



## AGRICULTURAL & FOOD LAW CONSORTIUM

# Ag & Food Law Update:

## *Third Quarter 2017*

The Agricultural & Food Law Consortium is a national, multi-institutional collaboration designed to enhance and expand the development and delivery of authoritative, timely, and objective agricultural and food law research and information.

This information is available to the nation's vast agricultural community of producers, attorneys, state and federal policymakers, Cooperative Extension Service professionals, and others at the local, state, regional, and national levels.

Agricultural law and food law includes law related to land-based food, fiber, and energy production systems, as well as seafood and marine-based aquaculture.

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In the third quarter of 2017, there were a number of significant legal developments in the agricultural sector. Many of these issues will continue to play out over the next year and impact agriculture throughout the country. Notably, there were important developments involving animal welfare, the Syngenta Viptera Corn lawsuits, dicamba drift, and FSMA.

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.

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).

### SUBJECTS:

- I. [Animal Welfare](#)
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## **I. ANIMAL WELFARE**

### **House Appropriations Committee Votes on Horse Slaughter Ban**

On July 12, 2017, the United States House Committee on Appropriations approved the [2018 Agriculture Appropriations Bill](#) which did not include a ban on using federal funds for horse meat inspections. Earlier that day, the Committee [voted](#) to not reinstate the ban on federally funded horse slaughtering in the U.S. Generally, federal funds are necessary for the running of horse slaughtering facilities because USDA employees must inspect the horses meant for human consumption.

### **House Appropriations Committee Approves Transportation Regulations Impacting Livestock**

On July 27, 2017, the House Appropriations Committee approved [language](#) permanently extending exemptions to regulations which impact the transport of livestock. Previously, regulations enacted in [49 U.S.C. 31137](#) required that certain types of commercial transport vehicles, including those transporting livestock, have a device installed which would track the vehicle's hours of operation. This electronic logging device (ELD) worked to keep drivers in compliance with hours of service (HOS) requirements enforced by the Federal Motor Carrier Safety Administration (FMCSA). The appropriations subcommittee's [report on the appropriations bill](#) stated that these regulations are "problematic for livestock which can become overheated and may sometimes die without the air flow provided by the motion of the truck," and "encourages" the FMCSA to take a more varied approach to livestock transporter's exemption requests to HOS requirements. As such, Section 132 of the bill restricts FMCSA funding from going towards enforcement of the ELD requirements.

### **USDA Unveils Public Search Tool for Animal Welfare Compliance Records**

On August 18, 2017, the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) [announced](#) the availability "of the refined public search tool that provides access to Animal Welfare Act compliance records." According to APHIS, the new search tool is intended to provide the public with "information on APHIS' performance of its statutory duties under the Animal Welfare Act, in accordance with privacy laws." The announced availability marks the return of the public search tool component of the Animal Care Information System which had been "taken off-line for review on February 3, 2017."

## **II. AQUACULTURE**

### **No Possessory Interest in Oysters Removed from Prohibited Waters**

A New Jersey oyster farmer lost his claim against two state agencies who confiscated and destroyed his oysters because he harvested shellfish from prohibited waters without a permit. The oysterman bought the oyster seed from a lab located in prohibited waters, and moved it twice into prohibited waters before finally moving the oysters to an approved site. The court reasoned that the oysters were property that was acquired criminally and therefore the oyster farmer had no possessory interest in the shellfish. *Zitter v. Petruccelli*, 2017 WL 3393805 (D.N.J. Aug. 7, 2017), opinion available [here](#).

### **Army Corps Sued Over Shellfish Permit**

On August 10, 2017, the Center for Food Safety sued the Army Corps of Engineers for approving a general permit that expands shellfish aquaculture in Washington state. The organization alleges the agency violated federal law by failing to properly consider or disclose the environmental impacts. A copy of the complaint is available [here](#).

