

Materials

WOTUS Update: EPA & Corps Propose New Definition

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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 country, 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.

The Deal With Dicamba: Products Registered, Lawsuit Filed

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On February 6, 2026, the Environmental Protection Agency (“EPA”) announced that it had re-registered three dicamba-based herbicides for direct, over-the-top use on dicamba-resistant soybeans and cotton. The decision came exactly two years after a federal court in Arizona overturned the previous registration decision for over-the-top use of dicamba and ruled that the decision violated the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). EPA’s latest registration decision marks the fourth time that the agency has approved dicamba for over-the-top use since 2016. All three of the previous registration decisions have faced legal action, a trend that will hold true for the latest registration which is already facing a lawsuit. Currently, over-the-top dicamba products will be available during the 2026 and 2027 growing seasons.

Background

The herbicide dicamba has been used in the United States since the 1960s to target broadleaf plant species. More recently, it has been used to control palmer amaranth, also known as pigweed, which has become resistant to glyphosate. Before 2016, dicamba was used as a pre-emergent. It was primarily applied in late winter or early spring before crops had been planted. This limitation was largely due to dicamba’s tendency to volatilize, a process by which a pesticide evaporates into the air and can drift far off target. However, in 2016, EPA for the first time approved a new, low volatility dicamba product developed by the pesticide manufacturer Monsanto (now owned by Bayer) for use directly on soybean and cotton seeds that had been genetically modified to resist dicamba.

Ultimately, EPA’s decision to register dicamba for over-the-top use in 2016 led to the registration of additional low volatility dicamba products such as BASF’s Engenia and Syngenta’s Tavium. It also resulted in a series of lawsuits filed by environmental groups who claimed that EPA’s 2016, 2018, and 2020 decisions to approve low volatility dicamba herbicides for use directly on crops violated both FIFRA and the Endangered Species Act (“ESA”). Under FIFRA, a pesticide product can only be sold and distributed in the United States after being approved by EPA. EPA may only approve a pesticide product for use after concluding that the product will not cause “unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(c)(5)(C). The ESA requires all federal agencies to ensure that their proposed actions will not jeopardize the existence of threatened and endangered species by engaging in consultation with the United States Fish and Wildlife Service. 16 U.S.C. § 1536(a). The plaintiffs who challenged EPA’s 2016, 2018, and 2020 dicamba registrations decisions claimed that EPA failed to meet both those standards.

In 2020, the Ninth Circuit Court of Appeals [issued a ruling](#) to overturn EPA’s 2018 registration decision after concluding that the agency had failed to show that registration of over-the-top dicamba would not cause “unreasonable adverse effects on the

environment.” The ruling was issued in June of that year, creating uncertainty for farmers who had purchased dicamba-resistant seeds to use with dicamba herbicides during that growing season. EPA [ultimately reapproved](#) over-the-top dicamba products for use later that year. That decision faced another lawsuit again filed by plaintiffs who claimed that EPA had violated both FIFRA and the ESA. That lawsuit also resulted in a win for the plaintiffs when a federal court in Arizona [overturned EPA’s decision](#) after concluding that the agency had failed to comply with the procedural requirements of FIFRA. That decision was issued in February 2024.

Following the Arizona court’s ruling, over-the-top dicamba was not approved for use during the 2024 and 2025 growing seasons. During that time, Bayer, BASF and Syngenta all resubmitted applications to EPA to have their low volatility dicamba formulations once again registered for use on dicamba-resistant soybean and cotton crops. In August 2025, EPA [proposed to register](#) three dicamba products for over-the-top use. The proposal included various new use restrictions intended to further reduce volatility and limit pesticide exposure to wildlife species. EPA sought an unconditional registration for the products, meaning that they would be available for at least fifteen years. Following a period of public comment, EPA issued a final registration decision on February 6, 2026.

Final Registrations

The final registration decision covers three dicamba herbicides: Stryax, manufactured by Bayer, previously known as XtendiMax; Engenia, manufactured by BASF; and Tavium, manufactured by Syngenta. Each of the three products has been approved for use on both dicamba-resistant soybean and cotton crops. The registration decision includes a variety of use requirements which will be included on the labels for each of the three products. Some of those requirements have been carried over from past dicamba approval decisions while others have been introduced for the first time. Importantly, in a departure from the initially proposed registration rule, the final decision approves a conditional registration decision which will expire on February 6, 2028, which means that the approved products will be available only for the 2026 and 2027 growing seasons.

