainty, I present the Department of Agriculture (USDA) as an agency that retains untapped statutory discretion. Even after *West Virginia*, USDA can use flex its existing rulemaking power to scale up climate mitigation in the agriculture sector.¹³ Through its authority to condition commodity subsidy eligibility on “sound agricultural practices,”¹⁴ USDA should tie commodity subsidies to voluntary and mandatory carbon-sequestering practices on cropland.

Climate change presents a policy area that cuts across every sector of society. Progress requires each organ of government to act within its domain.¹⁵ *West Virginia* concerned EPA's efforts to act on the cross-cutting issue of climate change within its domain.¹⁶ It is simple to see how EPA's regulatory area

7. The Court did not, for example, interfere with EPA's underlying jurisdiction over GHGs (i.e., with EPA's endangerment finding or with the Court's holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007)). See Dan Farber, *What the Supreme Court Left Standing*, LEGAL PLANET (July 21, 2022), <https://legal-planet.org/2022/07/21/what-the-supreme-court-left-standing/>.

8. For example, the opinion did not overrule *Massachusetts v. EPA*, the endangerment finding, nor EPA's basic power to regulate greenhouse gases. It also did not adopt some of petitioners' arguments that would limit EPA to inside-the-fence line regulation. *Id.*

9. See Exec. Order No. 13990, 86 Fed. Reg. 7038 (Jan. 25, 2021); Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021).

10. In particular, the Biden administration's “whole of government” policy approach emphasizes executive branch action. See, e.g., Alice C. Hill, *What Does the Supreme Court's Decision in West Virginia v. EPA Mean for U.S. Action on Climate?*, COUNCIL ON FOREIGN RELS. (Jul. 19, 2022), <https://www.cfr.org/blog/what-does-supreme-courts-decision-west-virginia-v-epa-mean-us-action-climate>; Benjamin Storrow, *Hope Dims that the U.S. Can Meet 2030 Climate Goals*, E&E NEWS (July 8, 2022).

11. Lesley Clark & Niina H. Farah, *3 Climate Rules Threatened by the Supreme Court Decision*, E&E NEWS (July 7, 2022), <https://www.eenews.net/articles/3-climate-rules-threatened-by-the-supreme-court-decision/>.

12. *Id.*

13. See 47 U.S.C. § 9018(a)(1); discussion *infra* Subpart IV.B.

14. See 47 U.S.C. § 9018(a)(1)(c). Commodity programs provide federal payments to producers of certain crops. For a fuller discussion of commodity programs, see *infra* Subpart V.A.

15. Of course, comprehensive climate mitigation and adaptation also requires action far beyond government institutions, from grassroots community leadership to meaningful industry reform. Government plays an important, but incomplete, role in guiding behavior across this spectrum of private entities.

16. See generally *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

intersects with climate: EPA regulates carbon emissions from power plants, which are a direct driver of atmospheric carbon pollution.¹⁷

USDA's domain also intersects with climate change in important ways. Over half of U.S. land is used for agriculture.¹⁸ Agriculture is the source of over 10 percent of U.S. greenhouse gas emissions.¹⁹ Even more importantly, agricultural lands have enormous potential for carbon sequestration—enough to turn the entire sector into a net carbon sink and to offset current U.S. fossil fuel emissions by over 30 percent.²⁰ A growing body of “carbon farming” practices that maximize sequestration are well-known in the agriculture-science community.²¹ The challenge is achieving widespread implementation of carbon farming practices by large producers.²² Optimizing carbon sequestration sector-wide requires the large commodity monoculture operations that dominate the sector to implement carbon farming practices.²³ Most large producers receive federal subsidies from USDA merely for possessing land that historically produced “commodity” crops such as corn, wheat, and soy.²⁴ Despite being based on historical commodity production, today's subsidy programs no longer require producers to actually cultivate commodity crops.²⁵

17. For more information about EPA's GHG and stationary source regulatory prerogatives, see *Regulatory and Guidance Information by Topic: Air*, EPA, <https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-air#ghgs> (last updated June 21, 2022).

18. *Major Land Uses*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC. (last updated Aug. 20, 2019), <https://www.ers.usda.gov/topics/farm-economy/land-use-land-value-tenure/major-land-uses/#:~:text=The%20U.S.%20land%20area%20covers,the%20first%20time%20since%201959.>

19. PETER H. LEHNER & NATHAN A. ROSENBERG, *FARMING FOR OUR FUTURE: THE SCIENCE, LAW, AND POLICY OF CLIMATE-NEUTRAL AGRICULTURE* 41 (2021).

20. See *id.* at 58–59, 68; Ranjith P. Udawatta & Shibu Jose, *Agroforestry Strategies to Sequester Carbon in Temperate North America*, 83 *AGROFORESTRY SYS.* 225, 225, 239 (2012).

21. See LEHNER & ROSENBERG, *supra* note 19, at 66–88. For a description of the term “carbon farming” and its origin, see *id.* at 4 n.4 (referencing ERIC TOENSMEIER, *THE CARBON FARMING SOLUTION* (Brianne Goodspeed & Laura Jorstad eds., 2016), which defines “carbon farming” as “a system of agricultural economics and practices organized around carbon sequestration”). Aside from net carbon sequestration, these practices also deliver local natural resource co-benefits to the ecosystem, local communities, and downstream consumers. See *id.* at 31, 66–88. These co-benefits include increasing cropland's resilience to inevitable climatic changes. See *id.* at 37.

22. See *id.* at 63 n.2.

23. Half of U.S. cropland comprises farms over 1,000 acres. *Industrialization of Agriculture*, JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, <https://www.foodsystemprimer.org/food-production/industrialization-of-agriculture/> (last visited Nov. 20, 2022). Nearly 60 percent of U.S. cropland is dedicated to commodity crops, typically grown in monocultures. UNION OF CONCERNED SCIENTISTS, *THE HEALTHY FARMLAND DIET: HOW GROWING LESS CORN WOULD IMPROVE OUR HEALTH AND HELP AMERICA'S HEARTLAND* 3 (2013).

24. As discussed further *infra* Part IV, current commodity subsidies are based on historic “base acres” rather than on actual production. *Title I: Crop Commodity Program Provisions*, U.S. DEP'T OF AGRIC.: ECON. RSCH. SERV., <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/title-i-crop-commodity-program-provisions/> (last updated Feb. 7, 2023).

25. In 2020, government payments made up 39 percent of net farm income. Chuck Abbot, *Record-High Ag Subsidies to Supply 39% of Farm Income*, *SUCCESSFUL FARMING* (Dec. 3, 2020), <https://www.agriculture.com/news/business/record-high-ag-subsidies-to-supply-39-of-farm-income>. The full list of crops covered by the commodity programs, which are discussed further *infra* Part IV, is wheat,

Without a doubt, agriculture law and policy could use legislative revision. Still, USDA can take meaningful administrative action today, without waiting for Congress. USDA should promulgate a rule fleshing out the Farm Bill’s “sound agricultural practices” commodity program eligibility criterion.²⁶ USDA should formalize a matrix of carbon farming practices and then tie producers’ implementation of those practices to their subsidy eligibility. The agency could make a minimum degree of carbon farming practice a threshold condition for program participation. It could also tie producers’ differentiated scales of carbon farming implementation to differentiated tiers of subsidy incentives.²⁷

USDA using the “sound agricultural practices” subsidy condition to promulgate a carbon farming rule would be bold and innovative.²⁸ Yet under *West Virginia*, the MQD does not appear fatal to such a rule. For one, USDA’s approach would not be a transformative *type* of authority. Rather, a carbon farming rule would be a consistent outgrowth of USDA’s entrenched conservation mandate.²⁹ Nor is the “sound agricultural practices” provision old, neglected, or ancillary. Congress created the provision relatively recently and has progressively expanded its reach.³⁰ The expertise required for a carbon farming rule also sits squarely within USDA’s domain.³¹ Finally, Congress has never rejected any analogous legislative proposal. In fact, Congress has shown unique bipartisan support for legislation encouraging agricultural carbon sequestration.³² The history of Congress’s Farm Bill legislation, the history of USDA’s Farm Bill implementation, and USDA’s expertise relative to other agencies show that a carbon farming rule, unlike the EPA rule underlying *West Virginia*, would not upset the Supreme Court’s MQD guideposts.³³

I. THE MAJOR QUESTIONS DOCTRINE IN *WEST VIRGINIA V. EPA*

In *West Virginia*, the Supreme Court used an EPA rule promulgated under the Clean Air Act as the vehicle to entrench the MQD. The MQD limits agencies’

oats, and barley (including wheat, oats, and barley used for haying and grazing), corn, grain sorghum, long grain rice, medium grain rice, seed cotton, pulse crops, soybeans, other oilseeds, and peanuts.

26. 47 U.S.C. § 9018(a)(1)(c).

27. In practice, this might require establishing a tiering of subsidies based on degree of carbon farming implementation, in addition to tailored requirements based on relevant producers’ characteristics such as farm size, commodity produced, climate and geographic location, and other local factors. Honing these features of a “sound agricultural practices” rule would be squarely within USDA’s specialized expertise. See *infra* Subpart V.C.3.

28. As of now, USDA has neither interpreted the “sound agricultural practices” standard nor developed criteria to assess whether producers meet this eligibility requirement. See Agriculture Risk Coverage and Price Loss Coverage Programs, 84 Fed. Reg. 45,877 (Sept. 3, 2019) (codified at 7 C.F.R. § 1412.46) [*hereinafter* 2019 Final Rule]; see also Subpart V.B.

29. See *infra* Subpart V.C.1.

30. See *infra* Subpart V.C.2.

31. See *infra* Subpart V.C.3.

32. See *infra* Subpart V.C.4.

33. See discussion of the *West Virginia*’s MQD guideposts *infra* Subpart III.B.

ability to read new and bold power into vague, broad statutory language.³⁴ Since *Chevron U.S.A., Inc. v. Natural Resource Defense Council* (1984), judicial review of agency action has been defined by deference to agency statutory interpretation.³⁵ Under *Chevron*, absent precise language from Congress, the agency's statutory interpretation controls so long as it is reasonable.³⁶ The MQD appear to change this core tenet of administrative law. Now, in cases where an agency claims "extraordinary" power, that agency does not enjoy the presumption of correct statutory interpretation.³⁷ Instead, the agency must point to a clear statement from Congress authorizing the claimed authority.³⁸ Moving forward past *West Virginia*, this shift in administrative law raises uncertainty for all agencies that want to drive bold climate policy within their regulatory domains despite lacking clear statutory language about climate change. That key question is: when does an agency action rise to the level of *extraordinariness* that it triggers the MQD and flips the presumption that the agency's interpretation is correct?

West Virginia leaves agencies with four vague guideposts. First, the Court considered the nature of the agency's claimed authority: the degree to which the authority departs from the agency's past practice.³⁹ Second, the Court discussed the relevant statutory provision's history and nature: the degree to which Congress meant it—and to which the agency has long interpreted it—to be an ancillary provision with little weight.⁴⁰ Third, the Court emphasized the agency's domain of expertise, particularly the degree to which the claimed authority may require expertise more fit for another agency.⁴¹ Fourth, the Court weighed the presence of failed legislative attempts at the same policy: the degree to which Congress repeatedly rejected legislation analogous to the agency rule.⁴² Before discussing these guideposts in depth and applying them to a USDA carbon farming rule, understanding the EPA context behind *West Virginia* is useful.

A. EPA Action Underlying West Virginia

West Virginia arose out of a challenge to the Obama administration EPA's greenhouse gas emission standards for existing power plants.⁴³ States heavily dependent on fossil fuel-generated electricity challenged EPA's "Clean Power

34. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–16 (2022).

35. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–44 (1984) (articulating the doctrine of *Chevron* deference).