### **Conservancy May File Suit Under the Clean Water Act for Net Pen Release**

On August 24, 2017, the Wild Fish Conservancy provided a sixty-day notice of intent to sue Cooke Aquaculture in a citizen enforcement suit of the Clean Water Act. On the weekend of August 19-20<sup>th</sup>, 2017, the net pens at one of Cooke Aquaculture's facilities experienced structural failure and at least 162,000 farmed salmon escaped into the Puget Sound. The environmental group is expected to seek civil penalties, injunctive relief, and court costs and attorney fees. More information available [here](#).

### **Court Upholds Seafood Import Monitoring Program**

A group of seafood importers, processors, and harvesters claimed that the U.S. Department of Commerce violated federal law by creating the Seafood Import Monitoring Program, which is a federal regulation to prevent illegal, unreported, and unregulated (IUU) fishing and seafood fraud. In August, the U.S. District Court for the District of Columbia upheld the Seafood Import Monitoring Program. *Alfa International Seafood v. Ross*, 2017 WL 3726984 (D.D.C. Aug. 28, 2017), opinion available [here](#).

## **III. ENERGY**

### **Judge Says Dakota Access Pipeline Needs New Environmental Impact Assessment**

On June 14, 2017, the United States District Court for the District of Columbia [ruled](#) that the United States Army Corps of Engineers “did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline’s effects are likely to be highly controversial.” The court noted, “To remedy those violations, the Corps will have to reconsider those sections of

its environmental analysis upon remand by the Court.” However, the court also noted that whether the pipeline must cease to operate presently is a separate question to be determined in the near future.

### **Hearings Begin for Keystone XL Pipeline in Nebraska**

On August 7, 2017, the Nebraska Public Service Commission commenced an evidentiary [hearing](#) on TransCanada’s application for the [Keystone XL Pipeline](#). The Keystone XL Pipeline is a pipeline designed to transport crude oil from Hardisty, Alberta, through Steele City, Nebraska. The hearing continued for five days and included witness testimony, exhibits, and cross examination. According to the [Lincoln Journal Star](#), attorneys for landowners primarily questioned how TransCanada plans to avoid damaging land and natural resources. Recordings of the hearing can be found on [Nebraska’s PBS & NPR Station](#).

### **BLM Plans to Rescind the Rule Governing Hydraulic Fracturing on Federal Lands**

On July 25, 2017, the Bureau of Land Management (BLM) proposed a rescission of the 2015 rule: [Oil and Gas: Hydraulic Fracturing on Federal and Indian Lands](#). The 2015 rule provided that oil and gas companies publicly disclose chemicals used in hydraulic fracturing fluids as well as clarified and strengthened other regulations on well construction for oil and gas operations on federal lands. The 2015 rule has not been implemented yet, and the BLM says therefore, the proposed rescission will cause no change to current regulations. The BLM is now accepting public comment until September 25, 2017, for the proposed rule rescission.

### **Court Rules against EPA Reductions in Renewable Fuel Volumes**

On July 28, 2017, the D.C. Circuit Court of Appeals [vacated](#) the Environmental Protection Agency’s (EPA) decision to reduce the total renewable fuel volume requirements for 2016. Americans for Clean Energy, among other groups, brought suit over the reduced biofuel requirement, and the Circuit Court held that the EPA must review its rule, stating that the, “EPA erred in how it interpreted the ‘inadequate domestic supply’ waiver provision,” as outlined in the [Renewable Fuel Standard Program](#). Accordingly, the EPA’s recently announced biofuel decreases for 2018 have been removed from its website.

## **IV. FOOD**

### **FDA Releases Multiple Food Safety Modernization Act Guidance Documents**

In August and September 2017, the U.S. Food and Drug Administration (FDA) released multiple guidance documents intended to help industry comply with the Food Safety and Modernization Act (FSMA):

- On August 7, 2017, FDA published material regarding FSMA exemptions for Low-acid Canned Foods; juice Hazard Analysis and Critical Control Point (HACCP); and seafood HACCP. According to FDA,

while specific exemptions are provided for these products, processors need to be aware that certain FSMA regulations may still be applicable.

