

Agricultural Management Committee Newsletter

*A joint newsletter of the Agricultural Management Committee
and the International Environmental and Resources Law Committee*

Vol. 17, No. 3

July 2013

CHAIR MESSAGE

Thomas P. Redick, Jennifer Wills, and Brett Grosko

As the chairs of Agricultural Management and International Environmental and Resources Law Committees, we offer this joint newsletter with information relating to the intersection of international environmental and agricultural environmental law.

This newsletter features an internationally-oriented regulatory update from Thomas Redick that also provides important news relating to the U.S. Department of Agriculture's decision to change its regulatory approach to biotech crop approval. Next, Chad Burchard reviews a case that is litigating the issue of major market approval for biotech crops. Jillian Hishaw then sums up the controversy (*United States vs. European Union*) on pesticides that may be harming bees. We close with a point-counterpoint on genetically modified (GM) labeling law from Anna Bennett and Mircha King (with a chart listing representative GM labeling laws from Thomas Redick).

We are pleased to report that SEER had a very successful Spring Conference in Salt Lake City, Utah, with programs on agriculture and a plenary session on the Clean Water Act. The 42nd Spring Conference addressed various issues of relevance to agricultural and international environmental lawyers on climate change regulation and litigation, with its agricultural angles and content relating to water pollution and including programs on hydraulic fracturing and

expanding litigation under the Resource Conservation and Recovery Act.

Members should start planning now for the 21st Fall Conference in Baltimore, Maryland. We encourage members to attend and enjoy interesting CLE content and networking with colleagues. SEER is committed to providing the information and assistance that our members need to be better lawyers. Our committees enjoy active participation by members, with quality programs arising from member involvement. If you would like to be a part of program planning or committee activities, please let us or Agricultural Management Programs Vice Chairs Brandee Ketchum (brandee.ketchum@la.gov) and Brandon Neuschafer (bwneuschafer@bryancave.com) or the International Environmental and Resources Law Committee Program Vice Chair Juge Gregg (juge@stanfordalumni.org), know about your interest and ideas.

Programs of possible interest to the agricultural environmental lawyer at the Fall Meeting in Baltimore are:

- Adapting After Natural Disasters: Building Resiliency Through Policy, Legal, and Regulatory Approaches
- TMDL Regulation: How EPA's Chesapeake Bay Initiative May Spread to Your Watershed
- State Authority on Climate Change: Where Are the Commerce Clause Boundaries?

continued on page 3

**Agricultural Management
Committee Newsletter**
Vol. 17, No. 3, July 2013
Jillian Hishaw, Guest Editor

In this issue:

Chair Message

Thomas P. Redick, Jennifer Wills, and
Brett Grosko 1

Regulatory "Hot News" Corner

Thomas P. Redick..... 3

***Syngenta Seeds, Inc. v. Bunge North
America, Inc.***

Chad Burchard 5

**Why Are Bees Dropping like Flies? The
U.S. and EU Struggle to Find the Right
Regulatory Approach**

Jillian Hishaw 5

GMO Labeling—Truth Beyond the Hype

Anna K. Bennett 7

**GMO Labeling Article: Pro and
Opposition Arguments**

Mircha Chad King..... 10

Chart of Labeling Laws

Thomas P. Redick..... 13

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**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

August 1-2, 2013

**25th Annual Texas Environmental
Superconference**

Austin, TX

Primary Sponsor: State Bar of Texas,
Environmental and Natural Resources Law
Section

August 8-13, 2013

ABA Annual Meeting

St. Regis

San Francisco, CA

October 9-12, 2013

21st Fall Conference

Hilton Baltimore

Baltimore, MD

March 20-22, 2014

43rd Spring Conference

The Grand America Hotel

Salt Lake City, UT

June 4-6, 2014

32nd Annual Water Law Conference

The Red Rock Resort, Casino and Spa
Las Vegas, NV

October 8-11, 2014

22nd Fall Conference

The Trump Doral Golf Resort & Spa
Miami, FL

**For full details, please visit
www.ambar.org/EnvironCalendar**

continued from page 1

Demands for sustainability information from producers might play a role in “The Corporate Supply Chain Goes Global: What You Need to Know to Counsel Your Multinational Client”—if the Fall Conference follows the pattern we saw in Salt Lake City, many sessions will have agricultural content that emerges in other discussions.

International angles on issues also come up in various sessions, including the session on the Corporate Supply Chain session mentioned above.

While it might be far afield for some agricultural management attorneys, fracking will be raised at the Fall Meeting session concerning “Energy Exports: A New Market with Legal Import!” The Agricultural Management committee would welcome an article on this topic outlining the benefits and costs of fracking to a typical agricultural community.

