



Fourth Quarter, 2021

Ag & Food Law Quarterly Report: Fourth Quarter 2021

October 1, 2021 – December 31, 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 Fourth Quarter of 2021, October 1 through December 31, 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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Antitrust

In *In re Broiler Chicken Antitrust Litigation*, 1:16-cv-08637, No. 5130 (N.D.Ill. Oct. 18, 2021), the court approved settlements totaling \$181 million with six poultry producers, Tyson Foods, Fieldale Farms, Peco Foods, George's Inc., Pilgrim's Price Corp. and Mar-Jac, to resolve consumer claims that they conspired to inflate broiler chicken prices. Litigation continues against other Defendants.

Bankruptcy

In *IN RE: EXPRESS GRAIN TERMINALS, LLC DEBTOR*, No. 21-11832-SDM, 2021 WL 5918376 (Bankr. N.D. Miss. Dec. 14, 2021), the court found that individual grain contracts were severable, and thus were individual contracts under the MTA, because the language of both the MTA and the individual grain contract demonstrate the severable nature of the individual grain contracts. Further supporting evidence included the conduct of the parties during the execution. The court also found that the individual grain contracts were not for financial accommodations because they were not contracts for the extension of cash or a line of credit. For a compilation of state laws regulating grain warehouses and dealers, click [here](#).

Carbon/Climate

Strategizing for Sustainability. The California legislature enacted SB 27 which requires the state's Natural Resources Agency, among others, to establish the Natural and Working Land Climate Smart Strategy to help advance the state's climate goals and establish carbon removal targets for 2030 and beyond. This legislation also requires the Natural Resources Agency to establish a registry that lists projects seeking funding that drive climate action on the state's natural and working lands. Info [here](#). For information on climate policy and the carbon industry as it relates to agriculture, check out previous NALC webinars [here](#), [here](#), [here](#), and [here](#). Also, for NALC publications on the topic, click [here](#).

The Farm Service Agency ("FSA") is investing \$10 million to measure and monitor soil carbon on land enrolled in the Conservation Reserve Program ("CRP"). According to a U.S. Department of Agriculture press release, available [here](#), FSA is collecting this data to quantify the climate outcomes of certain CRP practice types to help the agency strengthen its conservation planning resources for producers. The three categories of CRP practice types that will be monitored include perennial grass, trees, and wetlands.

Clean Water Act

States Retain Certification Power Under CWA. A federal court issued a ruling in the lawsuit *In re Clean Water Act Rulemaking*, No. C 20-04636 WHA, 2021 WL 4924844 (N.D. Cal. Oct. 21, 2021), vacating the 2020 Clean Water Act Section 401 Certification Rule ("2020 Rule"). Under Section 401 of the CWA, applicants for CWA permits must obtain a water quality certification from the state that the permit activity will be located in. States can either grant the certification, grant the certification with conditions, or deny the certification. If the certification is denied, then the permit will not be issued. The 2020 Rule would have limited the scope of Section 401

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certification by restricting the conditions that states may impose on the certifications it issues. In vacating the regulation, the judge found that the 2020 Rule was so flawed that EPA was unlikely to adopt it again. For a closer look at this decision, see NALC's write-up [here](#).

NWPR Vacated Once Again. In *Navajo Nation v. Regan*, No. 20-CV-602-MV/GJF, 2021 WL 4430466 (D.N.M. Sept. 27, 2021), the court considered whether to include vacatur when remanding the Navigable Waters Protection Rule ("NWPR"). The Navajo Nation argued that vacatur was proper because leaving the NWPR in place would result in significant, actual environmental harms to the Navajo Nation. The court considered two factors to determine whether the NWPR should be vacated. One, "the seriousness of the rule's deficiencies," and two, "the disruptive consequences of an interim change that may itself be changed." The court concluded that allowing the NWPR to remain in place upon remand would present a possibility of serious environmental harm. Additionally, the court found that any potential for disruptive consequences was outweighed in favor of vacatur. The court held that voluntary remand of the NWPR was appropriate and that the remand should include vacatur of the NWPR.