36. *Id.*

37. See *West Virginia*, 142 S. Ct. at 2608–16.

38. See *id.* at 2609–10, 2614.

39. See *id.* at 2608–16.

40. See *id.*

41. See *id.*

42. See *id.*

43. *Id.* at 2602–04.

Plan” rule.⁴⁴ The Clean Power Plan typified an executive branch attempt to drive climate policy prerogatives despite an inactive Congress that would neither pass new climate legislation nor update agencies’ mandates to include addressing climate change.⁴⁵ EPA tried to advance Obama climate goals by reading its existing statutory authority—the power to set carbon emission standards for existing power plants—from a new angle.⁴⁶

The Clean Air Act empowers EPA to create and update caps on existing power plants’ carbon emissions.⁴⁷ EPA has the discretion to set emission levels based on what EPA experts determine is the “best system of emission reduction” that is “adequately demonstrated.”⁴⁸ Before the Clean Power Plan, EPA approached this task by contemplating the emission-reduction technologies that power plants could use at their facilities to minimize emissions.⁴⁹ EPA would then set standards that would be attainable if power plants implemented a suite of those technologies, indirectly forcing them to do so.⁵⁰

In the Clean Power Plan, EPA took a slightly different approach. Instead of looking at how individual plants could optimize their emissions, EPA looked holistically at the electricity grid and contemplated that the “best system of emission reduction” would require a wholesale shift away from higher emission sources of generation (i.e., coal and other fossil fuels), toward cleaner sources (i.e., renewables).⁵¹ The Clean Power Plan set carbon emission standards based on this grid-level “generation shifting” rather than on plant-level technology improvements.⁵² Instead of identifying technologies that coal and other fossil fuel plants could use to become incrementally cleaner, the Clean Power Plan identified three ways dirty plants could engage in generation shifting to contribute to a cleaner grid.⁵³ A coal plant, for example, could (1) reduce its own electricity generation volume; (2) build its own—or invest in the development of someone else’s—clean electricity generation source (e.g., a wind, solar, or

44. *Id.*; Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 65661 (Oct. 23, 2015) [*hereinafter* Clean Power Plan]. For procedural details about the initial stay granted on the Clean Power Plan, the Clean Power Plan repeal by the Trump administration, replacement with the Affordable Clean Energy rule, and judicial invalidation of the Clean Power Plan repeal that ultimately made the original Clean Power Plan available for judicial review by the Supreme Court, see *West Virginia*, 142 S. Ct. at 2604–06.

45. See Clean Power Plan, 80 Fed. Reg. 65661.

46. *Id.*

47. Clean Air Act § 111(a), (d) (codified at 42 U.S.C. § 7411(a), (d)).

48. *Id.* (“The term ‘standard of performance’ means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” (emphasis added)).

49. See *West Virginia*, 142 S. Ct. at 2601–03.

50. *Id.*

51. Clean Power Plan, 80 Fed. Reg. 65661 (Oct. 23, 2015); *id.* at 2602–04.

52. See *West Virginia*, 142 S. Ct. at 2602–04; Clean Power Plan, 80 Fed. Reg. 65661.

53. See *West Virginia*, 142 S. Ct. at 2603; Clean Power Plan, 80 Fed. Reg. 65661.

natural gas installation); or (3) purchase credits in a cap-and-trade program.⁵⁴ In other words, rather than forcing coal plants to clean up their facilities but still prioritize coal-electricity generation (and only indirectly pushing the plants out of business if meeting the emission standards turned out to be too expensive), the Clean Power Plan more directly compelled self-sacrifice by coal-fired electricity plants in favor of bringing entirely different generation types onto the grid.

The challengers of the Clean Power Plan alleged that, in setting standards that expected coal-fired plants either to become or to finance wind, solar, or natural gas plants, EPA had exceeded the authority that Congress gave it in the Clean Air Act.⁵⁵ Most narrowly, this was a question of statutory interpretation. The Clean Air Act allows EPA set carbon emission standards based on the “best system of emission reduction.”⁵⁶ However, does discretion to determine the “best system of emission reduction” authorize EPA to contemplate the best balance of electricity generation types across the whole electricity grid—or only to think within the bounds of possible technology-based emission reductions at specific plants? In the current Supreme Court’s view, EPA exceeded its authority by basing the standard on generation-shifting at the grid level.⁵⁷ However, departing from a textualist approach, the Supreme Court did not center its analysis on a statutory interpretation of the language “best system of emission reduction.”⁵⁸ Instead, the Court focused on the political philosophy of separation of powers, particularly the balance between the executive and legislative branches.⁵⁹ In doing so, the majority formalized a doctrine of administrative law that limits agencies’ discretion to read significant power in broad statutory language: the MQD.⁶⁰

The MQD requires an agency to point to “clear Congressional authorization” (rather than to broad, ambiguous statutory language) in order to act through rulemaking in ways that are “extraordinary” (i.e., that implicate major national policy questions).⁶¹ In the Supreme Court’s view, the MQD addresses a chronic problem in the executive branch: agencies “asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”⁶² In *West Virginia*, the Court reasoned that EPA’s emission

54. See *West Virginia*, 142 S. Ct. at 2603; Clean Power Plan, 80 Fed. Reg. 65661.

55. See *West Virginia*, 142 S. Ct. at 2604–06.

56. Clean Air Act § 111(a), (d) (codified at 42 U.S.C. § 7411(a), (d)).

57. See *West Virginia*, 142 S. Ct. at 2616.

58. See *id.* at 2607–08 (using two sentences to reference and dismiss principles of statutory interpretation before diving into the MQD). For an overview of how textualist reasoning has otherwise defined the modern Court, see generally Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413 (2019).

59. See *West Virginia*, 142 S. Ct. at 2608–16. Under the guise of preserving executive branch deference to the legislative branch, the judiciary increased its own power over the executive. For an analysis of the modern Court’s self-aggrandizing tendencies, see, e.g., Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

60. See *West Virginia*, 142 S. Ct. at 2608–16.

61. See *id.*

62. *Id.* at 2609.

standards based on generation shifting exemplified this kind of overstep and were extraordinary enough to trigger the MQD.⁶³ The Supreme Court characterized EPA as taking its Clean Air Act authority to set emissions standards and reading into it the power to “substantially restructure the American energy market.”⁶⁴ From the Court’s perspective, EPA claimed to discover sweeping new authority in vague, broad statutory language that had long existed but that EPA had always interpreted more narrowly.⁶⁵ The Court viewed EPA, through the Clean Power Plan, as legislating its own “transformative expansion in regulatory authority.”⁶⁶ This made the Clean Power Plan extraordinary enough to trigger the MQD and flip the presumption of correct statutory interpretation.⁶⁷ As a result, absent a clear statement from Congress giving EPA the green light for a generation-shifting-based standard, EPA’s interpretation of the Clean Air Act’s “best system of emission reduction” was presumptively incorrect.⁶⁸ Moving forward, a key question for agencies is whether their rulemakings are extraordinary enough to trigger the MQD and, consequently, to require clear legislative authorization rather than allow deference to agency interpretation of ambiguous language. As mentioned previously, *West Virginia* offers agencies four guideposts to ascertain whether their actions trigger the MQD.⁶⁹

B. Arriving at Four MQD Guideposts

Chief Justice Roberts’s majority opinion left the MQD as an amorphous standard rather than a bright-line rule. Before turning to USDA and its regulatory domain, it is helpful to consider in more depth the guideposts that define the MQD’s current condition and trigger points.

1. How Does the MQD Operate?

The MQD arises out of a notion among the Supreme Court’s majority that the administrative state should be smaller and less powerful than it is now, more subservient to Congress, and more disciplined in its self-confinement to narrow interpretations of Congress’s directives.⁷⁰ Underlying this political philosophy is the belief that Congress can give clear and agile direction to agencies and that Congress will adapt decisively to changing knowledge and circumstances by routinely updating statutory directives to agencies.⁷¹ Conventional

63. *Id.* at 2609–10.

64. *Id.* at 2610.

65. *Id.*

66. *Id.*

67. For a discussion of how the MQD interacts with deference to agencies during judicial review, see *infra* Subpart III.B.1.

68. See *West Virginia*, 142 S. Ct. at 2610, 2614.

69. See generally *id.*

70. See, e.g., *id.* at 2608; KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., THE SUPREME COURT’S “MAJOR QUESTIONS” DOCTRINE: BACKGROUND AND RECENT DEVELOPMENT (2022).

71. *West Virginia*, 142 S. Ct. at 2610, 2614.

administrative law wisdom, in contrast, counsels deference to agency expertise and statutory interpretation because Congress lacks the resources and knowledge necessary to address legislatively every new circumstance that arises.⁷² The MQD interacts with this tradition of deference to agency interpretation by adding a new threshold question: whether the claimed agency authority is so “extraordinary” that a judicial reviewer should “hesitate before concluding that Congress meant to confer such authority.”⁷³ This threshold question is apparently meant to determine whether a *Chevron* analysis, and its agency deference, is even triggered.⁷⁴ Judging by *West Virginia*, if the answer to the MQD threshold question is yes, the court need not apply even apply *Chevron*.⁷⁵ Instead, absent clear language from Congress, the presumption of a correct statutory interpretation is flipped against the agency from the start.⁷⁶ Instead of being able to rely on a “merely plausible textual basis” to justify its interpretation, the agency must now point to “clear congressional authorization” for the power it claims.⁷⁷ The critical question is how to determine whether an agency action is “extraordinary” enough to flip the deferential presumption and require a clear statement from Congress.

2. *The Guideposts: When Does an Agency Action Trigger the MQD?*

In *West Virginia*, the Chief Justice stopped short of providing a clear test for an “extraordinary case” that triggers the MQD. However, four guideposts appear in the majority’s reasoning: the relevant statutory provision’s history, the agency rule’s consistency with the agency’s own past interpretation of the relevant provision, the rule’s consistency or contradiction with other legislative acts, and whether the rule fits within the agency’s domain of expertise relative to other agencies.⁷⁸

A first guidepost for whether an agency action triggers the MQD is novelty: whether the agency is claiming a new and unheralded authority.⁷⁹ Before the Clean Power Plan, EPA had always set section 111 emissions standards based on plant-level technology upgrades that would allow dirty plants to run incrementally more cleanly.⁸⁰ In the Supreme Court’s view, EPA using the statutory language of “best system of emission reduction” to allow generation

72. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–44 (1984) (articulating the doctrine of *Chevron* deference).

73. See *West Virginia*, 142 S. Ct. at 2608–10.

74. See *id.* at 2609–10; see also KATE R. BOWERS, CONG. RSCH. SERV., THE MAJOR QUESTIONS DOCTRINE 1 (Nov. 22, 2022); Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. at *23 (forthcoming 2023).

75. *West Virginia*, 142 S. Ct. at 2608–10.

76. *Id.*

77. *Id.*

78. See *id.* at 2608–16; see also Dan Farber, *Emerging Answers to Major Questions*, LEGAL PLANET (July 11, 2022), <https://legal-planet.org/2022/07/11/some-useful-answers-to-some-major-questions/>.

