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The National Agricultural Law Center provides the *Ag & Food Law Quarterly Report* as part of its mission to serve as the nation's leading source of agricultural and food law research and information. The *Quarterly Report* is a quarter-by-quarter comprehensive but not necessarily exhaustive summary of notable federal and state level regulatory, legislative, and judicial agricultural and food law legal developments. This edition covers Quarter 1 of 2021, as well as a few developments that occurred near the end of 2020. Links to additional resources for each development are provided, as appropriate. For daily updates, both archived and upcoming, please visit the National Agricultural Law Center (NALC) *Ag & Food Law Update*, available on the NALC website [here](#).

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I. Animal Welfare

Cracking Current Utah Law. In March, Utah enacted a statute, available [here](#), that prohibits the confinement of egg-laying hens in an enclosure that does not meet the statutory definition of a “cage-free housing system”. The law will take effect January 1, 2025. A state-by-state digitized compilation of states’ animal confinement laws is available on the NALC website [here](#). For additional resources regarding animal welfare, visit the NALC’s Animal Welfare Reading Room [here](#).

II. Biotechnology/Genetic Engineering

Moving Along on Movement of GE Animals? On March 7, USDA APHIS [reopened](#) the comment period of its advance notice of proposed rulemaking (ANPR) regarding the movement of certain animals modified or developed through genetic engineering. The ANPR was initially issued on December 27, 2020, available [here](#). Given the timing of the initial ANPR action, the ANPR will likely have a bumpy ride under the new Administration. The comment period closed May 7, during which more than 51,000 comments, available [here](#), were submitted. The Food Safety Inspection Service also [issued](#) the same notice on March 7.

III. Checkoff Programs

Cracking Open a New Checkoff. On February 21, the USDA Agricultural Marketing Service issued a final rule established the Pecan Promotion, Research, and Information Order. The final rule, available [here](#), is codified at 7 C.F.R. Part 1223. The checkoff is the latest edition to the family of nearly [two dozen](#) research and promotion programs, also known as “checkoff” programs, administered by the USDA Agricultural Marketing Service. For additional information about federal and state checkoff programs, see the NALC Checkoff Programs Reading Room [here](#).

Got Lawsuits? Two separate, but interrelated, legal actions continue in different federal court systems. And both actions are brought by the same plaintiff against the same defendant. The first, *R-CALF v. USDA*, is before the Ninth Circuit Court of Appeals for the second time in about five years. The most visible issue in that appeal is whether checkoff funding provided to third parties by the Montana Beef Council (and other “Qualified State Beef Councils”) constitutes “government speech” vis-a-vis the Memoranda of Understanding that several state beef councils have entered into with the USDA Agricultural Marketing Service. Oral arguments are currently scheduled for June 10. The second action is filed in the United States District Court for the District of Columbia. In that action, the primary argument is that the Memoranda of Understanding are impermissible insofar as they were not issued subject to notice-and-comment rulemaking. The parties continue to file briefings in the matter, with the most recent action occurring on February 19. In addition to the NALC Checkoff Programs Reading Room, for resources pertinent to ongoing beef checkoff litigation, visit the NALC website [here](#) and [here](#).

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IV. Clean Water Act

Not the Clean Air Act. In March, a Maryland state circuit court held that the state is required to regulate ammonia emissions from poultry operations pursuant to the Clean Water Act. The court based its ruling on Maryland-specific statutory language that defined “pollutant” to include any “gaseous [. . .] substance.” A detailed discussion of the court’s discussion is available on the NALC website, [here](#).

To Know or Not to Know?, That is the Question. In *United States v. Lucero*, the United States Court of Appeals for the Ninth Circuit held that in order for the individual at issue to be convicted on a Clean Water Act violation, the jury must determine that the individual “knowingly” committed the violation. The *Lucero* decision is discussed further on the NALC website [here](#).

