Hot Topics in Agricultural Law

Pesticides, "Prop 12" and More

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National Agricultural Law Center

DIVISION OF AGRICULTURE
RESEARCH & EXTENSION
University of Arkansas System

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Outline:

- ✓ *WOTUS*
- *Pesticide Decisions, Registrations & Use*
- *Prop 12: Current Effect, Future Model?*
- *The Future of Federal Regulations*

What's Going On?

Check out all NALC articles on WOTUS →

- Last year saw many changes to the regulatory definition of the Clean Water Act term "waters of the United States"
  - New definition from EPA in January, Supreme Court ruling in May, updated definition in August, and on-going lawsuits
- Understanding last year's changes and what lies ahead is crucial for ag landowners that may be subject to regulation

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WOTUS Background: The Basics

- Congress passed the CWA in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).
- To accomplish this goal, the CWA prohibits unpermitted discharges of any pollutant from a discernable, concrete source into "navigable waters." 33 U.S.C. § 1342.
- The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).
- Congress did not define the term "waters of the United States," instead leaving it up to EPA and the Army Corps of Engineers
- Since 1972, there have been multiple agency regulations and Supreme Court decisions aimed at defining WOTUS

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WOTUS Background: Relatively Permanent vs. Significant Nexus

The relatively permanent standard comes from the plurality opinion authored by Justice Scalia in *Rapanos v. U.S.*

- Interprets WOTUS to include non-navigable waters only if they are "relatively permanent, standing or continuously flowing bodies of water" and wetlands that share a "continuous surface connection with" such waters

The significant nexus test comes from Justice Kennedy's concurrence in *Rapanos v. U.S.*

- Interprets WOTUS to include waters or wetlands that possess "a significant nexus to waters that are or were navigable in fact or that could reasonably be made so"
- A significant nexus exists if the water or wetland "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as navigable"

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What's in the January 2023 Rule?: The Basics

New rule includes five categories of WOTUS:

1. Traditional navigable waters used for interstate or foreign commerce; the territorial seas; and interstate waters
2. Impoundments of waters otherwise identified as a WOTUS, except for impoundments of waters identified under the fifth category of WOTUS
3. Tributaries of traditional navigable waters or impoundments that are either: relatively permanent, standing or continuously flowing bodies of water; or that alone or in combination with similarly situated waters in the region significantly affect the chemical, physical, or biological integrity of traditional navigable waters
4. Wetlands adjacent any of the following: traditional navigable waters; a relatively permanent, standing or continuously flowing impoundment or tributary; an impoundment or tributary if the wetlands either alone or in combination with similarly situated waters have a significant nexus with a traditional navigable water
5. Interstate lakes and ponds, streams, or wetlands that do not fall into any of the above categories provided the water shares either a continuous surface connection or a significant nexus with a WOTUS

Sackett v. EPA

Supreme Court opinion →

- On May 25, the U.S. Supreme Court released its long-awaited opinion in *Sackett v. EPA*
- The question before the Court was whether *Rapanos* should be revisited to adopt the plurality's relatively permanent test for WOTUS jurisdiction under the CWA
- Ultimately, the Court sided with the plaintiffs and adopted the *Rapanos* plurality opinion

The Court's Conclusion

Further analysis →

Ultimately, the Supreme Court ruled in favor of the plaintiffs, finding that:

- **The CWA's use of "waters" in ["waters of the United States"] refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection.**

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EPA's Response: The August 2023 Conforming Rule

The Conforming Rule includes five categories of WOTUS:

