Ag & Food Law Update:

Fourth Quarter 2017

AGRICULTURAL & FOOD LAW CONSORTIUM

The Agricultural & Food Law Consortium is a national, multi-institutional collaboration designed to enhance and expand the development and delivery of authoritative, timely, and objective agricultural and food law research and information.

This information is available to the nation's vast agricultural community of producers, attorneys, state and federal policymakers, Cooperative Extension Service professionals, and others at the local, state, regional, and national levels.

Agricultural law and food law includes law related to land-based food, fiber, and energy production systems, as well as seafood and marine-based aquaculture.

Members of the Consortium include:

The National Agricultural Law Center

Center for Agricultural and Shale Law at Penn State Law

National Sea Grant Law Center

Agricultural & Resource Law Program at The Ohio State University

In the fourth quarter of 2017, there were a number of significant legal developments in the agricultural sector. Many of these issues will continue to play out over the next year and impact agriculture throughout the country. Notably, there were important developments involving animal welfare, GIPSA, pesticides and water law.

In this light, the Agricultural and Food Law Consortium has compiled this review of some of these developments, with links for additional resources. Led by the National Agricultural Law Center (NALC), the Consortium is a four-university partnership designed to enhance and expand the development and delivery of authoritative, timely, and objective agricultural and food law research and information.

For daily updates of federal and state legislative, regulatory, and judicial developments, check out the Ag & Food Law Update published on the NALC website **here**. With suggestions for next quarter's update or other related questions, please contact Mark Camarigg (National Agricultural Law Center).

SUBJECTS:

I. ANIMAL WELFARE

13 States Sue Massachusetts Over Animal Confinement Law

On December 11, 2017, attorneys general from Indiana, Alabama, Arkansas, Louisiana, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wisconsin petitioned the U.S. Supreme Court challenging the Massachusetts Prevention of Farm Animal Cruelty Act (PFACA). PFACA prevents for sale in Massachusetts any product derived from poultry, hogs, and calves where the animal was not housed according to Massachusetts standards. The petition alleged that this action is an attempt to regulate farming in other states and thereby violates the Commerce Clause.

13 States Ask U.S. Supreme Court to Block California Egg Law

On December 4, 2017, attorneys general from Missouri, Alabama, Arkansas, Indiana, Iowa, Louisiana, Nebraska, Nevada, North Dakota, Oklahoma, Texas, Utah, and Wisconsin petitioned the U.S. Supreme Court to block California's egg law. The California law requires that eggs sold in the state may come only from laying hens that are permitted the ability to lie down, stand up, fully extend their limbs, and turn around freely. The attorneys general assert that the law violates the Commerce Clause because eggs are a basic food staple and that California's action has cost U.S. consumers an additional $350.7 million per year.

Utah Agrees to $349,000 "Ag-Gag" Settlement

On November 18, 2017, the Salt Lake Tribune reported that Utah's office of attorney general has agreed to pay $349,000 to settle a lawsuit involving the state's "ag-gag" law. The settlement follows a July 7, 2017 ruling by the U.S. District Court for the District of Utah, which held that Utah Code §76-6-112 violated first amendment rights to free speech. According to the report, the settlement amount must be approved by the Utah legislature.

New Animal Care Standards for Ohio Veal and Dairy in 2018

Veal and dairy producers in Ohio are subject to new livestock care standards for veal calves and dairy cattle beginning in 2018. The changes are pursuant to continued implementation of State Issue 2, a constitutional amendment passed by voters in 2011 that required Ohio to establish standards for the care of livestock. Producers were given a little more than six years to transition their facilities to the new regulations, which affect pen size, tethering and group housing for veal calves and prohibit tail docking of dairy cattle unless medically necessary and performed by a licensed veterinarian. Information about Ohio's Livestock Care Standards is available on the Ohio Department of Agriculture's website, here.