Maui Comes to EPA: Groundwater Guidance. In January, EPA issued a Guidance Memorandum in response to the Supreme Court’s 2020 decision in *County of Maui v. Hawaii Wildlife Fund*, available [here](#), that held that certain discharges of pollutants into groundwater would be regulated under the CWA. This action follows the December 4, 2020 draft guidance that was published in the Federal Register, available [here](#). For a discussion of the *County of Maui* case, visit the NALC website [here](#). For background on the December 4 Proposed Guidance, see *Making Waves: EPA Issues Draft of Proposed Guidance for “County of Maui” Case*, available on the NALC website [here](#).

Centennial State of WOTUS Mind: Injunction Lifted. On March 2, the United States Court of Appeals for the Tenth Circuit ruled in *State of Colorado v. EPA* that the state should not be prohibited from implementing in the state of Colorado the Navigable Waters Protection Rule, the final rule issued in 2020 defining “Waters of the United States”. Specifically, the Tenth Circuit held that the federal district court abused its discretion when it issued an injunction prohibiting implementation of the rule in Colorado. For more information on this decision, see *Hot Topics in Environmental Law: Recent Developments in 2021*, available on the NALC website [here](#).

Aquaculture Impact: Court Vacates General CWA Permit. In February, the United States Court of Appeals for the Ninth Circuit upheld a lower court ruling to vacate Nationwide Permit 48, which was approved by the U.S. Army Corps of Engineers in 2017 to allow for certain shellfish aquaculture activities. To learn more, see *Ninth Circuit Upholds Decision to Vacate General CWA Permit*, available on the NALC website [here](#).

Revoking the Revoked: Pumping Brakes on Yazoo Pumps Project? In January, several environmental groups brought an action, *American Rivers v. EPA*, seeking to reverse in 2021 the 2020 revocation of an EPA veto issued in 2008 that had essentially prohibited implementation of the Yazoo Pumps Project. It is possible that the Biden Administration will revisit the 2020 revocation, which could impact the course of this litigation and overall status of the Yazoo Pumps Project. For a detailed discussion of the history and current status of this litigation, see *Environmentalists Challenge EPA Over Flood Project*, available on the NALC website [here](#).

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Pressing Pause on EPA Litigation. In January, EPA formally requested that the Department of Justice request stays of several items of pending litigation that sought judicial review of EPA regulations issued between January 20, 2017 and January 20, 2021. The request applies to a range of issue areas, including the Clean Water Act regulation and numerous pesticide-related matters. For more detail on the request and its scope of application, see *Pressing Pause: EPA Asks DOJ to Seek Stays of Litigation*, available on the NALC website [here](#).

CAFO Extension Granted. In February, South Dakota adopted SB 52, extending the length of the general waste discharge permit for concentrated animal feeding operations to ten years. Previously, the permit only lasted for five years. See [here](#) for the details.

V. Climate

Climate Comments. In March, USDA issued a [notice](#) seeking public comment on the January 27 Executive Order, *Tackling the Climate Crisis at Home and Abroad*. The comment period closes April 29, 2021.

VI. Economic Stimulus

That's A Relief. The Consolidated Appropriations Act of 2021 included a \$900 billion stimulus relief package, \$13 billion of which was allocated to the U.S. Department of Agriculture to fund agricultural programs. Most of the funding was used to provide a third round of direct payments to agricultural producers under the Coronavirus Food Assistance Program (CFAP). This additional program funding extended eligibility to several different types of producers, including crop, livestock, dairy, poultry, timber, and aquaculture producers. For background on the Consolidated Appropriations Act see *Aid to Agriculture: Overview of the Recent Stimulus Package*, available on the NALC website [here](#).

Protection for Livestock Sellers. Aside from the agricultural financial assistance provisions of the Consolidated Appropriations Act of 2021, the stimulus legislation also contained a measure which created a federal livestock dealer trust. Congress established this statutory trust to benefit unpaid cash sellers of livestock. A detailed discussion of the federal livestock dealer trust is available on the NALC website [here](#).