The newly approved labels for over-the-top dicamba include various use requirements that are intended to ensure that applying dicamba directly to crops will not cause “unreasonable risk to human health or the environment.” Many of the requirements are aimed at reducing spray drift and volatility. Carry over requirements that were included on previous over-the-top dicamba labels include:

- Mandatory use of an approved drift reduction agent;
- Maintaining a 240-ft spray drift buffer during application;

- A prohibition on applications during a temperature inversion, within 48 hours of a forecasted rainfall, if the soil is saturated, or within one hour after sunrise or after two hours before sunset;
- A requirement that applications take place only when wind speed is between 3-10 miles per hour;
- A complete prohibition on aerial applications.

Along with these carry over requirements, the recently approved labels include new restrictions intended to further reduce drift and to satisfy new conservation requirements under EPA's Herbicide Strategy. More information on that policy is available [here](#). The new requirements include:

- An annual limit of two applications of 0.5 lbs of dicamba per acre – this is a reduction from the previous annual limit of four applications;
- Use of a volatility reduction agency at 40 oz. per acre for every application;
- Achieving 3 runoff mitigation points from EPA's certified conservation practices menu with the possibility of 6 points needed in designated pesticide use limitation areas – this requirement is in compliance with EPA's Herbicide Strategy;
- A prohibition on applications if the temperature is forecasted to be at or above 95°F.

A more complete look at the various application requirements that will appear on the labels for the three over-the-top dicamba products can be found [here](#), in EPA's initial announcement, and [here](#) in documents from the final rule.

In a departure from the proposed registration decision made available last fall, the final registration decision has been issued conditionally for a period of two years. Under FIFRA, EPA may grant a conditional registration when it concludes that there is enough evidence to suggest that registering the pesticide product temporarily will not cause unreasonable adverse reactions to human health or the environment, but that more data is needed before EPA can make the decision to register the pesticide unconditionally. To date, all registrations of over-the-top dicamba have been conditional. According to the 2026 registration decision, the dicamba products will be available for the 2026 and 2027 growing seasons. EPA will need to make another registration decision if over-the-top dicamba is to remain available in 2028 and beyond. More information on the difference between conditional and unconditional pesticide registrations is available [here](#).

New Lawsuit

Shortly after the new over-the-top dicamba labels were approved, a coalition of environmental groups initiated a legal challenge against EPA for its decision. The plaintiffs are the same groups who successfully saw prior over-the-top dicamba approval decisions

overturned by courts in 2020 and 2024. The lawsuit has been filed directly in the Ninth Circuit Court of Appeals. Typically, lawsuits challenging final agency decisions will be filed in federal district courts, but FIFRA grants citizens the right to challenge pesticide registration decisions directly with circuit courts.

At the moment, it is too early to say how the case will resolve or even what the specific arguments raised by the plaintiffs will be. The case was initiated by the plaintiffs filing a petition with the Ninth Circuit asking the court to review EPA's registration decision for allegedly violating both FIFRA and the ESA. The plaintiffs will lay out the reasons why they believe the registration decision violates federal law when they submit their opening brief to the court. Currently, the plaintiffs' opening brief is due on May 11 and EPA's response brief defending their registration decision is due on June 10. These dates may be adjusted if either party requests additional time to file. The court will not rule until it has seen arguments from both sides.

Lawsuits challenging federal decisions often take some time to move through the court system. When these same plaintiffs challenged EPA's original 2016 decision to approve a dicamba product for over-the-top use, the lawsuit failed to reach the trial stage before the two-year conditional approval expired. When the plaintiffs filed again to challenge EPA's 2018 registration decision for over-the-top dicamba, they asked the court to grant an expedited trial so that the challenge could be heard before the 2018 decision expired. It is possible that the plaintiffs could make such a request here so that the case can be heard by a judge while the 2026 approval decision is still active. If the court hears the case before the recent approval decision expires, it is possible that the court could overturn EPA's approval and over-the-top dicamba could once again be made unavailable as the result of a court decision. On the other hand, the court could uphold EPA's approval decision which could provide insight into future availability. If the case is not expedited, it is possible that the 2026 approval decision expires before the court can hear the matter. Whatever the outcome of this lawsuit, it could have an impact on continued availability of over-the-top dicamba.

What Next?

Currently, three over-the-top dicamba products are available for use in 2026 and 2027. While this provides clarity for the next two growing seasons, additional EPA action will be necessary if over-the-top dicamba is to remain available after February 6, 2028. Although this decision has provided greater certainty after two years where over-the-top dicamba was unavailable, the recently filed lawsuit could call that certainty into question as it moves through the court system.

Federal Court Strikes Down 2019 & 2024 ESA Regulations

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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.

“Effects of the Action”

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 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 its 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 “threatened 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.