- On August 14, 2017, FDA [published](#) material clarifying the waiver "for food establishments that provide food directly to consumers from the requirements of the Sanitary Transportation of Human and Animal Food Rule." FDA stated that the guidance is in direct response to questions received following the publication of the final rule.
- On August 24, 2017, FDA [published](#) a guide to assist small businesses comply with the Final Rule on Mitigation Strategies to Protect Food Against Intentional Adulteration. According to FDA, the guide "provides nonbinding recommendations on such topics as developing a food defense plan and records management."
- On August 30, 2017, FDA [published](#) food facility guidance regarding "how to establish and implement a heat treatment...to prevent contamination by disease-causing bacteria." FDA stated that the guidance is intended to help food facilities comply with specific requirements of the preventive controls for human food rule "such as developing a written food safety plan, establishing preventive controls, and taking corrective actions."
- On September 5, 2017, FDA [announced](#) the release of guidance material designed to help small businesses comply with the Food Safety and Modernization Act's (FSMA) Produce Safety Rule. According to the FDA, the guidance material is specifically intended to assist small and very small "farmers determine whether they are eligible for a qualified exemption, which would modify the requirements they are subject to under the Produce Safety Rule." Additionally, the FDA stated that the guidance material "can also help [small and very small farmers] understand those modified requirements."

### **FDA Extends Produce Safety Rule Compliance Dates**

On September 13, 2017, the U.S. Food and Drug Administration (FDA) published notice in the Federal Register proposing to extend to the Produce Safety Rule's agricultural water compliance dates for covered produce other than sprouts ([82 FR 42963](#)). According to the FDA, the extension is intended "to address questions about the practical implementation of compliance with certain provisions and to consider how we might further reduce the regulatory burden or increase flexibility while continuing to achieve our regulatory objectives..." Comments regarding the proposed extension must be submitted by November 13, 2017.

### **FDA Announces that the FSMA Produce Safety Rule is Now Final**

On September 17, 2017, the U.S. Food and Drug Administration (FDA) [announced](#) that the FDA Food Safety and Modernization Act (FSMA) Produce Safety rule is now final. Initially proposed in 2013, FDA stated that “[t]he final rule is a combination of the original proposal and revisions outlined in the supplemental proposal (proposed in 2014), with additional changes as appropriate.” According to FDA, key requirements of the final rule include: (1) agricultural water; (2) biological soil amendments; (3) sprouts; (4) domesticated and wild animals; (5) worker training and health and hygiene; and (6) equipment, tools and buildings.

### **Nature Valley “100% Natural” Lawsuit Dismissed**

On July 12, 2017, the U.S. District Court for Minnesota [granted a motion to dismiss](#) in a lawsuit brought against General Mills, specifically concerning the company’s Nature Valley brand oat-based food products. The claim concerned the various foods’ “100% Natural” label, with the complaint arguing that, “this claim is misleading, false, and deceptive because Nature Valley Products contain trace amounts of the chemical glyphosate[.]” The Court dismissed the claim on the basis that the plaintiffs failed to state an adequate claim, concluding that the plaintiffs had too broadly construed the “100% Natural” labeling. The Court also stated that, “It would be nearly impossible to produce a processed food with no trace of any synthetic molecule.”

## **V. GMOs**

### **Kansas Farmers Awarded Over \$217 Million in Syngenta Class Action Suit**

On June 23, 2017, a federal jury found in favor of Kansas corn farmers awarding over \$217,700,000 to 7,000 farmers. The class action lawsuit was [filed](#) in January of 2016 against Syngenta for introducing new genetic traits into the U.S. corn market before the GMO varieties had been approved by all major export markets. The complaint alleged that these traits, commercially advertised as Viptera and Duracade, were then found in imports to China before being approved. This resulted in the inability of U.S. corn farmers to export corn into China. Feedstuffs [reported](#) that this class action lawsuit was one of eight brought by corn farmers throughout the U.S. and the first one to go to trial. At the conclusion of the trial, a Syngenta spokesperson announced, “[t]he case is without merit, and we will move forward with an appeal and continue to defend the rights of American farmers to access safe and effective, U.S.-approved technologies.”

