

THE AGRICULTURAL & FOOD LAW REPORT

*An objective monthly update on legal developments affecting the nation's
agricultural community*

Provided by: [The Agricultural & Food Law Consortium](#)



May, 2015

The following information is a comprehensive but not necessarily exhaustive summary of legislative, regulatory, and judicial developments in agriculture and food that occurred between May 1, 2015 to May 31, 2015. Many of the summaries provide links that take the reader to the primary documents or other websites with additional resources.

Table of Contents:

[Environmental & Natural Resources](#)

[Ag Biotechnology](#)

[Specialty Crops & Organics](#)

[Food Law](#)

[Ag Markets/Trade & Economy](#)

[Additional Developments](#)

ENVIRONMENTAL & NATURAL RESOURCES

Waters of the United States: Final Rule On May 26, EPA Administrator Gina McCarthy and the Assistant Secretary of the Army Jo Ellen Darcy signed the EPA Waters of the United States, although the rule is not yet published in the Federal Register.

Waters of the United States: Congress On May 12, the U.S. House of Representatives passed the Regulatory Integrity Protection Act of 2015 ([H.R. 1732](#)), which calls for the withdrawal of the Waters of the United States proposed rule. Similar action is expected in the U.S. Senate in the near future.

Clean Water Act (CWA) Jurisdiction: Litigation In *Eoff v. EPA*, No. 4:13-CV-368-DPM, slip. op., 2015 WL 2405658 (E.D. Ark. May 19, 2015), the court considered whether the U.S. Army Corps of Engineers and the EPA “unreasonably asserted Clean Water Act jurisdiction over a creek in Van Buren County, Arkansas” in what was characterized, in part, as a “tributary of a tributary” issue. Text of the decision is available via Google Scholar [here](#). The court raised the issue of whether the area at issue fell under the stock-pond exemption.

CWA/Nitrates in Des Moines: Litigation On May 22, the response was filed by the three Iowa counties named as defendants in the potentially landmark CWA lawsuit filed by Des Moines Water Works earlier this year. Recommended Resource: *Drainage Districts, Agriculture, and the Clean Water Act: What Happens in Des Moines Stay in Des Moines?*, published by the Mississippi River Basin Conservation Network March 2015 edition of *Confluence*, available [here](#).

Endangered Species Act: Final Rule The U.S. Fish & Wildlife Service and the National Marine Fisheries Service issued a final rule, available [here](#), to amend regulations that implement Section 7 of the Endangered Species Act (See 50 CFR Part 502) dealing with incidental take permits.

Endangered Species Act: Litigation In *Nat'l Ass'n of Homebuilders v. U.S. Fish & Wildlife Service*, 786 F.3d 1050 (D.C. Cir. 2015), text of decision is available via Google Scholar [here](#), the court rejected an action filed under the Administrative Procedure Act and the ESA that challenged consent decrees that required the USFWS to determine whether more than 200 species should be listed as endangered or threatened.

Wind Energy: Notice On May 1, a notice, available [here](#), was issued that announced the availability of the Upper Great Plains Wind Energy Programmatic Environmental Impact Statement (PEIS) was announced.

Agricultural Workers & Pesticides: Draft Document EPA submitted a draft regulatory document to USDA regarding the use of pesticides and the Agricultural Worker Protection Standard, the latest in a [series of actions](#) since 2013. This draft document is not yet available to the public.

EPA, Bees, & Pesticides: Proposed Rule On May 29, EPA issued a proposed rule, available [here](#), that would adopt mandatory pesticide label restrictions to protect bees from foliar application of pesticides during bloom that are acutely toxic to bees on a contact exposure basis. This development follows the May 19 release by the Obama Administration of the National Strategy to Promote the Health of Honeybees and Other Pollinators, available [here](#). Recommended Resource: Congressional Research Service Report, *Bee Health: The Role of Pesticides*, available on NALC website [here](#).

More on Pesticides: Emergency Exemptions EPA issued emergency pesticide exemptions, notice available [here](#), which applies to nearly three dozen states.

Biomass Crop Assistance Program (BCAP): Final Rule A final rule, available [here](#), was issued that briefly reopened the comment period on the BCAP final rule issued in February 2015. Recommended Resource: Congressional Research Service Report: *Biomass Crop Assistance Program: Status and Issues*, available on NALC website [here](#).

Federal Conservation Programs: Handbook Revisions USDA NRCS provided notice, available [here](#), of a proposed series of revisions to the National Handbook of Conservation Practices to be considered for adoption in states' Field Office Technical Guide.

Marine Fisheries & NEPA: Congress On May 15, the *Strengthening Fishing Communities and Increasing Flexibility in Fisheries Management Act of 2015* ([H.R. 1335](#)) was reported out of the Natural Resources Committee in the U.S. House of Representatives. H.R. 1335 would exempt operations from environmental analysis requirements under the National Environmental Policy Act.

