Federal Court Strikes Down 2019 & 2024 ESA Regulations (published 4.16.26)

On March 30, 2026, a federal court in California issued a ruling to overturn several Endangered Species Act ("ESA") regulations adopted by the Trump administration in 2019 and the Biden administration in 2024. The plaintiffs in ***Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 24-cv-04651 (N.D. Cal. Mar. 30, 2026)** challenged six rules in total with the court ultimately concluding that four violated the statutory text of the ESA. Earlier this year, the United States Fish and Wildlife Service ("FWS") together with the National Marine Fisheries Service ("NMFS") proposed a slate of new ESA regulations intended to restore the rules established under the first Trump administration. While those rules have yet to be finalized, it is possible that the recent court ruling may offer some insight into how courts may ultimately treat those regulations.

ESA Overview

The ESA was enacted in 1973 for the purpose of conserving species at risk of extinction and the habitats upon which those species depend. 16 U.S.C. § 1531(b). The statute is jointly administered by FWS and NMFS (collectively, "the Services") which are responsible for creating and maintaining a list of species that are classified as either "threatened" or "endangered" depending on the level of risk those species face. 16 U.S.C. § 1533. Once a species is added to that list, it becomes protected under the ESA.

When the Services list a species for protection under the ESA, they must also designate critical habitat for the species. 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines critical habitat as specific geographical areas which are "occupied by the species, at the time it is listed […] on which are found those physical or biological features essential to the conservation of the species" or areas which are not occupied by the species at the time of listing but the Services have determined are "essential for the conservation of the species." 16 U.S.C. § 1532 (5)(A).

Along with requiring the Services to list species under the ESA and designate critical habitat for those species, the ESA also requires all other federal agencies to consult with the Services to avoid harming listed species or designated critical habitat. Specifically, the ESA requires each federal agency to ensure that any action it "authorize[s], fund[s], or carrie[s] out" is "not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). To initiate this process, the agency taking action will determine whether its action "may affect" listed species. 50 C.F.R. § 402.13. If the agency concludes that its action "may affect" a listed species, it must reach out to the Services to determine whether the action is

"likely to adversely affect" the species. 50 C.F.R. § 402.13 If so, then the Services must engage in formal consultation, a process which requires the consulting Service to prepare a document known as a Biological Opinion ("BiOp"). 50 C.F.R. § 402.13 The BiOp will evaluate more thoroughly the expected impacts of the agency's action and if it concludes that the action is likely to jeopardize the continued existence of a protected species or result in the destruction or adverse modification of critical habitat, it must also include mitigation measures the agency can take to avoid causing such negative impacts. 50 C.F.R. § 402.13. When making a determination about the impacts an agency action may have on listed species, the Services must base their conclusions on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

Background to the Case

Since 2019, the ESA has experienced several rounds of regulatory changes. In August 2019, the Services issued final rules to change the procedures related to the listing of species under the ESA and the consultation process between the Services and other federal agencies. A closer look at those changes is available here. The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* filed a lawsuit to challenge those 2019 regulations. However, following a change in Presidential administration, the court sent the matter back to the Services for review, bringing that lawsuit to an end. In 2024, the Services adopted new regulations which, according to the plaintiffs, resolved some of their concerns with the 2019 regulations but ultimately retained certain issues while introducing others. More information on the 2024 regulatory changes can be found here.

After the new regulations were finalized in 2024, the plaintiffs filed the current lawsuit to challenge six specific provisions that had been either introduced in 2019 and retained in 2024 or introduced for the first time in 2024. Following another change in Presidential administration in 2025, the Services sought to have the case either paused or dismissed, citing another round of updated ESA regulations that had been proposed in 2025 which the Services expect to finalize before the end of 2026. However, the court concluded that neither pausing or dismissing the case would be appropriate, noting that it would be better for the court to "provide the [Services] with its reading" before the new regulations are final so that the Services can take into account any "problems" the court might find.

Many of the regulatory changes proposed in 2025 were identical to those that had been made in 2019 before being modified in 2024. Although various lawsuits were filed to challenge the 2019 rules, they were largely paused or dismissed after the Services announced that they would revisit those regulations following the transition from the Trump administration to the Biden administration. For that reason, no court ever fully considered whether the 2019 rules complied with the ESA. The recent decision in *Ctr. for Biological*

Diversity v. U.S. Dep't of Interior represents the first time a court has considered the legality of those regulations and may provide some insight into how the rules proposed in 2025 may be viewed by courts after they are finalized.

Recent Court Decision

The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* asked the court to review six ESA regulations and consider whether they violated the statutory requirements of the ESA. Four of those regulations are related to the consultation process while the other two are concerned with the designation of critical habitat. Of those six, the court found that four violated the ESA and should be overturned. The other two were upheld.

<u>"Effects of the Action"</u>

During agency consultation with the Services, the ESA requires the Services to evaluate the effects of the agency action on listed species and critical habitat to determine whether jeopardy of a species or the destruction or adverse modification of critical habitat is likely to occur. 16 U.S.C. § 1536. Before 2019, the ESA regulations defined "effects of the action" as "the direct and indirect effects of an action on the species or critical habitat." 50 C.F.R. § 402.02 (2018). The 2019 rules changed the definition of "effects of the action" to "all consequences to listed species or critical habitat that are caused by the proposed action" and clarified that a "consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02 (2019). The Services left this definition in place when it amended the regulations in 2024.

The plaintiffs argue that this violates the ESA's requirement that the Services rely on the best scientific data available when considering the impacts an agency's action may have on listed species and that it the phrase "reasonably certain to occur" conflicts with the ESA requirement that the Services consider whether jeopardy of a species is "likely" to occur. The court agreed with the plaintiffs on both arguments. First, the court concluded that the 2019 rule violates the ESA's "best available data" requirement because the ESA "imposes a mandatory duty on the Services to analyze the likelihood of jeopardy or harm to habitat using the best available data." According to the court, the best scientific data available may not be the same as impacts that are "reasonably certain to occur." Next, the court concluded that the provision of the 2019 regulation that requires the Services to only consider those impacts to species and habitat which are "reasonably certain to occur" is contrary to the ESA requirement that Services consider whether jeopardy of a species or harm to habitat is "likely." Because what is "likely" may not necessarily include what is "reasonably certain to occur," the court held that this regulation violated the ESA and should be overturned.

Consideration of Mitigation Measures

When drafting a BiOp, the ESA regulations require the Services to take into account "any beneficial actions" taken or proposed to be taken by the action agency. 50 C.F.R. § 402.14(g)(8). The purpose of this rule is to ensure that the Services consider any activities that are beneficial to listed species that the consulting agency plans to include as part of its proposed action when determining what the impacts of that action could be to protected wildlife. In 2019, the Services amended the ESA rules to clarify that the Services should take such beneficial activities into consideration without "any additional demonstration of binding plans." 50 C.F.R. § 402.14(g)(8). In other words, the 2019 rules require the Services to give proposed beneficial activities the same consideration as any other portion of the agency action even if the agency has not committed to carrying out those activities.

The plaintiffs argued that this violates the ESA's requirement that the Services "insure" against jeopardy of listed species by "forcing them to consider amorphous, non-binding mitigation plans in making no-jeopardy findings." In it's opinion, the court agreed with the plaintiffs, concluding that the 2019 rule violated the ESA because it does not satisfy the statutory requirement that the Services "insure" against harm to species or habitat. According to the court, the ESA requires beneficial activities to be excluded from consideration unless they are binding.

Definition of "Destruction or Adverse Modification"

Under the ESA, the Services must "insure" that federal agency actions will not cause jeopardy to listed species or "destruction or adverse modification" to designated critical habitat. 16 U.S.C. § 1536(a)(2). Prior to 2019, the ESA regulations defined "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (2018). In 2019, that definition was amended to "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species." 50 C.F.R. § 402.02 (2019). That definition was retained in the 2024 regulations.

The plaintiffs argue that introducing the language "as a whole" violates the ESA by replacing the statutory requirement to avoid all destruction or adverse modification of critical habitat with a regulatory provision that allows at least some destruction or adverse modification of critical habitat. The court agreed, concluding that the text of the ESA "prohibits adverse modification entirely" and that the 2019 rule violated that requirement by permitting at least some adverse modification to critical habitat.

Duty to Request Reinitiation of Consultation

Before 2024, the ESA regulations concerning agency consultation required both the agency taking action or the consulting Service to request reinitiation of consultation under certain circumstances. 50 C.F.R. § 402.16(a) (2023). In 2024, the Services amended their regulations so that only the agency taking action is required to request reinitiation of consultation. The plaintiffs claim that the Services unlawfully rescinded their duty to request reinitiation of consultation, arguing that the Services failed to provide adequate reasons to support amending the regulations. In 2024, the Services stated that they were amending the regulation to clarify that only the action agency has the authority and responsibility to initiate or reinitiation consultation. The court was not persuaded by that reasoning. According to the court, while the text of the ESA does not allow the Services to compel any federal agency to engage in consultation, nothing in the pre-2024 rule gave the Services that authority. The rule required the Services to request reinitiation in certain circumstances but did not grant the Services the authority to require the federal agency to reinitiate consultation. Because the Services failed to provide a persuasive reason for changing a rule that had been in place for 25 years, the court found the change to be unlawfully arbitrary and concluded that it should be overturned.

Rules Upheld

Finally, the court considered the last two regulations challenged by the plaintiffs. While the court overturned the first four regulations it considered, it upheld the last two after concluding that they did not violate the ESA.

The ESA defines "threated species" as "any species which is likely to become an endangered species within the foreseeable future[.]" 16 U.S.C. § 1532(20). Before 2024, the ESA regulations required the Services to defined "foreseeable future" as extending "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." 50 C.F.R. § 424.11(d) (2023). In 2024, the Services amended that definition to "as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats." 50 C.F.R. § 424.11(d) (2025). In making this change, the Services replaced language requiring that they "reasonably determine" that threats to a species are "likely" with language that the Services make "reasonably reliable predictions" about those same threats. The plaintiffs argued that the new language contradicts the ESA requirement that the Services base their conclusions on the "best available data," but the court disagreed. In its ruling, the court concluded that the two phrases "appear synonymous" and that to determine whether an effect is "likely" requires making a "reliable prediction" about that effect. Because the court determined that the pre-2024 rule and the amended rule are functionally equivalent, it concluded that the rule should be upheld.

Finally, the court considered the plaintiffs' challenge to an ESA regulation concerning the designation of critical habitat. The text of the ESA requires the Services to designate critical habitat at the same time it lists a species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3). Before 2024, the ESA regulations identified two limited circumstances where designating critical habitat at the same time a species is listed would not be prudent and determinable. In 2024, the Services modified the regulation to include two other circumstances where designating critical habitat would not be necessary. The plaintiffs argue that the new rule violates the ESA by unlawfully expanding the conditions under which the Services may find that designating critical habitat is not prudent and determinable. However, the court disagreed, citing previous court decisions which held that the Services could only make a not-prudent finding with respect to critical habitat would be beneficial to the species. Because the two additional circumstances outlined in the 2024 ruling described situations where reaching a not-prudent finding would be beneficial to the species, the court found that the regulation complied with the ESA and should be upheld.

Going Forward

Since 2019, the ESA has seen several rounds of regulatory updates. So far, this is the first time a court has reviewed any of the updated rules on the merits to consider whether they comply with the statutory requirements of the ESA. In 2025, the Services launched a new round of regulatory changes, many of which mirror the changes made in 2019. While those rules have yet to be finalized, the ruling in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* may offer some insight into how courts will treat those regulations once they are final. For those who are regulated under the ESA, remaining informed on regulatory changes is helpful to understand how the law will be implemented going forward.

To view the court's decision in *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, click here.

To view the text of the ESA, click here.

For more NALC resources on the ESA, click here.

Supreme Court Agrees to Hear Pesticide Preemption Lawsuit (published 1.27.26)

The United States Supreme Court has announced that it will hear oral arguments in *Durnell v. Monsanto*, a case filed by a Missouri plaintiff who claims that exposure to the herbicide Roundup and its active ingredient glyphosate caused him to develop non-Hodgkin's lymphoma. The case is one of thousands that have been filed over the last decade against Monsanto Company (now owned by Bayer) by plaintiffs who claim that using Roundup caused them to develop cancer and that Monsanto failed to warn consumers about the alleged health risk. For its part, Bayer has argued that the state law claims raised by plaintiffs in these cases are preempted by federal pesticide law and should be dismissed. After years of litigation, that question will now be presented to the Supreme Court. However, the Court rules in this case will have an impact not only on ongoing litigation involving Roundup and glyphosate but may set a precedent for lawsuits involving other pesticide products.

Background: Roundup Lawsuits and *Durnell*

Roundup is one of the most widely used herbicides in the United States. It was developed in the 1970s and has been available in the United States for decades. Glyphosate, the active ingredient in Roundup, was first approved by the Environmental Protection Agency ("EPA") since 1974. Roundup is used both in agricultural and non-agricultural settings. Since the 1990s, Roundup has been an essential part of Monsanto's Roundup Ready system which paired use of the herbicide with glyphosate-resistant crop seeds to allow direct applications during the growing seasons. Commercial formulations of Roundup have been used in home and municipal landscaping for years.

Since 2015, tens of thousands of lawsuits have been filed against Bayer by plaintiffs claiming that the use of Roundup caused them to develop cancer. These cases have been filed in state courts and raise what products liability claims that arise out of state law, specifically the civil tort of failure to warn. In response, Bayer has argued that federal pesticide law preempts state law products liability claims and that such claims should be dismissed. While only a handful of the cases filed against Bayer have gone to trial, juries and judges alike have been split on the issue. While some juries have issued verdicts in favor of Bayer, finding that the pesticide manufacturer complied with the law and is not liable for a plaintiff's injuries, others have returned verdicts in favor of the plaintiffs and awarded damages in amounts exceeding $2 billion. Similarly, of the three circuit courts that have been asked to determine whether federal pesticide law preempts the plaintiffs' state law claims, the Third Circuit has held that the claims are preempted while the Ninth and Eleventh Circuits have held that they are not.

The plaintiff in *Durnell* originally filed his lawsuit against Bayer in 2019. He filed his case in state court in Missouri where he lives and where Monsanto is headquartered. Like other plaintiffs in pesticide liability cases, the plaintiff in *Durnell* raised several state law products liability claims including failure to warn. At trial, the jury concluded that Monsanto had failed to warn the plaintiff of possible health risks of using Roundup and awarded him $1.25 million. Bayer appealed that verdict to the Missouri Court of Appeals which affirmed the jury order and held that the plaintiff's failure to warn claim was not preempted by federal law. Bayer then attempted to appeal that ruling to the Missouri Supreme Court which declined to hear the case. Now, the matter comes before the United States Supreme Court.

Arguments Before the Supreme Court

Both the plaintiff and Bayer have made arguments to the Supreme Court that have become familiar to those keeping up with how pesticide liability cases have evolved in recent years. Each argument focuses on the text of the Federal Insecticide, Rodenticide, and Fungicide Act ("FIFRA") and a previous Supreme Court case to either support or refute the argument that federal pesticide law preempts state law claims of failure to warn.

FIFRA is the primary federal law regulating pesticide use in the United States. Under FIFRA, a pesticide cannot be sold or distributed in the United States until it has been approved for use by the Environmental Protection Agency ("EPA"). To approve a pesticide, EPA must determine that the product will not cause "unreasonable adverse effects" on the environment when used as intended. 7 U.S.C. § 136a(c)(5)(C). FIFRA defines "unreasonable adverse effects" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). To meet this standard, EPA will assess the human health impacts of pesticides it is seeking to register, including assessing the carcinogenicity of the product and its active ingredients.

Along with providing for the registration of pesticide products, FIFRA also describes the authority that states have to regulate approved pesticides. Under FIFRA, a state may "regulate the sale or use of any federally registered pesticide[.]" 7 U.S.C. § 136v(a). However, FIFRA also provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from" those required by federal law. 7 U.S.C. § 136v(b). In other words, while FIFRA allows states to regulate the sale and use of federally registered pesticides, it does not allow states to set requirements for the labeling or packaging of a registered pesticide that differs from the labeling and packaging approved by EPA. Additionally, FIFRA prohibits the sale and distribution of any pesticide which is "misbranded." 7 U.S.C. § 136j(a)(1)(E). Under FIFRA, a pesticide is

considered misbranded if its label does not include a warning statement which may be necessary to protect health and the environment. 7 U.S.C. § 136(q)(1)(G).

Failure to warn is a type of civil tort that is typically raised in products liability cases. As with most civil torts, failure to warn arises out of state law and is enforced at the state level. When a plaintiff raises a claim of failure to warn, they are not arguing that a product they used was defective, but rather that the product manufacturer failed to provide adequate warnings or instructions about the safe use of the product. To succeed on failure to warn, a plaintiff will generally need to demonstrate two things. First, that the manufacturer did not adequately warn consumers about a particular risk, and second that the risk was either known or knowable in light of the best available knowledge at the time the product was manufactured and distributed.

In the past, the Supreme Court has only once addressed FIFRA's prohibition on states to impose labeling requirements that differ from those approved by EPA and how it interacts with products liability claims that arise under state law. In ***Bates v. Dow Agrosciences LLC*, 544 U.S. 431**, the Supreme Court held that a pesticide labeling requirement imposed by state law would be preempted by FIFRA if the requirement is "in addition to or different from" the labeling and packaging requirements imposed under FIFRA. The Court noted that a state law requiring a pesticide label to include the word "DANGER" when its federally registered label is required to include the word "CAUTION" would be preempted by FIFRA. However, the Court also noted that a state requirement for pesticide labeling would not be preempted if it was "equivalent to, and fully consistent with, FIFRA's misbranding provisions."

In appealing *Durnell* to the Supreme Court, Bayer asked the Court to consider whether FIFRA preempts the plaintiff's state law failure to warn claim. Bayer argues that the claim is preempted. It first cites FIFRA's requirement that states may not require a pesticide's label to bear language that is "in addition to or different from" federal labeling requirements. According to Bayer, the only way it could fully resolve the plaintiff's claims would be to amend the label for Roundup products sold in Missouri to include a cancer warning which is not required by the federal label. Not only does the federal label for Roundup not include a cancer warning, but Bayer also notes that EPA has never made a finding that either Roundup or glyphosate are carcinogenic to humans. Relying on the ruling in *Bates*, Bayer argues that the plaintiff's failure to warn claims should be preempted because to resolve them, Bayer would be required to put a cancer warning on its Roundup labels which would differ from the labeling language required under federal law.

The plaintiff argues exactly the opposite. According to the plaintiff, his failure to warn claims are not preempted by FIFRA because they run parallel to FIFRA's misbranding

provisions. Also relying on *Bates*, the plaintiff in *Durnell* argues that Supreme Court precedent has already established that a state law products liability claim will not be preempted by FIFRA if it is equivalent to and consistent with FIFRA's prohibition on the sale of misbranded pesticides. According to the plaintiff, his failure to warn claim is consistent with FIFRA's misbranding prohibitions because FIFRA considers a pesticide to be misbranded if it does not include a warning necessary to protect health and the claim of failure to warn was raised to argue that Bayer failed to provide a necessary health warning to users of Roundup. Because failure to warn raises a claim that is consistent with FIFRA's misbranding provisions, the plaintiff asks the Supreme Court to rule that the claim is not preempted.

While these arguments directly mirror claims raised by Bayer and other plaintiffs in other cases involving federal preemption of failure to warn claims in pesticide liability cases, *Durnell* adds a twist that slightly differentiates it from those cases. Unlike other plaintiffs, the plaintiff in *Durnell* asserts that his failure to warn claims were not brought over the labels affixed to each individual unit of Roundup, but rather to the marketing materials that Monsanto used to advertise Roundup in the 1990s and 2000s. The plaintiff claims that he bought and used Roundup based on commercials and print advertising that stated using Roundup was completely safe and featured people applying Roundup while wearing only tee shirts and shorts. Because FIFRA applies only to pesticide labeling, not marketing materials, the plaintiff argues that his lawsuit differs from previous litigation where the question of whether FIFRA preempts failure to warn has been raised. Bayer maintains that there is no difference between *Durnell* and prior preemption cases because it would still need to update labels for units of Roundup sold in the state of Missouri to include a cancer warning to fully redress the plaintiff's claim.

Going Forward

As of the publication of this article, the Supreme Court has not scheduled a date to hear oral arguments in *Durnell*. It is not yet clear when a final ruling in the case can be expected. Whatever the outcome, whether the Court agrees with the plaintiff and finds that FIFRA does not preempt the state law claim of failure to warn or sides with Bayer and finds that FIFRA does preempt such claims, the final decision in this lawsuit will affect not only the thousands of currently pending pesticide liability cases but is also likely to affect any such lawsuits filed in the future. While the bulk of pesticide liability cases filed over the last decade have involved Roundup and glyphosate, other pesticides such as paraquat and chlorpyrifos have also been the focus of such lawsuits. Despite settling thousands of pesticide liability lawsuits, Bayer still has thousands more actively pending against it. The

company has indicated that if the matter is not resolved, it could threaten the future availability of Roundup for agricultural uses.

Although it is too early to predict how the Supreme Court will rule, prior to agreeing to hear *Durnell*, the Court asked the federal government to weigh in. In December, the Solicitor General filed an amicus brief both urging the Supreme Court to take up the case and clarifying that the federal government believes that FIFRA preempts the plaintiff's failure to warn case.

The National Agricultural Law Center will provide in-depth updates as this case proceeds.

To view Bayer's petition to the Supreme Court, click here.

To view the plaintiff's response, click here.

To view the Solicitor General's amicus brief, click here.

For more information on pesticide liability lawsuits from the National Agricultural Law Center, click here.

WOTUS Update: EPA & Corps Propose New Definition (published 12.02.25)

On November 17, 2025, the Environmental Protection Agency ("EPA") together with the United States Army Corps of Engineers ("the Corps") announced a proposed rule to redefine the term "waters of the United States" under the Clean Water Act ("CWA"). The intent of the proposal is to bring the definition of waters of the United States, commonly referred to as WOTUS, in line with the United States Supreme Court 2023 decision ***Sackett v. EPA*, 566 US 120 (2023)**. This proposal marks the sixth time since 2015 that the regulatory definition of WOTUS has changed and is likely to prompt litigation after it is formally finalized. The proposal has been published the Federal Register and is currently open for public comment through January 5, 2026.

Background CWA, Current WOTUS Rule, and *Sackett*

The CWA of 1972 is the leading federal water pollution statute in the United States. The purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA has established permitting programs to limit the amount of pollution discharged into waters and wetlands. Under the National Pollution Elimination System ("NPDES") program, it is illegal for anyone to discharge a pollutant from a discernable, concrete source into "navigable waters" without first receiving a permit from EPA. 33 U.S.C. § 1342. Similarly, the 404 permitting program prohibits the discharge of "dredged or fill material" into "navigable waters" without a permit from the Corps. 33 U.S.C. § 1344. Crucially, both the NPDES and 404 permitting programs cover activities that occur within "navigable waters." Although the term "navigable waters" is a legal term of art which is generally understood to refer to waters which can be used to facilitate interstate or foreign commerce, the CWA defines the term as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). However, the CWA does not define the term "waters of the United States." Instead, it has been left up to EPA and the Corps to define the term.

In the decades since the CWA was passed, crafting a lasting definition of WOTUS has been a struggle for the agencies and courts, and the formal regulatory definition has changed several times. A full timeline of the different definitions of WOTUS is available here. Most recently, the definition of WOTUS was revised in 2023, first through a finalized rulemaking conducted by EPA during the Biden administration, and then again following the Supreme Court's ruling in *Sackett v. EPA*. Under the initial 2023 final rule, the definition of WOTUS included five categories of waters: (1) traditional navigable waters that could be used in interstate for foreign commerce, the territorial seas, and interstate waters including interstate wetlands; (2) impoundments of waters otherwise identified as WOTUS; (3) tributaries of traditionally navigable waters or impoundments that met either the relatively

permanent standard or significant nexus test articulated by the Supreme Court in ***Rapanos v. US*, 547 US 715 (2006)**; (4) wetlands adjacent to any WOTUS with "adjacent" understood to mean neighboring, bordering, or contiguous; and (5) all other lakes, ponds, streams, and wetlands that satisfied either the relatively permanent standard or significant nexus test. Further information on the initial 2023 WOTUS definition can be found here.

The initial 2023 WOTUS rule fully incorporated both the relatively permanent standard and the significant nexus test which stem from the Supreme Court's decision in *Rapanos v. US*. In that case, the Supreme Court was asked to consider the degree to which wetlands could be included in the definition of WOTUS. The Court was unable to reach a majority opinion, instead issuing a plurality opinion and a concurring opinion. The plurality opinion articulated the relatively permanent standard which would extend the definition of WOTUS to those waters which are "relatively permanent, standing or continuously flowing" and then to those wetlands which share a "continuous surface connection" with such waters. The concurring opinion, on the other hand, crafted the significant nexus test which extended the WOTUS jurisdiction to those wetlands that share a "significant nexus," with a water that is already recognized as a WOTUS. A significant nexus would exist if a wetland "significantly affect[s] the chemical, physical, and biological integrity" with a recognized WOTUS.

Weeks after the first 2023 definition of WOTUS was finalized, the Supreme Court released its decision in *Sackett v. EPA*. Like in *Rapanos v. US*, the Court in *Sackett v. EPA* was asked to consider to what extent wetlands should be included in the WOTUS definition. Specifically, the plaintiffs specifically asked the Supreme Court to formally overturn the significant nexus test and adopt the relatively permanent standard. Ultimately, the Court did just that, concluding that the term "waters" in "waters of the United States" refers to "only those relatively permanent, standing or continuously flowing bodies of water […] described in ordinary parlance as streams, oceans, river, and lakes" and to wetlands that are "indistinguishable" from such waters due to a continuous surface connection.

Following the Supreme Court's decision in *Sackett v. EPA*, EPA issued what is known as the Conforming Rule to revise the WOTUS definition in light of the Court's ruling. Issued in August 2025, the Conforming Rule cut references to the significant nexus test from the WOTUS definition and clarified that the word "adjacent" with respect to adjacent wetlands meant "having a continuous surface connection." The rule also noted that only those tributaries of navigable waters which satisfy the relatively permanent standard would be considered WOTUS. To learn more about the Conforming Rule, click here.

When the Trump administration took office in 2025, it announced an intention to revisit numerous environmental regulations, including the definition of WOTUS. After holding a

series of listening sessions with stakeholders across the county, EPA and the Corps have released their latest proposal to redefine the term.

Proposed WOTUS Definition

According to EPA, its latest WOTUS proposal has two primary goals: to bring the definition in line with *Sackett v. EPA* and to provide more clarity to landowners and the public as to which waters fall under the CWA's permitting jurisdiction. To that end, it is proposing to include five categories of waters in the definition of WOTUS and is introducing new definitions intended to clarify when a water is relatively permanent and what constitutes a continuous surface connection.

