AGRICULTURAL & FOOD LAW CONSORTIUM

Ag & Food Law Update:

Second Quarter 2018

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.

Members of the Consortium include:

The National Agricultural Law Center

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Agricultural & Resource Law Program at The Ohio State University

In the second quarter of 2018, 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 will impact agriculture throughout the country. Notably, there were important developments involving checkoff programs, right-to-farm laws, and WOTUS.

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. AQUACULTURE

Senator Wicker (R-MS) Introduces AQUAA Act

On June 26, Mississippi Senator Roger Wicker introduced S. 3138—also known as the "Advancing the Quality and Understanding of American Aquaculture" (AQUAA) Act. This bill is meant to streamline the permitting process for aquaculture farms in federal waters as well as fund research and development meant to advance the aquaculture industry. Among other things, the bill would establish a federal Office of Marine Aquaculture with the National Oceanic and Atmospheric Administration, create a 25-year federal aquaculture permit, create a new programmatic environmental impact statement program for certain areas of the exclusive economic zone (EEZ), and create a research and development grant program to further the Act's purposes. If enacted, the Act would appropriate a total of $296 million over the course of five fiscal years (from 2018 to 2022) to carry out the act. An electronic copy of the bill's text can be found here.

Oregon District Court Dismisses Oyster Company Challenge to State TMDL

The Oregon Department of Environmental Quality (DEQ) has a duty to establish Total Maximum Daily Loads (TMDLs) for bacteria. The DEQ established a TMDL for the Tillamook Watershed in 2001. Hayes Oyster Company claimed that the waste load allocations for the National Pollutant Discharge Elimination System (NPDES) were not reasonably calculated to obtain compliance with the water quality standard for all shellfish growing in Tillamook Bay. Hayes Oyster Company sued the Oregon Department of Environmental Quality (DEQ) and the DEQ's interim director for public nuisance and unjust takings under the U.S. and Oregon constitutions. The DEQ moved to dismiss the complaint. The court held that the plaintiff's Fifth Amendment takings claim was not ripe, because it did not seek remedies in state court first. Furthermore, the plaintiff argued that the DEQ waived its 11th Amendment sovereign immunity; however, 11th Amendment immunity waivers cannot be implied, and the plaintiff failed to show that the DEQ explicitly waived immunity. The court noted that ultimately the federal court is not the proper place to challenge state TMDL decisions; therefore, the court granted the defendant's motion to dismiss for lack of subject matter jurisdiction. *Hayes Oyster Co. v. Oregon Dep't of Envt'l Quality*, 2017 WL 1381659 (D. Or. Apr. 17, 2017). A copy of the opinion is available here.

President Trump Issues New Executive Order Regarding Ocean Policy

On June 19, President Donald Trump released his "Executive Order Regarding the Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States." This order formally revokes the oceans policy issued by former President Barack Obama in 2010 and replaces it with a markedly different plan for how the federal government should focus its efforts in managing the nation's oceans, coastal waters, and Great Lakes. Among other things, the new Ocean Policy places far more emphasis on economic and security concerns and aims to roll back what the current administration sees as excessive bureaucracy created by the Obama administration. The Obama-era policy, in comparison, emphasized the vulnerability of marine environments and called for improvement of the nation's capacity to respond to climate change and ocean acidification. The Executive Order may be viewed here.

FDA Approves Indiana AquaBounty Salmon Facility

On April 26, 2018, The U.S. Food and Drug Administration (FDA) announced approval of an application by AquaBounty Technologies, Inc. to raise genetically engineered (GE) salmon at a land-based facility near Albany, Indiana. The company, however, is unable to begin operations at the Indiana facility due to current law

prohibiting the importation of the eggs necessary to produce GE salmon. Accordingly, under Import Alert 99-40, until labeling guidelines have been established, FDA may not permit into interstate commerce food that contains GE salmon. FDA stated that it considers salmon eggs to meet the definition of food.

II. ANTITRUST

Court Says Egg Producers Did Not Violate Antitrust Laws

On June 14, 2018, the U.S. District Court for the Eastern District of Pennsylvania issued a verdict in favor of egg producers in an antitrust lawsuit. (*In re Processed Egg Prods. Antitrust Litig.*, *E.D. Pa.*, No. 08-md-2002). According to Bloomberg, the jury found that while the producers did conspire, their actions did not unreasonably restrict trade. Therefore, the producers were not liable for antitrust violations. The lawsuit was brought by Kraft Foods Global, Inc., Kellogg Company, General Mills, Inc., and Nestlé USA, Inc. against United Egg Producers, Inc. The plaintiffs had accused the egg producers of conspiring to reduce the supply of eggs and increase the market price for egg products.

