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The National Agricultural Law Center provides the Ag & Food Law Quarterly Report as part of its mission to serve as the nation's leading source of agricultural and food law research and information. The Quarterly Report is a comprehensive but not exhaustive summary of notable federal and state level regulatory, legislative, and judicial agricultural and food law legal quarterly developments. Links to additional resources for each development are provided, as appropriate. For daily updates, both archived and upcoming, please visit the National Agricultural Law Center (NALC) Ag & Food Law Update, available on the NALC website [here](#).

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Animal Welfare

The Other Prop 12? On August 11, the parties in a lawsuit challenging Massachusetts's restriction on pork sales agreed to stay the case until the Supreme Court of the United States decides a case before them

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contemplating the constitutionality of California's Proposition 12. Massachusetts's restriction on pork sales is substantially similar law to Proposition 12. Info [here](#). To see other states' animal confinement statutes, click [here](#).

What's Cooking with Prop 12? Recently, the NALC published an article that provides an update of the previous version with events from the past 6 months on the litigation concerning California's Proposition 12 and the prohibition of importing food products that are not raised to Prop 12 standards. To read this article, click [here](#).

In October, the Supreme Court heard oral arguments in the Proposition 12 case, and a recording is available [here](#). A ruling is expected in early to mid-2023.

Notice announcing the availability of FDA's most recent periodic reassessment of the definition of "small number of animals" for minor use in major species. FDA is also announcing that the small number of animals upper limit thresholds (small numbers) for horses and the food-producing major species (cattle, pigs, turkeys, and chickens) will remain the same. [Info here](#).

Antitrust

On July 25, the Department of Justice (DOJ) filed a lawsuit against a data consulting firm, Cargill Inc., Sanderson Farms Inc., and Wayne Farms LLC. At the same time, DOJ filed proposed consent decrees against the same companies. Both efforts aim to end the "long-running conspiracy to suppress worker pay at poultry processing plants and address deceptive abuses against poultry growers." For more information on these lawsuits, click [here](#).

Biotechnology/Genetic Engineering

A standalone text option on food packaging does not comply with a 2016 GMO labeling law requiring an accessible alternative to QR codes, according to [U.S. District Judge James Donato in the Northern District of California](#). For more background on biotechnology issues, click [here](#).

Carbon/Climate

On August 16, 2022, President Biden signed the \$739 billion spending package known as the Inflation Reduction Act ("IRA") of 2022 into law. Many of the financial incentives and other funding measures incorporated into the IRA are aimed at agriculture, including \$18 billion for four USDA conservation programs. Along with funding for these programs, the IRA also includes \$4 billion in funding for drought relief efforts in the Western United States. Additionally, the IRA allocates \$3.1 billion in debt relief for "distressed borrowers" whose farming operations are at financial risk and another \$2.2 billion in financial assistance for certain underserved producers that experienced discrimination in a USDA lending program prior to January 1, 2021. To read the text of the IRA, click [here](#). For NALC articles on the agricultural provisions incorporated in the IRA, click [here](#) and [here](#).

Investing in Carbon-Smart Commodities. Recently, USDA announced that it is investing up to \$2.8 billion in 70 selected projects under the first [Partnerships for Climate-Smart Commodities](#) funding pool. The projects, which were awarded up to \$95 million each and will be carried out over five years, are aimed at producing lower-carbon versions of agricultural commodities.

Clean Water Act

On Alert? In *Shark River Cleanup Coal. v. Twp. of Wall, No. 21-2060 (3rd Cir. Aug. 24, 2022)*, the Third Circuit Court of Appeals considered what information a plaintiff must include in the notice provided to a defendant alerting them that the plaintiff intends to file a Clean Water Act ("CWA")



citizen suit against them. Under the CWA, any party looking to initiate a citizen suit, must first provide notice to the alleged violator informing them of the alleged violation, and the possibility of a future lawsuit. The notice must be issued sixty days prior to the prior to the plaintiff filing suit, and must contain enough information so that the recipient may identify the “components of an alleged violation” including the exact provision of the CWA that has allegedly been violated. Here, the court determined that the plaintiff had provided “just barely” enough information to allow the defendant to locate the area where the alleged violation occurred. However, the court found that because the notice referred to the entire CWA – as opposed to a particular provision – as well as several state laws, the notice failed to inform the defendants what CWA provisions the plaintiffs were claiming had been violated. Therefore, the court found the notice to be insufficient and dismissed the case.

