The State and Local Regulatory Landscape for Bioengineered Plants: September 2014[1]

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Across the country, numerous state and local governments have enacted, or are considering, laws that impact the cultivation, use, and labeling of genetically engineered plants ("GMOs"). These laws are best described in three categories:

- Laws that ban the cultivation of GMOs;
- Laws that regulate the handling of GMOs; and
- Laws that impose disclosure requirements on the sale of GMOs, such as food labeling.

The landscape of GMO laws is constantly in flux. Although only a few laws are currently in effect, many more are being proposed. Additionally, some laws are subject to legal challenges and at least one has been overturned.

Laws Banning the Cultivation of GMOs

Laws that ban GMOs are straightforward prohibitions against any form of growing a bioengineered plant. Currently, there are versions of these laws in California (Marin, Mendocino, Santa Cruz, and Trinity counties, and the cities of Arcata and Point Arena), Hawaii (Hawaii County), Maine (Town of Montville), Oregon (Jackson and Josephine counties), and Washington (San Juan County). Generally, these laws state that it is unlawful for "any person or entity to propagate, cultivate, raise, or grow genetically modified organisms" in the specified county. Some versions of these laws are more stringent, making it unlawful to "sell, distribute, propagate, cultivate, raise or grow seeds or crops of genetically engineered organisms" (Arcata Ordinance 1350; Point Arena Code § 8.25). Other

[1]Text that reflects November 2014 election results and results of rulings and lawsuits in Hawaii were added in January 2015.

versions, such as that of Hawaii County, impose a general prohibition on the open-air cultivation, propagation, development, and testing of genetically engineered crops or plants, but exempt certain crops (*e.g.*, papaya) and allow the continued cultivation on land where GMOs were planted before the ordinance became effective (Hawaii County Code § 14-128).

A number of states have passed legislation prohibiting counties from adopting ordinances regulation GMOs or proclaiming such ordinances to be preempted by state law. Oregon, for example, passed bill 863 preempting counties from enacting GMO bans, although Jackson County was exempted from the ordinance.[2] Notwithstanding state preemption, Lane and Benton counties in Oregon are attempting to get similar bans on their ballots for the November 2014 election. More than a dozen other states have laws prohibiting county or local regulation of GMOs.[3] California and Hawaii are not among the states to pass such a law, which is significant because Humboldt County (Measure P) and Maui County have ballot initiatives that would prohibit cultivation of GMOs that are slated to be included as part of the November 2014 election.

While not a ban *per se*, Kauai County, Hawaii, passed Ordinance 960 that contained four operative provisions that imposed various notification requirements on commercial agricultural entities, created pesticide buffer zones, mandated a county environmental and public health impact study, and provided penalties for non-compliance. Specifically, the notification provision required commercial agricultural entities to make annual public reports to the county disclosing the growing of GMOs, including a general description of each, its geographic location, and the date on which it was planted.

Litigation

In Hawaii, Syngenta, Pioneer Hi-Bred, Agrigenetics, and BASF Plant Science challenged the Kauai County Ordinance 960 on numerous grounds including state and federal preemption. On August 23, 2014, the US District Court for Hawaii held that Ordinance 960 was preempted by state law. It also held that the law was not preempted by either the Federal Insecticide, Fungicide, and Rodenticide Act or the Federal Coordinated Framework for biotechnology. Nevertheless, the ordinance was struck down.

In June 2014, several associations, including the Biotechnology Industry Organization, filed suit challenging the Hawaii County ordinance alleging that it was preempted by both federal and state laws, violated the commerce clause of the US constitution, and was illegal under the Hawaii constitution. In July, the plaintiffs filed a motion for partial summary judgment on their preemption claims. The case went before the same judge that decided the Kauai County ordinance. After hearing oral arguments in October 2014, the court found that the Hawaii County ordinance preempted and enjoined its enforcement.

[2]Although Josephine County, Oregon has approved a GMO ban, it is expressly preempted by state law.

[3]These include Arizona (SB1282 Passed 4/22/05); Florida (HB1717 Passed 5/6/2005); Georgia (SB87 Passed 2/18/2005); Idaho (HB38 Passed 3/23/2005); Indiana (HB1302 Passed 3/25/2005); Iowa (HF642 Passed 4/6/2005); Kansas (HB2341 Passed 4/1/2005); North Dakota (SB2277 Passed 3/16/2005); Ohio (HB66 Passed 6/30/2005); Oklahoma (HB1471 Passed 4/18/2005); Pennsylvania (HB2387 Passed 11/29/2004); South Dakota (SB152 Passed 2/25/2005); Texas (HB2313 Passed 6/17/2005); West Virginia (SB580 Passed 4/16/2005).