WOTUS Redux. On December 6, 2021, EPA published its highly-anticipated proposed rule to redefine the term "waters of the United States" ("WOTUS") under the Clean Water Act. This is the fourth proposed definition of WOTUS since 2015, and the latest effort by EPA to establish a lasting definition of the crucial term. The text of the proposed rule is available [here](#), and an in-depth look at the rule is available [here](#) on the NALC website. For a full timeline of the various definitions of WOTUS, click [here](#)

Endangered Species Act

Set the Date. A federal court in *WildEarth Guardians v. Haaland*, No. CV 20-1035 (CKK) (D.D.C. Sept. 30, 2021), set dates by which FWS must complete its findings on whether to list four freshwater aquatic species under the ESA. WildEarth Guardians filed this lawsuit after it petitioned FWS to list the four species as either threatened or endangered, but FWS had failed to make a listing decision within the statutorily mandated timeline. Now FWS has a court-ordered date by which to make its decision.

Regulations Reviewed. Since the Biden Administration took office, agencies have been taking steps to review a variety of environmental regulations adopted during the Trump Administration, including regulations that impact the ESA. [This article](#) is an overview of some of those efforts and their progress so far.

Proposals. FWS issued proposals regarding [Tiehim's buckwheat](#), the [cactus ferruginous pygmy-owl](#), [Macrochelys temminckii](#), the [northern spotted owl](#), the [bracted twistflower](#), and the [humpback chub](#) (*Gila cypha*)

Critical Habitat. FWS designated critical habitat for the narrow-headed gartersnake (*Thamnophis rufipunctatus*). [Info here](#).

Announcements. FWS published a final rule announcing the revised taxonomy of four wildlife species and two plant species under the ESA to reflect the scientifically accepted taxonomy and nomenclature of these species. [Info here](#).

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FWS released a notice announcing the availability of its draft recovery plan for endangered aquatic invertebrates in the Diamond Y Spring system of the Chihuahuan Desert of western Texas. [Info here.](#)

FWS received an application for an incidental take permit to take the federally listed Delhi Sands flower-loving fly under the Endangered Species Act. [Info here.](#)

Environmental Protection Agency

Hydrofluorocarbons Reduced. In accordance with the American Innovation and Manufacturing Act, EPA issued regulations to implement the phasedown of hydrofluorocarbons, which are highly potent greenhouse gases, by 85 percent over a period ending in 2036. [Info here.](#) Additionally, EPA issued calendar year 2022 allowances for the production and consumption of hydrofluorocarbons. [Info here.](#)

Understanding Environmental Justice. Both USDA and EPA define environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies.” A highlight of NALC resources relating to environmental justice is available [here.](#) .

Tackling PFAS. EPA released a document known as the PFAS Strategic Roadmap which outlines the Agency’s approach to addressing issues related to PFAS contamination. The Roadmap lays out a timeline by which EPA plans to take certain actions to protect communities and the environment from harm caused by PFAS. To learn about EPA’s PFAS goals, and how PFAS contamination impacts farmers, see [here.](#)

Estate Planning

A heirs property situation often occurs when a landowner passes away “intestate,” without a will or other estate plan. This fractional ownership, which has disproportionately affected BIPOC communities, greatly increases the risk that an heir, in attempting to separate their interests, will force a partition sale of the property, or that the land will be lost to tax default. A highlight of NALC and partner resources on this topic is available [here.](#)

Finance, Credit, & Tax

The Farm Credit Administration (“FCA”) adopted a final rule that amends the regulatory capital requirements for Farm Credit System institutions. [Info here.](#)

Funding for Food System. On October 4, 2021, the U.S. Department of Agriculture (“USDA”) announced it would provide \$100 million in the form of loan guarantees backed by the agency. The funds are offered through community and private lenders to improve the processing, storage, and other food supply chain infrastructure. This commitment is in addition to an earlier \$500 million investment by USDA to expand meat and poultry processing capacity. Info [here.](#)

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Higher Loan Limits. On October 1, 2021, the U.S. Department of Agriculture (“USDA”) increased its loan limit from \$1.776 million to \$1.825 million for borrowers seeking a guaranteed farm loan. Info [here](#).