2026 Update on State Pesticide Liability Limitation Bills

NALC Staff Attorney, Brigit Rollins

The 2026 legislative session is currently in process for most states and legislative trends have begun to emerge. One of those trends, familiar from the 2025 and 2024 legislative sessions, focuses on state regulation of pesticide labels. At least six states have introduced bills to limit the liability of pesticide companies in injury and product liability lawsuits by establishing uniformity between federal and state pesticide labeling requirements. Additionally, the draft farm bill recently introduced to the federal Congress includes a provision to clarify the authority of states under the Federal Insecticide,

Fungicide, and Rodenticide Act (“FIFRA”). While not all of these bills are guaranteed to pass, they indicate a legislative trend that is relevant to those in the agricultural industry.

Background

Over the last decade, there has been a marked increase in the number of lawsuits filed by plaintiffs who claim that exposure to a particular pesticide product caused them to suffer an injury or illness. The best known of these cases have involved plaintiffs who claim that glyphosate, the active ingredient in the widely used herbicide Roundup, have caused them to develop non-Hodgkin’s lymphoma. However, cases have also been filed over exposure to paraquat, chlorpyrifos, and various other commonly used pesticide products.

Regardless of the specific pesticide implicated in a particular lawsuit, across the board the plaintiffs in pesticide liability litigation raise similar legal claims which arise out of state law. One of those legal claims, the claim that pesticide manufacturers [failed to warn](#) consumers about the health risks allegedly associated with exposure to a certain pesticide product, has become central to pesticide liability litigation.

Failure to warn claims arise out of state law and are most often brought by plaintiffs in product liability lawsuits to claim that the manufacturer of a particular product failed to warn consumers about potential injuries that can result from normal use of the product. For example, a plaintiff who alleges failure to warn in a pesticide liability lawsuit involving glyphosate will argue that Bayer, the manufacturer of glyphosate, failed to warn consumers that exposure to the herbicide could cause the user to develop cancer. Pesticide manufacturers have pushed back on these claims by arguing that pesticides are regulated under FIFRA, a federal law that requires all pesticides bear a federally approved label to be legally sold in the United States. FIFRA specifically prohibits states from adding language to a federally registered pesticide label that is “in addition to or different from” federal requirements. [7 U.S.C. § 136v\(b\)](#). Additionally, part of registering a pesticide label requires the Environmental Protection Agency (“EPA”) to conduct a human health risk assessment for the pesticide and make a carcinogenicity classification. Pesticide manufacturers such as Bayer have argued that failure to warn claims in pesticide injury lawsuits should be categorically dismissed because the only way to avoid the claims would be for the manufacturer to add warning statements to their pesticide products that are not required under federal law.

The question of whether failure to warn claims should be permitted in pesticide liability lawsuits continues to make its way through the court system, with the United States Supreme Court [announcing in early 2026](#) that it would hear the issue. In the meantime, some states are looking to pass legislation that would make a federally registered pesticide label a complete defense to failure to warn claims. In 2025, Georgia and North Dakota both

passed laws to make a federally registered pesticide label a complete defense to state law failure to warn claims. More states may follow in 2026.

Pesticide Liability in 2026

So far, at least six states and the federal government have introduced bills to limit liability for pesticide manufacturers in 2026. The bills are largely similar, with a handful of differences.

Florida

Florida introduced [HB 443](#) in November 2025. It states that any state law action based on failure to warn “may not be brought or maintained” against a pesticide product that has been registered by EPA under FIFRA so long as the label for such pesticide has been approved by EPA, is consistent with the most recent human health risk assessment performed under FIFRA, or is consistent with EPA’s carcinogenicity classification for the pesticide. In other words, should HB 443 become law, a federally approved pesticide label would be a complete defense against a state law claim that the pesticide manufacturer failed to warn consumers about an alleged health risk of using the pesticide. Importantly, HB 443 would not shield a pesticide manufacturer from liability if EPA determines that the manufacturer “knowingly withheld, concealed, misrepresented, or destroyed material information” regarding the human health impacts of the pesticide in order to obtain a federally approved label.

HB 443 is currently before the Florida House of Representatives Civil Justice & Claims Subcommittee. An identical bill, [SB 518](#), was introduced to the Florida Senate in January 2026. State lawmakers will often introduce identical bills to both chambers of their legislature to make the process of passing legislation quicker and more efficient. Florida introduced similar legislation in 2025 but failed to pass it. The Florida legislature will adjourn on March 13. If HB 443 becomes law, it will go into effect July 1, 2026.

Kansas

[HB 2476](#) was introduced to the Kansas legislature on January 20, 2026. Like the Florida bill, HB 2476 provides that a pesticide product will satisfy any state law requirements for health and safety warnings so long as it bears a federally registered label that is either consistent with the most recent human health assessment performed for the pesticide under FIFRA or is consistent with EPA’s carcinogenicity classification for the pesticide. The bill would apply only to legal claims related to failure to warn. It would not provide a defense against claims that are unrelated to product warnings or labeling.