79. See *West Virginia*, 142 S. Ct. at 2610; see also Deacon & Litman, *supra* note 74, at *49–50.

80. See *West Virginia*, 142 S. Ct. at 2610.

shifting was a “fundamental revision of the statute, changing it from one sort of a scheme of regulation to an entirely different kind.”⁸¹ This perceived novelty was a core part of why EPA’s action was sufficiently extraordinary to trigger the MQD.⁸²

A second guidepost is whether the claimed agency authority is born out of statutory language that has existed for a long time but which had not (until the disputed rule) been given much attention by either Congress or the agency. A component of this guidepost is whether the agency’s newfound power came from a “gap-filler” provision that had long been viewed as an “ancillary part” of the greater statutory framework.⁸³ In *West Virginia*, the Court referred to the relevant Clean Air Act provision as “long extant,” meant to conjure up images of an archaic and neglected provision.⁸⁴ The provision had been in force since 1970, amended only twice, and never since 1990.⁸⁵ The Court emphasized that the provision at issue had “rarely been used in the preceding decades” despite having existed unchanged in the statute for a long time.⁸⁶

A third guidepost is whether the agency is doing something more directly within another agency’s domain of expertise and authority. In *West Virginia*, the Court thought that devising emissions standards based on generation shifting would require electricity grid expertise that EPA lacks—including in the complexities of transmission, distribution, and storage systems.⁸⁷ The Court reasoned that where an agency has “no comparative expertise” in making the relevant policy judgments, Congress presumably would not task that agency with developing policy in that area.⁸⁸

In the majority’s view, if EPA implemented a generation-shifting standard, even though it would reduce emissions, EPA would be asserting itself as the agency making energy decisions beyond its regulatory domain: for example, how much coal generation can be sacrificed without jeopardizing grid reliability and how high energy rates should be.⁸⁹ The Court implicitly reasoned that in making these energy policy judgments, EPA would be stepping into the Department of Energy’s and the Federal Energy Regulatory Commission’s domains.⁹⁰ The Court analogized EPA’s overstep to the Center for Disease Control and Prevention’s eviction moratorium: although the eviction moratorium slowed the spread of disease during the COVID-19 pandemic, developing housing policy is the Department of Housing and Urban Development’s domain of expertise and

81. *Id.* at 2611.

82. *See id.*

83. *See id.* at 2610.

84. *Id.*

85. *Id.* at 2602; *see also* 42 U.S.C. § 7411(a), (d); Robert R. Nordhaus & Ari Zevin, *Historical Perspectives on § 111(d) of the Clean Air Act*, 44 ENV’T REP. 11,095, 11,096–99 (2014).

86. *West Virginia*, 142 S. Ct. at 2610.

87. *See id.* at 2612–13.

88. *Id.*

89. *See id.*

90. *See id.*

authority.⁹¹ The Court presented other hypotheticals to exemplify agency encroachment into other agencies' domains.⁹² The Department of Homeland Security making trade or foreign policy on the basis that it might decrease illegal immigration, the Court said, would not pass muster.⁹³ Similarly, the Occupational Safety and Health Administration would encroach on EPA's domain if it were to set emissions standards for factories using its mandate to regulate workplace health.⁹⁴ Thus, in *West Virginia*, the fact that EPA's action encroached on another agency's domain was a key reason why the Clean Power Plan triggered the MQD.

A fourth and final MQD guidepost is whether the agency tried to do something the legislature already "conspicuously" and "repeatedly" declined to do itself.⁹⁵ In the Clean Power Plan, EPA gave plants the option to generation shift by participating in a cap-and-trade system.⁹⁶ The Court pointed to highly controversial and loudly debated federal legislative attempts to create a cap-and-trade system that ultimately failed.⁹⁷ The Court reasoned that "the same basic scheme EPA adopted" had been the subject of an "earnest and profound debate across the county," which ultimately resulted in clear federal legislative rejections of the policy.⁹⁸ In light of that congressional decision, the Court framed EPA's attempt to circumvent the legislature and implement the rejected policy through administrative rulemaking as an impermissible agency assertion of power.⁹⁹

In considering whether other rulemakings will trigger the MQD, agencies—including USDA—now must contemplate these same four guideposts. Before considering a "sound agricultural practices" carbon farming rule relative to these guideposts, the next Part will provide an orientation to agriculture law and policy.

II. AGRICULTURE LAW & POLICY'S UNIQUE, FLAWED LANDSCAPE

Agriculture is an irregular area of law and policy, replete with exemptions from traditional command-and-control regulation.¹⁰⁰ By and large, agriculture

91. *See id.* at 2613.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 2610.

96. *Id.* at 2614.

97. *Id.* at 2614; *see also, e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (1st Sess. 2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (1st Sess. 2009); Climate Protection Act of 2013, S. 332, 113th Cong., (1st Sess. 2013); Save our Climate Act of 2011, H.R. 3242, 112th Cong., (1st Sess. 2011).

98. *West Virginia*, 142 S. Ct. at 2614.

99. *Id.*

100. *See, e.g.*, 49 C.F.R. § 395.1(k) (2024) (describing agricultural exemptions from motor vehicle regulations); 29 C.F.R. § 780 (2024) (describing agricultural exemptions from labor regulations); 40 C.F.R. § 370 (2024) (describing agricultural exemptions from other EPA regulations).

law and policy is a spending regime.¹⁰¹ While many environmental laws interact with agriculture and food systems,¹⁰² the sector's central statutory framework is a package of subsidy allocations, updated approximately every five years, referred to as the Farm Bill.¹⁰³ The current Farm Bill passed in 2018.¹⁰⁴ The Farm Bill gives life to USDA. Like the Clean Air Act provides statutory authority to EPA to fill in gaps left by Congress, the Farm Bill allows USDA to implement spending programs and, in doing so, to fill in details that Congress left open.¹⁰⁵ Commodity subsidy programs form a core part of the Farm Bill's spending regime.¹⁰⁶ In reality, the Farm Bill allocates about three-quarters of its total funds to a group of programs tangentially related to the agriculture sector: Supplemental Nutrition Assistance Programs, which provide direct support to food-insecure individuals and families.¹⁰⁷ However, nearly one-third of the remaining Farm Bill funding goes to commodity subsidy programs.¹⁰⁸ Commodity programs subsidize nearly two-thirds of U.S. cropland by area.¹⁰⁹ Understanding the Farm Bill's development over time provides important context for the opportunity a USDA carbon farming rule presents.

A. *The Farm Bill: a Brief History*

The Farm Bill is an omnibus law born from the New Deal.¹¹⁰ However, since its inception, the Farm Bill has failed to adapt to drastic changes in the U.S. farm economy. The first Farm Bill, the Agricultural Adjustment Act of 1933, was meant to support farmers whose incomes the Great Depression decimated.¹¹¹ Against that backdrop, the New Deal Congress stepped in with

101. See RENÉE JOHNSON & JIM MONKE, CONG. RSCH. SERV., FARM BILL PRIMER: WHAT IS THE FARM BILL? (2022).

102. See MARY JANE ANGELO ET AL., FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW 129–240 (2013).

103. See FARM BILL PRIMER, *supra* note 101. For the current Farm Bill, see generally Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018) [*hereinafter* 2018 Farm Bill].

104. 2018 Farm Bill, 132 Stat. 4490.

105. See FARM BILL PRIMER, *supra* note 101; see generally 2018 Farm Bill, 132 Stat. 4490.

106. See 2018 Farm Bill tit. I, 132 Stat. at 4500–30; *Analysis of Previous Farm Bills: Historical Overviews*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC, <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/analysis-of-previous-farm-bills/>. Commodity programs are discussed at length *infra* Part IV.

107. *Farm Bill Spending*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC. (last updated Sept. 19, 2022), <https://www.ers.usda.gov/topics/farm-economy/farm-commodity-policy/farm-bill-spending/>.

108. *Id.*

109. UNION OF CONCERNED SCIENTISTS, *supra* note 23, at 3.

110. See ANGELO ET AL., *supra* note 102, at 1–12; see generally Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (1933) [*hereinafter* 1933 Farm Bill].

111. See 1933 Farm Bill §§ 1–2, 48 Stat. at 31–32; ANGELO ET AL., *supra* note 102, at 1–12; *History of the United States Farm Bill*, LIBRARY OF CONG., <https://www.loc.gov/ghe/cascade/index.html?appid=1821e70c01de48ae899a7ff708d6ad8b&bookmark=What%20is%20the%20Farm%20Bill> (last visited Nov. 20, 2022); see also Katherine L. Oaks, *The Public Value of Ecological Agriculture*, 21 VT. J. ENV'T L. 544, 565–72 (2020); LEHNER & ROSENBERG, *supra* note 19, at 14 (describing how the agriculture sector was especially hard hit during the Great Depression, at a time when nearly 20 percent of Americans were farmers).

what it intended to be temporary protection for small farmers.¹¹² The Farm Bill of 1933 was meant to stabilize prices for major commodities like corn and wheat at a level that would provide a livable income for all farmers.¹¹³ It contained many component programs, including supply controls, soil conservation strategies, crop insurance and credit, and rural community infrastructure programs.¹¹⁴

The Farm Bill of 1933 successfully caused farmer incomes to rise and stabilize.¹¹⁵ However, because of this success, farm incomes became dependent upon government subsidies that inflated the price of industrially produced commodities. From 1929 to 1940 alone, government payments increased from 3 percent to 29 percent of net farm income.¹¹⁶ Today, this figure is nearly 40 percent.¹¹⁷ Paired with advances in mechanization and chemicals, these subsidies encouraged the biggest producers to consolidate power and dramatically overproduce staple crops like wheat, corn, and soybeans.¹¹⁸

Farm Bill policies, at their core, intentionally created artificially low prices and subsidies tied to maximizing commodity monocultures.¹¹⁹ Over time, this has driven smaller farmers out of the sector and encouraged ecologically destructive land use.¹²⁰ Fueled by Farm Bill policy, today's agriculture sector has consolidated from a fifth of the nation's population working on family farms to relatively few, massive industrial agriculture conglomerates focused solely on commodity monocultures.¹²¹ In 1935, there were 6.8 million farms in the United States, and the average farm size was 155 acres.¹²² In 2021, there were just over 2 million farms in the United States, and the average size was 445 acres.¹²³ Although the amount of land under cultivation has increased slightly, the total number of farms has decreased by 71 percent.¹²⁴ Around 90 percent of Farm Bill subsidy funds go to producers of five commodities—corn, wheat, soybeans,

112. ANGELO ET AL., *supra* note 102, at 2–3.

113. *Id.* at 3; *see also* 1933 Farm Bill §§ 1–2, 11, 48 Stat. at 31–32, 38; *see also* Oaks, *supra* note 111, at 565–72 (describing the Farm Bill's history and evolution through a critical lens).

114. ANGELO ET AL., *supra* note 102, at 3; *See generally* 1933 Farm Bill, 48 Stat. 31.

115. *See* ANGELO ET AL., *supra* note 102, at 4; Oaks, *supra* note 111, at 565–72 (describing the Farm Bill's history and evolution through a critical lens).

116. LEHNER & ROSENBERG, *supra* note 19, at 14.

117. CONG. RSCH. SERV., U.S. FARM INCOME OUTLOOK: DECEMBER 2020 FORECAST (2021).

118. ANGELO ET AL., *supra* note 102, at 2–3; *see also* 1933 Farm Bill, 48 Stat. 31; Oaks, *supra* note 111, at 565–72.

119. *See* ANGELO ET AL., *supra* note 102, at 1–12; *see also* LEHNER & ROSENBERG, *supra* note 19, at 1–32.

120. *See* ANGELO ET AL., *supra* note 102, at 1–12; *see also* LEHNER & ROSENBERG, *supra* note 19, at 1–32.

121. *See* ANGELO ET AL., *supra* note 102, at 1–12; *see also* LEHNER & ROSENBERG, *supra* note 19, at 1–32.