Aid for Negotiated Hogs. Recently, the U.S. Department of Agriculture (“USDA”) [announced](#) it was implementing a program to provide aid to certain hog producers who suffered unexpected financial losses caused by the COVID-19 pandemic. Under this program, known as the [Spot Market Hog Pandemic Program](#) (“SMHPP”), the Farm Service Agency (“FSA”) will provide direct financial aid to assist eligible hog producers who sold hogs through a negotiated sale between April 16, 2020 through September 1, 2020. FSA is [accepting applications](#) for SMHPP assistance through February 25, 2022. To learn more, click [here](#).

Food Safety & Labeling

EPA aims to reduce PFAS contamination while California limits PFAS in food packaging. EPA released a strategy for reducing contamination by per- and polyfluoroalkyl substances (PFAS). EPA’s strategy includes a timeline of actions to help protect communities and the environment from PFAS contamination. EPA’s goal is to create “enduring and protective solutions” to PFAS contamination through a “lifecycle approach” which will address both existing contamination and on-going PFAS use. EPA’s PFAS Strategic Roadmap can be found [here](#). To read a recent NALC blog post about the strategic roadmap, click [here](#). On the state level, California passed Assembly Bill 1200 which, beginning January 1, 2023, prohibits any person from distributing, selling, or offering for sale any food packaging that contains regulated PFAS. To read Assembly Bill 1200, click [here](#).

Don’t be salty. On October 13, 2021, the Food and Drug Administration published its Guidance for Industry on Voluntary Sodium Reduction Goals. The guidance provides “measurable voluntary short-term (2.5-year) goals for sodium content in commercially processed, packaged, and prepared foods to reduce excess population sodium intake, while recognizing and supporting the important roles sodium plays in food technology and food safety.” To read the guidance in full, click [here](#).

Flavors v. Ingredients. In the fourth quarter of 2021 trail courts continued to hear cases regarding how certain foods are labeled. In *Ankush Puri v. Costco Wholesale Corporation*, No. 5:21-CV-01202-EJD, 2021 WL 6000078 (N.D. Cal. Dec. 20, 2021), the plaintiff claimed that chocolate covered ice cream bars were mislabeled because the chocolate coating was mostly vegetable oil and not cacao powder. The court held a reasonable consumer would know that chocolate must be mixed with something to create a coating for ice cream bars and dismissed the case. Additionally, in *Francine Civello, individually & on behalf of all others similarly situated v. Conopco, Inc.*, No. 20 CIV. 1173 (VM), 2021 WL 5761894 (S.D.N.Y. Dec. 3, 2021), the plaintiff alleged that the term “vanilla bean” on an ice cream label was misleading because the ice cream was not flavored by vanilla derived from the vanilla orchid plant. The court found that a reasonable consumer would interpret the ice cream’s label to refer to the ingredient “vanilla bean” and not simply the flavor “vanilla”, but because the ice cream did contain some amount of vanilla bean, the court held the label was not misleading. Similarly, in *Zahora v. Orgain LLC*, No. 21 C 705, 2021 WL 5140504 (N.D. Ill. Nov. 4, 2021), the plaintiff claimed that the term “Vanilla Bean Flavor” was misleading, but the court held that a reasonable consumer would only expect a certain flavor after reading the term, and not a certain ingredient. Finally, in *Boswell v. Bimbo Bakeries USA, Inc.*,

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No. 20-CV-8923 (JMF), 2021 WL 5144552 (S.D.N.Y. Nov. 4, 2021), the plaintiff claimed that the phrase “All Butter Loaf Cake” was misleading when the cake also contained soybean oil and artificial flavors. The court held that the plaintiff failed to prove the product label was deceptive, and granted the defendant’s motion to dismiss.

The PPIA does not preempt. In *Cohen v. ConAgra Brands, Inc.*, No. 20-55969, 2021 WL 4956243 (9th Cir. Oct. 26, 2021), the 9th Circuit found that the Poultry Products Inspection Act does not preempt claims challenging statements such as “No Preservatives!”, “No Artificial Colors”, and “No Artificial Flavoring” on product labels without evidence to support a finding that a label has been reviewed and approved.