Under the proposal, the following categories of waters would be considered WOTUS:

(1) Traditionally navigable waters which may be used to facilitate interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and the territorial seas.
(2) Impoundments of waters otherwise identified as WOTUS.
(3) Tributaries of traditionally navigable waters which are relatively permanent, standing or continuously flowing.
(4) Wetlands adjacent to a traditionally navigable water or tributary.
(5) Lakes and ponds that do not fall into the above categories but which are relatively permanent, standing or continuously flowing and share a continuous surface connection with a traditionally navigable water or tributary.

Importantly, the proposal would not include interstate waters as a category of WOTUS. This is a departure from previous WOTUS definitions, almost all of which have included interstate waters as WOTUS. These categories also differ from previous WOTUS definitions by specifying that waters which fall under category five must not only be relatively permanent but must also share a continuous surface connection with a traditionally navigable water or tributary to be considered WOTUS. Under past definitions, the continuous surface connection standard was applied only to wetlands.

Along with making changes to the categories of waters considered WOTUS, the proposed rule also includes new definitions for the terms "relatively permanent," "continuous surface connection," and "tributary." Under the proposed rule, "relatively permanent" would be defined as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." EPA notes that "the wet season" would refer to a predictable and extended period of time when surface water is present in a geographical feature in response to an annual wet season when precipitation is greater than average. However, that would not include what are

known as “ephemeral waters” which are geographic features that contain surface water only in direct response to precipitation. Under this definition of relatively permanent, a river which periodically dries out in the late summer months, but which flows during the winter and spring after increased rain and snowmelt could be considered a WOTUS, while a creek that is dry most of the time and flows only after a heavy rain would likely not be considered a WOTUS.

The proposed rule would define “continuous surface connection” as “having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water.” EPA clarifies that this definition presents a two-pronged test which requires a wetland or waterbody to both: (1) abut, as in directly touch, a traditionally navigable water or tributary; and (2) have surface water at least during the wet season. Wetlands or waters with a sub-surface connection to a recognized WOTUS – meaning connected to a WOTUS by water that is not on the surface but is not deep enough underground to be considered groundwater – would not be considered a WOTUS under this definition. Additionally, EPA notes that CWA permitting jurisdiction would only be extended to the portion of a wetland which retains surface water at least during the wet season.

Finally, the proposal would define “tributary” as “a body of water with relatively permanent flow, a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow.” Under this definition, a tributary to a traditionally navigable water that has a discernable bank and bed, and which has surface water at least during the wet season could be considered a WOTUS. However, a water without a bank and bed, such as a grassed waterway, would likely not be considered a WOTUS even if it held surface water year-round.

Besides defining what a WOTUS is, the proposal also strengthens language describing what a WOTUS is not. Particularly relevant to agriculture, the proposal would strengthen existing exclusions for prior converted cropland. The term “prior converted cropland” comes from the Wetland Conservation provisions of the 1985 Farm Bill, better known as Swampbuster. Prior converted cropland refers to wetland areas which were converted to agricultural land capable of producing a crop prior to December 23, 1985. Although prior converted cropland is currently excluded from the definition of WOTUS, the proposed rule would clarify that such land would only lose that exclusion and become subject to CWA jurisdiction if it were abandoned and reverted to a wetland that met the definition of “adjacent wetland” under WOTUS.

Next Steps

The proposed rule was published in the Federal Register on November 20, 2025, formally initiating a period of public comment that is currently set to end on January 5, 2026. While public comments may address any part of the proposal, EPA is specifically requesting comment on the following: whether WOTUS should be limited to only traditionally navigable waters and those wetlands that share a continuous surface connection with such waters; whether "relatively permanent" should include only those waters that contain surface water year-round instead of waters that contain surface water at least during an annual wet season; and whether a wetland must have a continuous surface connection with a navigable water or tributary year-round to be considered a WOTUS.

After the period of public comment concludes, EPA and the Corps will review the comments it receives before drafting and issuing a final rule. Once the rule becomes finalized, it is very likely that it will be challenged in court. Since 2015, all final regulations defining WOTUS have led to lengthy legal battles that often result in separate WOTUS definitions being applied across the country as the court cases proceed. Importantly, the last time a court was asked to consider whether the regulatory definition of WOTUS complied with the text of the CWA, the doctrine of *Chevron* deference was still the law of the land. Under *Chevron* deference, courts were instructed to defer to agency interpretations of ambiguous statutory language so long as the interpretation was reasonable. However, in 2024, the Supreme Court overturned *Chevron* deference in its landmark decision ***Loper Bright Enters. v. Raimondo*, 603 US 369 (2024)**. According to the Supreme Court, judges should not defer to agency statutory interpretations but should themselves state what the law is. This means that judges asked to consider whether a future WOTUS definition complies with the CWA may rely on judicial interpretations of the statute rather than agency interpretations.

The new proposed WOTUS definition has kicked off another cycle of attempting to define a crucial, but ambiguous term that determines when someone needs a CWA permit and when they do not. Whether the final definition will satisfy EPA's goals of crafting a durable definition remains to be seen.

To view the proposed WOTUS rule and learn how to submit a comment, click here.

To view the current definition of WOTUS, click here.

To view the text of *Sackett v. EPA*, click here.

To view the text of the CWA, click here.

For more CWA resources from the National Agricultural Law Center, click here.

Preliminary Injunction Halts Enforcement of West Virginia's Food Dye Ban (published 2.3.26)

On December 23, 2025, a District Judge in the Southern District of West Virginia ruled that the state is temporarily prohibited from enforcing its synthetic food dye ban while the law is being challenged in court. This law, enacted as HB 2354 and codified at W. Va. Code § 16-7-2, 4; 18-5D-3A, is being challenged by the International Association of Color Manufacturers (IACM). While the litigation remains ongoing, this article will discuss the court's most recent ruling.

Background on HB 2354

In 2025, West Virginia enacted HB 2354, a bill that addressed synthetic color dyes. Specifically, this bill was two-fold and included both a provision banning the use of certain synthetic color dyes statewide and prohibiting foods with these ingredients from being included in a "meal served in a school nutrition program." The bill had a two-step implementation scheme with the school portion going into effect last year, and the statewide ban going into effect in 2028.

The statewide ban portion included language that declared foods with ingredients that are "poisonous or injurious" to health to be adulterated. W. Va. Code § 16-7-2(b)(7). This language is followed by an enumerated list of "poisonous or injurious" ingredients that includes, "butylated hydroxyanisole, propylparaben, FD&C Blue No.1, FD&C Blue No.2, FD&C Green No.3, FD&C Red No. 3, FD&C Red No. 40, FD&C Yellow No. 5, and FD&C Yellow No. 6." In West Virginia, adulterated foods are prohibited from being sold and violators are guilty of a misdemeanor and will be fined upon conviction. W. Va. Code § 16-7-4. However, this law includes an exception for sellers of foods with the enumerated ingredients if the seller makes less than $5,000 in aggregate of food per month. This portion of the law is set to go into effect on January 1, 2028.

The second part of the law, codified at W. Va. Code § 18-5D-3A, bans the following color dyes from being served in school nutrition program meals – Red Dye No. 3, Red Dye No. 40, Yellow Dye No. 5, Yellow Dye No. 6, Blue Dye No. 1, Blue Dye No. 2, and Green Dye No. 3. This provision did not prohibit the sale of food items with these ingredients as part of a school fundraiser off school premises or on school premises at least one-half hour after the end of the school day. The school meal portion of the law went into effect on August 1, 2025.

Background of color additives

The Food and Drug Administration (FDA) defines color additives as “a dye, pigment or other substance, which is capable of imparting color when added or applied to a food, drug, or cosmetic to the human body.” They are distinguished from food additives by the Federal Food, Drug and Cosmetic Act (FDCA), and must be approved by FDA before they can be used in food. Color additives are classified into two categories – naturally occurring and synthetic. A synthetic color dye is manmade and is required by the FDA to be certified as safe before it is included in food. While a naturally occurring color additive must also be approved by the FDA before it is used, it is exempted from the safety certification process that synthetic dyes must undergo.

There are nine synthetic color dyes approved for use in foods by the FDA – three of which the agency is in the process of revoking. The approval for the nine can be found at 21 CFR § 74.101-706. Seven of the nine approved synthetic dyes are included in the enumerated list of prohibited ingredients in West Virginia’s law. The other two enumerated ingredients are not classified as color additives by the FDA. Butylated hydroxyanisole is classified as a food additive, and propylparaben is an ingredient classified under the “Generally Recognized As Safe” pathway. To learn more about the federal government’s current color dye scheme, click here to read NALC article “FDA Announces Plan to ‘Phase Out’ Synthetic Dyes.”

The Case

Two months after the school meal provision of HB 2354 went into effect, the trade association, International Association of Color Manufacturers (IACM), challenged its constitutionality. IACM has been the singular association “representing the interests of the color additives industry, both natural and synthetics,” since 1972. Its members include manufacturers, producers, and users in the color industry. The case is *International Association of Color Manufacturers v. Singh.*

In its complaint, IACM is claiming HB 2354’s unconstitutionality in three ways. First, IACM claims the law is a violation of the Equal Protection Clause because it “targeted color additives without any rational basis for finding that they are . . . unsafe in any way.” Second, they claim the law is a prohibited bill of attainder that “singl[es] out for prohibition and criminal sanction the named color additives” without a proper judicial proceeding. Last, the complaint claims that the law is unconstitutionally vague in violation of the Due Process Clause.

This litigation is ongoing, and the merits of IACM’s challenge remain undecided. However, this article will further discuss a recent decision in the case – the Judge’s ruling on IACM’s request for a preliminary injunction.

A preliminary injunction is a motion that may be granted before or during a trial with the goal of preserving the status quo before a final judgement. For a preliminary injunction to be issued, a plaintiff must satisfy four factors: 1) that the plaintiff is likely to succeed on the merits, 2) that he is likely to suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in his favor, and 4) that an injunction is in the public interest. However, when the defendant is the government, the last two factors are combined.

Success on the Merits

The Court first looked at IACM's three claims to see if they would be likely to succeed on the merits. For the equal protection claim, the Court determined that IACM was not likely to succeed because "there was at least a debatable question regarding the safety of the named color additives" brought before the West Virginia legislature. An equal protection claim arises from the Fourteenth Amendment to the U.S. Constitution and provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of law." Specifically, this clause requires equal treatment for individuals in similar situations. However, unless a law burdens a fundamental right or a suspect class, it will be upheld if "it bears a rational relation to some legitimate end." Through looking at the legislative history, the Court determined that enough discussion about the potential safety risks of color additives occurred to create a rational basis for HB 2354's enactment.

Next, the Court determined that IACM was also unlikely to succeed on their bill of attainder claim. An unconstitutional bill of attainder occurs when a legislative act singles out an individual or narrow group of people for punishment without a judicial proceeding. There are three elements that must be met for a legislative act to be considered a bill of attainder: 1) the law must impose punishment, 2) it must target specific individuals or identifiable groups, and 3) it must do so in a manner that bypasses judicial protections. Here, the Court found that HB 2354 is not an unconstitutional bill of attainder. The Court determined that the law applies to anyone who adulterates food, and not just the specific manufacturers or users of the enumerated color additives. Further, the Court found the bill does not impose punishment without judicial protection because it includes language that clarifies a punishment will not be levied until after conviction.

Last, the Court looks to IACM's claim of unconstitutional vagueness and determines that IACM would be successful. Specifically, the Court finds that HB 2354 is unconstitutionally vague because it fails to define "poisonous and injurious" and does not prohibit other color additives not included in the enumerated list from being classified as such. The doctrine of void for vagueness applies when a statute fails to "give a person of ordinary intelligence adequate notice of what conduct is prohibited" or does not "include sufficient standards to prevent arbitrary and discriminatory enforcement." Manning v. Caldwell for City of

Roanoke, 930 F.3d 264, 272 (4th Cir. 2019). Thus, a statute that does not clearly state what actions it is prohibiting would be considered vague because it does not give adequate notice to the public and might lead to unfair enforcement.

Here, along with its lack of definition for poisonous or injurious, the Court took issue with the following language in HB 2354, "poisonous or injurious to the health, *including* butylated hydroxyanisole, propylparaben, FD&C Blue No. 1 . . ." (emphasis added). In particular, the Court found that a failure to define "poisonous or injurious" paired with the insertion of a "nonexclusive" enumerated list of FDA-approved color additives would "leave the door open for arbitrary enforcement." In other words, the Court believes HB 2354 is vague because it does not make clear what color additives would be classified as "poisonous and injurious." Further, since there is no standard that clarifies which color additives are prohibited, additional color additives could be considered "poisonous and injurious" without the public having adequate notice.

Though this ruling analyzed the claims of IACM and made assertions of their likely outcomes, it is not a ruling on the merits. However, a ruling like this is often an indicator of the direction a judge might go later when the merits are actually being decided.

Irreparable Harm

Next, the Court looked at a preliminary injunction's second factor, irreparable harm. For an injunction to succeed, the person seeking it must prove that it is likely to suffer irreparable harm in its absence. Harm that cannot be fully rectified by the trial's final judgement is considered irreparable, and economic harms will only be deemed irreparable if they are unrecoverable. Here, the Court finds that IACM has made sufficient showing that its members will suffer irreparable economic harm if this injunction fails. The Court specifies that the uncertainty surrounding HB 2354, because of its likely unconstitutional vagueness, is sufficient to establish irreparable harm. The Court explains that IACM's members would suffer harm if they spent significant resources changing their processes, updating equipment, or developing new products for a law that is likely unconstitutional.

Balance of Equities and Public Interest

Last, the court considers the third and fourth factors of a preliminary injunction – the balance of equities and public interest. In a case where the defendant is the government, these two factors are merged, thus the Court analyzes them together. The goal of a preliminary injunction is to "keep the status quo," and this factor will consider if the hardships imposed on the plaintiff outweighs the public's interest in having the law enforced. Here, the Court determines that it would be unfair to require IACM's members to comply with HB 2354 given that it is likely unconstitutional. Further, because the statewide

ban portion of HB 2354 is not yet being enforced by West Virginia's Department of Health, the Court believes that granting this injunction will not harm the public and will not disturb the status quo.

Impacts of the injunction

Because of the factors discussed, the Court grants IACM the preliminary injunction. This means that while the litigation remains ongoing, West Virginia's Department of Health will not be able to enforce the statewide ban portion of HB 2354. However, the Court notes in a footnote of its decision that the injunction will not apply to the school meal portion of the law. They make clear that this distinction is because IACM only "demonstrated that Section 16-7-2(b)(7)," the statewide ban portion, "is likely unconstitutionally vague." Thus, the West Virginia Board of Education will be permitted to continue enforcing the school meal portion of the law.

Conclusion

This case remains ongoing, and at this time, no trial date has been set. As more state legislatures consider passing similar legislation to West Virginia's, it is likely that this will not be the only litigation pertaining to the matter. To stay up to date on this case and the actions of state legislatures nationwide, click here to subscribe to NALC's biweekly newsletter, "The Feed."

Texas Food Law Litigation Updates: Part 2 (published 3.3.26)

Though 2026 is young, the year has already seen a few interesting judicial rulings related to food law coming out of the state of Texas. Specifically, courts in the Western District of Texas have issued two decisions on preliminary injunctions – granting one and denying the other. This article is the second in a two-part series covering recent litigation updates in Texas. The first article can be read here.

Cell-cultured Protein Ban

The first case involves a challenge to a Texas law that sought to temporarily ban the sale of "cell-cultured proteins" in Texas. SB 261, passed in the 2025 Texas legislative session, defined cell-cultured protein as "a food product derived from harvesting animal cells and artificially replicating those cells in a growth medium to produce tissue." Per the law, the prohibition on selling cell-cultured meat went into effect on September 1, 2025, and will last until September 1, 2027. The law is codified into the Texas code at Tex. Health & Safety Code §§ 431.002(5-a), 431.02105(a). Texas is one of seven states to have passed a ban on the sale of cell-cultured meat. To learn more about other state alternative protein laws, click here to view NALC's Alternative Protein Laws State Compilation.

The day after SB 261 went into effect, it was challenged in court. The plaintiffs are Wild Type, Inc. d/b/a Wildtype (Wildtype) and UPSIDE Foods, Inc. (Upside) – two companies based out of California who produce and sell cultivated meat. Wildtype produces cultivated salmon, and Upside produces cultivated chicken. The plaintiffs claim that SB 261 violates the Dormant Commerce Clause and the Supremacy Clause of the US Constitution.

January 2026 Ruling

On January 16, 2026, the court heard oral arguments on a number of motions in this case. Following the arguments, the court orally ruled on all motions; however, it also released an order explaining the decisions. The motions that were heard included Defendant Garza's Motion to Dismiss for Lack of Jurisdiction; Defendants Paxton, Young, and Shuford's Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim; and Plaintiffs' Motion for Preliminary Injunction. Specifically, the judge granted Defendant Garza's Motion to Dismiss and Granted in-part the Motion to Dismiss from Defendants Paxton, Young, and Shuford. This means that Defendant Garza, the County Attorney for Travis County, will no longer be a party in this case. As for the other defendants, the court granted in-part their motion to dismiss. This means that while it dismissed part of the claims against them, the case will still be allowed to continue on some of the Plaintiff's claims. Specifically, the court dismissed Upside's claims that SB 261 is preempted by the federal poultry laws, but found

that both plaintiffs may still bring their claim that SB 261 violated the Dormant Commerce Clause.

In determining these rulings, the court specifically looked to Upside's claim that the Poultry Product Inspection Act (PPIA) preempted SB 261. The PPIA is the federal law that "regulates the processing, inspection, distribution, labeling, and sale of poultry products sold in interstate commerce," and it is administered by the US Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS). Specifically, the PPIA includes an express preemption clause that states "requirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter may not be imposed by any State."

Express preemption claims will be evaluated by looking to the scope of the express preemption clause and determining if the challenged state law falls within the scope. Here, the court determined that the scope of the PPIA's express preemption claim extended to food safety activities and any behaviors that would cause the adulteration of a product. Under that standard, the court finds that SB 261 does not fall within the scope of the PPIA's clause because SB 261 is a "complete sales ban" that has no impact on food safety nor behaviors that might adulterate a chicken product. Thus, the court found that the PPIA would not preempt SB 261 and that claim should be dismissed.

Last, the court turned to the Plaintiff's motion for a preliminary injunction. In making this motion, Upside and Wildtype were asking the court to prohibit Texas from enforcing this law while the litigation is ongoing. A preliminary injunction will have four elements: 1) moving party must show they are likely to succeed on the merits, 2) that they will suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in their favor, and 4) that an injunction is in the public interest. Here, the court determined that the Plaintiffs do not meet the irreparable harm element because Plaintiff's do not have significant "contractual business already in place in Texas." Additionally, the court finds that it would not be in the balance of equities to grant this preliminary injunction for two companies with very little business in Texas. Further, since two of the four elements are not met, the court declines the opportunity to analyze all four and denies the preliminary injunction.

Effect of the ruling

The court's decision to deny plaintiff's motion for preliminary injunction does not mean the case is resolved, nor is it a determination on the case's merits. This decision's effect is that the state of Texas will have the ability to enforce the ban on cell-cultured proteins while the litigation remains ongoing. Further, because of the court's decision to deny Defendants

Paxton, Young, and Shuford's motion to dismiss against the Dormant Commerce Clause claim, the case will continue on that claim. However, Upside and Wildtype have appealed the denial of a preliminary injunction to the 5th Circuit. While it remains unclear at this time how the 5th Circuit will rule, it is likely that no judgement on the merits will occur until the preliminary injunction issue is first settled.

MAHA Law

Also, in its 2025 legislative session, Texas passed SB 25, which has been referred to as Texas' "MAHA bill." This name is referencing the fact that many of the policy changes included in this legislation are aligned with priorities of the "Make America Healthy Again" movement. This law includes a section that requires food manufacturers to bear a particular disclosure statement if their food product contains any of 44 listed ingredients. Tex. Health & Safety Code § 431.0815. Specifically, the disclosure must say, "WARNING: This product contains an ingredient that is not recommended for human consumption by the appropriate authority in Australia, Canada, the European Union, or the United Kingdom." This portion of SB 25 will not go into effect until January 1, 2027, and its scope is limited to food product labels developed or copyrighted after the effective date. To learn more about the legislation itself, click here to read NALC article "'MAHA' Movement: New Texas and Louisiana Laws."

On December 5, 2025, a group of nonprofit associations that represent food and beverage manufacturers brought a lawsuit challenging the constitutionality of SB 25's labeling provision. Specifically, the plaintiffs make four claims 1) that SB 25's labeling requirement is a violation of the First Amendment, 2) that it is preempted by federal law, 3) that it is unconstitutionally vague, and 4) that it violates the Dorman Commerce Clause.

Like the litigation on Texas' cell-cultured meat ban, this case remains ongoing. However, the court recently published an order that ruled on the plaintiff's request for a preliminary injunction. As previously mentioned, a preliminary injunction is a pretrial motion that can order a party to cease or begin doing a specific action. For a preliminary injunction to be successful, the moving party must satisfy four elements: 1) that they are likely to succeed on the merits, 2) that they will suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in their favor, and 4) that an injunction is in the public interest.

Likelihood of Success on the Merits

To determine if the first element of a preliminary injunction is met, the court first looked to see if plaintiffs would be likely to succeed on their claim that SB 25's labeling requirement violates the First Amendment. The First Amendment of the US Constitution prohibits laws

that abridge the freedom of speech and includes protections against content-based regulations. A content-based regulation is one that will compel a particular message and require an individual or entity to alter the content of their speech. These laws are presumed to be unconstitutional unless the government can prove "they are narrowly tailored to serve compelling state interests" under the standard of strict scrutiny.

Here, the court notes that SB 25 compels the manufacturers of foods and beverages to convey a word-for-word, government-scripted message on their food labels. As a result, the court finds that strict scrutiny is likely to be the standard applied. When strict scrutiny is applied, the burden shifts, and now the government must prove that its actions were constitutional (as opposed to the plaintiffs having to show that the actions were unconstitutional). The court noted that the government failed to meet its burden, instead focusing almost entirely on a different argument. Because the government did not meet its burden under that analysis, if the strict scrutiny standard is applied, the statute would be unconstitutional on First Amendment grounds.

Instead, the government primarily focused its argument on a claim that the court should consider the case under the intermediate scrutiny argument. Intermediate scrutiny would be applied here if a court classified SB 25's labeling provision as commercial speech rather than content-based regulation. While the court does not assess whether it is commercial speech or content-based here, it walks SB 25 through an intermediate scrutiny analysis by applying the four-part test established in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). It's four elements include 1) is the speech misleading or does it concern unlawful activity, 2) is there a substantial government interest, 3) does the regulation advance the government interest asserted, and 4) is it narrowly tailored to achieve the interest.

Here, the court determines that there is a substantial government interest in promoting the consumption of better food ingredients by citizens of Texas. However, the court does not believe that SB 25's labeling provision asserts this interest in a "narrowly tailored" way. It finds there are less restrictive ways Texas could accomplish this goal. As an example, the court states that Texas could have conducted a public advertising campaign warning of these dangers. Thus, the four elements of *Central Hudson* are not met, and the court determines SB 25's labeling provision would likely not pass intermediate scrutiny. Since the court found that the provision would likely not pass either a strict scrutiny or intermediate scrutiny evaluation, it concludes that the plaintiffs have shown a substantial likelihood of success on their First Amendment claim.

Before moving on to the other elements though, the court also evaluates the likelihood of success on plaintiff's vagueness and preemption claims. Both of these claims are related

to a portion of SB 25's labeling provision that would make the provision ineffective if the US Food and Drug Administration or the USDA issued a law or regulation that prohibited the use, imposed conditions of use, or determined the safety of one of the 44 listed ingredients. Tex. Health & Safety Code § 431.0817. The court determines that plaintiffs have not shown they are likely to succeed on their vagueness challenge because they have not produced enough evidence to show that food or beverage manufacturers would be unclear on what triggers the preemption clause. Further, the court finds that the plaintiffs would likely not succeed on their claim that SB 25's labeling provision is preempted by *current* federal laws because neither the Food, Drug, and Cosmetics Act nor the Nutrition Labeling and Education Act "directly conflict" with the Texas law. Though the court finds that success on the merits is not likely with the claims of vagueness and preemption, the first element of a preliminary injunction is met through the likelihood of success on the First Amendment claim.

Irreparable Harm

Next, the court looked to the second factor of a preliminary injunction, irreparable harm. To meet this element, the person seeking a preliminary injunction must prove they are likely to suffer irreparable harm if the law is enforced. In cases involving the First Amendment, courts recognize that the loss of free speech constitutes an irreparable injury, even if the injury only occurs for a short period of time. Here, since the court found it was likely that plaintiffs would succeed on their First Amendment claim, the court determines that irreparable harm is satisfied. Thus, the second element of a preliminary injunction is met.

Balance of Equities and Public Interest

Last, the court looked to the third and fourth elements of a preliminary injunction. In cases where the government is the defendant, these two factors merge. This element will consider whether the hardships imposed on the moving party outweigh the public's interest the law's enforcement. Here, since the hardship suffered is a likely infringement upon First Amendment freedoms, the court determines that this outweighs any public interest in SB 25's enforcement. Accordingly, the court finds that the third and fourth factors of a preliminary injunction are met.

Effects of the ruling

Since the four factors were satisfied, the court grants the plaintiffs a preliminary injunction and the state of Texas will be prohibited from enforcing the labeling provisions of SB 25 while the litigation is ongoing. A decision on a preliminary injunction is not a ruling on the merits, but might be an indicator of the direction a court might go in the future. A trial date has not yet been set for this case, and it currently sits in the discovery phase of the lawsuit.

Conclusion

Since neither of the court's most recent rulings on SB 261 or SB 25 were final judgements, there will likely continue to be noteworthy updates in both cases. To stay up-to-date on these lawsuits and other issues related to food law, click here to subscribe to NALC's biweekly newsletter, "The Feed."

'MAHA' Movement: Defining Ultra-processed Foods (published 10.21.25)

This month California Governor Gavin Newsom signed AB 1264 into law. This landmark legislation creates a statutory definition of ultra-processed foods (UPF) and makes California the first state in the nation to ban certain UPFs from being served in schools. AB 1264's enactment follows recent announcements from the US Department of Agriculture (USDA) and the Food and Drug Administration (FDA) that the federal agencies are collaborating to create a definition for UPFs. This article will discuss both the California law and compare it with another popular food classification system.

Background of UPFs and NOVA

The new California enactment is the first time UPFs have been officially defined by law. This is noteworthy because there is no otherwise universally accepted definition of UPF, whether in law or in science. However, there are several food classification systems that attempt to define it. The system most applied in scientific literature is called Nova, the Portuguese translation for the word "new." Nova was created by researchers at the University of Sao Paulo, Brazil in the format of a 2010 publication titled, "A new classification of foods based on the extent and purpose of their processing." It expanded on work published the year before by Brazilian epidemiologist Carlos Monteiro, a collaborator on the Nova publication, in which Monteiro first termed the phrase UPF. The 2010 publication extended the concept of UPFs into the Nova system and further classified foods into three categories based on "the extent and purpose of the industrial processing applied to them."