HB 2476 passed the Kansas House of Representatives on January 30, 2026 and is currently before the Kansas Senate Committee on Agriculture and Natural Resources. If HB 2476 passes the Kansas Senate and is signed into law by the state's governor, it would become law as soon as it is officially published in the Kansas code. The Kansas legislature will adjourn on March 10.

Kentucky

Legislators in Kentucky introduced [SB 199](#) on February 13, 2026. Should it become law, SB 199 would amend Kentucky law so that a federally registered pesticide label would be considered a "sufficient warning label" for any state law concerning the duty to warn. Like the bill introduced in Kansas, SB 199 would only make a federally registered pesticide label a defense against failure to warn claims. Legal causes of action that arise out of state law other than failure to warn would not be prohibited should SB 199 become law. Similarly, SB 199 clarifies that the defense to failure to warn claims would not apply if EPA has determined that a pesticide manufacturer "knowingly withheld, conceal, misrepresented, or destroyed" information related to the human health risks of a particular pesticide product.

SB 199 is currently with the Kentucky Senate but has not been assigned a committee for an initial hearing. The Kentucky legislature is set to adjourn on April 15.

Missouri

Lawmakers in Missouri pre-filed [HB 2712](#) in early January before the start of the legislative session. Under HB 2712, a pesticide label that is approved by EPA, or consistent with the EPA carcinogenicity classification for the pesticide would satisfy any state requirement regarding cancer warning labels. Importantly, it would not provide complete immunity from liability to pesticide manufacturers. HB 2712 would only provide a defense to claims that the pesticide does not bear a necessary cancer warning.

This is the third year in a row that Missouri has considered a bill to limit liability for pesticide manufacturers facing failure to warn claims. In both 2024 and 2025, Missouri failed to pass the proposed legislation. Currently, HB 2712 is before the Missouri House of Representatives. The Missouri legislature will adjourn on May 30.

Tennessee

[HB 809](#) was introduced to the Tennessee legislature in February 2025. It has been carried over into the 2026 legislative session. HB 809 provides that the manufacturer or seller of a pesticide that has been registered by EPA under FIFRA would not be liable for any civil action related to the labeling of the pesticide including failure to warn so long as the

pesticide bore a label approved by EPA at the time of sale. Like the bill introduced in Florida, HB 809 clarifies that it would not apply if EPA determines that a pesticide manufacturer “knowingly withheld, concealed, misrepresented, or destroyed material information” related to the human health risks of a pesticide to have the product federally registered.

At the moment, HB 809 is before the Tennessee House of Representatives Judiciary Committee. Identical legislation was introduced to the Tennessee Senate as [SB 527](#) in January 2025 and passed the chamber on April 7, 2025. Should HB 809 be passed in the Tennessee House of Representatives, it appears likely to become law and would go into immediate effect upon being signed into law. The Tennessee legislature is set to adjourn on April 26.

Wyoming

While the other states that have introduced pesticide liability legislation this year have all been in regular session, Wyoming is currently in a budget session. During a budget session, the Wyoming legislature will typically focus on legislation involving the state budget. Other bills may be proposed, but non-budget legislation will only be formally introduced to the legislature if two thirds of the chamber vote to introduce it. SF 74 was received for introduction in the Wyoming Senate on February 6. The bill provides that health and safety labels for any pesticide sold in Wyoming “shall not vary in material respects” from the pesticide’s federally registered label and would supersede any state law requirements related to pesticide labels or warnings.

Ultimately, [SF 74](#) did not pass a vote to be introduced to the Wyoming Senate. It is unlikely that the bill will be further considered by the Wyoming legislature this term.

Federal Congress

On February 13, 2026, the House Committee on Agriculture released a [draft Farm Bill](#) that is currently before the Committee. The bill includes a provision titled “Uniformity of Pesticide Labeling Requirements” which, if passed into law, would limit the ability of states to modify federally registered pesticide labels. Specifically, the provision would prohibit any state or court from requiring a pesticide manufacturer to include language on a federally registered pesticide label that differs from the language approved by EPA under FIFRA. Additionally, the bill would prevent a court from holding a pesticide manufacturer liable for failing to include language on a pesticide label that differs from the language approved by EPA.

In an announcement that accompanied the release of the draft Farm Bill, the House Committee on Agriculture Chairman Glen “GT” Thomson stated that the Committee would

being marking up the bill on February 23. Following the mark up, the Committee will vote on whether to advance the bill to the full House of Representatives. If the House votes to pass the bill, it would progress to the Senate. The future of the bill is uncertain as it [has been reported](#) that several lawmakers consider the current draft to contain “poison pills” which they would be unwilling to vote for, including the pesticide labeling uniformity provision. It is unclear whether the bill will advance out of committee.

