2017 Ag Law Year in Review – Federal Level

Tiffany Dowell Lashmet, Texas A&M Agrilife Extension Service

2017 has been a busy year on the agricultural law front. From WOTUS to "ag gag," Syngenta to Dicamba, there has been no shortage of drama this year. Here is a look at some of the most important issues on the federal level.

EPA heads back to the drawing board to re-draft WOTUS rule.

Where to even start? Readers likely remember back in 2015 when the EPA published a rule offering a definition of what constitutes a "Water of the United States" pursuant to the Clean Water Act. Before the ink was dry on that rule, numerous lawsuits were filed claiming the 2015 rule exceeded the scope and power given to the EPA by the Clean Water Act. The US Court of Appeals for the Sixth Circuit entered a nationwide stay, so the rule never went into effect. [Read prior blog post here and listen to prior podcast episode here.]

In February 2017, President Trump issued an Executive Order requiring the EPA and US Army Corps of Engineers to "rescind or revise" the 2015 rule and that the agencies should "consider interpreting" the term consistent with Justice Scalia's opinion in the *Rapanos* decision. [Read prior blog post here.]

The EPA and COE followed President Trump's Executive Order and have begun the process to rescind and replace the 2015 rule. They have created a two-step process by which they will first rescind the 2015 rule and then will turn to crafting a new definition. The first step has undergone notice and comment rulemaking and a published rule rescinding the 2015 rule should be forthcoming. [Read prior blog post here.]

In October, the US Supreme Court took up the WOTUS issue, but in a very limited fashion. The Court heard oral arguments on the issue of jurisdiction only--should it be an appellate level court (like the 6th Circuit) or a trial level court who hears the lawsuits challenging the 2015 rule. This question will come down to how the Justices interpret the language of Section 509 of the Clean Water Act, which gives appellate courts jurisdiction over challenges to "any effluent limitation or other limitation" and permit approvals or denials. A decision has not been announced yet.

Meanwhile, in November, the EPA and COE have proposed a 2 year stay on the implementation of the 2015 WOTUS rule. They say this stay is necessary to ensure certainty in the event the 6th Circuit judicial stay is lifted for some reason.

California farmer "reluctantly" settles controversial WOTUS case.

Continuing on the WOTUS front, a California farmer settled a much-watched lawsuit involving a Clean Water Act claim. In 2012, John Duarte purchased 450 north of Sacramento intending to sow wheat. The property had been in agricultural production for decades, being farmed prior to 1988, then grazed by cattle from 1988 – 2012. When Duarte's employee began to plow the field, the US Army Corps of Engineers decided that low points in the field that collected water when it

rained, referred to as "vernal swales" constituted a Water of the United States, meaning that Duarte was required to obtain a federal permit under the Clean Water Act to plow his field.

The trial court sided with the Corps of Engineers, holding that the vernal swales were a WOTUS as they were hydrologically connected to a stream over 8 miles away that fed into the Sacramento River. Additionally, the "normal ongoing farming operation" did not apply to this property because plowing was not an ongoing operation during the years that the property had been grazed prior to Duarte's purchase. [Read prior blog post here.]

Duarte initially appealed, but in August, Duarte issued a statement that "given the risks posed by further trial on the government's request for up to $45 million in penalties…" he "reluctantly" agreed to settle the case. Under the agreement, Duarte does not admit liability, but will pay civil penalties of approximately $300,000 and purchase mitigation credits of approximately $770,000. There are also various limitations on how he can farm the field going forward. [Read prior blog post here.]

"Ag Gag" statutes held unconstitutional, additional challenge filed.

Statutes seeking to impose criminal penalties on activists who either trespass on farms or obtain employment through false pretenses to record undercover video of agricultural operations have repeatedly been deemed unconstitutional this year. Most notably, federal district courts in Idaho and Utah have held that the states' respective statutes violate the First Amendment Free Speech Clause and the Fourteenth Amendment Equal Protection Clause of the United States Constitution. The Idaho case is currently pending on appeal before the United States Court of Appeals for the Ninth Circuit, and Utah announced that it will not appeal the lower court ruling. Additionally, in October, animal rights groups filed suit in Iowa, making similar challenges to that state's "ag gag law." [Read prior blog posts here and here, and listen to prior podcast episode here].

Tentative settlement reached in cases pitting corn farmers against Syngenta.

Numerous cases across the United States were filed by farmers against Syngenta related to Syngenta's release of genetically modified corn seeds containing the MIR-162 trait. Although the seeds were approved for planting in the United States, they were not approved for China for exporting from the US. When corn containing the MIR-162 trait was found in 2013 corn shipments, China rejected these shipments at the border. Shortly thereafter, corn prices fell. Plaintiffs from numerous states filed putative class action lawsuits against Syngenta, alleging that they acted negligently in marketing and selling these seeds, causing corn prices to drop and monetary damages to producers who did not plant the seeds. [Read prior blog post here.]