In 2019, Monteiro further expanded Nova in a publication for the UN Decade of Nutrition. Now, Nova recognizes four categories of food. The categories include unprocessed or minimally processed; processed culinary ingredients; processed foods; and UPFs. Unprocessed or minimally processed includes edible parts of plants or animals, fungi, algae and water. Food can be still be classified in this category if it underwent minimal processing such as roasting, boiling, non-alcoholic fermentation, or pasteurization. Processed culinary ingredients include oils, butter, lard, sugar, and salt. These are substances that are derived from group 1 foods or else from nature by processes like pressing, refining, grinding, milling, and drying. Processed foods are foods that are made by adding a group 2 substance to a group 1 food and are generally recognized as modified versions of the group 1 food. This could include canned vegetables, tinned fish preserved in oil, whole fruit preserved in syrup, and most freshly baked breads. Under the Nova system, UPFs are defined as "formulations made mostly or entirely from substances derived from foods and additives, with little if any intact group 1 food." Examples of UPF food under the

Nova system include soft drinks, sweet or savory packaged snacks, and pre-prepared frozen dishes.

As mentioned before, Nova is not the only food classification system that defines UPFs, but it was the first and is the most applied in scientific literature. Food and Agriculture Organization of the United Nations' publication titled "Ultra-processed foods, diet quality, and health using the NOVA classification system" contains a helpful chart in Annex 1 that outlines some of the different systems.

California's AB 1264

With a goal of making school meals healthier, California enacted AB 1264. This law, along with creating a legal definition for UPFs, prohibits certain foods meeting the definition from being served in California's public schools. This is the first time a state has both sought to statutorily define UPFs and ban their use in schools. However, this is not the first time California has passed landmark legislation related to the ingredients of food served in schools. In 2024, California was the first state to prohibit the sale of food and beverages containing synthetic color additives in schools. In 2025, several states passed similar legislation, many of whom did so under the mantle of "Make America Healthy Again" (MAHA). Though the California initiatives were not enacted under the "MAHA" mantle, AB 1264, in a way similar to the synthetic dye ban, might serve as a model for how other states attempt to define UPFs. To learn more about California's school synthetic dye prohibition, click here to read NALC article "State Food Laws Enacted in 2024." To lean more about other state "MAHA" actions, click here to read NALC article, "'MAHA' Movement: New Texas and Louisiana Laws."

Definition of UPFs

Along with defining UPFs, AB 1264 bans certain foods that meet that definition from being served in school meals. Specifically, the law bans "restricted school foods" and "UPFs of concern" from being served in elementary, middle, or high schools after July 1, 2035. The classification of foods as being "restricted school foods" or "UPFs of concern" depends on whether the foods meet the definition of UPFs laid out in the California law. Thus, to understand which foods are prohibited, this article will first discuss California's definition of UPFs.

AB 1264 will codify the following definition of UPFs at Cal. Health & Safety Code § 104661. UPFs are food or beverages that contain:

- A substance available in FDA's Substances Added to Food database that has a FDA-defined technical effect, and

- *Either* 1) high amounts of saturated fat, sodium, or added sugar, *or* 2) a non-nutritive sweetener

FDA's Substances Added to Food is a searchable database that includes many of the types of ingredients regulated by the FDA. For example, the database includes food additives, color additives, and Generally Recognized as Safe substances that are listed in FDA regulations. California's new UPF definition applies to a substance found in the database that is designed to have any of the following technical effects, surface-active agents; stabilizers and thickeners; propellants, aerating agents, and gases; colors and coloring adjuncts; emulsifiers and emulsifier salts; flavoring agents and adjuvants (excluding spices and other natural seasonings and flavorings); flavor enhancers (excluding spices and other natural seasonings and flavorings); and nonnutritive sweeteners. The definitions of these technical effects can be found in 21 CFR § 170.3(o).

To meet the UPF definition, a food or beverage must contain one of the substances with a defined technical effect and contain *either* 1) high amounts of saturated fats, sodium, or added sugar *or* 2) a nonnutritive sweeter. Specifically, the law defines a product with a high amount of saturated fat as a food or beverage deriving 10 percent or greater of its total energy from saturated fat. Similarly, high sodium food or beverages contain a ratio equal to or greater than 1:1 milligrams of sodium to calories. Finally, added sugar products meeting the definition include food or beverages with at least 10 percent of total energy derived from added sugars. Thus, under California's UPF definition, a food containing a substance with a defined technical effect that derives 12 percent of its total energy from added sugars would be a UPF.

Further, California's definition would also include a food that contains 1) a substance with a defined technical effect and 2) a non-nutritive sweetener. A non-nutritive sweetener is defined as a substance with less than 2 percent of the caloric value of sucrose per equivalent unit of sweetening capacity. 21 CFR § 170.3(o)(19). California lists several examples of a non-nutritive sweetener including sucralose, steviol glycosides, and lactitol.

The law clarifies that raw agricultural commodities, unprocessed locally grown or raised agricultural products, minimally processed prepared foods, class 1 milk, alcoholic beverages, medical foods, infant formula, and commodity foods specifically made available by the USDA do not qualify as UPFs. Additionally, the law explains that salt, sodium chloride, spices or other natural seasonings or flavorings, nor natural color additives "shall not by themselves cause a food or beverage to be categorized as a UPF."

"Minimally processed prepared foods" is defined in Cal. Food & Agri. Code § 49015(a)(4) as food that prepared using 1) traditional processes to make food edible, to preserve it, or to

make it safe for human consumption, or 2) physical processes that do not fundamentally alter the raw product or that only separate a whole, intact food into component parts. Traditional processes could include smoking, roasting, freezing, drying, and fermenting. Physical processes could include grinding meat, separating eggs, and pressing fruits to produce juice. Thus, under California law, foods that undergo these processes do not meet the standard of "ultra-processed."

Examples of UPFs

Using California's definition, this article will evaluate the following foods and beverages to determine if they would classify as UPFs.

- Goldfish – Pepperidge Farm's Goldfish backed snack crackers would be considered a UPF because the product contains 1) Riboflavin, a database substance that functions as a color or coloring adjunct and flavor enhancer, and 2) has a 250mg of sodium and 140 calories – a ration greater than 1:1.
- Dino Nuggets – Tyson Foods' Frozen (chicken) Dino Nuggets would be considered a UPF under the California standard because the product contains food starch, a stabilizer or thickener, a high amount of sodium with 430mg of sodium and 210 calories.
- Mac & Cheese – Based on the nutrition facts of Kraft's Original Mac & Cheese Macaroni and Cheese Dinner, it would qualify as an UPF. The ingredient list contains Sodium Triphosphate, a substance designed as an emulsifier or emulsifier salt, and contains greater than a 1:1 sodium to calorie ratio with 530mg of sodium and 220 calories in a serving.
- Corn Dogs – Based on the nutrition facts of State Fair's Classic Corn Dogs, this food would qualify as an UPF. The product contains Sodium Diacetate which is a substance designed as a flavoring agent and adjuvant, and the product contains more than 10% of total energy from saturated fat.
- Gatorade – The lemon-lime flavor of Gatorade would qualify as a UPF because it contains 1) FD&C Yellow 5, a substance designed to function as a color or coloring adjunct, and 2) more than 10% of its total energy from added sugars.
- Apple Juice – Mott's 100% Original Apple Juice would not meet the California definition of a UPF because as juice produced from the pressing of a fruit, it falls under the "minimally processed prepared food" exception. However, regardless of the exception, it would still not be a UPF because it does not meet the definition's two-part test. While the apple juice contains ascorbic acid, a substance designed to function as a stabilizer or thickener, it has 0 percent added sugars and saturated

fats, has a sodium to calorie ratio under 1:1, and does not contain a non-nutritive sweetener.

Prohibiting specific UPFs from schools

Along with creating a definition for UPFs, the California law also prohibits “restricted school foods” and “UPFs of concern” from being served in schools. UPFs of concern include food that 1) meets the law’s outlined UPF definition and 2) is classified as “of concern” through regulations adopted by the California Department of Public Health (CDPH). Restricted school foods are defined very broadly by the law as a food or beverage that contains one or more of the listed substances with a defined technical effect and is also restricted from service or sale in schools via CDPH regulations.

The law directs the CDPH to define both UPFs of concern and restricted school foods after considering several factors. Seven factors are listed in the law and include questions like, “whether the substance or group of substances are banned or restricted in other state, federal, or international jurisdictions due to concerns about adverse health consequences,” “whether the food has been modified to be high in saturated fat, added sugar, or salt,” and “whether the food meets the requirements of [FDA’s] final rule . . . titled ‘Food Labeling: Nutrient Content Claims; Definition of Healthy.’” CDPH’s consideration of the listed factors must be “guided by a rigorous examination of available reputable peer-reviewed scientific evidence” and must be completed by June 1, 2028. By July 1, 2029 schools must begin to phase out both restricted school foods and UPFs of concern, and by July 1, 2032 a vendor shall not offer restricted school foods or UPFs of concern to a school.

CDPH is required to review the regulations and update definitions every five years. Additionally, the law creates reporting requirements for vendors of food products sold to a school. The vendor reporting requirements will go into place on February 1, 2028 and must be submitted yearly until February 1, 2032.

CA vs Nova

California’s definition of UPFs is different from the standard created in Nova because it outlines tangible characteristics that a food must possess to be classified as a UPF. For instance, California’s definition classifies food as an UPF is it contains a specific substance with a defined technical effect or if it contains a certain amount of added sugars. Conversely, Nova categorizes food based on a broad spectrum of the type and extent of processing it underwent. However, Nova is vague about what level of processing crosses into the UPF threshold. For example, in the UN Decade of Nutrition article UPFs are classified as those with “additives that imitate or enhance the sensory qualities of foods.” However, the article also blurs the line between UPFs and processed foods by stating that

"additives in UPFs include some also used in processed foods, such as preservatives, antioxidants and stabilizers." While Nova is a helpful tool in categorizing foods into four groups, it is not a nuanced definition like the California law.

Federal Agencies Seek to Define UPFs

The timing of the enactment of AB 1264 is significant because the USDA and FDA are currently collaborating to establish a definition of UPFs. On July 23, 2025, the agencies published a press release announcing a joint Request for Information to "gather information and data to help establish a federally recognized uniform definition for UPFs." This initiative follows statements in the Make Our Children Healthy Again Assessment, published by the Make America Healthy Again Commission, that UPF overconsumption is one of the driving factors of what the assessment calls the "childhood chronic disease crisis." The agencies have not indicated that they plan to prohibit UPFs in school meals, as California has done, but they have stated a uniform definition will "allow for consistency in research and policy." The RFI is publicly available for comments until Oct. 23, 2025.

Though California's law and the state's initiative is not categorized under the mantle of "MAHA," its enactment might have an effect on the definition USDA and FDA create. Further, as other state legislatures begin their 2026 sessions in the upcoming months, they might model California's law in their own UPF definitional attempts.

To learn more about the FDA's Final "Healthy" Rule, click here to read NALC article "FDA Releases Final 'Healthy' Rule."

Solar Smarts for Landowners: An Overview

By Rusty Rumley

While not a new subject, solar leasing is a topic that will garner increased attention because of the additional funds from the Inflation Reduction Act (IRA) becoming available at the beginning of 2023. The IRA incentivizes the adoption of solar through several mechanisms such as the 30% solar tax credit for installing solar on a residence, but the primary one affecting solar leasing on a commercial scale is the 30% business investment tax credit. This credit is expected to spur demand for more commercial solar projects over the next decade and landowners can expect to be approached by representatives of these future projects for leasing opportunities.

What is a solar lease?

The typical commercial solar lease is where an outside party approaches a landowner to negotiate placing solar panels, substations, power lines, roads and other necessary infrastructure on their property for a significant period of time (twenty-five to thirty-five years with optional extensions are common) for a specified rental rate per acre per year or with some form of revenue sharing much like a royalty payment for an oil or gas lease.

These leases tend to be complicated and due to the length of the lease it is important to have an experienced attorney look over any potential contract before signing. While the leases tend to be long, twenty to forty pages is not uncommon, there are some clauses that need to be reviewed carefully.

Typical Clauses and Things to be Aware of in Solar Leases

Different companies use different lease agreements; however, there are similarities between the various contracts. Understanding these clauses can help when consulting with an experienced attorney about potential lease options.

Signing a lease agreement does not guarantee a solar lease.

Signing a solar lease guarantees that the solar developer has the option to go forward with the construction of a solar project, but it does not guarantee that they will build it. Solar companies may approach many landowners and sign lease agreements that lock the landowner into an initial agreement where the solar company can gather data and decide which site will best fit their needs. During the initial period the landowner typically has to grant them access to the property and refrain from signing any other agreements that might interfere with the solar lease. If by the end of the initial period the company has not started construction then the agreement typically expires, the landowner is able to keep any payments that have already been made, and the landowner can sign new lease agreements with other solar companies.

Income from the Solar Lease

What have your neighbors been offered? Many leases have a confidentiality clause, but those are typically only binding after the contract has been signed. Rental rates can vary dramatically so researching current rates is critical before signing a solar lease. Another issue this often not thought of is how will your rental rate increase over time? Remember that these agreements can last for

more than three decades. The revenue you receive might be adequate in 2023, but will that same sum be a fair rental rate in 2037? Escalation clauses address this issue by building into the agreement an orderly increase in the rental rate over the life of the lease agreement.

Property taxes

Property that is assessed and tax as agricultural property generally has a lower property tax rate than residential or commercial property. If a solar project is developed on your property then a county assessor may determine that the property is in commercial energy production rather than agricultural production which could significantly increase your annual property tax. This should be an area that is addressed in a lease agreement. Does the solar company pay the increase in taxes due to the solar development or will the landowner bear this cost?

Liability for Damage to the Solar Equipment

What about protecting the solar panels and other equipment on the leased property? Some leases make the landowner liable for any damages to equipment on the leased property. Can you guarantee that nobody will damage the equipment? Many solar projects construct fencing around the perimeter and it may be prudent to make the company responsible for any damage that occurs on their leased property.

Decommissioning the Project

Solar projects can easily last twenty-five to thirty-five years; however, at some point the project will no longer be economically viable. Who will pay for cleanup at the end of the lease period? Many contracts are silent as to which party bears the cost of removing the solar equipment and restoring the land to its prior condition. A good lease agreement should specify which party will be responsible for decommissioning the project and some ever require the solar company to establish a bond to pay for cleanup at termination. A lawyer can be extremely helpful in negotiating these types of arrangements.

Conclusion

There are numerous things that a landowner should think about before signing a solar lease and this article covers some of the important things to consider. Having an experienced attorney go through the lease is crucial because the time to negotiate is before signing the contract. For more information on the subject of solar leases click **here**.

To read the Inflation Reduction Act of 2022, click **here**.

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

Solar Leasing for Landowners: Payment Structures

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Solar leasing is the practice of renting tracts of land to install solar panels and infrastructure to generate electricity from sunlight. The typical commercial solar lease is where an outside party approaches a landowner to negotiate placing solar panels, substations, power lines, roads and other necessary infrastructure on their property for a significant period of time (twenty-five to thirty-five years with optional extensions are common) for a specified rental rate per acre per year or with some form of revenue sharing much like a royalty payment for an oil or gas lease.

Because landowners and solar companies are free to negotiate terms, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that all leases contain. Available commercial solar leases were gathered and analyzed to create this blog series about common clauses and to layout the variety of terms within those common clauses. The following post details common components of the payment structure of solar leases.

Common Payment Structures

Solar companies establish payment structures in their proposed lease agreements, and this is typically one of the first sections that a landowner will review. Many solar companies exist across the country resulting in diverse payment structures. While most lease agreements will vary, there are some common approaches that most companies follow. A very common approach to solar leases is to divide the lease into separate phases and pay different rates or through different calculations according to the phase of the solar lease. Some leases may pay a fixed rate based on the potential megawatts of power that the project could generate or even pay a royalty payment of some percentage of the power actually produced while many leases pay a fixed amount per acre per year. Other factors, such as state laws can also impact lease agreements. For example, both Tennessee and Florida statutorily require solar

lease agreements to include statements of the lease's compensation structure.[1] It is critical to carefully examine the lease and understand what compensation you are entitled to either during the life of the lease or if payment depends on the current phase of the lease agreement.

Simple Payment Structure

Simple payment structures may focus on one phase, such as the production phase, to compensate the property owner. For example, one lease agreement we reviewed requires payment based on the potential amount of energy produced:

> "… the annual rent of Seventy-five hundred dollars ($7,500) per megawatt (AC) of Installed Power (as defined herein) payable to Landlord, in advance, in annual installments."

This type of payment structure exposes the landowner to a major potential risk. Not all lease agreements turn into a completed solar project. There may be years after signing the initial agreement before a final decision on a project is made. Will the landowner be compensated for this time period? Simple payment structures may not take into account the time and complexity of building a solar project, so landowners need to ensure that they are adequately compensated for what they provide even if the project is never completed.

Payments Based on Lease Phases

Solar leases, and the developments themselves, are complicated projects that will take years to start producing power. It is common to break up lease agreements into different phases and the compensation methods and amount for the phases may differ dramatically. Common phases are the option phase, the construction phase, the operations phase and the decommissioning phase. Lease agreements may use some, or all, of the phases above. Exact names may differ from lease to lease, but the practical effects are similar.

The Option Phase

An option phase is the time period between the signing of the agreement and the beginning of the construction phase. Some of these phases can be as short as six months, while others may last for years. During the option phase, most leases contain no guarantee that the leased land will actually be used for a solar project.

[1] *See* Tenn. Code Ann. § 66-9-204; *see also* Fla. Stat. § 520.23 (2023).

The company may enter into contracts with several landowners while they decide which land to initiate their project on. The company will also need to sort out many practical issues such as permits, loans, power purchase agreements and a myriad of other things necessary for a successful solar project. Because rental payments in the future are unknown, it is beneficial to require rent payments during the option period. Example:

> "As consideration for the Option, during the Option Period, Grantee shall pay to Landowner option payments (collectively, the "Option Payments" and each an "Option Payment") in the amount of (i) US $2,500 (the "Initial Option Payment"), due and payable on the date that is forty-five (45) days after the Effective Date and (ii) thereafter, US $625 per calendar quarter, due and payable on the first day of the applicable calendar quarter."

Construction Phase

This phase of construction typically begins when they start bringing in construction equipment and materials and will last until solar project is actively producing power. During the option phase there may be minimal disruption to the landowner's use of their property, but during the construction phase the landowner may have very limited access to a significant portion of their property. Payments for this phase tend to be more substantial than the payments from the option phase because of the loss of access to the property. Examples:

- Payment is to begin when construction begins, and payment is to be made per acre.
- Landowner shall be paid $20,000 annually during Construction period.

Operations Phase

This phase begins when the construction is complete and the project begins producing power commercially. This phase can last for decades and ends when the project goes into the decommissioning phase. It is important to carefully review the contract to see how long it can last. Many contracts also include language where a specified period of time is guaranteed (20 years) and the company is entitled to extend this phase at their own discretion (company has an option to extend the agreement by five or ten years at their sole discretion). Payment calculations during the operations phase can also vary substantially. Many contracts pay on a per acre per year basis, but other contracts are paid on installed megawatts or a royalty payment based on the actual amount of power generated. Because of the length of this phase in the lease it is a common practice build in an escalation clause to keep up with inflation. Examples:

- $2,200 per acre of Easement Area per year during the Operations Period, escalating at a rate of 2% per annum.
- …$1,000 per acre per year for the Rent Payment of the leased property. Starting on the third (3rd) anniversary of the first Rent Payment Date, and for each annual anniversary thereafter, the annual Rent shall be increased by three percent (3%) over the Rent otherwise then in effect.

Decommissioning Phase

This phase begins at the end of the operations phase and, hopefully, concludes when all of the solar project infrastructure has been removed from the property and the premises has been returned to the state that it was in before the construction phase began. Many older agreements do not address the decommissioning phase and landowners may need to negotiate for payment and additional security to ensure proper decommissioning. Because of the length of these leases the original parties that signed the agreement may no longer be available (or the project could be sold to another company) so it is critical to document each party's responsibilities in the contract. One common approach to ensure that funds are available to pay for decommissioning is to require a bond from the solar company that can cover cleanup at the end of the lease. It also may be a wise idea to have payments for the property to continue through the decommissioning phase to incentivize the company to move forward. Example:

- Rental Payment of $1,500 per acre per year shall continue until all solar infrastructure has been removed from the premises at the conclusion of the agreement.

Conclusion

Overall, it is important that the solar lease agreement accurately encapsulates the terms agreed on by the parties. It is important to have an attorney that is knowledgeable about solar leases to thoroughly review the agreement for the landowner because once the contract is signed it is very difficult to make any changes. The long lease period means that anything left out of the agreement is something that the landowner, and potentially their heirs, will have to deal with for years to come.

To see more articles in this series click here.

To read the Inflation Reduction Act of 2022, click **here**.

To read the Farmland Owner's Guide to Solar Leasing, click here.
To read Understanding Solar Energy Agreements, click here.

Solar Smarts for Landowners: Property Owner Rights/Use

Rusty Rumley, Senior Staff Attorney

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Solar leasing is the practice installing solar panels on large areas of land leased from a third party to generate electricity from sunlight. Commercial solar leasing is a topic that has garnered increasing attention because of the high rental rates in many areas of the country. Large-scale commercial solar leases include several unique aspects that make them differ from the typical residential solar contract. Because landowners and solar companies are free to enter a contract containing whatever terms the parties agree on, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that many leases contain. We gathered and analyzed many available commercial solar leases to create this blog series about the most common clauses and layout the variety of terms found within those common clauses. The following post details common clauses involving the landowner's rights and use of the land during the lease; however, it is important to have an attorney thoroughly review any contract before it is signed. To read the overview post on Solar Smarts for Landowners click here.

Access and Use of the Property Clauses

Land carries an intrinsic value for farmers that is often difficult to put into words. Protecting the land and farming land that is not being used under a solar lease is often a priority when negotiating any lease. This makes it important to consider whether the lease agreement significantly limits the landowner's access to, or use of, their property. Many leases contain an "owner access" or property use restriction clause that specifies what actions can be taken by both the solar developer and the landowner. Having clear expectations from both sides of the agreement can limit potential conflicts in the future. In our research, some solar leases may adequately address many of these issues while others are lacking in detail. If there are specific uses and activities that the landowner wishes to continue, the lease agreement should expressly include those rights before anything is signed. Below are sample clauses from various solar leases that we have selected to use as examples as well as commentary about the clauses:

- Landlord shall not make any material changes to the property that would impact the soil quality of the Easement area or block the sunlight.

This clause provides very little guidance to the lease parties and is written entirely in favor of the solar developer. What impacts soil quality and what should be avoided to not block sunlight? Adding clear expectations with specific descriptions of prohibited activities would help to clarify this clause. The landowner will also want assurances on how they can continue to use their property in a way that does not violate the lease agreement. These issues will be addressed as we look at different clauses. Example two:

- "During the Development Term, owner shall have the right to continue to use the Property for agricultural, ranching, timber harvesting, and/or other reasonable purposes so long as the Property is maintained substantially in accordance with its current condition and in compliance with all applicable laws."

This clause allows the property owner to continue using the property for normal farming activities during the development term of the lease. It is important to note that this clause only applies to the development term, not the entire lease. Once construction begins the landowner will lose access to some property but notice that the exact property at issue is not described in this clause. To learn more about the different phases of a solar lease read our guide to Understanding Solar Energy Agreements here.

If a landowner wishes to retain rights to use the land in these ways throughout the entirety of the lease term, the lease agreement should reflect that and include a similar clause applicable to the construction and operation terms. One issue that frequently arises is that due to the nature of the construction phase, the project may need more of the land than when the project moves into the operation phase. The solar developer will need extra space to store equipment and supplies during the construction phase, and the landowner should make sure that they will be compensated for this additional temporary usage. During this phase the landowner is unlikely to be able to continue farming this property. Because the development phase can take years to complete the landowner would like to be able to farm their property in the meantime and receive sufficient notice before the solar lease moves into the construction phase. For pasture this notice may be short, but for row crops the landowner should negotiate for a longer notice period so that they do not lose

a growing crop. Regardless of the notice period, it is important to include language specifying damages when a solar lease moves into the construction phase.

A lease may also include an owner access clause that specifies the process to be followed for the landowner to access the leased premises.

For example:

- "During the Construction and Operation Term and any Extended Term with respect to any Property, Owner shall have the right to reasonably access such Property at reasonable intervals and at reasonable times and upon at least forty-eight hours' prior advance written notice to Lessee to inspect such Property. Any such access shall not materially interfere with Lessee's use of such Property for Solar Energy Purposes and occupancy of such Property in any manner."

This clause clarifies the steps to be taken for the landowner to access the property and also places a restriction on the actions taken by the landowner while on the property. The property owner may want to inspect their property to make sure that the property is being taken care of, but this is also a potentially dangerous place to be with either construction equipment during the construction phase or dangerous amounts of electricity during the operation term so the solar developer will want to protect themselves as well.

Ultimately, a solar lease also grants access to the land to many individuals who are likely strangers to the landowner. Employees from the solar company, maintenance workers, and others will be accessing the land over the course of several decades. This is likely unfamiliar to rural landowners and can cause additional stress and impose increased liability. A lease may specifically limit what can be grown on the land (timber is typically prohibited since it may create shade), what can be built on the land (barns, houses or other structures that could create shade) and other uses, such as hunting rights, may be restricted or significantly limited.

It is important to negotiate the access and usage of the property that the landowner will feel comfortable with before signing any agreement. Once the agreement is signed then it is very difficult to change the agreement in the future.

Maintenance of the Property

Most leases establish which party is responsible for maintenance of the property. Some leases require the tenant to maintain the property, while others hold the landowner responsible for keeping the land in proper order.

For example:

- "Landlord shall maintain its property adjacent to the Leased Premises in good condition and state of repair to avoid interference with Tenant's use of the Leased Premises and the Easement. Landlord shall not construct or permit to be constructed structures or plant or permit to be planted trees adjacent to the Leased Premises that will impede solar access to Solar Farm."
- Landlord shall maintain the property in a good condition, including the property in the immediate vicinity of the System.
- Operator (tenant) shall maintain the property in a neat and clean condition. Operator shall repair any cattle guards, fences, or gates damaged in connection to the Operator's activities on the property.

Many solar agreements split the duty for maintenance of the property. The solar developer is often responsible for the property that is being actively used by the project (this land is almost aways fenced in to limit access) and the property owner is responsible for maintaining the property outside the fence. Many solar developers will also reserve the right to maintain land immediately outside of the project so that they can cut down vegetation that could create shade or a fire hazard. Specifying responsibilities between the parties can make relations better over the life of the lease agreement.