Going Forward

With the legislative session now underway for most states, the trend which emerged in 2024 and 2025 regarding pesticide labeling is continuing into 2026. So far, at least six states have introduced bills to make a federally registered pesticide label a complete defense to any state level claims that a pesticide manufacturer failed to warn consumers about a potential health risk of using a particular pesticide. Congress has also introduced language that would further limit the ability of states to require pesticide labeling language that differs from what is required by EPA. While it remains unclear which states will successfully pass a pesticide liability limitation bill in 2026, it is possible that the Supreme Court could render any further actions from states unnecessary following its decision to hear a case which directly asks whether federal pesticide law should preempt state law claims of failure to warn.

Supreme Court Agrees to Hear Pesticide Preemption Lawsuit

NALC Staff Attorney, Brigit Rollins

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, 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.

Supreme Court Asked to Revisit Definition of WOTUS

NALC Staff Attorney, Brigit Rollins

The United States Supreme Court is currently considering whether to take up a case from the Second Circuit Court of Appeals concerning the definition of "waters of the United States" and the scope of wetlands jurisdiction under the Clean Water Act ("CWA"). The case, ***Andrews v. United States, No. 25-668 (2026)***, focuses on a dispute between a

landowner and the Environmental Protection Agency (“EPA”) over an alleged CWA violation to occurred when the landowner filled in wetlands located on his property without a CWA permit. Directly before the Court is the question of whether the Second Circuit incorrectly interpreted the definition of “waters of the United States,” or WOTUS, following the Supreme Court’s 2023 decision in ***Sackett v. EPA*, 598 U.S. 651 (2023)**. It is currently unclear whether the Court will agree to hear the case.

The Clean Water Act & WOTUS

The CWA is the primary federal law regulating water pollution in the United States. The purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” which is largely accomplished through permitting programs administered by EPA and the United States Army Corps of Engineers (“the Corps”). 33 U.S.C. § 1251(a). The CWA prohibits the “discharge of any pollutant by any person” into a “navigable water” from a “point source” without a valid CWA permit. 33 U.S.C. § 1311(a). Additionally, the CWA requires a permit for “the discharge of dredged or fill material” into “navigable waters.” 33 U.S.C. § 1344(a).

The phrase “navigable waters” is a legal term that is typically used to refer to waters that can be used as a highway for interstate commerce. However, the CWA specifically defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362. Understanding which waters qualify as “waters of the United States” is crucial to implementing the CWA because only those waters that are considered WOTUS are subject to the CWA’s permitting authority. Despite the importance of the term, Congress chose not to include a statutory definition of WOTUS in the text of the CWA. Instead, it has been the responsibility of EPA and the Corps to set a regulatory definition for the term “waters of the United States.” This has proven to be a challenging task, with the last decade in particular seeing several different rulemaking efforts to change the definition. A full timeline of the definition of WOTUS is available [here](#).

Courts have also weighed in on determining the limits of WOTUS. Most recently, the Supreme Court issued the decision *Sackett v. EPA* in 2023 where the Court concluded that WOTUS extended to “those relatively permanent, standing or continuously flowing bodies of water [...] described in ordinary parlance as streams, oceans, rivers, and lakes” and to wetlands that share a “continuous surface connection” with such waterbodies. A full breakdown of the Court’s ruling can be found [here](#). After the *Sackett v. EPA* decision was issued, [EPA updated the definition](#) of WOTUS to reflect the Court’s conclusion. The agency then [initiated another rulemaking](#) effort in 2025 to bring the definition of WOTUS even more inline with the Supreme Court’s decision. That rulemaking is currently on-going. Until that effort is finalized, the definition of WOTUS includes the following:

- Traditional navigable waters which are currently used or may be used to facilitate interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, the territorial seas, and all interstate waters (collectively, “traditional navigable waters”);
- Impoundments of waters otherwise defined as WOTUS;
- Tributaries of traditional navigable waters that are themselves relatively permanent, standing, or continuously flowing;
- Wetlands that are adjacent to traditional navigable waters, or relatively permanent, standing, or continuously flowing tributaries of such waters;
- Intrastate lakes and ponds that do not fall into any of the above categories, but that are relatively permanent, standing, or continuously flowing bodies of water that share a surface connection with a recognized WOTUS.

For the purposes of wetlands, the current definition defines “adjacent” as “having a continuous surface connection.”

