



# The National Agricultural Law Center

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*Second Quarter, 2022*

## Ag & Food Law Quarterly Report: Second Quarter 2022

*April 1, 2022 – June 30, 2022*

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 Second Quarter of 2022, April 1 through June 30, 2022. 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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## Agritourism

Recently, Maryland passed HB 558 which modifies the definition of “agritourism” to include camping and incidental stays for purpose of a certain provision of law authorizing a local jurisdiction to adopt the definition of “agritourism”. More information on this bill is available [here](#).

## Animal Agriculture/Welfare

Nebraska passed legislation outlining disposal methods for animals in catastrophic livestock mortality situations. More information on LB 848 is available [here](#).

Agri-pulse reported that “[USDA directs \\$200M to meatpacking expansion, releases ‘tournament system’ rule](#)”. [The actual rule regarding poultry growing tournament systems was posted to the federal register on June 6, [here](#).]

## Biofuels

*Iowa Adopts E15.* Iowa has officially expanded access to E15 and other higher blends of biofuels with legislation signed by Governor Kim Reynolds on May 17. Click [here](#) to learn more.

## Clean Water Act

*Ag Groups Get Their Feet Wet.* Fourteen agriculture groups, including the American Farm Bureau Federation, filed an *amicus* brief in a United States Supreme Court case concerning the scope of “waters of the United States” (“WOTUS”) under the Clean Water Act (“CWA”). The plaintiffs in *Sackett v. EPA*, which the Supreme Court formally took up in January, ask the Court to revisit its landmark CWA ruling in *Rapanos v. U.S.* which laid out the test used to determine whether a wetland is protected under the CWA. In their *amicus* brief, the agriculture groups urge the Court to rule in favor of the plaintiffs and formally adopt the “relatively permanent” test which requires a wetland to have a “continuous surface connection” to a water already protected by the CWA in order to fall under CWA jurisdiction. To learn more about the *amicus* brief, click [here](#). To learn more about *Sackett v. EPA*, and its journey to the Supreme Court, click [here](#).

## Conservation Programs

*Early Expiration.* In May, USDA announced that it will allow participants in the Conservation Reserve Program to request termination of their contract if they are in the last year of their agreement. The decision is aimed at opening up more acres to wheat production in light of global food challenges due to the on-going war in Ukraine. For more information, click [here](#).

## Cottage & Local Food

*Got Milk?* Georgia passed HB 1175, the Georgia Raw Dairy Act, which authorizes and regulates the production, handling, transporting, and sale of raw milk and raw milk products for human consumption. The act also provides standards for safety, cleanliness, and health for such products and the animals producing them. Info [here](#).

*Increasing cottage food caps.* Maryland passed HB 178 which alters the definition of “cottage food business” for the purpose of increasing the cap on the annual revenue from the sale of cottage food products from \$25,000 to \$50,000. Info [here](#).



*Homemade Food Freedom.* Tennessee HB 813 enacts the Tennessee Food Freedom Act to specify circumstances when persons may sell certain homemade food products without meeting certain permitting and licensure requirements. Info [here](#).

## Disaster Relief/Crop Insurance

*Offsetting Natural Disaster Impacts.* The Farm Service Agency (“FSA”) recently began administering the first phase of a program known as the [Emergency Livestock Relief Program](#) (“ELRP”) to provide \$750 million in direct assistance to certain eligible livestock producers who suffered forage losses resulting from severe drought or wildfire in 2021. Eligibility for Phase One of ELRP is available to producers participating in the 2021 Livestock Forage Disaster Program (“LFP”) who suffered grazing losses due to drought in a county that was rated as having a D2, D3, or D4 drought intensity rating. Producers permitted to graze livestock on federally managed rangelands, but were prohibited from doing so due to wildfire in 2021, also qualify for ELRP financial assistance. To learn more about ELRP, click [here](#). For updates on the second phase of ELRP, click [here](#). For NALC resources on disaster programs and assistance, click [here](#).

