Topic Areas

- National Agricultural Law Center
  - Mission, Stakeholders, Research & Info Activities
- Clean Water Act Update
- Federal/State Checkoff Programs
- CERCLA/EPCRA Case
- Drone Update
- Endangered Species Act & National Environmental Policy Act (NEPA)
- CA Egg Case
- “Honorable Mentions”
OUR NEXT WEBINAR

Agritourism, Zoonotic Diseases and Legal Liability

Featuring:
Carrie Klumb
Minnesota Department of Health

&
Peggy Hall
Ag Law & Taxation Program, OSU
### Webinars

- Monthly webinars on current and emerging issues in agricultural and food law
- **Upcoming:**
  - Agritourism, Zoonotic Diseases and Legal Liability
  - The Basics of Water Law and Its Relationship to Agriculture
  - Using LLCs in Agriculture: Beyond Liability Protection

### Updates

- **Daily Update**
  - A comprehensive summary of today’s judicial, legislative, and regulatory developments in agriculture and food

- **Quarterly Update**
  - Quarterly review of significant legal developments in the agricultural sector

[www.nationalaglawcenter.org](http://www.nationalaglawcenter.org)
Clean Water Act: The Very Basics

• “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”

• Establishes “effluent limitations” to define the amount of pollution that can be discharged (primarily focused on “point sources”)

• Every 2 years, states identify waters where “effluent limitations” do not meet water quality standards
  ○ These are “impaired waters” and includes the Total Maximum Daily Loads (TMDLs)

• EPA then approves/disapproves the listings and loadings
Clean Water Act: Lake Erie

- *National Wildlife Federation v. EPA* (Dist. of Columbia; Apr. 2017)
- *Environmental Law & Policy Center v. EPA* (N.D. of Ohio; May 17, 2017)

- Oct. 20, 2016 = Ohio submitted its “impaired waters” list
  - Included parts of Lake Erie but **NOT** the open waters of the western basin of Lake Erie
  - EPA recently approved Ohio list

- Michigan submitted its “impaired waters” list in Nov. 2016
  - EPA approved on Feb. 3
  - Michigan listed all of Lake Erie in its jurisdiction, including open waters in the western basin of the lake
Clean Water Act: Lake Erie

- Plaintiffs assert that EPA’s inaction allows pollution “to continue unabated” in Lake Erie

- Plaintiffs believe EPA will disapprove, setting stage for TMDLs to be established
  - Think back to *Chesapeake Bay* decision
Clean Water Act: DMWW (Very Quick Update)
Federal/State Checkoff Programs

- HSUS v. Pork Checkoff

- HSUS/OCM v. Beef Checkoff

- **R-CALF v. USDA** (Montana federal district court)
  - Government speech doctrine
    - *Johanns* (USSC 2005)
  - Redirection policy/AMS proposed rule (for beef and soybeans)
    - Converts state-retained dollars into federal-obtained dollars
  - AMS has assumed direct oversight of the Montana Beef Council via a Memorandum of Understanding
Beef: Follow(ing) the Money

- 7 U.S.C. § 2904(8)(A)
- 7 C.F.R. § 1260.181(b)(4)
- Failure to comply could result/results in violation of Act

Producer/Importer Pays $1 per-head

“Collecting Person” Collects & Remits Assessments to QSBC

QSBC then remits those assessments, minus producer credit to CBB
Soybeans: Follow(ing) the Money

- 7 U.S.C. § 6304(a)
- 7 C.F.R. § 1220.228(a)(1)(iv) **AND** § 1220.228(b)(4)
- Failure to comply could result/results in violation of Act

“First Purchaser” collects assessment of \( \frac{1}{2} \) of 1% of net market price

First Purchaser Remits That Assessment to QSSB

QSSB Remits Assessment to USB, “minus authorized credits. . . .”
AMS states* that the rule would apply when:

1) There is no state law requiring assessments to a state board or council; or
2) There is a state law requiring* assessments, but the state law allows for refunds.
AMS predicts 10 out of 569,998 soybean producers and 20 cattle producers out of 915,000 operations will use the rule

AMS states that rule could result in decreased assessments to state boards and councils

Impossible to predict application/scope of rule
  - Examples: Idaho, Delaware, Arkansas, and others
AMS states that a producer who receives a state refund will be in violation of the Beef/Soybean Act
  - Even though AMS’s position is that a request for refund triggers “redirection”

State refund provisions preempted or superseded by federal law?
  - Potentially competing interpretations
Federal/State Checkoff Programs

- De-certification / Disqualification by USDA of state beef councils or state soybean boards
- Stated legal standards vary
- Appears to be no express legal authority in federal law
CERCLA/EPCRA: *Waterkeepers*

  - U.S. Egg & Poultry Ass’n and others intervened

- CERCLA/EPCRA require parties to notify authorities when large quantities of hazardous materials are released into environment
  - Ammonia and Hydrogen sulfide

