



Third Quarter, 2021

Ag & Food Law Quarterly Report: Third Quarter 2021

July 1, 2021 – September 30, 2021

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 comprehensive but not exhaustive summary of notable federal and state level regulatory, legislative, and judicial agricultural and food law legal quarterly developments. This edition covers the Third Quarter of 2021, July 1 through September 30, 2021. 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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Ag-gag

Court Considers Constitutional Challenge. The Eighth Circuit Court of Appeals upheld part of, and struck down part of an Iowa state law that prohibits people from accessing agricultural production facilities under false pretense or by making false statement. The law at issue prohibits a person from: (1) obtaining access to an agricultural production facility by false pretenses; and (2) making a false statement or representation as part of an application or agreement to be employed at an agricultural production facility if the purpose of doing so is to commit an act not authorized by the owner of the facility. Several organizations filed a lawsuit challenging the law, arguing that it violates the First Amendment. Ultimately, the Eighth Circuit concluded that the provision related to access was constitutional, but that the provision related to employment was constitutional. It has remanded the case back to the lower court for further proceedings. For additional information on the case, click [here](#).

Animal Legal Def. Fund v. Kelly, No. 20-3082, 2021 WL 3671122 (10th Cir. 2021). The Kansas Farm Animal and Field Crop and Research Facilities Protection Act (“Kansas Protection Act”) prohibits a person from making a false statement in order to gain access to or control over an animal facility. Two other subsections of the law also prohibit directly recording in an animal facility, and trespass to an animal facility with “the intent to damage the enterprise.” The court found that each of the three subsections of the Act were unconstitutional because the “intent to damage the enterprise” element present in all three subsections did not constitute the sort of harm required for false speech to be unprotected under the First Amendment. Typically, in order for false speech to be unprotected, it must cause “legally cognizable harm.” After making its finding, the Tenth Circuit upheld an injunction forbidding the Governor and Attorney General of Kansas from enforcing those portions of the Kansas Protection Act that it found unconstitutional. For additional information, click [here](#).

“Ag-gag” Laws Update. State laws limiting photography or recordings on agricultural operations without the consent of the owner are commonly called “ag-gag” or “farm security” laws. They became a popular response to numerous releases of undercover videos taken and published by animal activists. However, many of the statutes have been challenged and court rulings have shaped the conversation. Within the past several weeks, three courts have handed down rulings on challenges to the currently existing laws in the states of Arkansas, Iowa, and Kansas. For a full look at an overview of the cases, click [here](#).

Antitrust

Price fixing allegations. On July 29 the United States Department of Justice (DOJ) issued two indictments, the first charged four Pilgrim’s Pride executives and the second charged Koch Foods. The company and individuals were charged under the Sherman Antitrust Act for price fixing activities. According to a DOJ press release, available [here](#), the indictments “allege that the defendants and co-conspirators conspired to suppress and eliminate competition for sales of broiler chicken products”.

Climate

As part of USDA’s broader efforts on climate change, USDA is requesting comments on a Climate-Smart Agriculture and Forestry Partnership Program. [Info here](#). To learn more about existing carbon markets on the state and international level, a NALC blog post is [available here](#).

OSHA. The Occupational Safety and Health Administration is looking at farms and other operations where workers are exposed to extreme heat, and beginning to develop a heat standard for workers. More information about the proposal on the federal level, as well as other standards that are in place in various states are available in a NALC blog post [here](#).

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Conservation Programs

Getting Familiar with CRP. The Conservation Reserve Program is a voluntary program first authorized by the Food Security Act of 1985. Under the program, agricultural producers contract with USDA's Farm Service Agency to take highly erodible and environmentally sensitive land out of production in exchange for financial support. Participants in CRP will implement various conservation practices on their agricultural land, such as establishing certain plant species or developing wildlife habitat. In return, USDA will provide rental payments and cost-share assistance. Understanding the basics of CRP is useful for anyone who is interested in the program. To learn more about CRP, click [here](#).

Crop Block Grant Program

Saying Goodbye to SCBGP. On July 27, AMS published a final rule removing the regulations pertaining to the Specialty Crop Block Grant Program (SCBGP). AMS stated the regulations, which were established in 2006 as a matter of USDA policy, were duplicative of and in conflict with the recent revisions to the Office of Management and Budget's (OMB) Office of Federal Financial Management's Guidance for Grants and Agreements. Consequently, the SCBGP-specific regulations are no longer needed. AMS removed the obsolete regulations in order to align its grant programs with OMB requirements and implement the programs efficiently. [Info here](#).

Economic Stimulus

American Rescue Plan. On July 19, USDA published a notice seeking input from the public following an Executive Order from President Biden on Promoting Competition in the American Economy on how to invest an estimated \$500 million of American Rescue Plan funds to improve infrastructure, increase capacity, and hasten diversification across the processing industry. Info [here](#).