DOJ Announces Conditional Approval of Bayer/Monsanto Merger

On May 29, 2018, the U.S. Department of Justice (DOJ) announced that it had granted conditional approval regarding Bayer AG's proposed acquisition of Monsanto Company. According to DOJ, approval for the acquisition was granted on condition that Bayer AG divests itself of approximately $9 billion in businesses and assets to the chemical manufacturer BASF. The required divestments include Bayer AG cotton, canola, soybean, and vegetable seed businesses, as well as the company's Liberty herbicide business. DOJ stated that without the required divestments, farmers would have experienced "higher prices, lower quality, and fewer choices across a wide array of seed and crop protection products." The $66 billion acquisition of Monsanto Company was finalized on June 7, 2018. Additionally, Bayer AG stated that following the acquisition, the Monsanto Company name will no longer exist, although the acquired products will continue to carry their current brand names.

Lawsuit Alleges Price-Fixing by Pork Industry

On June 26, 2018, plaintiffs filed a class-action complaint against major pork and meat packing companies alleging antitrust violations in the United States District Court for the District of Minnesota. Plaintiffs claim that defendants entered into a conspiracy beginning in 2009 to fix, raise, maintain, and stabilize the price of pork. According to plaintiffs, this was done by "coordinating their output and limiting production with the intent and expected result of increasing pork prices in the United States." A copy of the complaint is available here.

III. CHECKOFF PROGRAMS

USDA Terminates Proposed Organic Checkoff Program

On May 14, 2018, the U.S. Department of Agriculture (USDA) published notice in the Federal Register that the department was terminating a proposed rule that would have established a certified organic products checkoff program (83 FR 22213). Under the proposed rule, a federal program would have been developed for the national research and promotion of certified organic products. Program funding was to have been made possible through an assessment, or "checkoff," levied on certified organic products. According to USDA, during the rule making process, stakeholder comments revealed a split within the organic industry regarding the

proposed program. USDA stated that there were outstanding substantive issues with the proposed program and industry support for the program was uncertain. Concerns were raised in regards to methods used to assess imports, paperwork reduction, and the assessment of non-food products.

Court Rules Beef Checkoff May Conflict with First Amendment

On April 9, 2018, the U.S. Court of Appeals for the Ninth Circuit held that a lower court did not abuse its discretion when it determined that the U.S. Department of Agriculture's beef checkoff program likely violated the First Amendment rights of the Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) (*R-CALF USA v. Perdue*, No. 17-35669, D.C. No. 4:16-cv-00041-BMM). As a result, the court upheld a preliminary injunction preventing the Montana Beef Council from using beef checkoff funds collected from Montana ranchers without the ranchers' consent.

Court Finds NCBA Beef Checkoff Records Not Subject to FOIA

The United States District Court for the District of Columbia sided with defendants on summary judgment on May 25, 2018, determining that certain records were not subject to the Freedom of Information Act (FOIA). The Physicians Committee for Responsible Medicine filed suit against the United States Department of Agriculture (USDA), alleging violation of FOIA when USDA withheld documents relating to the dairy and beef checkoff programs. The National Cattlemen's Beef Association (NCBA) intervened in the suit. On summary judgment, the Court considered whether documents created by NCBA were subject to FOIA. Because USDA did not create nor obtain the NCBA beef checkoff records, and was not in control of them when the FOIA request was made, the documents did not qualify as agency records and were not subject to FOIA.

IV. ENERGY

Federal Court Dismisses Lawsuit Seeking Compensation for New York Hydraulic Fracturing Ban

On June 18, 2018, the U.S. District Court for the Western District of New York dismissed a lawsuit by an East Rochester resident who sued the state of New York for banning hydraulic fracturing. The resident, David Morabito, claimed that the ban constituted an unconstitutional taking of his oil and gas rights. The court, however, decided that the lawsuit was in violation of the Eleventh Amendment, which prohibits parties from suing states for money in federal court.

Court Declines to Lift Stay of BLM Waste Prevention Rule

On June 4, 2018, the 10th Circuit Court of Appeals refused to lift an injunction imposed by a lower court in the ongoing legal case for the Bureau of Land Management's (BLM) Waste Prevention Rule (*Wyoming et al., v. Dept. of the Interior*, No. 18-8027). The rule, *Waste Prevention, Production Subject to Royalties, and Resource Conservation* was promulgated in November 2016 for the purpose of reducing methane emissions from venting, flaring, and leaks during natural gas production. Following the transition from the Obama administration to the Trump administration, BLM announced they would review the rule and delay certain provisions. BLM then published a proposed rule in February 2018 that revised the Waste Prevention Rule. Soon after, Montana and Wyoming filed a motion requesting a suspension of the deadlines within the original Waste Prevention Rule, in light of the new proposed rule. The lower court granted their request and issued a stay of the original Waste Prevention Rule in April 2018, stating that it would be a "waste of judicial resources" to go forward with this case while BLM revisions to the original rule are pending (*Wyoming et al, v. Dept. of the Interior, et al.*, No.