Conservation Programs

Program Signups. On July 12, USDA announced that it had begun accepting offers for more than 3.1 million acres from agricultural producers and private landowners through this year’s Grassland Conservation Reserve Program (Grassland CRP) signup. According to USDA, this is the largest amount of signups in the history of CRP. To learn more about this year’s CRP signup, click [here](#).

Constitutional Conservation. In *Foster v. United States Dep’t of Agric.*, No. 4:21-CV-04081 (D. S.D. July 1, 2022), a federal court considered whether the wetland conservation provisions of the Food Security Act of 1985, typically referred to as the “Swampbuster” program, were constitutional. The case arose out of the plaintiff’s desire for USDA to set aside a wetland certification made by NRCS pursuant to Swampbuster concluding that 0.8 acres of land located on the plaintiff’s property was a wetland. The plaintiff’s filed suit, arguing that the Swampbuster program violated the Commerce Clause of the United States Constitution because wetlands are not an instrument of commerce. In response, the defendant asked the court to dismiss the case, noting that for decades various courts have upheld Swampbuster as constitutional under the spending power granted to Congress by Article I § 8 of the Constitution. The court agreed with the defendants, finding that Swampbuster was constitutional under the spending power. Accordingly, the case was dismissed.

Disaster Relief/Crop Insurance

Rejecting Reformation of Insurance Policy. In *Elbert v. United States Dep’t of Agric.*, No. CV 18-1574 (JRT/TNL), 2022 WL 2670069 (D. Minn. July 11, 2022), a group of dark red kidney bean farmers from Minnesota filed suit against the Federal Crop Insurance Corporation (“FCIC”) and the Risk Management Agency (“RMA”) for allowing their crop insurance policies to convert from revenue coverage into yield protection coverage. For the 2015 crop year, the plaintiff-farmers purchased crop insurance to protect against a decline in bean prices as measured by the difference between the spring projected price and the fall harvest price. Such a decline occurred but there was insufficient published pricing data to establish a harvest price. Accordingly, the harvest price was set equal to the projected price and the farmers were unable to receive indemnities under their policies. The farmers brought claims under the Administrative Procedure Act (“APA”) against FCIC and RMA arguing that it was arbitrary and capricious to allow the conversion of their policies. The plaintiffs requested the court to reform the insurance policy contracts to required FCIC to establish a harvest price when insufficient published data is available. The court, however, determined that reforming the policy was not an appropriate remedy under the APA. Instead, the court ordered FCIC to reconsider whether to (1) amend the pricing mechanism for dark red kidney beans in Minnesota for the 2015 crop year or (2) have FCIC establish a price under the policy. The court’s decision in *Elbert* can be found [here](#). For NALC resources on crop insurance, click [here](#).

Grants for Livestock Operation Infrastructure. Recently, the Arizona state legislature enacted **HB 2182** to provide grant assistance to landowners and lessees of livestock operations of more than forty animals under normal operating conditions for infrastructure projects that are required as a result of a wildfire and associated flooding. To read the text of HB 2182, click [here](#).



Endangered Species Act

Dammed Up. In *San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District*, No. 21-cv-55479 (9th Cir. 2022), the plaintiffs claimed that the defendants' operation of Twitchell Dam interferes with Southern California Steelhead's reproductive migration and constitutes an unlawful take in violation of the ESA. The defendants argued that they have no discretion to release any amount of dam water to preserve endangered Southern California Steelhead and therefore are not liable under the ESA. Both the district court, and the appellate court agreed with the defendants.

Proposals. FWS issued proposals regarding the [ivory-billed woodpecker](#), and the [magnificent ramshorn snail](#).

Listed. FWS has listed the [Canoe Creek clubshell mussel](#) as endangered under the ESA.