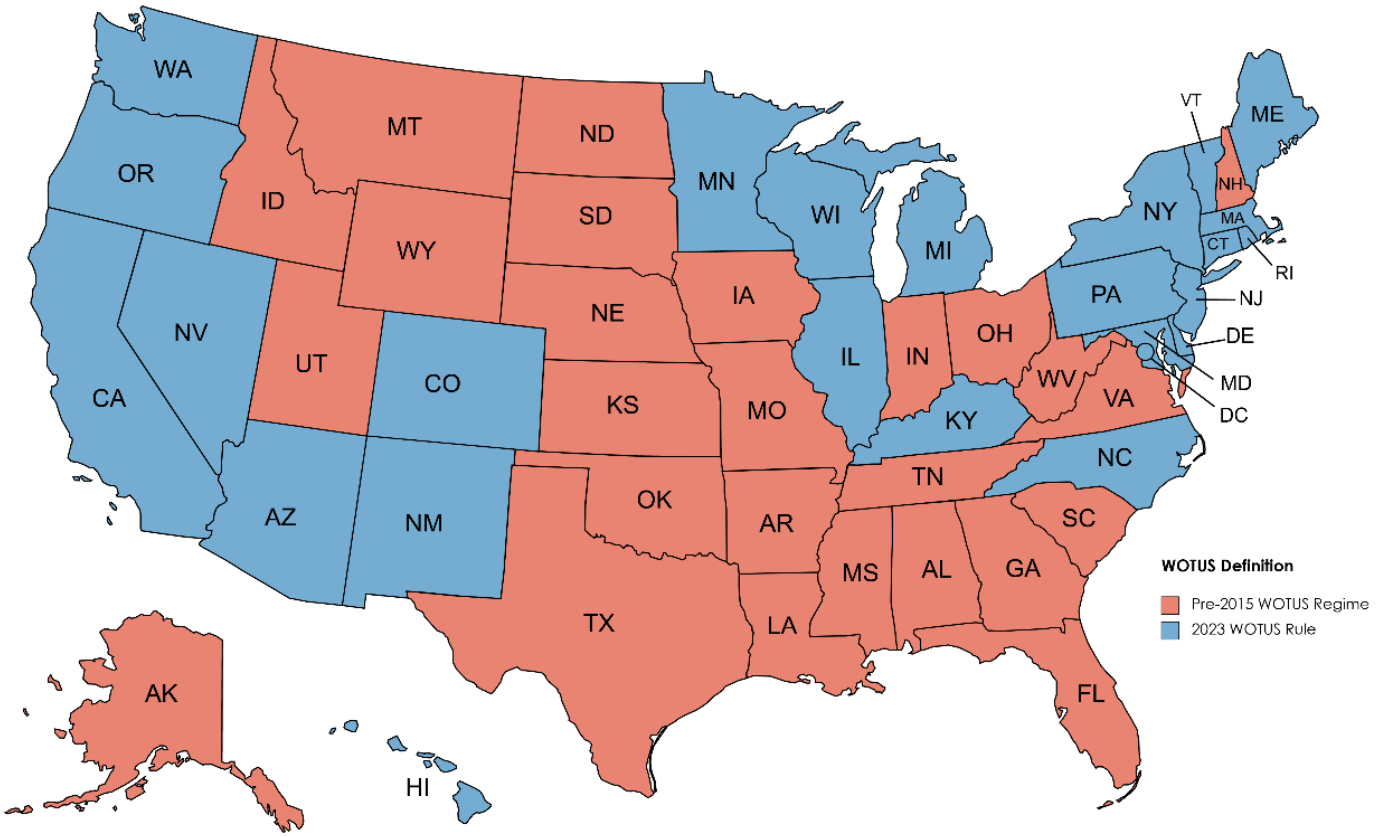
1. Traditional navigable waters used for interstate or foreign commerce; the territorial seas; and interstate waters
2. Impoundments of waters otherwise identified as WOTUS
3. Tributaries of traditionally navigable waters that are relatively permanent, standing, or continuously flowing
4. Wetlands adjacent to traditionally navigable waters or that share a continuous surface connection with a tributary or impoundment
5. Relatively permanent, standing, or continuously flowing intrastate lakes and ponds not already identified as WOTUS