Lastly, for anyone who needs ethics credits to meet an MCLE deadline, this year’s Fall Conference will have another plenary session on professional ethics.

If you want to get more involved in any of our committees’ activities, including any topics that you would like to write about in a future newsletter, please let us know (Agricultural Management—Tom Redick at thomasredick@netscape.net; International Environmental and Resources Law editor Andrew Long, along@fcsl.edu). Additional contact information for our committees is available on the committee Web sites. Our committee newsletter editors are always ready to entertain article ideas. Both of our committees appreciate periodic guest editors who help to get out their respective newsletters. We would especially like to thank Jillian Hishaw, the guest editor for this issue.

Thomas P. Redick is chair of the Agricultural Management Committee and *Jennifer Wills* and *Brett Grosko* are co-chairs of the International Environmental and Resources Law Committee.

REGULATORY “HOT NEWS” CORNER

Thomas P. Redick

The U.S. Department of Agriculture (USDA) issued its final rule on country-of-origin labeling (COOL) to comply with a recent World Trade Organization (WTO) ruling supporting Canada and Mexico. Over 200 organizations commented in support of keeping COOL in place if labels are made detailed to comply with WTO’s requirements as USDA has proposed. Other major meat, poultry, and retail trade associations, however, have asked USDA to delay implementation of a proposed new rule to fix the program until the WTO determines whether it brings the United States into compliance. Canada is working to implement a COOL system and nearly 50 other countries have either enacted or plan to enact COOL.

The Office of the U.S. Trade Representative is seeking public comments on “all issues related to Japan’s participation in the Trans Pacific Partnership trade negotiations . . . [including] certain non-tariff measures of Japan that will be conducted bilaterally like accelerating and streamlining risk assessments related to common food additives, fungicides etc.”

In a momentous decision that seeks to end National Environmental Policy Act litigation, the Animal and Plant Health Inspection Service (APHIS) of USDA intends to prepare environmental impact statements for an upcoming *Federal Register* notice that is subject to public comment. The Biotechnology Industry Organization (BIO) expressed disappointment in the decision, and suggested “this action by the Agency sets bad precedent” (while the prepublication *Federal Register* notice states a 30-day comment period, the Biotechnology Regulatory Services (BRS) news release states that public comments are due within 60 days of the date of publication of the notices). Links to this historic decision are set forth below.

USDA EIS Links (All May 10, 2013)

- BRS APHIS News Release, http://www.aphis.usda.gov/newsroom/2013/05/brs_24d_and_dicamba.shtml

- BRS, *Questions and Answers: Notice of Intent to Prepare Environmental Impact Statements for 2,4-D and Dicamba Genetically Engineered Plants Under Consideration for Deregulation,*” http://www.aphis.usda.gov/publications/biotechnology/2013/faq_brs_24d_and_dicamba.pdf
<http://www.aphis.usda.gov/biotechnology/news.shtml>
- APHIS Prepublication Federal Register Notice, Dow AgroSciences LLC; Notice of Intent to Prepare an Environmental Impact Statement for Determination of Nonregulated Status of Herbicide Resistant Corn and Soybeans, and Notice of Virtual Public Meeting, http://www.aphis.usda.gov/brs/fedregister/fr_noi_eis_aphis_13_042_1.pdf
- APHIS Prepublication Federal Register Notice, Monsanto Co.; Notice of Intent to Prepare an Environmental Impact Statement for Determination of Nonregulated Status of Herbicide Resistant Soybeans and Cotton, and Notice of Virtual Public Meeting, http://www.aphis.usda.gov/brs/fedregister/fr_noi_eis_aphis_13_043_1.pdf
- BIO Statement, <http://www.bio.org/media/press-release/bio-statement-usda-announcement-further-analysis-needed-dicamba-and-2-4-d-resist>
- Save Our Crops Coalition (SOCC) issued a news release, USDA to Prepare an Environmental Impact Statement for Dicamba Tolerant Crops, which states in part that SOCC “is pleased that USDA has now chosen to undertake a comprehensive review of these crops. SOCC hopes that this process will better inform the decision makers at USDA and EPA about the vastly increased potential for non-target plant damage impacts caused by dicamba spray drift and volatilization.”
<http://saveourcrops.org/2013/05/10/usda-to-prepare-an-environmental-impact-statement-for-dicamba-tolerant-crops/>
- N.Y. TIMES, *Environmental Review to Delay Two Engineered Crops*, http://www.nytimes.com/2013/05/11/business/energy-environment/environmental-review-to-delay-two-engineered-crops.html?_r=0

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SYNGENTA SEEDS, INC. V. BUNGE NORTH AMERICA, INC.

