

Ag & Food Law Update: First Quarter 2017

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Since the beginning of the year, there have been a number of significant legal developments in the agricultural sector. Many of these issues will continue to play out over the next year and will impact agriculture throughout the country. Notably, there were important developments involving the WOTUS Rule, the Des Moines Waterworks lawsuit, and the Endangered Species Act.

In this light, the Agricultural and Food Law Consortium has compiled this review of some of these developments, with links for additional resources. Led by the National Agricultural Law Center (NALC), the Consortium is a four-university partnership designed to enhance and expand the development and delivery of authoritative, timely, and objective agricultural and food law research and information.

Many of these issues will also be discussed at the Fourth Annual Mid-South Agricultural & Environmental Law Conference, to be held on June 9th at the University of Memphis Cecil C. Humphreys School of Law. Details on the Mid-South conference are available on the National Agricultural Law Center website [here](#).

For daily updates of federal and state legislative, regulatory, and judicial developments, check out the *Ag & Food Law Update* published on the NALC website [here](#). With suggestions for next quarter's update or other related questions, please contact Mark Camarigg (National Agricultural Law Center) at camarigg@uark.edu.

Rusty Patched Bumble Bee Listed Under the Endangered Species Act

The rusty patched bumble bee's official endangered species status became effective on March 21, 2017 after a regulatory freeze by the Trump Administration suggested that there would be a review of the listing, pushing the bee's status date past the originally intended date of February 10, 2017. The rusty patched bumble bee is an important pollinator species whose habitat, at one time, covered a large swath of the Northeast, East, and Midwest in the U.S. as well as parts of Canada. In recent years, the bumble bee's range and overall numbers have diminished. More information about the Endangered Species Act and the rusty patched bumble bee's listing is available from The Ohio State Agricultural & Resource Law Program [here](#).

Des Moines Water Works Lawsuit Dismissed

A federal district court dismissed the lawsuit brought by the Des Moines Water Works utility against thirteen upstream drainage districts in Iowa. The utility, which supplies water to the most populated area in Iowa, sued the drainage districts for costs of removing nitrates that it claimed originated from drainage tile within those districts and for violating a number of state and federal laws, including the Clean Water Act. The federal court submitted questions of state law to the Iowa Supreme Court, which responded in January 2017 that state law prohibited damage claims against the drainage districts. The federal court then ruled on the remaining questions of federal law in March, rejecting all of the water utility's claims and dismissing the lawsuit. A full explanation of the lawsuit and its possible implications for the rest of the United States is available [here](#) and [here](#). *See also*, Harrison Pittman, Rusty Rumley, *Agriculture, Drainage Districts, and the Clean Water Act: Does What Happens in Des Moines Stay in Des Moines?*, 8 Ky. J. Equine, Agric. & Nat. Resources L. 509 (2016).

Waters of the United States Rule

In late February and early March of 2017, actions taken by Congress and the Trump administration began to chip away at the controversial Waters of the United States Rule (WOTUS) Rule, including a House Resolution, an Executive Order, and a subsequent EPA and Civil Works response. The WOTUS Rule was the Obama Administration's attempt to clarify waters that qualify as "waters of the United States" for purposes of regulation under the Clean Water Act. Many believe the WOTUS Rule expands the definition of "waters of the United States," which also expands federal regulatory authority, but the current political climate suggests that the Rule will not become effective. A more thorough explanation of the recent actions concerning WOTUS is available from The Ohio State University Agricultural & Resource Law Program [here](#).

Syngenta Class Action Lawsuit Opt-out Deadline Passes

April 1, 2017 marked the deadline for farmers to exclude themselves from the class action lawsuit against Syngenta pending in the U.S. District Court in Kansas. The lawsuit, "In re Syngenta AG MIR162 Corn Litigation," claims that Syngenta should be liable for the drop in corn prices that followed China's rejection of U.S. corn shipments in 2013 because Syngenta had released its Duracade and Viptera brands of genetically-modified seed before receiving China's approval. An update of the Syngenta litigation is available from The Ohio State University Agricultural & Resource Law Program [here](#). A recording of the January 19th Consortium webinar titled *Major Market Approval and the Syngenta China Corn Class Action* is available on the National Agricultural Law Center website [here](#).