EPA info on current implementation of WOTUS →

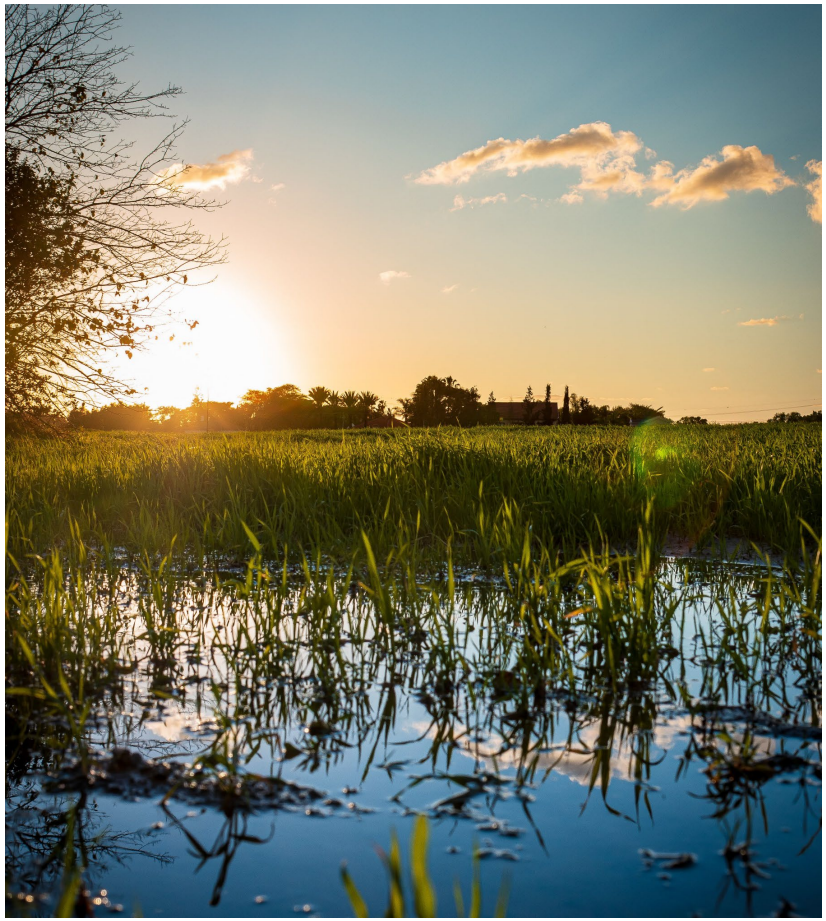
Current Legal Challenges: Lawsuits

- Currently, there are three lawsuits that have been filed to challenge the new WOTUS rule
  - *State of Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.)
  - *Commonwealth of Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky.)
  - *State of West Virginia v. EPA*, No. 3:23-cv-00032 (D. N.D.)
- All three were originally filed to challenge the January 2023 WOTUS rule and are still on-going
  - They now challenge the August 2023 Conforming Rule
- Between these lawsuits, the 2023 WOTUS rule has been enjoined in 27 states
  - In these states, EPA is interpreting WOTUS consistent with the pre-2015 definition and the *Sackett* decision

WOTUS Injunctions



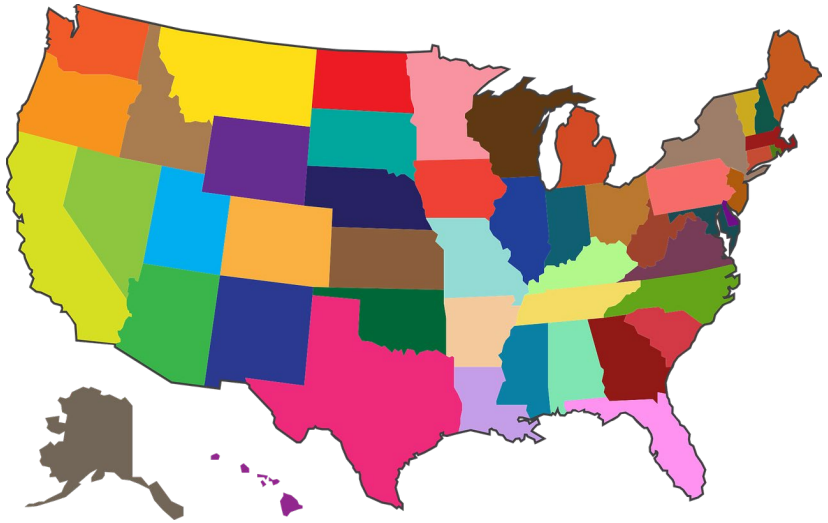
Wetlands Beyond WOTUS



- Reminder that *Sackett* and WOTUS only affect the CWA
- Many state and federal laws continue to regulate wetlands
  - Swampbuster
  - Endangered Species Act
  - Etc.
- These could become more relevant in light of the *Sackett* ruling

State Laws

- Many states have their own laws regulating water and wetlands pollution which will be unaffected by the *Sackett* decision
- Because these laws are state specific, they are highly varied – you may need to check with your state environment or natural resources department to see how wetlands are regulated
- Reminder: feds set the floor, not the ceiling!