Chad Burchard

On November 21, 2012, the U.S. District Court for the Northern District of Iowa issued a ruling in the case of *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, 906 F. Supp. 2d 827 (N.D. Iowa). The origins of the case lay in Bunge's refusal to accept Agrisure®Viptera™ corn until it had received approval from "major export markets," such as China. Bunge posted its policy about not accepting the biotech crop at its facilities and on its Web site.

Syngenta filed suit in 2011. Its complaint alleged that Bunge's policy was misleading in stating that Agrisure®Viptera had not received necessary overseas approval which was in violation of the Lanham Act's ban on false advertising. 15 U.S.C. § 1125(a). Syngenta also alleged violations of the U.S. Warehousing Act (USWA) and made various state law claims, including breach of contract and violation of Iowa's warehousing laws.

Previously, in September 2011, the court denied Syngenta's request for preliminary injunctive relief, finding no likelihood that it would succeed in any of its claims.

In its most recent ruling, the court granted Bunge's motion for judgment on the pleadings as to Syngenta's USWA and breach-of-contract claims, but not as to Syngenta's claim that Bunge's actions violated Iowa's warehousing laws. The court held that "[n]othing in the pleadings" disproved "Syngenta's allegation that some of Bunge's Iowa grain facilities are not federally licensed" (thus not preempted by the USWA) and therefore "subject to Iowa's warehousing laws . . ."

The court also granted Bunge's motion for summary judgment as to Syngenta's Lanham Act claim, holding that Syngenta could not show that it had engaged in "commercial competition" with Bunge or that Bunge had engaged in "commercial speech." In addressing the latter issue, the court noted that there was nothing

about Bunge's stated policy of not accepting Agrisure®Viptera that could qualify as "commercial speech" under the Lanham Act. The court concluded as a matter of law that "a statement of refusal to enter into a certain transaction, standing alone, is not a *proposal* of any transaction, and, hence, is not 'commercial speech.'"

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WHY ARE BEES DROPPING LIKE FLIES? THE U.S. AND EU STRUGGLE TO FIND THE RIGHT REGULATORY APPROACH

Jillian Hishaw

Domesticated honeybees are one of nature's primary pollinators. Pollinators transport pollen from male to female plants to pollinate crops. With the constant decline in bee colonies, many agricultural crops have suffered significant yield losses. In 1947, six million colonies resided in the United States. However, by 1970 the number declined to four million and in 1990 to three million. Today, the number of colonies reported is at 2.5 million with an annual loss of 30 percent. Many beekeepers, scientists, and agricultural groups attribute the decline to the increased use and toxicity of pesticides known as neonicotinoids. Produced by Bayer and Syngenta, neonicotinoids are absorbed in the vascular system of a crop and emitted in the pollen, protecting the crop against predators. Most neonicotinoid composition is directed toward providing seed treatments that protect against pests in corn and soybean crops.

Experts estimate that worldwide \$217 billion of crop production depends on honeybee pollination. In the United States, honeybee pollination is valued at \$19 billion. Due to the honeybee value, the EU's ban of the three neonicotinoids, clothianidin, imidacloprid, and thiamethoxam, some would argue, was based on accurate research and common sense. The European

Union's (EU) reasoning for the ban was primarily based on the European Food Safety Authority (EFSA) study that associated neonicotinoid use with the decline in honeybee health. Tonio Borg, European Commissioner for Health and Consumer Policy, pledged, "[I will] do my utmost to ensure that our bees, which are so vital to our ecosystem and contribute over •22 billion [\$29 billion] annually to European agriculture, are protected." The ban will go into effect on December 1, 2013.

Bayer, the maker of clothianidin and imidacloprid, called the EU decision "a setback for technology, innovation, and sustainability." Bayer stated that "clear scientific evidence has taken a backseat in the decision-making process."

On May 2, 2013, the U.S. Environmental Protection Agency (EPA) and U.S. Department of Agriculture (USDA) issued a joint report on honeybee health, stating that "acute and sublethal effects of pesticides on honeybees have been increasingly documented, and are a primary concern." In addition to these threats, they attribute bee declines to "parasites, disease, genetics, poor nutrition and pesticides use" as a perfect storm of challenges to colony health. *See* <http://www.usda.gov/documents/ReportHoneyBeeHealth.pdf>.

According to the joint report, if bees consumed pollen from nonpesticide fields, bee health would improve. With USDA projecting corn crops to cover 94 million acres in 2013, the likelihood of bees consuming pollen from neonicotinoid fields is highly probable. EPA's and USDA's reason for "poor nutrition" could arguably link colony decline to pesticide use. EPA estimates its review of all registered neonicotinoid agents will not be complete until 2018. To expedite the review process in March, the Sierra Club, along with other environmental groups, filed suit against EPA to prohibit the use of neonicotinoids.