II. AQUACULTURE

Washington Terminates Cooke Aquaculture Pacific's Port Angeles Net Pen Lease

On December 15, 2017, the Washington Department of Natural Resources terminated Cooke Aquaculture Pacific's Port Angeles net pen lease—where the company was raising over 700,000 Atlantic salmon. Net pen sites in the state had recently been subject to additional inspections in the wake of Cooke's Cypress Island net pen collapse in August 2017, which released approximately 160,000 non-native fish into the state's waters. A December 4 inspection of the Port Angeles facility revealed serious safety concerns including pens operating outside of the leasehold, crumbling Styrofoam floats, and unconnected and compromised net pen anchor chains. As a result of these violations, the Washington Department of Natural Resources exercised its authority to

terminate Cooke's lease agreement. An investigation by multiple state agencies into the August escape is still underway. More information is available here, and a copy of the termination and notice of default letter is available here.

III. ENERGY

BLM Rescinds 2015 Hydraulic Fracturing Rule

On December 29, 2017, the Bureau of Land Management (BLM) rescinded their 2015 hydraulic fracturing rule with a new rule entitled *Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule*. The 2015 rule included requirements for oil and gas operators to obtain approval before conducting hydraulic fracturing operations as well as various safety and environmental requirements. BLM states that the rule is being rescinded because they believe "it imposes administrative burdens and compliance costs that are not justified."

BLM Releases Final Rule Suspending Methane Emission Requirements for Natural Gas Production

On December 8, 2017, the Bureau of Land Management (BLM) released a final rule that will suspend certain requirements within the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rule. The purpose of the original regulation was to reduce natural gas waste from venting, flaring, and leaks from oil and natural gas production. Several sections of the regulation are being suspended by the BLM out of concern for cost, feasibility, and statutory authority. The new final rule will become effective January 8, 2018.

DOJ Concludes Royalty Payment Investigation of Chesapeake Energy

On November 2, 2017, Chesapeake Energy announced in their Securities and Exchange Commission (SEC) report that the Department of Justice (DOJ) is no longer investigating Chesapeake's royalty payment practices. According to the report, Chesapeake has received informational subpoenas from the DOJ, the U.S. Postal Service, and U.S. states. Chesapeake is still responding to demands from the Postal Service and state agencies.

Ohio Court Determines that Lease Applies "At the Well" Rule

On October 25, 2017, the U.S. District Court for the Northern District of Ohio granted Chesapeake Appalachia's motion for summary judgment in a case regarding post-production royalties (*Lutz v. Chesapeake Appalachia, L.L.C., N.D. Ohio No. 4:09-cv-2256)*. The case is a class action lawsuit brought by several landowners who argued that Chesapeake was underpaying their royalties by deducting post production costs from payments. The question of whether Ohio follows the "at the well" rule or the "marketable product" rule was certified to the Ohio Supreme Court. The Ohio Supreme Court declined to answer the question and ruled that the rights and remedies of the parties in an oil and gas contract are controlled by the lease. Following this ruling, the district court held that the language in the lease was clear and ambiguous and that the "at the well" rule should be applied in this case.

IV. FOOD LAW

San Francisco to Require Large Grocery Stores to Disclose Antibiotics in Meat

On October 3, 2017, the San Francisco Examiner reported that the San Francisco Board of Supervisors has approved an ordinance requiring that large grocery stores in the city submit annual reports detailing the use of antibiotics in raw meats and poultry products. According to the ordinance, antimicrobial drugs found in meat

and poultry pose an environmental and public health threat by allowing antibiotic-resistant bacteria to multiply and spread. The ordinance seeks to reduce this threat by requiring grocery stores operating in the city, which also own or operate 25 or more grocery stores anywhere, to annually report antimicrobial information to the Department of the Environment (Department). Upon receiving the annual reports, the Department will make public the information through publication on its website.