A Loss of Livestock. On July 20, the Farm Service Agency announced the availability of funds for the Pandemic Livestock Indemnity Program to aid producers for losses of livestock and poultry depopulated from March 1, 2020 through December 26, 2020 due to insufficient processing access as a result of the COVID-19 pandemic and for the cost of depopulation and disposal. [Info here](#).

CFAP 2 Extension. A final rule amended CFAP 2 to extend the deadline for submitting CFAP 2 applications to October 12, 2021 and included assistance for contract producers of swine and poultry who were not originally eligible for CFAP 2. [Info here](#).

Pandemic Livestock Indemnity Program. Recently, the U.S. Department of Agriculture ("USDA") [announced](#) it was implementing a program for livestock and poultry producers who suffered unexpected financial losses due to the limited access to processing facilities caused by the coronavirus pandemic. This program, known as the [Pandemic Livestock Indemnity Program](#) ("PLIP"), is administered by USDA's Farm Service Agency ("FSA") to provide financial assistance to certain eligible agricultural producers who depopulated their livestock or poultry during the pandemic. To learn more, click [here](#).

The continuing resolution that was passed to keep the government operating this fall includes a \$10 billion expansion in agricultural disaster aid and temporarily extends authority for USDA's livestock price reporting system. It will keep the government funded at FY21 levels through Dec. 3.

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Endangered Species Act

Newly Listed. The following species have been added to the list of threatened and endangered species: Sierra Nevada Distinct Population Segment of the Sierra Nevada red fox (endangered); Bartram's stonecrop (threatened); Franklin's bumblebee (threatened); pyramid pigtoe (threatened); slenderclaw crayfish (endangered)

Removed or Reclassified. The following species have either been removed from the list of threatened and endangered species or had its status on that list change: running buffalo clover (removed from list); Cumberland sandwort (removed from list).

Proposals. The following is a list of proposals on future ESA actions: proposal to remove the plant *Adiantum vivipes* from the list of threatened and endangered species; proposal to list the emperor penguin as a threatened species; proposal to extend the comment period on the proposed rule to list two distinct population segments of the lesser prairie-chicken; proposal to revise the designated critical habitat for the northern spotted owl; proposal to list the Dolphin as a threatened species; proposal to list the Union caribou as a threatened species; proposal to list six Central Texas mussel species (the Guadalupe fatmucket, Texas fatmucket, Texas fawnsfoot, Guadalupe orb, Texas pimpleback, and the false spike) as endangered; proposal to designate critical habitat for the Miami tiger beetle, proposal to remove 23 species from the Federal Lists of Endangered and Threatened Wildlife and Plants due to extinction, proposal to consider the American bumble bee, Long Valley speckled dace, and Siuslaw hairy-necked tiger beetle for inclusion on threatened or endangered lists

Announcements. FWS has received an application from the Missouri Department of Conservation for an incidental take permit under the Endangered Species Act. If approved, the permit would be for a 50-year period covering four species of bats. [Info here.](#) The Kansas Department of Wildlife and Parks has applied for a permit associated with the implementation of a programmatic safe harbor agreement and candidate conservation agreement with assurances for 14 aquatic species in Kansas. [Info here.](#)

Proposed rule announcing that the U.S. Fish and Wildlife Service proposes to remove 23 species from the Federal Lists of Endangered and Threatened Wildlife and Plants due to extinction. [Info here.](#)

Proposed rule announcing FWS's 90-day findings on four petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants and one petition to downlist a species from endangered to threatened under the Endangered Species Act. Based on its review, FWS finds that the petitions to list the American bumble bee (*Bombus pensylvanicus*), Long Valley speckled dace (*Rhinichthys osculus* ssp.), and Siuslaw hairy-necked tiger beetle (*Cicindela hirticollis siuslawensis*) present substantial scientific or commercial information indicating that the petitioned actions may be warranted. [Info here.](#)

Finance, Credit, & Tax

To Heir is Human. FSA has adopted a final rule implementing a new Heirs' Property Relending Program that was authorized by the 2018 Farm Bill. The program is designed to help heirs with undivided ownership interests resolve both ownership and succession issues on farms that are owned in common by multiple heirs. For more information the final rule, click [here.](#)

Loan Forgiveness Lawsuit Becomes Class Action. A group of Texas farmers filed a lawsuit against alleging that its loan forgiveness payments violate the United States Constitution. This case is one of many other ongoing lawsuits brought in other jurisdictions, also challenging USDA's loan forgiveness program. Specifically, the Texas farmers argued that Section 1005 of the [American Rescue Plan of 2021](#) violates the equal protection rights promised under the Constitution because the statutory provision limits loan forgiveness to borrowers who qualify as a socially disadvantaged farmer or rancher, a designation based on race. On July 1, 2021, Judge Reed

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O'Connor, a federal judge serving the United States District Court for the Northern District of Texas, certified two classes of farmers and ranchers for that lawsuit. As a result, the lawsuit will proceed as a class action against the USDA. For more information on these lawsuits, click [here](#).