EPA v. Andrews: Background & Lower Court Rulings

The CWA case currently on petition to the Supreme Court was initially filed in 2020 by EPA against the defendant for allegedly discharging dredged and fill material into wetlands located on his property without a valid CWA permit. The Corps, which is the agency responsible for issuing CWA permits for dredge and fill activity, initially visited the defendant’s property in 2011 and informed the defendant that he would need a permit for filling in the wetlands to avoid violating the CWA. According to the Corps, the wetlands fell under CWA jurisdiction because they were adjacent to another waterbody that is itself a WOTUS. The Corps referred the matter to EPA in 2017. Over the next two years, EPA sent the defendant several notification letters regarding possible CWA violations but did not receive a reply. Ultimately, EPA obtained an administrative warrant from a federal court in 2019 to inspect the defendant’s property. As a result of that inspection, EPA filed a lawsuit against the defendant in 2020, asking a federal court in Connecticut to require the defendant to halt his unauthorized dredge and fill activities and to pay civil penalties for his CWA violations.

The federal district court ruled in favor of EPA in June 2023, concluding that the defendant’s unpermitted deposition of dredge and fill material into the wetlands on his property was a violation of the CWA. The court based its ruling on a finding that the wetlands at issue were WOTUS and subject to CWA permitting jurisdiction. In its decision, the district court noted that following the Supreme Court’s decision in *Sackett v. EPA*, only those wetlands which share a “continuous surface connection” with a water already recognized as a WOTUS such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins”

would also be considered a WOTUS. EPA claimed that the wetlands filled in by the defendant met that “continuous surface connection” standard because the wetland shared “continuous surface flow paths” with a relatively permanent water recognized as a WOTUS. Because the defendant did not dispute that the wetland was a WOTUS subject to CWA jurisdiction or that he had filled in those wetlands without a CWA permit, the district court ruled in favor of EPA and ordered the defendant to cease all unpermitted dredge and fill activities, restore the disturbed wetlands, and pay appropriate civil penalties.

Following the district court’s decision, the defendant appealed the ruling to the Second Circuit Court of Appeals. On appeal, the defendant argued that the case against him should have been dismissed because “there is no surface water on his property.” The Second Circuit disagreed, citing evidence showing that there was surface water on the property. Because the defendant failed to show that the lower court’s conclusion that he had discharged dredge and fill material into wetlands that fall under CWA jurisdiction without a valid CWA permit, the Second Circuit affirmed the district court’s decision. Following that ruling, the defendant petitioned the case to the Supreme Court.

Petition to Supreme Court

Currently, *Andrews v. United States* is on petition for certiorari to the Supreme Court. This means that the petitioner, Andrews, has asked the Supreme Court to hear the matter, but the Court has yet to decide whether it will accept the case for review. Both Andrews and EPA have submitted briefs to the Court making arguments as to why the Court should or should not agree to hear the dispute.

In [his petition to the Supreme Court](#), Andrews asks the Court to consider whether the Second Circuit was correct to extend CWA jurisdiction over wetlands that are not “as a practical matter indistinguishable” from a water recognized as a WOTUS. According to the petitioner, the Second Circuit misapplied *Sackett v. EPA* in upholding the lower court’s conclusion that Andrews had violated the CWA. In *Sackett v. EPA*, the Supreme Court held that “the CWA extends to those wetlands that are ‘as a practical matter indistinguishable from waters of the United States[.]’” The Court explained that WOTUS included only those wetlands adjacent to a waterbody that itself constitutes a WOTUS and that adjacency is established when a wetland “has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” Andrews argues that *Sackett v. EPA* established “indistinguishability” as the key requirement for extending CWA jurisdiction to wetlands and that the Second Circuit failed to consider whether the wetlands on his property were “indistinguishable” from the WOTUS to which they are adjacent. Instead, the Second Circuit upheld the lower court’s finding that the wetland shared “continuous surface connection” with the WOTUS because evidence showed that

there were continuous surface flow paths linking the wetlands with the WOTUS. Andrews argues that this is not enough and that to satisfy *Sackett v. EPA*, the wetlands should be “indistinguishable” from the WOTUS. Andrews urges the Supreme Court to take up his case and clarify that the test for establishing a wetland as a WOTUS relies on “indistinguishability.”

In response, [EPA argues](#) that the case should not be taken up by the Supreme Court both because Andrews did not raise the argument of “indistinguishability” at either the district court or the Second Circuit Court of Appeals, and because EPA is currently carrying out a rulemaking to bring the definition of WOTUS inline with the Court’s decision in *Sackett v. EPA*. In general, courts will only hear arguments on appeal if the argument was raised before a lower court. Here, EPA argues that Andrews forfeit the right to raise the question of “indistinguishability” to the Supreme Court because he did not bring that matter to the Second Circuit. Instead, he argued that the Second Circuit should overturn the district court’s ruling because there was no surface water present on his property. Because Andrews did not argue that *Sackett v. EPA* established an “indistinguishability” requirement to the Second Circuit, EPA argues that the timing is not right for the Supreme Court to now hear that question. Additionally, EPA notes that it is currently in the process of rewriting the definition of WOTUS and that there is “no sound reason for this Court to intervene while the agencies’ rulemaking is ongoing.”