### **Syngenta Settles with Corn Farmers over Loss of Chinese Market**

On September 26, 2017, Syngenta [announced](#) that a settlement had been reached with U.S. corn farmers “to resolve litigation concerning the launch of Syngenta’s Agrisure Viptera and Agrisure Duracade corn traits.” The litigation stemmed from allegations that Syngenta had introduced new genetic traits (commercially advertised as Viptera and Duracade) into the U.S. corn market before the genetically modified varieties had been approved

by all major export markets. Eventually, the traits were detected in U.S. corn imports to China and resulted in U.S. corn farmers being denied access to the Chinese market. Though Syngenta did not disclose the financial terms of the settlement, [Bloomberg News reported](#) that the total amount exceeded \$1.4 billion.

### **Interested Parties Asked to Provide Input on National Bioengineered Food Disclosure Standard**

The USDA's Agricultural Marketing Service (AMS) moved a step closer toward implementing the National Bioengineered Food Disclosure Standard this summer when it sought interested party responses to a list of thirty questions. The [questions](#) addressed definitions of important terms such as "bioengineering" and "small manufacturers," technical issues such as breeding techniques and limits for bioengineered substances, and compliance issues such as recordkeeping requirements and investigation practices. USDA plans to use the input as it drafts the proposed rule, which the agency must complete by July 29, 2018.

## **VI. INTERNATIONAL TRADE**

### **South Korea Lifts Ban on U.S. Poultry**

On August 17, 2017, the U.S. Department of Agriculture (USDA) [announced](#) "that the government of South Korea has lifted its ban on imports of U.S. poultry and poultry products, including fresh eggs." According to USDA, earlier this year South Korea had temporarily reopened its market "for U.S. eggs and egg products, but imports were again restricted after the [highly pathogenic avian influenza] HPAI detection in Tennessee."

### **Access for U.S. rice exports to Columbia expanded**

On August 17, 2017, U.S. Trade Representative Robert Lighthize announced an agreement was reached with the government of Colombia permitting expanded market access for U.S. exports of paddy rice. The [announcement](#) stated that, "A previous agreement in 2012 between both countries enabled exports of U.S. paddy rice to Colombia, but under strict and costly requirements related to phytosanitary concerns." These requirements are lifted under the new agreement. The new agreement also "expands access beyond the single port of Barranquilla, which was the only port previously open to U.S. exporters." Colombia is the United States' 12th largest export market for food and agricultural products, with exports valued at over \$2.4 billion in 2016.

### **Bipartisan Bill Combats Fraud in Organic Imports**

On September 28, 2017 House Agriculture Committee member John Faso (R-N.Y.) introduced the [Organic Farmer and Consumer Protection Act](#) to address fraud in organic imports by increasing funding for USDA's National Organic Program (NOP) and strengthening requirements for shipment tracking and record-keeping.

The legislation calls for annual increases to NOP's annual budget, from \$9 million now to \$24 million by 2023. It also earmarks \$5 million for USDA to modernize trade and transaction certificates. Text of the bill is available [here](#).

## **VII. LABOR**

### **House Appropriations Approves Amendment Expanding H-2A Access**

On July 18, 2017, the House Appropriations Committee [approved](#) an amendment which would permit H-2A workers to work for more types of agricultural businesses than previously allowed. The language of the amendment states that H-2A workers can, “perform agricultural labor services, without regard to whether such labor is, or services are, of a temporary or seasonal nature.” The amendment would not change how long workers will remain in the country, but provide them the potential to work for other types of businesses, “such as dairies and agriculture operations with multiple crops and harvests.”

### **Judiciary Chairman Announces Plans to Replace H-2A Program**

On September 6, 2017, House Judiciary Chairman Bob Goodlatte (R-VA) [announced](#) plans to introduce a bill, entitled the Agricultural Guestworker Act, which would replace the current H-2A program with the H-2C program. Chairman Goodlatte stated that the current agricultural guestworker program “is expensive, flawed, and plagued with red tape” and that the H-2C program will result in greater efficiency and flexibility for agricultural employers. According to Chairman Goodlatte, “[t]he H-2C program will be administered by the folks at the U.S. Department of Agriculture, an agency that clearly understands the unique needs of America’s farm and ranch operations and the importance of getting perishable agricultural commodities to market in an efficient manner.” Currently, the H-2A program is being administered by the U.S. Department of Labor.