Conclusion

A property owner should consider how the lease terms impact their ability to use their land. Issues such as use of the surrounding land and maintenance of the property may seem like far away concepts during the lease negotiation, but the terms created during these negotiations will dictate how the land will be used and maintained for decades to come.

To read other articles in the Solar Smarts for Landowners series click **here.**

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

Solar Smarts for Landowners: Miscellaneous Clauses

Solar leasing is the practice of installing solar panels on large areas of land leased from a third party to generate electricity from sunlight. Commercial solar leasing is a topic that has garnered increasing attention because of the high rental rates in many areas of the country. Large-scale commercial solar leases include several unique aspects that make them differ from the typical residential solar contract. Because landowners and solar companies are free to enter a contract containing whatever terms the parties agree on, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that many leases contain. We gathered and analyzed many available commercial solar leases to create this blog series about the most common clauses and layout the variety of terms found within those common clauses. The following post details common clauses regarding miscellaneous topics such as assignment/subleasing provisions, confidentiality clauses, binding arbitration clauses, insurance requirements, and oil, gas, and mineral rights.

Assignment/Subleasing

Most, if not all, of these leases include a clause that allows the developer to assign, transfer, or sublease their interest in the property without the consent of the landowner. Some leases require limited or no notice to sublease or assign the developer's interest to another party. Landowners may be able to negotiate for more notice on an assignment or sublease, but it is doubtful that the developer will forego this ability. Solar leases are long-term contracts that can last for decades and developers will want, or need, the flexibility to transfer the project to another party. What does this practically mean for the landowner? Other than negotiating for more notice potentially, this type of clause illustrates the importance of capturing the full agreement in writing. A landowner may have a wonderful relationship with the initial developer, but subsequent operators may not be so accommodating. The landowner's success in navigating future challenges with the solar company depends on the language that is negotiated before the lease is executed.

Confidentiality Clauses

Solar companies often ask that landowners not discuss the details of their agreements with their neighbors or nearby landowners. Some leases specifically include confidentiality clauses that prohibit either party from disclosing to a third party the financial details of the agreement, especially during the option period. Landowners are also often prohibited from revealing the lessee's product design,

methods of operation and construction to any third party. These clauses are included to protect the unique features of a solar company’s business model from competing companies and potentially in negotiating different pay rates with different neighbors. There are several different issues that landowners and their attorneys should be aware of with confidentiality clauses.

First, this does not stop the landowner from seeking legal advice on the lease. In fact, a landowner may be able to use this clause to negotiate with the developer on paying some, or all, of the landowner’s attorney fees for reviewing the lease because they are creating legal liability for the landowner. In some parts of the country developers may be willing to reimburse attorney fees for the landowners and not in other parts, but it is an issue that your attorney should explore.

Second, the landowner should be able to consult with other people such as family members, accountants, tenants and lenders before signing the agreement as the contract needs to be executed for the confidentiality clause in the lease to come into force. Some developers may have other types of documents, such as Non-Disclosure Agreements (NDAs), that are introduced earlier in the negotiations and those agreements should be carefully reviewed by the landowner’s attorney before they are signed.

It is important to be aware of any confidentiality requirements in your agreement to avoid liability for breach of contract.

Arbitration and Venue
Ideally, lease agreements would sufficiently encapsulate the agreement of the parties, and the parties would not have any issues that lead to disputes. However, no contract can address all potential problems that may arise during a lease that is likely to last more than a quarter of a century. Leases often include arbitration clauses that require parties to resolve any disputes through binding arbitration rather than in court. Before entering a lease agreement that requires arbitration, a landowner should consider whether they are willing to surrender their right to have the case heard in court. These binding arbitration clauses are often more favorable to the solar companies because a landowner is much more likely to win a jury trial in his or her hometown against a large solar corporation.
Here is an example of a binding arbitration clause:

> “Any Dispute that is not settled to their mutual satisfaction within the applicable notice or cure periods provided in this Agreement shall be settled by arbitration between the Parties.”

Venue, or forum selection, is another clause that your attorney should carefully review. Venue clauses decide the location where a contract dispute will be litigated. If the solar lease does not specify where venue should occur, then the default answer is where the breach of contract happened. This is usually going to be the county or parish where the solar lease is located which typically favors the landowner. Developers that do not have an arbitration clause will usually want to have any court actions held in a location that is more favorable to them. The landowner's attorney should carefully review these sections of the agreement to fully protect the landowner's interests as much as practicable in case of a later dispute.

Insurance/Indemnification

It is important to ensure that, in the case of an accident that causes loss, both parties are protected. The most common lease requires the developer to maintain an insurance policy that covers injury to person and property. These clauses typically include a minimum policy amount. For example, a $2 million minimum for each individual occurrence and $5 million in umbrella liability insurance. This requirement ensures that the solar developer will be able to pay for any damages that arise from its actions or injuries on the property.

Additionally, landowners are subject to premises liability and owe a certain duty of care to those who enter their land. This duty of care would extend to employees of the solar company, maintenance workers, and any other individual who enters the land in relation to the solar project. Solar leases should include indemnity clauses in which the developer agrees to indemnify and hold harmless the landowner for any losses caused by injury to another person or piece of property. This is important because it is possible that an accident may occur in the 30+ year span these agreements typically last, and the landowner does not want to be held liable for personal injury in relation to the project. Some early solar leases have indemnity clauses that protect the developer at the landowner's expense and those should be avoided whenever possible. The landowner should not be held responsible if, for example, teenagers shoot at solar panels from the road and cause damage. A well drafted lease will put the risk of liability on the developer since they are the ones with control over that property during the life of the solar lease.

Mineral Rights and Solar Leases

It is very common in some states that both mineral developments (usually oil and gas exploration) and solar development are happening in the same area at the

same time. Solar developers will want the exclusive right to use the property for their solar project and may ask landowners for some form of assurance in the lease that they will have sole rights to the property. This may not be something that the landowner can guarantee. People that own the surface estate (the landowners) may not own the mineral estate (the valuable minerals underneath the surface) if those rights have been severed. In many states the mineral estate is the dominant estate over the surface estate, and they may use a "reasonable amount" of the surface as necessary to extract their minerals. This means that if the landowner has only the surface rights to their property, then they cannot, and should not, guarantee that the solar developer will have exclusive rights to the surface because they cannot exclude a mineral owner from extracting those minerals. With modern drilling techniques there is more flexibility on where the wellhead can be located, but the landowner should not agree to clauses that they may not be able to honor. Developers in states with active mineral exploration should be aware of this issue; however, the landowner's attorney should also seek to minimize the risk by recognizing this risk in the lease agreement.

Conclusion

Ultimately, landowners and solar companies may include any clauses they wish in a lease agreement. It is best to enter into a comprehensive agreement that addresses all material issues and topics in order to protect both the landowner and the developer. Any term that is written in the lease is enforceable against both parties, and it will be more difficult, if not impossible to enforce terms that are not included in the written agreement. Landowners spend much of their time looking at the payment clause of a solar lease, but the other miscellaneous clauses can impact the overall success of the lease agreement.

To read other articles in the Solar Smarts for Landowners series click **here**.

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

IEEPA Tariffs Challenged in Supreme Court (published 10.16.25)

Introduction

On August 29, a federal appeals court ruled that the International Emergency Economic Powers Act (IEEPA) does not provide the Trump Administration authority to impose retaliatory tariffs. In its ruling, the appeals court held that President Trump exceeded the authority granted by the IEEPA when he signed five Executive Orders imposing tariffs on "nearly all goods from nearly every country in the world." The court's ruling permitted the Trump Administration to appeal the judgment to the United States Supreme Court, which agreed to hear arguments during the first week of November. Trump is the first and only President to rely on the IEEPA to implement tariffs, so this case will cover new ground. With the challenged tariffs playing a large role in international trade, the outcome of this case will certainly impact U.S. agricultural markets. This article will discuss the background of the case, the decision of the appeals court, and what comes next.

Background

The IEEPA was established in 1977 to grant the President the authority to exercise a variety of economic powers in response to a declared national emergency, while also limiting other economic powers granted to the President by earlier statutes like the Trading with the Enemy Act (TWEA). Functionally, the IEEPA allows the President to "investigate, regulate, or prohibit any transactions in foreign exchange." **50 U.S.C. §1702(a) (1977)**. However, the President's authority under the IEEPA is available only "to deal with any unusual and extraordinary threat . . . if the President declares a national emergency with respect to such threat." **50 U.S.C. §1701(a) (1977)**.

In January of this year, President Trump **declared** a national emergency at the U.S.- Mexico Border, citing national security concerns. This national emergency was later expanded to include Canada and China. Executive Orders Nos. **14193**, **14194**, **14195**, **14257**, and **14266** imposed tariffs on Mexico, Canada, and China in response to these national emergencies. The tariffs instituted by these executive orders are referred to in the court's opinion as the "Trafficking and Reciprocal Tariffs." The Trump Administration cited the President's IEEPA authority to regulate foreign trade in the event of a national emergency as the legal basis for instituting the tariffs. At issue in ***V.O.S. Selections, Inc. v. Trump,*** **No. 2025-1812 (Fed. Cir. 2025)**, are the five Executive Orders issued by President Trump to impose trade duties on foreign trading partners.

The Case

On April 14, 2025, a group of five businesses **filed suit** in the Court of International Trade (CIT), challenging the reciprocal tariffs instituted by President Trump following the declared national emergency. In the complaint, the plaintiffs alleged that the IEEPA did not grant President Trump the authority to levy the challenged tariffs. The complaint asserted that the authority to impose tariffs, "must be granted clearly and unmistakably" and not "through some implication so vague and indeterminate that it went unnoticed by every other President for nearly five decades."

The plaintiffs additionally claimed that even if the IEEPA did confer this authority to the President, then it is an unconstitutional delegation of legislative authority. On this point, the plaintiffs alleged that interpreting the IEEPA as allowing the challenged tariffs would constitute a "sweeping delegation of legislative power." According to the complaint, this "sweeping delegation" would violate the nondelegation doctrine, which exists to prevent Congress from giving its legislative power to entities not vested with such authority under the Constitution. At the CIT, the court **held** that the IEEPA did not authorize these tariffs and that the challenged orders would be permanently enjoined. Because the CIT found that the IEEPA did not authorize the tariffs, the CIT did not address whether it was an unconstitutional delegation of authority. The government appealed that decision to the U.S. Court of Appeals for the Federal Circuit.

On appeal, the court limited its discussion to "whether the Trafficking and Reciprocal Tariffs imposed by the Challenged Executive Orders are authorized by IEEPA." The court **held** that they were not. In reaching this conclusion, the appeals court relied on the text of the IEEPA, the IEEPA's history, and similar trade statutes. The court held that the IEEPA's authority, which permits the President to "regulate . . . importation," does not include the ability to impose sweeping tariffs. The court noted that the IEEPA does not include the word "tariff" or any of its synonyms like "tax" or "duty." However, in a variety of other statutes that do confer tariff authority on the President, Congress has used "clear and precise terms to delegate tariff power."

The court reasoned that the history and purpose of the IEEPA conflicted with President Trump's tariffs. The court pointed out that since the IEEPA was enacted, "not once before has a President asserted his authority . . . to impose tariffs." The court noted that the IEEPA was specifically enacted to "cabin the President's authority" and further reasoned that, "it seems unlikely that Congress intended, in enacting IEEPA, to depart from its past practice and grant the President unlimited authority to impose tariffs." This, coupled with the explicit grants of authority found in similar statutes, led the court to conclude that, "whenever Congress intends to delegate to the President the authority to impose tariffs, it does so

explicitly." Because the court found that IEEPA did not authorize these tariffs, the court did not address whether IEEPA violated the nondelegation doctrine.

Moving Forward

Despite finding that the IEEPA did not authorize the tariffs implemented by President Trump, the appeals court declined to affirm the CIT's decision to overturn and block the challenged tariffs. For now, the challenged tariffs will stand. In reaching this decision, the court relied on **Trump v. CASA, Inc., 606 U.S. 831 (2025).** There, the Supreme Court **held** that the injunctions sought were "broader than necessary to provide complete relief to each plaintiff with standing to sue." Rather than granting the injunction, the Supreme Court in **CASA** instructed the lower courts to "move expeditiously to ensure that, with respect to each plaintiff, the injunctions comport with this rule and otherwise comply with principles of equity."

The appeals court here took the same approach. On sending the decision back to the CIT for further review, the appeals court instructed the CIT to "consider in the first instance whether its grant of a universal injunction comports with the standards outlined by the Supreme Court in *CASA.*" This refusal to grant the injunctions have preserved the tariffs and will allow the Trump Administration to continue collecting tariff revenue for the time being. The government has appealed the CIT's decision to the Supreme Court, which decided to hear the case.

At the Supreme Court, **two questions** have been presented for review. First, whether the IEEPA allows a President to institute tariffs after declaring a national emergency. Second, if IEEPA authorizes the tariffs, whether the statute unconstitutionally delegates legislative authority to the President, a question that was left unanswered in the lower courts. The Trump Administration has urged the Supreme Court to hear the case and issue a decision quickly. In a document published on September 9, the Supreme Court **granted** a motion to expedite the case and set oral arguments for November 5, 2025.

The Supreme Court's decision will have major political and economic implications, regardless of the outcome. Siding with the President would likely allow further tariffs to be enacted under the IEEPA and would expand the statute's authority for future administrations. Siding with the plaintiffs would likely result in the challenged tariffs being completely vacated. Given the impacts of the tariffs so far, this option would have a major effect on the U.S. economy. A final decision is not likely to come soon, but the outcome of this case will have major implications for the U.S. agriculture industry.

Overview of Recent Ag Trade Announcements (published 11.20.25)

Background

Following President Trump's three-leg journey across Asia in October of 2025, the White House has released details of new trade agreements that seek to increase U.S. agricultural exports. Additionally, agreements executed earlier this year with the United Kingdom (U.K.) and the European Union (E.U.) mark a similar attempt to increase exports to various European nations. This article will briefly discuss the details of the various trade developments announced by the White House throughout 2025.

Mutual Responsibilities & Consequences

It is important to note that the trade deals discussed below are still preliminary and in some cases are merely agreed upon "frameworks" meant to guide negotiations as they progress. As a result, they are not (and are not yet intended to be) binding on either country. Given the unpredictability of international trade, the final agreements could potentially vary greatly from these initial framework agreements, depending on future negotiations.

Article I of the Constitution gives Congress the exclusive power to "regulate commerce with foreign nations." In the past, when the President exercised their power to negotiate trade agreements, they were considered "congressional-executive agreements" and would ultimately require Congress' approval under trade promotion authority (TPA) enacted by Congress. However, the **most recent TPA authority** expired in 2021, creating uncertainty in whether foreign trade agreements would require congressional authorization. For example, when President Biden executed the Indo-Pacific Economic Framework for Prosperity (IPEF), no agreements under this trade deal were submitted to Congress for approval.

With the expiration of the TPA, it is unclear whether President Trump's "framework agreements" will require Congressional approval, creating yet another area of uncertainty in the future of these agreements. The Congressional Research Service has recently published a **report** that may be helpful for more information on the interplay between executive and legislative authority.

China

Following a meeting in South Korea between President Trump and Chinese President Xi Jinping, the White House published details of a new trade deal agreed upon by the U.S. and China. In a **fact sheet** recently published on the White House website, the trade deal is referred to as a "historic agreement" that will "open China's market to U.S. soybeans and other agricultural exports." The trade deal stipulates that China will suspend its retaliatory

tariffs implemented throughout 2025. These include tariffs on U.S. chicken, wheat, corn, cotton, sorghum, soybeans, pork, beef, aquatic products, fruits, vegetables, and dairy products. Further, China has agreed to purchase at least 12 million metric tons of U.S. soybeans during the final two months of 2025. China has also committed to purchase at least 25 million metric tons of U.S. soybeans in 2026, 2027, and 2028. Finally, China has agreed to resume purchasing U.S. sorghum, hardwood, and softwood logs.

China is a major purchaser of U.S. soy, so this can have a significant impact on production and market values. For example, in 2024 China purchased 26.81 million metric tons of U.S. soybeans. Between January and May of 2025, before trade tensions escalated, figures **indicate** China had imported 6 million metric tons of U.S. Soybeans. It has been **reported** by the USDA that since the summit in South Korea, China has purchased 792,000 metric tons of U.S. soybeans.

As of the time of writing, China **has not** publicly issued a confirmation of its commitment to purchase the specified amounts of U.S. soybeans. However, in regards to some other components of the deal, China has **confirmed** its suspension of its retaliatory tariffs on U.S. imports. It will, however, leave in place a 13% tariff on imported U.S. soybeans.

Japan

During the trip to Asia, President Trump met with Japan's Prime Minister Sanae Takaichi to reconfirm the Framework Agreement entered by the U.S. and Japan on July 22, 2025. The framework contained provisions intended to bolster agricultural trade between the U.S. and Japan. Details of this agreement were outlined in an **Executive Order** signed by President Trump on September 4, 2025, titled "Implementing the United States-Japan Agreement." The Executive Order states that Japan will be "working toward an expedited implementation of a 75 percent increase of United States rice procurements within the Minimum Access rice scheme." Additionally, Japan will be investing $8 billion per year towards "purchases of United States agricultural goods, including corn, soybeans, fertilizer, bioethanol (including for sustainable aviation fuel)." Japan has reconfirmed its commitments in a recently published **Joint Statement** between Japan and the U.S..

The United Kingdom

On May 8, 2025 President Trump and Prime Minister Keir Starmer **announced** the U.S.-UK Economic Prosperity Deal (EPD). Per the **general terms** of this agreement, the United Kingdom will be removing its 20% tariff on U.S. beef exports, which currently impacts beef exports within a quota of 1,000 metric tons. The U.K. has also agreed to create a preferential duty-free quota of 13,000 metric tons for U.S. beef. A preferential-duty free agreement is a form of trade agreement that allows products to be imported with reduced

import costs and fees. The trade deal between the U.S. and the U.K. also stipulates that the two nations will “commit to working together to improve market access for agricultural products.” However, the trade deal does not go into detail on how exactly market access will be improved. An **update** recently published by the U.K. government states, “We will execute the legislative process to create a preferential duty-free quota for US beef of 13,000 metric tonnes (MT) per calendar year.” Similar to the above agreements, at this point this is a voluntary and mutual decision, rather than a binding legal commitment.

The E.U.

On July 27, 2025, President Trump **announced** a new “Framework Agreement” with the E.U.. The **Framework Agreement** stipulates that the E.U. provide preferential market access for U.S. agricultural goods including tree nuts, dairy products, fresh and processed fruits and vegetables, processed foods, planting seeds, soybean oil, and pork and bison meat. Like the agreement with the U.K., this trade deal states that the E.U. and U.S. “commit to work together to address non-tariff barriers affecting trade in food and agricultural products” which includes “streamlining requirements for sanitary certificates for pork and dairy products.” In a **Joint Statement** between the U.S. and the E.U., the Framework Agreement is referred to as “a first step in a process that can be further expanded over time to cover additional areas and continue to improve market access and increase their trade and investment relationship.”

Malaysia

On October 26, 2025, the U.S. and Malaysia executed the “**Agreement on Reciprocal Trade**.” According to a **fact sheet** published by the Office of the U.S. Trade Representative, Malaysia has committed to provide significant preferential market access for U.S. agricultural products. This includes dairy, horticultural products, poultry, pork, rice, and fuel ethanol. Malaysia has also committed to address “non-tariff” barriers to U.S. agricultural exports. To accomplish this, Malaysia has pledged to: (1) recognize the U.S. food safety system for U.S. meat, poultry, and dairy products; (2) streamline halal certification of U.S. food and agricultural products; (3) open market access for U.S. sorghum; and (4) adopt regionalization approaches to facilitate U.S. exports of pork and poultry. Malaysia has confirmed these commitments via a **Joint Statement** between the U.S. and Malaysia. According to that joint statement, the two nations will “undertake domestic formalities in advance of the Agreement entering into force.” The agreement is additionally confirmed in a **post** by the National Trade Promotion Agency of Malaysia, which claims the agreement “strengthens regulatory certainty and supply-chain resilience through deeper cooperation in trade facilitation.”

Cambodia

On the same day that the Malaysia agreement was formalized, a **new trade agreement** with Cambodia was also announced. Under this agreement, Cambodia has agreed to eliminate tariffs on all U.S. food and agricultural product imports. Further, the agreement contains language indicating Cambodia's intent to promote the importation of U.S. agricultural products. Specifically, Cambodia says it will recognize U.S. regulatory oversight, U.S. sanitary and phytosanitary measures, and accept certificates issued by U.S. regulatory authorities for food and agricultural products. U.S. **sanitary and phytosanitary measures** are a set of testing and inspection methods used to ensure the safety of agricultural products. This language in the trade agreement indicates that when importing U.S. agricultural products, Cambodia will defer to safety determinations already made by U.S. regulatory agencies. This, in theory, should reduce non-tariff barriers to trade between the U.S. and Cambodia. While this agreement is not yet finalized, the two countries **have committed** to "undertake domestic formalities" to make it so.

Ongoing Negotiations

The negotiations discussed in this section are even more nebulous, as they are merely attempts to negotiate the terms of a potential agreement. However, they are still an indication that the following countries are at least at the negotiating table with the U.S.

Indonesia and the U.S. are still negotiating details of a trade deal that was first discussed in a **joint statement** issued on July 22, 2025. Per the joint statement, Indonesia would eliminate "approximately 99 percent" of tariff barriers currently placed on a "full range" of imported U.S. food and agricultural products. The proposed agreement also stipulates that the U.S. and Indonesia will cooperate to exempt U.S. food and agricultural products from all import licensing regimes, provide Fresh Food of Plant Origin designation for all applicable U.S. plant products, and to recognize listing of all U.S. meat, poultry, and dairy facilities. The joint statement provides that Indonesia will also accept certificates issued by U.S. regulatory authorities.

Further, the U.S. and Vietnam have announced a **framework** for a trade agreement, but are still in the process of finalizing details of a more comprehensive agreement. The framework states that Vietnam will provide preferential market access for "substantially all" U.S. agricultural exports to Vietnam.

On October 26, 2025, the White House posted a **joint statement** discussing an agreed-upon framework for a new trade deal between the U.S. and Thailand. The framework states that Thailand will eliminate tariff barriers on "approximately 99 percent of goods" covering a full range of U.S. food and agricultural products. Similar to other agreements, the U.S. and

Thailand trade deal would require Thailand to accept safety certifications of food and agricultural products issued by U.S. regulatory authorities. This joint statement also "takes note" of "the forthcoming commercial deals between U.S. and Thai companies" for the purchase of U.S. feed corn, soybean meal, and dried distiller grains with solubles at an estimated 2.6 billion dollars per year.

Finally, on November 14, 2025, the White House published a **fact sheet** outlining the framework for new U.S. trade deals with Switzerland and Liechtenstein. Negotiations are ongoing, but a recently published **press release** indicates that Switzerland and Liechtenstein have in fact signed a "non-binding memorandum of understanding" with the U.S. At this time, only the "non-binding memorandum of understanding" has been signed, so the specific details of the agreement have not been finalized and may be subject to change. Per the fact sheet, this new trade deal will "lock in the largest expansion ever of U.S. exporter access to Swiss markets, creating new opportunities for U.S. manufacturers, farmers, ranchers, fishermen, and other producers." To accomplish this expansion, Switzerland and Liechtenstein will remove "a range of tariffs" on U.S. agriculture products including fresh and dried nuts, fish and seafood, and fruits. Additionally, Switzerland will establish tariff rate quotas for American poultry, beef, and bison. Finally, the fact sheet discusses Switzerland and Liechtenstein's intent to address non-tariff barriers which have historically prevented certain U.S. goods from being imported. To remove these barriers, the nations will address "restrictive measures" on U.S. poultry and attempt to streamline requirements for U.S. dairy products.

Conclusion

Trade relationships between countries are complicated. Until binding agreements are reached, negotiations may continue. While more time will be needed to determine the ultimate impact, the language recognizes the importance of international trade to U.S. agriculture and indicates an intent to improve exports of U.S. agricultural products.

Supreme Court Vacates IEEPA Tariffs (published 3.5.26)

Introduction

In January 2025, President Trump declared national emergencies at the U.S. borders, citing an influx of "poisonous fentanyl" and "the extraordinary threat posed by illegal aliens". According to the Trump Administration, these emergencies authorized the President to impose tariffs under the International Emergency Economic Powers Act (IEEPA). IEEPA grants the President authority to undertake specific economic actions in response to a national emergency. Using IEEPA, the Trump Administration imposed tariffs on Mexico, Canada, and China. These tariffs were challenged in federal courts and ultimately struck down by the Supreme Court on February 20, 2026, in *Learning Resources, Inc. v. Trump*. To learn more about the IEEPA tariffs and the Court's decision, click here.

Following that decision, certain questions remained unanswered. Will there be refunds for the IEEPA tariffs? How will those refunds be issued? Will the Trump Administration impose new tariffs, and if so, how? Recent developments have provided some clarity on these issues and what importers can expect moving forward. This article will discuss refunds, new tariffs implemented by the Trump Administration, and an investigation by the United States Trade Representative that could potentially lead to new tariffs.

Refunds & The CAPE System

Reportedly, approximately $133.5 billion was collected on IEEPA tariffs by December 2025. With those tariffs now vacated by the Supreme Court, American importers are seeking refunds. Because the Court's decision did not mention refunds, importers were left uncertain about whether refunds would be issued. Recent developments at the Court of International Trade (CIT) have provided some clarity, but background is needed to understand those actions.

When a good that is subject to tariffs enters the United States, one of two collection processes applies: formal and informal entries. Formal entry is required when the value of imported goods exceeds $2,500. In a formal entry, the importer must pay the estimated tariff rate and post a bond with Customs and Border Protection (CBP). CBP later calculates the final tariff rate. This is known as "liquidation." Under federal law, liquidation must occur within one year of the entry. Informal entries generally do not require a bond and are considered liquidated once the importer pays the estimated tariffs.

Under the Tariff Act of 1930, the Secretary of the Treasury is authorized to offer tariff refunds when "it is ascertained on liquidation or reliquidation . . . that more money has been deposited or

paid as duties than was required by law." In those situations, refunds are required if the discrepancy exceeds $20.00. Additionally, refunds may be mandated after a court orders reliquidation.

On March 4, 2026 the Court of International Trade (CIT) issued an order stating that, "all importers of record whose entries were subject to IEEPA duties are entitled to benefit from the *Learning Resources* decision." To facilitate this, the CIT ordered that any liquidated entries "for which liquidation is not final" be reliquidated without regard to the IEEPA tariffs. Unliquidated entries were likewise ordered to be liquidated. In other words, the CIT ordered CBP to pretend as if the IEEPA tariffs never existed and begin issuing refunds. As discussed above, liquidation is a crucial step in the refund process, as it determines the amount owed by the importer.