Farm Credit Service Regulations. Final rule amending FCS's regulations governing standards of conduct of directors and employees of Farm Credit System institutions, excluding the Federal Agricultural Mortgage Corporation. The final rule requires each System institution to have or develop a Standards of Conduct Program based on core principles to put into effect ethical values as part of its corporate culture. [Info here](#).

Food Safety & Labeling

But is it Organic? AMS has announced the renewal of several substances listed on the National List of Allowed and Prohibited Substances within USDA's organic regulations. To see which substances were renewed, click [here](#).

Cell Cultured Meat. In September the Food Safety Inspection Service published an Advanced Notice of Proposed Rulemaking, available [here](#), seeking comments on how it should regulate the labeling of cell cultured meat and poultry products. To read more about this issue click [here](#).

Homemade Food in the Sunshine State. The Florida legislature enacted the "Home Sweet Home Act". The act revises Florida's definition of cottage food, increases the annual gross sales limitations for exempting cottage food operations from certain food and building permitting requirements, authorizes the delivery of cottage food by mail, and preempts city and county government cottage food regulations. Info [here](#).

Animal Food Additives. The Food and Drug Administration issued two final rules amending the regulations for food additives permitted in the feed and drinking water of animals. The first final rule, available [here](#), provides for the safe use of selenomethionine hydroxy analogue as a source of selenium in feed for beef and dairy cattle. The second final rule, available [here](#), provides for the safe use of guanidinoacetic acid as a precursor of creatine in poultry feed.

The Exotic Yak. In July the Food Safety Inspection Service ("FSIS") published a final rule, available [here](#), which amends the regulatory definition of yak and included it as an "exotic animal" eligible for voluntary inspection. This final rule also revised the definitions of antelope, bison, buffalo, catalo, deer, elk, reindeer, and water buffalo. FSIS also considered whether all farmed Bovidae, Cervidae, and Camelidae species should be eligible for voluntary inspection or subject to mandatory inspection.

Welfare Labeling. In *Animal Legal Def. Fund v. Hormel Foods Corp.*, No. 19-CV-0397, 2021 WL 3921512 (D.C. Sept. 2, 2021), the District of Columbia Court of Appeals held that the Animal Legal Defense Fund ("ALDF") had standing to sue Hormel Foods over the use of the phrase "Natural Choice."

Hemp

For 2022 crops, states are making the decision on whether hemp oversight should take place on the state level or be left to USDA. More information is available [here](#).

Labor

Heat Standards. On September 20, 2021, the U.S. Department of Labor announced that OSHA will be taking steps to implement a workplace heat standard. In October 2021, OSHA will be issuing an Advance Notice of Proposed Rulemaking on heat injury and illness prevention, initiating a comment period that will allow

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OSHA to gather more information to protect workers. For more information on these efforts, click [here](#). To read more about the rule click [here](#).

Marketing Orders and Checkoff Programs

Blueberry Business. On July 26, the Agricultural Research Service published a proposed rule inviting comments on changes in membership of the U.S. Highbush Blueberry Council under the Blueberry Promotion, Research and Information Order, by removing the first-handler member and alternate position and adding two exporter member and alternate positions. [Info here](#).

Potatoes - AMS proposed a rule inviting comments on amendments to the Potato Research and Promotion Plan. [Info here](#).

Legal Checkup on Checkoffs. In July of 2021, the United States Court of Appeals for the Ninth Circuit issued its latest and final decision in the years' long saga that was Ranchers-Cattlemen Action Legal Fund (R-CALF) v. USDA. The Ninth Circuit held, inter alia, that the speech at issue – that of third parties that receive checkoff funding from states' Qualified State Beef Councils (QSBCs)– was “government speech” and therefore exempt from First Amendment scrutiny. To read more click [here](#).

Nutrition

Oh SNAP! In August the Food and Nutrition Service released the 2021 version of the Thrifty Food Plan, available [here](#). This reevaluation went into effect on October 1, 2021 and is projected to increase benefits on average by 21.03%. For a more in-depth overview of SNAP and the Thrifty Food Plan, visit the NALC website [here](#).

Pesticides

Roundup Back in Court. A California State Court of Appeal upheld a trial court jury verdict awarding millions of dollars in damages to a married couple who claimed that exposure to Roundup caused them both to develop non-Hodgkin's lymphoma. One of the issues presented on appeal was whether the plaintiffs' state law failure-to-warn claims were preempted by FIFRA and should therefore not have been raised at trial. The California appellate court was the latest to consider that argument which had already been brought before the Ninth Circuit Court of Appeals. Like the Ninth Circuit, the California court concluded that the state law claims were not preempted by FIFRA, because the California state law duty to warn did not impose any requirements that were “different from or in addition to” requirements imposed by FIFRA. For more information, click [here](#).

