Environmental Law:

Regulatory & Litigation Ag Industry Update

DIVISION OF AGRICULTURE
RESEARCH & EXTENSION
University of Arkansas System

Outline:

- Pesticides
- Clean Water Act
- Endangered Species Act
- National Environmental Policy Act
- Final Thoughts

Monsanto v. Durnell: The Basics

In January 2026, the Supreme Court agreed to hear *Monsanto v. Durnell*

The lawsuit was filed by a plaintiff who claimed that use of Roundup gave him cancer and that Monsanto failed to warn him about the risk

Bayer argues that the plaintiffs' failure to warn claim should be dismissed because it is preempted by FIFRA

Oral argument was held on April 27, final opinion expected sometime later in the year

The decision is likely to impact thousands of active Roundup lawsuits and other pesticide liability cases – very likely to shape the future of pesticide liability litigation

Context

- Since 2015, thousands of lawsuits have been filed by plaintiffs against Monsanto/Bayer alleging that the company failed to warn consumers about health risks of glyphosate
- Bayer has argued that FIFRA preempts the plaintiffs' failure to warn claims
- EPA has never found that glyphosate, the active ingredient in Roundup, is carcinogenic – there is no cancer warning required on the federal label
- But plaintiffs disagree – they argue that their failure to warn claims satisfy the parallel requirements standard from *Bates* and that their claims are parallel to FIFRA's misbranding requirements

The Two Main Arguments

FIFRA Preempts Failure to Warn Claims

State law failure to warn claims would require a new warning to be added to the glyphosate label that *is different from* or *in addition to* the federally registered label.

Preemption under 7 U.S.C. § 136v.

FIFRA misbranding requirement is broader than state law failure to warn claims, so preemption does not occur.

No preemption if FIFRA requirements are parallel to state law requirements.

FIFRA Does **NOT** Preempt Failure to Warn Claims

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Bates v. Dow – "Parallel Requirements"

- Plaintiffs' claim that Dow had failed to warn that Strongarm could stunt peanut growth was based in common law rules that qualify as a *requirement* for labeling or packaging
  - Plaintiffs' claim was that Dow had violated standards for labeling
- Court found that common law rules are subject to FIFRA's limits on state authority but are not automatically preempted
- If a common law rule would impose a labeling requirement that diverges from the federal label it would be preempted
- BUT if the common law rule is equivalent to or fully consistent with FIFRA's labeling standards it would not be preempted – instead it would be considered a *parallel requirement*
- Claims in *Bates* were parallel to FIFRA's requirement that a pesticide not be misbranded

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Durnell: Primary Arguments

Bayer argues

- FIFRA preempts failure to warn claims
- Express preemption because text of FIFRA directly prohibits states from altering label language
- Implied preemption because Bayer cannot comply with both federal and state labeling requirements

Durnell argues

- Failure to warn claims not preempted
- Failure to warn claims are consistent with FIFRA prohibition on misbranding
- FIFRA authorizes the judiciary to determine whether a pesticide is misbranded
  - EPA determinations that a label complies with misbranding provisions are the agency's "opinion"