On May 8 2013, on the heels of the EU's two-year ban on neonicotinoid use in the EU and the joint report noted above, EPA approved the use of sulfoxaflor, a new insecticide that could prove fatal to bees. According to EPA, the decline in bee colonies is due to

a multitude of factors, not just pesticide use. May Berenbaum, a bee researcher at the University of Illinois and participating scientist of the conference that produced the EPA/USDA report, stated that "more than 100 different chemicals—not just the pesticides that may be banned in Europe—have been found in bee colonies. Scientists find it hard to calculate how they react in different dosages and at different combinations."

Neonicotinoid proponents argue the EFSA study used limited information on pollinators other than honeybees and advised that the ecology and behavior of other pollinators differed enough to require further risk assessments on other pollinators. In each instance, the EFSA concluded that "a high risk was indicated or could not be excluded in relation to certain aspects of the risk assessment for honeybees for some of the authorized uses. For some exposure routes it was possible to identify low risk for some of the authorized uses." EFSA concluded that dust exposure to bees during time of planting (*i.e.*, dust clouds) and dust drift (*i.e.*, deposition on plants in neighboring fields) posed the highest risk to honeybees.

The United Kingdom (UK) is considering implementing the recommended ban despite a recent report by the Humboldt Forum for Food and Agriculture, which estimated that banning neonicotinoids could cut yields of some crops by up to 20 percent and cost the UK economy £630 million (around \$850 million annually). The Humboldt study, released January 15, 2013, warns that a ban on neonicotinoid seed treatments could cost the EU economy up to •17 billion (\$22.6 billion), put 50,000 jobs at risk, and threaten sustainable food production. Due to the ban, the next step could be to restrict imports from nations still using neonicotinoids in corn, soy, and other crops. According to Roger Waite of the European Commission, "[T]he size of the economic damage was difficult to assess and had not been taken into account when the decision was taken."

No matter what the reason, the fact remains that bee populations are plummeting at an alarming rate. With beekeepers reporting over a 50 percent loss this year, California almond farmers who rely on billions of bees

to pollinate their orchards to produce 80 percent of the world's almonds are eager to implement stewardship. See Environmental Protection Agency, PESP Wire (Spring 2013), <http://www.epa.gov/pestwise/news/pep/pepwire-2013-04.pdf>. Additionally, EU rapeseed growers who produced 19.3 million tons of the 60.7 million tons of canola oil worldwide during the 2012-2013 season are feeling the pinch.

Unfortunately, outside of the banned "Big 3" pesticides, EU rapeseed growers do not have any other pesticide alternatives, leaving their crops susceptible to pests like the peach potato aphid, which causes the spread of the turnip yellow virus, resulting in 30 percent yield loss.

The bottom line is something is causing the decline of bee populations; unfortunately, the debate and crop and money loss will continue as bees drop like flies, waiting for a solution.

Jillian Hishaw Agricultural Attorney Charlotte, North Carolina.

Leadership Development Program

Applications Now Accepted Deadline August 12, 2013

Now in its fourth year, the LDP is designed to support Section members interested in expanding a current leadership role or growing their knowledge of the Section so that they can assume a leadership role in the future. These individuals reflect diversity and help the Section support ABA Goal III. It is our hope that at the conclusion of this program, LDP participants will have a better sense of how the Section operates and of leadership opportunities available, and will be better able to focus their future Section involvement.

For details visit:

**[http://www.americanbar.org/groups/
environment_energy_resources/](http://www.americanbar.org/groups/environment_energy_resources/)**



GMO LABELING—TRUTH BEYOND THE HYPE

Anna K. Bennett

Those who oppose the use of genetically modified organisms (GMOs) for food often conjure images of so-called Frankenfood to play on the hearts and minds of the public. It is a good strategy—few will tell you that they are excited to eat a strawberry that contains fish DNA. GMO opponents also cloak their campaigns in the language of consumer choice, truth in advertising, and the need for wholesome, safe food. The truth is, most laws that seek to require GMO food labeling do not address any of these issues and, in fact, can cause more harm. Here are some (but not all) of the most important reasons why GMO labeling laws are not the way to achieve these goals.

No Scientific Evidence That GMOS Are Harmful

One of the most commonly cited justifications for GMO labels is that GMO products are harmful to consumers. Specifically, critics of GM foods often recite the refrain, "If we don't know whether a food is a GMO, how will we know if it causes any health problems?" However, fears such as allergenicity are misplaced—there have been hundreds of peer-reviewed studies conducted on known GMOs, none of which have shown any negative health effects of GMO consumption. See David Tribe, *470+ Published Safety Assessments on GM Foods and Feeds*, GMO Pundit Blog (June 12, 2007), <http://gmopundit.blogspot.com/2007/06/150-published-safety-assessments-on-gm.html>. In fact, this lack of proof is the primary reason there is no federal mandatory labeling scheme.

