



The Feed

Recent Developments in Ag Law & Policy

The Feed highlights recent legal developments affecting agriculture, with issues released twice a month.

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WOTUS. On May 23, the Supreme Court released its highly-anticipated opinion in *Sackett v. EPA*, clarifying the scope of wetlands jurisdiction under the Clean Water Act (CWA). According to the Justices, only those wetlands that share a “continuous surface connection” with a jurisdictional water will be protected under the CWA. This overturns previous Supreme Court opinions that found wetlands to be protected if they shared a “significant nexus” with a jurisdictional water. The text of the opinion is available **here**. This decision comes only a few months after the Environmental Protection Agency (EPA) released a rule to rewrite the WOTUS decision. While the ruling from the Court is likely to impact aspects of that definition, it is currently unclear what EPA’s response will be. To learn more about the recent WOTUS definition, click **here** to read NALC article *WOTUS Update: EPA Releases Highly Anticipated Final Rule to Redefine “Waters of the United States.”*

- Webinar opportunity: Brigit Rollins, Staff Attorney, National Agricultural Law Center, will present a webinar covering the *Sackett* decision and its possible implications. Webinar and registration

Colorado River. As drought continues to threaten the key water supply for the Western United States, an agreement has been reached that would conserve roughly 3 million acre-feet of Colorado River water supply through 2026 in exchange for \$1.2 billion in federal funding given to the states of California, Arizona, and Nevada. The funding will be used to compensate cities, farmers, and Native American tribes of these states for the conservation of 2.3 million acre-feet, while the remaining 700,000 acre-feet would be paid for with state funds or would go uncompensated. This agreement is awaiting approval by the Upper Basin states of Colorado, New Mexico, Utah, and Wyoming, and the Bureau of Reclamation. To learn more about the specifics of the agreement, click [here](#).

Prop 12. Lawmakers in Congress are considering whether to introduce a provision in the farm bill that would potentially block California from enforcing its newly SCOTUS-approved Prop 12 regulations on animal housing. The provision focuses on interstate commerce and transportation rights. It would apply to Prop 12 and other similar state laws that regulate the production of animals for food. Similar provisions have been considered in previous farm bills. To learn more about Prop 12 and the recent SCOTUS decision upholding it, click [here](#) to read NALC article What's Cooking with Prop12?: SCOTUS Decision.

Pesticides: Dicamba. The plaintiffs in a lawsuit challenging the Environmental Protection Agency's (EPA) 2020 decision to register certain dicamba pesticide products for use directly onto crops have filed a motion for summary judgment, asking the court to vacate the registration on the grounds that it violates both the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the Endangered Species Act (ESA). According to the plaintiffs, EPA failed to do mandatory ESA analysis, and to address the FIFRA violations identified by the Ninth Circuit in a 2020 decision which vacated the previous dicamba registration for "over-the-top" use. The plaintiffs in the current case are the same plaintiffs that were successful in that 2020 decision. For more information on the current motion for summary judgment, click [here](#) to read NALC article The Deal with Dicamba: Plaintiffs Ask Court to Vacate 2020 Registration Decision. To learn more about the litigation concerning dicamba, click [here](#) for the NALC series The Deal with Dicamba.

Pesticides: Enlist One, Enlist Duo. Fish and Wildlife Service (FWS) have recently released a draft biological opinion determining that the pesticides Enlist One, and Enlist Duo are unlikely to jeopardize the continued existence of any species listed under the ESA or adversely modify any designated critical habitat. In early 2022, EPA introduced new, county-level restrictions on use of both Enlist products after the Agency concluded that use of the pesticides "may affect" listed species. Following consultation and review from FWS, those county-level restrictions are likely to be lifted. Comments on the draft opinion may be submitted through July 24. To read the report or submit a comment, click [here](#).

Swampbuster. On May 12, the Eighth Circuit Court of Appeals issued a ruling which found that the USDA had properly denied a farmer's requests for the agency to revisit a wetland certification it made on the farmer's land in 2011. In the lawsuit, the farmer argued that USDA had improperly denied requests he made for recertification in 2017 and 2020. In response, USDA claimed that the farmer had failed to provide the additional information required by Swampbuster to initiate a wetland recertification. The court found in favor of USDA. A copy of the opinion is available [here](#). For more NALC resources on Swampbuster and other conservation programs, click [here](#).

Labor: Smoke Inhalation. New plans are expected to be adopted by the Washington Department of Labor and Industries that would regulate the amount of wildfire smoke inhaled by all outdoor workers.

Washington has implemented an emergency rule the past two summer seasons, however this will be a permanent rule. Employers will be required to monitor the EPA's **Air Quality Index** and use controls to regulate smoke inhalation. Click [here](#) to learn more.

