



The Feed

Recent Developments in Ag Law & Policy

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

Volume 2, Issue 13

July 11, 2024

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NALC WEBINAR SERIES

**HPAI in Poultry and Cattle:
How Can We Miss You If You Won't Go Away?**

July 17, 2024, Noon EDT

Presenter:
Brook Duer
Penn State Center for
Agricultural & Shale Law

Administrative Law. The Supreme Court issued the final opinions of the most recent term on July 1, bringing an end to a season heavy with administrative law decisions. In **Jarkesy v. SEC**, the Court considered whether the Securities and Exchange Commission could seek civil penalties for securities fraud through its administrative adjudication proceedings or if such matters were better settled in federal court. There, the Supreme Court ultimately concluded that the U.S. Constitution requires issues resembling common law fraud to be heard in court. Similarly, in **Loper Bright v. Raimondo**, the Court considered the scope of agency authority to interpret the statutes they are tasked with administering. Specifically, the Court was asked to reconsider the doctrine of **Chevron** deference which required courts to defer to agencies' reasonable statutory interpretations when the exact meaning of a statutory provision is ambiguous. The Supreme Court overturned **Chevron** deference, concluding that it is the purpose of courts to say what the law is. Additionally, in **Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve System**, the Supreme Court determined that the six-year statute of limitations the Administrative Procedure Act grants for challenging agency regulations will start when the plaintiff is injured by final agency action instead of when the regulation goes into effect. **Jarkesy**, **Loper Bright**, and **Corner Post** are expected to have far-reaching impacts. To learn more about the Court's decision in **Jarkesy**, click **here** to read NALC's article "Supreme Court of the United States Rules SEC Administrative Proceedings Unconstitutional." To learn more about **Loper Bright**, click **here** to read NALC article "Supreme Court Overturns Long-Standing 'Chevron' Doctrine."

Swampbuster. The Supreme Court vacated and remanded a decision by the 8th Circuit Court of Appeals allowing a South Dakota farmer, Arlen Foster, to challenge the designation of wetlands on his land. This decision follows the Court's recent ruling in **Loper Bright v. Raimondo**, which overturned its 1984 **Chevron** decision and ruled that courts may not defer to agency interpretation of ambiguous laws. The Court ordered the 8th Circuit to reconsider the decision "in light of **Loper Bright**." Click **here** to read the 2023 8th Circuit opinion. To learn more about the case, click **here** to read NALC article "Recently Filed Lawsuit Claims that Swampbuster is Unconstitutional."

CAFOS. Oregon is **proposing** stricter regulations for confined animal feeding operations (CAFOs). Key proposals include mandatory water permits for operations using over 12,000 gallons daily, stricter notification standards for new facilities, and increased local government authority over CAFO placement and buffer zones. The Oregon Department of Agriculture is seeking public feedback until July 22 before finalizing the rules, which are expected to be implemented later this summer. To submit comments, email rulemaking@oda.oregon.gov with the subject line "SB 85 Rules" by July 22 at 5 p.m. There will also be a **virtual public hearing** held via Teams on July 15 at 1 p.m. PDT.

OSHA. The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has proposed a **new rule** aimed at safeguarding workers from extreme heat. If finalized, the rule would protect about 36 million workers across indoor and outdoor settings, reducing heat-related injuries and fatalities. Key provisions include mandatory heat hazard prevention plans for employers, ensuring provisions like drinking water and rest breaks during high heat conditions. The rule also emphasizes training, emergency response procedures, and specific protections for new or returning workers unfamiliar with high heat environments. To learn more about different federal and state heat safety regulations, click **here** to view NALC article "Recent Federal and State Heat Safety Proposals."

Food Additives. The FDA has **revoked** the authorization of brominated vegetable oil (BVO) as a food additive due to findings from studies which indicated potential adverse health effects. BVO, a substance modified with bromine and once used to prevent flavor separation in beverages like Mountain Dew and Gatorade, has been regulated by the FDA since 1970. Despite pledges from major companies like PepsiCo and Coca-Cola to remove BVO from their products in 2014, some off-brand items continued to use it. The FDA's ban, proposed in November and effective August 2, allows a year for companies to reformulate, relabel, and deplete existing BVO-containing inventory. To learn more about state and federal bans on BVO and other food additives, click **here** to read NALC article "Update on Proposed Food Additive Bans."

HPAI. A fourth human case of highly pathogenic avian influenza (HPAI) has been **identified** in Colorado. Like the three previous confirmed cases, the infected person is a dairy farmworker who was in direct contact with infected cows. Additionally, the Federal Drug Administration (FDA) **announced**

the results of a study conducted with the U.S. Department of Agriculture (USDA) confirming the safety of the U.S. commercial milk supply. Through testing the most common pasteurization practices used in commercial milk processing, the FDA and USDA found that those practices are effective to inactivate HPAI virus found in milk.

- Webinar opportunity (July 17): **Brook Duer**, Staff Attorney, Penn State Center for Agricultural and Shale Law will present "HPAI in Poultry and Cattle: How Can We Miss You If You Won't Go Away?" To register, click [here](#).