Paraquat Preview. EPA has announced availability of its interim registration review decision for the pesticide paraquat. The interim decision includes new safety measures intended to reduce exposure. See [here](#) for more information.

Trifludimoxazin Dispute. The Center for Food Safety and Center for Biological Diversity filed a petition in 9th Circuit Court of Appeals alleging the EPA's registration of trifludimoxazin wasn't supported by substantial evidence and fails to protect endangered species and habitats. Link to Center of Biological Diversity's statement, [here](#).

Goodbye Chlorpyrifos. On August 19, 2021, the Environmental Protection Agency (“EPA”) announced its intention to publish a final rule in the Federal Register revoking all tolerances for residues of the pesticide chlorpyrifos. This decision comes 14 years after environmental groups filed a petition requesting that EPA revoke all chlorpyrifos tolerances, and four months after a decision from the Ninth Circuit Court of Appeals ordered EPA to make a

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final decision. The decision is expected to impact only uses of chlorpyrifos on food crops. For a NALC overview of the decision, click [here](#).

Racial Equity

How can USDA help? USDA received around 2,400 comments on how the USDA can advance racial justice and equity for underserved communities as part of its implementation of Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. [Info here.](#)

USDA announced its intent to establish an Equity Commission (EC) including a Subcommittee on Agriculture. The EC will advise the Secretary of Agriculture by facilitating identification of critical USDA programs, policies, systems, structures, and practices that contribute to barriers to inclusion or access, systemic discrimination, or exacerbate or perpetuate racial, economic, health and social disparities. [Info here.](#)

Aid to Socially Disadvantaged Farmers. On July 27, USDA announced the availability of funds for fiscal year 2021 and solicited applications from community-based and non-profit organizations, institutions of higher education, and Tribal entities to compete for financial assistance through the Outreach and technical assistance for Socially Disadvantaged Farmers and Ranchers and Veteran Farmers and Ranchers Program. [Info here.](#)

Water Law

Hawai'i Wildlife Fund 2.0. The case *Hawai'i Wildlife Fund v. Cty. Of Maui*, No. CV 12-00198 SOM/KJM, 2021 WL 3007168 (D. Haw. July 15, 2021), made its way back to federal district court after a few issues in the case were decided by the Supreme Court of the United States. In its decision, the Supreme Court issued guidance for when a discharge would be considered the functional equivalent of a direct discharge. That guidance included some factors that should be considered, the most important of which is the amount of time it takes discharged pollutants to reach a protected waterbody, and the amount of distance the pollutants travel. The remaining factors are primarily concerned with the overall integrity of the pollutants by the time they reach protected waters. Applying these factors, the district court determined that the County of Maui was required to obtain an NPDES permit for discharges made from a wastewater reclamation facility owned by the County.

The Public Trust Doctrine in Wisconsin. In the case *Clean Wisconsin, Inc. v. Wisconsin Dep't of Nat. Res.*, 2021 WI 72 (Wis. 2021), the Wisconsin Supreme Court ruled that the Wisconsin Department of Natural Resources ("DNR") had the authority and discretion to consider the environmental impacts of all high-capacity groundwater wells. DNR is responsible for evaluating applications to operate high-capacity groundwater wells. For some of these wells, DNR is required to follow an environmental review process before approving the application. For other wells, the environmental review process is not required, although DNR will sometimes still consider the potential environmental impacts before approving a well's application. At the heart of this case were eight well applications that did not require environmental review. Although DNR had knowledge that the wells would have a negative environmental impact, it approved the applications after concluding that it did not have the statutory authority to perform an environmental review. According to the Wisconsin Supreme Court, DNR has both a constitutional duty and the statutory authority to consider the environmental effects of all proposed high-capacity wells. The constitutional duty stems from Wisconsin's Public Trust Doctrine which protects the state's waters which have the potential to be impacted from high-capacity wells. The statutory authority comes from a Wisconsin state law requiring DNR to "protect, maintain, and improve" the state's water supply. According to the court, this statutory duty meant that DNR had to consider the environmental impacts of high-capacity wells. The court went on to find that the state law limiting DNR's actions to those which were "explicitly" required did not change its conclusion because the legislature explicitly granted the DNR broad authority to consider the potential environmental impact of proposed high-capacity wells. Because the authority granted to DNR is broad, it can consider the environmental impacts of all well applications.

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EPA issued a memorandum rescinding the guidance document entitled “Applying the Supreme Court’s County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program,” which was signed on January 14, 2021. The memorandum was issued on September 15, 2021. [Info here](#). A NALC blog post discussing the memo is [available here](#).

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