Proposed update to the agricultural water rule. On December 6, 2021, the FDA published a proposed rule to amend the agricultural water provisions of the produce safety regulation. If finalized, the proposal would replace the microbial criteria and testing requirements for pre-harvest agricultural water for covered produce (other than sprouts) with provisions for systems-based agricultural water assessments. The water assessments are designed to be more feasible to implement across the wide variety of agricultural water systems, uses, and practices, while also being adaptable to future advancements in agricultural water quality science and achieving improved public health protections. To read a recent NALC blog post about the proposed rule, click [here](#). To read NALC’s fact sheet on the Produce Safety Rule, click [here](#).

Mainers have a “right to food”. On November 2, 2021, Maine voters passed a ballot initiative to amend the Maine Constitution to declare that individuals have a “natural, inherent and unalienable right to food,” including “the right to save and exchange seeds,” and “the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being.” For more information about this ballot initiative, click [here](#).

In the pursuit of safe food. On October 19, USDA’s Food Safety and Inspection Service (FSIS) announced it is “mobilizing a stronger, and more comprehensive effort to reduce *Salmonella* illness associated with poultry products.” FSIS aims to reduce *Salmonella* illness by 25%. To read the press release announcing the effort, click [here](#). To read a NALC blog post on the topic, click [here](#). [In its efforts to reduce foodborne illness](#), on November 2, 2021, FSIS announced it corrected its regulations requiring official plants that process egg products to develop and implement Hazard Analysis and Critical Control Point (HACCP) Systems and Sanitation Standard Operating Procedures and to meet other sanitation requirements consistent with FSIS’ meat and poultry regulations. Click [here to read the correction](#). [For more about food safety generally, visit NALC’s food safety reading room, here.](#)

Hemp

Legislation (California): AB 45 requires a manufacturer of dietary supplements and food that includes industrial hemp to register with the State Department of Public Health and must demonstrate all parts of the plant used come from a state or country that has an established and approved industrial hemp program that inspects or regulates hemp under a food safety program. To read more click [here](#).

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Labor

DOL proposes changes for H-2A wage rates. The Department of Labor has proposed a rule that would modify the way that it determines the hourly Adverse Effect Wage Rates for agricultural occupations. For more information on the proposed rule, click [here](#). To read more about the proposed changes click [here](#).

Changes to Immigration Enforcement. DHS has issued two memoranda addressing immigration enforcement issues. Specifically, one memo discussed the removal of noncitizens who do not pose a threat to national security, and the other covered raids of workplaces where undocumented immigrants are employed. [This NALC blog post](#) discusses them. For more information on relevant labor and immigration laws, view the NALC Reading Room on Labor, available [here](#).

COVID Workplace Requirements. During this quarter, OSHA has issued workplace COVID requirements on vaccination and testing (more info from Agri-Pulse [here](#)), and that mandate was challenged and halted by the courts (more info from Agri-Pulse [here](#)). The mandate was then considered by the United States Supreme Court, which blocked it from enforcement on January 13, 2022. A NALC blog article discussing the situation is available [here](#). Cities, states and private companies are still free to impose their own requirements. For more information on COVID-19 and OSHA regulations click [here](#) to view a past webinar hosted by NALC.

Hazardous Heat. OSHA has initiated rulemaking to protect workers from hazardous heat. [Info here.](#) [A NALC blog post discussing the issue further is available here.](#)

Marketing Orders & Checkoff Programs

Litigation: In *RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA v. UNITED STATES DEPARTMENT OF AGRICULTURE, et al.*, No. CV 20-2552 (RDM), 2021 WL 4462723 (D.D.C. Sept. 29, 2021), the court considered the USDA's motion to dismiss for lack of jurisdiction and failure to state a claim. Ranchers-Cattlemen Action Legal Fund ("R-CALF") brought an action under the Administrative Protection Act ("APA"). R-CALF is claiming that the USDA substantively amended the Beef Checkoff Program violating the APA by entering into agreements ("MOUs") with the Qualified State Beef Councils ("QSBCs") instead of engaging in notice-and-comment rulemaking. The MOUs increased USDA oversight over how QSBCs use their funds that they received from the Beef Checkoff Program. While the underlying case is focused on the MOUs, the issue that was immediately before this court was a motion to dismiss for lack of standing. *Overview of case continued on [October 5 Daily Update](#)*