Reclassified. FWS has reclassified the [smooth coneflower](#) from endangered to threatened.

Environmental Protection Agency

EPA Approves. In July, EPA issued a final rule announcing that it was authorizing all of Tennessee's changes to its hazardous waste program under the Resource Conservation and Recovery Act. The authorization became effective September 12. For more information, see [here](#).

Finance, Credit & Tax

CFAP Fraud Findings. A [recent study](#) conducted by the Government Accountability Office ("GAO") found that USDA did not adequately guard against fraudulent [Coronavirus Food Assistance Program](#) ("CFAP") claims. In response to the economic crisis caused by the coronavirus pandemic, USDA offered financial assistance to producers under CFAP. From 2020 through 2021, USDA conducted three separate rounds of CFAP and provided \$31 billion in assistance to over 950,000 producers. GAO reviewed 90 producers' CFAP claims that were considered to be "at-risk" for improper payment. Of those 90, GAO found that over half of the producers' program payments were potentially improper. Accordingly, GAO recommended that USDA conduct additional and more rigorous spot-check reviews to ensure producers' claims for program payments are accurate. The full report can be found on GAO's website [here](#). For more resources on disaster assistance programs, click [here](#).

Food Safety & Labeling

The Adulterating Foodborne Pathogens. On August 1, the Food Safety and Inspection Service ("FSIS") announced it will declare Salmonella an adulterant in breaded and stuffed raw chicken products. FSIS expects to publish a proposed rule in the fall of 2022. To read a USDA press release discussing this announcement, click [here](#). Additionally, the Food and Drug Administration ("FDA") published a final guidance for industry entitled "Prevention of Salmonella Enteritidis in Shell Eggs During Production, Storage, and Transportation (Layers with Access to Areas Outside the Poultry House): Questions and Answers Regarding the Final Rule." That guidance can be found [here](#).

A Bigger Cottage. A few states have increased the gross annual sales threshold for cottage food producers, meaning that more home-base food manufacturers fall under the reduced restrictions placed on such businesses. Through [HB 314](#), New Hampshire adjusted the maximum annual gross sales of food by a homestead food operation that determines exemption from licensure and departmental inspection from \$20,000 to \$35,000. Louisiana's state legislature enacted [HB 828](#), which increases the gross annual sales threshold to \$30,000 for which a home-based preparer of low-risk foods may qualify for protections under the state's cottage food law. Also, California's state legislature enacted [SB 972](#), which now allows cottage food operations within the state to serve as a commissary or mobile support unit for up to 2 compact mobile food operations if the operation permit includes an



endorsement from the local enforcement agency that the operation can support the preparation and storage of the food. This bill also authorizes non-potentially hazardous foods prepared in a cottage food operation to be served from a compact mobile food operation.

Either ounces or pounds. FSIS amended its labeling regulations to remove the dual labeling requirements for certain packages of meat and poultry. Previously, meat and poultry packages of certain sizes were required to express net weight or net contents in two different units of measurement on the product label. Read the agency’s final rule [here](#).

Slacking to fill. In *Leroy Jacobs, individually & on behalf of all others similarly situated Plaintiff, v. Whole Foods Mkt. Grp., Inc., Defendant.*, --- F.Supp.3d---, No. 22 C 2, 2022 WL 3369273 (N.D. Ill. Aug. 16, 2022), Whole Foods was sued on the grounds that it violated the Illinois consumer protection statutes by selling its private label “Long Grain & Wild Rice – Rice Pilaf,” in boxes that were larger than necessary. The court found that the unambiguous, conspicuous, and accurate information specific to the question of product yield, coupled with the “net weight and quantity” disclosures printed on the box, conclusively dispelled any reasonable misunderstanding a consumer might have based on box size about the amount of rice pilaf they can make with a box of uncooked product. The court dismissed all of plaintiff’s claims. Click [here](#).