Another Round. In January, USDA issued a final rule, available [here](#), that would provide additional financial assistance to certain eligible agricultural producers under a program called Coronavirus Food Assistance Program-Additional Assistance. To implement this program, USDA planned to use the funds remaining from the two earlier rounds of CFAP direct payments, which was valued at \$2.3 billion. For background on the additional round of payments see *Coronavirus Food Assistance Program (CFAP) Additional Assistance: Structure and Status*, available on the NALC website [here](#).

Loan Forgiveness. On March 11, 2021, a coronavirus stimulus package known as the American Rescue Plan Act of 2021 was signed into law and \$10.4 billion was allocated to the U.S. Department of Agriculture. The legislation included a provision which instructed the USDA to

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provide debt forgiveness to socially disadvantaged farmers and ranchers who hold certain USDA direct and guaranteed loans. For more information on the debt relief program check out the USDA's website [here](#).

Initiating a Game Plan. On March 24, 2021, the U.S. Department of Agriculture introduced a new initiative known as the Pandemic Assistance for Producers. The USDA designed the four-part initiative, which is valued at \$12 billion, to provide aid and support a broader set of producers than earlier pandemic-related assistance program. For a detailed discussion of the USDA-led initiative see *USDA Aid Initiative: Pandemic Assistance for Producers* available on the NALC website [here](#).

VII. Endangered Species Act

Proposed ESA Regulatory Change. On January 11, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service issued a proposed rule, available [here](#), that would modify the Endangered Species Act consultation regulations specific to U.S. Forest Service and the Bureau of Land Management.

Glyphosate and Atrazine: Biological Evaluations. On March 12, 2021 the comment period closed for the draft nationwide biological evaluations for the registration review of glyphosate relative to the potential effects on threatened and endangered species and their designated critical habitats. The evaluation was initially to expire January 26, but was [extended](#) for 45 days. Likewise, on February 21, the comment period closed out on the nationwide biological evaluations for the potential effects of atrazine, simazine, and propazine on threatened and endangered species and their designated habitats. That evaluation was initially set to expire January 5, 2021 but was [extended](#) an additional 45 days. The evaluations result from the October 2019 settlement in *Center for Biological Diversity et al. v. EPA et al.* (N.D. Ca.).

VIII. Environmental Regulations

Won't You Stay? On January 21, EPA send a letter to DOJ requesting stays for all pending litigation seeking judicial review of EPA regulations adopted during the Trump administration. That request included litigation involving the 2020 WOTUS rule and various on-going pesticide cases. For further details, see *Pressing Pause: EPA Asks DOJ to Seek Stays of Litigation* available [here](#).

IX. Food Safety & Labeling

It's a (Uniform Compliance) Date! In early January, the Food and Drug Administration issued a final rule, available [here](#), that established January 1, 2024 as the uniform compliance date for any food labeling regulations published on or after January 1, 2021 and on or after December 31, 2022.

Water Under the Organic Bridge? The ongoing debate over whether hydroponic plants – those grown in water and therefore not in soil – can be labeled as USDA certified organic took its

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latest turn with a decision by the United States District Court for the Northern District of California. The court affirmed USDA’s decision to exempt hydroponic operations from the National Organic Program requirements pertaining to soil fertility. For background on this issue see *The Fight for Organic: Hydroponic Certification Under Fire*, available on the NALC website [here](#).

Food Fight in The Show Me State. In late March, the United States Court of Appeals for the Eighth Circuit affirmed in *Turtle Island Food, SPC v. Thompson*, a lower court’s decision to deny plaintiffs’ request for preliminary injunction to prevent the state of Missouri from enforcing its [law](#) that established a criminal offense for “misrepresenting a product as meat that is not derived from harvested production livestock or poultry.” The matter is back before the federal district court for further proceedings and could very well return to the Eighth Circuit. For a detailed discussion of *Turtle Foods*, see *Truth in Labeling Law(suit): Missouri*, available on the NALC website [here](#).

X. Hemp

Hemping Into 2021: New Final Rule. On January 15, 2021, the USDA Agricultural Marketing Service issued a [final rule](#) for industrial hemp production, as required by the 2018 Farm Bill, that supersedes the interim final rule that was issued in October 2019. A more detailed discussion of the final rule is available on the NALC website [here](#).