FDA Proposes Revoking Soy Protein Health Claim

In October, the Food and Drug Administration (FDA) moved to revoke its regulation authorizing health claims regarding the relationship between soy protein and coronary heart disease on the labeling of foods. The agency based its decision after reviewing "the totality of publicly available scientific evidence currently available." The FDA tentatively concluded that evidence does not support its previous determination "that there is significant scientific agreement (SSA) among qualified experts for a health claim regarding the relationship between soy protein and reduced risk of coronary heart disease." The agency will accept written comments on the proposed rule until January 16, 2018.

V. GIPSA

USDA Eliminates GIPSA as a Standalone Agency

On November 15, 2017, Agri-Pulse reported that the U.S. Department of Agriculture (USDA) has eliminated the Grain Inspection, Packers, and Stockyards Administration (GIPSA) as a standalone agency. Under a memorandum issued by Secretary of Agriculture Sonny Perdue, USDA announced that those functions which were formerly part of GIPSA have been moved to a newly created Fair Trade Practices program area. According to the memorandum, the intention of the action is to improve industry engagement and customer focus.

USDA Withdraws Proposed GIPSA Rule

On October 18, 2017, the U.S. Department of Agriculture (USDA) published notice in the Federal Register that the agency was withdrawing the Grain Inspection, Packers and Stockyards Administration (GIPSA) rule proposed on December 20, 2016 (82 FR 48603). According to USDA, the proposed rule was intended to clarify unfair, unjust, or deceptive practices and to determine when such practices resulted in unfair advantages for packers, swine contractors, or live poultry dealers. USDA stated that as a result of withdrawing the proposed rule, the agency will continue the approach of determining "unfair and deceptive practices on a case-by-case basis."

VI. INDUSTRIAL HEMP

Pennsylvania Expands Permitting of Industrial Hemp Research

On December 6, 2017, Pennsylvania Governor Tom Wolf announced an expansion of the Commonwealth's industrial hemp program. Currently, Pennsylvania allows researchers from institutions of higher education and individual growers contracting with the Pennsylvania Department of Agriculture (PDA) the opportunity to apply for permits to grow industrial hemp for research purposes. In 2017, PDA issued 30 permits and limited each permit holder to the growing of no more than five acres of industrial hemp. According to Governor Wolf, for 2018, the program will be expanded to allow the issuing of as many as 50 permits. Additionally, each permit holder will have the ability to grow up to 100 acres of industrial hemp.

Wisconsin Enacts Hemp Law and Broadens Ability to Transport

On December 1, 2017, Marijuana Business Daily reported that Wisconsin Governor Scott Walker signed legislation authorizing hemp production. Of note, with the enactment of the Wisconsin law, the ability to transport hemp products becomes significantly broader. According to the report, "the U.S. Drug Enforcement Agency has said interstate transfers of some hemp products are legal only among states that have authorized hemp pilots." Accordingly, with the passage of Wisconsin's hemp law, due to the state's geographic position, it is now physically possible to legally drive hemp products between the East and West coasts.

VII. PESTICIDES

EPA Determines Glyphosate Not Likely Carcinogenic to Humans

On December 18, 2017, the U.S. Environmental Protection Agency (EPA) announced the release of a draft human health and ecological risk assessments for the pesticide glyphosate. According to EPA, the draft risk assessment provides a determination that glyphosate is "not likely carcinogenic to humans." Additionally, EPA asserted that when used according to the pesticide label, glyphosate has not been shown to cause any other "meaningful risks to human health." EPA stated that in early 2018, the agency "will open a 60-day public comment period for the draft risk assessments, evaluate the comments received, and consider any potential risk management options…"

EU Renews Glyphosate Approval

On November 27, 2017, the European Commission (EC) announced that the European Union (EU) Member States have agreed to renew the approval of the herbicide glyphosate for another 5 years. According to the EC, the agreement was reached by a qualified majority of the Appeal Committee. To achieve a qualified majority, a vote must be supported by 55% of the countries, representing at least 65% of the total EU population. Accordingly, the EC reported that 18 Member States (representing 65.71% of the EU population) voted in favor of renewal, 9 Member States (representing 32.26 % of the EU population) voted against, and 1 Member State (representing 2.02 % of the EU population) abstained.