On November 4, 2014, Maui County passed a ballot initiative that imposes a moratorium on the growth and cultivation of GMOs. A group of organizations and companies filed a suit challenging the Maui County moratorium in federal district court, raising the same arguments as against the Kauai and Hawaii County laws. Given the court's previous rulings on similar laws, the Maui County moratorium will likely be defeated as well.

Laws Regulating GMOs

A number of states have reserved the right to regulate GMOs by requiring permits prior to open-air cultivation. Idaho, for example, restricts the "shipment, introduction into or release within this state of any…genetically engineered plant…except under permit issued by the department, or as exempted by a rule" (Idaho Code § 22-2016). Minnesota (Minnesota Statutes § 18F-07), Nebraska (Nebraska Revised Statutes § 2-10, 113), Oklahoma (Oklahoma Statutes §2-11-36), Wisconsin (Wisconsin Statutes §146.60) and Washington (Washington Revised Code § 17.24.051) have similar laws.

These provisions require notification of, and approval by, the state before any GMO is grown within the state. Most of the laws contain exemptions where the Animal and Plant Health Inspection Service has permitted the release*, e.g.* Wash. Rev. Code § 17.24.051: "A special permit is not required for the introduction or release within the state of a genetically engineered plant or plant pest organism if the introduction or release has been approved under provisions of federal law and the department has been notified of the planned introduction or release." Some laws grant the state the authority to quarantine an area or take other action to prevent the spread of a GMO that is considered to be a noxious weed (Wash. Rev. Code § 17.24.041).

GMO Labeling Laws

There are two types of labeling laws: those that apply to food and those that apply to seed.

GMO Food-Labeling Laws: Adopted and Proposed Legislation

Only four states (to date) have passed GMO food-labeling laws: Alaska, Connecticut, Maine and Vermont. Of these, only the laws in Alaska and Vermont have immediate effect. The laws in Connecticut and Maine are not currently enforceable, but rather are contingent upon other states passing similar legislation. Connecticut's law requires four states to enact similar legislation, one of which must border Connecticut and the aggregate populations of the other states must total at least 20 million people. Maine's law becomes effective when five contiguous states enact similar legislation. Both of these laws seemingly require New York to pass a similar labeling law in order to become effective.[4]

Of the laws in effect, only Vermont's has real consequences because Alaska's pertains only to seafood, of which no GMO varieties are currently available. The Vermont law

[4]Maine also has a currently effective labeling law that establishes requirements for labeling a food as "as free of or made without recombinant deoxyribonucleic acid technology, genetic engineering or bioengineering." Maine Revised Statutes, Title 7, §530-A. This law allows "any food 1% or less of which consists of genetically engineered ingredients to be labeled as free of genetically engineered ingredients."

requires any food offered for retail sale that is entirely or partially produced with genetically engineered ingredients to be labeled (Vermont Statutes Annotated Title 9, § 3043). It also prohibits any GMO food from bearing the term "all natural" on its label. It defines genetic engineering as the process by which food is produced through "*in vitro* nucleic acid techniques" or the "fusion of cells" or "hybridization techniques that overcome natural barriers, physiological, reproductive, or recombination barriers, where the donor cells or protoplasts do not fall within the same taxonomic group, in a way that does not occur by natural multiplication or natural recombination" [Vermont Statutes Annotated Title 9. § 3042(4)].

The Vermont law lists a number of exemptions from the labeling requirements. Excluded commodities include food derived from a non-GM animal that was fed GMO feed or injected with a genetically engineered drug, non-GMO food processed with one or more genetically engineered processing aids or enzymes, alcoholic beverages, food containing 0.9% or less (by weight) of genetically engineered materials, food served at restaurants or intended for "immediate human consumption," medical food, and food certified by an independent organization to be non-GMO (Vermont Statutes Annotated Title 9 § 3044). The failure to label a food that is not exempt subjects a liable party to a penalty of "not more than $1,000.00 per day, per product" (Vermont Statutes Annotated Title 9 § 3048).

The Maine and Connecticut laws are nearly identical to Vermont's. They both use the same definition of "genetically engineered," require the same disclosure obligations, provide for the same exemptions, and impose the same penalties. Maine's law explicitly precludes citizen suits, however, and Connecticut's law contains an additional exemption for food sold at farmers' markets.