Freedom of Information Act

In *Telematch, Inc. v. United States Dep’t of Agric.*, No. 20-5378, 2022 WL 3330101 (D.C. Cir. Aug. 12, 2022), the U.S. Court of Appeals for the D.C. Circuit considered whether the Freedom of Information Act (FOIA) required the USDA to disclose the assigned numbers of the plots of enrolled farmland and their owners. Telematch, Inc. is a commercial vendor of agricultural data. In 2018 and 2019, it submitted to USDA seven FOIA requests for records containing farm numbers, tract numbers, and customer numbers. USDA withheld the numbers under Exemptions 3 and 6. Telematch sued to challenge USDA’s withholding of the farm, tract, and customer numbers. The court held that USDA permissibly withheld the requested farm, tract, and customer numbers. To read the D.C. Circuit’s ruling, [click here](#).

Hemp

Hemp in the State Legislature. Louisiana recently enacted HB 330, which establishes the state’s Industrial Hemp Promotion and Research Program to support the growth and development of the industrial hemp industry in the state by enhancing research, education, promotion, facilities, and industrial hemp related activities through the Industrial Hemp Promotion and Research Advisory Board. Further, Louisiana’s state legislature passed HB 758, which establishes a definition of “performance-based sampling” and exempts licensees approved by the state’s department of agriculture and forestry for performance-based sampling from the department’s pre-harvest sample collection. To read the text of HB 330 and HB 758, click [here](#) and [here](#).

Marketing Orders & Checkoff Programs

On September 28, 2022, AMS published a final rule that amends the Cotton Board Rules and Regulations by increasing the value assigned to imported cotton for the purposes of calculating supplemental assessments collected for use by the Cotton Research and Promotion Program. This amendment is required each year to ensure that assessments collected on imported cotton and the cotton content of imported products will be the same as those paid on domestically produced cotton. The final rule is published on the Federal Register’s website [here](#).

Nutrition

Pay the farmers, feed the kids. On June 30, 2022, USDA announced it will [contribute almost \\$1 billion to support the purchase of American-grown food in schools](#). The funding, which will be



provided through the Commodity Credit Corp., builds upon the department's \$1 billion in Supply Chain Assistance funding allocated in December. The funding announcement follows President Joe Biden's signing last week of the [Keep Kids Fed Act](#), which extends flexibility to allow schools to serve meals this summer at no cost to families. The \$943 million will be disbursed to state agencies to ensure U.S products are used in schools throughout the country. On July 25, USDA announced it will award more than \$10 million in Farm to School Grants to 123 projects across the country. USDA'S press release announcing the investment can be found [here](#). To read a recent NALC article on the topic, click [here](#).

Organic

The Fight Over Organic Hydroponics. On September 22, the Ninth Circuit Court of Appeals upheld a district court ruling that allows hydroponic produce growers to continue to sell their produce as organic. A NALC article on this topic can be found [here](#).

What is an organic chicken? On August 9, the Agricultural Marketing Service (AMS) published a proposed rule aiming to amend the organic livestock and poultry product requirements. For more information, read a NALC article on this topic [here](#).

Pesticides

Back to the Drawing Board? In **Bader Farms, Inc. v. BASF Corp., No. 20-3663 (8th Cir. July 7, 2022)**, the Eight Circuit Court of Appeals reviewed an appeal brought by Monsanto and BASF concerning a jury decision to award the plaintiffs punitive damages without separately assessing how much damage each defendant was responsible for. In 2020, a jury awarded the plaintiff \$250 million – later reduced to \$60 million – in punitive damages for harm caused to the plaintiff's peach production operation as the result of dicamba drift. The dicamba had been manufactured by the defendant companies, BASF and Monsanto. On appeal, BASF challenged the punitive damages award, claiming that the jury had only been instructed to consider whether Monsanto was liable for punitive damages, not whether BASF was liable. BASF claimed that this was an error and that punitive damages should not have been awarded without the jury individually assessing BASF's wrongdoing. The Eighth Circuit agreed. It ruled that BASF should not have been found liable for punitive damages without a jury reviewing the extent of BASF's wrongful actions and sent the case back to the lower court for a new trial to determine the individual culpability of both BASF and Monsanto.