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In the Meantime…

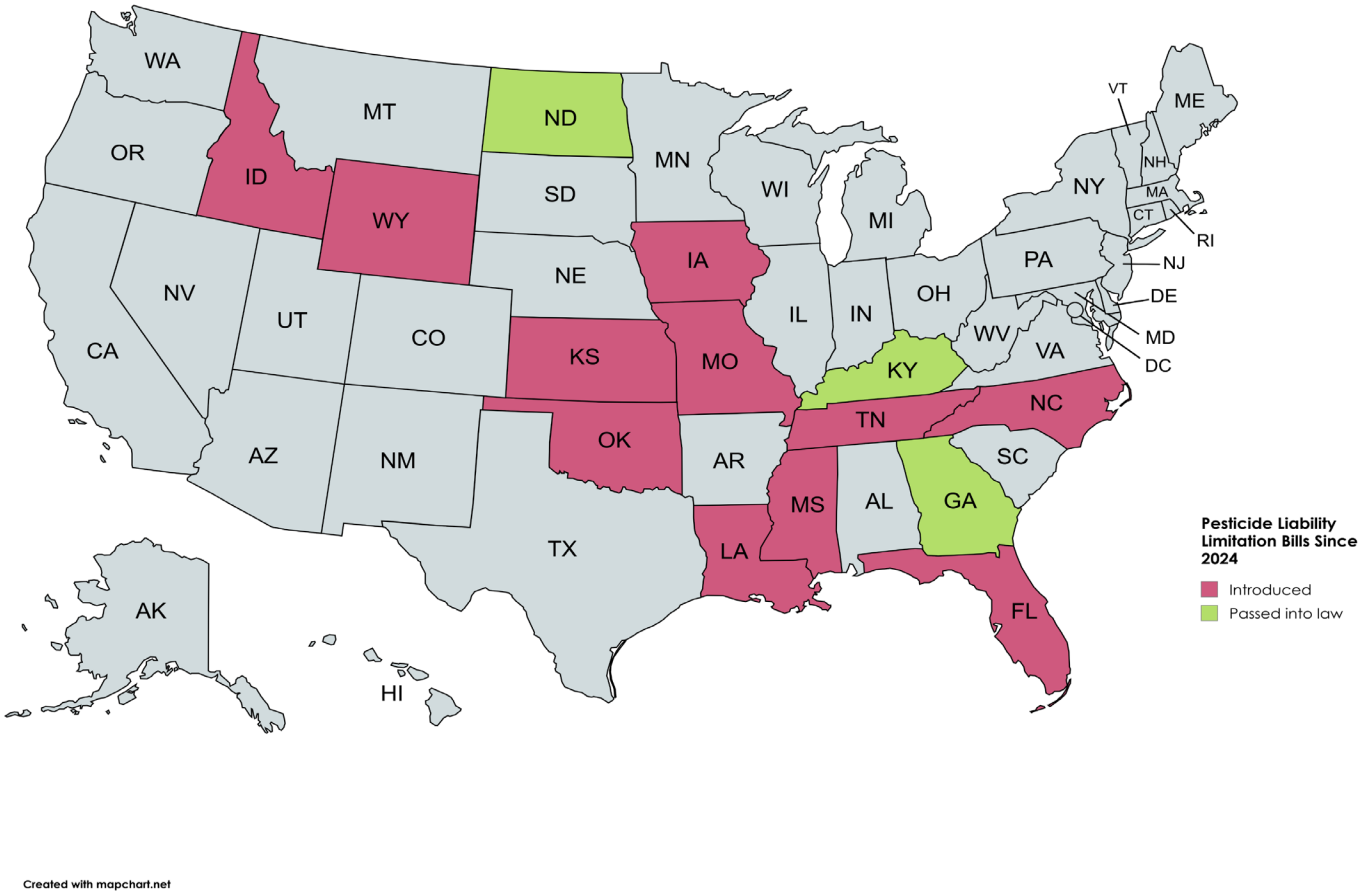
As the question of FIFRA preemption and failure to warn works its way through the court system, some states have also weighed in

Since 2024, several states have attempted to answer the FIFRA preemption question through legislation

State Pesticide Liability Limitation Bills

- State bills have sought to limit liability for pesticide manufacturers by making a federally registered pesticide label a complete defense to a failure to warn claim
  - Note: some bills provide that a federally registered label would be a defense to all common law claims related to labeling, *including* failure to warn
- These bills provide that a federally registered pesticide label that has been approved by EPA under FIFRA shall be considered:
  - "a sufficient warning label for the purposes of an action commenced under any provision of state law concerning the duty to warn or label, or any other common law duty to warn"

Which States?



