



# The Feed

## Recent Developments in Ag Law & Policy

The Feed highlights recent legal developments affecting agriculture, with issues released twice a month.

Volume 1, Issue 19

October 12, 2023

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### Save the Date: 2024 NALC Conferences

Mid-South  
Agricultural & Environmental Law Conference  
**June 6-7**

Western  
Agricultural & Environmental Law Conference  
**June 13-14**



**PFAS.** Michigan environmental regulators have requested the state's highest court to reinstate regulations on per- and polyfluoroalkyl compounds (PFAS) in drinking water. The regulations were overturned by a split state appeals panel, citing a missing cost-analysis. The Michigan Department of Environment, Great Lakes and Energy (EGLE) argued that it followed the proper steps in regulating PFAS but was wrongfully challenged by 3M Co., which sued EGLE for not including an impact statement in the rulemaking process. The disagreement centers on the estimated compliance cost and whether regulators accurately stated the full cost. 3M claimed that regulators failed to calculate compliance costs, while EGLE argued it provided a general estimate. Click **here** to read EGLE's petition.

- Webinar Opportunity: On October 18, a panel of experts present "Not Your Grandfather's Corn Maze – Regulatory and Legal Responses to Challenges Faced by Agriculture Due to PFAS Contamination". Webinar and registration information are available **here**.

**Antitrust.** The Justice Department is taking legal action against Agri Stats Inc., claiming that the company violated antitrust laws by aggregating and sharing pricing and other data with major poultry, pork, and turkey producers. The government alleges that Agri Stats engaged in anticompetitive information exchanges, stabilizing prices and reducing output for meat products. Specifically, the Justice Department has claimed that Agri Stats violated Section 1 of the Sherman Act by collecting and distributing competitively sensitive data among meat processors. Agri Stats denies these allegations, citing its role in providing benchmarking services that benefit consumers by keeping production costs and prices low. Click **here** to read the Justice Department's complaint. To learn more about antitrust litigation in the protein sector, click **here** to view NALC webinar "Multi-District Antitrust Litigation in the Protein Sectors (Poultry, Pork, and Beef)."

**H-2A Rules.** A federal court in North Carolina has rejected a request for an injunction from farm employers seeking to halt U.S. Department of Labor (DOL) enforcement of a rule that increases

wages for H-2A workers. The court found that the employers failed to demonstrate a likelihood of success on the merits and allowed the matter to proceed. The court noted that DOL had adequately considered the impact of higher Adverse Effect Wage Rates on producers. The court also determined that granting an injunction could cause "at least as much" harm to H-2A workers as denying the injunction would harm the plaintiffs. Typically, a court will only grant an injunction if the balance of equities tips in favor of the plaintiffs, and if the injunction is in the public interest. Click [here](#) to read the court's decision. For more NALC resources on ag labor, click [here](#).

**Lake Erie.** EPA has approved Ohio's plan for reducing phosphorus levels in the western Lake Erie Basin. The plan establishes a total maximum daily load (TMDL) for phosphorus in the Maumee River Watershed which feeds into Lake Erie. Specifically, the [plan](#) addresses harmful algal blooms (HABs) that negatively impact drinking water and aquatic life. To help reduce HABs and meet the phosphorous TMDL, the plan relies on engagement with concentrated animal feeding operations located in the basin to reduce runoff. For more information from EPA, click [here](#).

**Crop Insurance: RMA.** The USDA's Risk Management Agency (RMA) is introducing a new crop insurance program called the Controlled Environment program, set to be available in the 2024 crop year. This program will offer coverage for plants, cuttings, seedlings, and tissue culture grown in fully enclosed controlled environments. It aims to compensate producers for losses incurred when they are required to destroy plants due to diseases under federal or state destruction orders. This program will provide additional options for urban, specialty crop, and organic producers engaged in controlled environment agriculture. The insurance program operates as a "dollar plan of insurance," basing guarantees on reported inventory values by the producer and covering plant categories not typically available in other nursery insurance programs. For more information on the program from USDA, click [here](#).

**Crop Insurance: Eighth Circuit.** The Eighth Circuit affirmed the district court's ruling in a crop insurance case holding that varieties of brown midrib (BMR) corn is not "adapted for silage use only" and can be insured as grain even if the producer uses the crop as silage. The court further held that the defendants did not fraudulently obtain crop insurance proceeds by chopping corn as silage when it was insured as grain because intended usage can change, and the defendants notified the insurer of this change before chopping the corn. At the time of a claim, the fields are audited, and the payment is made based on the audit. To read the decision, click [here](#). For more resources on federal crop insurance, visit the NALC Crop Insurance/Disaster Assistance Reading Room [here](#).