The Food and Drug Administration (FDA) says that GMOs are "substantially similar" to conventional species, pose no greater risk to health than any conventional species, and thus require no labels. In contrast to these fears, many developing nations have embraced GMO technology because GM crops can be engineered to provide more nutrients than conventional crops, proving useful in the struggle to feed starving populations more effectively.

GMO Labeling Does Not Increase Consumer Knowledge

A second commonly cited reason for GMO labeling is that consumers deserve the right to know what is in their food. However, even if this is true, GMO labeling does not stand to greatly increase consumer knowledge. In today's industrial food system, there are many ingredients derived from either corn or soy, most of which are genetically modified. A simple label stating "This Food Contains GM Ingredients" would do nothing to alert a consumer as to *which* ingredients were GM, making tracking of any health or allergenicity claims nearly impossible. Additionally, most individuals do not understand GM technology or what GM means—there is a strong possibility that labeling would only cause confusion and misinformation. Finally, studies have shown that increased labeling can cause consumer attention to labels to actually *decrease*. This has led labeling opponents such as the American Medical Association to conclude that consumers might actually pay *less* attention to labels that are more important, such as calorie content or health claims, due to labels that are only marginally informative. See American Medical Association, *Report 10 of the Council on Scientific Affairs: Genetically Modified Crops and Foods*, <http://www.ama-assn.org/ama/no-index/about-ama/13595.shtml> (last visited Jan. 18, 2013).

GMO Labeling Laws Have Industry-Driven Loopholes

Further adding to the lack of information or effectiveness derived from a mandatory labeling law, many GMO labeling laws have loopholes that cater to industries that support the laws. A major example is the most recent California law, Proposition 37 (voted down in November 2012), which contained a loophole for organic foods, legally allowed to contain a small percentage of GM genes, as long as the farmer did not purposely use GM technology. GMO AWARENESS, <http://gmo-awareness.com/2011/05/05/is-organic-always-gmo-free> (last visited Jan. 15, 2013) (listing ways that organic foods may include GMO ingredients). In addition to frequently exempting organic foods, many GMO labeling laws have such a

low threshold percentage of GMO ingredients that they would force all products to require a label. For example, Proposition 37 had a zero percent tolerance level for GMO ingredients, which is impossible to achieve. See GARY E. MARCHANT, ET AL., THWARTING CONSUMER CHOICE 46 (2010) (describing how GM tracking cannot be achieved by generic GMO labels because of the prevalence of genetically modified commodity crops in other foods and how labeling GMO thresholds in state laws create labeling burdens for all crops). Had the California law passed, almost every (if not every) non-organic product would have required a label regardless of its minimum GMO percentage. For the organic industry, Proposition 37 would have created a purchasing boom that was largely based on misinformation and loopholes.

I-522, the pending Washington State labeling initiative, has similar loopholes for organic foods. The tolerance level of GM genes within I-522 is 0.9 percent, which means that all non-organic foods would have to meet the same standard that Whole Foods requires of its products. However, there are exemptions within the statute for foods from restaurants, medical foods, alcohol, meat, and dairy products. Indeed, most labeling laws, including Proposition 37 and I-522, contain loopholes for meat products derived from animals that were fed GMO food (or are even GMOs themselves). As was true of Proposition 37, the class of products that would not require labels under I-522 is extensive. In many cases, the food manufacturers that support labeling initiatives are large organic food producers, *e.g.*, Kashi, that stand to gain greatly from the proposed exemptions. As major food producers often fund initiative campaigns, these loopholes are not likely to go away in future iterations of state labeling laws.

GMO Labeling Laws Preempted by Federal Regulations

The reason that states seek to enact GMO labeling laws is because there are no federal laws that explicitly require or reject labeling of GMOs. However, a 1992 policy letter from FDA specifically states that there is no federal labeling requirement for any product that is "substantially similar" to a conventional product. FDA

contends that because GMOs are substantially similar to their conventional counterparts, there is no need for labels. The primacy of federal labeling requirements, combined with this statement of policy, likely forecloses any state law on the subject of mandatory GMO labeling because it would conflict with federal law. *See Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166 (D.D.C. 2000) (a citizen group directly challenged FDA’s GMO labeling policy; the court found that requiring labeling for substantially similar products that are not “materially different” would be mislabeling under federal law). The question of whether state laws are preempted is important to the laws’ survival. The only sure thing these laws will bring is the promise of long costly litigation in court.