On the Federal Level

Congress also considered a legislative solution

Initial drafts of the 2026 Farm Bill included the "Uniformity of Pesticide Labeling Requirements"

Passed out of Committee but removed from draft that passed the House

Future of the bill remains uncertain

Dicamba Update

Three over-the-top dicamba products approved for the 2026 and 2027 growing seasons

- Stryax (previously XtendiMax), Engenia and Tavium
- Approved for use on dicamba-resistant soybean and cotton crops

New restrictions to reduce drift and satisfy the Herbicide Strategy included on the labels

- Annual limit reduced to two applications of 0.5lbs per acre (previously four applications were allowed)
- Use of volatility reduction agent at 40 oz. per acre for every application
- 3 runoff mitigation points necessary
- No applications if the temperature if forecasted to be at or above 95

Lawsuit filed in Ninth Circuit Court of Appeals claiming registration decision violates FIFRA and the ESA

- Same plaintiffs who successfully overturned dicamba registration in 2020 and 2024

Draft Fungicide Strategy

- Proposes mitigation measures that EPA will include on fungicide labels to reduce impacts to threatened and endangered species
- Very similar to Herbicide and Insecticide Strategies
- EPA will assess whether a fungicide will have population-level impacts to listed species and assign mitigation measures accordingly
- Mitigation measures look to reduce spray drift and runoff/erosion
- Comments on draft due June 29

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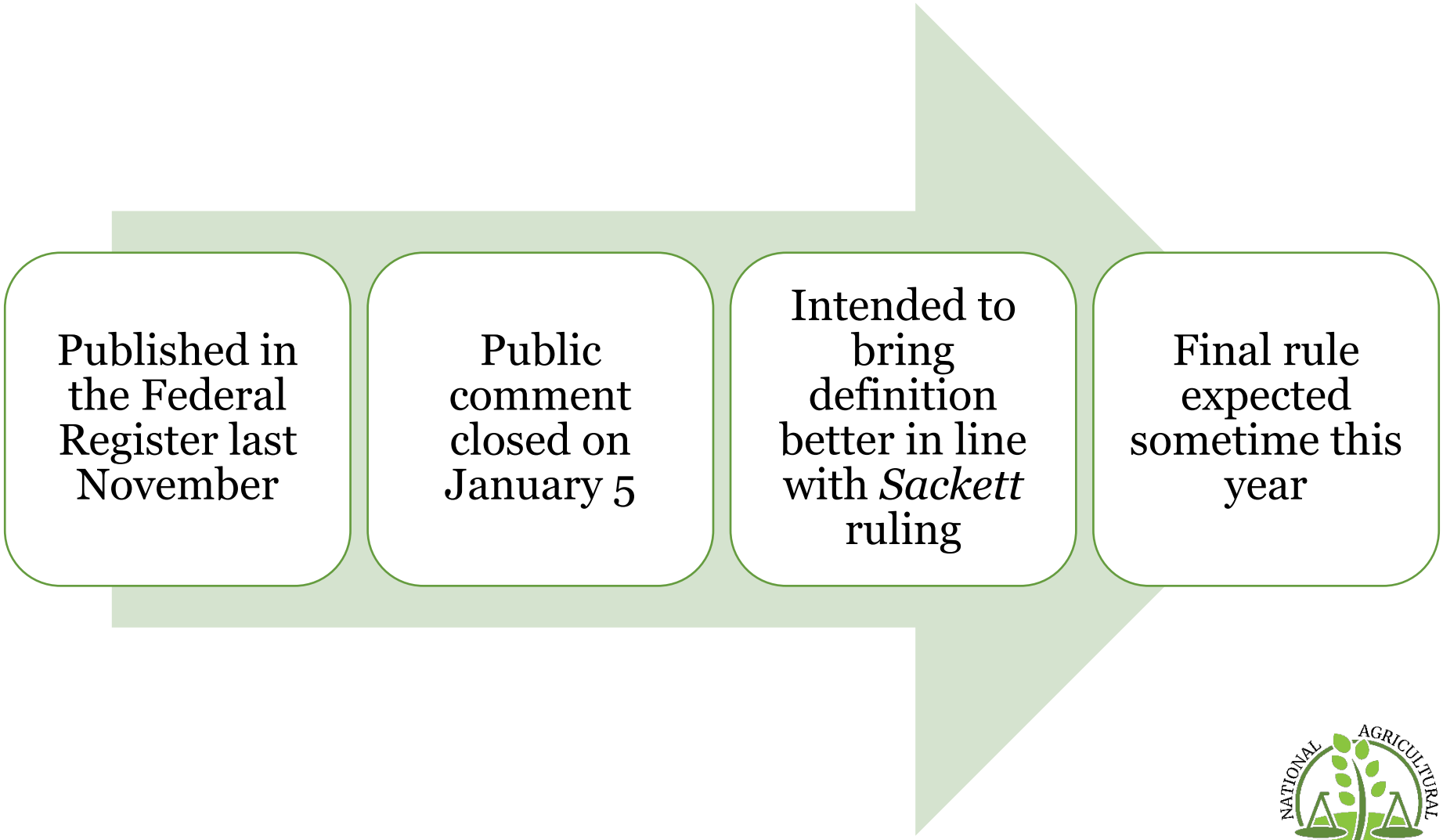
WOTUS Proposed Rule