Labor. The U.S. District Court for the Western District of Washington **granted** a preliminary injunction enjoining the U.S. Department of Labor (DOL) from enforcing its One-Year rule in Washington and ordering the DOL to reinstate 2020-Survey prevailing wage rates. Plaintiffs Familias Unidas por la Justicia, a farmworkers union in Skagit County, Washington, sought a preliminary injunction against a DOL policy they claimed reduced their wages to "below-market rates." The DOL policy, adopted in 2022 and called the One-Year rule, invalidated a prevailing wage rate that is older than a year. With the preliminary injunction in place, prevailing wage calculations will be reinstated to the 2020 level which includes calculating wages on a piece-rate basis. Plaintiffs claim that in Washington farmworker wages will increase if wage calculations include piece-rates. The preliminary injunction will be in effect until a judgment is entered on the merits of the case.

Water Quality. A judge in Oklahoma state court ruled that the Oklahoma Department of Agriculture, Food and Forestry (ODA) wrongly allowed large poultry farms to be built and operated in a "sensitive watershed" without proper environmental review. According to the court, the ODA had failed to classify the poultry farms as Concentrated Animal Feeding Operations (CAFOs) under the federal Clean Water Act. If the ODA had classified the farms as CAFOs, the federal regulations would have required a period of public notice and comment to be given prior to the operation of the farms. Instead, the ODA classified the farms as Poultry Feeding Operations under Oklahoma state law which required no public notice. Going forward, the court has instructed ODA to classify any poultry operation housing over 125,000 non-laying hens as a CAFO pursuant to federal law. To read the court's decision, click [here](#). This ruling comes against the backdrop of the long-running litigation between Tyson Foods and the State of Oklahoma over the company's operation of chicken houses in the Illinois River watershed.

Food Labeling: Meat Alternatives. The U.S. District Court for the Western District of Oklahoma **found** that plaintiffs Plant Based Foods Association (PBFA) and the Tofurky Company do not have standing to challenge Oklahoma's Meat Consumer Protection Act (MCPA). The 2020 Oklahoma law prohibits food products not derived from harvested livestock from advertising itself as "meat." However, the MCPA does permit the sale of plant-based meat products if its packaging displays with prominence a disclosure that it is derived from plants. The court held that neither PBFA, its member companies, nor the Tofurky Company demonstrated an injury sufficient for standing. The court rejected PBFA's argument that the money and effort spent lobbying against the law's passage demonstrated an injury and found PBFA's member companies could not demonstrate an injury because the MCPA only applies to companies that sell food products coming from an "edible portion of livestock." To learn more about meat alternatives labeling litigation, click [here](#) to view NALC "Truth in Labeling Lawsuits" article series.

Food Labeling: Allergens. The Food and Drug Administration (FDA) has sent a warning letter to Bimbo Bakeries USA for its inclusion of potentially dangerous allergens on the label of food products which do not contain those allergens. Specifically, the letter claims Bimbo Bakeries, who owns the brand Sara Lee, included the ingredient sesame seeds on the label of multiple of Sara Lee branded breads when the products did not actually contain sesame seeds. In the letter, the FDA categorizes such products as "misbranded" because they mislead consumers to believe the food product contains an allergen which is not actually present. The FDA clarifies that labeling is not an alternative to compliance with allergen cross-contact requirements. Click [here](#) to read the FDA's warning letter.

Pesticides. The U.S. Environmental Protection Agency's (EPA) Office of Pesticide Programs (OPP) **announced** a significant increase in the concentration equivalent level of concern (CE-LOC) for herbicide atrazine. CE-LOC is the level at which EPA determines that products such as atrazine will adversely affect aquatic plants and triggers required monitoring and/or mitigation to protect aquatic plants. EPA is raising atrazine's CE-LOC from 3.4 ppb to 9.7 ppb. OPP claims the increase will result in the removal of millions of watersheds that were expected to exceed the former level of concern. To learn more about pesticides generally, click [here](#) to view NALC Pesticides Reading Room.

Agrivoltaics. The U.S. Department of Energy (DOE) announced the Large Animal and Solar System Operations (LASSO) Prize to offer up to \$8.2 million to projects developed for the dual use of land for solar energy generation and cattle grazing. The LASSO Prize is funded by DOE's Solar Energy Technologies Office, and aims to bring together teams of multi-stakeholders, such as landowners, solar developers, and ranchers, to build an understanding of the outcomes of agrivoltaics on cattle. Prize applications will open in September, close on October 14, and prizes will be awarded on November 28. Click [here](#) to view the prize administrator page.

- Webinar opportunity (August 21): **Peggy Kirk Hall**, Director, Agricultural and Resource Law Program at The Ohio State, and **Jesse Richardson**, Professor of Law, West Virginia University College of Law will present "Can Agriculture and Solar Co-Exist? Exploring the Promise and Challenge of Agrivoltaics" To register, click [here](#).

Right-to-Repair. The U.S. Federal Trade Commission has sent **warning letters** to eight companies about warranty practices that harm consumers' right-to-repair. The letters were sent to warn manufacturers for company statements indicating that consumers must use specified parts or service providers to keep their warranties intact. The FTC claims these practices violate the Magnuson-Moss Warranty Act (MMWA), which prohibits companies from conditioning warranties for a product that cost over \$5 on a consumer's use of certain articles or service. To learn more about how the right-to-repair issue affects agriculture, click [here](#) to view NALC article "Update on Right-to-Repair."

- Webinar opportunity (September 18): **Ross Pifer**, Director, Penn State Center for Agricultural and Shale Law will present "Right to Repair and Agriculture." To register, click [here](#).

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