Purple Paint Trespassing Legislation Continues to Gain Momentum in States

Ohio became the thirteenth state in the country to consider legislation that allows landowners to use "purple paint" to alert potential trespassers of property boundaries. Under the Ohio proposal,

purple paint markings would have the same legal effect as a “No Trespassing” sign for purposes of prosecuting trespassers under criminal trespassing laws. West Virginia, Kansas, Arizona, Montana, Arkansas, Idaho, Florida, Maine, North Carolina, Missouri, Illinois and Texas have passed similar legislation to provide landowners a less expensive and longer-lasting alternative to posting signs that are often removed or damaged. Visit [this link](#) to read more about the latest purple paint legislative proposal. Additionally, the National Agricultural Law Center is collecting the statutory language for those states who have already passed similar laws, and it will be available shortly.

Calculating Differential Property Tax Assessment for Farmland

Methods of determining property tax on agricultural land vary significantly from state to state. One thing that is similar however, is that farmers in many states have experienced significant increases in property taxes the past few years. In Ohio, for example, the Current Agricultural Use Value (CAUV) program offers differential tax assessment based on farmland’s agricultural use and not on the market value of the property. A bill proposes changes to the CAUV calculation method to minimize the potential of dramatic increases in property taxes from year-to-year. An explanation of the proposed legislation is [here](#). Further, The Ohio State University Agricultural & Resource Law Program is in the process of collecting the language of the various states’ differential property tax laws as they relate to agriculture. The compilation should be available sometime in the coming few months.

Avian Influenza Confirmed in Three Southern States

In March 2017, state and federal officials confirmed the presence of avian influenza in commercial poultry flocks in [Tennessee](#), [Kentucky](#), and [Alabama](#).

California Farm Faces Cruelty Charges

On February 7, 2017, the [Los Angeles Times](#) reported that a California egg farm had been charged with 39 counts of animal cruelty. According to the article, the charges in question were for the alleged violation of the state’s Prevention of Farm Animal Cruelty Act. Known also as [California Proposition 2](#), the law “prohibits the confinement of farm animals in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs.” Several states have passed similar farm animal confinement statutes. To read the language of those statutes, compiled by the National Agricultural Law Center, click [here](#).

Philadelphia Soda Tax Goes Into Effect

On January 1, 2017, the city of Philadelphia, Pennsylvania’s sugar-sweetened beverage tax went into effect ([Bill No. 160176](#)). The legislation imposes on beverage dealers a 1.5% per fluid ounce tax on any sugar-sweetened beverage supplied, acquired, delivered, or transported into the City for retail sale.

USDA Announces Farmer Fair Practices Rules

Late last year, the USDA's Grain Inspection, Packers and Stockyards Administration (GIPSA) announced updated regulations designed to protect contract rights of farmers. Per the USDA, the proposed rules address unfair practices and clarify conduct violating the Packers and Stockyards Act. The proposed Farmer Fair Practices Rules, the comment period of which closed on March 24th, may be viewed [here](#).

Punitive Damages Allowed in Farmer Lawsuits Against Syngenta

A Minnesota judge will permit farmers to seek punitive damages against Syngenta for selling genetically modified corn seeds before China approved imports of crops grown from them. The judge concluded there is evidence Syngenta knew the risks of commercializing Viptera and Duracade corn containing a trait China had not approved for imports, and intentionally disregarded the probability of losing the Chinese market for U.S. corn farmers. A copy of the opinion is available [here](#).

AMS Proposes Industry-Funded Promotion Program for Organic Products

A proposed rule published by the Agricultural Marketing Service (AMS) would establish an industry-funded "promotion, research, and information" program (Order) for certified organic products. The Organic Trade Association submitted the proposed program to AMS citing a need to address domestic supply shortages of organic products, pest management, and general market confusion. Proponents believe improved measures will also expand existing markets for organic products. AMS recently announced that it is extending the comment periods on whether USDA should establish an organic research and promotion checkoff and how a referendum on that checkoff should be conducted. The deadline for comments is April 19 and details on the program are available [here](#). For more information on checkoff or marketing programs in general please click [here](#).