2:16-CV-0285-SWS). For more information on this, please see our Shale Law in the Spotlight article, *Current Legal Developments Relating to Bureau of Land Management (BLM) Rules on Methane Waste Prevention and Hydraulic Fracturing*.

President Trump Alters Policy on Reduction of Energy Usage by Federal Agencies

On May 17, 2018, President Trump issued an executive order which altered requirements established by President Obama for federal agencies to reduce their energy use by 2.5 percent per year, use clean energy sources for 25 percent of their energy needs, and reduce overall water consumption by 36 percent. The new executive order removes the specific targets put into place in 2015 and instead allows agencies to set their own targets.

V. FOOD LABELING

FDA Releases Menu Labeling Guidance

On May 8, 2018, the U.S. Food and Drug Administration (FDA) published notice in the Federal Register of the availability of guidance material entitled *Menu Labeling: Supplemental Guidance for Industry* (83 FR 20731). The resource is an attempt by FDA to assist food establishments affected by regulations requiring nutritional labeling on menus. Accordingly, the guidance material: 1) provides labeling examples, 2) addresses caloric disclosure signage, and 3) provides methods for providing calorie disclosure information.

FDA to Reconsider Guidance on Labeling of Added Sugars for Maple Syrup and Honey

On June 19, 2018, the Food and Drug Administration (FDA) announced that it will reconsider and offer revisions on draft guidance regarding the labeling of added sugars, specifically maple syrup and honey. The draft guidance, *The Declaration of Added Sugars on Honey, Maple Syrup, and Certain Cranberry Products; Draft Guidance for Industry; Availability*, was issued in early March and received over 3,000 comments. The draft guidance advised manufacturers to categorize maple syrup and honey as "added sugars" on the nutrition label. Under this guidance, manufacturers could use a "†" to lead the reader to a statement with additional information. In its press release, FDA stated that the "the approach laid out in the draft guidance does not provide the clarity that the FDA intended."

FDA Extends Nutrition Labeling Compliance Date

On May 4, 2018, the U.S. Food and Drug Administration (FDA) published notice in the Federal Register that the compliance date for updating nutritional information on food labels has been extended by more than one year (83 FR 19619) According to the agency, the extension is being issued to allow affected manufacturers the ability to: 1) receive FDA guidance and 2) to have sufficient time to comply with the new rules. As a result of FDA's action, the compliance date for updating nutritional information on food labels has been extended from July 26, 2019, to January 1, 2021.

National GMO Standard proposed

On May 4, 2018, the Agricultural Marketing Service (AMS) released the administrative rule it proposes to meet the 2016 Congressional mandate to develop a National Bioengineered Food Disclosure Standard. The rule would require that genetically modified or "bioengineered" food be labeled as such. According to the AMS, "[t]he proposed rule is intended to provide a mandatory uniform national standard for disclosure of information

to consumers about the [bioengineered] status of foods." The comment period for the proposed rule closed on July 3, 2018.

VI. FOOD SAFETY

FDA Releases Draft Guidance on Strategies to Protect Against Food Adulteration

On June 20, 2018, the Food and Drug Administration (FDA) announced the release of draft guidance for the FDA regulation, *Mitigation Strategies to Protect Food Against Intentional Adulteration*. The purpose of the guidance document is to help food facilities that "manufacture, process, pack, or hold food…" to comply with current regulations. The guidance includes chapters on how to develop a Food Defense Plan, vulnerability assessments, strategies for actionable process steps, and food defense monitoring. Comments on the draft guidance will be accepted until December 17, 2018.

FDA Issues Draft Guidance for PC Animal Food Rule

On June 14, 2018, the U.S. Food and Drug Administration (FDA) issued draft guidance to help facilities needing a supply-chain program meet the requirements under the rule, *Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals rule* (PC Animal Food rule). The rule adds requirements for specific domestic and foreign animal food facilities to establish hazard analysis and risk-based preventive controls for food for animals. The purpose of the rule is to ensure animal food safety to avoid illness for both humans and animals. The draft guidance is intended to help producers determine whether they need a supply-chain program, identify and implement the required approval process, establish frequency of supplier verification activities, meet documentation requirements, and provide general clarification.

FDA Issues FSMA Small Entity Compliance Guide

On May 14, 2018, the U.S. Food and Drug Administration (FDA) published notice in the Federal Register of the availability of a guidance document entitled: The *FDA Food Safety Modernization Act; Extension and Clarification of Compliance Dates for Certain Provisions of Four Implementing Rules: What You Need to Know About the Food and Drug Administration Regulation—Small Entity Compliance Guide* (83 FR 22193). According to FDA, the document provides explanations and clarifications regarding how small entities must comply with the final rule entitled, *The Food and Drug Administration Food Safety Modernization Act; Extension and Clarification for Certain Provisions of Four Implementing Rules*. FDA stated that the intent of the guidance document is to reduce the burden encountered by small entities when determining how to comply with the final rule.