Marine Fisheries: Congress On May 20, Senator Marco Rubio introduced the *Florida Fisheries Improvement Act of 2015* ([S. 1403](#)), which seeks to improve fisheries management in the Gulf of Mexico and South Atlantic regions by modifying the Magnuson-Stevens Act in several ways.

Invasive Species: Litigation On May 12, 2015, the U.S. District Court for the District of Columbia granted the United States Association of Reptile Keepers Inc. (USARK) requests for a preliminary injunction to prevent the Department of the Interior from implementing a final rule that adds four species of constricting snakes to the list of injurious species under the Lacey Act. The opinion is on the National Sea Grant Law Center website, available [here](#).

AG BIOTECHNOLOGY

***Bacillus thuringiensis* & Soybeans: Final Rule** EPA issued a final rule, available [here](#), that establishes an exemption from the requirement of a tolerance for residues of the *Bacillus thuringiensis* (*B.t.*) Cry1A.105 protein in or on soybeans when used as a plant-incorporated protectant. Upcoming webinar: *Regulation of Agricultural Biotechnology in the United States: An Overview*, information available on NALC website [here](#).

GM Food Labeling: Congress The Safe and Accurate Food Labeling Act of 2015 ([H.R. 1599](#)), introduced in March 2015, gained more than 50 co-sponsors by the end of May. Upcoming July 30 webinar provided by the Agricultural & Food Law Consortium, Ross Pifer presenting: *Mandatory GM Labeling Laws: Overview and Status of Current Issues*, details available on the NALC website [here](#).

GM Food Labeling: USDA In mid-May, it was widely reported that USDA announced a new, voluntary GM food labeling program to operate under the USDA Agricultural Marketing Service. A New York Times article about this development is available [here](#).

GE Cotton: Notice On May 28, USDA APHIS announced, notice available [here](#), the availability of a preliminary plant pest risk assessment, draft environmental assessment, and preliminary finding of no significant impact for the preliminary determination of nonregulated status regarding a request for nonregulated status for cotton that has been genetically engineered for resistance to the herbicides 2,4-D and glufosinate.

County Ban on GMO Crops: Litigation In *Schultz Family Farms, LLC v. Jackson County*, No. 1:14-CV-01975, slip op., 2015 WL 3448069 (D. Or. May 29, 2015), text of decision available via Google Scholar [here](#), the court held, *inter alia*, that a county ordinance that banned the growing of genetically modified crops within the county was not preempted by the Oregon Right to Farm Act.

SPECIALTY CROPS & ORGANICS

National Organic Program (NOP): Notice On May 6, the USDA Agricultural Marketing Service announced its determination, available [here](#) that there is no need to amend the NOP regulations, based on its Section 10 Regulatory Flexibility Act review of the NOP. Recommended Resource: NALC NOP Reading Room [here](#).

Organic Checkoff : Petition On May 12, the Organic Trade Association and the GRO Organic Core Committee submitted a petition, available on OTA website [here](#), to USDA to establish a checkoff program for organic products pursuant to the Commodity Promotion, Research, and Information Act of 1996.

Similac & Organic Ingredients: Litigation On May 15, a class action lawsuit was filed by several consumers against Abbott Laboratories in federal district court in New York, alleging that certain Similac Advance Organic infant formula products contain more than two dozen ingredients not allowed under the NOP.

Marketing Order Programs & U.S. Antitrust Laws: Proposed Rule On May 6, the USDA Agricultural Marketing Service issued a proposed rule, available [here](#), that would add “accentuate” the applicability of U.S. antitrust laws to federal fruit, vegetable, and specialty crop marketing orders and agreements.

FOOD LAW

Alcohol/Distilleries On May 21, 2015 legislation that would reduce excise taxes on distillers was introduced in the U.S. House and Senate. The House bill is the Distillery Innovation and Excise Tax Reform Act ([H.R. 2520](#)). The Senate bill is the Distillery Excise Reform Act ([S. 1444](#)).

USDA FSIS & Veal Calves: Proposed Rule USDA Food Safety Inspection Service issued a proposed rule, available [here](#), that would require that non-ambulatory veal calves offered for slaughter be condemned and euthanized.

USDA FSIS & HACCP Validations: Agency Guidance On May 14, USDA FSIS issued a notice, available [here](#), announcing the availability of the final revision of the Compliance Guideline for Hazard Analysis Critical Control Point (HACCP) systems validation. The final revision responds to comments submitted in conjunction with the draft guidance [proposed rule](#) issued in May 2013.