Most of the cases were consolidated in the Multi-District Ligation Court in Kansas. Nine classes were certified initially, with numerous other states with claims filed and certification pending. In June, the first trial awarded Kansas farmers nearly $217 million on a negligence claim. With additional cases coming down the pike, and a trial underway in Minnesota on similar claims, Syngenta announced in September that they had reached a tentative settlement of the

lawsuits. Details have yet to be worked out and approved by the court, but Reuters News reported that the settlement amount was to be $1.5 billion. [Read prior blog posts here and here.]

Case limiting scope of Endangered Species Act reversed on appeal.

The People for the Ethical Treatment of Property Owners won a huge trial level decision in Utah federal court in 2014, when the judge held that the Endangered Species Act could not apply to the Utah Prairie Dog since it was a purely intrastate animal. [Read prior blog post here.] This year, however, the United States Court of Appeals for the Tenth Circuit reversed that decision. Specifically, the court found that Congress had a rational basis to conclude that the Endangered Species Act, in the aggregate, substantially affects interstate commerce. Plaintiffs are seeking review by the United States Supreme Court. [Read prior blog posts here.]

Flood of new lawsuits related to pesticide Dicamba.

Almost certainly, the biggest ag law news story this year involved claims of damage caused by pesticide drift from over the top application of Dicamba on soybeans and cotton. With the development of genetically modified soybean and cotton plants that are tolerant to Dicamba, many producers turned to this pesticide to help control resistant weeds. Throughout the country, there have been numerous lawsuits filed related to Dicamba. [Read prior blog post here.] Several class action suits have been filed against Monsanto, the developer of Xtend soybean and cotton seeds and the corresponding XtendiMax pesticide. Monsanto has filed a claim of its own in Arkansas against the Arkansas State Plant Board, which prohibited the use of the Monsanto product last year in the state, and which has imposed an April 15 deadline on application for 2018. Lawsuits have also been filed against the EPA for approving the use of Dicamba at all. In October, the EPA announced it was making numerous changes to the label for three new Dicamba formulations, including XtendiMax and Engenia. Most importantly, these pesticides will now be restricted use, meaning that person will be required to have an applicator's license and training the purchase the products. Additionally, changes have been made to maximum wind speeds, times when the product may be applied, and recordkeeping requirements will increase. [Read prior blog post here.]

Court holds that agriculture is not exempt from federal air emissions standards.

In April, a D.C. Circuit opinion involving air emissions and agriculture caused concern among many animal agriculture groups. The Court in *Waterkeeper Alliance v. EPA* found that exemptions that excluded agriculture from reporting air emission requirements under federal CERCLA and EPCRA environmental statues were illegal. These statutes require reporting of "any release" into the air of hazardous substances above a certain threshold. Now that agriculture is no longer exempt per the court's ruling, this would include animal agricultural operations emitting hazardous substances from animal wastes. After an additional stay was entered by the court, reporting will not be required until January 22, 2018. In October, the EPA issued "guidance" on reporting releases of hazardous substances from animal waste, stating that releases of substances such as ammonia and hydrogen sulfide in an amount over 100 pounds of either from an entire farm per 24-hour period would trigger the reporting requirement. The

guidance offers direction on how to calculate emissions from various animal operations. [Read prior blog post here.]

Court finds that damage caused by manure excluded from insurance coverage containing "pollutant exclusion."

A Washington case offers an important reminder for ag producers to carefully read and understand liability insurance policies. This case was an insurance coverage dispute between a dairy farm, which was accused of polluting groundwater with inadequate manure storage and application practices, and their insurance company. When the dairy contacted the insurer about the underlying lawsuit being filed, the insurer denied both indemnification and defense to the dairy, stating that claims related to manure were excluded from coverage pursuant to the "pollutant exclusion" clause in the insurance policy. This is the second case in recent years reaching this conclusion and could have important impacts on ag operations facing claims of damage related to manure. [Read prior blog post here.]

Ninth Circuit holds that federal reserved water rights includes groundwater.

A really interesting and important issue was before the United States Court of Appeals for the Ninth Circuit. When the federal government sets aside lands for purposes such as an Indian Reservation or a National Park, the government also reserves "appurtenant water then unappropriated to the extent needed to accomplish the purpose" of the land. In this case, the federal government created a reservation in California for the Agua Caliente Band of Cahuilla Indians (the Tribe) in the 1800's. A question arose as to whether the federally reserved water rights included groundwater, as well as surface water. This is an extremely important issue for the Tribe because this particular area of California is extremely dry, receiving only 3-6 inches of rain per year and having a very limited supply of surface water. No federal court had addressed this issue, but the US Court of Appeals for the Ninth Circuit held that the federally reserved water rights does include groundwater. The court also stated that these federally reserved rights preempt state groundwater law. The case was appealed to the US Supreme Court, but they declined to hear the matter. The case will now proceed back to the trial court to determine the quantity of water reserved to the Tribe. Given water shortages and large amounts of federally owned land across the West, this decision could have major implications for groundwater rights in many states. [Read prior blog post here.]

So that's a wrap of the key agricultural legal issues for 2017. No doubt, 2018 will bring even more exciting news and cases.