On March 6, the CIT issued a subsequent order temporarily suspending CBP's obligation to issue refunds, after CBP indicated it needed additional time to liquidate or reliquidate all entries. CBP asserted that the "volume of entries" made each year prevent it from being able to "affirmatively review and liquidate each entry." CBP is still responsible for collecting and liquidating all non-IEEPA tariffs, which seems to have initially caused CBP to doubt its ability to comply with the CIT's order. However, CBP then filed a subsequent declaration which outlined its plans to implement a new online system to process IEEPA refunds.

CBP plans to implement the Consolidated Administration and Processing of Entries (CAPE) claims portal. According to CBP, CAPE will be a web-based resource allowing importers and brokers to submit IEEPA refund requests. CAPE will use information submitted by importers to determine refund eligibility. If eligible, tariff rates will be liquidated or reliquidated "as if the IEEPA duties had never been declared." After liquidation or reliquidation, CAPE will automatically issue refunds to eligible importers. It is important to note that CAPE is not yet finalized. Accordingly, CBP will be implementing a phased development of CAPE, with basic system functionality being activated first. To ensure eligibility for refunds, importers must first enroll in the Automated Clearing House (ACH) program. ACH is a system used by CBP to process and transmit electronic credit and debit transfers and will be used to distribute IEEPA refunds. For more information on the CAPE system, click here.

Refunds have been a looming issue since the Court's decision in *Learning Resources*. Given the amount collected under the IEEPA tariffs, many U.S. importers are likely seeking to recover refunds. When the Court did not address refunds in its opinion, those importers were left with uncertainty. However, with its introduction of the CAPE system, CBP has provided at least one potential avenue for producer refunds under IEEPA.

Section 122 Tariffs

On February 20, 2026, President Trump announced a new 10% global tariff rate under Section 122 of the Trade Act of 1974 (Section 122). The initial announcement came the same day the Supreme Court invalidated the IEEPA tariffs. Since its enactment, no tariffs had previously been implemented under Section 122. Because no tariffs have been imposed under Section 122 before, many importers may be unclear about Section 122's purpose and how it relates to the newly announced tariffs.

Section 122 was implemented to address "fundamental international payments problems." More specifically, Section 122 allows the president to impose tariffs to: 1) deal with large and serious United States balance-of-payments deficits; 2) prevent an imminent and significant depreciation of the dollar in foreign exchange markets; or 3) cooperate with other countries in correcting an international balance-of-payments disequilibrium.

A balance-of-payments refers to a record detailing all transactions made between a country's entities and international trading partners. It includes a current account, a capital account, and a financial account. The current account tracks a nation's trade of goods and services, its earnings on foreign investments, and its foreign money transfers. The capital account covers transactions in foreign financial institutions and central bank reserves. The financial account records deposits, ownership of investment securities, and direct investment between U.S. residents and foreign entities. A balance-of-payments deficit means that the United States is sending more money out than it is taking in.

Unlike IEEPA, Section 122 explicitly grants the President authority to impose tariffs. However, Section 122 also places limitations on any tariffs enacted under its authority. To address one of the above-mentioned payments problems, the President may enact a temporary tariff. The tariff cannot exceed 150 days, unless approved by Congress. 19 U.S.C. § 2132(a)(3). The tariff rate may not exceed 15% *ad valorem*. An *ad valorem* tariff is calculated based on the total value of the goods, rather than their quantity or weight. In other words, the tariff may not exceed 15% of the total value of the imported goods. Section 122 requires that the tariff rate be applied "consistently with the principle of nondiscriminatory treatment." 19 U.S.C. § 2132(d)(1). This means that the rate must generally apply equally to all countries. However, when a country has "large or persistent balance-of-payments surpluses," the President may target them specifically.

Using the authority granted by Section 122, the Trump Administration announced a 10% *ad valorem* import duty on articles being imported into the United States. The administration asserts that the Section 122 tariffs are necessary to correct "a large and serious balance-of-payments deficit." The announcement explains that the United States is currently in an overall account deficit and running a deficit in each component of the current account. To support this claim, the Trump Administration asserts that: 1) the annual U.S. goods trade deficit reached 40% during 2024; 2) the U.S. made less on exported capital and labor than other countries made by exporting capital

and labor to the U.S. and; 3) more money is currently being transferred out of the United States than is being transferred in. According to the announcement, these issues "endanger U.S. economic and national security."

The announcement additionally lists certain exemptions from the Section 122 tariff rate. The exemptions include but are not limited to: certain critical minerals; natural resources unavailable in the United States; beef, tomatoes, and oranges; pharmaceuticals; certain electronics; certain aerospace products; and informational materials. Additionally, goods traded according to the agreement between the United States, Mexico, and Canada will be exempted. As discussed above, the Section 122 tariffs face a 150-day statutory-limit, which could potentially be extended by Congress. This means that the tariffs could at least be active until July 20, 2026.

The Section 122 tariffs have already faced legal challenges. A coalition of twenty-four states filed a lawsuit challenging the Section 122 tariffs on March 5, 2026. The suit, filed in the CIT, argues that Section 122 does not authorize the Trump Administration's tariffs. The complaint argues that a trade deficit is not a balance-of-payments deficit, and therefore Section 122 does not apply. According to the states, the administration is "contorting" the term balance-of-payments and "cherry-picking only the negative components." They argue that when foreign capital and financial investments into the United States are included, the actual balance-of-payments is only 0.2% of the United States' gross domestic product, which the states characterize as "essentially a rounding error." The states claim that Section 122 does not authorize tariffs based on a trade deficit and that the administration cannot "redefine" the term balance-of-payments to justify the Section 122 tariffs. The plaintiffs conclude by requesting the CIT to declare the Section 122 tariffs unlawful, vacate them, and order refunds of tariffs already collected.

Whether the Section 122 tariffs will survive this challenge remains to be seen. As of the time of writing, the tariffs have been in effect for just over a month, and many questions remain unanswered. Section 122 imposes a 150-day limit, but Congress could extend that period. Even if Congress were to extend the deadline, the tariffs could be overturned by the courts. Further, President Trump has indicated that the rate will be increased to 15%. Whether Section 122 authorized the recent tariffs is an issue for the federal courts to decide, which could take some time.

Potential Section 301 Tariffs

On March 17, 2026, the Office of the United States Trade Representative (USTR) initiated an investigation of foreign countries under Section 301 of the Trade Act of 1974 (Section 301). According to a USTR press release, the investigation focuses on "acts, policies, and practices of various economies" related to structural excess capacity in manufacturing sectors. Structural excess capacity occurs when production capacity exceeds domestic and global demand. The USTR

claims that this excess capacity will lead to "overproduction and large or persistent trade surpluses, as well as underutilized and unused capacity, in manufacturing sectors." According to the USTR, this poses "a serious challenge to U.S. efforts to re-shore supply chains and provide good-paying jobs for American workers." While the USTR has explained why it launched the investigation, many may still be unclear about how Section 301 works and what could come next.

Section 301, at its core, is designed to address "unfair" foreign trade policies and enforce international trade agreements. Section 301 applies when the USTR determines that "the rights of the United States under any trade agreement are being denied." Section 301 also applies when "an act, policy, or practice of a foreign country violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or is unjustifiable and burdens or restricts United States commerce."

A Section 301 investigation can be initiated by the USTR itself or by a private party. Private parties must file a petition describing the unfair trade practice and how it is harming the U.S. economy. Once filed, the USTR has 45 days to decide whether to begin a formal investigation. The USTR must publish a notice in the Federal Register when self-initiating an investigation. The USTR is also required to seek public comment on proposed actions. For non-trade agreement investigations, a final determination will generally be issued 12 months after an investigation begins.

If the USTR finds through investigation that a country has violated a trade agreement or implemented an act, policy, or practice that is unjustifiable, Section 301 authorizes certain actions. Most notably, the USTR may impose tariffs. Under Section 301 the USTR is authorized to impose duties or "other import restrictions" on the goods of a foreign country for "such time as the Trade Representative determines appropriate."

The USTR announced that it has self-initiated a Section 301 investigation. The USTR will investigate China, the European Union, Singapore, Switzerland, Norway, Indonesia, Malaysia, Cambodia, Thailand, Korea, Vietnam, Taiwan, Bangladesh, Mexico, Japan, and India for the above-mentioned structural excess capacity concerns. If the USTR determines that the policies or practices of the countries under investigation are actionable under Section 301, it may act under the statute, including imposing tariffs.

This is a broad investigation, and it will likely be some time before any official action is announced. However, any actions taken could have significant economic consequences. Individuals interested in submitting a public comment on the investigation may do so here. The deadline to submit written comments is April 15, 2026.

Conclusion

In the aftermath of the *Learning Resources* decision, many questions remained unanswered. However, some answers have emerged in the weeks since. While not finalized, the CAPE system may provide an avenue for importers seeking IEEPA refunds. Despite ongoing legal challenges, President Trump's Section 122 tariffs suggest that tariffs remain a central part of the administration's trade strategy. This is further reinforced by the USTR's decision to initiate a broad Section 301 investigation against U.S. trading partners. It remains to be seen what the investigation will ultimately find and what actions may follow. Regardless, importers and consumers should stay informed about these developments and monitor further changes in U.S. trade policy.

To learn more about the IEEPA tariffs, click here.

To read the full text of the Trade Act of 1974, click here.

To learn more about enrolling in the ACH program, click here.

Federal Court Strikes Down 2019 & 2024 ESA Regulations (published 4.16.26)

On March 30, 2026, a federal court in California issued a ruling to overturn several Endangered Species Act ("ESA") regulations adopted by the Trump administration in 2019 and the Biden administration in 2024. The plaintiffs in ***Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 24-cv-04651 (N.D. Cal. Mar. 30, 2026)** challenged six rules in total with the court ultimately concluding that four violated the statutory text of the ESA. Earlier this year, the United States Fish and Wildlife Service ("FWS") together with the National Marine Fisheries Service ("NMFS") proposed a slate of new ESA regulations intended to restore the rules established under the first Trump administration. While those rules have yet to be finalized, it is possible that the recent court ruling may offer some insight into how courts may ultimately treat those regulations.

ESA Overview

The ESA was enacted in 1973 for the purpose of conserving species at risk of extinction and the habitats upon which those species depend. 16 U.S.C. § 1531(b). The statute is jointly administered by FWS and NMFS (collectively, "the Services") which are responsible for creating and maintaining a list of species that are classified as either "threatened" or "endangered" depending on the level of risk those species face. 16 U.S.C. § 1533. Once a species is added to that list, it becomes protected under the ESA.

When the Services list a species for protection under the ESA, they must also designate critical habitat for the species. 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines critical habitat as specific geographical areas which are "occupied by the species, at the time it is listed […] on which are found those physical or biological features essential to the conservation of the species" or areas which are not occupied by the species at the time of listing but the Services have determined are "essential for the conservation of the species." 16 U.S.C. § 1532 (5)(A).

Along with requiring the Services to list species under the ESA and designate critical habitat for those species, the ESA also requires all other federal agencies to consult with the Services to avoid harming listed species or designated critical habitat. Specifically, the ESA requires each federal agency to ensure that any action it "authorize[s], fund[s], or carrie[s] out" is "not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of" critical habitat. 16 U.S.C. § 1536(a)(2). To initiate this process, the agency taking action will determine whether its action "may affect" listed species. 50 C.F.R. § 402.13. If the agency concludes that its action "may affect" a listed species, it must reach out to the Services to determine whether the action is

"likely to adversely affect" the species. 50 C.F.R. § 402.13 If so, then the Services must engage in formal consultation, a process which requires the consulting Service to prepare a document known as a Biological Opinion ("BiOp"). 50 C.F.R. § 402.13 The BiOp will evaluate more thoroughly the expected impacts of the agency's action and if it concludes that the action is likely to jeopardize the continued existence of a protected species or result in the destruction or adverse modification of critical habitat, it must also include mitigation measures the agency can take to avoid causing such negative impacts. 50 C.F.R. § 402.13. When making a determination about the impacts an agency action may have on listed species, the Services must base their conclusions on "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

Background to the Case

Since 2019, the ESA has experienced several rounds of regulatory changes. In August 2019, the Services issued final rules to change the procedures related to the listing of species under the ESA and the consultation process between the Services and other federal agencies. A closer look at those changes is available here. The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* filed a lawsuit to challenge those 2019 regulations. However, following a change in Presidential administration, the court sent the matter back to the Services for review, bringing that lawsuit to an end. In 2024, the Services adopted new regulations which, according to the plaintiffs, resolved some of their concerns with the 2019 regulations but ultimately retained certain issues while introducing others. More information on the 2024 regulatory changes can be found here.

After the new regulations were finalized in 2024, the plaintiffs filed the current lawsuit to challenge six specific provisions that had been either introduced in 2019 and retained in 2024 or introduced for the first time in 2024. Following another change in Presidential administration in 2025, the Services sought to have the case either paused or dismissed, citing another round of updated ESA regulations that had been proposed in 2025 which the Services expect to finalize before the end of 2026. However, the court concluded that neither pausing or dismissing the case would be appropriate, noting that it would be better for the court to "provide the [Services] with its reading" before the new regulations are final so that the Services can take into account any "problems" the court might find.

Many of the regulatory changes proposed in 2025 were identical to those that had been made in 2019 before being modified in 2024. Although various lawsuits were filed to challenge the 2019 rules, they were largely paused or dismissed after the Services announced that they would revisit those regulations following the transition from the Trump administration to the Biden administration. For that reason, no court ever fully considered whether the 2019 rules complied with the ESA. The recent decision in *Ctr. for Biological*

Diversity v. U.S. Dep't of Interior represents the first time a court has considered the legality of those regulations and may provide some insight into how the rules proposed in 2025 may be viewed by courts after they are finalized.

Recent Court Decision

The plaintiffs in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* asked the court to review six ESA regulations and consider whether they violated the statutory requirements of the ESA. Four of those regulations are related to the consultation process while the other two are concerned with the designation of critical habitat. Of those six, the court found that four violated the ESA and should be overturned. The other two were upheld.

<u>"Effects of the Action"</u>

During agency consultation with the Services, the ESA requires the Services to evaluate the effects of the agency action on listed species and critical habitat to determine whether jeopardy of a species or the destruction or adverse modification of critical habitat is likely to occur. 16 U.S.C. § 1536. Before 2019, the ESA regulations defined "effects of the action" as "the direct and indirect effects of an action on the species or critical habitat." 50 C.F.R. § 402.02 (2018). The 2019 rules changed the definition of "effects of the action" to "all consequences to listed species or critical habitat that are caused by the proposed action" and clarified that a "consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02 (2019). The Services left this definition in place when it amended the regulations in 2024.

The plaintiffs argue that this violates the ESA's requirement that the Services rely on the best scientific data available when considering the impacts an agency's action may have on listed species and that it the phrase "reasonably certain to occur" conflicts with the ESA requirement that the Services consider whether jeopardy of a species is "likely" to occur. The court agreed with the plaintiffs on both arguments. First, the court concluded that the 2019 rule violates the ESA's "best available data" requirement because the ESA "imposes a mandatory duty on the Services to analyze the likelihood of jeopardy or harm to habitat using the best available data." According to the court, the best scientific data available may not be the same as impacts that are "reasonably certain to occur." Next, the court concluded that the provision of the 2019 regulation that requires the Services to only consider those impacts to species and habitat which are "reasonably certain to occur" is contrary to the ESA requirement that Services consider whether jeopardy of a species or harm to habitat is "likely." Because what is "likely" may not necessarily include what is "reasonably certain to occur," the court held that this regulation violated the ESA and should be overturned.

Consideration of Mitigation Measures

When drafting a BiOp, the ESA regulations require the Services to take into account "any beneficial actions" taken or proposed to be taken by the action agency. 50 C.F.R. § 402.14(g)(8). The purpose of this rule is to ensure that the Services consider any activities that are beneficial to listed species that the consulting agency plans to include as part of its proposed action when determining what the impacts of that action could be to protected wildlife. In 2019, the Services amended the ESA rules to clarify that the Services should take such beneficial activities into consideration without "any additional demonstration of binding plans." 50 C.F.R. § 402.14(g)(8). In other words, the 2019 rules require the Services to give proposed beneficial activities the same consideration as any other portion of the agency action even if the agency has not committed to carrying out those activities.

The plaintiffs argued that this violates the ESA's requirement that the Services "insure" against jeopardy of listed species by "forcing them to consider amorphous, non-binding mitigation plans in making no-jeopardy findings." In it's opinion, the court agreed with the plaintiffs, concluding that the 2019 rule violated the ESA because it does not satisfy the statutory requirement that the Services "insure" against harm to species or habitat. According to the court, the ESA requires beneficial activities to be excluded from consideration unless they are binding.

Definition of "Destruction or Adverse Modification"

Under the ESA, the Services must "insure" that federal agency actions will not cause jeopardy to listed species or "destruction or adverse modification" to designated critical habitat. 16 U.S.C. § 1536(a)(2). Prior to 2019, the ESA regulations defined "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (2018). In 2019, that definition was amended to "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species." 50 C.F.R. § 402.02 (2019). That definition was retained in the 2024 regulations.

The plaintiffs argue that introducing the language "as a whole" violates the ESA by replacing the statutory requirement to avoid all destruction or adverse modification of critical habitat with a regulatory provision that allows at least some destruction or adverse modification of critical habitat. The court agreed, concluding that the text of the ESA "prohibits adverse modification entirely" and that the 2019 rule violated that requirement by permitting at least some adverse modification to critical habitat.

Duty to Request Reinitiation of Consultation

Before 2024, the ESA regulations concerning agency consultation required both the agency taking action or the consulting Service to request reinitiation of consultation under certain circumstances. 50 C.F.R. § 402.16(a) (2023). In 2024, the Services amended their regulations so that only the agency taking action is required to request reinitiation of consultation. The plaintiffs claim that the Services unlawfully rescinded their duty to request reinitiation of consultation, arguing that the Services failed to provide adequate reasons to support amending the regulations. In 2024, the Services stated that they were amending the regulation to clarify that only the action agency has the authority and responsibility to initiate or reinitiation consultation. The court was not persuaded by that reasoning. According to the court, while the text of the ESA does not allow the Services to compel any federal agency to engage in consultation, nothing in the pre-2024 rule gave the Services that authority. The rule required the Services to request reinitiation in certain circumstances but did not grant the Services the authority to require the federal agency to reinitiate consultation. Because the Services failed to provide a persuasive reason for changing a rule that had been in place for 25 years, the court found the change to be unlawfully arbitrary and concluded that it should be overturned.

Rules Upheld

Finally, the court considered the last two regulations challenged by the plaintiffs. While the court overturned the first four regulations it considered, it upheld the last two after concluding that they did not violate the ESA.

The ESA defines "threated species" as "any species which is likely to become an endangered species within the foreseeable future[.]" 16 U.S.C. § 1532(20). Before 2024, the ESA regulations required the Services to defined "foreseeable future" as extending "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." 50 C.F.R. § 424.11(d) (2023). In 2024, the Services amended that definition to "as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats." 50 C.F.R. § 424.11(d) (2025). In making this change, the Services replaced language requiring that they "reasonably determine" that threats to a species are "likely" with language that the Services make "reasonably reliable predictions" about those same threats. The plaintiffs argued that the new language contradicts the ESA requirement that the Services base their conclusions on the "best available data," but the court disagreed. In its ruling, the court concluded that the two phrases "appear synonymous" and that to determine whether an effect is "likely" requires making a "reliable prediction" about that effect. Because the court determined that the pre-2024 rule and the amended rule are functionally equivalent, it concluded that the rule should be upheld.

Finally, the court considered the plaintiffs' challenge to an ESA regulation concerning the designation of critical habitat. The text of the ESA requires the Services to designate critical habitat at the same time it lists a species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3). Before 2024, the ESA regulations identified two limited circumstances where designating critical habitat at the same time a species is listed would not be prudent and determinable. In 2024, the Services modified the regulation to include two other circumstances where designating critical habitat would not be necessary. The plaintiffs argue that the new rule violates the ESA by unlawfully expanding the conditions under which the Services may find that designating critical habitat is not prudent and determinable. However, the court disagreed, citing previous court decisions which held that the Services could only make a not-prudent finding with respect to critical habitat would be beneficial to the species. Because the two additional circumstances outlined in the 2024 ruling described situations where reaching a not-prudent finding would be beneficial to the species, the court found that the regulation complied with the ESA and should be upheld.

Going Forward

Since 2019, the ESA has seen several rounds of regulatory updates. So far, this is the first time a court has reviewed any of the updated rules on the merits to consider whether they comply with the statutory requirements of the ESA. In 2025, the Services launched a new round of regulatory changes, many of which mirror the changes made in 2019. While those rules have yet to be finalized, the ruling in *Ctr. for Biological Diversity v. U.S. Dep't of Interior* may offer some insight into how courts will treat those regulations once they are final. For those who are regulated under the ESA, remaining informed on regulatory changes is helpful to understand how the law will be implemented going forward.

To view the court's decision in *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, click here.

To view the text of the ESA, click here.

For more NALC resources on the ESA, click here.

Supreme Court Agrees to Hear Pesticide Preemption Lawsuit (published 1.27.26)

The United States Supreme Court has announced that it will hear oral arguments in *Durnell v. Monsanto*, a case filed by a Missouri plaintiff who claims that exposure to the herbicide Roundup and its active ingredient glyphosate caused him to develop non-Hodgkin's lymphoma. The case is one of thousands that have been filed over the last decade against Monsanto Company (now owned by Bayer) by plaintiffs who claim that using Roundup caused them to develop cancer and that Monsanto failed to warn consumers about the alleged health risk. For its part, Bayer has argued that the state law claims raised by plaintiffs in these cases are preempted by federal pesticide law and should be dismissed. After years of litigation, that question will now be presented to the Supreme Court. However, the Court rules in this case will have an impact not only on ongoing litigation involving Roundup and glyphosate but may set a precedent for lawsuits involving other pesticide products.

Background: Roundup Lawsuits and *Durnell*

Roundup is one of the most widely used herbicides in the United States. It was developed in the 1970s and has been available in the United States for decades. Glyphosate, the active ingredient in Roundup, was first approved by the Environmental Protection Agency ("EPA") since 1974. Roundup is used both in agricultural and non-agricultural settings. Since the 1990s, Roundup has been an essential part of Monsanto's Roundup Ready system which paired use of the herbicide with glyphosate-resistant crop seeds to allow direct applications during the growing seasons. Commercial formulations of Roundup have been used in home and municipal landscaping for years.

Since 2015, tens of thousands of lawsuits have been filed against Bayer by plaintiffs claiming that the use of Roundup caused them to develop cancer. These cases have been filed in state courts and raise what products liability claims that arise out of state law, specifically the civil tort of failure to warn. In response, Bayer has argued that federal pesticide law preempts state law products liability claims and that such claims should be dismissed. While only a handful of the cases filed against Bayer have gone to trial, juries and judges alike have been split on the issue. While some juries have issued verdicts in favor of Bayer, finding that the pesticide manufacturer complied with the law and is not liable for a plaintiff's injuries, others have returned verdicts in favor of the plaintiffs and awarded damages in amounts exceeding $2 billion. Similarly, of the three circuit courts that have been asked to determine whether federal pesticide law preempts the plaintiffs' state law claims, the Third Circuit has held that the claims are preempted while the Ninth and Eleventh Circuits have held that they are not.

The plaintiff in *Durnell* originally filed his lawsuit against Bayer in 2019. He filed his case in state court in Missouri where he lives and where Monsanto is headquartered. Like other plaintiffs in pesticide liability cases, the plaintiff in *Durnell* raised several state law products liability claims including failure to warn. At trial, the jury concluded that Monsanto had failed to warn the plaintiff of possible health risks of using Roundup and awarded him $1.25 million. Bayer appealed that verdict to the Missouri Court of Appeals which affirmed the jury order and held that the plaintiff's failure to warn claim was not preempted by federal law. Bayer then attempted to appeal that ruling to the Missouri Supreme Court which declined to hear the case. Now, the matter comes before the United States Supreme Court.

Arguments Before the Supreme Court

Both the plaintiff and Bayer have made arguments to the Supreme Court that have become familiar to those keeping up with how pesticide liability cases have evolved in recent years. Each argument focuses on the text of the Federal Insecticide, Rodenticide, and Fungicide Act ("FIFRA") and a previous Supreme Court case to either support or refute the argument that federal pesticide law preempts state law claims of failure to warn.

FIFRA is the primary federal law regulating pesticide use in the United States. Under FIFRA, a pesticide cannot be sold or distributed in the United States until it has been approved for use by the Environmental Protection Agency ("EPA"). To approve a pesticide, EPA must determine that the product will not cause "unreasonable adverse effects" on the environment when used as intended. 7 U.S.C. § 136a(c)(5)(C). FIFRA defines "unreasonable adverse effects" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide[.]" 7 U.S.C. § 136(bb). To meet this standard, EPA will assess the human health impacts of pesticides it is seeking to register, including assessing the carcinogenicity of the product and its active ingredients.

Along with providing for the registration of pesticide products, FIFRA also describes the authority that states have to regulate approved pesticides. Under FIFRA, a state may "regulate the sale or use of any federally registered pesticide[.]" 7 U.S.C. § 136v(a). However, FIFRA also provides that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from" those required by federal law. 7 U.S.C. § 136v(b). In other words, while FIFRA allows states to regulate the sale and use of federally registered pesticides, it does not allow states to set requirements for the labeling or packaging of a registered pesticide that differs from the labeling and packaging approved by EPA. Additionally, FIFRA prohibits the sale and distribution of any pesticide which is "misbranded." 7 U.S.C. § 136j(a)(1)(E). Under FIFRA, a pesticide is

considered misbranded if its label does not include a warning statement which may be necessary to protect health and the environment. 7 U.S.C. § 136(q)(1)(G).

Failure to warn is a type of civil tort that is typically raised in products liability cases. As with most civil torts, failure to warn arises out of state law and is enforced at the state level. When a plaintiff raises a claim of failure to warn, they are not arguing that a product they used was defective, but rather that the product manufacturer failed to provide adequate warnings or instructions about the safe use of the product. To succeed on failure to warn, a plaintiff will generally need to demonstrate two things. First, that the manufacturer did not adequately warn consumers about a particular risk, and second that the risk was either known or knowable in light of the best available knowledge at the time the product was manufactured and distributed.

In the past, the Supreme Court has only once addressed FIFRA's prohibition on states to impose labeling requirements that differ from those approved by EPA and how it interacts with products liability claims that arise under state law. In ***Bates v. Dow Agrosciences LLC*, 544 U.S. 431**, the Supreme Court held that a pesticide labeling requirement imposed by state law would be preempted by FIFRA if the requirement is "in addition to or different from" the labeling and packaging requirements imposed under FIFRA. The Court noted that a state law requiring a pesticide label to include the word "DANGER" when its federally registered label is required to include the word "CAUTION" would be preempted by FIFRA. However, the Court also noted that a state requirement for pesticide labeling would not be preempted if it was "equivalent to, and fully consistent with, FIFRA's misbranding provisions."