122. ANGELO ET AL., *supra* note 102, at 10.

123. U.S. DEP'T OF AGRIC., FARMS AND LAND IN FARMS: 2021 SUMMARY 4 (2022).

124. ANGELO ET AL., *supra* note 102, at 10.

cotton, and rice—which account for almost 60 percent of the nearly 400 million acres of cropland in the United States.¹²⁵

The monoculture production practiced nearly universally on this land presents a missed opportunity. There are known farming practices that, if implemented, could sequester enough carbon on this land to turn the agriculture sector into a net carbon sink and offset nearly a third of U.S. carbon emissions without sacrificing food production.¹²⁶

B. Climate Mitigation in the Agriculture Sector

Agriculture is both a source of greenhouse gas emissions and an enormous potential carbon sink. Total emissions from the sector were about 629 million metric tons of carbon equivalent (MMT CO₂ eq.) in 2019, constituting over 10 percent of annual U.S. greenhouse gas emissions.¹²⁷ Compared to other sectors, agriculture emits a high share of short-lived climate pollutants, especially nitrous oxide, of which 80 percent of the U.S. total comes from agriculture, and methane, of which 40 percent of the U.S. total comes from agriculture.¹²⁸

The agriculture sector also presents a major carbon sequestration opportunity: soil and biomass matter on agricultural lands trap atmospheric carbon.¹²⁹ However, degraded soil and annual crops—those completely destroyed when harvested, which include the major commodities corn, wheat, cotton, and soy—sequester relatively little carbon.¹³⁰ By contrast, carbon farming practices that increase soil health and perennial biomass could sequester 530 MMT of carbon annually, which would make the agriculture sector a net carbon sink.¹³¹

125. *Id.* at 11; see Trevor J. Smith, *Corn, Cows, and Climate Change: How Federal Agriculture Subsidies Enable Factory Farming and Exacerbate U.S. Greenhouse Gas Emissions*, 9 WASH. J. ENV'T L. & POL'Y 37–40 (2019); UNION OF CONCERNED SCIENTISTS, *supra* note 23, at 3.

126. See LEHNER & ROSENBERG, *supra* note 19, at 58–59, 68; Udawatta & Jose, *supra* note 20, at 225, 239; see also Oaks, *supra* note 111, at 573–78 (describing the externalities of modern commodity subsidy programs).

127. LEHNER & ROSENBERG, *supra* note 19, at 40–41.

128. *Id.* at 41–43. The biggest source of agricultural emissions are livestock operations, especially enteric fermentation in livestock and manure management. *Id.* Livestock is a segment of the agriculture sector this Note—and the commodities programs—does not directly deal with. However, another major source of agricultural emissions, including 93 percent of nitrous oxide emission, is poor management of organic matter breakdown in soil, primarily on cropland. *Id.* at 41; Oaks, *supra* note 111, at 558–63.

129. *What is Carbon Sequestration and How Does It Work?*, UC DAVIS CLEAR CTR. (Sept. 20, 2019), <https://clear.ucdavis.edu/explainers/what-carbon-sequestration>.

130. See LEHNER & ROSENBERG, *supra* note 19, at 58–88; R.F. Follett, *Soil Management Concepts and Carbon Sequestration in Cropland Soils*, 61 SOIL & TILLAGE RSCH. 77, 79–81 (2001); Alexandra Tiefenbacher et al., *Optimizing Carbon Sequestration in Croplands: A Synthesis*, 11 AGRONOMY 882, 882–85 (2021); *Soil-Based Carbon Sequestration*, MIT CLIMATE PORTAL (Apr. 15, 2021), <https://climate.mit.edu/explainers/soil-based-carbon-sequestration>; see also Oaks, *supra* note 111, at 558–63 (describing carbon farming practices).

131. LEHNER & ROSENBERG, *supra* note 19, at 58–59; Udawatta & Jose, *supra* note 20, at 225, 239; see also Oaks, *supra* note 111, at 558–63 (describing carbon farming practices); see generally Follet, *supra* note 130; Tiefenbacher et al., *supra* note 130.

As other sectors like energy and transportation decarbonize, agriculture will become an important sector through which to drive climate policy. Agriculture is the single largest use of land in the United States.¹³² Agriculture accounts for 52 percent of all U.S. landmass and 62 percent of landmass in the lower forty-eight states.¹³³ Due to this scale, the cumulative impact of carbon-sequestering practices on agricultural land can be dramatic over time, even if implemented only on cropland historically dedicated to major commodity crops.

Producers can implement many known carbon farming practices alongside continued commodity production to reduce net emissions from cropland.¹³⁴ As discussed in Part IV, many commodity producers may still receive subsidies despite no longer using their land for commodity production (or for any cultivation at all).¹³⁵ In these cases, producers could implement soil conservation and carbon farming practices at a substantial scale.

Carbon farming practices can take many forms. Methods include cover cropping between harvests of annual crops and reducing or eliminating soil tillage.¹³⁶ Carbon farming can also take the form of agroforestry practices that integrate woody perennials into crop systems.¹³⁷ One specific practice is alley cropping: restructuring monocultured commodity land to instead grow the annual commodity crops in alleys between rows of perennial crops.¹³⁸ Increased alley cropping and silvopasture (tree farming) could sequester over 500 MMT of carbon annually, nearly one-third of the total fossil fuel emissions in the United States each year.¹³⁹

USDA should use its specialized expertise to flesh out this body of carbon sequestering practices. USDA should publish abundant informational materials, and it should offer technical guidance to help producers in diverse agricultural contexts determine which practices are most feasible and effective for them. However, the Farm Bill also gives USDA teeth in crafting a path forward for carbon farming: the authority to tie commodity subsidy payments to producers' implementation of carbon sequestering practices.

III. COMMODITY PROGRAMS & A CARBON FARMING RULE

USDA should tie commodity subsidies to producers' implementation of carbon farming practices, either in a tiered subsidy incentive structure or as a

132. *Major Land Uses*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC. (last updated Aug. 20, 2019), <https://www.ers.usda.gov/topics/farm-economy/land-use-land-value-tenure/major-land-uses/>.

133. *Id.*; LEHNER & ROSENBERG, *supra* note 19, at 37–38. Cropland, as opposed to forest and grazing land, makes up over half of this total. *Id.*

134. *See, e.g.*, Oaks, *supra* note 111, at 558–63 (describing carbon farming practices); Udawatta & Jose, *supra* note 20; Follet, *supra* note 130; Tiefenbacher et al., *supra* note 130.

135. *See* discussion *infra* Subpart V.A.

136. LEHNER & ROSENBERG, *supra* note 19, at 77.

137. *Id.* at 66–67.

138. *Id.*

139. *Id.* at 68.

threshold eligibility criterion. USDA has the authority to implement a carbon farming rule through its discretion to condition subsidies on producers maintaining their land “in accordance with sound agricultural practices.”¹⁴⁰ USDA can take this action notwithstanding *West Virginia* and its new limitation on executive action. Using the Farm Bill’s “sound agricultural practices” language to promulgate a carbon farming rule would be bold agency action. But under the Supreme Court’s *West Virginia* MQD guideposts, it would not be extraordinary enough to trigger the MQD and upset the presumption that USDA has correctly interpreted its statutory authority.

A. Current Commodity Subsidy Programs: ARC & PLC

Commodity subsidy programs allocate federal money to producers of “commodity” crops.¹⁴¹ The programs supplement commodity producers’ earnings while actual market prices for their commodities fall.¹⁴² Commodity subsidy programs have existed since the first Farm Bill, but their contours have changed over time.¹⁴³ Initially, the programs were structured as direct payments to producers tied to the quantity of the commodity harvested.¹⁴⁴ This approach directly incentivized production maximization and allowed producers no flexibility in planting decisions.¹⁴⁵ In the 1990s, this structure came into tension with newly established international trade laws because of its protectionist impact.¹⁴⁶ After reforms in the 1990s, commodity programs were “decoupled.”¹⁴⁷ Decoupling refers to subsidy quantity no longer being tied to harvest quantity.¹⁴⁸ Instead, subsidies are tied to factors like current commodity price and a producer’s historic size of acres planted (even if not currently planted with covered commodities).¹⁴⁹ In this way, Congress has intentionally allowed producers greater planting decision flexibility.

140. 47 U.S.C. § 9018(a)(1)(c).

141. The covered commodities are wheat, oats, barley, corn, grain sorghum, long grain rice, medium grain rice, pulse crops, soybeans, other oilseeds, peanuts, and seed cotton. 7 U.S.C. § 9011(6).

142. See *Crop Commodity Programs*, ECON. RSCH. SERV., U.S. DEP’T OF AGRIC. (last updated Aug. 20, 2019), <https://www.ers.usda.gov/agriculture-improvement-act-of-2018-highlights-and-implications/crop-commodity-programs/>; *Farm Commodity Programs: An Overview*, NAT’L AGRIC. L. CTR., <https://nationalaglawcenter.org/overview/commodity-programs/> (last visited Nov. 20, 2022).

143. See ANGELO ET AL., *supra* note 102, at 1–12; *Farm Commodity Programs: An Overview*, *supra* note 142; Oaks, *supra* note 111, at 573–78; see also 1933 Farm Bill §§ 1–19, 48 Stat. 31, 31–41 (showing the original commodity programs).

144. See ANGELO ET AL., *supra* note 102, at 1–12; 1933 Farm Bill §§ 1–19, 48 Stat. at 31–41.

145. See ANGELO ET AL., *supra* note 102, at 1–12.

146. *Id.* at 8–10.

147. *Id.*; see also, e.g., Agricultural Act of 2014, Pub. L. No. 113-79, §§ 1101–1119, 128 Stat. 649, 658–74 (2014) [*hereinafter* 2014 Farm Bill] (exemplifying a modern, decoupled commodity program).

148. See ANGELO ET AL., *supra* note 102, at 8–10.

149. See *id.*; see also, e.g., 2014 Farm Bill §§ 1101–1119, 128 Stat. at 658–74 (showing a modern commodity program structure where payments are tied to “base acres” rather than actual harvest quantities).

Today's iteration of commodity programs first appeared in the 2014 Farm Bill.¹⁵⁰ Congress then reauthorized the same structure for the current 2018 Farm Bill.¹⁵¹ There are two major commodity programs: the Agricultural Risk Coverage (ARC) program and the Price Loss Coverage (PLC) program.¹⁵² The ARC and the PLC function in parallel to one another, using the same basic structure, but operating on income and price, respectively.¹⁵³ Both programs cover the same commodities¹⁵⁴ and base payments on the size of each producer's historic planting area (called "base acres"), not on the current production of each commodity.¹⁵⁵ Farmers choose to enroll in either the ARC *or* the PLC program, and they may decide differently for each covered crop.¹⁵⁶

The ARC is an *income* support program: it pays producers the difference between a "benchmark revenue" that USDA sets for each commodity and producers' actual revenue.¹⁵⁷ The program tasks USDA with determining the benchmark revenue for each county based on a detailed methodology.¹⁵⁸ The program then guarantees that a producer's crop-year income for each covered commodity will equal 86 percent of that benchmark revenue, calculated against the producer's base acres.¹⁵⁹

The PLC is a *price* support program: it pays producers the difference between a "reference price" set by USDA for each commodity and that year's actual market price for the commodity.¹⁶⁰ The commodity's market price (called the "effective price") is either the national average market price over the current year or the national average loan rate for marketing assistance for the commodity, whichever is higher.¹⁶¹

The 2014 and 2018 Farm Bills authorize USDA to condition subsidy payments on four eligibility factors, all of which pertain to ecosystem health and land conservation.¹⁶² The same eligibility conditions govern the ARC and PLC.¹⁶³ Two of the four conditions call for compliance with specific soil erosion and wetland conservation requirements found elsewhere in the Farm Bill.¹⁶⁴ A

150. See 2014 Farm Bill §§ 1101–1119, 128 Stat. at 658–74.

151. See 2018 Farm Bill §§ 1101–1108, 132 Stat. 4490, 4500–08.

152. 2018 Farm Bill §§ 1106–1107, 132 Stat. at 4504–08.