Example: Wetlands Permitting in Florida

Florida regulates dredge and fill through its Environmental Resource Program Permits	Wetlands are defined as:	When considering whether to issue a permit, Florida will consider:
• "Dredging" means excavation of wetlands or other surface waters or excavation in upland that creates wetlands or other surface waters • "Filling" means depositing any material in wetlands or other surface waters	• Those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils	• Whether the applicant has shown that state water quality standards will not be violated by the proposed activity • The effects on public health, safety, welfare, and property rights • The effects on fish and wildlife • Adverse effects on navigation or harmful erosion • Other factors including effects on marine productivity, whether the project is temporary/permanent, effects to historical and archeological resources

Example: Wetlands Permitting in Arkansas

- Arkansas does not have an independent wetlands permitting program
- Wetlands permitting in Arkansas is carried out according to section 404 of the CWA
- Post-*Sackett*, some states may adopt their own wetlands permitting program

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What's Going On?

- In early 2022, EPA announced that it was developing a new policy to increase its compliance with the ESA when taking actions under FIFRA
- The work plan released later that year outlined a series of "early mitigations" that EPA would develop to reduce pesticide impacts to species listed under the ESA
- If implemented as proposed, this new policy is likely to impact all pesticide users

ESA: The Basics

The ESA was enacted in 1973 for the purpose of conserving threatened and endangered species and the ecosystems on which they depend

The ESA is administered by FWS and NMFS who are responsible for identifying and listing threatened and endangered species, and designating critical habitat

Listed species and designated critical habitat receive ESA protections

Federal agencies are required to consult with FWS and NMFS to ensure that the actions they carry out will not "jeopardize" listed species, or destroy critical habitat

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FIFRA: Agency Actions

- FIFRA agency actions that would require Section 7 consultation include:
  - Registering a new pesticide product label
  - Modifying a pesticide label by adding a new use
  - Registering a new pesticide active ingredient
  - Reregistering a pesticide
  - Carrying out registration review
- Each action would require ESA consultation

How Did We Get Here?

For decades, EPA has failed to fully engage in ESA Section 7 consultation over its FIFRA actions

This resulted in a mounting series of lawsuits, typically resulting in outcomes favorable to the plaintiffs

To reduce lawsuits and come into full ESA compliance, EPA is launching a new ESA-FIFRA policy

New ESA-FIFRA Policy

EPA Draft Herbicide Strategy Open for Comment (NALC Blog Post, Rollins)

EPA Proposes Vulnerable Species Pilot Project (NALC Blog Post, Rollins)

- Broadly, EPA's new ESA-FIFRA Policy focuses on "early mitigations"
  - These are new restrictions that will be added to pesticide labels to reduce impacts to listed species and critical habitat
- The goal of introducing early mitigations is to reduce the number of future ESA consultations that result in findings of "jeopardy" or "adverse modification"
- EPA is developing these early mitigations in two ways:
  - Broadly across different groupings of pesticides (herbicides, insecticides, rodenticides, etc.)
  - Tailored to address species that are considered particularly vulnerable to pesticides

Looking Ahead

There are several upcoming deadlines for this policy in 2024:

- Final Herbicide Strategy due August 30
- Draft Insecticide Strategy due July 30
- Additional updates to the VSP in the fall

Still many uncertainties, but announcements from EPA confirm that the agency is:

- Working to create better species maps to help tailor mitigations
- Simplification of the point system – EPA will now use four tiers to describe effectiveness of mitigation instead of nine
- Making additional conservation practices eligible for mitigation
- Considering reducing the mitigation that may be needed when growers have already adopted certain practices to reduce pesticide runoff

Dicamba Update:

Arizona court decision

On Feb. 6, a federal court vacated the labels for XtendiMax, Engenia, and Tavium

- EPA has issued an order allowing use of existing stocks of the three dicamba products so long as they were “labeled, packaged, and released for shipment” prior to Feb. 6
- After this growing season? The future remains uncertain

Bayer has submitted a new label for XtendiMax to EPA, but approval could still be a ways away