GMO Labeling Laws Likely Violate the First Amendment

Another possible conflict—beyond preemption—is that state mandatory labeling laws likely violate the First Amendment. In *International Dairy Foods Ass’n, et al. v. Amestoy*, the Second Circuit held unconstitutional a Vermont law requiring disclosure of whether dairy products were made with milk from cows that had been treated with the growth hormone rBST. 92 F.3d 67 (2nd Cir. 1996). Vermont enacted its law in the wake of consumers upset upon learning that it was common practice for commercial dairy cows to be treated with rBST, a synthetic version of a naturally-occurring cow hormone, bovine somatotropin (BST). The court considered FDA statements on the safety of rBST and its lack of appreciable effect on human health, and ultimately held that consumer desire for information alone cannot compel manufacturers to speak against their will. In a moment of foresight, the *Amestoy* court stated that “[w]ere consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods.” Given that FDA has also determined that GMOs are safe for human consumption and do not expose consumers to any risk, mandatory GMO labeling laws would likely also be an unconstitutional violation of the First Amendment rights of food companies.

GMO Labeling Laws Stress the Food System

Depending on the law, a GMO labeling scheme may place responsibility for assuring compliance not on manufacturers, but on retailers instead. Proposition 37 is an example—it placed the burden of ensuring proper product labeling on retailers, not manufacturers. This would require retailers to adopt elaborate systems to ensure that all products coming into their stores comply with labeling provisions, the costs of which the retailers would likely pass onto the consumers. Higher food prices mean that low-income individuals will have to eat lower on the food chain, leading to increased public health problems already plaguing their communities.

Apart from paying any applicable penalties, retailers would also face the possibility of litigation. For example, Proposition 37 created a citizen-prosecutor provision, which allowed citizens to sue retailers for failing to ensure 100 percent label compliance. I-522 creates a similar citizen-prosecutor allowance. In addition to increasing administrative costs, retailers would also pass the costs of litigation onto consumers. Corner stores and local grocers are also susceptible to litigation due to noncompliance, increasing the likelihood of driving out small business. Additionally, many urban areas are working to end “food deserts” by offering incentives to grocers who locate in designated areas. However, increased liabilities for noncompliance would surely discourage large and small retailers from establishing much-needed food outlets in underserved areas.

Furthermore, this patchwork quilt of GMO food labeling laws would create a regulatory nightmare for food companies that are already inundated with bureaucracy and red tape. For example, as Washington State’s I-522 notes, 49 countries, including China, Russia, EU member states, and other key U.S. trading partners, have mandated GMO labeling. Many countries have restrictions or bans against GMO foods. Additional state compliance on top of the existing foreign regulation could add considerable expense to producing and selling food. International food trade associations such as the American Soybean Association have also argued to the

U.S. Trade Representative that GMO labeling laws violate the principles of the World Trade Organization, which seeks to eliminate unnecessary trade barriers between nations.

Federal Policy Against Labeling: Coming Soon?

Given the increased attention that GMO labeling laws have drawn in recent years, many within the food industry realize that this trend is not going to go away. With the industry's powerful lobbies and political allies that include former food company executives, it is likely that industrial food companies will pressure FDA to adopt an official non-labeling rule to expressly preempt any state attempts to regulate labeling in the future. Indeed, sources in the industry indicate that major food producers met with FDA in January 2013, possibly in an attempt to work out a uniform federal policy of non-labeling to divert any possible state action on the matter. *See* Ronnie Cummins, *Are Wal-Mart and Big Food Lobbying the FDA for a GMO Labeling Law?*, ORGANIC CONSUMERS ASSN. (Jan. 10, 2013), http://www.organicconsumers.org/articles/article_26864.cfm. With a lack of any evidence of harm, and a lot of evidence that mandatory labeling laws will only complicate the food business and raise prices, it is unlikely that the question of whether states can enact their own labeling schemes will remain unaddressed by federal courts for much longer.

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GMO LABELING ARTICLE: PRO AND OPPOSITION ARGUMENTS

Mircha Chad King

Do you really believe that “what you see is what you get” when you bite into a “where’s the beef” burger? Producers and companies who market food products for consumption are not required by law to label products as “may contain genetically modified ingredients.” Currently, U.S. food manufacturers are not mandated by federal law to label genetically modified organism (GMO) food products, due in part to a compromise between consumer rights and corporate-backed lobbying efforts of food manufacturers.

However, in California, Proposition 37 (Prop 37) sought to put an end to the compromise by demanding food transparency from manufacturers in the state. Had it passed last November, Prop 37 would have forced food processors in California that include trace genetically engineered (GE) ingredients in their products to apply warning labels alerting consumers of such content. In addition, Prop 37 would have given consumers legal standing to sue food manufacturers who failed to label GMO products or who misled consumers regarding their contents.