*Livestock Insurance Revisions.* RMA recently revised insurance options and provisions of the Dairy Revenue Protection (“DRP”), Livestock Gross Margin (“LGM”), and Livestock Risk Protection (“LRP”) programs to serve more swine, dairy, and cattle producers. The revised DRP policy now permits dairy producers to continue coverage even if their farming operation experiences a natural disaster that prevents them from marketing their milk. To view the updated DRP policy, click [here](#). Coverage under the LGM program is now available to cattle, dairy, and swine producers located in Alaska and Hawaii under the new policy, which can be viewed [here](#). One change to the LRP program includes increased the head limits for fed cattle and feeder cattle to 12,000 per endorsement and 25,000 head per crop year. Also, the revised LRP policy now requires insurance companies to pay indemnities within 30 days—instead of 60 days—after receiving a producer’s claim form. To view all LRP policy revisions, click [here](#). The changes to these programs are effective for the 2023 and succeeding crop years.

*FCIC Changes the Crop Insurance Policy.* The Federal Crop Insurance Corporation (“FCIC”) published a [final rule](#) on June 30, 2022, that amends certain provisions of the “Common Crop Insurance Policy” (“CCIP”). Among these changes, which are effective for most federal crop insurance program policies for the 2023 crop year, FCIC increases flexibility to the production reporting requirements that producers must satisfy to obtain crop insurance coverage. Because some producers do not have disinterested third-party records available to them, the final rule revises existing terminology and adopts new provisions to the CCIP to expand the type of acceptable production records a producer may provide to FCIC. Further, the policy now indicates that a producer’s actual yields will be adjusted if the producer changes their method of production that will likely result in a lower yield. Another important revision to the CCIP is a 30-day deadline to appeal good farming practice determinations. For more on these changes, click [here](#). read NALC resources on the crop insurance, click [here](#).

## Endangered Species Act

*Habitat Upheld.* In *N. New Mexico Stockman’s Ass’n v. U.S. Fish & Wildlife Serv.*, No. 21-2019 (10th Cir. Apr. 15, 2022), the Tenth Circuit Court of Appeals upheld a lower court ruling finding that FWS had properly designated critical habitat for the endangered New Mexico Meadow Jumping Mouse, ruling against claims brought by two New Mexico ranching associations that the designation had been in violation of the ESA.

*Continue to Grouse.* A federal court in *Desert Survivors v. U.S. Dep’t of the Interior*, No. 20-CV-06787 (N.D. Cal. May 16, 2022), found that FWS had improperly withdrawn its proposal to list the bi-state sage grouse as “threatened” under the ESA. Accordingly, the court vacated the withdrawal and remanded the issue back to FWS to make a new final listing decision for the bi-state sage grouse.



*“Habitat” Definition Rescinded.* FWS have published a final rule rescinding a regulatory definition of “habitat” under the ESA. This final rule rolls back another Trump Administration regulatory change made to the ESA which, prior to December 2020, did not have a formal regulatory definition of “habitat.” By rescinding that definition, FWS is returning to how the ESA was previously implemented. To read the final rule, click [here](#).

*Proposals.* FWS issued proposals regarding the [Nelson’s checker-mallow](#), a [subspecies of silverspot butterfly](#), and the [Ocmulgee skullcap](#).

*Critical Habitat.* FWS designated critical habitat for the [Arctic subspecies of the ringed seal](#), and the [Beringia distinct population segment of the Pacific bearded seal](#).

*Listed.* FWS has listed the [streaked horned lark](#) as threatened under the ESA.

*Removed.* [Johnson’s seagrass](#), and [Siderastrea glynni coral species](#) have been formally removed from the Federal List of Threatened and Endangered Species.

## Environmental Protection Agency

*Back to the Drawing Board.* In April, EPA gave the state of Pennsylvania 90 days to submit a new watershed improvement plan indicating how the state will comply with nutrient reduction targets for the Chesapeake Bay. According to EPA, the previously submitted plan fell short of nitrogen reduction targets by 9.7 million pounds. For more information, see [here](#).

*EPA Gives E15 Go-Ahead.* On April 29, EPA issued an emergency waiver to stop the June 1 restriction that would have come into place for E15 biofuels. The 20-day waiver was aimed at allowing consumers access to E15 fuel in order to help offset rising fuel costs. See [here](#) for further information.