In addition to states with existing laws, a number of proposed laws will appear on state ballots in November 2014, competing with federal bills addressing GMO labeling.

Both Oregon and Colorado have certified ballot initiatives on the November ballot. These proposed laws are similar to Vermont's, with a few differences. Colorado's proposed law would have exempted chewing gum in addition to the listed exemptions that are the same as the Vermont law. Oregon's proposed law has fewer exemptions, as it contains no provision excepting food from animals fed or treated with genetically engineered food or drugs. Oregon's proposed law also differs from the others in that it contains a citizen-suit provision allowing a citizen acting in the public interest to bring an action to enjoin a violation of the law (and if the citizen prevails, (s)he is entitled to attorneys' fees and costs). Both of these ballot initiatives were defeated by voters in the November election, however.

California, New York and Hawaii have attempted to pass labeling legislation through the state legislative bodies. None of the bills introduced in the previous legislative sessions garnered enough support to make significant progress. In fact, one bill in New York was voted down before making it before the New York Senate. In Arizona, a group was able to put together a ballot initiative, but failed to obtain the requisite number of signatures. Thus, the initiative did not appear on the ballot.

At the federal level, there are two competing bills—one that would mandate labeling and one that would provide for voluntary labeling and preempt state labeling laws. Senator Boxer and Representative DeFazio introduced identical bills in the Senate (Bill 809) and House (Bill 1699) that would amend the Food Drug and Cosmetic Act (FDCA) to require labeling of GMOs, dubbed the Genetically Engineered Food Right-to-Know Act. These bills adopt the same definition of "genetically engineered" as the Vermont law and provide for similar exemptions. The bills are silent on the issue of whether food from animals fed or treated with genetically engineered food or medicine would need to be labeled.

Representative Mike Pompeo, along with four co-sponsors, introduced the Safe and Accurate Food Labeling Act (H.R. 4432) that would establish voluntary labeling standards regarding GMOs and require labeling only where a material difference in a food exists. The bill also amends the FDCA to create a mandatory premarket notification and review process that would obligate the developer of a GMO to notify the Food and Drug Administration (FDA) that a GMO is being proposed for food use. The FDA would review and evaluate the application and inform the applicant whether the agency agrees with the determination, objects to the determination, or concludes more information is required to make a determination. The bill would set national labeling standards regarding the presence or absence of GMOs and preempt all state GMO-labeling laws.

GMO Seed-Labeling Laws

Several states have enacted laws that require labeling of GMO seed. Under Vermont law, "[f]or all seed containing genetically engineered material, the manufacturer or processor shall cause the label or labeling to specify the identity and relevant traits or characteristics of such seed, plus any requirements for their safe handling, storage, transport, and use, the contact point for further information and, as appropriate, the name and address of the manufacturer, distributor, or supplier of such seed" (Vermont Statutes Annotated, Title 6 § 644). In Virginia, "[f]or transgenetic seed, in addition to any other requirements, the guarantor shall label all seed produced from transgenetic plant material pursuant to regulation" [Code of Virginia § 3.2-4008(K)]. In Maine , "the manufacturer or seed dealer of the genetically engineered plants, plant parts or seeds shall provide written instructions to all growers on how to plant the plant parts, seeds or plants and how to grow and harvest the crop to minimize potential cross contamination" [Maine Revised Statutes, Title 7, §1052 (2001)].

GMO Labeling-Law Litigation

In Vermont, a group of plaintiffs, led by the Grocery Manufacturers Association, is challenging the state's GMO food-labeling law alleging that the law violates:

- The First Amendment's protection against forced commercial speech in requiring a label;
- The First Amendment's protection against restricting commercial speech for preventing the use of the term "all natural" on food required to be labeled;
- The Fifth Amendment's due process clause for containing vague terms regarding the restriction of using terms "similar" to "all natural";

- The Commerce Clause for imposing unreasonable burdens on manufactures outside of Vermont; and
- The Supremacy Clause on account of the fact that the law conflicts with federal law.

The state filed a motion to dismiss the complaint for lack of standing and failure to state a claim. That motion has not been fully briefed.

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He received his undergraduate degree from Duke University—where he double-majored in public policy and economics—and a juris doctorate and environmental law certificate from the University of Hawaii's William S. Richardson School of Law.

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