153. See 7 U.S.C. §§ 9016, 9017.

154. *Id.* § 9011(6). The covered commodities are wheat, oats, barley, corn, grain sorghum, long grain rice, medium grain rice, pulse crops, soybeans, other oilseeds, peanuts, and seed cotton.

155. See *id.* §§ 9011(10), 9011(14), 9014.

156. Agriculture Risk Coverage and Price Loss Coverage Programs, 84 Fed. Reg. 45,877, 45,877 (Sept. 3, 2019) [*hereinafter* 2019 Final Rule].

157. 7 U.S.C. § 9017.

158. *Id.* § 9017(c).

159. *Id.*

160. *Id.* § 9016(a); see also USDA, FSA HANDBOOK: AGRICULTURAL RISK COVERAGE AND PRICE LOSS COVERAGE 4-3 (2021).

161. 7 U.S.C. § 9016(b).

162. *Id.* § 9018(a)(1)(A)-(D).

163. *Id.* § 9018.

164. First, producers must "comply with applicable conservation requirements under subtitle B of title XII of the Food Security Act of 1985." *Id.* § 9018(a)(1)(A). Second, producers must "comply with

third condition is that producers, if not using their land for any cultivation, must continue to use their acreage “for an agricultural or conserving use” as opposed to for “a nonagricultural commercial, industrial, or residential use.”¹⁶⁵ The Farm Bill gives USDA broad authority to determine whether a producer’s use has crossed over from an “agricultural or conserving” use to some other commercial, industrial, or residential use.¹⁶⁶ The fourth and final condition is the focus of this Note: producers must “otherwise maintain the land in accordance with sound agricultural practices, as determined by the Secretary [of Agriculture].”¹⁶⁷ Even though Congress included the clause “as determined by the Secretary” in the fourth condition itself, Congress also chose to reiterate in a standalone provision that it intended to delegate broad discretion to USDA. The separate provision immediately following the four conditions reads: “The Secretary [of Agriculture] may issue such rules as the Secretary considers necessary to ensure producer compliance with the requirements of [any of the four conditions].”¹⁶⁸

Read together, the plain language in all four conditions seems to demonstrate intent to grant USDA broad power to ensure ecosystem-oriented practices (as opposed to merely production-maximizing practices) receive subsidies.¹⁶⁹ While each condition allows USDA to fill in certain gaps, it is the “sound agricultural practices” condition where USDA has the most room to drive novel and effective climate policy. However, USDA has not yet fully leveraged that power.¹⁷⁰

B. *USDA’s Opportunity: the Carbon Farming Rule*

As Congress has changed commodity subsidy programs over time, it has varied the language governing USDA’s authority to implement the programs. A close reading of commodity program statutory language—from the early Farm Bills through the 1990s restructuring and to the present—demonstrates that Congress has deliberately increased USDA’s discretion to tailor producer eligibility to climate change and conservation principles. Dictating best soil, water, and other conservation practices has long been a USDA prerogative.¹⁷¹

applicable wetland protection requirements under subtitle C of title XII of that Act.” *Id.* § 9018(a)(1)(B). Those two references provisions, originating in the 1985 Farm Bill, (1) prohibit USDA program benefits from flowing to any person who produces an agricultural commodity on highly erodible land without the use of conservation practices appropriate for that land; and (2) prohibit USDA program benefits from flowing to producers who convert wetlands to cropland after December 23, 1985. Food Security Act of 1985, Pub. L. No. 99-198, §§ 1211–1213, 1221–1223, 99 Stat. 1354, 1506–08 (1985) [*hereinafter* 1985 Farm Bill].

165. 7 U.S.C. § 9018(a)(1)(D).

166. *Id.* The condition ends with the clause “as determined by the Secretary [of Agriculture].” *Id.*

167. *Id.* § 9018(a)(1)(C).

168. *Id.* § 9081(2). In the statute, the bracketed language reads “paragraph (1)”.

169. See LEHNER & ROSENBERG, *supra* note 19, at 142 (framing the broad grant of discretion to USDA that section 9018 entails).

170. See *id.*

171. See ANGELO ET AL., *supra* note 102, at 1–12.

Over the past few Farm Bill cycles, Congress's changes to Farm Bill statutory language appear to have expanded this long-standing conservation prerogative into a power to drive climate-oriented carbon farming practices using the commodity program eligibility condition. Understanding the current state of USDA commodity program rulemaking provides important background about how USDA's rules can continue to develop.

1. USDA's Current Use of "Sound Agricultural Practices"

USDA has weakly fleshed out its discretion to condition ARC and PLC eligibility on "sound agricultural practices." Nevertheless, USDA has given some important attention to the "sound agricultural practices" statutory language. USDA has only promulgated two rulemakings about the ARC and PLC programs: once after each Farm Bill in which the programs appeared. The first came in 2014, implementing the 2014 Farm Bill ARC and PLC.¹⁷² The second was in 2019, implementing the 2018 Farm Bill ARC and PLC.¹⁷³ In both the 2014 and 2019 rulemakings, USDA referenced—but did not substantively use—its authority to require that producers maintain "sound agricultural practices."¹⁷⁴ However, of the four ARC and PLC conditions, the "sound agricultural practices" condition was the only one USDA mentioned in both rulemakings.¹⁷⁵ As introduced below and further discussed in Subpart C's MQD analysis, this reveals a trend whereby USDA has given disproportionate and growing attention to the "sound agricultural practices" criterion relative to the other eligibility criteria, even though it has not meaningfully leveraged any of the criteria yet. This trend frames a carbon farming rule not as a transformative departure from agency norms that comes through an old, neglected provision, but rather as a natural outgrowth of established momentum around a new, weighty provision.

Read together, the 2014 and 2019 final rules show USDA giving progressively more attention to its "sound agricultural practices" authority. The 2014 final rule, the first to implement the ARC and PLC, references "certain requirements to which the participant must agree to be eligible for payments."¹⁷⁶ In the following sentence, the final rule provides one (and only one) example: the requirement that producers maintain their land using "sound agricultural practices."¹⁷⁷ However, the 2014 final rule ends the discussion there, failing to interpret what the "sound agricultural practices" requirement means.¹⁷⁸

The 2019 final rule is analogous, though slightly expanded. It contains a nearly identical paragraph referring to "certain requirements to which the

172. Agriculture Risk Coverage and Price Loss Coverage Programs, 79 Fed. Reg. 57,703 (Sept. 26, 2014) [*hereinafter* 2014 Final Rule].

173. 2019 Final Rule, 84 Fed. Reg. 45,877.

174. 2014 Final Rule, 79 Fed. Reg. at 57,710; 2019 Final Rule, 84 Fed. Reg. at 45,883.

175. 2014 Final Rule, 79 Fed. Reg. at 57,710; 2019 Final Rule, 84 Fed. Reg. at 45,883.

176. 2014 Final Rule, 79 Fed. Reg. at 57,710.

177. *Id.*

178. *Id.*

participant must agree” and gives only one condition (rather than all four): “sound agricultural practices.”¹⁷⁹ However, in the subsequent sentences, USDA references eligibility details not included in the 2014 final rule.¹⁸⁰ The 2019 rule considers historic commodity base acres planted with fruits, vegetables, and wild rice—which in 2014 would have been ineligible for commodity payments—to count as “planted and considered planted” eligible for subsidies.¹⁸¹ This shows USDA using its subsidy eligibility power to encourage agricultural land use that breaks from traditional commodity production.

The 2019 final rule, unlike the 2014 rule, also explicitly mentions “double-cropping.”¹⁸² Double-cropping refers to sequentially planting two crops on the same field in a given year.¹⁸³ Double-cropping is closely related to the core carbon farming practices of cover cropping and agroforestry.¹⁸⁴ It can be an effective method of increasing soil carbon sequestration by maintaining living roots in the soil year-round.¹⁸⁵ The 2019 rule said that, in light of the “sound agricultural practices” condition, USDA will update a list of counties that have a history of double-cropping commodities with fruits, vegetables, or wild rice, implying that in these areas double cropping would be considered a sound practice.¹⁸⁶ There are currently over a hundred counties on that list.¹⁸⁷ In this way, the 2019 rule shows a precedent for USDA interpreting “sound agricultural practices” as empowering it to encourage flexible use of base acres for practices very similar to carbon farming methods: the integration of diverse crops (which might include perennial fruit trees) into historically commodity-monocultured fields.

Against this backdrop, leveraging the “sound agricultural practices” power to incentivize reasonable carbon farming practices—i.e., to tie “soundness” to carbon sequestration, either explicitly or implicitly through long-standing soil health prerogatives already reflected in the eligibility condition list—is not a departure in the *type* of statutory interpretation or agency power.¹⁸⁸ Rather, USDA would simply be making its current interpretation more rigorous.

179. 2019 Final Rule, 84 Fed. Reg. at 45,883.

180. *See id.*

181. *Id.*

182. *Id.*

183. ALLISON BORCHERS ET AL., U.S. DEP’T OF AGRIC., MULTI-CROPPING PRACTICES: RECENT TRENDS IN DOUBLE CROPPING 2, 3 (2014).

184. *Id.*

185. *Id.*; Curtis D. Jones et al., *Perennialization and Cover Cropping Mitigate Soil Carbon Loss from Residue Harvesting*, 47 J. ENV’T QUALITY 710, 710, 716 (2018).

186. *See* 2019 Final Rule, 84 Fed. Reg. at 45,883 (codified at 7 C.F.R. § 1412.46(f) (2024)).

187. *See* 7 C.F.R. § 1412.46.

188. USDA’s subagency, the Natural Resource Conservation Service, has for many decades worked with farmers, through its local field offices, to implement science-based practices to restore and build soil health. Several of these long-running Natural Resource Conservation Service soil conservation practices, such as cover cropping and reduced tillage, are also core carbon sequestering practices that would be leveraged in a carbon farming rule. For an overview of the Natural Resource Conservation Service’s soil health work since the 1930s, *see A Brief History of NRCS*, U.S. DEP’T OF AGRIC., <https://www.nrcs.usda.gov/about/history/brief-history-nrcs> (last visited Feb. 15, 2023).

USDA should accompany its next rulemaking with a robust, nuanced matrix of carbon farming practices, including those discussed above. It should include recommendations for producers based on localized, regional factors. USDA should use its expertise paired with local conservation districts and stakeholders. Meaningful local engagement early in the rulemaking process could both head off skepticism from stakeholders and inform how aggressively it is feasible for USDA to ramp up carbon farming eligibility requirements. USDA should have an eye toward future rulemakings that require *all* producers wishing to receive subsidy payments to implement some flexible, producer-chosen mix of carbon farming practices from USDA's evolving official matrix.

At least initially, USDA's program may take the form of tiering subsidies to allow greater payments to producers who voluntarily opt into carbon farming practices rather than cutting off from all subsidies producers who fail to implement carbon farming practices. In other words, if USDA favors incrementalism over more rapid disruption in the agriculture sector, it could create tiered subsidy levels instead of immediately requiring carbon farming as a mandatory eligibility condition. For example, USDA may link refusal to implement any carbon farming practices to its lowest subsidy tier and reward greater carbon farming implementation with incrementally greater subsidies, using as many tiers of subsidy amounts as practicable.

Throughout its program implementation, USDA should prioritize serious, good-faith stakeholder engagement and empower local conservation districts to leverage their expertise about regional producers and the holistic local impacts of federally-driven changes. This could entail regionally-tailored carbon farming requirements based on county, management district, or producer-specific factors like quantity of base acres; commodity type historically produced; current use of base acres; local climate and topography; local economic and food supply conditions; and other factors agency experts and local practitioners deem consequential.¹⁸⁹ In any case, USDA's goal should be to entrench a norm over time where producers' eligibility for commodity payments is tied to the degree to which producers implement carbon farming practices.