- There is a 17-month mandatory review period that is unlikely to be completed before September 2025
- If EPA goes through ESA review the process could be longer
- The label would allow only two applications of XtendiMax to soybeans prior to emergence – no post-emergence use on soybeans would be allowed
- No similar action has been taken for Engenia or Tavium

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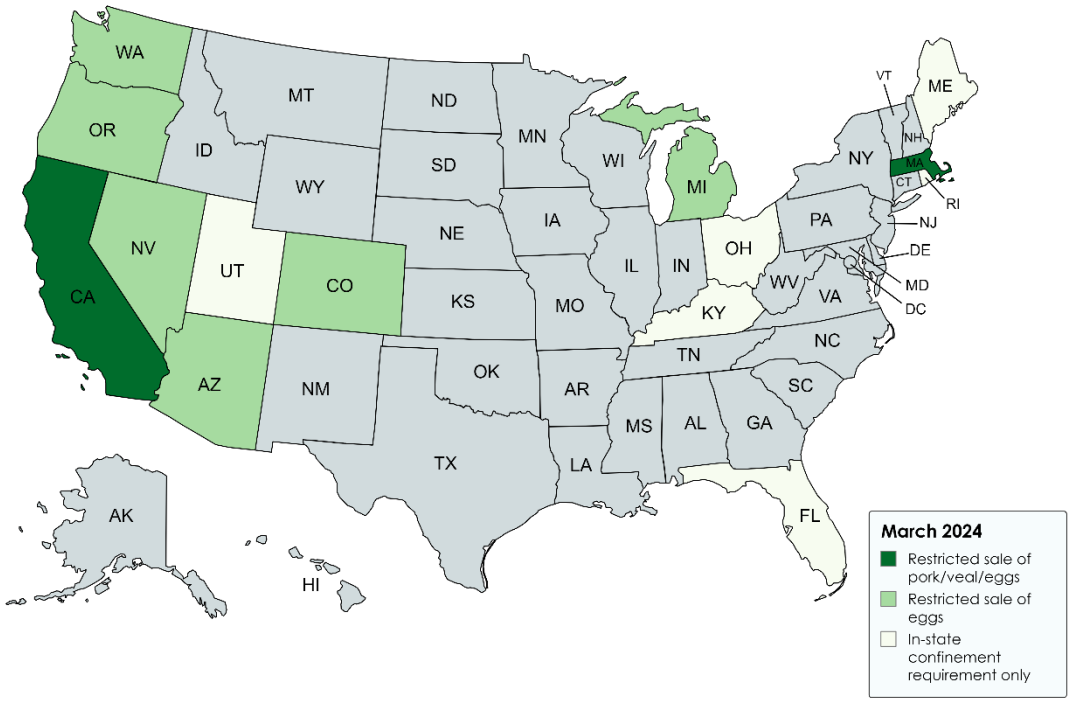
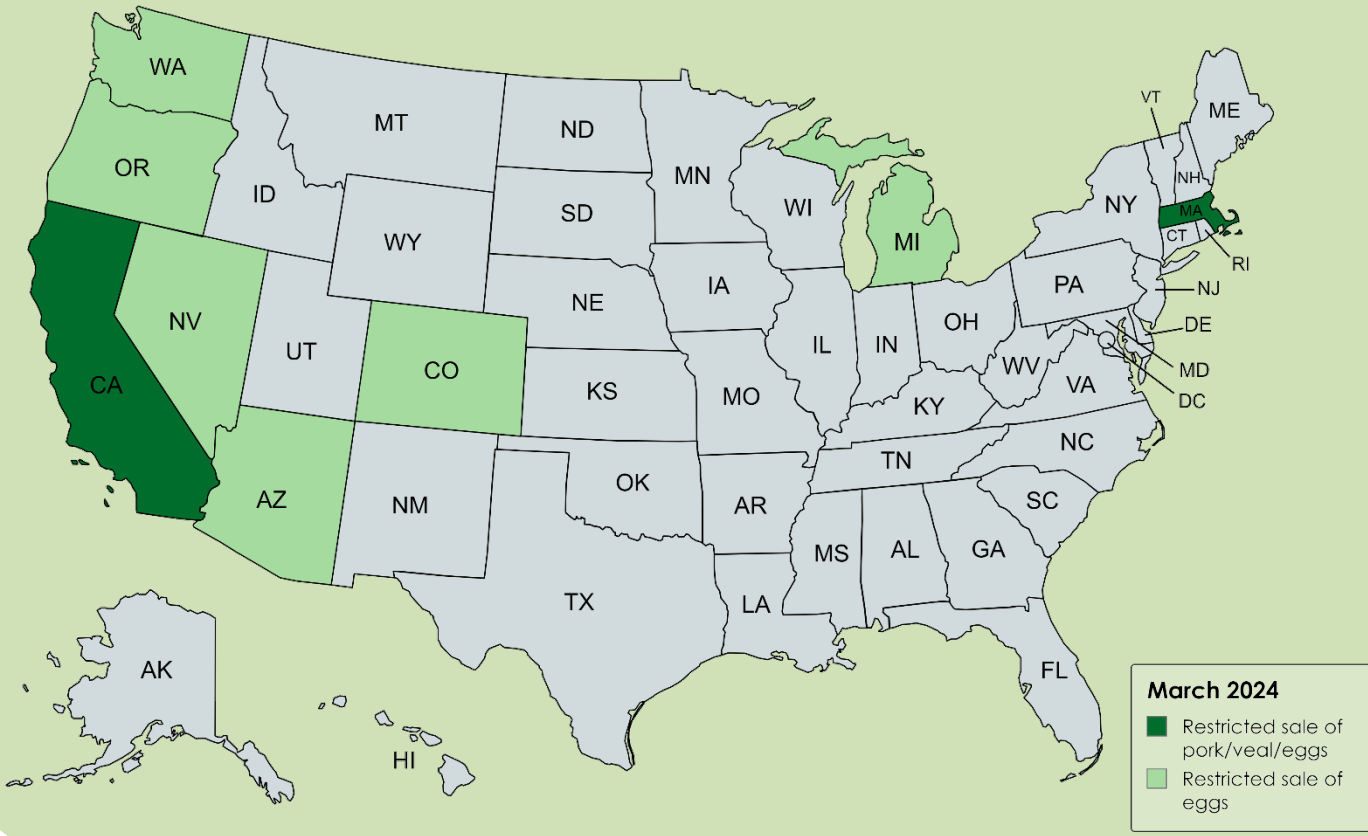
Current Confinement Statutes/Regs: 2024