In appealing *Durnell* to the Supreme Court, Bayer asked the Court to consider whether FIFRA preempts the plaintiff's state law failure to warn claim. Bayer argues that the claim is preempted. It first cites FIFRA's requirement that states may not require a pesticide's label to bear language that is "in addition to or different from" federal labeling requirements. According to Bayer, the only way it could fully resolve the plaintiff's claims would be to amend the label for Roundup products sold in Missouri to include a cancer warning which is not required by the federal label. Not only does the federal label for Roundup not include a cancer warning, but Bayer also notes that EPA has never made a finding that either Roundup or glyphosate are carcinogenic to humans. Relying on the ruling in *Bates*, Bayer argues that the plaintiff's failure to warn claims should be preempted because to resolve them, Bayer would be required to put a cancer warning on its Roundup labels which would differ from the labeling language required under federal law.

The plaintiff argues exactly the opposite. According to the plaintiff, his failure to warn claims are not preempted by FIFRA because they run parallel to FIFRA's misbranding

provisions. Also relying on *Bates*, the plaintiff in *Durnell* argues that Supreme Court precedent has already established that a state law products liability claim will not be preempted by FIFRA if it is equivalent to and consistent with FIFRA's prohibition on the sale of misbranded pesticides. According to the plaintiff, his failure to warn claim is consistent with FIFRA's misbranding prohibitions because FIFRA considers a pesticide to be misbranded if it does not include a warning necessary to protect health and the claim of failure to warn was raised to argue that Bayer failed to provide a necessary health warning to users of Roundup. Because failure to warn raises a claim that is consistent with FIFRA's misbranding provisions, the plaintiff asks the Supreme Court to rule that the claim is not preempted.

While these arguments directly mirror claims raised by Bayer and other plaintiffs in other cases involving federal preemption of failure to warn claims in pesticide liability cases, *Durnell* adds a twist that slightly differentiates it from those cases. Unlike other plaintiffs, the plaintiff in *Durnell* asserts that his failure to warn claims were not brought over the labels affixed to each individual unit of Roundup, but rather to the marketing materials that Monsanto used to advertise Roundup in the 1990s and 2000s. The plaintiff claims that he bought and used Roundup based on commercials and print advertising that stated using Roundup was completely safe and featured people applying Roundup while wearing only tee shirts and shorts. Because FIFRA applies only to pesticide labeling, not marketing materials, the plaintiff argues that his lawsuit differs from previous litigation where the question of whether FIFRA preempts failure to warn has been raised. Bayer maintains that there is no difference between *Durnell* and prior preemption cases because it would still need to update labels for units of Roundup sold in the state of Missouri to include a cancer warning to fully redress the plaintiff's claim.

Going Forward

As of the publication of this article, the Supreme Court has not scheduled a date to hear oral arguments in *Durnell*. It is not yet clear when a final ruling in the case can be expected. Whatever the outcome, whether the Court agrees with the plaintiff and finds that FIFRA does not preempt the state law claim of failure to warn or sides with Bayer and finds that FIFRA does preempt such claims, the final decision in this lawsuit will affect not only the thousands of currently pending pesticide liability cases but is also likely to affect any such lawsuits filed in the future. While the bulk of pesticide liability cases filed over the last decade have involved Roundup and glyphosate, other pesticides such as paraquat and chlorpyrifos have also been the focus of such lawsuits. Despite settling thousands of pesticide liability lawsuits, Bayer still has thousands more actively pending against it. The

company has indicated that if the matter is not resolved, it could threaten the future availability of Roundup for agricultural uses.

Although it is too early to predict how the Supreme Court will rule, prior to agreeing to hear *Durnell*, the Court asked the federal government to weigh in. In December, the Solicitor General filed an amicus brief both urging the Supreme Court to take up the case and clarifying that the federal government believes that FIFRA preempts the plaintiff's failure to warn case.

The National Agricultural Law Center will provide in-depth updates as this case proceeds.

To view Bayer's petition to the Supreme Court, click here.

To view the plaintiff's response, click here.

To view the Solicitor General's amicus brief, click here.

For more information on pesticide liability lawsuits from the National Agricultural Law Center, click here.

WOTUS Update: EPA & Corps Propose New Definition (published 12.02.25)

On November 17, 2025, the Environmental Protection Agency ("EPA") together with the United States Army Corps of Engineers ("the Corps") announced a proposed rule to redefine the term "waters of the United States" under the Clean Water Act ("CWA"). The intent of the proposal is to bring the definition of waters of the United States, commonly referred to as WOTUS, in line with the United States Supreme Court 2023 decision ***Sackett v. EPA*, 566 US 120 (2023)**. This proposal marks the sixth time since 2015 that the regulatory definition of WOTUS has changed and is likely to prompt litigation after it is formally finalized. The proposal has been published the Federal Register and is currently open for public comment through January 5, 2026.

Background CWA, Current WOTUS Rule, and *Sackett*

The CWA of 1972 is the leading federal water pollution statute in the United States. The purpose of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, the CWA has established permitting programs to limit the amount of pollution discharged into waters and wetlands. Under the National Pollution Elimination System ("NPDES") program, it is illegal for anyone to discharge a pollutant from a discernable, concrete source into "navigable waters" without first receiving a permit from EPA. 33 U.S.C. § 1342. Similarly, the 404 permitting program prohibits the discharge of "dredged or fill material" into "navigable waters" without a permit from the Corps. 33 U.S.C. § 1344. Crucially, both the NPDES and 404 permitting programs cover activities that occur within "navigable waters." Although the term "navigable waters" is a legal term of art which is generally understood to refer to waters which can be used to facilitate interstate or foreign commerce, the CWA defines the term as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). However, the CWA does not define the term "waters of the United States." Instead, it has been left up to EPA and the Corps to define the term.

In the decades since the CWA was passed, crafting a lasting definition of WOTUS has been a struggle for the agencies and courts, and the formal regulatory definition has changed several times. A full timeline of the different definitions of WOTUS is available here. Most recently, the definition of WOTUS was revised in 2023, first through a finalized rulemaking conducted by EPA during the Biden administration, and then again following the Supreme Court's ruling in *Sackett v. EPA*. Under the initial 2023 final rule, the definition of WOTUS included five categories of waters: (1) traditional navigable waters that could be used in interstate for foreign commerce, the territorial seas, and interstate waters including interstate wetlands; (2) impoundments of waters otherwise identified as WOTUS; (3) tributaries of traditionally navigable waters or impoundments that met either the relatively

permanent standard or significant nexus test articulated by the Supreme Court in ***Rapanos v. US*, 547 US 715 (2006)**; (4) wetlands adjacent to any WOTUS with "adjacent" understood to mean neighboring, bordering, or contiguous; and (5) all other lakes, ponds, streams, and wetlands that satisfied either the relatively permanent standard or significant nexus test. Further information on the initial 2023 WOTUS definition can be found here.

The initial 2023 WOTUS rule fully incorporated both the relatively permanent standard and the significant nexus test which stem from the Supreme Court's decision in *Rapanos v. US*. In that case, the Supreme Court was asked to consider the degree to which wetlands could be included in the definition of WOTUS. The Court was unable to reach a majority opinion, instead issuing a plurality opinion and a concurring opinion. The plurality opinion articulated the relatively permanent standard which would extend the definition of WOTUS to those waters which are "relatively permanent, standing or continuously flowing" and then to those wetlands which share a "continuous surface connection" with such waters. The concurring opinion, on the other hand, crafted the significant nexus test which extended the WOTUS jurisdiction to those wetlands that share a "significant nexus," with a water that is already recognized as a WOTUS. A significant nexus would exist if a wetland "significantly affect[s] the chemical, physical, and biological integrity" with a recognized WOTUS.

Weeks after the first 2023 definition of WOTUS was finalized, the Supreme Court released its decision in *Sackett v. EPA*. Like in *Rapanos v. US*, the Court in *Sackett v. EPA* was asked to consider to what extent wetlands should be included in the WOTUS definition. Specifically, the plaintiffs specifically asked the Supreme Court to formally overturn the significant nexus test and adopt the relatively permanent standard. Ultimately, the Court did just that, concluding that the term "waters" in "waters of the United States" refers to "only those relatively permanent, standing or continuously flowing bodies of water […] described in ordinary parlance as streams, oceans, river, and lakes" and to wetlands that are "indistinguishable" from such waters due to a continuous surface connection.

Following the Supreme Court's decision in *Sackett v. EPA*, EPA issued what is known as the Conforming Rule to revise the WOTUS definition in light of the Court's ruling. Issued in August 2025, the Conforming Rule cut references to the significant nexus test from the WOTUS definition and clarified that the word "adjacent" with respect to adjacent wetlands meant "having a continuous surface connection." The rule also noted that only those tributaries of navigable waters which satisfy the relatively permanent standard would be considered WOTUS. To learn more about the Conforming Rule, click here.

When the Trump administration took office in 2025, it announced an intention to revisit numerous environmental regulations, including the definition of WOTUS. After holding a

series of listening sessions with stakeholders across the county, EPA and the Corps have released their latest proposal to redefine the term.

Proposed WOTUS Definition

According to EPA, its latest WOTUS proposal has two primary goals: to bring the definition in line with *Sackett v. EPA* and to provide more clarity to landowners and the public as to which waters fall under the CWA's permitting jurisdiction. To that end, it is proposing to include five categories of waters in the definition of WOTUS and is introducing new definitions intended to clarify when a water is relatively permanent and what constitutes a continuous surface connection.

Under the proposal, the following categories of waters would be considered WOTUS:

(1) Traditionally navigable waters which may be used to facilitate interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide and the territorial seas.
(2) Impoundments of waters otherwise identified as WOTUS.
(3) Tributaries of traditionally navigable waters which are relatively permanent, standing or continuously flowing.
(4) Wetlands adjacent to a traditionally navigable water or tributary.
(5) Lakes and ponds that do not fall into the above categories but which are relatively permanent, standing or continuously flowing and share a continuous surface connection with a traditionally navigable water or tributary.

Importantly, the proposal would not include interstate waters as a category of WOTUS. This is a departure from previous WOTUS definitions, almost all of which have included interstate waters as WOTUS. These categories also differ from previous WOTUS definitions by specifying that waters which fall under category five must not only be relatively permanent but must also share a continuous surface connection with a traditionally navigable water or tributary to be considered WOTUS. Under past definitions, the continuous surface connection standard was applied only to wetlands.

Along with making changes to the categories of waters considered WOTUS, the proposed rule also includes new definitions for the terms "relatively permanent," "continuous surface connection," and "tributary." Under the proposed rule, "relatively permanent" would be defined as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." EPA notes that "the wet season" would refer to a predictable and extended period of time when surface water is present in a geographical feature in response to an annual wet season when precipitation is greater than average. However, that would not include what are

known as “ephemeral waters” which are geographic features that contain surface water only in direct response to precipitation. Under this definition of relatively permanent, a river which periodically dries out in the late summer months, but which flows during the winter and spring after increased rain and snowmelt could be considered a WOTUS, while a creek that is dry most of the time and flows only after a heavy rain would likely not be considered a WOTUS.

The proposed rule would define “continuous surface connection” as “having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water.” EPA clarifies that this definition presents a two-pronged test which requires a wetland or waterbody to both: (1) abut, as in directly touch, a traditionally navigable water or tributary; and (2) have surface water at least during the wet season. Wetlands or waters with a sub-surface connection to a recognized WOTUS – meaning connected to a WOTUS by water that is not on the surface but is not deep enough underground to be considered groundwater – would not be considered a WOTUS under this definition. Additionally, EPA notes that CWA permitting jurisdiction would only be extended to the portion of a wetland which retains surface water at least during the wet season.

Finally, the proposal would define “tributary” as “a body of water with relatively permanent flow, a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow.” Under this definition, a tributary to a traditionally navigable water that has a discernable bank and bed, and which has surface water at least during the wet season could be considered a WOTUS. However, a water without a bank and bed, such as a grassed waterway, would likely not be considered a WOTUS even if it held surface water year-round.

Besides defining what a WOTUS is, the proposal also strengthens language describing what a WOTUS is not. Particularly relevant to agriculture, the proposal would strengthen existing exclusions for prior converted cropland. The term “prior converted cropland” comes from the Wetland Conservation provisions of the 1985 Farm Bill, better known as Swampbuster. Prior converted cropland refers to wetland areas which were converted to agricultural land capable of producing a crop prior to December 23, 1985. Although prior converted cropland is currently excluded from the definition of WOTUS, the proposed rule would clarify that such land would only lose that exclusion and become subject to CWA jurisdiction if it were abandoned and reverted to a wetland that met the definition of “adjacent wetland” under WOTUS.

Next Steps

The proposed rule was published in the Federal Register on November 20, 2025, formally initiating a period of public comment that is currently set to end on January 5, 2026. While public comments may address any part of the proposal, EPA is specifically requesting comment on the following: whether WOTUS should be limited to only traditionally navigable waters and those wetlands that share a continuous surface connection with such waters; whether "relatively permanent" should include only those waters that contain surface water year-round instead of waters that contain surface water at least during an annual wet season; and whether a wetland must have a continuous surface connection with a navigable water or tributary year-round to be considered a WOTUS.

After the period of public comment concludes, EPA and the Corps will review the comments it receives before drafting and issuing a final rule. Once the rule becomes finalized, it is very likely that it will be challenged in court. Since 2015, all final regulations defining WOTUS have led to lengthy legal battles that often result in separate WOTUS definitions being applied across the country as the court cases proceed. Importantly, the last time a court was asked to consider whether the regulatory definition of WOTUS complied with the text of the CWA, the doctrine of *Chevron* deference was still the law of the land. Under *Chevron* deference, courts were instructed to defer to agency interpretations of ambiguous statutory language so long as the interpretation was reasonable. However, in 2024, the Supreme Court overturned *Chevron* deference in its landmark decision ***Loper Bright Enters. v. Raimondo*, 603 US 369 (2024)**. According to the Supreme Court, judges should not defer to agency statutory interpretations but should themselves state what the law is. This means that judges asked to consider whether a future WOTUS definition complies with the CWA may rely on judicial interpretations of the statute rather than agency interpretations.

The new proposed WOTUS definition has kicked off another cycle of attempting to define a crucial, but ambiguous term that determines when someone needs a CWA permit and when they do not. Whether the final definition will satisfy EPA's goals of crafting a durable definition remains to be seen.

To view the proposed WOTUS rule and learn how to submit a comment, click here.

To view the current definition of WOTUS, click here.

To view the text of *Sackett v. EPA*, click here.

To view the text of the CWA, click here.

For more CWA resources from the National Agricultural Law Center, click here.

Preliminary Injunction Halts Enforcement of West Virginia's Food Dye Ban (published 2.3.26)

On December 23, 2025, a District Judge in the Southern District of West Virginia ruled that the state is temporarily prohibited from enforcing its synthetic food dye ban while the law is being challenged in court. This law, enacted as HB 2354 and codified at W. Va. Code § 16-7-2, 4; 18-5D-3A, is being challenged by the International Association of Color Manufacturers (IACM). While the litigation remains ongoing, this article will discuss the court's most recent ruling.

Background on HB 2354

In 2025, West Virginia enacted HB 2354, a bill that addressed synthetic color dyes. Specifically, this bill was two-fold and included both a provision banning the use of certain synthetic color dyes statewide and prohibiting foods with these ingredients from being included in a "meal served in a school nutrition program." The bill had a two-step implementation scheme with the school portion going into effect last year, and the statewide ban going into effect in 2028.

The statewide ban portion included language that declared foods with ingredients that are "poisonous or injurious" to health to be adulterated. W. Va. Code § 16-7-2(b)(7). This language is followed by an enumerated list of "poisonous or injurious" ingredients that includes, "butylated hydroxyanisole, propylparaben, FD&C Blue No.1, FD&C Blue No.2, FD&C Green No.3, FD&C Red No. 3, FD&C Red No. 40, FD&C Yellow No. 5, and FD&C Yellow No. 6." In West Virginia, adulterated foods are prohibited from being sold and violators are guilty of a misdemeanor and will be fined upon conviction. W. Va. Code § 16-7-4. However, this law includes an exception for sellers of foods with the enumerated ingredients if the seller makes less than $5,000 in aggregate of food per month. This portion of the law is set to go into effect on January 1, 2028.

The second part of the law, codified at W. Va. Code § 18-5D-3A, bans the following color dyes from being served in school nutrition program meals – Red Dye No. 3, Red Dye No. 40, Yellow Dye No. 5, Yellow Dye No. 6, Blue Dye No. 1, Blue Dye No. 2, and Green Dye No. 3. This provision did not prohibit the sale of food items with these ingredients as part of a school fundraiser off school premises or on school premises at least one-half hour after the end of the school day. The school meal portion of the law went into effect on August 1, 2025.

Background of color additives

The Food and Drug Administration (FDA) defines color additives as “a dye, pigment or other substance, which is capable of imparting color when added or applied to a food, drug, or cosmetic to the human body.” They are distinguished from food additives by the Federal Food, Drug and Cosmetic Act (FDCA), and must be approved by FDA before they can be used in food. Color additives are classified into two categories – naturally occurring and synthetic. A synthetic color dye is manmade and is required by the FDA to be certified as safe before it is included in food. While a naturally occurring color additive must also be approved by the FDA before it is used, it is exempted from the safety certification process that synthetic dyes must undergo.

There are nine synthetic color dyes approved for use in foods by the FDA – three of which the agency is in the process of revoking. The approval for the nine can be found at 21 CFR § 74.101-706. Seven of the nine approved synthetic dyes are included in the enumerated list of prohibited ingredients in West Virginia’s law. The other two enumerated ingredients are not classified as color additives by the FDA. Butylated hydroxyanisole is classified as a food additive, and propylparaben is an ingredient classified under the “Generally Recognized As Safe” pathway. To learn more about the federal government’s current color dye scheme, click here to read NALC article “FDA Announces Plan to ‘Phase Out’ Synthetic Dyes.”

The Case

Two months after the school meal provision of HB 2354 went into effect, the trade association, International Association of Color Manufacturers (IACM), challenged its constitutionality. IACM has been the singular association “representing the interests of the color additives industry, both natural and synthetics,” since 1972. Its members include manufacturers, producers, and users in the color industry. The case is *International Association of Color Manufacturers v. Singh.*

In its complaint, IACM is claiming HB 2354’s unconstitutionality in three ways. First, IACM claims the law is a violation of the Equal Protection Clause because it “targeted color additives without any rational basis for finding that they are . . . unsafe in any way.” Second, they claim the law is a prohibited bill of attainder that “singl[es] out for prohibition and criminal sanction the named color additives” without a proper judicial proceeding. Last, the complaint claims that the law is unconstitutionally vague in violation of the Due Process Clause.

This litigation is ongoing, and the merits of IACM’s challenge remain undecided. However, this article will further discuss a recent decision in the case – the Judge’s ruling on IACM’s request for a preliminary injunction.

A preliminary injunction is a motion that may be granted before or during a trial with the goal of preserving the status quo before a final judgement. For a preliminary injunction to be issued, a plaintiff must satisfy four factors: 1) that the plaintiff is likely to succeed on the merits, 2) that he is likely to suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in his favor, and 4) that an injunction is in the public interest. However, when the defendant is the government, the last two factors are combined.

Success on the Merits

The Court first looked at IACM's three claims to see if they would be likely to succeed on the merits. For the equal protection claim, the Court determined that IACM was not likely to succeed because "there was at least a debatable question regarding the safety of the named color additives" brought before the West Virginia legislature. An equal protection claim arises from the Fourteenth Amendment to the U.S. Constitution and provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of law." Specifically, this clause requires equal treatment for individuals in similar situations. However, unless a law burdens a fundamental right or a suspect class, it will be upheld if "it bears a rational relation to some legitimate end." Through looking at the legislative history, the Court determined that enough discussion about the potential safety risks of color additives occurred to create a rational basis for HB 2354's enactment.

Next, the Court determined that IACM was also unlikely to succeed on their bill of attainder claim. An unconstitutional bill of attainder occurs when a legislative act singles out an individual or narrow group of people for punishment without a judicial proceeding. There are three elements that must be met for a legislative act to be considered a bill of attainder: 1) the law must impose punishment, 2) it must target specific individuals or identifiable groups, and 3) it must do so in a manner that bypasses judicial protections. Here, the Court found that HB 2354 is not an unconstitutional bill of attainder. The Court determined that the law applies to anyone who adulterates food, and not just the specific manufacturers or users of the enumerated color additives. Further, the Court found the bill does not impose punishment without judicial protection because it includes language that clarifies a punishment will not be levied until after conviction.

Last, the Court looks to IACM's claim of unconstitutional vagueness and determines that IACM would be successful. Specifically, the Court finds that HB 2354 is unconstitutionally vague because it fails to define "poisonous and injurious" and does not prohibit other color additives not included in the enumerated list from being classified as such. The doctrine of void for vagueness applies when a statute fails to "give a person of ordinary intelligence adequate notice of what conduct is prohibited" or does not "include sufficient standards to prevent arbitrary and discriminatory enforcement." Manning v. Caldwell for City of

Roanoke, 930 F.3d 264, 272 (4th Cir. 2019). Thus, a statute that does not clearly state what actions it is prohibiting would be considered vague because it does not give adequate notice to the public and might lead to unfair enforcement.

Here, along with its lack of definition for poisonous or injurious, the Court took issue with the following language in HB 2354, "poisonous or injurious to the health, *including* butylated hydroxyanisole, propylparaben, FD&C Blue No. 1 . . ." (emphasis added). In particular, the Court found that a failure to define "poisonous or injurious" paired with the insertion of a "nonexclusive" enumerated list of FDA-approved color additives would "leave the door open for arbitrary enforcement." In other words, the Court believes HB 2354 is vague because it does not make clear what color additives would be classified as "poisonous and injurious." Further, since there is no standard that clarifies which color additives are prohibited, additional color additives could be considered "poisonous and injurious" without the public having adequate notice.

Though this ruling analyzed the claims of IACM and made assertions of their likely outcomes, it is not a ruling on the merits. However, a ruling like this is often an indicator of the direction a judge might go later when the merits are actually being decided.

Irreparable Harm

Next, the Court looked at a preliminary injunction's second factor, irreparable harm. For an injunction to succeed, the person seeking it must prove that it is likely to suffer irreparable harm in its absence. Harm that cannot be fully rectified by the trial's final judgement is considered irreparable, and economic harms will only be deemed irreparable if they are unrecoverable. Here, the Court finds that IACM has made sufficient showing that its members will suffer irreparable economic harm if this injunction fails. The Court specifies that the uncertainty surrounding HB 2354, because of its likely unconstitutional vagueness, is sufficient to establish irreparable harm. The Court explains that IACM's members would suffer harm if they spent significant resources changing their processes, updating equipment, or developing new products for a law that is likely unconstitutional.

Balance of Equities and Public Interest

Last, the court considers the third and fourth factors of a preliminary injunction – the balance of equities and public interest. In a case where the defendant is the government, these two factors are merged, thus the Court analyzes them together. The goal of a preliminary injunction is to "keep the status quo," and this factor will consider if the hardships imposed on the plaintiff outweighs the public's interest in having the law enforced. Here, the Court determines that it would be unfair to require IACM's members to comply with HB 2354 given that it is likely unconstitutional. Further, because the statewide

ban portion of HB 2354 is not yet being enforced by West Virginia's Department of Health, the Court believes that granting this injunction will not harm the public and will not disturb the status quo.

Impacts of the injunction

Because of the factors discussed, the Court grants IACM the preliminary injunction. This means that while the litigation remains ongoing, West Virginia's Department of Health will not be able to enforce the statewide ban portion of HB 2354. However, the Court notes in a footnote of its decision that the injunction will not apply to the school meal portion of the law. They make clear that this distinction is because IACM only "demonstrated that Section 16-7-2(b)(7)," the statewide ban portion, "is likely unconstitutionally vague." Thus, the West Virginia Board of Education will be permitted to continue enforcing the school meal portion of the law.

Conclusion

This case remains ongoing, and at this time, no trial date has been set. As more state legislatures consider passing similar legislation to West Virginia's, it is likely that this will not be the only litigation pertaining to the matter. To stay up to date on this case and the actions of state legislatures nationwide, click here to subscribe to NALC's biweekly newsletter, "The Feed."

Texas Food Law Litigation Updates: Part 2 (published 3.3.26)

Though 2026 is young, the year has already seen a few interesting judicial rulings related to food law coming out of the state of Texas. Specifically, courts in the Western District of Texas have issued two decisions on preliminary injunctions – granting one and denying the other. This article is the second in a two-part series covering recent litigation updates in Texas. The first article can be read here.

Cell-cultured Protein Ban

The first case involves a challenge to a Texas law that sought to temporarily ban the sale of "cell-cultured proteins" in Texas. SB 261, passed in the 2025 Texas legislative session, defined cell-cultured protein as "a food product derived from harvesting animal cells and artificially replicating those cells in a growth medium to produce tissue." Per the law, the prohibition on selling cell-cultured meat went into effect on September 1, 2025, and will last until September 1, 2027. The law is codified into the Texas code at Tex. Health & Safety Code §§ 431.002(5-a), 431.02105(a). Texas is one of seven states to have passed a ban on the sale of cell-cultured meat. To learn more about other state alternative protein laws, click here to view NALC's Alternative Protein Laws State Compilation.

The day after SB 261 went into effect, it was challenged in court. The plaintiffs are Wild Type, Inc. d/b/a Wildtype (Wildtype) and UPSIDE Foods, Inc. (Upside) – two companies based out of California who produce and sell cultivated meat. Wildtype produces cultivated salmon, and Upside produces cultivated chicken. The plaintiffs claim that SB 261 violates the Dormant Commerce Clause and the Supremacy Clause of the US Constitution.

January 2026 Ruling

On January 16, 2026, the court heard oral arguments on a number of motions in this case. Following the arguments, the court orally ruled on all motions; however, it also released an order explaining the decisions. The motions that were heard included Defendant Garza's Motion to Dismiss for Lack of Jurisdiction; Defendants Paxton, Young, and Shuford's Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim; and Plaintiffs' Motion for Preliminary Injunction. Specifically, the judge granted Defendant Garza's Motion to Dismiss and Granted in-part the Motion to Dismiss from Defendants Paxton, Young, and Shuford. This means that Defendant Garza, the County Attorney for Travis County, will no longer be a party in this case. As for the other defendants, the court granted in-part their motion to dismiss. This means that while it dismissed part of the claims against them, the case will still be allowed to continue on some of the Plaintiff's claims. Specifically, the court dismissed Upside's claims that SB 261 is preempted by the federal poultry laws, but found

that both plaintiffs may still bring their claim that SB 261 violated the Dormant Commerce Clause.