**Seed Patents.** Corteva Agriscience has filed a lawsuit against Inari Agriculture, alleging that Inari used a third-party agent to acquire Corteva's protected seeds and then illegally exported them from the United States in violation of Corteva's patent rights and Plant Variety Protection certificates. Corteva also claims that Inari made minor genetic modifications to the biotech traits and is seeking U.S. patents for these modified traits. Corteva is seeking damages to compensate it for the harm allegedly caused by Inari, as well as a permanent injunction to prevent Inari from taking any future actions in violation of Corteva's intellectual property. The lawsuit was recently filed in the U.S. District Court for the District of Delaware. To read the complaint, click [here](#). For more NALC resources on biotechnology and seed patents, click [here](#).

**Wisconsin CAFOs.** Dairy farmers in Wisconsin have filed a lawsuit seeking to remove regulations on concentrated animal feeding operations (CAFOs). Currently, Wisconsin state law requires CAFOs to obtain a Wisconsin Pollutant Discharge Elimination System permit before discharging pollutants such as manure or waste into waters of the state. In their lawsuit, the Wisconsin Dairy Alliance and Venture Dairy Cooperative claim that such permits should no longer be required due to discrepancies between Wisconsin law and the federal Clean Water Act. To read the complaint, click [here](#). To learn more about CAFO permitting under the Clean Water Act, click [here](#) to read NALC article "Clarifying NPDES Requirements for Concentrated Animal Feeding Operations."

**Nebraska Water Transfer.** The Nebraska Supreme Court has ruled that certain natural resources districts and a power district do not have necessary legal standing to challenge a proposed transfer of water from the Platte River to the Republican River, the first interbasin transfer of its kind to take

place in Nebraska. The transfer is aimed at helping Nebraska comply with a compact between itself and Kansas over Republican River flows. However, various natural resources districts along the Platte River opposed the transfer, claiming that it could harm groundwater irrigators and hydropower production. With the ruling from the Nebraska Supreme Court, the Nebraska water czar will be free to rule on the proposed transfer without hearing from objectors. Click [here](#) to read the court's decision.

**California.** California Governor Gavin Newsom has recently signed into law a variety of bills impacting agriculture. Those bills include:

- **AB 363:** imposes a ban on the sale, possession, and use of neonicotinoid pesticides for non-agricultural use on ornamental plants, trees, and turf beginning on January 1, 2025.
- **SB 389:** clarifies the California State Water Board's role regarding pre-1914 water rights, stating that the Board has the authority to ascertain the validity of individual water rights.
- **SB 253**, and **SB 261:** establishes requirements that large companies report on their climate impacts.
- **AB 1016:** streamlines the licensing and training process for agricultural producers who use drones to make pesticide applications.
- **AB 418:** bans the sale or manufacture of food products that contain brominated vegetable oil, potassium bromate, propylparaben, and red dye 3. This bill is more commonly known as the Skittles ban.

**FSA Prohibits Foreign Participation in Programs.** Recently, FSA published a **final rule** to implement the Milk Loss Program ("MLP") and Phase 2 of the Emergency Relief Program ("ERP"), including eligibility for the programs. Generally, eligible entities that contain some percentage of foreign ownership may still participate in FSA-administered assistance programs and receive a payment that is proportionate to the ownership interest of the entity's eligible members (*i.e.*, U.S. citizens, legal resident aliens of the U.S., and domestic entities). However, FSA has established different eligibility and payment criteria for MLP and ERP. Specifically, only individuals and business entities consisting solely of U.S. citizens or resident aliens of the U.S. are eligible to participate in MLP or ERP. In other words, according to the language contained in the final rule, farm entities that contain any percentage of foreign ownership are ineligible to participate in MLP or ERP. To view NALC resources concerning foreign interests and investments in U.S. agriculture, click [here](#).

**Pesticides: Treated Seeds.** EPA has issued an Advance Notice of Proposed Rulemaking to solicit public comments and suggestions about seeds that have been coated in pesticides, otherwise known as treated seeds. Specifically, EPA is seeking comment on whether it should adopt a rule requiring treated seeds to be regulated under FIFRA. Currently, treated seeds are not subject to FIFRA registration requirements like other pesticide products. However, recent litigation filed by environmental groups and action taken by state legislature have raised the question of whether treated seeds should be subject to additional regulation. Click [here](#) to view EPA's proposal and learn how to submit a comment. For more information on recent action regarding treated seeds, click [here](#) to read NALC article "EPA Faces Treated Seeds Lawsuit."

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