



The Feed

Recent Developments in Ag Law & Policy

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

Volume 1, Issue 14

July 25, 2023

Thank you to everyone coast-to-coast who has subscribed so far! Be sure to **forward the subscription link** to anyone in your network. All previous issues of The Feed are available **here**. Questions, concerns, or suggestions for improvement can be sent to **NALC Director Harrison Pittman**.

Be sure to follow us on social:



Save the Date: 2024 NALC Conferences

Mid-South
Agricultural & Environmental Law Conference
June 6-7

Western
Agricultural & Environmental Law Conference
June 20-21



Chevron Deference. A group of New Jersey herring fishers told the U.S. Supreme Court during oral argument earlier this month that it should overrule a long-standing legal doctrine known as *Chevron* deference, which instructs lower courts to defer to federal agencies' interpretations of ambiguous laws. Specifically, the fishers are challenging regulations issued by the National Marine Fisheries Service ("NMFS") that require the fishing industry to pay for federal inspectors on board their ships. The fishers argue that NMFS's interpretation of the Magnuson-Stevens Act to allow the government to impose the cost of federal monitors on fishers is in conflict with the statute. In urging the Court to overturn *Chevron* deference, they claim that the doctrine has led to an imbalance of power, with the executive branch assuming authority that should belong to Congress and the judiciary. *Chevron* deference is widely considered to be foundational to administrative law in the U.S. However, the doctrine is controversial, and several Supreme Court justices have indicated that they do not believe *Chevron* deference is constitutional. Click **here** to read the plaintiffs' opening brief to the Court.

Foreign Ownership of Ag Land: Federal Legislation. Recently, Senators Tammy Baldwin (D-WI)

and Chuck Grassley (R-IA) introduced the Farmland Security Act of 2023 ([S. 2382](#)), which seeks to require USDA to conduct annual audits of at least 10% of the AFIDA reports filed with the agency to ensure the filings are complete and accurate (bill text available [here](#)). The measure would also impose stricter penalties on “shell corporations” that do not properly disclose their foreign agricultural landholding interests. The Food Security is National Security Act of 2023 ([S. 2312](#)) was also recently introduced into Congress, which would add USDA as a member of CFIUS and would require CFIUS to consider certain aspects of the agricultural industry when investigating foreign investments in the U.S. entities and real estate (bill text available [here](#)). Today, the Senate will vote on the Promoting Agriculture Safeguards and Security Act (“PASS Act”) ([S. 168](#)), which seeks to expand CFIUS’s jurisdiction to restrict investments by China, Russia, Iran, and North Korea in U.S. agriculture. For information on foreign investments in U.S. agriculture, read NALC’s “Foreign Ownership of Agricultural Land: FAQs & Resource Library” available [here](#).

Pesticides: Mitigation Measures. As part of a settlement agreement between EPA and the Center for Biological Diversity, the agency has released a draft strategy for assessing the impacts of herbicides on federally endangered and threatened species. The strategy is aimed at streamlining Endangered Species Act consultation, a process that EPA says can take between 4-12 years for each pesticide the agency approves. According to the text of the document, the strategy would employ a “menu” of mitigation measures, and would ensure that herbicides with similar characteristics would share similar mitigation measures to establish a consistent approach. A public comment period on the draft strategy will be open through September 22. According to the settlement agreement, the strategy must be finalized by March 30, 2023. Click here to [read](#) the draft strategy, and [here](#) to submit a comment.

Pesticides: Dicamba. Two lawsuits concerning EPA’s 2020 decision to approve three dicamba-based pesticides for use directly onto crops will continue in federal district courts following a ruling from the D.C. Circuit Court of Appeals that one of the challenges belongs in the lower courts. The D.C. Circuit found that it did not have jurisdiction to hear a challenge to dicamba regulations filed by soybean and cotton growers because EPA did not have a public hearing before issuing its 2020 registration decision. The case concerns challenges to cut-off dates and buffer zones included in the 2020 registrations that the growers claim will hinder the productivity of their operations. To learn more about the lawsuit filed by agricultural producers, click [here](#) to read NALC article “The Deal With Dicamba: Lawsuit Challenges Registration, EPA Change FIFRA Policy.”

Meanwhile, another lawsuit filed by environmental groups in a federal district court in Arizona also challenges the 2020 dicamba registrations, but in that case the plaintiffs argue that the registration violates federal law and should be overturned. Briefing on that case is almost finished and a decision could be issued as soon as this year. To learn more about the lawsuit filed by environmental groups, click [here](#) for NALC article “The Deal With Dicamba: Plaintiffs Ask Court to Vacate 2020 Registration.”

Biofuels. The Environmental Protection Agency (“EPA”) is being sued by the Center for Biological Diversity (“CBD”) for failing to conduct a formal Endangered Species Act consultation over the impact of its latest biofuel usage mandates. CBD argues that EPA should have reviewed the effects on endangered species from land conversion, pesticide, and fertilizer use. EPA requested consultation with the agencies four days after completing the rule, which has now been formally published. Despite EPA’s assertion that renewable volume obligations are unlikely to harm listed species and critical habitat, they plan to proceed with informal consultation and make revisions if necessary. To read CBD’s complaint, click [here](#).