EPA Agrees to Dicamba Registration and Labeling Changes

The Environmental Protection Agency (EPA) announced an agreement with Monsanto, BASF and DuPont to change registration and labeling of the dicamba herbicide beginning with the 2018 growing season. The agreement was a voluntary measure taken by the manufacturers to minimize the potential of dicamba drift from "over the top" applications on genetically engineered soybeans and cotton, a recurring problem in the Midwest and South. Changes agreed upon include dicamba products being classified as "restricted use" products for over the top applications, specific training on dicamba use and application, reduction of maximum wind speed for applications from 15 mph to 10 mph, greater restrictions on the times during the day when applications can occur, tank clean-out instructions on the label and label language heightening awareness of application risk to sensitive crops.

Monsanto Sues Arkansas Board Over Dicamba Ban

Monsanto sued to block the Arkansas Plant Board from enforcing a rule preventing its dicamba product from being used each year from April 16 through October 31. In September, the Plant Board granted initial approval to regulations prohibiting its use during those dates. A copy of the complaint is available **here**.

Plaintiff in Dicamba Lawsuit Adds BASF to Civil Conspiracy Allegations

The case ***Bader Farms, Inc. and Bill Bader Plaintiffs, v. Monsanto Co., Defendant***, No. 1:16-CV-299-SNLJ, 2017 WL 4758886 (E.D. Mo. October 20, 2017) involved plaintiffs' claims that their peach crops were damaged by "drift" of defendant's dicamba herbicide. Plaintiff alleged "fraudulent concealment" by defendant, among a host of charges. Here, plaintiff sought to file an amended complaint to add BASF as a defendant to its civil conspiracy claim. Plaintiff believes "[t]he conspiracy is no longer between Monsanto and the farmers who bought dicamba-resistant seeds." Instead, plaintiff charges "Monsanto and BASF conspired to create an 'ecological disaster' where farmers would be forced to buy dicamba-based products." Court observed that plaintiff "alleges more than parallel conduct and an existing, legal business agreement between the companies" (Monsanto and BASF) and granted plaintiff's motion to file an amended complaint to add a party defendant. A copy of the court opinion is available **here**.

VIII. WATER LAW

Farmers Barred from Seeking Compensation from United States over Klamath Project

Several farmers filed claims regarding water delivery from the Klamath Project. The farmers claimed that the decision by the Bureau of Reclamation to shut off its irrigation delivery service in 2001 was a physical taking under the Fifth Amendment, and they were entitled to just compensation for the value of the lost water. The Bureau shut off the water to help sustain shortnose suckers and coho salmon. However, the plaintiffs argued that their rights stemmed from various contracts with the United States, which guaranteed them the delivery of this water. The plaintiffs' claims were dismissed and summary judgment was granted to the defendants. A copy of the opinion is available **here**.

9th Circuit Applies "Significant Nexus" Test to Wetland Case

On November 27, 2017, the Ninth Circuit Court of Appeals affirmed the criminal conviction of a defendant in an ongoing Clean Water Act case. The defendant was found guilty of discharging dredged material into a wetland. Applying the "significant nexus" test developed by Justice Kennedy in *Rapanos v. United States*, the court affirmed the conviction and reasoned "[w]hether a wetland or non-navigable water has a significant nexus to a traditionally navigable water has nothing to do with whether the traditionally navigable water is healthy."

EPA and the Army Propose Amending Applicable Date of "Waters of the United States" Rule

On November 22, 2017, the U.S. Environmental Protection Agency and the Department of the Army published notice of a proposed amendment that would delay the applicable date for the 2015 rule defining the "waters of the United States" (82 FR 55542). Accordingly, the agencies seek to delay the applicable date of the rule until two years after the proposed amendment has been finalized and published in the Federal Register. The agencies stated that the delay is intended to permit sufficient time for the proper reconsideration of the definition of the "waters of the United States."