## Finance, Credit & Tax

In *IN RE: EXPRESS GRAIN TERMINALS, LLC DEBTOR*, No. 21-11832-SDM, 2022 WL 1051097 (Bankr. N.D. Miss. Apr. 7, 2022), the court considered whether the State of Mississippi could revoke the business debtors’ licenses. The court found that the State of Mississippi had met its burden and satisfied the public policy test and was allowed to issue an order revoking the licenses of the debtors as an exception to the automatic stay that was in place.

*Internet Interests.* On May 2, 2022, Oklahoma enacted HB 3811, which authorized the state’s Secretary of State to provide a master list of creditors’ security interests in farm products by Internet download. Additionally, under this law, the fee for individuals registering as a buyer of farm products does not apply if the buyer or other interested party accesses the master list through Internet download. To read HB 3811, click [here](#). For NALC resources on the federal farm products rule, click [here](#).

## Food Safety & Labeling

*We’ve got beef.* In *Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016 (10th Cir. 2022), consumers filed a class action complaint against meat processors that alleged that their labels deceived consumers into paying higher prices for beef based on the mistaken belief that it originated from cattle born and raised in the United States. Ranchers in New Mexico also filed a class action that alleged that they were paid less for domestic cattle because of the processors’ conduct. The cases were consolidated and the district court dismissed the case, the consumers and ranchers appealed. The 10<sup>th</sup> Circuit Court of Appeals held that the Federal Meat Inspection Act preempted the consumer’s and rancher’s deceptive-labeling claims. The court also held that the state’s concurrent jurisdiction over



misbranding claims did not affect that, under federal law, the products were not misbranded. The court of appeals affirmed the district court's decision.

*Truth in Labeling Law(suits).* In *Turtle Island Foods SPC v. Strain*, No. CV 20-00674-BAJ-EWD, 2022 WL 909039 (M.D. La. Mar. 28, 2022), the plaintiff challenged the constitutionality of Louisiana's Truth in Labeling of Food Products Act. The court found that plaintiff had standing to challenge the Act because they had demonstrated a serious intent to engage in proscribed conduct, the desired conduct was proscribed by the Act, and the threat of future enforcement was substantial. The court then applied the Central Hudson test to determine whether the act impermissibly restricted commercial speech. The court found that the Act impermissibly restrict commercial speech because the speech at issue was not misleading and the Act was more extensive than necessary to further the government's interest. Meanwhile, the Kansas legislature passed [SB 261](#) which prohibits the use of identifiable meat terms on the labels of meat analogs when such labels do not include proper qualifying language to indicate that such products do not contain meat. To learn more, read NALC's most recent blog post on the topic, [here](#).

*Prop 65 litigation.* In *California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468 (9th Cir. 2022), the 9<sup>th</sup> Circuit Court of Appeals considered a preliminary injunction that would prevent enforcement of California Prop. 65's warning requirements as it applied to acrylamide in food products. The district court granted the plaintiffs motion for preliminary injunction and the defendant appealed. The court reviewed the claims likelihood of success on the merits. The court found that the compelled disclosure requirement was unduly burdensome, and that the district court had not abused its discretion for any of its findings when granting the preliminary injunction. The circuit court affirmed the district courts holding.

*Raw Butter Rule.* In *McAfee v. United States Food & Drug Admin.*, No. 21-5170, 2022 WL 2080444 (D.C. Cir. June 10, 2022), a dairy farmer challenged Food and Drug Administration's (FDA) denial of his petition to revoke the rule barring interstate sale of raw butter. The farmer and FDA filed cross motions for summary judgment, and the United States District Court for the District of Columbia granted FDA's motion and denied the farmer's motion. The farmer appealed. The Court of Appeals held that FDA was not required to engage in rulemaking to repeal regulation banning interstate sale of unpasteurized butter and affirmed the district court's decision.

## Hemp

*Oklahoma Hemp Rule.* Oklahoma passed HB 3439 which modifies definitions relating to industrial hemp, allows for licensee to remediate noncompliant industrial hemp, and provides that the licensee may sell industrial hemp grain and other industrial hemp derivatives. To read HB 3439 click [here](#) and to learn more about hemp laws across the country click [here](#).