USDA FSIS & Mechanically Tenderized Beef Products: Final Rule On May 18, USDA FSIS issued a final rule, available [here](#), in response to public health concerns to require the terms “mechanically tenderized,” “blade tenderized,” or “needle tenderized” as well as validated cooking instructions to appear on the labels of certain raw or partially cooked needle- or blade-tenderized beef products.

FDA & Mandatory Food Recalls: Agency Guidance An FDA-issued draft Industry Guidance, available [here](#), addresses implementation issues under the mandatory food recall provisions of the Food Safety Modernization Act (FSMA). Federal Register notice available [here](#).

FDA & Antimicrobial Animal Drugs: Proposed Rule On May 20, FDA issued a proposed rule titled, “Antimicrobial Animal Drug Sales and Distribution Reporting”, available [here](#), that, among other provisions, sets out the practices and procedures for annual reporting to FDA of new animal drugs containing an antimicrobial ingredient sold or distributed for use in food-producing animals. The FDA [website](#) states that the proposed rule “would require animal drug sponsors to submit species-specific estimates of antimicrobial sales for cattle, swine, chickens, and turkeys.”

FDA & Compounding Animal Drugs: Notice FDA issued a [notice](#) announced the availability of a draft guidance for industry titled, “Compounding Animal Drugs from Bulk Drug Substances”, available [here](#), as well as the withdrawal of the July 2003 compliance guide titled dealing with compounding of drugs for use in animals.

FDA & Veterinary Drugs in Human Food: Notice On May 13, FDA issued a notice, available [here](#), announcing the availability of a revised industry guidance titled, “Studies to Evaluate the Safety of Residues of Veterinary Drugs in Human Food: Genotoxicity Testing.”

School Nutrition & Sodium/Grains: Congress On May 21, the Healthy School Meals Flexibility Act of 2015 ([H.R. 2508](#)) was introduced in the U.S. House of Representatives, which seeks to amend rules

applicable to certain school meals, foods, and snacks for sodium as well as grain content. This action follows the introduction of [S. 1146](#), an identical proposal in the U.S. Senate in late April 2015 and introduction of the Reducing Federal Mandates on School Lunch Act of 2015 ([H.R. 1504](#)) in March 2015.

School Nutrition & Milk: Congress On May 19, the School Milk Nutrition Act of 2015 ([H.R. 2407](#)) was introduced in the U.S. House of Representatives, which seeks to increase milk consumption in schools.

Inorganic Arsenic & Rice: Congress On May 21, the *Reducing Food-Based Inorganic Compounds Exposure (RICE) Act of 2015* (H.R. 2529), a bill to establish limitations on the quantity of inorganic arsenic in rice and rice products, was introduced.

USDA APHIS & Veterinary Biologics: Final Rule USDA APHIS issued a final rule, available [here](#), that will require that veterinary biologics prepared under the veterinary practitioner exemption “be prepared at the same facility the veterinarian utilizes in conducting the day-to-day activities associated with his or her practice.”

AG MARKETS/TRADE & ECONOMY

Trade Promotion Authority On May 22, the U.S. Senate passed the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 ([S. 995](#)) better known as Trade Promotion Authority or “fast track” legislation, by a vote of 62-37. The legislation is a key step towards advancing the Trans Pacific Partnership and Trans Atlantic Trade and Investment Partnership free trade agreements.

U.S. Grain Standards Act: Congress The United States Grain Standards Act Reauthorization of 2015 ([S. 1417](#)) was introduced May 21, 2015. The U.S. House Agricultural Committee passed the House version ([H.R. 2088](#)) on April 30. Recommended Resource: Congressional Research Service Report, *U.S. Grain Standards Act: Potential Reauthorization in the 114th Congress*, available on NALC website [here](#).

Port Disputes: Congress On May 12, the Port Performance Act of 2015 ([S. 1298](#)), a bill that would impose data collection for exports at major ports and reporting requirements triggered when the data demonstrates declines in exports before and after labor agreements, was introduced.

USTR, WTO, & China: Notice The United States Trade Representative has requested, notice available [here](#), the establishment of a WTO Dispute Settlement Panel to examine whether certain Chinese policies provide export-contingent subsidies to businesses with several industrial sectors in China, including agriculture.

Country of Origin Labeling: Congress Following the WTO decision that COOL violates international trade rules, Congress initiated actions regarding COOL. The Country of Origin Labeling Amendments Act of 2015 ([H.R. 2393](#)) would amend the repeal country of origin labeling requirements for beef, pork, and chicken. Recommended resource: CRS Report, *Country-of-Origin Labeling for Foods and the WTO Dispute on Meat Labeling*, available on NALC website [here](#).

CFTC & Forward Contracts: Final Interpretation On May 18, the Commodity Future Trading Commission (CFTC) and the Security and Exchange Commission jointly issued a final interpretation, available [here](#), that seeks to clarify its position regarding forward contracts with embedded volumetric optionality.