### **Employers Must Use New I-9 Form**

As of September 18, 2017, employers must begin using the July 17, 2017 version of [Form I-9](#) for employment eligibility verification. On the new form, the U.S. Citizenship and Immigration Services revised the list of acceptable documents for employment authorization (List C) to include a Consular Report of Birth Abroad (Form FS-240). The instructions for the new form also reflect the name change for the office that enforces anti-discrimination provisions of the Immigration and Nationality Act. The office is now called the [Immigrant and Employee Rights Section](#), which replaces the previous Office of Special Counsel for Immigration-Related Unfair Employment Practices.

## **VIII. PESTICIDES**

### **Court Allows Continued Use of Chlorpyrifos**

On July 18, 2017 the United States Court of Appeals for the Ninth Circuit [denied](#) a motion challenging the EPA's continued use of the pesticide chlorpyrifos. The motion was a challenge brought by the Pesticide Action Network North America and Natural Resources Defense Council (PANNA) and alleged that the EPA's decision not to ban chlorpyrifos was inadequate. The court held that the motion was "premature" and that any objections to the EPA's decision "must first be made through the administrative process mandated by statute." This recent legislation is another chapter to the longer story between the EPA and PANNA. As discussed in the motion, PANNA filed an administrative petition with the EPA in 2007 asking them to ban the use of chlorpyrifos. Frustrated with a lack of response, in 2014 PANNA petitioned the court for an answer to their administrative petition which they were granted. In March of this year, the EPA responded by denying the petition, which is the reason for the current bout in court.

### **Arkansas Farmers Sue Biotech Companies Over Dicamba Damage**

Several Arkansas farms filed a class action suit against biotechnology companies Monsanto, BASF, and DuPont on July 19, 2017 in the Eastern District of Missouri. Plaintiffs operate soybean farms across Eastern Arkansas. Specifically, plaintiffs allege the following: (1) violation of the Lanham Act; (2) creating a public nuisance "by causing widespread damage due to over-the-top spraying of dicamba on Xtend products;" (3) Trespass to Chattels; (4) negligence; (5) various strict products liability claims; (6) violations of Section 2 of the Sherman Act; (7) violation of the Arkansas Deceptive Trade Practices Act; and (8) civil conspiracy. The full filing is available [here](#). Additional dicamba-related class action suits have been filed in [Arkansas](#) and in [Illinois](#).

### **Arkansas Dicamba Task Force Recommends Ban on Dicamba in 2018**

According to the [Arkansas Farm Bureau](#), on August 24, 2017, the Arkansas Dicamba Task Force recommended a date-specific ban on dicamba use for the 2018 crop year. The recommendations included a cutoff date for the use of all dicamba products of April 15 for the 2018 crop year and the need to seek a legislative change removing provisions requiring proof of damage before a violation can be ruled "egregious." The group also called for more independent testing before a product comes to market. (Earlier that month, Monsanto issued an "[open letter](#)" to farmers experiencing issues with the company's recently developed dicamba formulation known as XtendiMax® with VaporGrip® Technology). On September 21, 2017, the Arkansas Plant Board approved the proposed ban on Dicamba products. The proposed ban will undergo a 30 day public comment period, followed by a public hearing on November 8, 2017.