Clean Water Act. Section 404 of the Clean Water Act (“CWA”) institutes a permitting system for discharges of dredged and fill material into waters of the United States. The CWA allows states and federally recognized Native American tribes to take over management of that permitting program within their borders, provided they receive approval from EPA. To date, only three states have been approved. EPA has announced a proposed rule in an effort to make it easier for states and tribes to gain approval for running their own 404 programs. Specifically, the proposed rule would clarify what details must be included in the program descriptions that states and tribes must submit when applying for 404 permitting authority. Additionally, the new rule would make clear exactly which waters fall

under CWA jurisdiction following the Supreme Court's ruling in *Sackett v. EPA*. To learn more about the proposal, click [here](#).

Lesser Prairie Chicken. A group of agricultural producers represented by the Pacific Legal Foundation has filed a lawsuit against the U.S. Fish and Wildlife Service ("FWS") for its decision to list the lesser prairie chicken as a threatened species under the Endangered Species Act ("ESA"). FWS made its **listing decision** in 2022 after finding that ongoing loss of habitat would likely lead to the lesser prairie chicken becoming endangered in the foreseeable future. The plaintiffs in the recent lawsuit argue that listing the bird as threatened would result in land-use restrictions that would harm their agricultural operations. To read the plaintiffs' complaint, click [here](#).

Additionally, the U.S. House of Representatives is expected to vote this week on whether to overturn FWS' decision to list lesser prairie chicken under the ESA. In May, the Senate voted 50-48 to overturn the decision. However, that is not close to the two-thirds veto which would be needed to override a presidential veto, which President Biden is expected to issue if the House votes to overturn the listing decision.

Idaho CAFOs. EPA has proposed updated groundwater monitoring regulations for concentrated animal feeding operations (CAFOs) in Idaho. Specifically, EPA has proposed changes to the National Pollutant Discharge Elimination System permit for CAFOs in Idaho to require monitoring of subsurface discharges from production areas, as well as dry weather surface and subsurface discharges from land application areas. The proposed change comes after the Ninth Circuit Court of Appeals invalidated the previous permit in 2021, stating that the absence of monitoring provisions undermined the "zero discharge" assertion made by the EPA. The newly proposed permit aims to address these concerns and ensure better environmental monitoring and compliance. EPA is accepting comments on the proposed changes through September 1. Click [here](#) to review the proposal.

Labor: Heat Protection. The state of Washington has updated heat protections for outdoor workers, including those in construction and farming. The new rules, effective from July 17, include lower temperature thresholds that trigger actions like providing shade and drinking water, and mandatory cool-down periods at specific temperature levels. The regulations also address acclimatization and exposure to high heat, ensuring employers closely observe workers during heatwaves and newly assigned workers. Employers are required to update their outdoor heat exposure safety programs and train workers and supervisors accordingly. To view the updated heat protections, click [here](#).

Labor: Ag Minimum Wage. The governor of Maine, Gov. Janet Mills D-Maine, has vetoed a bill that would have classified farm workers as "employees," thereby making them eligible to receive the state minimum wage of \$13.80 an hour. According to Gov. Mills, she supports the concept, but has issues with the language of the bill. The Maine legislature now has an option to vote to override Gov. Mills' veto. To read the text of L.D. 398, click [here](#).

Grassland CRP. USDA is currently accepting offers to enroll approximately 2.7 million acres in the grassland portion of the Conservation Reserve Program (CRP). This number is lower than last year's 3.1 million acres because the program is reaching its overall acreage cap. USDA's goal is to avoid hindering future signups or the implementation of existing and new Conservation Reserve Enhancement Partnership agreements in 2024, as there are already a low number of acres expiring in 2024 and 2025. For more information from USDA, click [here](#).

Oregon: Water Restrictions. Under **S.B. 85** which recently passed both houses of Oregon's legislature, new and expanding CAFOs will no longer have unlimited access to water to support their livestock operations. Instead, such operations will be required to submit detailed water supply plans to state regulators. Currently, CAFOs have been exempt from the water restrictions that apply to every other agricultural industry in the state of Oregon through stockwater exemption rules that allow for unlimited water supplies to support livestock. While existing CAFOs would be grandfathered into the new requirements, all new and existing CAFOs would be required to cap their water use at 12,000 gallons a day. The bill is seen as a response to ongoing drought in the region. Oregon Gov. Tina Kotek is expected to sign the bill.

Agricultural Competition. On July 19, USDA announced that it has initiated a bipartisan partnership with attorneys general from **31 states** to increase agricultural competition while protecting consumers. This new partnership will assist state attorneys general in taking on anticompetitive structures in agricultural markets that are causing price increases and fewer choices for consumers. Specifically, the partnership will help state attorneys general in their efforts to conduct “on-the-ground” assessments of competition issues, while enhancing coordination between federal and state authorities and creating independent research programs. For more information on the agreement, click [here](#).

Also of interest in the agricultural competition arena - the USDA Packers and Stockyards Division is hiring legal specialists focused on antitrust, enforcement and policy. Applications are for GS 11-13, and GS 14. Both are open through July 31. Click [here](#) to learn more about the GS 11-13 position, [here](#) for the GS 14 position.

Thank You to Founding Supporters of *The Feed*



Thank You to Supporters of *The Feed*





Follow the National Agricultural Law Center on social:



This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture

The National Agricultural Law Center | NationalAgLawCenter.org

National Agricultural Law Center | University of Arkansas, 2549 N. Hatch Ave., Fayetteville, AR 72704

[Unsubscribe nataglaw@uark.edu](mailto:Unsubscribe_nataglaw@uark.edu)

[Constant Contact Data Notice](#)

Sent by nataglaw@uark.edu powered by



Try email marketing for free today!