*Proposed Hemp Rule in Utah.* Utah has a proposed rule to remove references to industrial hemp cultivation because Senate Bill 190 removed it from the Utah Department of Agriculture and Food's authority. Changes are made through this rule to restrict the transfer of industrial hemp waste to a medical cannabis cultivator except under limited circumstances, consistent with legislative intent. To read more about the proposed rule click [here](#).

## International Trade

*Potatoes in Mexico.* The United States and Mexico have finally reached an agreement and potatoes from the United States can now be shipped beyond the 26-kilometer from the border limit that Mexico had previously established. Link [here](#).

*Shipping Reform.* The Ocean Shipping Reform Act was signed into law to help with international shipping costs and to help ease supply chain backlogs. The Act is also supposed to help United States farmers and exported get their goods to the global market. Link [here](#).



## Labor

*Overtime for Oregon.* Agricultural workers in Oregon are now required to receive overtime if they work in excess of their maximum allowable hours. Info [here](#).

## National Environmental Policy Act

*NEPA Revisited.* The Council of Environmental Quality has issued a final rule amended three provisions of its regulations implementing NEPA, largely restoring the provisions that had been in place for decades prior to changes made in 2020. The revisions include: (1) the requirement for a purpose and need statement in every environmental impact statement; (2) the removal of language that could be construed as limiting agencies' flexibility to develop or revise procedures to implement NEPA specific to their programs; and (3) adjusting the definition of "effects" to include direct, indirect, and cumulative effects. To read the final rule, click [here](#).

## Nutrition

*2<sup>nd</sup> White House Conference on Hunger.* On Wednesday, May 4, 2022, the White House [announced](#) that it will host a conference on hunger, nutrition, and health in September 2022. To read more about the conference, read NALC's blog post on it [here](#).

*Maryland Farm-to-School Program.* Maryland passed HB 121 which modifies the purpose and use of the Maryland Farms and Families Fund, establishes the Maryland Food and Agricultural Resiliency Mechanism Grant Program and Fund to provide grants to food banks and charitable emergency food providers to alleviate food insecurity, and establishes the Maryland Farm-to-School Meal Grant Pilot Program and Fund to award grants to eligible school districts that include a local food component in school meals and to incentivize the production, procurement, and provision of local foods in school meals. Info [here](#).

## Organic

On June 1, 2022 the USDA announced a framework to transform the food system to benefit consumers, producers and rural communities by providing more options, increasing access, and creating new, more, and better markets for small and mid-size producers. In the announcement, USDA shared that it is investing up to \$300 million in a new Organic Transition Initiative to provide comprehensive support for farmers to transition to organic production. Info [here](#).

## Pesticides

*EPS Sets Course on ESA.* EPA released its anticipated workplan outlining how the Agency plans to satisfy its obligations to both register pesticides under FIFRA and protect endangered species under the ESA. According to EPA, the workplan will serve as the "blueprint" for how the Agency will establish a long-lasting method for complying with both FIFRA and the ESA, something EPA believes it has previously failed to do. Central to the workplan is EPA's commitment to work with FWS on carrying out ESA Section 7 consultations when registering pesticides under FIFRA. To read the workplan, click [here](#).

*Done with Diuron?* On June 27, the comment period closed on a proposal from EPA to prohibit the use of the pesticide diuron on food and feed crops. Diuron is an herbicide used to control both broadleaf and grassy weeds. It is currently approved for use on a wide variety of agricultural crops, including alfalfa, wheat, cotton, sugar cane, and various fruits. EPA is proposing to restrict use of diuron on food and feed crops based on revised human health risk assessments for the pesticide which have identified cancer risks associated with use of diuron on food crops. However, several weed scientists have made statements opposing EPA's proposed



restriction of diuron use, claiming that the Agency relied on faulty data in reaching the conclusion that using diuron on food crops increases cancer risk. To learn more about this issue, click [here](#).

*Glyphosate at the Supreme Court.* In June, the United States Supreme Court declined to take up two cases concerning whether exposure to glyphosate via use of the pesticide Roundup caused the plaintiffs to develop cancer. Both cases were appealed to the Supreme Court by the defendant who argued that one of the key claims that plaintiffs raised in each case was preempted by FIFRA. In one of the cases, the Supreme Court asked the Solicitor General to file a brief informing the Court of the federal government's view of the case. In the brief, the Solicitor General sided with the plaintiff, arguing that the claim was not preempted by federal law. It is possible that the brief played a factor in the Supreme Court declining to hear either case. To read the Solicitor General's brief, click [here](#). For more information about the issue of preemption in glyphosate litigation, click [here](#).