In determining these rulings, the court specifically looked to Upside's claim that the Poultry Product Inspection Act (PPIA) preempted SB 261. The PPIA is the federal law that "regulates the processing, inspection, distribution, labeling, and sale of poultry products sold in interstate commerce," and it is administered by the US Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS). Specifically, the PPIA includes an express preemption clause that states "requirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter may not be imposed by any State."

Express preemption claims will be evaluated by looking to the scope of the express preemption clause and determining if the challenged state law falls within the scope. Here, the court determined that the scope of the PPIA's express preemption claim extended to food safety activities and any behaviors that would cause the adulteration of a product. Under that standard, the court finds that SB 261 does not fall within the scope of the PPIA's clause because SB 261 is a "complete sales ban" that has no impact on food safety nor behaviors that might adulterate a chicken product. Thus, the court found that the PPIA would not preempt SB 261 and that claim should be dismissed.

Last, the court turned to the Plaintiff's motion for a preliminary injunction. In making this motion, Upside and Wildtype were asking the court to prohibit Texas from enforcing this law while the litigation is ongoing. A preliminary injunction will have four elements: 1) moving party must show they are likely to succeed on the merits, 2) that they will suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in their favor, and 4) that an injunction is in the public interest. Here, the court determined that the Plaintiffs do not meet the irreparable harm element because Plaintiff's do not have significant "contractual business already in place in Texas." Additionally, the court finds that it would not be in the balance of equities to grant this preliminary injunction for two companies with very little business in Texas. Further, since two of the four elements are not met, the court declines the opportunity to analyze all four and denies the preliminary injunction.

Effect of the ruling

The court's decision to deny plaintiff's motion for preliminary injunction does not mean the case is resolved, nor is it a determination on the case's merits. This decision's effect is that the state of Texas will have the ability to enforce the ban on cell-cultured proteins while the litigation remains ongoing. Further, because of the court's decision to deny Defendants

Paxton, Young, and Shuford's motion to dismiss against the Dormant Commerce Clause claim, the case will continue on that claim. However, Upside and Wildtype have appealed the denial of a preliminary injunction to the 5th Circuit. While it remains unclear at this time how the 5th Circuit will rule, it is likely that no judgement on the merits will occur until the preliminary injunction issue is first settled.

MAHA Law

Also, in its 2025 legislative session, Texas passed SB 25, which has been referred to as Texas' "MAHA bill." This name is referencing the fact that many of the policy changes included in this legislation are aligned with priorities of the "Make America Healthy Again" movement. This law includes a section that requires food manufacturers to bear a particular disclosure statement if their food product contains any of 44 listed ingredients. Tex. Health & Safety Code § 431.0815. Specifically, the disclosure must say, "WARNING: This product contains an ingredient that is not recommended for human consumption by the appropriate authority in Australia, Canada, the European Union, or the United Kingdom." This portion of SB 25 will not go into effect until January 1, 2027, and its scope is limited to food product labels developed or copyrighted after the effective date. To learn more about the legislation itself, click here to read NALC article "'MAHA' Movement: New Texas and Louisiana Laws."

On December 5, 2025, a group of nonprofit associations that represent food and beverage manufacturers brought a lawsuit challenging the constitutionality of SB 25's labeling provision. Specifically, the plaintiffs make four claims 1) that SB 25's labeling requirement is a violation of the First Amendment, 2) that it is preempted by federal law, 3) that it is unconstitutionally vague, and 4) that it violates the Dorman Commerce Clause.

Like the litigation on Texas' cell-cultured meat ban, this case remains ongoing. However, the court recently published an order that ruled on the plaintiff's request for a preliminary injunction. As previously mentioned, a preliminary injunction is a pretrial motion that can order a party to cease or begin doing a specific action. For a preliminary injunction to be successful, the moving party must satisfy four elements: 1) that they are likely to succeed on the merits, 2) that they will suffer irreparable harm unless the injunction is issued, 3) that the balance of equities tips in their favor, and 4) that an injunction is in the public interest.

Likelihood of Success on the Merits

To determine if the first element of a preliminary injunction is met, the court first looked to see if plaintiffs would be likely to succeed on their claim that SB 25's labeling requirement violates the First Amendment. The First Amendment of the US Constitution prohibits laws

that abridge the freedom of speech and includes protections against content-based regulations. A content-based regulation is one that will compel a particular message and require an individual or entity to alter the content of their speech. These laws are presumed to be unconstitutional unless the government can prove "they are narrowly tailored to serve compelling state interests" under the standard of strict scrutiny.

Here, the court notes that SB 25 compels the manufacturers of foods and beverages to convey a word-for-word, government-scripted message on their food labels. As a result, the court finds that strict scrutiny is likely to be the standard applied. When strict scrutiny is applied, the burden shifts, and now the government must prove that its actions were constitutional (as opposed to the plaintiffs having to show that the actions were unconstitutional). The court noted that the government failed to meet its burden, instead focusing almost entirely on a different argument. Because the government did not meet its burden under that analysis, if the strict scrutiny standard is applied, the statute would be unconstitutional on First Amendment grounds.

Instead, the government primarily focused its argument on a claim that the court should consider the case under the intermediate scrutiny argument. Intermediate scrutiny would be applied here if a court classified SB 25's labeling provision as commercial speech rather than content-based regulation. While the court does not assess whether it is commercial speech or content-based here, it walks SB 25 through an intermediate scrutiny analysis by applying the four-part test established in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). It's four elements include 1) is the speech misleading or does it concern unlawful activity, 2) is there a substantial government interest, 3) does the regulation advance the government interest asserted, and 4) is it narrowly tailored to achieve the interest.

Here, the court determines that there is a substantial government interest in promoting the consumption of better food ingredients by citizens of Texas. However, the court does not believe that SB 25's labeling provision asserts this interest in a "narrowly tailored" way. It finds there are less restrictive ways Texas could accomplish this goal. As an example, the court states that Texas could have conducted a public advertising campaign warning of these dangers. Thus, the four elements of *Central Hudson* are not met, and the court determines SB 25's labeling provision would likely not pass intermediate scrutiny. Since the court found that the provision would likely not pass either a strict scrutiny or intermediate scrutiny evaluation, it concludes that the plaintiffs have shown a substantial likelihood of success on their First Amendment claim.

Before moving on to the other elements though, the court also evaluates the likelihood of success on plaintiff's vagueness and preemption claims. Both of these claims are related

to a portion of SB 25's labeling provision that would make the provision ineffective if the US Food and Drug Administration or the USDA issued a law or regulation that prohibited the use, imposed conditions of use, or determined the safety of one of the 44 listed ingredients. Tex. Health & Safety Code § 431.0817. The court determines that plaintiffs have not shown they are likely to succeed on their vagueness challenge because they have not produced enough evidence to show that food or beverage manufacturers would be unclear on what triggers the preemption clause. Further, the court finds that the plaintiffs would likely not succeed on their claim that SB 25's labeling provision is preempted by *current* federal laws because neither the Food, Drug, and Cosmetics Act nor the Nutrition Labeling and Education Act "directly conflict" with the Texas law. Though the court finds that success on the merits is not likely with the claims of vagueness and preemption, the first element of a preliminary injunction is met through the likelihood of success on the First Amendment claim.

Irreparable Harm

Next, the court looked to the second factor of a preliminary injunction, irreparable harm. To meet this element, the person seeking a preliminary injunction must prove they are likely to suffer irreparable harm if the law is enforced. In cases involving the First Amendment, courts recognize that the loss of free speech constitutes an irreparable injury, even if the injury only occurs for a short period of time. Here, since the court found it was likely that plaintiffs would succeed on their First Amendment claim, the court determines that irreparable harm is satisfied. Thus, the second element of a preliminary injunction is met.

Balance of Equities and Public Interest

Last, the court looked to the third and fourth elements of a preliminary injunction. In cases where the government is the defendant, these two factors merge. This element will consider whether the hardships imposed on the moving party outweigh the public's interest the law's enforcement. Here, since the hardship suffered is a likely infringement upon First Amendment freedoms, the court determines that this outweighs any public interest in SB 25's enforcement. Accordingly, the court finds that the third and fourth factors of a preliminary injunction are met.

Effects of the ruling

Since the four factors were satisfied, the court grants the plaintiffs a preliminary injunction and the state of Texas will be prohibited from enforcing the labeling provisions of SB 25 while the litigation is ongoing. A decision on a preliminary injunction is not a ruling on the merits, but might be an indicator of the direction a court might go in the future. A trial date has not yet been set for this case, and it currently sits in the discovery phase of the lawsuit.

Conclusion

Since neither of the court's most recent rulings on SB 261 or SB 25 were final judgements, there will likely continue to be noteworthy updates in both cases. To stay up-to-date on these lawsuits and other issues related to food law, click here to subscribe to NALC's biweekly newsletter, "The Feed."

‘MAHA’ Movement: Defining Ultra-processed Foods (published 10.21.25)

This month California Governor Gavin Newsom signed AB 1264 into law. This landmark legislation creates a statutory definition of ultra-processed foods (UPF) and makes California the first state in the nation to ban certain UPFs from being served in schools. AB 1264’s enactment follows recent announcements from the US Department of Agriculture (USDA) and the Food and Drug Administration (FDA) that the federal agencies are collaborating to create a definition for UPFs. This article will discuss both the California law and compare it with another popular food classification system.

Background of UPFs and NOVA

The new California enactment is the first time UPFs have been officially defined by law. This is noteworthy because there is no otherwise universally accepted definition of UPF, whether in law or in science. However, there are several food classification systems that attempt to define it. The system most applied in scientific literature is called Nova, the Portuguese translation for the word “new.” Nova was created by researchers at the University of Sao Paulo, Brazil in the format of a 2010 publication titled, “A new classification of foods based on the extent and purpose of their processing.” It expanded on work published the year before by Brazilian epidemiologist Carlos Monteiro, a collaborator on the Nova publication, in which Monteiro first termed the phrase UPF. The 2010 publication extended the concept of UPFs into the Nova system and further classified foods into three categories based on “the extent and purpose of the industrial processing applied to them.”

In 2019, Monteiro further expanded Nova in a publication for the UN Decade of Nutrition. Now, Nova recognizes four categories of food. The categories include unprocessed or minimally processed; processed culinary ingredients; processed foods; and UPFs. Unprocessed or minimally processed includes edible parts of plants or animals, fungi, algae and water. Food can be still be classified in this category if it underwent minimal processing such as roasting, boiling, non-alcoholic fermentation, or pasteurization. Processed culinary ingredients include oils, butter, lard, sugar, and salt. These are substances that are derived from group 1 foods or else from nature by processes like pressing, refining, grinding, milling, and drying. Processed foods are foods that are made by adding a group 2 substance to a group 1 food and are generally recognized as modified versions of the group 1 food. This could include canned vegetables, tinned fish preserved in oil, whole fruit preserved in syrup, and most freshly baked breads. Under the Nova system, UPFs are defined as “formulations made mostly or entirely from substances derived from foods and additives, with little if any intact group 1 food.” Examples of UPF food under the

Nova system include soft drinks, sweet or savory packaged snacks, and pre-prepared frozen dishes.

As mentioned before, Nova is not the only food classification system that defines UPFs, but it was the first and is the most applied in scientific literature. Food and Agriculture Organization of the United Nations' publication titled "Ultra-processed foods, diet quality, and health using the NOVA classification system" contains a helpful chart in Annex 1 that outlines some of the different systems.

California's AB 1264

With a goal of making school meals healthier, California enacted AB 1264. This law, along with creating a legal definition for UPFs, prohibits certain foods meeting the definition from being served in California's public schools. This is the first time a state has both sought to statutorily define UPFs and ban their use in schools. However, this is not the first time California has passed landmark legislation related to the ingredients of food served in schools. In 2024, California was the first state to prohibit the sale of food and beverages containing synthetic color additives in schools. In 2025, several states passed similar legislation, many of whom did so under the mantle of "Make America Healthy Again" (MAHA). Though the California initiatives were not enacted under the "MAHA" mantle, AB 1264, in a way similar to the synthetic dye ban, might serve as a model for how other states attempt to define UPFs. To learn more about California's school synthetic dye prohibition, click here to read NALC article "State Food Laws Enacted in 2024." To lean more about other state "MAHA" actions, click here to read NALC article, "'MAHA' Movement: New Texas and Louisiana Laws."

Definition of UPFs

Along with defining UPFs, AB 1264 bans certain foods that meet that definition from being served in school meals. Specifically, the law bans "restricted school foods" and "UPFs of concern" from being served in elementary, middle, or high schools after July 1, 2035. The classification of foods as being "restricted school foods" or "UPFs of concern" depends on whether the foods meet the definition of UPFs laid out in the California law. Thus, to understand which foods are prohibited, this article will first discuss California's definition of UPFs.

AB 1264 will codify the following definition of UPFs at Cal. Health & Safety Code § 104661. UPFs are food or beverages that contain:

- A substance available in FDA's Substances Added to Food database that has a FDA-defined technical effect, and

- *Either* 1) high amounts of saturated fat, sodium, or added sugar, *or* 2) a non-nutritive sweetener

FDA's Substances Added to Food is a searchable database that includes many of the types of ingredients regulated by the FDA. For example, the database includes food additives, color additives, and Generally Recognized as Safe substances that are listed in FDA regulations. California's new UPF definition applies to a substance found in the database that is designed to have any of the following technical effects, surface-active agents; stabilizers and thickeners; propellants, aerating agents, and gases; colors and coloring adjuncts; emulsifiers and emulsifier salts; flavoring agents and adjuvants (excluding spices and other natural seasonings and flavorings); flavor enhancers (excluding spices and other natural seasonings and flavorings); and nonnutritive sweeteners. The definitions of these technical effects can be found in 21 CFR § 170.3(o).

To meet the UPF definition, a food or beverage must contain one of the substances with a defined technical effect and contain *either* 1) high amounts of saturated fats, sodium, or added sugar *or* 2) a nonnutritive sweeter. Specifically, the law defines a product with a high amount of saturated fat as a food or beverage deriving 10 percent or greater of its total energy from saturated fat. Similarly, high sodium food or beverages contain a ratio equal to or greater than 1:1 milligrams of sodium to calories. Finally, added sugar products meeting the definition include food or beverages with at least 10 percent of total energy derived from added sugars. Thus, under California's UPF definition, a food containing a substance with a defined technical effect that derives 12 percent of its total energy from added sugars would be a UPF.

Further, California's definition would also include a food that contains 1) a substance with a defined technical effect and 2) a non-nutritive sweetener. A non-nutritive sweetener is defined as a substance with less than 2 percent of the caloric value of sucrose per equivalent unit of sweetening capacity. 21 CFR § 170.3(o)(19). California lists several examples of a non-nutritive sweetener including sucralose, steviol glycosides, and lactitol.

The law clarifies that raw agricultural commodities, unprocessed locally grown or raised agricultural products, minimally processed prepared foods, class 1 milk, alcoholic beverages, medical foods, infant formula, and commodity foods specifically made available by the USDA do not qualify as UPFs. Additionally, the law explains that salt, sodium chloride, spices or other natural seasonings or flavorings, nor natural color additives "shall not by themselves cause a food or beverage to be categorized as a UPF."

"Minimally processed prepared foods" is defined in Cal. Food & Agri. Code § 49015(a)(4) as food that prepared using 1) traditional processes to make food edible, to preserve it, or to

make it safe for human consumption, or 2) physical processes that do not fundamentally alter the raw product or that only separate a whole, intact food into component parts. Traditional processes could include smoking, roasting, freezing, drying, and fermenting. Physical processes could include grinding meat, separating eggs, and pressing fruits to produce juice. Thus, under California law, foods that undergo these processes do not meet the standard of "ultra-processed."

Examples of UPFs

Using California's definition, this article will evaluate the following foods and beverages to determine if they would classify as UPFs.

- Goldfish – Pepperidge Farm's Goldfish backed snack crackers would be considered a UPF because the product contains 1) Riboflavin, a database substance that functions as a color or coloring adjunct and flavor enhancer, and 2) has a 250mg of sodium and 140 calories – a ration greater than 1:1.
- Dino Nuggets – Tyson Foods' Frozen (chicken) Dino Nuggets would be considered a UPF under the California standard because the product contains food starch, a stabilizer or thickener, a high amount of sodium with 430mg of sodium and 210 calories.
- Mac & Cheese – Based on the nutrition facts of Kraft's Original Mac & Cheese Macaroni and Cheese Dinner, it would qualify as an UPF. The ingredient list contains Sodium Triphosphate, a substance designed as an emulsifier or emulsifier salt, and contains greater than a 1:1 sodium to calorie ratio with 530mg of sodium and 220 calories in a serving.
- Corn Dogs – Based on the nutrition facts of State Fair's Classic Corn Dogs, this food would qualify as an UPF. The product contains Sodium Diacetate which is a substance designed as a flavoring agent and adjuvant, and the product contains more than 10% of total energy from saturated fat.
- Gatorade – The lemon-lime flavor of Gatorade would qualify as a UPF because it contains 1) FD&C Yellow 5, a substance designed to function as a color or coloring adjunct, and 2) more than 10% of its total energy from added sugars.
- Apple Juice – Mott's 100% Original Apple Juice would not meet the California definition of a UPF because as juice produced from the pressing of a fruit, it falls under the "minimally processed prepared food" exception. However, regardless of the exception, it would still not be a UPF because it does not meet the definition's two-part test. While the apple juice contains ascorbic acid, a substance designed to function as a stabilizer or thickener, it has 0 percent added sugars and saturated

fats, has a sodium to calorie ratio under 1:1, and does not contain a non-nutritive sweetener.

Prohibiting specific UPFs from schools

Along with creating a definition for UPFs, the California law also prohibits "restricted school foods" and "UPFs of concern" from being served in schools. UPFs of concern include food that 1) meets the law's outlined UPF definition and 2) is classified as "of concern" through regulations adopted by the California Department of Public Health (CDPH). Restricted school foods are defined very broadly by the law as a food or beverage that contains one or more of the listed substances with a defined technical effect and is also restricted from service or sale in schools via CDPH regulations.

The law directs the CDPH to define both UPFs of concern and restricted school foods after considering several factors. Seven factors are listed in the law and include questions like, "whether the substance or group of substances are banned or restricted in other state, federal, or international jurisdictions due to concerns about adverse health consequences," "whether the food has been modified to be high in saturated fat, added sugar, or salt," and "whether the food meets the requirements of [FDA's] final rule . . . titled 'Food Labeling: Nutrient Content Claims; Definition of Healthy.'" CDPH's consideration of the listed factors must be "guided by a rigorous examination of available reputable peer-reviewed scientific evidence" and must be completed by June 1, 2028. By July 1, 2029 schools must begin to phase out both restricted school foods and UPFs of concern, and by July 1, 2032 a vendor shall not offer restricted school foods or UPFs of concern to a school.

CDPH is required to review the regulations and update definitions every five years. Additionally, the law creates reporting requirements for vendors of food products sold to a school. The vendor reporting requirements will go into place on February 1, 2028 and must be submitted yearly until February 1, 2032.

CA vs Nova

California's definition of UPFs is different from the standard created in Nova because it outlines tangible characteristics that a food must possess to be classified as a UPF. For instance, California's definition classifies food as an UPF is it contains a specific substance with a defined technical effect or if it contains a certain amount of added sugars. Conversely, Nova categorizes food based on a broad spectrum of the type and extent of processing it underwent. However, Nova is vague about what level of processing crosses into the UPF threshold. For example, in the UN Decade of Nutrition article UPFs are classified as those with "additives that imitate or enhance the sensory qualities of foods." However, the article also blurs the line between UPFs and processed foods by stating that

“additives in UPFs include some also used in processed foods, such as preservatives, antioxidants and stabilizers.” While Nova is a helpful tool in categorizing foods into four groups, it is not a nuanced definition like the California law.

Federal Agencies Seek to Define UPFs

The timing of the enactment of AB 1264 is significant because the USDA and FDA are currently collaborating to establish a definition of UPFs. On July 23, 2025, the agencies published a press release announcing a joint Request for Information to “gather information and data to help establish a federally recognized uniform definition for UPFs.” This initiative follows statements in the Make Our Children Healthy Again Assessment, published by the Make America Healthy Again Commission, that UPF overconsumption is one of the driving factors of what the assessment calls the “childhood chronic disease crisis.” The agencies have not indicated that they plan to prohibit UPFs in school meals, as California has done, but they have stated a uniform definition will “allow for consistency in research and policy.” The RFI is publicly available for comments until Oct. 23, 2025.

Though California’s law and the state’s initiative is not categorized under the mantle of “MAHA,” its enactment might have an effect on the definition USDA and FDA create. Further, as other state legislatures begin their 2026 sessions in the upcoming months, they might model California’s law in their own UPF definitional attempts.

To learn more about the FDA’s Final “Healthy” Rule, click here to read NALC article “FDA Releases Final ‘Healthy’ Rule.”

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IN FOCUS

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Committee on Foreign Investment in the United States (CFIUS)

The Committee on Foreign Investment in the United States (CFIUS) is an interagency body chaired by the Secretary of the Treasury. It serves the President in overseeing the potential national security risks of certain foreign direct investment (FDI) in the U.S. economy. CFIUS jurisdiction includes the review of mergers, acquisitions, and takeovers that could result in foreign control of a U.S. business; certain noncontrolling investments in businesses involved in critical technologies, critical infrastructure, or sensitive personal data (so-called "TID U.S. businesses"); and certain real estate transactions. At the recommendation of CFIUS, the President may suspend or prohibit transactions that threaten to impair U.S. national security.

The United States is the world's largest foreign investor and recipient of FDI. U.S. policy has supported a rules-based and open investment environment domestically and globally to promote U.S. economic growth and ensure the U.S. position as a premier FDI destination. Amid this backdrop, CFIUS has reviewed a small subset of foreign investment with an exclusive focus on national security. The focus of CFIUS's national security actions has evolved over time in response to emerging issues and concerns. Congressional focus on CFIUS has intensified since 2016 amid growing attention to the potential national security ramifications of investments by firms directed, controlled, or funded by a foreign government, notably the People's Republic of China (PRC), and in strategic sectors. Members are engaged in oversight of CFIUS reforms that Congress mandated in 2018 and some have introduced legislation to address perceived gaps in CFIUS's jurisdiction and actions.

CFIUS Authorities and Composition

CFIUS derives its authorities from Section 721 of the Defense Production Act (DPA), as amended (50 U.S.C. §4565), and implementing regulations (31 C.F.R. Chapter VIII). CFIUS initially was created and operated through a series of executive orders. In 1988, Congress passed the "Exon-Florio" amendment to the DPA (50 U.S.C. App. §2170), which codified the review process, at the time largely driven by concerns over Japanese firms' acquisitions of U.S. defense-related firms. In 2007, amid concerns over the proposed purchase of commercial operations of six U.S. ports by a firm based in the United Arab Emirates, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49), which formally gave CFIUS statutory authority.

In 2018, Congress passed the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-232), which expanded CFIUS's jurisdiction and review process in key ways. FIRRMA was intended to "strengthen and modernize" CFIUS and enhance its ability to address concerns involving nonpassive, noncontrolling investments (e.g., minority stake) in TID business and real estate transactions (e.g., land purchases) in proximity to military installations, or part of maritime ports or airports. Foreign investors with ties to countries that are part of the "five eyes" alliance—Australia, Canada, New Zealand, and the United Kingdom—may be exempt from some of the rules.

CFIUS consists of nine members: Secretary of the Treasury (chair); Secretaries of State, Defense, Homeland Security, Commerce, and Energy; Attorney General; U.S. Trade Representative; and Director of the Office of Science and Technology Policy. The Secretary of Labor and Director of National Intelligence (DNI) are nonvoting, ex officio members. Five White House offices observe or participate in CFIUS, as appropriate (e.g., the Council of Economic Advisers and National Security Council). The President can appoint other officials to serve on a case-by-case basis.

CFIUS Review Process

The review process begins with notification to CFIUS by the parties to the transaction, which is a voluntary step except in certain cases. Even when notification is not mandatory, firms have an incentive to do so to receive potential "safe harbor" from CFIUS, which limits future CFIUS action on a transaction after it is cleared. Non-notified transactions remain subject indefinitely to future CFIUS review and possible divestment or other actions mandated by the President. As directed by FIRRMA, CFIUS has increased attention and resources to monitoring non-notified transactions of concern. CFIUS may also unilaterally initiate a review.

> The President can exercise authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he/she finds that (1) credible evidence exists that the foreign person might take action that threatens to impair national security, and (2) no other laws provide "adequate and appropriate authority" to protect the national security risks.

Notification. A party's filing of a transaction can be submitted as (1) a declaration (an abbreviated, short-form filing (30-day CFIUS assessment) or (2) a traditional written notice (45-day CFIUS review). Declarations and notices are distinguished by submission length, timeline for CFIUS' consideration, and CFIUS's options for disposition of the submission. Filing is mandatory in select cases where a transaction involves (1) a foreign government acquiring a "substantial interest" in a TID U.S. business, and (2) a TID U.S. business that produces, designs, manufactures, etc. a critical technology subject to export licensing/controls. In 2026, Treasury proposed a Known Investor Program (KIP) that may streamline filing processes and offer benefits for certain foreign investors that frequently file with CFIUS.

National Security Review. Treasury and a co-lead agency conduct a 45-day review (30-day review for declarations) to determine the effects of the transaction on U.S. national security, informed by a DNI threat analysis. CFIUS's "risk-based assessment" considers the threat, vulnerabilities, and

consequences to national security related to the transaction. In its assessment, CFIUS is to consider an illustrative list of national security factors. Factors for consideration in statute include the domestic production needed for national defense; control of domestic industries and commercial activity by foreign citizens; effects on sales of military goods or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; U.S. technological leadership in areas affecting national security; and effects on U.S. critical infrastructure and critical technologies. In 2022, President Biden issued E.O. 14083 to elaborate and expand on such factors. These include effects on the resilience of critical supply chains and technological leadership; aggregate industry investment trends; cybersecurity risks; and risks to U.S. sensitive data.

National Security Investigation. The initial review proceeds to a 45-day investigation if CFIUS finds that a transaction threatens U.S. national security and the risk has not been mitigated; is foreign-government controlled; or would result in foreign control of any U.S. critical infrastructure. A 15-day extension is allowed in "extraordinary circumstances." CFIUS can negotiate and impose mitigation conditions on the parties to address its concerns; a lead agency is tasked with monitoring compliance with such agreements. CFIUS Enforcement and Penalty Guidelines, issued in 2022, and regulatory updates in 2024, emphasize monitoring and compliance with mitigation measures as priorities.