While voters in California chose to maintain the current Food and Drug Administration (FDA)-endorsed system of voluntary labeling, the Washington State Initiative 522 (WA-522) calling for GMO product labeling was submitted to the Washington legislature on January 4, 2013. The legislature can either enact it into law, reject it or abstain, or approve an amended initiative. Failure to act sends it to a public vote in November 2013. If the legislature amends the proposed law, that amended version and the original version go on the November ballot. The predicted outcome is no legislative action, letting I-522 go to voters this Fall.

FDA’s Voluntary Labeling Raises Concerns over Food Transparency

Under FDA’s policy of voluntary labeling, food manufacturers are not required to label their GMO

products. Similarly, manufacturers can label their food products as non-GMO, as long as the statement on the label does not imply or infer that non-GMO foods are superior to foods containing GMOs. This system of voluntary labeling encourages other manufacturers not to disclose their use of GMO inputs, leaving consumers to rely upon the manufacturer's independent labeling choice when determining if a particular product is healthy or desirable to eat. This is problematic for many consumers want to know which ingredients companies are placing in their food products.

Proponents of voluntary labeling argue that such a system provides real choices to consumers because they can choose to buy organic products or non-GMO products. However, this does not address the issue of food transparency as a whole because products that contain GMO traces and/or inputs are not being labeled. This can create a situation where consumers do not know what they purchased as they exit the grocery store. In most cases, the choice not to label GMO products is a consensus business decision. Many food manufacturers know that if consumers knew the contents of their favorite brands, many would opt to purchase other products without GE inputs.

The FDA policy of voluntary GMO labeling also allows food companies to label their products as "natural" despite containing GE inputs. This public frustration is currently being played out legislatively and legally. For example, in *Bolerjack v. Pepperidge Farms, Inc.*, a Colorado resident is suing the manufacturer for misleading consumers in labeling its Cheddar Goldfish crackers as natural when in fact they contain GMO soy derivatives. This case opens the question of how many more companies are misleading the American consumer under the FDA's policy of voluntary labeling.

Mandatory GMO Labeling Laws Coincide with International Mandates

This phenomenon of having to guess what is in one's food is uncommon in other countries. Many developed countries already have laws in place that require companies to label GMO products. All European Union (EU) countries, as well as China, Brazil, and

Australia, require GMO labeling. The EU labeling law requires that any food product containing more than 0.9 percent of GM inputs must be labeled, which is the same tolerance stated in the proposed WA-522 law. U.S. consumers deserve the same opportunity as their foreign counterparts in choosing whether to serve their families food products derived from a genetically manipulated plant or seed.

Prop 37 would have set an important precedent in the United States, forcing food companies to level with the consumers as to content. Some argue that Prop 37 would have demanded more organic inputs in processed foods, which would have driven up the retail prices of certified organic products, and as a result forced food processors in California to seek organic inputs from overseas organic producers. The concern of Prop 37 and similar labeling laws creating international trade barriers lacks substance. Advocates opposed to mandatory GMO labeling laws have cited international accords such as the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement) as examples of possible agreements that mandatory GMO labeling regulations may violate, but the United States has failed to take action over a 15-year period.

The SPS Agreement set international trade standards that protect the health and life of humans, plants, and animals. The SPS Agreement also influences food policies as it relates to pesticides, bacterial contaminants, and meat products that have been treated with banned growth hormones. Similarly, the TBT Agreement ensures that such regulations on international trade (like the SPS Agreement) will not create unnecessary barriers to trade by allowing policy implementation to achieve legitimate objectives regarding human health protection.

Mandatory labeling of GMO foods is in line with the spirit and intent of the TBT and SPS Agreements. The WTO has gone to great lengths to ensure that barriers to international trade, particularly among developed nations, are kept to a minimum. The SPS Agreement and other similar international agreements will not conflict with mandatory GMO labeling laws like Prop

37. As long as the proposed labeling efforts protect the general public welfare both domestic and international efforts can co-exist.

Environmental and Human Health Concerns of GMO Foods

Even if the above assertions are meritorious, the health concerns surrounding GMO products do not outweigh the cost that companies might incur in complying with labeling laws like Prop 37 and WA-522. Most Americans would agree with Gary Hirshberg, president of Stonyfield Farms, who stated that “while the debate is raging, consumers deserve the right to choose whether they want to support or embrace a system that promotes . . . chemical overuse” but the need for government mandates at the state level remains unclear.