- Stems from 2008 CAFO Final Rule that (generally) exempted CERCLA/EPCRA reporting of air releases from animal waste
  - Basic rationale: federal response “impractical and unlikely” to ever regulate

- Several environmental groups asserted that the exemptions were outside EPA authority
D.C. Circuit held that EPA lacked authority to create exemptions set out in 2008 rule
- Vacated the 2008 rule

May 25 letter to EPA Administrator Pruitt by approx. 20 U.S. Senators to challenge D.C. Circuit decision

Currently under a request for a rehearing, but not likely to succeed...
Drone Update

- Extremely fast growing area of law at state and federal levels
  - Last 3 legislative session between 30 to 45 states have had proposed legislation and many bills were enacted

- Basic approach is FAA regulates safety of US airspace and states deal with liability issues and privacy...
  - Current state laws typically revolve around use by law enforcement, privacy, etc... Some states have provisions on harassing hunters, shooting down drones, and other topics
Drone Update

- Commercial vs. Recreational Use – the difference?

- *Taylor v. Huerta* (FAA drone rule)
  - (Advisory Circular 91-57)

- What does this case mean?
  - States may have a greater role in regulating how UAS operate within their borders
Endangered Species Act: The Very Basics

- **Purpose**: to “protect and recover imperiled species and the ecosystems upon which they depend”

- A species may be listed as either **endangered** or **threatened**
  - “**Endangered**” means a species is in danger of extinction throughout all or a significant portion of its range.
  - “**Threatened**” means a species is likely to become endangered within the foreseeable future.

- The “take” of listed animals is prohibited
  - “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”
  - “Harm” - “an act which actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.
    - Includes nesting and reproduction
Endangered Species Act

- Guaranteed Loans (USDA FSA & SBA)
  - Leveraging ESA to prevent loans and, therefore, ag production

- Quick update: Proposed listings
ESA: Monarch Butterflies

August 2014

• Center for Biological Diversity and the Center for Food Safety petitioned the USFWS to list Monarch Butterfly as “threatened”

December 2014

• USFWS responded to request and initiated a review of the butterfly’s status

January 2016

• A notice of intent to sue USFWS was filed by two environmental groups
  • Seeks to compel USFWS to complete its review under a legally binding deadline
• Focus of suit: GM crops (Roundup Ready)
• Settlement agreement reached with listing decision due June 2019
• Sept 21: FWS proposed listing the rusty patched bumble bee for federal protection as an endangered species
  ○ Historically, its range included 28 states, the District of Columbia and 2 provinces in Canada. Since 2000, it has been found in only 12 states and 1 province.

• March 21 it was listed as endangered (delayed from original date)
ESA: Rusty Patched Bumblebee

- **Reasons for declining populations, per FWS**
  - **Habitat loss**: Prairies/grasslands converted to farms, cities and roads
  
  - **Intensive farming**: Increased farm sizes and technology advances have led to increased use of pesticides, loss of crop diversity, loss of hedgerows and the flowers that grew there, and loss of legume pastures.
  
  - **Disease**: Pathogens and parasites may pose a threat to rusty patched bumble bees
  
  - **Pesticides**: The rusty patched bumble bee may be vulnerable to pesticides used across its range. Pesticides are used widely on farms and in cities and have both lethal and sublethal toxic effects. Bumble bees can absorb toxins directly through their exoskeleton and through contaminated nectar and pollen. Rusty patched bumble bees nest in the ground and may be susceptible to pesticides that persist in agricultural soils, lawns and turf.
  
  - **Global climate change**: Climate changes that may significantly harm bumble bees include increased temperature and precipitation extremes, increased drought, early snow melt and late frost events.
NEPA

- Requires Environmental Assessments (EAs) and Environmental Impact Statements (EIS) for proposed federal actions

- Animal Legal Defense Fund & Center for Biological Diversity: Request for moratorium on animal ag operations in NE Arkansas
  - Targeting environmental, animal welfare, & public health concerns
  - Wants all operations to be considered simultaneously rather than individually
Lawsuit against CA’s “Phase 2”

July 2010: Passage of CA law prohibiting sale of eggs within state borders that don’t meet Prop 2 conditions (AB 1437)

Feb. 2014: Attorney generals in six states (MO, NE, OK, AL, KY & IA) file lawsuit claiming that the law is unconstitutional.

Oct. 2014: Judge dismisses suit on grounds that the AGs didn’t have “standing” to file.

Jan. 2015: “Phase 2” became effective.

Nov. 2016: Appellate Court (9th Cir.) denies appeal

May 2017: USSC denies cert, effectively dismissing the case.
Honorable Mentions


- North Carolina veto override re: Right-to-Farm law

- Idaho “Ag Gag”/Farm Protection law (oral arguments at 9th Cir.) – NC and AR have also enacted statutes

- Farm Bill Update

- Waters of the United States

- Others?
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