## **IX. WATER LAW**

### **EPA Extends Comment Period for Definition of “Waters of the United States”**

On August 22, 2017, Environmental Protection Agency and the Department of the Army's Corps of Engineers (the agencies) published notice extending the comment period for the proposed rule entitled: Definition of Waters of the United States—Recodification of Pre-existing Rules ([82 FR 39712](#)). Extended 30 days as a result of stakeholder requests, the comment period closed on September 27, 2017. Published on July 27, 2017, the proposed rule would rescind the 2015 Clean Water Rule and reinstate the previous federal definition of “waters of the United States” ([82 FR 34899](#)). According to the agencies, the proposed rule is the result of a February 28, 2017, [Executive Order](#) which required the agencies to review the 2015 Clean Water Rule and to propose a rule that either rescinded or revised the rule. The proposed rule would re-codify the definition of “waters of the United States” as it presently appears in the Code of Federal Regulations and restore the definition that existed prior to the 2015 Clean Water Rule. Following finalization of the proposed rule, the agencies will begin future rulemaking efforts by “conduct[ing] a substantive re-evaluation of the definition of ‘waters of the United States.’”

### **Court Upholds Ag Use Exemptions Regarding Surface Water**

In South Carolina, a group of private property owners unsuccessfully challenged the Department of Health and Environmental Control’s exemption for agricultural users under the state’s Surface Water Withdrawal Act. They claimed the exemption was an unconstitutional taking of their right to reasonable use of the water adjacent to their property, as well as a violation of the public trust doctrine. The opinion is available [here](#).

### **EPA to Improve Safe Drinking Water Act (SDWA) Oversight**

In July, the U.S. Environmental Protection Agency (EPA) released a report that examined whether public water systems (PWS) were complying with the SDWA’s monitoring and reporting requirements. In response to the report’s findings, the EPA announced it will take steps to improve its oversight tools for determining whether PWSs are complying with the Act. The report can be found [here](#).

### **Wisconsin DNR Sued Over CAFO Regulations**

In Wisconsin, the Dairy Business Association has filed a lawsuit against the Department of Natural Resources. The lawsuit challenges the Department’s authority to require Concentrated Animal Feeding Operations (CAFOs) to obtain operating permits, claiming that requiring a permit goes beyond federal requirements. Many are watching the case, as it could have significant impacts on groundwater quality in the state. The complaint can be found [here](#).

### **Changes to Ohio Lake Erie Commission Will Impact Ohio Agriculture**

The Ohio legislature made several revisions to the Ohio Lake Erie Commission (OLEC) and Ohio's Lake Erie Protection and Restoration Strategy in [S.B. 2](#), effective Oct. 6, 2017. For Ohio agriculture, the most important change is the expansion of OLEC's purpose to include "issues related to nutrient-related water quality." This change reveals a new focus on nutrient impacts on Lake Erie's water quality and a resulting charge for OLEC to implement the Ohio EPA's current plan for reducing phosphorous levels in the Lake by 40% by 2025. Most notably, the new law will shift some of OLEC's focus to combating water quality problems associated with nutrient pollution, a change that will surely affect Ohio agriculture.

## **X. MISCELLANEOUS**

### **USDA Strengthens Enforcement Rules for Livestock Mandatory Reporting and COOL Programs**

On August 8, 2017, the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) [announced](#) that the agency has "issued a final rule allowing USDA to take action as needed, including levying civil penalties, against violators of the Livestock Mandatory Reporting (LMR) and the Country of Origin Labeling (COOL) regulations." USDA-AMS stated that "[t]he action extends the current rules of practice under the Agricultural Marketing Act of 1946, as amended, to include LMR and COOL violations." Accordingly, the new rules "allow up to \$10,000 in fines per violation for violating the LMR regulations...[and] fines for a retailer or person engaged in the business of supplying a covered commodity that willfully violates COOL regulations."

### **BPI Settles with ABC over Food Disparagement Claim**

On June 28, 2017, Beef Products Inc. (BPI) settled its lawsuit with ABC Television over ABC referring to BPI's beef product as "pink slime" over three hundred times in 2012. The final amount of the settlement has not been disclosed, although [according to](#) the Journal Star, BPI claimed losses of roughly \$400 million in the five year period since 2012. South Dakota, where the suit took place, has food libel laws, making it one of 13 states where suits of libel or defamation over food are easier to pursue.