CFTC & Trade Options: Notice On May 7, The CFTC issued a notice of proposed rulemaking, available [here](#), that would amend the trade option exemption in CFTC regulations with respect to reporting requirements for trade option counterparties that are not swap dealers or major swap participants as well as recordkeeping requirements for trade option counterparties that are not swap dealers or major swap participants.

CFTC Reauthorization & Other Provisions: Congress On May 29, the U.S House Agriculture Committee approved the Commodity End-User Relief Act ([H.R. 2289](#)), which, among other items, would reauthorize the CFTC, impact some Dodd-Frank provisions, and exempt grain elevators and others from certain recordkeeping requirements.

ADDITIONAL DEVELOPMENTS

Chapter 12 Bankruptcy: Litigation In *In re Rachel Claire Myrstol Snider*, 530 B.R. 850 (Bankr. D. Mont. 2015), text of decision available via Google Scholar [here](#), it was held that debtor who gardened and claimed to have raised animals did not qualify as “family farmer.” Recommended Resources: NALC Bankruptcy Reading Room, including annotation of bankruptcy cases, available [here](#).

Horse Slaughter: Litigation In *New Mexico ex rel. v. Valley Meat Co., LLC*, No. CIC 14-1100 JB/KBM, slip. op., 2015 WL 3544288 (D.N.M. May 20, 2015), text of the decision available via Google Scholar [here](#), the court ordered that a lawsuit involving the potential opening of a commercial horse slaughter facility be remanded to state court. In so doing, the court ordered D’Allende Meats, LLC – an entity not actually a named defendant in the action – to pay just costs and expenses and attorneys’ fees to the State of New Mexico.

Horse Slaughter: Congress On May 15, the *Safeguard American Food Exports Act of 2015* ([H.R. 1942](#)), a bill that focuses on human health concerns to effectively prohibit the slaughter of horses in the U.S. and the export of horses to other countries for slaughter, was referred to the U.S. House Agriculture Subcommittee on Livestock and Foreign Agriculture. Similar legislation, the John Rainey Memorial Safeguard American Food Exports Act of 2015 ([S. 1214](#)) was filed in the Senate on May 6. Recommended Resource: Congressional Research Service Report, *Horse Slaughter Bills and Issues*, available on then NALC website [here](#).

FY16 Appropriations FY16 appropriations continues to move forward in both the U.S. House and Senate, with action expected in June and July.

Landowner Liability In *Gina Squinobal v. Robert Zenko et al.*, NO. FBTCV116018033, 2015 WL 3555284 (Conn. Super. Ct. May 8, 2015) (unreported), the Superior Court of Connecticut denied a motion for

summary judgment in a matter involving plaintiff Gina Squinobal who was allegedly injured while working on defendants' farming operation.

County Pet Breeder Ordinance In *Missouri Pet Breeders Ass'n v. Cnty of Cook*, No. 14C6930, 2015 WL 2448332, --- F.Supp.3d ---, (N.D. Ill. May 21, 2015), text of the decision available via Good Scholar [here](#), a pet breeders association and three pet store owners filed an action against a county and county officials challenging a county ordinance that regulated the sale of dogs, cats, and rabbits in pet stores. The defendants' motion to dismiss was granted, but the court expressly provided the plaintiffs a time-sensitive opportunity to cure the complaint.

Local Zoning vs. Farm Operation In *Twp. Of Williamston v. Hudson*, No. 321306, 2015 WL 2437172, --- F.Supp.3d --- (Mich. Ct. App. May 19, 2015), the Michigan Court of Appeals held that the Michigan Right to Farm Act did not protect a farming operation from local zoning ordinances. Text of the decision via Google Scholar is available [here](#).

Crop insurance: Litigation In *SMS Planting Company v. Farm Bureau Mutual Insurance Company of Arkansas, Inc.*, 2015 Ark. App. 331 (Ark. Ct. App. 2015), text of the decision available via Google Scholar [here](#), the Arkansas Court of Appeals reversed a circuit court decision, ruling that a fact issue remained as to whether damage to rice crop stored in grain bins was caused by lightning or windstorm within the meaning of the peril policy and whether an agent failed to properly advise insured about coverage needs.

Crop Insurance: Litigation In *Nat'l Union Fire Ins. Co. of Pittsburgh v. Florida Crystals Corp.*, No. 14-81134-CIV, slip. op., 2015 WL 2374426 (S.D. Fla. May 11, 2015), text of decision available via Google Scholar [here](#), the court denied an insurer's motion for summary judgment in an action brought by insurer asserting that under the policy it had no duty to defend a sugarcane operation in a separate state court action involving aerial drift.