Sackett v. EPA

The CWA's use of "waters" in ["waters of the United States"] refers only to "geographic[al] features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection

Current WOTUS Definition

The Conforming Rule includes five categories of WOTUS:

1. Traditional navigable waters used for interstate or foreign commerce; the territorial seas; and interstate waters
2. Impoundments of waters otherwise identified as WOTUS
3. Tributaries of traditionally navigable waters that are relatively permanent, standing, or continuously flowing
4. Wetlands adjacent to traditionally navigable waters or that share a continuous surface connection with a tributary or impoundment
5. Relatively permanent, standing, or continuously flowing intrastate lakes and ponds not already identified as WOTUS

Current Proposal

- Would include five water categories as WOTUS:
  - Traditionally navigable waters, including all waters subject to the ebb and flow of the tide and the territorial seas
  - Impoundments of waters otherwise identified as WOTUS
  - Tributaries of traditionally navigable waters which are relatively permanent, standing or continuously flowing
  - Wetlands adjacent to a traditionally navigable water or tributary
  - Lakes and ponds that are relatively permanent, standing or continuously flowing and share a continuous surface connection with a traditionally navigable water or tributary

- Excludes:
  - Interstate waters

New Definitions

"Relatively permanent"	Standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season
"Continuous surface connection"	Having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water
"Tributary"	A body of water with relatively permanent flow, a bed and bank, that connects to a downstream navigable water or the territorial seas, either directly or through one or more features that convey relatively permanent flow

Comment Requested

- During the comment period, EPA specifically sought 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
  - Should "relatively permanent" include only those waters that contain surface water year-round instead of at least during the wet season
  - Should a wetland have a year-round continuous surface connection to be considered WOTUS
- Final rule could be very different from proposal…

Andrews v. United States

- CWA case currently on petition for cert. to SCOTUS from Second Circuit
- Asking SCOTUS to clarify that *Sackett* requires wetlands to be "indistinguishable" from a WOTUS to be jurisdictional
- Involves dispute over wetlands that district court concluded were WOTUS in post-*Sackett* ruling due to "continuous surface flow paths"
- "Indistinguishability" argument not raised in lower courts
- Federal gov't has asked SCOTUS not to hear the case

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New Regs in the Works

FWS and NMFS proposed a host of new ESA regulations in November

Largely identical to rules adopted in 2019 and 2020

Comment period closed in December

Still waiting on final rules

What's Been Proposed?

Listing:

- Would change procedures for listing, reclassifying and delisting species
- Allow economic impacts to be taken into consideration when making listing decisions
- Return to 2019 definition of "foreseeable future"
- Unoccupied habitat could only be critical habitat if the area is "essential" for species conservation

Interagency Consultation:

- Return to 2019 definition of "environmental baseline" which emphasized current conditions at the time a federal action is proposed
- Revise mitigation activities that could be assigned as reasonable and prudent measures

Blanket 4(4) Rule:

- Revoke the rule

Critical Habitat

- Will consider the following when making an exclusion analysis: costs to federal agencies and other parties of project modification necessary to avoid destruction of CH; opportunity costs

What About “Harm”?