- Regulating living conditions for specific livestock
  - Laying hens
  - Pregnant sows
  - Veal calves
- Regulating in-state sales of products from non-conforming operations





Current Sales Restrictions

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Prop 12 Basics

- 2018 CA ballot proposal
  - Sponsored by HSUS
  - Passage 62% to 37%
- Overall requirements:
  - Prohibited the act of confining farm animals (egg-laying hens, veal calves and breeding pigs) in a "cruel manner."
    - Applied to actions and animals within the state of California
  - Prohibited the sale of products within the state that had been made from animals who had been confined in the "cruel manner" outlined in California's law.
- In other words:
  - Eggs produced/sold in California come from cage-free birds.
    - Previous requirement: "lying down, standing up and fully extending limbs or turning around freely"
  - Pork/veal sold in California come from farms without crates.
    - Applies to: gilts at six months of age or pregnant, older sows that have been bred for commercial breeding to produce pork meat, including a sow's immediate offspring.

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Prop 12 Challenge

- Challenge- NPPC/AFBF
  - Foundation of claims: Commerce clause
    - Barrier to trade by imposing "substantial burdens" obligations on out-of-state competitors v. in state producers
- Status:
  - NPPC lost in district & 9th Cir
  - Case appealed to, cert accepted and case heard by SCOTUS in October 2022
- Options for SCOTUS
  - Agree that CA can pass the law, it goes into effect as scheduled.
    - Consequence: states can pass similar laws that have an outsized effect on out-of-state production.
  - Send to lower/trial court for further development of the record
    - Hearing/briefings on what effect it has on in-state v. out-of-state, intent of the law etc.
    - Consequence: potentially see it back at USSC in 2ish years.
  - Disagree that CA can pass the law, Prop 12 struck down as unconstitutional
    - CA's original animal confinement law (Prop 2), would remain in effect.
      - Unlawful to prevent pregnant sows, veal calves and laying hens from lying down, standing up and fully extending limbs or turning around freely
      - Cannot sell shelled eggs in state unless they come from Prop 2 living conditions.