"Skittles Ban" Advances. A California bill currently making its way through the system proposes to ban any food products containing red dye no. 3, titanium dioxide, potassium bromate, brominated vegetable oil, or propylparaben. These are often found in candy, soda, and even baked goods. **AB 418**, sometimes referred to as the "Skittles ban," has passed the California Assembly and is currently before the State Senate.

Foreign Ownership of Ag Land: State Legislation. Since January 2023, over thirty have proposed one or more bills to restrict foreign ownership. In the past few days, a new proposal has been filed in Wisconsin (**SB 269**). For prior bills, see Volume 1, Issue 1 (Jan. 11) [here](#); Volume 1, Issue 2 (Jan. 25) [here](#); Volume 1, Issue 3 (Feb. 8) [here](#); Volume 1, Issue 4 (Feb. 24) [here](#); Volume 1, Issue 5 (March 9) [here](#); and Vol. 1, Issue 6 (March 22) [here](#); Volume 1, Issue 7 (April 14) [here](#); Volume 1, Issue 8 (April 28) [here](#); Volume 1, Issue 9 (May 12) [here](#). Also, the Alabama state legislature passed **HB 379**, which seeks to restrict certain foreign investments in agricultural and forest property located within the state. Also, Oklahoma passed a law (**SB 212**) that amends portions of the state's law which restricts certain foreign investments in real property within the state. To view states' laws restricting foreign ownership of private agricultural land, click [here](#).

Foreign Ownership of Ag Land: Federal Legislation. Recently, Representative Dale Strong (R-AL-5) introduced in Congress the Protecting America's Agricultural Land from Foreign Harm Act (**H.R. 3357**). This measure seeks to restrict investments in U.S. agricultural land by persons associated with "foreign adversaries" such as China, Iran, North Korea, and Russia. The bill would also restrict certain foreign persons from participating in certain farm programs administered by USDA. Back in March, a similar measure (**S. 926**) was filed in the Senate by Senator Mike Braun (R-IN).

Lawsuit Challenging Florida's Foreign Ownership Law. On May 22, a group of Chinese citizens living in Florida and a real estate brokerage firm—whose clients are primarily Chinese and Chinese American—have filed a lawsuit against the state of Florida alleging the state's new foreign ownership law, SB 264 (codified at **Ch. No. 2023-33**), violates the United States Constitution. In general, SB 264 restricts certain foreign acquisitions of land within the state. Specifically, with some exceptions, the law restricts certain Chinese investments in real property located within Florida. The plaintiffs claim the new law violates their equal protection rights because the law restricts their ability to purchase land because of their race. Further, the plaintiffs claim SB 264 is preempted by federal law because the federal government regulates foreign affairs, investments, and real estate transactions under CFIUS and the U.S. Treasury Department's Office of Foreign Assets Control. While these laws have been passed by the legislature, they are not yet fully enacted. To read the plaintiff's complaint, click [here](#). NALC's "Foreign Ownership of Agricultural Land: FAQs & Resource Library" is available [here](#).

Poultry Processor Settlement. On May 17, the **Justice Department announced that it had reached a settlement** with the poultry processing company George's Inc. to resolve claims that the company had conspired with other poultry processors to suppress workers' wages. As part of the settlement, George's will be required to stop sharing "competitively sensitive" information about wages paid to poultry processing plant workers, and pay \$5.8 million to workers who were harmed by the conspiracy. Additionally, the Justice Department is requiring George's to make changes to how processors pay contract farmers who produce chickens, which is expected to impact up to 15 percent of the industry. The resulting consent decree between the Justice Department and George's will be

published in the Federal Register for a 60-day period of public review.

Controlled Environment Agriculture. Governor Youngkin (VA) has signed two farm bills, **HB 1563** and **SB 1240**, supporting Controlled Environment Agriculture which would provide tax breaks to indoor agriculture facilities that are already enjoyed by outdoor agriculture facilities. Tax exemptions would include tangible, personal property items used in the construction of a CEA facility. An additional \$1.25 million will be added to the state's budgets over the next two years in the form of agriculture technology grants and loans to achieve these goals.

Colorado CAFOs. An administrative law judge in the state of Colorado has issued an order determining that the Clean Water Act general permit covering discharges from concentrated animal feeding operations within the state should have water monitoring requirements. According to the order, because the general permit prohibits discharges to surface water through groundwater, monitoring is necessary to ensure compliance. The decision is available [here](#). For more resources on the Clean Water Act from NALC, click [here](#).

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Thanks to our "Early Bird" presenters this week for a great online program!

Agenda, registration, and continuing education information available [here](#).

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