What Next?

As of the date of publication of this article, the Supreme Court has not yet determined whether it will hear *Andrews v. United States*. If the Court declines to hear the case, then *Sackett v. EPA* will remain the Supreme Court’s most recent ruling on the definition of WOTUS and jurisdiction under the CWA. However, should the Court agree to take up the case, the Court may choose to clarify the scope of its ruling in *Sackett v. EPA* which could ultimately impact EPA’s current effort to revise the regulatory definition of WOTUS. That effort is on-going, with a public comment period on the proposed definition having closed on January 5, 2026. If the Court agrees to take up *Andrews v. United States*, it is likely that a final decision would come after a final WOTUS rule has been issued unless EPA chose to stay the final rule in anticipation of a Supreme Court decision.

EPA Announces Draft Fungicide Strategy

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In April 2026, the Environmental Protection Agency (“EPA”) released a draft version of its Fungicide Strategy, the most recent move in the agency’s effort to reduce pesticide

exposure to endangered wildlife. The draft Fungicide Strategy is similar to both the Herbicide and Insecticide Strategies that EPA issued in 2024 and 2025 which focus on reducing pesticide spray drift and runoff to better protect wildlife species listed as threatened or endangered under the Endangered Species Act (“ESA”). EPA initially launched its effort to reduce pesticide exposure to listed species in 2022 after years of mounting litigation targeting the agency’s failure to fully comply with its ESA responsibilities when registering pesticide products under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). The goal of EPA’s new approach is to create stronger pesticide labels while reducing impacts to listed species.

Background

In 2022, EPA published a document titled [Balancing Wildlife Protection and Responsible Pesticide Use: How EPA’s Pesticide Program Will Meet its Endangered Species Act Obligations](#). That document, paired with [an update released later that year](#), described EPA’s plan to begin introducing new mitigation measures to pesticide labels aimed at reducing exposure to threatened and endangered species. The plan is centered around creating individual strategy documents for herbicides, insecticides, fungicides, and rodenticides, that limit pesticide exposure to endangered wildlife by requiring additional application restrictions. According to EPA, the new policy approach is necessary to address what the agency has described as a “decades-old challenge” to satisfy the agency’s obligations under both the ESA and FIFRA.

The ESA is the predominant federal wildlife protection law in the United States, while FIFRA is the nation’s primary federal statute regulating pesticide use. Under the ESA, all federal agencies, including EPA, are required to consult with the United States Fish and Wildlife Service (“FWS”) to ensure that the actions that federal agencies fund, authorize, or carry out will not “jeopardize” the continued existence of species protected under the ESA. 16 U.S.C. § 1536(a)(2). The consultation process can be time consuming because it requires FWS to examine the impacts to any listed species affected by an agency’s proposed action. To learn more about the consultation process, click [here](#) to view NALC’s ESA Manual.

EPA takes hundreds of actions under FIFRA each year, including but not limited to registering new pesticide products, conducting registration review of existing products, and authorizing new uses of registered pesticide products. Since the ESA was enacted in 1973, EPA has struggled to fully satisfy its consultation responsibilities when carrying out FIFRA actions. As a result, the agency has faced numerous lawsuits filed primarily by environmental groups seeking to compel EPA to complete ESA consultation on FIFRA actions. Because courts tend to strictly interpret the ESA’s consultation requirements, most of these lawsuits have resulted in either a judge requiring EPA to complete the

consultation process, or a settlement agreement where EPA has agreed to complete consultation. Currently, EPA believes it will take into the 2030s to finalize all the FIFRA-related ESA consultations that are under a judicially enforced deadline.

To both better protect endangered wildlife from pesticide exposure and create pesticide labels that are less likely to be challenged in court, EPA launched its new approach to satisfying its ESA responsibilities when carrying out actions under FIFRA. As part of this effort, EPA has sorted all registered pesticides into broad groups - herbicides, insecticides, fungicides, and rodenticides – and for each group developed mitigation measures designed to reduce pesticide exposure to protected species. EPA issued the final version of its [Herbicide Strategy](#) in 2024, and its final [Insecticide Strategy](#) in 2025. Both Strategies outline spray drift and runoff mitigations that the agency expects to include on herbicide and insecticides labels going forward. Now, the agency has released a draft version of its Fungicide Strategy which seeks to reduce the potential impacts of agricultural fungicides to listed species.