Major U.S. agricultural corporations such as Monsanto and DuPont have spent billions in research and reaped more billions in profits to produce the premiere pesticide-resistant, herbicide-resistant “super crops.” Unfortunately, most of the staples that make up our food products, such as corn and soybeans, are genetically modified. Monsanto’s Web site defines plant biotechnology in part as “allowing for the transfer of one, or a few genes that can introduce traits such as better insect and weed control.” Biotechnology is a newly-applied science, and GMO labeling should not be left up to those companies that produce the product for sale.

Producers today continue to use powerful pesticides and defoliant in our agricultural fields despite unknown environmental and human side effects. Some believe that the increase of food allergies and cancer is directly linked to the engineering practices of companies like Monsanto and DuPont. Because studies are not conclusive as to how much of a threat GMO crops pose to human and environmental health, the federal government should require mandatory labeling for U.S. food manufacturers.

Contrary to the opinion of some major agricultural corporations and select interest groups, there is an overwhelming sentiment that exists in this country among consumers who want to know what

manufacturers are placing in the foods they sell. This sentiment is growing and is gaining momentum in states like Washington, Vermont, New Mexico, and Missouri. WA-522 may provide the first test of whether such state laws can survive legal challenges. With California’s fate temporarily decided, the attempt to introduce mandatory GMO food labeling is seeing new life in the United States. Likewise, according to the “Just Label It” campaign, opponents have collected more than one million signatures petitioning FDA to require GMO labeling.

What the public doesn’t know will harm them is, unfortunately, the continued regulatory approach in California. The dangers of ingesting man-made foods into our biological system have yet to receive full exploration in a food system that has become highly complex and science based. The true concerns of international trade rest on whether mandatory labeling will ever catch up with EU countries, which make human and environmental health a priority.

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CHART OF LABELING LAWS

Thomas P. Redick

Type of labeling (substantially equivalent products)	Countries that enforce labeling policies	Countries with partially enforced or unenforced labeling policies	Countries with probable plans to introduce a labeling policy
Mandatory	Australia, Brazil, China, European Union, New Zealand, Norway, Japan, Russia, Saudi Arabia, South Korea, Switzerland, Taiwan	Croatia, Ecuador, El Salvador, Indonesia, Malaysia, Mauritius, Serbia, Sri Lanka, Thailand, Ukraine, Viet Nam	Nigeria, Uganda, UAE, Zambia
Voluntary	Argentina, Canada, Chile, Hong Kong, South Africa, USA		Peru (US FTA)

*Sources: US Department of Agriculture (USDA) GAIN reports (2006-2009), Gruère & Rao (2007) Gruere & Sengupta (2009) <http://www.ifpri.org/pbs/pdf/pbsbrief14.pdf> (Note: Research on nations that were listed as having “plans” for years that have not moved on draft bills, like Uruguay, were dropped. Moreover, Paraguay was reported as adopting GM labels in 2000, but review of their law and press reports reveal that this was mischaracterizing export certifications, not GM food labels. See, Steve Lewis, *Paraguay Adopts GM Labelling* (November 17, 2000) available at http://home.intekom.com/tm_info/rw01122.htm#33)*

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SESSION TITLES:

Wednesday, October 9, 2013

How to Get Hired by In House Counsel
Keynote Address: Kenneth R. Feinberg, Feinberg Rozen,
LLP, Washington, DC

Thursday, October 10, 2013

Plenary Session 1 - News from the Capitol:
Administration and Congressional Priorities for Energy
and Environmental Law and Policy
The Corporate Supply Chain Goes Global:
What You Need to Know to Counsel Your Multinational
Client
Reacting to Coastal Disasters: Response and Future
Preparedness
Less is More? The Expanding Universe of Low-Level
Toxic Tort Claims
Clean Air Developments Every Lawyer Should Know
Going Back to the Well: the Next Generation of Fracking
Challenges
Clash of the Titans: Live Litigation
Road Warriors - A Hands-On Practical Demonstration
of Technology and Ethical Perils

State Authority on Climate Change: Where are the
Commerce Clause Boundaries?

Environmental Markets 2.0: The Evolving Use of
Market-Based Mechanisms

Friday, October 11, 2013

Plenary Session 2—From the Top: Second Term Priorities
and Perspectives from Senior EPA Officials
Renewable Energy Development: Challenges,
Opportunities and Pay-Offs
TMDL Regulation: How EPA's Chesapeake Bay Initiative
May Spread to Your Watershed
CERCLA Case Studies and Lessons Learned—
Novel Approaches and Noteworthy Outcomes
Cooperative Federalism: Under Assault or In Balance?
Hot Topics in Environmental Enforcement and
Compliance
Transaction Jeopardy! Getting the Deal Done
Today's Ethics: More Complicated Than You Thought?
Managing Conflicts & Virtual Reality in Today's
Environmental, Energy and Natural Resources Law
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