- FWS proposed a rule to rescind the regulatory definition of “harm” from the statutory definition of “take” last year
- Still waiting on final rule – sometime this summer/fall? Final rule sent to OIRA in Apil
- Reminder, “harm” defined as “an act which actually kills or injure wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.”
- Supreme Court upheld this definition in *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*
- How will “harm” be defined in the future? Still part of the statutory text…

Lawsuits, Lawsuits, Lawsuits!

In March a federal judge overturned ESA regs from 2019 and 2024

- Filed by Center for Biological Diversity in California
- First time a court has ruled on any Trump I ESA regulations on the merits
- Indication for future of Trump II ESA regs?

Monarch butterfly lawsuit filed

- CBD and Center for Food Safety have sued FWS for delay in final listing rule for monarch butterfly
- ESA gives a one-year deadline to finalize a proposed listing rule
- Proposed rule published in December 2024

Endangered Species Committee decision challenged

- Various environmental groups challenging recent “God Squad” decision to exempt all oil and gas activities in the Gulf from ESA requirements
- Has the potential to be a precedent setting case – only 3 prior ESC decisions have been made, all more narrow than recent waiver

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What's Going On?

In late 2024/early 2025, two courts ruled that the Council on Environmental Quality lacks authority to issue binding regulations

CEQ first issued regulations for NEPA in 1977

Both courts determined that Congress did not specifically state that CEQ could issue regulations

CEQ rescinded all NEPA regs shortly after

CEQ Memo

- When rescinding its NEPA regulations, CEQ issued a memo to federal agencies offering guidance on what to do
- Memo told agencies that they would need to adopt their own internal rules for how to comply with NEPA and that those rules should do the following:
  - Indicate which agency actions are subject to NEPA and which are not
  - Establish a process for supplementary NEPA review
  - Establish protocols for working with other agencies
  - Establish protocols for working with states
  - Set rules for public involvement
- CEQ suggested that agencies adopt the process that had been in place since the 1970s and that any adjustments would need to be consistent with NEPA

Agency Response

- Many agencies already had their own NEPA regulations on the books
  - These tended to be somewhat limited and address agency-specific NEPA concerns
- Those agencies are altering their pre-existing NEPA regulations
  - Agencies without pre-existing regulations will need to adopt new ones
- This has been piecemeal – some agencies have completed the process, some are still in the middle of the process, others have not started

Example: USDA

USDA revised its NEPA regulations in 2025 in response to CEQ's regulatory rollback

The new rules will govern USDA NEPA compliance going forward

It says those changes are inline with both the text of NEPA and recent Supreme Court case, *Seven County Infrastructure Coal. v. Eagle County*, which reaffirmed that NEPA is a procedural process

What Are the Changes?

Incorporation of page limits and deadlines established by Congress in 2023

Adoption of the statutory definition of "major federal action" and clarification of circumstances where NEPA does not apply

Definition of "effects" now limited to environmental changes that are "reasonably foreseeable and have a reasonably close causal relationship" to the proposed action

USDA and subagencies will no longer be required to publish draft EIS and will have discretion in structuring NEPA documents, provided statutory requirements are met

Public comment required only in response to a Notice of Intent – USDA no longer required to solicit public comment on EIS

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Will They Hold Up?

- Environmental groups filed a lawsuit in January 2026 to challenge USDA's updated NEPA rules
  - *Ctr. for Biological Diversity v. USDA*, No. 3:26-cv-00866 (N.D. Cal. January 28, 2026)
- Groups claim that the new rules violate NEPA by removing the public participation requirement
  - They note that for many projects – logging, mining, drilling, road building – the draft EIS is the only time the public gets to weigh in
- Outcome could provide more insight into what agencies need to do to comply with NEPA in a post-CEQ regulation world

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Final Thoughts

- Lots coming down the pike in the second half of 2026
- Keep an eye out for:
  - *Monsanto v. Durnell* decision
  - Dicamba lawsuit/post-2027
  - Final WOTUS rule
  - Final ESA rules
  - More on NEPA
- Unlikely that some legacy issues will be settled anytime soon

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