Prop 12 SCOTUS Ruling

- Overall decision: Prop 12 is constitutional and enforceable by California
  - Split decision. "Opinion of the Court" (Gorsuch) and several concurrence/dissents written by other justices
    - Minority of justices would have sent it back to district court for further consideration
- Analysis:
  - Purposeful facial discrimination against out of state producers = unconstitutional
  - No facial discrimination + "practical effect of controlling commerce" = constitutional
  - No facial discrimination + disproportionate effect on out of state businesses = it depends, but not in this case

More analysis here

Read opinion here

Massachusetts/Question 3

- 2016 Ballot proposal
  - Massachusetts Conditions for Farm Animals Initiative
- Prohibited
  - Unlawful, for more than 6 hours in a 24 hour period, to prevent animal from lying down, standing up, fully extending the animal's limbs, or turning around freely.
    - Veal calves, pregnant sows & laying hens
  - Also requires that shell eggs, veal and pork sold within the state must not come from "a covered animal that was confined in a cruel manner"
- Pending lawsuit by several non-MA pork processors- ct dx all claims except arguments re: commerce clause.
- Current status: Ruling that slaughterhouse exemption violated commerce clause, pending SJ motion arguing that remaining Q3 is preempted by FMIA, as well as related response

Final Memo & Order- Triumph Foods 23-cv-11671 (D. MA, 2-5-24)

Farm Animal Confinement: Legal Challenges to Mass. Question 3 (NALC Blog Post, E. Rumley)

Middle/Longer Term Effects

Some laws already **passed/constitutional:**

- NV (law here):
  - Requires sale of cage-free eggs (unless from farm with less than 3k hens). Effective July 1, 2022.
    - Gov or third party certification
- AZ (regs here):
  - Requires sale of cage-free eggs. Effective Oct 2022, but modified regs until Jan 2025.
- CO (law here, regs here):
  - Requires sale of cage-free eggs. Effective Jan 2023, but modified regs for first 2 years.
    - Gov or third party certification, renewed annually
- OR (law here, regs here)
  - Requires sale of cage-free eggs (unless from farm with less than 3k hens). Effective Jan 1, 2024
- WA (law here, regs here)
  - Requires sale of cage-free eggs (unless from farm with less than 3k hens). Effective Jan 1, 2024
- MI (law here):
  - Requires sale of cage-free eggs (unless from farm with less than 3k hens). Effective Dec 31, 2024

Some laws **being considered**:

- States:
  - Cage-free egg proposals: NY, MD, HI, CT
  - No currently pending "pregnant sow"/pork proposals
- Farm Bill:
  - Consideration by House Ag Comm. Chair & Ranking Senate Ag Committee Member to include language reversing NPPC: "It's very clear to me that interstate commerce, interstate transportation — that's at the federal level. No state should be able to control that." – Thompson
- Other federal proposals?

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Chuck Grassley

@ChuckGrassley · **Follow**

Californias Prop12 went into full effect 1/1/24 telling producers in other states how 2 raise their pigs Its hogwash if u ask me Add reversing Prop12 to the 2do list this session Its Congress' job 2 regulate interstate commerce& Prop12 will hurt hog farmers nationwide

10:32 AM · Jan 2, 2024

Ending Agricultural Trade Suppression Act (S. 2019; HR4417)

- "Ending Agricultural Trade Suppression Act" ("EATS Act")
  - S. 2019, proposed by Sen. Roger Marshall (R-KS; cosponsored by 14 R)
  - H.R.4417, proposed by Rep. Ashley Hinson (R-IA; cosponsored by 36 R)
- Consequences if passed:
  - State governments cannot impose standards/conditions on preharvest production of ag products if 1) production occurred in different state and 2) the standard is different than that imposed by the other state
    - If there are no standards in the other state, that becomes de facto standard.