*Ninth Circuit Orders Re-Do.* On June 17, the Ninth Circuit Court of Appeals issued a decision ordering EPA to revisit its conclusion that glyphosate is "not likely" to cause cancer. According to the court, EPA failed to support its "not likely" conclusion with sufficient evidence. Therefore, the decision was sent back to EPA for further review. To learn more about the Ninth Circuit's decision, click [here](#).

## Production Contracts

USDA has published a proposed rule seeking comments and information to inform policy development and future rulemaking proposals regarding the use of poultry grower ranking systems commonly known as tournaments in contract poultry production. [Info here](#).

USDA has published a proposed rule soliciting comments on proposed revisions to the regulations under the Packers and Stockyards Act, 1921. The proposal would revise the list of disclosures and information live poultry dealers must furnish to poultry growers and sellers with whom dealers make poultry growing arrangements. [Info here](#).

## Racial Equality

*Increasing Equity.* President Biden issued an executive order directing federal agencies to craft action plans to improve services to historically underserved communities. The USDA plans to make changes to its WIC program and increase priority for rural and tribal communities in distributing broadband funding. Link [here](#).

*USDA Supports Minorities Through 1890s Universities.* The USDA announced that it signed an agreement to enhance its support of minority communities through its partnership with 1890s Land-Grant institutions. Ag Secretary Tom Vilsack signed a new memorandum of understanding with Dr. Paul Jones, chair of the 1890s Presidents Council, a group that is made up of presidents and chancellors of historically Black colleges and universities. The MOU sets up a new task force to "inject energy" into USDA's collaboration efforts. Link [here](#).

## Right to Farm

*Nuisance in Georgia.* Georgia passed HB 1150 which removes the "changed conditions language" and provides that no private nuisance actions shall be filed against any agricultural facility, agricultural operation, any agricultural operation at an agricultural facility, agricultural support facility or any operation at an agricultural support facility unless the plaintiff legally possesses the real property affected by the condition alleged to be a nuisance. To read HB 1150 click [here](#) and to see other right to farm statutes across the country click [here](#).



## Soil Management

*Supporting Soils.* Nebraska enacted the Resilient Soils and Water Quality Act (LB 925) to accelerate the use of best practices for healthy soil management, improve the state’s soil and water quality, and enhance agricultural production and profitability. Essentially, this law directs the state’s Department of Natural Resources to provide technical and legal assistance to agricultural producers and landowners in order to build awareness and knowledge of adopting the best management practices for soil health and water quality. More information on LB 925 is available [here](#).

## Miscellaneous

*California Foie Gras.* In *Ass’n des Éleveurs de Canards et d’Oies du Québec v. Bonta*, No. 20-55882, 2022 WL 1436840 (9th Cir. May 6, 2022), the Ninth Circuit upheld a California in-state sales ban on products that are the result of force feeding a bird for the purpose of enlarging the bird’s liver beyond normal size. The court also held that internet, phone, and fax sales by out-of-state sellers was permitted by California law.

*Funding Food Aid.* In April, USDA announced it is tapping the Bill Emerson Humanitarian Trust—the first time since 2014—to purchase domestic commodities such as wheat, sorghum, and vegetable oil to assist six African nations suffering from food insecurity resulting from Russia’s invasion of Ukraine. USDA is also using Commodity Credit Corporation funds to cover shipping and handling expenses. To read the USDA’s press release detailing the food aid package, click [here](#).

*Environmental Justice.* The Department of Justice (“DOJ”) has announced three actions that the Department will be taking in order to “secure environmental justice for all Americans.” Those steps include: (1) the adoption of a comprehensive environmental justice enforcement plan; (2) the creation of the Office of Environmental Justice; and (3) reviving the use of supplemental environmental projects as a way of settling environmental disputes. Click [here](#) to learn more about DOJ’s environmental justice initiatives.