\$455 Million Award to Bayer Affirmed in Patent Lawsuit

A federal appeals court upheld a patent infringement award involving a gene used in glufosinate-tolerant seed. Bayer sued Dow for patent infringement and an arbitration tribunal awarded Bayer \$455 million, including damages for breach of contract and patent infringement. The Federal Circuit Court of Appeals in Washington, D.C., affirmed a January 2016 district court judgment confirming an arbitration award issued by an international tribunal. Bayer alleged that Dow infringed on four patents that "describe and claim various technologies related to the *pat* gene, which confers resistance to the herbicide glufosinate," the appeals court said in its ruling. A copy of the opinion is available [here](#).

Montana Beef Council MOU With USDA Agricultural Marketing Service

On December 23, 2016, USDA announced in a court pleading filed in *Ranchers-Cattlemen Action Legal Defense Fund, United Stockgrowers of America v. United States Department of*

Agriculture, 4:16-cv-00041-BMM, Doc. 45 (D. Mont., Dec. 23, 2016) (R-CALF) that a Memorandum of Understanding (MOU) has been entered into between the USDA Agricultural Marketing Service (AMS) and the Montana Beef Council (MBC) for the purpose of providing direct AMS oversight of the MBC in its use of state-retained funds derived from the \$1.00 per-head assessment paid by Montana beef producers pursuant to the national beef research and promotion program. Importantly, the MOU also binds all third-party persons, entities, or institutions that contract with MBC to conduct research, consumer information, and industry information programs. Additionally, the MOU provides that the USDA Secretary “or agents of the Beef Promotion Operating Committee or the Beef Board may audit periodically the records of the contracting party.” The MOU is binding on MBC until such time as both MBC and AMS mutually agree to terminate the MOU. A National Agricultural Law Center Publication detailing the MOU is available [here](#). Further, a recording of the February 15th webinar titled *Legal Checkup on Checkoffs: Recent & Emerging Issues in Federal and State Checkoff Programs* is available [here](#). See also, the NALC publication titled *Beef, Beans, & The First Amendment: Disappearing Sovereignty for State Beef Councils and Soybean Boards?*, which is available [here](#).

FDA Denies Rulemaking Petition on Vibrio

In November 2016, the Food and Drug Administration (FDA) denied a citizen petition from the Center for Science in the Public Interest (CSPI) to issue and enforce a “performance standard” for control of *V. vulnificus* in shellfish. *V. vulnificus*, more commonly referred to as vibrio, is a naturally occurring bacteria in the marine environment that can cause infections through contact or ingestion. Consumers of raw oysters from the Gulf of Mexico are at greatest risk of vibrio infections. In its petition, the CSPI requested the FDA take regulatory action to establish a performance standard of “non-detectable” in molluscan shellfish intended for raw consumption. The FDA determined that a performance standard was not warranted at this time due to increased state and industry compliance with *V. vulnificus* control plans and subsequent reduced illnesses and deaths. A copy of the FDA’s denial letter is available [here](#).

U.S. Army Corps of Engineers Reissues Nationwide Permits

On Jan. 6, 2017, the U.S. Army Corps of Engineers published the final rule reissuing 50 nationwide permits (NWP) and issuing 2 new NWP – all necessary for work in streams, wetlands and other waters of the United States under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. NWP streamline the permitting process for qualifying projects and can significantly reduce the costs and time associated with obtaining project approval. The 2017 NWP took effect March 19, 2017.

The 2017 NWP reissued and revised NWP 48 for Existing Commercial Shellfish Aquaculture Activities. The 2017 NWP also includes a new nationwide permit for living shorelines. NWP 54 authorizes construction and maintenance of living shorelines for shore erosion control. The

Corps of Engineers issued NWP 54 to offer landowners an alternative general permit authorization to the various types of bank stabilization activities authorized by NWP 13.

More information about the Nationwide Permits can be accessed [here](#).

Additional Items of Interest:

- [9th Circuit resurrects ESA lawsuit over pesticide impacts](#)
- [The Veterinary Feed Directive Rules](#)
- [Minnesota Court Rejects Army Corp's CWA Jurisdiction](#)
- [Class Action Against Monsanto for Dicamba Drift](#)
- [ESA Compensatory Mitigation](#)
- [Senate Farm Bill hearings begin](#)
- [House Farm Bill hearings begin](#)