Migratory Bird Treaty Act

MBTA Revised. FWS adopted a final rule that once again prohibited incidental take under the Migratory Bird Treaty Act. In January 2021, FWS published a rule limiting the scope of the MBTA to only prohibit intentional take of birds. The final rule adopted by FWS on October 3, 2021 reverses that decision. [Info here.](#) On the same day, FWS also announced that it will start gathering information in order to develop proposed regulations that would allow for the incidental take of migratory birds under the MBTA. [Info here.](#)

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Pesticides

Established Tolerance. EPA issued final rules establishing the tolerance for residues on two pesticides, including: tolerances for [propamocarb](#) in or on Vegetable, Brassica, head and stem, group 5-16; and tolerances for residues of the insecticide [clothianidin](#) in or on food and feed commodities.

Commenting on Chlorpyrifos. Between October 13, 2021, and October 29, 2021, several growers, retailers, co-ops, refiners, importers, crop consultants, and others submitted written objections to EPA's August 30, 2021, final rule revoking all tolerances for chlorpyrifos. EPA is required to respond. To view the EPA office of Administrative Law Judges' docket of this matter, click [here](#).

Dicamba Uncertainty Continues. Farmers and lawmakers continue to be unsure whether EPA will impose restrictions to over-the-top dicamba application in 2022. This [sense of uncertainty](#) has prompted lawmakers to send a letter to EPA raising concerns and asking for clarification. Read that letter [here](#).

Right to Farm

In [Rural Empowerment Ass'n for Cmty. Help v. State](#), 2021-NCCOA-693, 2021 WL 6014722 (N.C. Ct. App. Dec. 21, 2021), the court considered whether North Carolina's Right to Farm Act was constitutional. In 2017 and 2018, the North Carolina legislature passed H.B. 467 and H.B. 711 to clarify and strengthen the state's Right to Farm laws to protect and ensure farming can continue in the state. Plaintiffs argued that H.B. 467 and S.B. 711 violated the Law of the Land Clause and asserted that the statutes facially exceeded the scope of the State's police power. The court found that limiting potential nuisance liability from agricultural, forestry, and related operations helps to ensure the State's stated goal to protect agricultural activities in North Carolina and to encourage the availability and continued "production of food, fiber, and other products." The court ultimately held that H.B. 467 and S.B. 711 were a valid exercise of legislative and the State's police powers, they did not violate the Law of the Land Clause or Due Process, were not a special or private law, and did not deprive a prospective plaintiff of the right to a jury trial. The court affirmed the trial courts order. To read more about the background of the North Carolina right to farm litigation that spurred this legislation click [here](#). For a compilation of each state's right to farm statutes, click [here](#), while a chart comparing and contrasting the states is available [here](#).

Water Law

Who Gets the Groundwater? In the long-running *Mississippi v. Tennessee* groundwater lawsuit, the United States Supreme Court decided to apply the doctrine of equitable apportionment to interstate aquifers that meet three qualifications. This decision represents the first time that the Supreme Court has found that the doctrine of equitable apportionment applies to groundwater. Going forward, this decision will could set the stage for similar groundwater lawsuits. A discussion of the ruling is available in NALC blog post [here](#).

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Miscellaneous

Legislation (California): AB 888 requires mobile slaughter operations to register with the state's Department of Food and Agriculture and obtain a license with the department to perform slaughter services. Info [here](#).

Legislation (California): SB 815 extends the licensing requirement for meat processing establishments, custom livestock slaughterhouses, livestock meat inspectors, and processing inspectors from January 1, 2022 to January 1, 2027. Info [here](#).

Who Owns the FARM. On October 5, Congress introduced the [Foreign Adversary Risk Management \(“FARM”\) Act](#) seeking to bring more scrutiny to foreign investments in the U.S. agricultural industry. Specifically, this bill would place the Secretary of Agriculture on the Committee on Foreign Investment in the U.S. (“CFIUS”) and require CFIUS to consider agriculture-specific criteria when determining whether a foreign investment poses a risk to the United States national security. Info [here](#). For information on foreign investments in U.S. agricultural land, check out a recent NALC webinar discussing the issue [here](#). For information on state laws governing foreign ownership of agricultural land, check out the NALC’s “Statutes Regulating Ownership of Agricultural Land” chart [here](#).

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