USDA Issues Revisions and Clarifications for the Processing of Donated Foods

On May 1, 2018, U.S. Department of Agriculture's Food and Nutrition Service published notice in the Federal Register of a final rule changing the requirements for the processing of donated foods (83 FR 18913). Under the new rule: (1) multi-State processors must now enter into National Processing Agreements in order to process donated foods into end products and (2) processors may now substitute certain commercially purchased beef and pork for donated beef and pork. The new rule, which also attempts to streamline and modernize oversight of inventories of donated foods, went into effect July 2, 2018.

Arizona Law Extends Egg Expiration Date

On April 11, 2018, Arizona enacted legislation that changed the state's egg labeling law to allow for a 45-day expiration date on Grade A eggs (HB 2464). Previously, expiration dates for Grade A eggs sold in Arizona could not exceed 24 days. According to Feedstuffs, with the passage of HB 2464, Arizona's Grade A egg expiration date law is now consistent with 48 other states.

VII. MARKETING ORDERS

USDA Announces California Federal Milk Marketing Order

On June 7, 2018, the U.S. Department of Agriculture (USDA) announced that the required number of California's dairy producers had voted to approve a Federal Milk Marketing Order (FMMO) to regulate the handling of milk in California. As a result, on June 8, 2018, USDA published notice in the Federal Register of a final rule establishing a California FMMO (83 FR 26547). According to USDA, the dairy product classification and pricing provisions will remain the same as those throughout the existing national FMMO system. FMMOs regulate the sale of milk between dairy farmers and buyers. The new marketing order includes provisions relating to dairy product classification, end-product price formulas, and producer-handler definition. As reported by USDA, California represents 18 percent of all U.S. milk production. Once the California FMMO is put in place, over 80 percent of the U.S. milk supply will be governed by federal regulation. The final rule will become effective on October 17, 2018, and compliance with the final rule will begin on November 1, 2018. USDA originally commenced the administrative hearing in this matter on September 22, 2015.

VIII. PESTICIDES

California Court Denies Bid to Change Preliminary Injunction for Glyphosate Warning Label

On June 12, 2018, the U.S. District Court for Eastern California denied a motion to alter a preliminary injunction against the application of Proposition 65 (Prop 65) for glyphosate (*National Association of Wheat Growers, et al. v. California*, CIV. NO. 2:17-2401 WBS EFB). Proposition 65 requires warning labels for any chemicals known by the state of California to cause cancer, and glyphosate is now on the Prop 65 list. This lawsuit was brought against California by several producers who argue that there is limited, if any, evidence that glyphosate causes cancer. On February 26, 2018, the District Court issued a preliminary injunction against the state so that producers would not need to comply with Proposition 65 for the time being. In the most recent court order, the court determined that the injunction would stand because the state was unable to present new evidence, and there was no clear error by the court in the issuance of the prior order.

Federal Court in Dicamba Suit Remands Case to Missouri State Court

The United States District Court for the Eastern District of Missouri granted plaintiffs' motion to remand the case of *McIvan Jones Farm, Inc. v. Monsanto Co.*, to Missouri state court because the court determined plaintiffs had not alleged any state-law cause of action that would depend upon a substantial issue of federal law. The court predicted that Monsanto will raise and argue a preemption defense, but it had not yet done so and thus, the plaintiffs' claims were not completely preempted. Details of the opinion are available here.

Jury Should Decide Foreseeability Issue in Monsanto Dicamba Case

The United States District Court for the Eastern District of Missouri denied defendant Monsanto's motion for partial summary judgment on May 8, 2018. In *Bader Farms, Inc. v. Monsanto Co*., the summary judgment

motion's denial leaves the issue of foreseeability that third party farmers who had planted dicamba-tolerant seed would unlawfully spray old dicamba formulations in the absence of a corresponding herbicide to a jury. A copy of the ruling is available here.

IX. PIPELINES

FERC Extends Comment Period on Revising Natural Gas Pipeline Process

On May 23, 2018, the Federal Energy Regulatory Commission (FERC) issued an order extending the public comment period regarding proposed changes to its policies on interstate transportation of natural gas to July 25, 2018. The agency is considering changes in how it determines whether proposed pipelines meet the standards of public convenience and necessity and is soliciting comments from the public to determine which, if any, additional factors should be considered. FERC's current policies date back to 1999 and, according to the agency, are in need of an update due to "significant changes in the energy markets, as well as in the production, use and consumption of natural gas."

Iowa Governor Signs Law Making Critical Infrastructure Sabotage a Felony

On April 17, 2018, Iowa Governor Kim Reynolds signed Senate File 2235 into law. The new law defines critical infrastructure sabotage to mean "any unauthorized act that is intended to cause a substantial interruption or impairment of service rendered to the public relating to critical infrastructure property. The law would apply to protect electrical plants, telecommunications or broadband structures, and transportation infrastructure. In addition, the law would apply to gas, oil, chemical, and petroleum product infrastructure, including processing plants, storage facilities, pump stations, and pipelines. Violation of this law is a Class B felony and calls for a fine of at least $85,000 but not more than $100,000.