2. *The Origin and Evolution of "Sound Agricultural Practices"*

Today's commodity subsidy programs—the ARC and PLC—began in 2014.¹⁹⁰ However, the “sound agricultural practices” condition first appeared in

189. USDA's subagencies (e.g., the Farm Service Agency and Natural Resources Conservation Service) administer commodity and other programs through localized field service centers on roughly on a county-wide basis. This existing institutional structure for local program tailoring could be leveraged when implementing a carbon farming rule. For an interactive map of USDA service centers, see Service Center Locator, U.S. DEP'T OF AGRIC., <https://offices.sc.egov.usda.gov/locator/app> (last visited Nov. 15, 2022).

190. See 2014 Farm Bill, 128 Stat. at 658–74.

the 2002 Farm Bill’s commodity programs.¹⁹¹ It appeared again in the 2008, in the only Farm Bill between 2002 and 2014.¹⁹² So, while the current subsidy structure has appeared in the past two Farm Bills, a “sound agricultural practices” condition has existed for the past four.¹⁹³ Still, the four Farm Bills enacted since 2002 represent only four of the five Farm Bills passed since Congress’s major commodity restructuring in 1996.¹⁹⁴ These are only the most recent four of eighteen total Farm Bills since 1933.¹⁹⁵ Even over the four Farm Bills passed since 2002, Congress has modified the provisions surrounding the “sound agricultural practices” condition.¹⁹⁶ A close reading of how Congress developed the commodity condition list over its five most recent Farm Bills—those passed since 1996—demonstrates a trend in congressional action: to delegate to USDA broader authority in structuring commodity eligibility, which opens the door to the agency incorporating carbon farming into eligibility criteria.

Four notable changes occurred in commodity eligibility provisions between 1996 and 2014. The first two happened between the 1996 and the 2002 Farm Bills. In 2002, Congress for the first time separated the list of eligibility criteria into its own named subsection, whereas it previously was integrated into the general program description.¹⁹⁷ Each Farm Bill since 2002 has retained this standalone section for eligibility criteria.¹⁹⁸ This shows Congress chose to place more emphasis on eligibility conditions as it moved from the first restructured Farm Bill in 1996 to the second in 2002.

191. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 1105(a)(1)(E), 116 Stat. 134, 153 (2002) [*hereinafter* 2002 Farm Bill].

192. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 1106(a)(1)(E), 122 Stat. 923, 949 (2008) [*hereinafter* 2008 Farm Bill].

193. 2002 Farm Bill § 1105(a)(1)(E), 116 Stat. at 153; 2008 Farm Bill § 1106(a)(1)(E), 122 Stat. at 949; 2014 Farm Bill § 1118(a)(1)(C), 128 Stat. at 672; 2018 Farm Bill §§ 1101–1108, 132 Stat. at 4500–08 (Note that the 2018 commodity title is structured as adopting the text of the 2014 commodity title except for certain enumerated amendments. The 2018 commodity title incorporates the same text of the 2014 eligibility section, which was section 1118, by reference by making no amendments to it. The “sound agricultural practices” provision is codified at 7 U.S.C. § 9018(a)(1)(C).).

194. For a list of U.S. farm bills, see *United States Farm Bills*, NAT’L AGRIC. L. CTR., <https://nationalaglawcenter.org/farmbills/> (last visited Nov. 20, 2022). For an overview of 1990s farm bill restructuring and commodity program decoupling, see ANGELO ET AL., *supra* note 102, at 8–10. For the text of the 1996 commodity programs, see Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, §§ 111–118, 110 Stat. 889, 898–904 (1996) [*hereinafter* 1996 Farm Bill].

195. See *United States Farm Bills*, *supra* note 194 (showing list of farm bill legislation).

196. Compare 2002 Farm Bill § 1105, 116 Stat. at 152–53, with 2008 Farm Bill § 1106(a)(1)(E), 122 Stat. at 949, and 2014 Farm Bill § 1118, 128 Stat. at 672–73.

197. Compare 2002 Farm Bill § 1105, 116 Stat. at 152–53 (dedicating section 1105 to eligibility conditions and titling the section “Producer Agreement Required as Condition of Provision of Direct Payments and Counter-Cyclical Payments”), with 1996 Farm Bill § 111, 110 Stat. at 898 (including the conditions within section 111, titled “Authorization for Use of Production Flexibility Contracts,” that describes general program components and definitions).

198. See 2008 Farm Bill § 1106, 122 Stat. at 949–50; 2014 Farm Bill § 1118, 128 Stat. at 672–73; 2018 Farm Bill §§ 1101–1108, 132 Stat. at 4500–08 (incorporating the 2014 eligibility section by reference, codified at 7 U.S.C. § 9018, as described in text accompanying note 193, *supra*).

Also in 2002, the “sound agricultural practices” condition appeared for the first time.¹⁹⁹ In other words, the “sound agricultural practices” criterion is *not* a long-extant holdover—old, outdated language from a bygone era—that lingered on, unnoticed and neglected, throughout immemorial Farm Bills.²⁰⁰ Instead, it was a shiny new criterion Congress added in 2002 to its original 1996 list of four eligibility criteria.²⁰¹ It was the product of a relatively recent Congress taking a second look at its original conditions list and affirmatively deciding to delegate even broader, malleable power to USDA. This grant of power allowed USDA to tie commodity subsidies to practically any producer practices the agency deemed worth encouraging.

Congress added the “sound agricultural practices” criterion during the same Farm Bill drafting cycle it chose to emphasize the entire conditions list by placing it in its own named subsection.²⁰² This further indicates that Congress created the “sound agricultural practices” conditions to carry weight, not to be an ancillary and meaningless provision. As discussed in Subpart C, the Farm Bill cycles leading up to 2002 were also defined by Congress increasing USDA’s conservation and climate research mandate elsewhere in the Farm Bill. For instance, the 1990 Farm Bill—the one immediately preceding the 1996 commodity program restructuring—included a “Global Climate Change” title, explicitly tasking USDA with incorporating climate mitigation and adaptation into all of its programming.²⁰³ This context indicates that USDA using the “sound agricultural practices” language to tie commodity subsidies to carbon farming would not constitute an abuse of an ancillary provision to transform the agency’s power. Rather, it would mean using a tool Congress intentionally gave the agency toward an end consistent with Congress’s previous mandates.

Congress made the next two significant changes to commodity subsidy eligibility criteria between the 2008 and the 2014 Farm Bills. In 2014, Congress eliminated an eligibility criterion that had existed since 1996: the requirement that producers comply with a list of planting flexibility requirements (listed in a separate subsection, also deleted beginning in 2014).²⁰⁴ Rather than suggesting that Congress meant to limit USDA’s power to impose eligibility requirements, the change removed a barrier to USDA’s discretion. The so-called “planting flexibility requirements” included in the 1996, 2002, and 2008 commodity titles

199. Compare 2002 Farm Bill § 1105, 116 Stat. at 152–53, with 1996 Farm Bill § 111, 110 Stat. at 898.

200. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (describing Clean Air Act section 111(d) as “long-extant” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

201. Compare 2002 Farm Bill § 1105, 116 Stat. at 152–53, with 1996 Farm Bill § 111, 110 Stat. at 898.

202. Compare 2002 Farm Bill § 1105, 116 Stat. at 152–53, with 1996 Farm Bill § 111, 110 Stat. at 898.

203. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, §§ 2401–2412, 104 Stat. 3359, 4058–62 (1990) [*hereinafter* 1990 Farm Bill]; see also *infra* Subpart V.C.3.

204. Compare 2014 Farm Bill § 1118, 128 Stat. at 672–73 (omitting compliance with planting flexibility requirements from the eligibility criteria), with, e.g., 2008 Farm Bill § 1106, 122 Stat. at 949.

did not *allow* producer flexibility but, instead, *narrowed* it.²⁰⁵ For example, the flexibility requirements prohibited producers from receiving subsidies if they planted any tree crops or perennials on their base acreage.²⁰⁶ Integrating trees and perennials into croplands is the paradigmatic carbon farming practice.²⁰⁷ This means that in the wake of giving sweeping new authority to USDA to condition producer eligibility on “sound agricultural practices, as determined by the Secretary [of Agriculture],”²⁰⁸ Congress also removed a direct restriction on USDA’s ability to leverage that new power to encourage carbon farming. This indicates that Congress wanted USDA to be able to allow, if not require, the type of farming practices that flexibility requirements prohibited from 1996 through 2008. Congress removing the planting flexibility criterion in 2014 showed again that Congress does not simply rubber stamp the same list of eligibility conditions each cycle, as if the whole list is a set of meaningless, ancillary provisions.²⁰⁹ In the 2014 Farm Bill (and again in the current 2018 Farm Bill), Congress chose to retain the “sound agricultural practices” criterion, the only criterion Congress has deliberately added since 1996.²¹⁰ In parallel, Congress *removed* the only condition that could limit the breadth of USDA’s potential interpretation of “sound agricultural practices”: the flexibility requirements.²¹¹

While Congress has held the other three remaining criteria constant since 1996, Congress *expanded* the “sound agricultural practices” condition in 2014, the same cycle in which it removed the flexibility requirement condition. In 2014, Congress for the first time extended the “sound agricultural practices” eligibility condition to all producers.²¹² When first introduced in 2002, and again in 2008, the “sound agricultural practices” condition ended with the clause “*if the agricultural or conserving use involves the noncultivation of any portion of the land.*”²¹³ In 2014 and again in 2018, Congress dropped that final clause entirely.²¹⁴ In other words, when originally adopted in 2002—until amended in 2014—the condition only gave USDA power over a subgroup of producers: those who were not cultivating all of their land but still wanted to receive federal

205. See, e.g., 2008 Farm Bill § 1107, 122 Stat. at 950–52.

206. See, e.g., *id.*

207. See, e.g., LEHNER & ROSENBERG, *supra* note 19, at 64–72.

208. 2014 Farm Bill § 1118(a)(1)(C), 128 Stat. at 672.

209. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2602, 2610 (2022) (describing Clean Air Act section 111(d) as “ancillary”).

210. 2014 Farm Bill § 1118(a)(1)(C), 128 Stat. at 672.

211. *Id.*

212. Compare 2014 Farm Bill § 1118(a)(1)(C), 128 Stat. at 672, with 2002 Farm Bill § 1105(a)(1)(E), 116 Stat. at 153, and 2008 Farm Bill § 1106(a)(1)(E), 122 Stat. at 949.

213. See 2002 Farm Bill § 1105(a)(1)(E), 116 Stat. at 153 (emphasis added); 2008 Farm Bill § 1106(a)(1)(E), 122 Stat. at 949 (emphasis added).

214. 2014 Farm Bill § 1118(a)(1)(C), 128 Stat. at 672; 2018 Farm Bill §§ 1101–1108, 132 Stat. at 4500–08 (incorporating the 2014 eligibility section by reference, codified at 7 U.S.C. § 9018(a)(1)(C), as described in text accompanying note 193, *supra*).

subsidies.²¹⁵ It is important that until 2014, USDA *only* had the authority to require “sound practices” for this subset of producers, and that in 2014 Congress ended this limitation on USDA’s scope of authority. This shows that Congress did not merely put the “sound agricultural practices” condition in an early, antiquated Farm Bill and then let the statutory language lie fallow. On the contrary, in 2014, Congress chose to edit the relevant statutory language to *broaden* the reach of the “sound agricultural practices” condition to apply to the entire regulated community. In fact, as discussed above, in the 2014 Farm Bill Congress simultaneously eliminated the only other condition that could possibly narrow meaning of “sound agricultural practices.”²¹⁶ Through this all, Congress held constant the three other criteria, all of which are conservation-oriented and consistent with carbon farming principles.²¹⁷

This context about how the “sound agricultural practices” Farm Bill provision has developed over the past decades is critical to applying the *West Virginia* MQD. The next Subpart considers how the *West Virginia* majority’s reasoning would interact with a USDA carbon farming rule in light of this context.