U.S. Senate Passes Changes to Federal Algal Bloom and Hypoxia Research and Control Act

The U.S. Senate has passed a bill that aims to improve the federal response to water pollution by amending the Harmful Algal Bloom and Hypoxia Research and Control Act of 1998. SB 1057 would add a new provision allowing federal officials to determine whether a hypoxia or harmful algal bloom event is an event of "national significance" and provide funds to the affected state or locality to mitigate damages from the event. Other changes include adding the Army Corps of Engineers to the list of agencies on the Task Force on Harmful Algal Blooms and Hypoxia, requiring that scientific assessments be submitted to Congress every five years for both freshwater and coastal algal blooms, establishing a website about the harmful algal bloom and hypoxia program, requiring the Task Force to work with extension programs to improve public understanding about harmful algal blooms and hypoxia, requiring the use of cost effective methods when carrying out the law, requiring the development of contingency plans for the long-term monitoring of hypoxia, and funding the program and the comprehensive research plan and action strategy from 2019 through 2023. The bill has yet to see action in the U.S. House of Representatives.

IX. MISCELLANEOUS

WHO Calls for End of Antibiotic Use in Healthy Animals

On November 7, 2017, the World Health Organization (WHO) announced recommendations designed to limit antibiotic use in healthy animals. According to WHO, the over-use of antibiotics in healthy animals has become a contributor to the increased threat of antibiotic resistance. As a result, WHO recommends that healthy animals should not receive antibiotics for growth promotion. Additionally, WHO recommends that antibiotic use in healthy animal be limited to the prevention of disease where there has been a diagnosis "in other animals in the same flock, herd, or fish population." WHO stated that instead of antibiotics, producers should consider improved "hygiene, better use of vaccination, and changes in animal housing and husbandry practices."

APHIS Proposes Change to Avian Influenza Virus Elimination Payments for Floor-Raised Meat Poultry

On December 21, 2017, the U.S. Department of Agriculture's Animal Plant and Health Inspection Service (APHIS) announced a proposed change to the flat rate calculation for floor-raised meat poultry eliminated after a notifiable detection of avian influenza. Accordingly, APHIS is proposing a flat rate payment for all floor-raised meat poultry facilities that will be based on a calculation of a facility's square footage. The change would replace the current flat rate payment which is based on a calculation of number of birds. APHIS accepted comment on the proposed elimination rate change through January 12, 2017.

Family Farmer Bankruptcy Clarification Act Becomes Law

On October 26, 2017, President Donald Trump signed into law the Family Farmer Bankruptcy Clarification Act of 2017. Introduced as S. 1237, the legislation was an addition to an appropriations bill, H.R. 2266. According to the bill's cosponsor, Senate Judiciary Committee Chairman Chuck Grassley of Iowa, the legislation "clarifies that bankrupt family farmers reorganizing their debts are able to treat capital gains taxes owed to a governmental unit, arising from the sale of farm assets during a bankruptcy, as general unsecured claims." Additionally, the legislation "removes the Internal Revenue Service's veto power over a bankruptcy reorganization plan's confirmation." Senator Grassley, stated that the legislation "corrects a Supreme Court ruling (*Hall v. United States*) that made it harder for family farmers to reorganize their finances when they fall on hard times."

USDA Proposes Withdrawing Organic Livestock and Poultry Practices Rule

On December 18, 2017, the U.S. Department of Agriculture (USDA) publish notice of the agency's intent to withdraw the Organic Livestock and Poultry Practices (OLPP) proposed final rule published on January 19, 2017 (82 FR 59988). Accordingly, the OLPP final rule, which is scheduled to become effective on May 14, 2018, addresses issues regarding: (1) livestock handling and transport for slaughter; (2) avian living conditions; (3) livestock care and production practices; and (4) mammalian living conditions. USDA asserted that the proposed withdraw is the result of agency's determination that the OLPP final rule exceeded USDA's statutory authority under the Organic Foods Production Act.