Draft Fungicide Strategy

Like both the Herbicide and Insecticide Strategies, the draft Fungicide Strategy proposes to reduce fungicide exposure to listed species by identifying new mitigation measures that will be added to the labels of agricultural fungicides. Similar to the previous Strategies, the draft Fungicide Strategy outlines mitigations that are intended to limit pesticide exposure by reducing spray drift and runoff. However, where the Herbicide and Insecticide Strategies focused on impacts to species which are similar to the target pests of the pesticides (*i.e.*, the Herbicide Strategy focused on impacts to listed plant species while the Insecticide Strategy focused on invertebrate species), the draft Fungicide Strategy evaluates potential impacts to all taxonomic groups of listed species. This is because fungicides can exhibit direct toxicity of multiple taxonomic groups while herbicides tend to exhibit toxicity primarily to plants and insecticides primarily to invertebrates. Additionally, the draft Fungicide Strategy considers that fungicide use is more localized than use of either herbicides or insecticides. Fungicides tend to be used more frequently in areas with high precipitation such as the Mississippi Delta region or around the Great Lakes, while herbicides and insecticides are prevalent throughout the country. EPA has taken this into account and given consideration to areas where usage of fungicides are low and may therefore present less of a threat to endangered wildlife.

Despite those differences, the draft Fungicide Strategy employs the three-step framework described in the previous Strategy documents. Under the first step, EPA will determine whether a particular fungicide has the potential to have population-level impacts to any listed species. Possible outcomes include “not likely,” “low,” “medium,” or “high.” If a

fungicide is determined to have either low, medium, or high levels of population-level impacts, then the product will require some degree of additional mitigation. To make that determination, EPA will consider how a fungicide is used, how it behaves in the environment, and overall toxicity thresholds for different species. Ultimately, the amount of required mitigation measures will increase when population-level threats are greater.

After making the final determination under step one, EPA will proceed to step two. There, EPA will assign mitigation measures to a particular fungicide based on the product's degree of population-level impacts to listed species. As with the Herbicide and Insecticide Strategies, mitigation measures included in the draft Fungicide Strategy are aimed at limiting spray drift and runoff. To reduce spray drift, EPA is primarily focused on requiring increase spray buffers, with the buffer zone increasing according to the level of mitigation required. The agency has also proposed allowing the use of drift reducing adjuvants to limit spray drift while cutting down on the required buffer distance. To reduce fungicide runoff, EPA is relying on the Mitigation Menu established under the two previous Strategies. The Mitigation Menu, which can be found [here](#), shows a variety of different mitigation measures that have been assigned a point value. Based on its conclusion from step one, EPA will assign each fungicide an amount of runoff mitigation points necessary to make an application. Applicators will then review the Mitigation Menu and identify measures they could take to achieve the necessary number of runoff points. The Mitigation Menu is extensive and includes a wide range of activities that are intended to provide pesticide applicators with a high degree of flexibility in choosing which mitigation measures are best for them.

While mitigation measures for spray drift and runoff identified in the draft Fungicide Strategy mirror those identified in the Herbicide and Insecticide Strategies, the Fungicide Strategy differs from the prior Strategies by including mitigation measures for species that may be present on agricultural fields. In the Herbicide and Insecticide Strategies, EPA concluded that the greatest degree of risk to listed species came from pesticides traveling off-field because endangered plants and vertebrates are unlikely to be in or on agricultural sites. However, EPA has identified eleven listed species that may be present on agricultural fields and could face population-level impacts following fungicide applications. To mitigate risks to those species, EPA is considering application timing restrictions to avoid exposure to species of concern. Those restrictions include prohibiting applications of fungicides from the time a crop begins to flower until the petals drop, or between sunrise and sunset during bloom when pollinators are more likely to be active.

Finally, under step three, EPA will determine the geographic areas where mitigation measures will be required. In some instances, EPA expects that a mitigation measure will

be required across a fungicide's entire use area. If that is the case, EPA will likely include mitigation requirements on the fungicide's general label. However, in other cases, EPA expects that the mitigation requirements will be geographically limited to protect a certain species. When that occurs, EPA will rely on its website [Bulletins Live! Two](#) to inform applicators to the specific geographic areas where mitigations are required. EPA will include language on a fungicide's label to direct applicators to check Bulletins Live! Two for any active bulletins in the area.

Next Steps

The draft Fungicide Strategy is currently open for a 60-day public comment period that will conclude on June 29, 2026. EPA has stated that its intention is to publish a final version of the Strategy by the end of November. Like the Herbicide and Insecticide Strategies, the Fungicide Strategy will not be self-implementing. Instead, EPA will apply the Fungicide Strategy to new fungicide products put forward for registration and to currently registered products that come up for registration review.