C. *The MQD Guideposts Condone a Carbon Farming Rule*

USDA conditioning commodity subsidy payments on carbon farming practices under its “sound agricultural practices” authority would be bold agency-driven climate action. However, this innovative rulemaking would not trigger *West Virginia*’s MQD and the flipped presumption of deference to agency interpretation. A legal challenge to USDA’s rule would likely allege that USDA’s statutory interpretation is an abuse of discretion and exceedance of authority.²¹⁸ In *West Virginia*’s wake, the challenge could also claim that USDA’s carbon farming rule, like EPA’s Clean Power Plan, is so “extraordinary” that it falls to the MQD threshold step during judicial review.²¹⁹ In that case, a court would not review USDA’s rule using lenient *Chevron* deference to agency interpretation; instead, the presumption would be against

215. See 2002 Farm Bill § 1105(a)(1)(E), 116 Stat. at 153; 2008 Farm Bill § 1106(a)(1)(E), 122 Stat. at 949.

216. As discussed above, Congress also removed the “planting flexibility requirements” in the 2014 Farm Bill, which gave producers more leeway to plant perennials and non-commodity crops on their base acres without losing subsidy eligibility. Compare 2014 Farm Bill § 1118, 128 Stat. at 672 (omitting compliance with any planting flexibility requirements from the list of eligibility criteria), with, e.g., 2008 Farm Bill § 1106, 122 Stat. at 949 (listing compliance with planting flexibility requirements as an eligibility condition).

217. For a list of the other three eligibility criteria, which require compliance with soil health and conservation regulations found elsewhere in the Farm Bill, see, e.g., 2014 Farm Bill § 1118(a)(1), 128 Stat. at 672.

218. See Administrative Procedure Act § 10, 5 U.S.C. § 706 (allowing the judiciary to set aside agency rules that are “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “(C) in excess of statutory jurisdiction, authority, or limitations”).

219. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2608, 2609 (2022).

USDA, surmountable only by USDA pointing to a clear statement by Congress that it meant to give USDA power to institute a carbon farming rule.²²⁰

However, the *West Virginia* guideposts would shine very differently on a USDA carbon farming rule than they did on the Clean Power Plan. As discussed in Subpart III.B, the Supreme Court majority used four guideposts in determining that the Clean Power Plan triggered the MQD: (1) the degree of novelty in the agency action; (2) the ancillary nature of the disputed provision within the larger statute; (3) the degree to which the agency action would require expertise better fit for another agency; and (4) the degree to which Congress already considered and rejected legislation intended to do what the agency is now attempting to do through rulemaking.²²¹ Considered relative to the Clean Power Plan and against these four guideposts, a USDA carbon farming rule would not trigger the MQD and the need for a clear statement of congress rather than deference to agency statutory interpretation.

1. Guidepost One: the Claimed Authority's Novelty

The first *West Virginia* guidepost is novelty: whether the agency is claiming a new and transformative type of power through a blatant change in its long-consistent interpretation of the disputed statutory language. USDA's carbon farming rule would be novel, but it would not entail the same type of transformation of agency power that the Supreme Court perceived in the Clean Power Plan. In the *West Virginia* Court's view, before the Clean Power Plan, EPA had always used section 111 of the Clean Air Act to set emissions limits based on the assumption that existing sources would operate more cleanly, *as opposed to* based on the assumption that existing sources would change to an entirely different form of generation.²²² In other words, the Court took issue with EPA transforming its power from compelling coal plants to change their behavior within the bounds of coal-fired electricity production, to instead compelling coal plants to stop prioritizing coal-fired electricity production altogether by focusing on a different generation type.²²³ In the agricultural context, a coal plant no longer prioritizing coal production (in favor of a different generation type) is analogous to a commodity producer no longer prioritizing commodity crop production (and instead focusing on a different crop mix). Unlike EPA and the Clean Air Act, in the agriculture sector, this crop shift is consistent with recent congressional commodity program reform since decoupling in the 1990s.²²⁴

Since Congress began restructuring the commodity program in 1996, both Congress (in its Farm Bill drafting) and USDA (in its implementation) have

220. See *id.* at 2608–16; see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) (articulating the doctrine of *Chevron* deference).

221. See *West Virginia*, 142 S. Ct. at 2608–16; see also overview of *West Virginia*'s holding and the MQD *supra* Subpart III.B.

222. See *West Virginia*, 142 S. Ct. at 2610.

223. See *id.* at 2603–04, 2610.

224. *Supra* Part IV (commodity payments are no longer tied to actual commodity production).

encouraged historic commodity producers to repurpose their land for non-commodity production.²²⁵ Unlike EPA reading Clean Air Act section 111 to contemplate generation shifting, Congress already drafted the commodity programs to contemplate that historic corn, wheat, and other commodity producers have, can, and will switch to perennial fruit and vegetable production.²²⁶ USDA has also read the “sound agricultural practices” language to include double-cropping in certain counties, a practice that does not necessarily maximize commodity crop yields.²²⁷ To expand the double cropping exception to include all producers—and to expand it into a matrix that includes diverse other carbon farming practices for producers to choose from—is far from a “fundamental revision of the statute, changing it from one sort of a scheme of regulation to an entirely different kind.”²²⁸ Rather, it is a natural fleshing out of USDA’s current practice.

This is especially true considering that soil health and conservation-oriented agricultural practices are a running theme throughout the Farm Bill and the commodity eligibility criteria list.²²⁹ This Note discusses USDA’s existing mandate to promote soil health and conservation under the agency expertise guidepost below. However, what is important from a novelty perspective is that carbon sequestration is largely a matter of soil health, and it is well settled that USDA has the authority to determine and incentivize producers to optimize soil health.²³⁰ Against this backdrop, using commodity subsidy eligibility as tool to incentivize carbon sequestering practices is not a radical transformation of USDA authority but, rather, an intuitive outgrowth of current USDA power and the congressional intent underlying it.

2. Guidepost Two: Old, Ancillary, & Neglected Provision?

The second *West Virginia* guidepost is the degree to which the provision allegedly delegating broad power was intended merely as an ancillary gap-filler within the larger statutory framework. In *West Virginia*, the Court referred to Clean Air Act section 111 as “ancillary” and “long-extant” but rarely used.²³¹ That Clean Air Act provision had existed since 1970—practically the beginning of the Clean Air Act’s history—and had been amended only twice, most recently

225. See discussion *supra* Subparts V.A–B.

226. See, e.g., 7 C.F.R. § 1412.46 (2024); discussion *supra* Subparts V.A–B.

227. See 7 C.F.R. § 1412.46.

228. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2608, 2609 (2022).

229. See 7 U.S.C. § 9018(a). For a broader discussion of soil health and conservation in the Farm Bill, see ANGELO ET AL., *supra* note 102, at 7–9, 21–25; *Farm Bill*, NAT. RES. CONSERVATION SERV., U.S. DEP’T OF AGRIC., <https://www.nrcs.usda.gov/farmbill> (last visited Nov. 20, 2022) (describing the 2018 Farm Bill’s conservation programs); SUSTAINABLE AGRIC., IMPACT OF 2018 FARM BILL PROVISIONS ON SOIL HEALTH (2019) (describing nearly sixty provisions tied to soil health).

230. See *A Brief History of NRCS*, *supra* note 188 (providing an overview of how ensuring soil health has been a core part of USDA’s mandate since the early Farm Bills of the 1930s).

231. *West Virginia*, 142 S. Ct. at 2602, 2610.

in 1990.²³² By contrast, the “sound agricultural practices” provision is a recent phenomenon in the Farm Bill’s long history. Whereas the Farm Bill has existed since 1933, the “sound agricultural practices” provision has only existed since 2002 and was amended as recently as 2014.²³³ In other words, the “sound agricultural practices” provision has appeared in only the most recent four of eighteen total Farm Bills: the most recent twenty years of the Farm Bill’s ninety-year history.²³⁴ Moreover, the provision has existed in its current form for only the most recent two of the eighteen total Farm Bills (i.e., for only eight of the total ninety years).²³⁵ Compared to EPA and Clean Air Act section 111, USDA has had less than half the time to settle into a consistent interpretation of “sound agricultural practices.” The relative youth of the “sound agricultural practices” provision in the Farm Bill’s long history distinguishes a potential USDA carbon farming rule from the Clean Power Plan that the Court rejected in *West Virginia*.

In addition to adding the provision relatively recently to the Farm Bill, Congress also indicated that it meant the “sound agricultural practices” criterion to carry special weight. The *West Virginia* Court described Clean Air Act section 111 as an ancillary provision.²³⁶ Congress had amended it only twice in fifty years and never since 1990.²³⁷ By contrast, Congress has amended the commodity eligibility provisions in four meaningful ways since 2002, most recently in 2014.²³⁸ These changes have not been neutral to the “sound agricultural practices” criterion. Rather, they have broadened its reach and removed impediments to a maximalist interpretation.²³⁹ This history indicates that the “sound agricultural practices” eligibility criterion is far from an ancillary provision, long since forgotten and neglected to a shadowy recess of the Farm Bill’s larger scheme. Rather, it is a shining new feature that Congress has spotlighted and continually tailored to maximize its delegatory weight.

3. Guidepost Three: Agency’s Domain of Expertise

The third *West Virginia* guidepost is whether the agency action requires expertise more directly within another agency’s domain.²⁴⁰ In *West Virginia*, the Court reasoned that in order to set standards based on generation shifting, EPA would need expertise in electricity transmission, distribution, and storage.²⁴¹ EPA would also need to determine grid reliability, energy prices, and other areas

232. Nordhaus & Zevin, *supra* note 85, at 11,096–99.

233. See discussion *supra* Subpart V.B.2.

234. See discussion of “sound agricultural practices” history, *supra* Subpart V.B.

235. See *id.*

236. *West Virginia*, 142 S. Ct. at 2610–12; see also 42 U.S.C. 7411(d).

237. Nordhaus & Zevin, *supra* note 85.

238. See discussion of changes to commodity eligibility criteria, *supra* Subpart V.B.2.

239. See discussion of 2014 amendments to the eligibility criteria, *supra* Subpart V.B.2.

240. *West Virginia*, 142 S. Ct. at 2612–13.

241. See *id.*

within the Federal Energy Regulatory Commission's regulatory domain.²⁴² Unlike EPA's action in the Clean Power Plan,²⁴³ determining effective and implementable carbon farming practices for commodity producers is squarely within USDA's traditional area of expertise.²⁴⁴ USDA's staff consists in large part of researchers with scientific expertise in optimizing agricultural practices for both food production and environmental health, including optimizing agricultural practices for net carbon sequestration.²⁴⁵ In addition, USDA already has a subagency dedicated to conservation research and implementation that works closely with local producers and conservation districts.²⁴⁶ The Agricultural Research Service, a subagency within USDA, also runs a National Soil and Air Program: a research program focused on climate mitigation and adaptation in the agriculture sector.²⁴⁷ In fact, in 2021, USDA released a report titled "Action Plan for Climate Adaptation and Resilience" and mentioned soil carbon sequestration throughout the report.²⁴⁸

It is clear that the expertise needed to determine carbon sequestration practices is well within USDA's domain. The 1996 commodity program restructuring and 2002 introduction of the "sound agricultural practices" criterion came on the heels of historic 1980s efforts that added new conservation programs to the Farm Bill.²⁴⁹ These programs directed USDA's experts toward

242. *See id.*

243. In framing the Clean Power Plan as involving energy issues beyond EPA's domain of expertise, the Court listed several other hypotheticals exemplifying agencies stepping into other agency's domains. These examples, listed here, are even more blatant than EPA's supposed overstep. It is worth keeping these other hypotheticals in mind when considering USDA's domain of expertise relative to a carbon farming rule. In *West Virginia*, the Court mentions the Center for Disease Control establishing an eviction moratorium that, though slowing the spread of disease, was really housing policy meant for the Department of Housing and Urban Development; the Department of Homeland Security making trade or foreign policy instead of the Departments of State or Commerce because it might impact illegal immigration; and the Occupational Safety and Health Administration setting emissions standards for factories as a workplace illness measure instead of EPA. *See West Virginia*, 142 S. Ct. at 2613. As discussed in this Subpart, compared to these hypotheticals, the agricultural expertise required for a carbon farming rule is within USDA's core domain.