XI. Labor

Speed Limit. In late March, the United States District Court for the District of Minnesota vacated the portion of the “New Swine Slaughter Inspection System” that eliminated evisceration line speed limits. The court held that FSIS’s failure to consider worker safety was a violation of the Administrative Procedures Act. In so doing, the court noted that “while FSIS summarized the comments it received about worker safety, the Final Rule contains no discussion, analysis, or evaluation of the worker safety comments.” The opinion is available [here](#), and the final rule is available [here](#).

XII. Migratory Bird Treaty Act

Migrating Definition. On January 6, the U.S. Fish and Wildlife Service issued a [final rule](#) that essentially codified a 2017 Department of Interior Memorandum defining the scope of the Migratory Bird Treaty Act (MBTA) to mean that the MBTA’s prohibitions on “pursuing, taking, capturing killing, or attempting to do the same, apply only to actions directed at migratory birds, their nests, or their eggs.” The rule was to become effective February 8, 2021 but on February 5 the Biden Administration [delayed](#) the effective date through March 8, 2021. Also, on March 8, the DOI withdrew the 2017 DOI Memorandum. Additionally, the rule was expressly included in the January 20 [Executive Order](#) that called for a review of all regulations passed during the Trump Administration. For additional information on the MBTA and the evolving status of the

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final rule, visit the NALC Environmental Law Reading Room, [here](#), and the Ag & Food Law Update, [here](#).

Finally, on March 2, the Department of Interior withdrew its appeal of a decision issued by the United State District Court for the Southern District of New York, *Nat. Res. Def. Council Inc. v. Dep't of the Interior*, 478 F. Supp.3d 469 (S.D.N.Y. 2020), that vacated the 2017 DOI Memorandum that formed the basis of the final rule issued on January 6.

Managing Cormorants. On February 12, the U.S. Fish and Wildlife Service final rule, available [here](#), *Migratory Bird Permits: Management of Conflicts Associated With Double-Crested Cormorants (Phalacrocorax auratus) Throughout the United States*. According to the rule, the new permit allows specific take activities that are normally prohibited under the MBTA.

XIII. Pesticides

What About Sulfoxaflor? A group of eleven states filed a motion in the Ninth Circuit opposing a request from EPA to remand the registration for sulfoxaflor back to the Agency while it brings the registration into ESA compliance. According to the states, sending the registration back to EPA instead of resolving the matter in the court system will both deprive the plaintiffs the opportunity to have their FIFRA claims heard, and allow the ESA violations to continue for an uncertain period of time. EPA has admitted that the sulfoxaflor registration is not compliant with the ESA, but that it may not be able to start resolving the issue until 2025 due to current backlogs. For more background on this lawsuit and the states' request, see *States, Environmental Groups Challenge EPA Over Sulfoxaflor*, available on the NALC website [here](#).

New York Says No to Glyphosate. At least on state property. The State of New York passed a law prohibiting the use of glyphosate on all state property. Available [here](#) at Section 33-1301 of the environmental conservation law, the law prevents all New York state departments, agencies, public benefit corporations, and pesticide applicators from applying glyphosate to state property. The law will not take effect until December 31, 2021.

Court Pushes Pause on AEZ Rule. A federal court in the Southern District of New York issued a temporary restraining order and a preliminary injunction preventing an EPA regulation from taking legal effect. The regulation, should it take effect, would roll back several FIFRA regulations passed in 2015 to strengthen protections for farmworkers, including a rule which would extend the "application exclusion zone" ("AEZ") to 100 feet. Since issuing the injunction in *Rural & Migrant Ministry v. U.S. Env'tl. Prot. Agency*, No. 20-CV-10645 (S.D. N.Y.), the court has consolidated the case with *New York v. U.S. Env'tl. Prot. Agency*, No. 20-CV-10642 and extended the injunction. More information is available at the NALC site [here](#).

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