### **USDA Seeks Comments on Regulatory Reform**

In response to President Trump's Executive Order on Enforcing the Regulatory Reform Agenda, the USDA published its ["Identifying Regulatory Reform Initiatives"](#) notice in the Federal Register on July 17. The notice invites the public to evaluate whether any of the agency's regulations should be repealed, replaced or modified, and asks commenters to present information on how regulations are outdated, inhibit job creation, impose unnecessary costs, are inconsistent with agency goals for disseminating quality information, or generally

frustrate regulatory reform initiatives. USDA will accept comments until July 17, 2018, but will review the comments in four phases. The deadline for the first review was September 15, 2017.

### **Tenth Circuit Rules Wyoming ‘Ag-Gag’ Law Violates First Amendment**

On September 7, 2017, the U.S. Court of Appeals for the 10th Circuit [ruled](#) that Wyoming’s “statutes imposing civil and criminal liability on any person who ‘[c]rosses private land to access adjacent or proximate land where he collects resource data’” violate the First Amendment. The court stated that under the Wyoming statutes, the phrase “collects resource data” is broadly defined so as to include numerous activities on public lands that “fit comfortably in the speech creation category recognized” by case law. Accordingly, the court asserted that while “trespassing does not enjoy First Amendment protection, the statutes at issue target the ‘creation’ of speech by imposing heightened penalties on those that collect resource data.” As a result, the court held “that the statutes regulate protected speech under the First Amendment and...are not shielded from constitutional scrutiny merely because they touch upon access to private property.”

### **Ohio Department of Agriculture Updates Fertilizer Certification Program Rules**

Updates to Ohio’s [Agricultural Fertilizer Applicator Certification Program](#) were recently adopted by the Ohio Department of Agriculture in order to fine tune the two and a half year old program, one of the first in the country to require certification for farmers using agricultural nutrients. The changes include three modifications to the certification requirements: 1) provide additional clarity about how the certifications apply to employees, 2) adjust the cycle for when the certifications begin and expire, and 3) establish a grace period to obtain a renewal certification after a prior certification has expired. New education requirements will allow an examination option in addition to the existing agricultural nutrient training requirement, and two new recordkeeping requirements will require the certificate holder to recorder the number of acres on which fertilizer is applied and total amount of fertilization applied.

### **Legal Activity Involving Checkoff Programs Continues**

The R-CALF litigation, originally filed in Montana federal district court in May 2016, argues that payments made to the Montana Beef Council violate the First Amendment because it compels producers to subsidize speech with which they disagree. The federal district court ruled in favor of R-CALF in late June. On September 15, USDA filed its appeal brief with the Ninth Circuit Court of Appeals. A similar action has been filed in Utah state court challenging the constitutionality of the Utah Beef Council and its collection of both the state-retained portion of the federal assessment and the state-only Utah beef checkoff. Separately, Organization for Competitive Markets (OCM) President Mike Weaver requested a meeting with USDA Secretary Sonny Perdue to discuss administration of agricultural checkoff programs. OCM is seeking more transparency and

additional federal oversight of the programs. For additional resources on these and other checkoff developments, visit the NALC Checkoff Programs Reading Room [here](#).

**Additional Items of Interest:**

[Pennsylvania Farmer Files \\$8M Claim Against EPA](#)

[Tyson Settles \\$5.8M Lawsuit with Iowa Workers](#)

[Foreign Investment in Agricultural Land Continues at Record Pace](#)

[U.S. Lawsuit Concerning Farmworkers Highlights Visa Program](#)

[Work on New Farm Bill Could Last Into 2018](#)

[California Initiative Would Require Egg-Laying Hens to be Kept Cage-Free](#)

[Lawsuit Against Dairy Farmers of America Moves Forward](#)

[Auditors Claim Crop Insurance Program Can Save Billions](#)

[North Dakota Corporate Farming Suit Asks Judge for Decision](#)

[Farm Flexibility Act Introduced to Combat Food Deserts](#)

[U.S. Farms See 20 Percent Increase in H-2A Guest Workers](#)

[Environmentalists Seek to Recognize Colorado River as a Person](#)

[FDA Commissioner Details How FSMA Will Work](#)

[Tyson Poultry Fined \\$2 million for Criminal Clean Water Violations](#)