Presidential Decision. If CFIUS determines a transaction poses unresolved concerns, it may recommend to the President that the deal be prohibited, unless the parties abandon the transaction. The President has 15 days to act. Presidents have prohibited 11 transactions to date, most in the past decade (**Table 1**). President Trump issued orders in 2025 and 2026 to block two PRC acquisitions of U.S. firms. Trump also reopened a CFIUS review and reversed a Biden order that prohibited Japan's Nippon Steel from acquiring U.S. Steel Corp. A national security agreement gives the U.S. government some rights in U.S. Steel.

Table 1. Presidential Blocks of Foreign Transactions

Year	U.S. Business	Acquirer	Sector
1990	MAMCO	CATIC	Aerospace
2012	4 wind farms	Ralls Corp. (Sany Group)	Renewables
2016	Aixtron SE	Grand Chip (China IC Fund)	Semiconductor
2017	Lattice	Canyon Bridge Capital Partners	Semiconductor
2018	Qualcomm	Broadcom	Semiconductor
2020	StayNTouch, Inc.	Shiji Information Technology Co.	Software
2020*	Musical.ly	ByteDance	Digital platform
2024	Real estate	MineOne	Crypto mining
2025*	U.S. Steel	Nippon Steel	Steel
2025	Jupiter Systems	Suirui Int'l	AV equipment
2026	EMCORE	HieFo Corp.	Semiconductor

Source: Presidential orders and *Federal Register*.
Note: * Orders ultimately were not enforced.

Recent Activity

CFIUS must report annually to Congress on its activities (**Table 2**). In most years since FIRRMA was enacted, there has been an increase in transactions reviewed. In 2024, CFIUS reviewed 325 filings (116 declarations, and 209 notices). CFIUS cleared 91 declarations and requested parties submit a subsequent notice in 15% of cases. Six declarations involved real estate. Over half of total notices proceeded to an investigation. In 49 cases, parties withdrew the notice during the investigation to address issues, and the majority refiled. CFIUS adopted mitigation measures for 25 notices (12% of total). In 7 cases, parties abandoned the deal after CFIUS was unable to resolve its concerns, or after the parties refused proposed measures. In 2024 CFIUS assessed four penalties for breaches of mitigation terms.

Table 2. Transactions Reviewed by CFIUS, 2019-2024

	2019	2020	2021	2022	2023	2024
Declarations	94	126	164	154	109	116
Notices	231	187	272	286	233	209
Investigations	113	88	130	163	128	116
Withdrawals	30	28	72	87	57	49
Presidential Decision*	1	1	0	0	0	2

Source: CFIUS Annual Report to Congress for CY2024, Aug. 2025.
Note: * Reported based on the year review was initiated. Filing numbers are greater than the number of distinct transactions, for example, due to the withdrawal and refile process.

Issues for Congress

Congress remains engaged in oversight of implementation of FIRRMA and CFIUS activities. Some Members say that PRC state-directed investments require a proactive and strategic approach. Some say that PRC investments in new operations and emerging technologies may evade or fall outside current authorities. Some Members have introduced bills to expand CFIUS jurisdiction over agricultural land; ban some investments by the PRC and foreign adversaries; and add the Secretary of Agriculture as a CFIUS member. These efforts stem in part from reports of PRC land buying and Treasury's 2022 decision that CFIUS did not have jurisdiction to review a PRC firm's land purchase in North Dakota near a U.S. Air Force base. (Treasury since has added some military bases subject to CFIUS' real estate jurisdiction.) Congress also enacted legislation on outbound investment to China (P.L. 119-60). Other issues include

- How well is CFIUS balancing an open U.S. investment posture with the aim to protect national security? How should CFIUS protect critical technologies in ways that promote competitiveness and a market-driven economy?
- Post FIRRMA, how sufficient are CFIUS's authorities to achieve current and emerging policy objectives? How has E.O. 14083 affected CFIUS reviews in practice?
- There may be incentives to file declarations instead of notices due to their fast turnarounds. What types of transactions is CFIUS clearing through declarations?
- How is the Commerce Department's role in identifying emerging technologies for export controls affecting CFIUS reviews?
- In what ways has CFIUS improved coordination with U.S. allies and partners in information sharing and in investment screening efforts as mandated by FIRRMA?
- How will KIP reforms affect CFIUS decisionmaking and review outcomes?

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Solar Smarts for Landowners: An Overview

By Rusty Rumley

While not a new subject, solar leasing is a topic that will garner increased attention because of the additional funds from the Inflation Reduction Act (IRA) becoming available at the beginning of 2023. The IRA incentivizes the adoption of solar through several mechanisms such as the 30% solar tax credit for installing solar on a residence, but the primary one affecting solar leasing on a commercial scale is the 30% business investment tax credit. This credit is expected to spur demand for more commercial solar projects over the next decade and landowners can expect to be approached by representatives of these future projects for leasing opportunities.

What is a solar lease?

The typical commercial solar lease is where an outside party approaches a landowner to negotiate placing solar panels, substations, power lines, roads and other necessary infrastructure on their property for a significant period of time (twenty-five to thirty-five years with optional extensions are common) for a specified rental rate per acre per year or with some form of revenue sharing much like a royalty payment for an oil or gas lease.

These leases tend to be complicated and due to the length of the lease it is important to have an experienced attorney look over any potential contract before signing. While the leases tend to be long, twenty to forty pages is not uncommon, there are some clauses that need to be reviewed carefully.

Typical Clauses and Things to be Aware of in Solar Leases

Different companies use different lease agreements; however, there are similarities between the various contracts. Understanding these clauses can help when consulting with an experienced attorney about potential lease options.

Signing a lease agreement does not guarantee a solar lease.

Signing a solar lease guarantees that the solar developer has the option to go forward with the construction of a solar project, but it does not guarantee that they will build it. Solar companies may approach many landowners and sign lease agreements that lock the landowner into an initial agreement where the solar company can gather data and decide which site will best fit their needs. During the initial period the landowner typically has to grant them access to the property and refrain from signing any other agreements that might interfere with the solar lease. If by the end of the initial period the company has not started construction then the agreement typically expires, the landowner is able to keep any payments that have already been made, and the landowner can sign new lease agreements with other solar companies.

Income from the Solar Lease

What have your neighbors been offered? Many leases have a confidentiality clause, but those are typically only binding after the contract has been signed. Rental rates can vary dramatically so researching current rates is critical before signing a solar lease. Another issue this often not thought of is how will your rental rate increase over time? Remember that these agreements can last for

more than three decades. The revenue you receive might be adequate in 2023, but will that same sum be a fair rental rate in 2037? Escalation clauses address this issue by building into the agreement an orderly increase in the rental rate over the life of the lease agreement.

Property taxes

Property that is assessed and tax as agricultural property generally has a lower property tax rate than residential or commercial property. If a solar project is developed on your property then a county assessor may determine that the property is in commercial energy production rather than agricultural production which could significantly increase your annual property tax. This should be an area that is addressed in a lease agreement. Does the solar company pay the increase in taxes due to the solar development or will the landowner bear this cost?

Liability for Damage to the Solar Equipment

What about protecting the solar panels and other equipment on the leased property? Some leases make the landowner liable for any damages to equipment on the leased property. Can you guarantee that nobody will damage the equipment? Many solar projects construct fencing around the perimeter and it may be prudent to make the company responsible for any damage that occurs on their leased property.

Decommissioning the Project

Solar projects can easily last twenty-five to thirty-five years; however, at some point the project will no longer be economically viable. Who will pay for cleanup at the end of the lease period? Many contracts are silent as to which party bears the cost of removing the solar equipment and restoring the land to its prior condition. A good lease agreement should specify which party will be responsible for decommissioning the project and some ever require the solar company to establish a bond to pay for cleanup at termination. A lawyer can be extremely helpful in negotiating these types of arrangements.

Conclusion

There are numerous things that a landowner should think about before signing a solar lease and this article covers some of the important things to consider. Having an experienced attorney go through the lease is crucial because the time to negotiate is before signing the contract. For more information on the subject of solar leases click **here**.

To read the Inflation Reduction Act of 2022, click **here**.

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

Solar Leasing for Landowners: Payment Structures

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Solar leasing is the practice of renting tracts of land to install solar panels and infrastructure to generate electricity from sunlight. The typical commercial solar lease is where an outside party approaches a landowner to negotiate placing solar panels, substations, power lines, roads and other necessary infrastructure on their property for a significant period of time (twenty-five to thirty-five years with optional extensions are common) for a specified rental rate per acre per year or with some form of revenue sharing much like a royalty payment for an oil or gas lease.

Because landowners and solar companies are free to negotiate terms, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that all leases contain. Available commercial solar leases were gathered and analyzed to create this blog series about common clauses and to layout the variety of terms within those common clauses. The following post details common components of the payment structure of solar leases.

Common Payment Structures

Solar companies establish payment structures in their proposed lease agreements, and this is typically one of the first sections that a landowner will review. Many solar companies exist across the country resulting in diverse payment structures. While most lease agreements will vary, there are some common approaches that most companies follow. A very common approach to solar leases is to divide the lease into separate phases and pay different rates or through different calculations according to the phase of the solar lease. Some leases may pay a fixed rate based on the potential megawatts of power that the project could generate or even pay a royalty payment of some percentage of the power actually produced while many leases pay a fixed amount per acre per year. Other factors, such as state laws can also impact lease agreements. For example, both Tennessee and Florida statutorily require solar

lease agreements to include statements of the lease's compensation structure.[1] It is critical to carefully examine the lease and understand what compensation you are entitled to either during the life of the lease or if payment depends on the current phase of the lease agreement.

<u>Simple Payment Structure</u>

Simple payment structures may focus on one phase, such as the production phase, to compensate the property owner. For example, one lease agreement we reviewed requires payment based on the potential amount of energy produced:

> "… the annual rent of Seventy-five hundred dollars ($7,500) per megawatt (AC) of Installed Power (as defined herein) payable to Landlord, in advance, in annual installments."

This type of payment structure exposes the landowner to a major potential risk. Not all lease agreements turn into a completed solar project. There may be years after signing the initial agreement before a final decision on a project is made. Will the landowner be compensated for this time period? Simple payment structures may not take into account the time and complexity of building a solar project, so landowners need to ensure that they are adequately compensated for what they provide even if the project is never completed.

<u>Payments Based on Lease Phases</u>

Solar leases, and the developments themselves, are complicated projects that will take years to start producing power. It is common to break up lease agreements into different phases and the compensation methods and amount for the phases may differ dramatically. Common phases are the option phase, the construction phase, the operations phase and the decommissioning phase. Lease agreements may use some, or all, of the phases above. Exact names may differ from lease to lease, but the practical effects are similar.

The Option Phase

An option phase is the time period between the signing of the agreement and the beginning of the construction phase. Some of these phases can be as short as six months, while others may last for years. During the option phase, most leases contain no guarantee that the leased land will actually be used for a solar project.

[1] *See* Tenn. Code Ann. § 66-9-204; *see also* Fla. Stat. § 520.23 (2023).

The company may enter into contracts with several landowners while they decide which land to initiate their project on. The company will also need to sort out many practical issues such as permits, loans, power purchase agreements and a myriad of other things necessary for a successful solar project. Because rental payments in the future are unknown, it is beneficial to require rent payments during the option period. Example:

> "As consideration for the Option, during the Option Period, Grantee shall pay to Landowner option payments (collectively, the "Option Payments" and each an "Option Payment") in the amount of (i) US $2,500 (the "Initial Option Payment"), due and payable on the date that is forty-five (45) days after the Effective Date and (ii) thereafter, US $625 per calendar quarter, due and payable on the first day of the applicable calendar quarter."

Construction Phase

This phase of construction typically begins when they start bringing in construction equipment and materials and will last until solar project is actively producing power. During the option phase there may be minimal disruption to the landowner's use of their property, but during the construction phase the landowner may have very limited access to a significant portion of their property. Payments for this phase tend to be more substantial than the payments from the option phase because of the loss of access to the property. Examples:

- Payment is to begin when construction begins, and payment is to be made per acre.
- Landowner shall be paid $20,000 annually during Construction period.

Operations Phase

This phase begins when the construction is complete and the project begins producing power commercially. This phase can last for decades and ends when the project goes into the decommissioning phase. It is important to carefully review the contract to see how long it can last. Many contracts also include language where a specified period of time is guaranteed (20 years) and the company is entitled to extend this phase at their own discretion (company has an option to extend the agreement by five or ten years at their sole discretion). Payment calculations during the operations phase can also vary substantially. Many contracts pay on a per acre per year basis, but other contracts are paid on installed megawatts or a royalty payment based on the actual amount of power generated. Because of the length of this phase in the lease it is a common practice build in an escalation clause to keep up with inflation. Examples:

- $2,200 per acre of Easement Area per year during the Operations Period, escalating at a rate of 2% per annum.
- …$1,000 per acre per year for the Rent Payment of the leased property. Starting on the third (3rd) anniversary of the first Rent Payment Date, and for each annual anniversary thereafter, the annual Rent shall be increased by three percent (3%) over the Rent otherwise then in effect.

Decommissioning Phase

This phase begins at the end of the operations phase and, hopefully, concludes when all of the solar project infrastructure has been removed from the property and the premises has been returned to the state that it was in before the construction phase began. Many older agreements do not address the decommissioning phase and landowners may need to negotiate for payment and additional security to ensure proper decommissioning. Because of the length of these leases the original parties that signed the agreement may no longer be available (or the project could be sold to another company) so it is critical to document each party's responsibilities in the contract. One common approach to ensure that funds are available to pay for decommissioning is to require a bond from the solar company that can cover cleanup at the end of the lease. It also may be a wise idea to have payments for the property to continue through the decommissioning phase to incentivize the company to move forward. Example:

- Rental Payment of $1,500 per acre per year shall continue until all solar infrastructure has been removed from the premises at the conclusion of the agreement.

Conclusion

Overall, it is important that the solar lease agreement accurately encapsulates the terms agreed on by the parties. It is important to have an attorney that is knowledgeable about solar leases to thoroughly review the agreement for the landowner because once the contract is signed it is very difficult to make any changes. The long lease period means that anything left out of the agreement is something that the landowner, and potentially their heirs, will have to deal with for years to come.

To see more articles in this series click here.

To read the Inflation Reduction Act of 2022, click **here**.

To read the Farmland Owner’s Guide to Solar Leasing, click here.
To read Understanding Solar Energy Agreements, click here.

Solar Smarts for Landowners: Property Owner Rights/Use

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Solar leasing is the practice installing solar panels on large areas of land leased from a third party to generate electricity from sunlight. Commercial solar leasing is a topic that has garnered increasing attention because of the high rental rates in many areas of the country. Large-scale commercial solar leases include several unique aspects that make them differ from the typical residential solar contract. Because landowners and solar companies are free to enter a contract containing whatever terms the parties agree on, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that many leases contain. We gathered and analyzed many available commercial solar leases to create this blog series about the most common clauses and layout the variety of terms found within those common clauses. The following post details common clauses involving the landowner's rights and use of the land during the lease; however, it is important to have an attorney thoroughly review any contract before it is signed. To read the overview post on Solar Smarts for Landowners click here.

Access and Use of the Property Clauses

Land carries an intrinsic value for farmers that is often difficult to put into words. Protecting the land and farming land that is not being used under a solar lease is often a priority when negotiating any lease. This makes it important to consider whether the lease agreement significantly limits the landowner's access to, or use of, their property. Many leases contain an "owner access" or property use restriction clause that specifies what actions can be taken by both the solar developer and the landowner. Having clear expectations from both sides of the agreement can limit potential conflicts in the future. In our research, some solar leases may adequately address many of these issues while others are lacking in detail. If there are specific uses and activities that the landowner wishes to continue, the lease agreement should expressly include those rights before anything is signed. Below are sample clauses from various solar leases that we have selected to use as examples as well as commentary about the clauses:

- Landlord shall not make any material changes to the property that would impact the soil quality of the Easement area or block the sunlight.

This clause provides very little guidance to the lease parties and is written entirely in favor of the solar developer. What impacts soil quality and what should be avoided to not block sunlight? Adding clear expectations with specific descriptions of prohibited activities would help to clarify this clause. The landowner will also want assurances on how they can continue to use their property in a way that does not violate the lease agreement. These issues will be addressed as we look at different clauses. Example two:

- "During the Development Term, owner shall have the right to continue to use the Property for agricultural, ranching, timber harvesting, and/or other reasonable purposes so long as the Property is maintained substantially in accordance with its current condition and in compliance with all applicable laws."

This clause allows the property owner to continue using the property for normal farming activities during the development term of the lease. It is important to note that this clause only applies to the development term, not the entire lease. Once construction begins the landowner will lose access to some property but notice that the exact property at issue is not described in this clause. To learn more about the different phases of a solar lease read our guide to Understanding Solar Energy Agreements here.

If a landowner wishes to retain rights to use the land in these ways throughout the entirety of the lease term, the lease agreement should reflect that and include a similar clause applicable to the construction and operation terms. One issue that frequently arises is that due to the nature of the construction phase, the project may need more of the land than when the project moves into the operation phase. The solar developer will need extra space to store equipment and supplies during the construction phase, and the landowner should make sure that they will be compensated for this additional temporary usage. During this phase the landowner is unlikely to be able to continue farming this property. Because the development phase can take years to complete the landowner would like to be able to farm their property in the meantime and receive sufficient notice before the solar lease moves into the construction phase. For pasture this notice may be short, but for row crops the landowner should negotiate for a longer notice period so that they do not lose

a growing crop. Regardless of the notice period, it is important to include language specifying damages when a solar lease moves into the construction phase.

A lease may also include an owner access clause that specifies the process to be followed for the landowner to access the leased premises.

For example:

- "During the Construction and Operation Term and any Extended Term with respect to any Property, Owner shall have the right to reasonably access such Property at reasonable intervals and at reasonable times and upon at least forty-eight hours' prior advance written notice to Lessee to inspect such Property. Any such access shall not materially interfere with Lessee's use of such Property for Solar Energy Purposes and occupancy of such Property in any manner."

This clause clarifies the steps to be taken for the landowner to access the property and also places a restriction on the actions taken by the landowner while on the property. The property owner may want to inspect their property to make sure that the property is being taken care of, but this is also a potentially dangerous place to be with either construction equipment during the construction phase or dangerous amounts of electricity during the operation term so the solar developer will want to protect themselves as well.

Ultimately, a solar lease also grants access to the land to many individuals who are likely strangers to the landowner. Employees from the solar company, maintenance workers, and others will be accessing the land over the course of several decades. This is likely unfamiliar to rural landowners and can cause additional stress and impose increased liability. A lease may specifically limit what can be grown on the land (timber is typically prohibited since it may create shade), what can be built on the land (barns, houses or other structures that could create shade) and other uses, such as hunting rights, may be restricted or significantly limited.

It is important to negotiate the access and usage of the property that the landowner will feel comfortable with before signing any agreement. Once the agreement is signed then it is very difficult to change the agreement in the future.

Maintenance of the Property

Most leases establish which party is responsible for maintenance of the property. Some leases require the tenant to maintain the property, while others hold the landowner responsible for keeping the land in proper order.

For example:

- "Landlord shall maintain its property adjacent to the Leased Premises in good condition and state of repair to avoid interference with Tenant's use of the Leased Premises and the Easement. Landlord shall not construct or permit to be constructed structures or plant or permit to be planted trees adjacent to the Leased Premises that will impede solar access to Solar Farm."
- Landlord shall maintain the property in a good condition, including the property in the immediate vicinity of the System.
- Operator (tenant) shall maintain the property in a neat and clean condition. Operator shall repair any cattle guards, fences, or gates damaged in connection to the Operator's activities on the property.

Many solar agreements split the duty for maintenance of the property. The solar developer is often responsible for the property that is being actively used by the project (this land is almost aways fenced in to limit access) and the property owner is responsible for maintaining the property outside the fence. Many solar developers will also reserve the right to maintain land immediately outside of the project so that they can cut down vegetation that could create shade or a fire hazard. Specifying responsibilities between the parties can make relations better over the life of the lease agreement.

Conclusion

A property owner should consider how the lease terms impact their ability to use their land. Issues such as use of the surrounding land and maintenance of the property may seem like far away concepts during the lease negotiation, but the terms created during these negotiations will dictate how the land will be used and maintained for decades to come.

To read other articles in the Solar Smarts for Landowners series click **here**.

To read Understanding Solar Energy Agreements by Shannon Ferrell, click **here**.

To read about Land Use Conflicts between Wind and Solar Renewable Energy and Agricultural Uses, click **here**.

Solar Smarts for Landowners: Miscellaneous Clauses

Solar leasing is the practice of installing solar panels on large areas of land leased from a third party to generate electricity from sunlight. Commercial solar leasing is a topic that has garnered increasing attention because of the high rental rates in many areas of the country. Large-scale commercial solar leases include several unique aspects that make them differ from the typical residential solar contract. Because landowners and solar companies are free to enter a contract containing whatever terms the parties agree on, the clauses and terms vary greatly from lease to lease. However, there are several common clauses that many leases contain. We gathered and analyzed many available commercial solar leases to create this blog series about the most common clauses and layout the variety of terms found within those common clauses. The following post details common clauses regarding miscellaneous topics such as assignment/subleasing provisions, confidentiality clauses, binding arbitration clauses, insurance requirements, and oil, gas, and mineral rights.

Assignment/Subleasing

Most, if not all, of these leases include a clause that allows the developer to assign, transfer, or sublease their interest in the property without the consent of the landowner. Some leases require limited or no notice to sublease or assign the developer's interest to another party. Landowners may be able to negotiate for more notice on an assignment or sublease, but it is doubtful that the developer will forego this ability. Solar leases are long-term contracts that can last for decades and developers will want, or need, the flexibility to transfer the project to another party. What does this practically mean for the landowner? Other than negotiating for more notice potentially, this type of clause illustrates the importance of capturing the full agreement in writing. A landowner may have a wonderful relationship with the initial developer, but subsequent operators may not be so accommodating. The landowner's success in navigating future challenges with the solar company depends on the language that is negotiated before the lease is executed.

Confidentiality Clauses

Solar companies often ask that landowners not discuss the details of their agreements with their neighbors or nearby landowners. Some leases specifically include confidentiality clauses that prohibit either party from disclosing to a third party the financial details of the agreement, especially during the option period. Landowners are also often prohibited from revealing the lessee's product design,

methods of operation and construction to any third party. These clauses are included to protect the unique features of a solar company's business model from competing companies and potentially in negotiating different pay rates with different neighbors. There are several different issues that landowners and their attorneys should be aware of with confidentiality clauses.

First, this does not stop the landowner from seeking legal advice on the lease. In fact, a landowner may be able to use this clause to negotiate with the developer on paying some, or all, of the landowner's attorney fees for reviewing the lease because they are creating legal liability for the landowner. In some parts of the country developers may be willing to reimburse attorney fees for the landowners and not in other parts, but it is an issue that your attorney should explore.

Second, the landowner should be able to consult with other people such as family members, accountants, tenants and lenders before signing the agreement as the contract needs to be executed for the confidentiality clause in the lease to come into force. Some developers may have other types of documents, such as Non-Disclosure Agreements (NDAs), that are introduced earlier in the negotiations and those agreements should be carefully reviewed by the landowner's attorney before they are signed.

It is important to be aware of any confidentiality requirements in your agreement to avoid liability for breach of contract.

Arbitration and Venue

Ideally, lease agreements would sufficiently encapsulate the agreement of the parties, and the parties would not have any issues that lead to disputes. However, no contract can address all potential problems that may arise during a lease that is likely to last more than a quarter of a century. Leases often include arbitration clauses that require parties to resolve any disputes through binding arbitration rather than in court. Before entering a lease agreement that requires arbitration, a landowner should consider whether they are willing to surrender their right to have the case heard in court. These binding arbitration clauses are often more favorable to the solar companies because a landowner is much more likely to win a jury trial in his or her hometown against a large solar corporation.

Here is an example of a binding arbitration clause:

> "Any Dispute that is not settled to their mutual satisfaction within the applicable notice or cure periods provided in this Agreement shall be settled by arbitration between the Parties."

Venue, or forum selection, is another clause that your attorney should carefully review. Venue clauses decide the location where a contract dispute will be litigated. If the solar lease does not specify where venue should occur, then the default answer is where the breach of contract happened. This is usually going to be the county or parish where the solar lease is located which typically favors the landowner. Developers that do not have an arbitration clause will usually want to have any court actions held in a location that is more favorable to them. The landowner's attorney should carefully review these sections of the agreement to fully protect the landowner's interests as much as practicable in case of a later dispute.

Insurance/Indemnification

It is important to ensure that, in the case of an accident that causes loss, both parties are protected. The most common lease requires the developer to maintain an insurance policy that covers injury to person and property. These clauses typically include a minimum policy amount. For example, a $2 million minimum for each individual occurrence and $5 million in umbrella liability insurance. This requirement ensures that the solar developer will be able to pay for any damages that arise from its actions or injuries on the property.

Additionally, landowners are subject to premises liability and owe a certain duty of care to those who enter their land. This duty of care would extend to employees of the solar company, maintenance workers, and any other individual who enters the land in relation to the solar project. Solar leases should include indemnity clauses in which the developer agrees to indemnify and hold harmless the landowner for any losses caused by injury to another person or piece of property. This is important because it is possible that an accident may occur in the 30+ year span these agreements typically last, and the landowner does not want to be held liable for personal injury in relation to the project. Some early solar leases have indemnity clauses that protect the developer at the landowner's expense and those should be avoided whenever possible. The landowner should not be held responsible if, for example, teenagers shoot at solar panels from the road and cause damage. A well drafted lease will put the risk of liability on the developer since they are the ones with control over that property during the life of the solar lease.

Mineral Rights and Solar Leases

It is very common in some states that both mineral developments (usually oil and gas exploration) and solar development are happening in the same area at the

same time. Solar developers will want the exclusive right to use the property for their solar project and may ask landowners for some form of assurance in the lease that they will have sole rights to the property. This may not be something that the landowner can guarantee. People that own the surface estate (the landowners) may not own the mineral estate (the valuable minerals underneath the surface) if those rights have been severed. In many states the mineral estate is the dominant estate over the surface estate, and they may use a "reasonable amount" of the surface as necessary to extract their minerals. This means that if the landowner has only the surface rights to their property, then they cannot, and should not, guarantee that the solar developer will have exclusive rights to the surface because they cannot exclude a mineral owner from extracting those minerals. With modern drilling techniques there is more flexibility on where the wellhead can be located, but the landowner should not agree to clauses that they may not be able to honor. Developers in states with active mineral exploration should be aware of this issue; however, the landowner's attorney should also seek to minimize the risk by recognizing this risk in the lease agreement.

Conclusion

Ultimately, landowners and solar companies may include any clauses they wish in a lease agreement. It is best to enter into a comprehensive agreement that addresses all material issues and topics in order to protect both the landowner and the developer. Any term that is written in the lease is enforceable against both parties, and it will be more difficult, if not impossible to enforce terms that are not included in the written agreement. Landowners spend much of their time looking at the payment clause of a solar lease, but the other miscellaneous clauses can impact the overall success of the lease agreement.

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