X. RIGHT TO FARM

North Carolina Legislature Overrides Governor Veto to Approve Changes to Right-to-Farm Law

On June 27, 2018, the North Carolina House of Representatives voted to override the governor's veto of SB 711 which, in part, addresses the protections that farmers have against nuisance lawsuits. The governor had vetoed the bill on June 25th, and the Senate voted to override his veto on June 26th. SB 711, or the North Carolina Farm Act of 2018 (Farm Act), includes an amendment to the North Carolina Right to Farm Act, which prohibits any nuisance action from being filed against an agricultural operation unless the plaintiff's property is directly affected, the affected property is within one-half mile of the operation, AND the action is filed within one year of the establishment of the operation or within one year of the operation undergoing a fundamental change. The Farm Act also limits the compensatory and punitive damages that are available in a nuisance suit against an agricultural operation. The Right to Farm amendment will apply only to lawsuits that are filed after the Farm Act became law. The changes to the law were made to clarify the intent of the legislature in light of what it believed to be incorrect court rulings.

Jury Awards Multi-Million Dollar Verdicts in Hog Nuisance Cases

On April 26, 2018, a jury in the U.S. District Court for the Eastern District of North Carolina issued $50,750,000 in damages as a result of manure management practices at a North Carolina hog operation (*McKiver v Murphy-Brown LLC*, No. 7:14-CV-180-BR). The case involved neighbor complaints regarding

odors that emanated from an agricultural operation that had contracted with pork producer Murphy Brown LLC to raise roughly 15,000 hogs. On May 7, 2018, the court reduced the damages award to $3.25 million due to North Carolina's statutory cap on punitive damages. On June 29, 2018, a jury in the U.S. District Court for the Eastern District of North Carolina awarded $25 million to plaintiffs in a separate nuisance lawsuit filed against Smithfield Foods (*McGowan v. Murphy-Brown, LLC*, No. 7:14-CV-182-BR).

Alaska Supreme Court Rules Storage Lagoons not protected Under Right-to-Farm Law

On April 6, 2018, the Supreme Court of Alaska held that a farmer's septage storage lagoons were not protected by the state's Right to Farm Act (RTFA) (*Riddle v. Lanser*, Supreme Court No. 7235 – April 6, 2018). Under Alaska's RTFA, "an agricultural facility or an agricultural operation at an agricultural facility used for commercial purposes cannot become a nuisance based on changes in surroundings if it was not a nuisance when it started" (AS 09.45.235(a)). The court held that the RTFA did not apply because the farmer's septage lagoons were not used as part of the farmer's agricultural operation. Instead, the lagoons were used to store septage from the farmer's separate septic pumping and storing business. The court held that even if the storage lagoons eventually became part of the agricultural operation, the lagoons were not used, or intended to be used, "in any farming capacity until after the lagoons had already become a nuisance."

Iowa Supreme Court Issues Ruling in State's Right-to-Farm Law

The Iowa Supreme Court has reversed a lower court's dismissal of nuisance claims brought by owners of real estate located near an operator's confined animal feeding operations (CAFO). In *Morgan HONOMICHL, Robin Honomichl, Timothy Honomichl, Deb Chance, Kara Chance, Karen Jo Frescoln, Mike Merrill, and Q.H., Appellee, v. VALLEY VIEW SWINE, LLC and JBS Live Pork, LLC, Appellants*, No. 16-1006, 2018 WL 3083982 (Iowa June 22, 2018), the court held that genuine issues of material fact existed, and the plaintiff's nuisance claims should not have been granted in part on summary judgment. In so doing, the court upheld its prior precedent which provides a three-pronged test for analyzing nuisance claims under Iowa's right-to-farm statute. However, the court clarified that courts analyzing these claims must engage in a fact-based analysis before ruling on pre-trial motions for summary judgment.

XI. WATER LAW

South Carolina Supreme Court Reaffirms Ruling on Surface Water Withdrawal Act

On May 30, the Supreme Court of South Carolina issued a decision refusing to reverse its 2017 ruling upholding a law allowing industrial farms to withdraw large amounts of river water without state permits. The plaintiffs in this case, concerned about their riparian rights, filed suit against the South Carolina Department of Health and Environmental Control (DHEC). The plaintiffs challenged certain registration provisions of the South Carolina Surface Water Withdrawal Act (SWWA)—legislation that requires anyone taking more than three million gallons of water per month from state rivers to obtain state permits. Plaintiffs took issue with the SWWA's provisions exempting agriculture, which require that agricultural users simply register their surface water use with the DHEC. After doing so, users are permitted to withdraw surface water up to the registered amount—with those withdrawals not being subject to the reasonableness factors the Act imposes for all other users. The plaintiffs made three primary arguments in this case: (1) that the SWWA's registration system is an unconstitutional taking of their riparian rights; (2) that the SWWA violates due process by depriving plaintiffs of their riparian rights without notice or an opportunity to be heard; and (3) that the SWAA violates the public