S. 2019

- Notes:
  - Letter opposing EATS act signed by 171 Reps (163 D, 5 R and 2 D from non-voting areas) and 30 Sens (27 D, 1 R, 2 I)
  - Harvard Animal Law & Policy Program, July 2023: *Legislative Analysis of S.2019 / H.R.4417: The "Ending Agricultural Trade Suppression Act" 118th Congress – 2023-2024*
    - Findings
      - 1000+ state laws could be overturned if the act takes effect
        - Ex: Zoonotic, plant/pest, food safety, natural resources
      - Would result in extensive litigation, imposing costs on state/local governments and fed agencies
      - Would create regulatory uncertainty for producers/industry/consumers

Harvard Analysis

Protecting Interstate Commerce for Livestock Producers- S 3382

- S. 3382, proposed by Sen Josh Hawley (R-MO)
  - Proposed 11/30/23
- Consequences if passed:
  - Prevent state and local entities from regulating the production, raising or importation of livestock and livestock goods from other states.
    - If there are no standards in the other state, that becomes de facto standard.
  - States could regulate imports in the event of animal disease.

Farm Bill Proposal
*Per House Ag Chair G.T. Thompson

- Clarifies that states and local governments cannot impose, directly or indirectly, as a condition for sale or consumption, a condition or standard on the production of covered livestock unless the livestock is physically located within such state or local government.
  - Provides clarity to national markets by ensuring producers must only comply with applicable production standards imposed by their own state or local government.
    - Protects producers from having to comply with a patchwork of state-by-state regulations.
  - Protects the rights of States and local governments to establish standards as they deem necessary, but only for those raising covered livestock within their own borders.
  - Only covers production (excluding domestic animals raised for the primary purpose of egg production), and does not include the movement, harvesting, or further processing of covered livestock.

Summary/overview; released 5/10

"If upheld against all constitutional challenges, California's novel and far-reaching regulations could provide a blueprint for other states."

- Justice Kavanaugh's NPPC dissent

Quick Thoughts:

- Animal welfare
  - Only grass fed
  - No tail docking
  - Prohibit slaughter of livestock unless the animal has lived "one quarter of their natural lifespan"
    - Natural lifespan; Cow= 20 years, Chicken= 8 years, Turkey= 10 years, Duck= 6 years, Pig= 15 years, Sheep= 15 years, Rabbit=6 years"
    - 2021 CO ballot proposal
- Env issues (pesticides, water, land use)
  - No use of dicamba or chlorpyrifos or glyphosate or ???
  - No use of irrigation
  - No CAFOs
  - Require production on sod/swampbuster compliant land
- Energy
  - Only products from companies that are 75% carbon neutral
  - Only products from companies that utilize 75% fossil fuels
- Labor
  - Only products picked/produced by individuals authorized to work in the United States
  - No child labor
  - Minimum wage/overtime requirements

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Admin Law Today: Changes Ahead?

- In January, SCOTUS heard *Loper Bright Enterprises v. Raimondo*
  - Case directly challenging "*Chevron* deference"
- *Chevron* deference is a judicial doctrine based on 40-year-old SCOTUS decision *Chevron v. Natural Resources Defense Council*
  - *Rule:* Courts will defer to a federal agency's interpretation of an ambiguous statute as long as the interpretation is reasonable
    - Gives agencies a lot of leeway in how they interpret statutes, recognizes that agencies have expertise in implementing the laws they are responsible for
    - May allow agencies to regulate beyond what Congress intended

Loper Bright Enterprises v. Raimondo

- Law: Magnuson-Stevens Act; allows for federal observers to be "carried on board a vessel"
  - Ambiguous on how the cost of such observers should be covered
- Regulation:
  - Commercial fishing vessels operating in the waters off the coast of New England must cover the cost of federal observers stationed on their vessels if Congress has not appropriated the funds to cover the costs
- Case history:
  - Challenged by group of commercial fishermen
  - Lower courts upheld the regulation, relying on *Chevron* deference
- Current issue: Request to overturn both the regulation and *Chevron* deference

Oral Arguments

NALC Blog Post

Admin Law Today: World Without *Chevron*?

- This Supreme Court is notably less friendly towards *Chevron* deference than previous Courts
  - It is likely that the Court will overturn or limit *Chevron* when it decides *Loper Bright Enterprises v. Raimondo*
- What would be the consequences of overturning *Chevron*?
  - Agency interpretation of ambiguous statutory provisions would likely be given less deference during judicial review
  - Would give courts more power to determine whether an agency regulation is an appropriate interpretation of the law
  - Could change how Congress writes legislation – in recent decades, Congress has chosen to write broad statutory language and leave the details up to the agencies, without *Chevron* it may be more difficult for Congress to delegate

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