Once Again, No Preemption. In **Carson v. Monsanto Co., No. 21-10994 (11th Cir. July 12, 2022)**, the Eleventh Circuit Court of Appeals became the latest federal appellate court to consider whether a plaintiff's failure to warn claims in a glyphosate lawsuit were preempted by FIFRA. Like the Ninth Circuit, the Eleventh Circuit concluded that the plaintiff's claim was not preempted because it was not "in addition to or different from" FIFRA requirements. Accordingly, the court ruled that the plaintiff's failure to warn claim could continue on to trial.

And Still, No Preemption. In **Kissan Berry Farm v. Whatcom Farmers Coop, No. 82774-0-I (Wash. Ct. Apps. Sept. 6, 2022)**, a Washington State Court of Appeals considered whether the plaintiffs' state law claims of express warranty were preempted by the FIFRA. Ultimately, the court concluded that the claims were not preempted because the failure to warn claims ran parallel to FIFRA requirements.

Dicamba Drift. A federal judge in Missouri has declined to dismiss product liability and punitive damages claims brought by an Arkansas honey producer against Bayer and BASF. Although the defendant tried to claim that the plaintiff's product liability claims were outside the statute of limitations, the court disagreed. While the plaintiff had allegedly suffered damage from dicamba drift during a year that was beyond the statute of limitations, other instances of damage fell within the timeframe and could be brought to court. For more information on that lawsuit, click [here](#).

Registration Review. EPA has announced the availability registration review documents for [1,3-dichloropropene \(1,3-D\)](#), and [dicamba](#).



Cancellation. EPA issued an order for the cancellations of various chlorpyrifos product. Click [here](#) to see the order.

Production Contracts

Tournament Time. AMS announced a proposed rule that would provide additional time for the public to submit comments and information that will inform policy development and future rulemaking proposals regarding the use of poultry grower ranking systems commonly known as tournaments in contract poultry production. This proposed rule can be found [here](#).

Racial Equality

On August 2, USDA and EPA announced their partnership with “the Closing American’s Wastewater Access Gap Community Initiative.” The agency will choose 11 communities where residents lack basic wastewater management in which the agencies will leverage technical assistance resources to help historically underserved communities identify and pursue federal funding to eliminate harmful wastewater. The press release announcing this partnership can be on USDA’s website [here](#).

Right to Farm

Iowa and the Right to Farm? In *Garrison v. New Fashion Pork LLP*, No. 21-0652, 2022 WL 2347783 (Iowa June 30, 2022), the plaintiff sued the neighboring confined animal feeding operation (CAFO) twice. The first lawsuit was in federal court and was dismissed on summary judgment for lack of expert testimony supporting the plaintiff’s claims that the CAFO’s manure runoff caused excessive nitrate levels in an ongoing violation of federal law. The federal court declined supplemental jurisdiction over his state law claims. The plaintiff then refiled his lawsuit in Iowa district court alleging common law nuisance, trespass, and drainage law violations. The CAFO defendants moved for summary judgment based on the statutory immunity under Iowa Code. The plaintiff, relying on *Gacke*, argued section 657.11 as applied to him was unconstitutional under Iowa’s inalienable rights clause. The district court rejected the plaintiff’s constitutional challenge after determining he failed to satisfy the three-part test in *Gacke* because his own CAFO had benefited from the immunity. The court then granted the defendants’ motion for summary judgment because the plaintiff lacked expert testimony or other evidence to support any exception to the statutory immunity defense or to prove causation or damages. The Supreme Court of Iowa reviewed the decision. On their review, they affirmed the summary judgment. The Court overruled *Gacke*’s three-part test and applied rational basis review to reject the plaintiff’s constitutional challenge to section 657.11 under the inalienable rights clause. The Court concluded that the plaintiff failed to preserve error on his takings claim under article I, section 18 of the Iowa Constitution and failed to generate a question of fact precluding summary judgment on statutory nuisance immunity or causation for his trespass and drainage claims. The Court did not address the plaintiff’s constitutional challenge to the damages limitations in section 657.11A(3). The court’s ruling can be found [here](#). To read your state’s right to farm statute, click [here](#).