trust doctrine by disposing of assets the State holds in trust. As to the first and second claims, the court held that plaintiffs had no standing, as the SWAA had not yet deprived plaintiffs of their riparian rights. The court was not convinced by their claim of future injury. As to plaintiffs' public trust claim, the court held that plaintiffs also lacked standing, since they did not allege that any public trust asset had been lost due to surface water withdrawals by agricultural users. Therefore, the court ruled against the plaintiffs, and the SWWA was, again, upheld. *Jowers v. S.C. Dep't of Health & Envtl. Control*, 2018 WL 2449220 (S.C. May 30, 2018). A copy of the opinion is available here.

U.S. Supreme Court Issues Decision in *Florida v. Georgia*

On June 27, 2018, the Supreme Court released a decision in the interstate dispute between Florida and Georgia for the apportionment of water from the Apalachicola River Basin, which is formed by the Chattahoochee, Flint, and Apalachicola Rivers. This case began in 2013 when Florida sued Georgia for equal apportionment of the Basin waters. The case was assigned to a Special Master, who in 2017 rejected Florida's argument that Georgia's water use should be restricted. The Supreme Court found that the Special Master applied too strict a standard when determining whether the court could fashion an appropriate equitable decree. The Supreme Court held that Florida met its initial burden with respect to remedy, but additional evidentiary findings were needed to enable the Court to conduct the equitable-balancing inquiry. For these reasons, the Court remanded this case for further proceedings with the Special Master. A copy of the opinion is available here.

D.C. District Court Sends Alabama-Georgia Dispute to Northern District of Georgia

In March, the U.S. District Court for the District of Columbia approved a motion to transfer a case challenging the U.S. Army Corps of Engineers' decision to grant the State of Georgia's request for additional water supply from a federal reservoir, Lake Lanier. The State of Alabama filed its challenge in the District of Columbia, arguing it was a case of national interest that deserved a neutral forum as the reservoir is part of the Apalachicola-Chattahoochee-Flint Basin, which covers Georgia, Florida, and Alabama. The D.C. District Court found the case should instead be heard in the Northern District of Georgia, because the lake is located there and the Corps' decision will affect four million Georgia residents who depend on the lake for their water supply. *Alabama v. U.S. Army Corps of Engineers*, 2018 WL 1542321 (D.D.C. Mar. 29, 2018). A copy of the opinion is available here.

XII. WOTUS

EPA and Army Corps of Engineers Announce New Proposal for WOTUS

On June 29, 2018, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers issued a supplemental notice regarding the repeal of the 2015 definition of "waters of the United States." Under the Clean Water Act, EPA regulates pollutant discharge into "navigable waters," which term is defined as "waters of the United States" (WOTUS). In 2015, EPA issued a final rule redefining WOTUS in light of several U.S. Supreme Court decisions. The 2015 final rule prompted a series of lawsuits, and ultimately, in February 2017, a Presidential Executive Order directed EPA to review WOTUS and then to rescind or revise the 2015 final rule. On February 6, 2018, EPA published a final rule adding a 2020 applicability date to the 2015 definition. The addition of the 2020 applicability date effectively delayed enforcement of the 2015 final rule for an additional two years which allows EPA sufficient time to rescind or revise the rule. As part of its

reconsideration, EPA has issued this recent supplemental notice to clarify its intention to completely and permanently repeal the 2015 definition of WOTUS.

Court Denies Transfer for WOTUS Cases to Texas

On May 29, the U.S. District Court for the Southern District of New York denied defendants' motion to transfer two cases challenging the Trump Administration's delay of the Clean Water Rule to Texas. The two cases in question are mostly identical but filed by different plaintiffs—the first filed by a group of states and the District of Columbia and the second brought by the Natural Resources Defense Council and the National Wildlife Federation. These cases concern several issues related to the new 2015 definition of "Waters of the United States" (WOTUS) under the Clean Water Act. In 2015, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers jointly promulgated a new WOTUS definition, which was immediately challenged in court. The first of the challenging cases, filed in the District of North Dakota, resulted in an injunction that prohibited implementation of the 2015 definition in thirteen states. In another case, the Sixth Circuit issued a nationwide stay of the 2015 definition—a decision that was struck down by the U.S. Supreme Court in early 2018 when it held the case should have been brought first in the district court. An additional lawsuit was pending in the Southern District of Texas. In the wake of the Supreme Court's decision, the plaintiffs in the Texas case moved for a nationwide injunction. The governmental and industry defendants in the other two cases moved to transfer them to the same Texas district—arguing that transfer would be proper as venue would have initially been proper in Texas. However, the court disagreed. The court held that the defendants in both cases did not legally reside in Texas for the purposes of the venue statute, nor did the events leading up to the lawsuit occur in Texas. The court also reasoned that a balancing of factors weighed heavily against transfer and that the defendants did not satisfy any of the other transfer requirements. Accordingly, the court ruled that transfer of either or both cases to Texas would not be appropriate and denied the defendants' motion. *New York v. Pruitt*, Nos. 18-CV-1030, -1048 (S.D.N.Y. May 29, 2018). A copy of the opinion is available here.