244. For technical reports exemplifying USDA's relevant scientific and economic expertise, *see, e.g.*, U.S. DEP'T OF AGRIC., U.S. AGRICULTURE AND FORESTRY GREENHOUSE GAS INVENTORY 1990-2018 (2022); JAN LEWANDROWSKI ET AL., U.S. DEP'T OF AGRIC., ECONOMICS OF SEQUESTERING CARBON IN THE U.S. AGRICULTURAL SECTOR (2004); *see also, e.g., USDA Launches First Phase of Soil Carbon Monitoring Efforts through Conservation Reserve Program Initiative*, U.S. DEP'T OF AGRIC. (Oct. 12, 2021), <https://www.fsa.usda.gov/news-room/news-releases/2021/usda-launches-first-phase-of-soil-carbon-monitoring-efforts-through-conservation-reserve-program-initiative>; *USDA to Invest \$8 Million to Expand Monitoring of Soil Carbon*, U.S. DEP'T OF AGRIC. (Sept. 27, 2022), <https://www.nrcs.usda.gov/news/usda-to-invest-8-million-to-expand-monitoring-of-soil-carbon>.

245. *See, e.g.*, U.S. DEP'T OF AGRIC., ACTION PLAN FOR CLIMATE ADAPTATION AND RESILIENCE (2021).

246. *See generally Natural Resource Conservation Service*, U.S. DEP'T OF AGRIC., <https://www.nrcs.usda.gov/> (last visited Nov. 9, 2023).

247. *Soil and Air*, AGRIC. RSCH. SERV., U.S. DEP'T OF AGRIC. (last updated May 28, 2020), <https://www.ars.usda.gov/natural-resources-and-sustainable-agricultural-systems/soil-and-air/>.

248. *See generally ACTION PLAN FOR CLIMATE ADAPTATION AND RESILIENCE*, *supra* note 245.

249. For an overview of 1980s reforms, *see ANGELO ET AL., supra* note 102, at 7–8.

researching how agricultural practices impact soil.²⁵⁰ At its core, carbon sequestration entails the same questions.²⁵¹

Congress has even tied USDA's mission directly to climate change within the Farm Bill. The 1990 Farm Bill contained an independent section entitled "Global Climate Change."²⁵² It directed USDA to integrate climate change mitigation and adaptation into all of its research and programming.²⁵³ While Congress discontinued the standalone climate change title, USDA retains a climate change research mandate to this day.²⁵⁴ In any case, the 1990 climate change title—along with the wave of new conservation programs in the 1980s and 1990s—shows the legislative context surrounding the Farm Bill cycle when the "sound agricultural practices" eligibility condition was born. This context indicates that not only is carbon sequestration well within USDA's expertise as a practical matter, but it is also within USDA's expertise as a matter of legislative intent. There is no agency other than USDA with clearer expertise and direction to figure out how to optimize agricultural practices for carbon sequestration.

Challengers might argue that a carbon farming rule involves expertise about carbon regulation, which is traditionally within EPA's domain. However, this challenge would misunderstand what expertise a carbon farming rule most crucially requires. The rule's crux is not merely the calculation of how much carbon a certain practice will sequester (though this is precisely the type of *agricultural* research USDA's experts do conduct).²⁵⁵ In developing a nuanced matrix of carbon farming practices, USDA will need to consider mandatory and voluntary thresholds that might vary by region and depend on local conditions like topography, climate, and systemic needs in the larger food supply chain. This is analogous to the broader electricity grid expertise the *West Virginia* Court believed EPA lacked.²⁵⁶ There, the Court viewed EPA as being great at calculating emissions but not an expert in systemic electricity grid issues (for example, physical transmission and storage infrastructure and consumer rates).²⁵⁷ By contrast, USDA's traditional expertise *is* in the analogous systemic nuances of agricultural production and the food supply chain, which by extension includes how a carbon farming rule will affect that system through impacts on

250. *See id.*

251. To the extent that carbon sequestration is not about soil, it is about integration of perennials. Recall that in the past three iterations of commodity programs, Congress has directly asked USDA to make determinations about the feasibility and history of double-cropping and perennial integration given local contexts. *See, e.g.*, 2002 Farm Bill, § 1101(g)(4), 116 Stat. at 147 (2002) ("the Secretary [of Agriculture] shall make an exception [to what would otherwise be a subsidy reduction] in the case of double cropping, as determined by the Secretary"); *see also* discussion *supra* Subpart V.B.2.

252. 1990 Farm Bill §§ 2401–2412, 104 Stat. at 4058–62.

253. *Id.*

254. *See* ACTION PLAN FOR CLIMATE ADAPTATION AND RESILIENCE, *supra* note 245.

255. *See* Greenhouse Gas Accounting and Mitigation, U.S. DEP'T OF AGRIC., <https://www.usda.gov/oce/energy-and-environment/climate/mitigation> (last visited Mar. 15, 2023).

256. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022).

257. *See id.*

the larger food supply chain and consumer costs.²⁵⁸ EPA would be far beyond its domain if it contemplated those food system details instead of USDA.

4. Guidepost Four: Prior, Failed Legislative Attempts

The fourth MQD guidepost is whether the agency is doing something the legislature has already “conspicuously” and “repeatedly” declined to do itself.²⁵⁹ Because the Clean Power Plan adopted a cap-and-trade system,²⁶⁰ the Court in *West Virginia* assessed the highly controversial and loudly debated federal legislative attempts at a cap-and-trade system that ultimately failed.²⁶¹ The Court concluded that the Clean Power Plan was “the same basic scheme” that Congress had “considered and rejected” after “earnest and profound debate across the country.”²⁶² To the Court, these failed legislative attempts signaled a lack of legislative intent to delegate EPA power to create a cap-and-trade program through rulemaking.²⁶³ Indeed, there is a long list of failed legislative cap-and-trade proposals.²⁶⁴

By contrast, Congress has considered very little legislation analogous to tying commodity subsidy eligibility to carbon farming, apart from two current bills.²⁶⁵ Neither bill is about commodity subsidies, but both would incentivize carbon sequestration on agricultural lands. One bill, introduced in September 2022, would amend the Internal Revenue Code to create a tax credit tied to farmers’ carbon sequestration.²⁶⁶ The other bill, introduced in April 2021, would authorize USDA to develop a voluntary market for carbon sequestration.²⁶⁷ The latter bill was sponsored by Republican Senator Mike Braun and already *passed* the Senate with an overwhelmingly bipartisan 92-8 vote in June 2021.²⁶⁸ So, unlike the Clean Power Plan and cap-and-trade legislation, Congress has never

258. For an example of USDA’s policy prerogatives and activity in this domain, *see* Press Release, U.S. Dep’t of Agric., USDA Announces Framework for Shoring Up the Food Supply Chain and Transforming the Food System to Be Fairer, More Competitive, More Resilient (June 1, 2022).

259. *See West Virginia*, 142 S. Ct. at 2610, 2614.

260. *See id.* at 2614.

261. *Id.* at 2614; *see also* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (1st Sess. 2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (1st Sess. 2009); Climate Protection Act of 2013, S. 332, 113th Cong. (1st Sess.); Save our Climate Act of 2011, H.R. 3242, 112th Cong. (1st Sess. 2011).

262. *West Virginia*, 142 S. Ct. at 2614.

263. *See id.*

264. *See e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009–2010); Energy Innovation and Carbon Dividend Act of 2021, H.R. 2307, 117th Cong. (2021–2022).

265. Growing Climate Solutions Act of 2021, S. 1251, 117th Cong. (2021–2022); Qualified Agricultural Carbon Sequestration Act of 2022, H.R. 9121, 117th Cong. (2021–2022).

266. *See generally* H.R. 9121.

267. *See generally* S. 1251.

268. *See id.*; Helena Bottemiller Evich & Tatyana Monnay, *In Rare Bipartisan Move, Senate Approves Bill to Help Farmers Profit on Climate Action*, POLITICO (June 26, 2021), <https://www.politico.com/news/2021/06/24/senate-farmers-carbon-agriculture-496029>. For a summary of the bill’s status, *see* S.1251 - Growing Climate Solutions Act of 2021, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/1251/text> (last visited Nov. 20, 2022).

rejected legislation analogous to a USDA carbon farming rule. If anything, the opposite is true: there is unique bipartisan support in Congress for incentivizing carbon sequestration. This recent congressional activity supports a notion that it also meant to delegate USDA statutory authority to incentivize carbon farming within its regulatory domain.

Viewed against all the Supreme Court’s *West Virginia* guideposts, a USDA carbon farming rule is far less “extraordinary” than EPA’s Clean Power Plan. Judged by these guideposts, a carbon farming rule should not trigger the MQD’s flipped presumption of correct statutory interpretation.

CONCLUSION

The MQD undoubtedly presents a limitation on agency power and signals a new era of administrative law. Agencies should proceed cautiously with provocative action. With the current makeup of the Supreme Court, litigation would likely result in even tighter judicial constraints. However, the MQD is a death sentence neither for creative and innovative rulemaking, nor for executive branch-driven climate policy. USDA’s ability to mitigate climate change through commodity subsidy programs exemplifies an area where bold, agency-led climate action is still possible, even after *West Virginia*. Through its authority to condition commodity subsidy eligibility on producers’ maintaining their land with “sound agricultural practices,” USDA can tie subsidies to carbon sequestering practices. USDA could look even further into other areas of untapped discretion in its statutory authority. For example, USDA could potentially leverage other major program areas—like federal crop insurance programs—to tie federal benefits to producer carbon sequestration.²⁶⁹

Agricultural law and policy need holistic reform. True transformation will require legislative action within the commodity programs and throughout the Farm Bill. The next Farm Bill cycle is already here,²⁷⁰ and ideas for revolutionary legislative change do exist.²⁷¹ Nevertheless, stalemate and stagnation continue to characterize Congress. Be that as it may, Congress has already delegated meaningful power to USDA to act through rulemaking. Even in light of the MQD, as long as the “sound agricultural practices” criterion exists in the Farm Bill, USDA can begin the process of scaling up carbon farming on U.S. cropland.

269. 7 U.S.C. § 1508(a)(3)(A)(iii) (conditioning insurance eligibility on sustainable farming practices); *id.* § 1508(i)(1) (authorizing USDA to devise insurance rates and policies that “will improve the actuarial soundness” of the insurance program).

270. *See The Farm Bill*, U.S. SENATE COMM. ON AGRIC., NUTRITION, AND FORESTRY, <https://www.agriculture.senate.gov/farm-bill>.

271. *See, e.g.*, 2023 FARM BILL PLATFORM, NAT’L SUSTAINABLE AGRIC. COAL. (2022); *2023 Farm Bill Policy Platform*, AM. FARMLAND TR., <https://farmland.org/2023-farm-bill/> (last visited Nov. 20, 2022); *see also* LEHNER & ROSENBERG, *supra* note 19, at 111–180; ANGELO ET AL., *supra* note 102, at 263–79, 325–32.

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