Missouri Supreme Court Rules Marijuana Not Protected by State's Right to Farm Law

On December 5, 2017, the Supreme Court of Missouri determined that Missouri's Right to Farm law did not protect an individual's right to grow marijuana. Under Article I, section 35 of the Missouri constitution, "the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers..." Accordingly, appellant Mark Shanklin argued that this provision protected his "farming practice" of raising 300 marijuana plants in his house. The court rejected Shanklin's argument and held that "because the amendment expressly recognizes farming and ranching practices are subject to local government regulation, it would be absurd to conclude Missouri voters intended to implicitly nullify or curtail state and federal regulatory authority over the illegal drug trade."

FMCSA Announces 90-Day ELD Waiver for Agricultural Commodities

On November 20, 2017, the U.S. Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA) announced a 90-day temporary waiver from the electronic logging device (ELD) requirements for transporters of agricultural commodities. Prior to the FMCSA announcement, ELD requirements were scheduled to take effect December 18, 2017. In addition to the 90-day temporary waiver, FMCSA also announced that the agency will be providing "formal guidance specifically pertaining to the existing Hours-of-Service exemption for the agricultural industry, and guidance on the "personal conveyance" provision." Fact sheet available **here**.

Farms Must Begin Reporting Air Releases of Hazardous Substances from Animal Wastes

Many livestock, poultry and equine farms must comply with reporting requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 103 beginning January 22, 2018. CERCLA requires entities to report releases of hazardous substances above a certain threshold that occur within a 24-hour period. Farms have historically been exempt from most reporting under CERCLA, but in the spring of 2017 the U.S. Court of Appeals for the District of Columbia Circuit struck down the rule that exempted farms from reporting. The U.S. EPA specifically names ammonia and hydrogen sulfide as two hazardous substances commonly associated with animal wastes that will require the emissions reporting. The U.S. EPA previously announced that farms had to report their emissions by November 15, 2017, but the Court delayed the deadline to January 22, 2018, to allow EPA to publish additional guidance to help farms determine their air emissions. Information from U.S. EPA is available here and an explanation of the new reporting requirements from Ohio State University's Agricultural & Resource Law Program is **here**.

FTCA's Discretionary Function Exemption Bars Suit Against USDA

On December 4, 2017, the U.S. Court of Appeals for the First Circuit held that the Federal Tort Claims Act's discretionary function exemption barred a landowner's lawsuit against the U.S. Department of Agriculture for the removal of twenty-five maple trees within state and federal invasive species quarantine areas. The quarantine orders were issued upon the detection of Asian Longhorn Beetle infestations in Massachusetts in 2008. The landowner alleged that the trees were removed without his permission resulting in liability pursuant to the FTCA. The First Circuit disagreed, finding that there was no federal requirement to obtain landowner permission before taking action to control the invasive species infestation. Because USDA personnel had discretion regarding whether to obtain permission before taking action, the USDA was protected from liability by the FTCA's discretionary function exemption. A copy of the opinion is available **here**.

Oklahoma Beef Checkoff Referendum Defeated

Per *Feedstuffs*, a recent Oklahoma Beef Checkoff referendum was defeated by a final count of 2,506 no votes to 1,998 yes votes. If passed, the referendum would have levied a $1 fee on cattle producers for each head of cattle sold. The additional fees would have been retained for use by the state of Oklahoma. Furthermore, the proposed fee would have been in addition to the $1 national checkoff fee currently enforced on each head of cattle sold. Under the national checkoff program, Oklahoma must share a portion of the money collected with other states that produce cattle sold in Oklahoma markets.

Additional Items of Interest:

Coalition Challenges Iowa 'Ag Gag' Law

Wisconsin: Environmental Groups Challenge DBA-DNR settlement, File Lawsuit

FDA Leaves Tainted Food on Shelves Too Long

Volatility from New Formulations Helps Cause Dicamba Damage

Court Rules New Mexico Ranchers may Access Water on Federal Land

USDA Reorganization May Impact International Food Safety Program

GAO Claims Ag Checkoffs Require More Consistent Analysis