EPA Announces Expectations for Chesapeake Bay Phase III Watershed Implementation Plans

On June 20, 2018, the U.S. Environmental Protection Agency (EPA) announced its expectations for the Chesapeake Bay Phase III Watershed Implementation Plans. EPA sent letters to state agencies within the Chesapeake Bay basin outlining what goals and practices are expected to be in place by 2025 to achieve sediment and nutrient reduction goals. EPA expectations include developing comprehensive local engagement strategies, building necessary programs, obtaining funding capacity, incorporating new science and information, and optimizing choices of pollution reduction practices. This most recent EPA announcement is a further implementation of the a plan that began in 2010 when EPA established the Chesapeake Bay Total Maximum Daily Load (Bay TMDL). To meet water quality standards, the Bay TMDL establishes pollution reductions necessary to address pollution from nitrogen, phosphorus, and sediment.

XIII. MISCELLANEOUS

EPA Releases Proposed Volume Requirements for Renewable Fuels

On June 26, 2018, the U.S. Environmental Protection Agency (EPA) released proposed volume requirements for the Renewable Fuel Standard Program. The EPA sets renewable fuel percentage standards each year for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel as applied to gasoline and

diesel transportation fuel. Part of the proposed volume requirements would increase the 2019 renewable fuel blending mandate to 19.88 billion gallons, an increase of 3 percent from 2018. EPA also plans to increase advanced biofuel requirements to 4.88 billion gallons and cellulosic biofuel to 381 million gallons. EPA will hold a public hearing for the proposed rule on July 18, 2018 and will accept public comment until August 17, 2018.

USDA Proposes Changes to National Poultry Improvement Plan and Auxiliary Provisions

On April 9, 2018, the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) published notice of a proposed rule amending regulations regarding the National Poultry Improvement Plan (NPIP) (83 FR 15082). According to APHIS, the purpose of NPIP is to prevent and control poultry diseases through a variety of voluntary programs. To further this purpose, the proposed rule would provide updates and clarification to several program provisions including "those concerning NPIP participation, voting requirements, testing procedures, and standards."

FSA Announces Change to Livestock Indemnity Program

On April 24, 2018, U.S. Department of Agriculture Farm Service Agency (FSA) announced an administrative clarification to the Livestock Indemnity Program that will allow an additional method to determine disaster assistance eligibility. In the event an agricultural producer loses livestock from a disease that is the result of a weather disaster, FSA county committees are now permitted "to accept veterinarian certifications that livestock deaths were directly related to adverse weather and unpreventable through good animal husbandry and management." Accordingly, FSA county committees, on a case-by-case basis, may then use the veterinarian certifications to determine disaster assistance eligibility.

Prevention of Cruelty to Farm Animal Initiative to be Added to California Ballot

On June 22, 2018, the California Secretary of State announced the eligibility of a farm animal confinement initiative to be added to the November 6, 2018, ballot. The initiative, *Prevention of Cruelty to Farm Animals Act*, aims to phase out "extreme methods" of farm animal confinement. The initiative establishes minimum space requirements for veal calves, breeding pigs, and egg-laying hens.

FDA Releases Guidance on Antimicrobial Animal Drug Sale Rule

On June 28, 2018, the U.S. Food & Drug Administration (FDA) released a new guidance document regarding antimicrobial animal drug sales for small business entities. The guidance document, *Antimicrobial Animal Drug Sales and Distribution Reporting Small Entity Compliance Guide*, is intended to help small businesses understand and comply with "reporting regulations for antimicrobial animal drug sales and distribution information." The guidance document was prepared following the 2016 publication of the final rule, *Antimicrobial Animal Drug Sales and Distribution*. The rule requires that sponsors of approved antimicrobial animal drug products must submit an annual report on the amount that is sold or distributed for use.

FSA Requests Applications for Veteran Farmer Pilot Program

On June 6, 2018, the U.S. Department of Agriculture's Farm Service Agency (FSA) published notice in the Federal Register of a new pilot program entitled, *Veteran Farmer Streamlined Eligibility Pilot Program* (83 FR 25640). According to FSA, the purpose of the new program is to provide veterans with a way to reduce the

management experience time requirements for Farm Ownership Loan (FO) Programs. The application period to participate in the pilot program began on June 15, 2018, and ends on July 20, 2018.

Maryland Enacts Model Definition of Agritourism

On May 15, 2018, Maryland enacted a law authorizing county governments to adopt a model definition for agritourism (HB 252). Under the legislation, agritourism is defined "as an activity conducted on a farm that is offered to a member of the general public or to invited guests for the purpose of education, recreation, or active involvement in the farm operation." Specifically, HB 252 states that the definition of agritourism includes: farm tours, hayrides, corn mazes, seasonal petting farms, farm museums, guest farms, pumpkin patches, "pick your own" or cut your own" produce, classes related to agricultural products or skills, and picnic and party facilities offered in conjunction with any agritourism activity. According to the Maryland Department of Agriculture, the law does not mandate that a county government adopt the model definition.

Ohio Funds Phosphorous Reduction Strategies for Lake Erie

Ohio's legislature has agreed upon financial commitments to help meet the state's goal of reducing phosphorus loading by 20% in Lake Erie by 2020. A bill passed in late June of 2018 includes a variety of strategies that scientists, Lake Erie advocates and agriculture leaders agree can help achieve phosphorus reduction. The bill provides $20 million in FY 2019 for a Soil and Water Phosphorus Program in the Ohio Department of Agriculture, which must include the purchase of equipment for subsurface placement of nutrients into soil; nutrient placement based on geographic information system data; soil testing; variable rate technology; manure transformation and manure conversion technologies; tributary monitoring and water management; and edge-of-field drainage management. Another $3.5 million will help county soil and water conservation districts in the Western Lake Erie basin develop nutrient management plans and Ohio State University's Sea Grant—Stone Laboratory on Lake Erie will receive $3.5 million to construct new research lab space and purchase in-lake monitoring equipment.

Court Upholds Conservation Easement Restriction on Subdivision of Farmland

In a battle over the future of a property subject to a conservation easement, the Twelfth District Court of Appeals in Ohio has determined that the easement's restriction on subdivision of the 76-acre farm is valid. The easement requires that the property be retained forever in its natural and agricultural state and prohibits any subdivision of the property. The lower court had determined that the subdivision restriction is an invalid and unreasonable restraint on alienation because it does not contain a reasonable temporal limitation, but the Court of Appeals disagreed, noting that the property could still be sold and that the prohibition on subdividing the property was consistent with the purpose of the conservation easement. See Taylor v. Taylor here.

Court Issues Mandate for CERCLA/EPCRA Reporting

On May 2, 2018, the U.S. Court of Appeals for the DC Circuit issued a mandate vacating a 2008 final rule that provided agricultural exemptions for reporting air emissions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA). Under the 2008 final rule, all agricultural operations were provided a complete exemption from CERCLA reporting requirements. While the 2008 final rule required certain concentrated animal feeding operations to report air emissions under EPCRA, the regulation exempted all other agricultural operations from

EPCRA reporting requirements. Subsequently, on April 11, 2017, the U.S. Court of Appeals for the DC Circuit vacated the 2008 final rule. Following the court's ruling, on March 23, 2018, President Donald Trump signed into law the Consolidated Appropriations Act, 2018 (Omnibus Bill) which contained language exempting agricultural operations from CERCLA air emission reporting requirements (Public Law No: 115-141). Additionally, because the Omnibus Bill excluded the reporting of air emissions from animal waste under CERCLA, "these releases fall out of the reporting requirements of EPCRA section 304." As a result, despite the May 2, 2018, court mandate, agricultural operations are not required to submit reports regarding air emissions from animal waste at farms under either CERCLA or EPCRA.

APHIS Announces Quarantine in New York for European Cherry Fruit Fly

On June 14, 2018, the U.S. Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) announced a quarantine for the European cherry fruit fly in areas of New York state. The fly attacks ripening fruit, generally sweet cherries, which causes the fruit to rot. European cherry fly infestation can cause 100 percent destruction of the host plant. APHIS has published pest response guidelines for the fly. Control methods include foliar bait spray treatments, soil drenching, and removal of all fruit. The area in quarantine consists of 92 square miles of Niagara County. Residents have been asked to consume homegrown cherries on site and not move the fruit from their property.

Supreme Court Rules SEC Administrative Law Judges are "Officers of the United States"

On June 21, 2018, the Supreme Court ruled that Securities and Exchange Commission (SEC) administrative law judges (ALJ) are "officers of the United States," subject to the Constitution's Appointments Clause. In reversing earlier rulings, the Court found ALJs qualify as "officers" and concluded that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." The text of the opinion (*Lucia v. Securities and Exchange Commission*) is available here.

ADDITIONAL ITEMS OF INTEREST:

Conference August 15-16, 2018: Ag Technology & The Law: Advancing American Agriculture

Court Rules 'Pigford' Consent Decree Merely Established Procedures for Debt Relief

Bipartisan Bill Seeks to Improve Agriculture Risk Coverage (ARC) Program

Unpermitted Point Source Discharges Reaching Navigable Waters May Violate Clean Water Act

FDA Releases Inspection Report from Farm Responsible for Recent Egg Recall

Label Changes for Dicamba in 2018