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The Future of Pesticides in Western States: *The Latest Legal Developments & Trends*

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The Future of Pesticides?

- Recent years have seen numerous changes to pesticide regulation that have the potential to impact the future of pesticide use
 - On-going lawsuits
 - Label challenges
 - ESA regulations
 - Etc.
- These changes can happen rapidly, and it is important to stay up-to-date!



Outline:

- Recent Litigation*
- Endangered Species Act*
- Sustainable Pest Management*
- Final Thoughts*

Recent Litigation



The last several years have seen a rise in litigation challenging pesticide labels and pesticide products

- Dicamba, chlorpyrifos, glyphosate, etc.



Some litigation has resulted in over-turned labels, restrictions on use, and posed questions about how to best interpret the Federal Insecticide, Fungicide, and Rodenticide Act

- Does FIFRA preempt state law tort claims? What is “misbranding”?



Several decisions from the last year help to illustrate the current state of pesticide litigation



Dicamba: The Headlines



- On February 6, a federal court in AZ issued a ruling to vacate over-the-top registration for three dicamba products
 - XtendiMax, Engenia, Tavium
 - All three were registered through the 2025 growing season
- EPA issued an order canceling OTT registration for the products, but will allow existing stocks to be used during the 2024 growing season
 - “Existing stocks” = products that were “labeled, packaged, and released for shipment” before Feb. 6
- This is the second time a court has vacated OTT use of dicamba



Dicamba: FIFRA Claims

Plaintiffs raised three main FIFRA arguments:

The 2020 registration failed to address the FIFRA violations identified by the Ninth Circuit in its June 2020 decision

When EPA registered dicamba for over-the-top use in 2018, it issued a conditional registration which allowed EPA to seek further data – the 2020 registration was an unconditional registration which can only be made when no additional data is needed; EPA failed to explain why the change was made despite relying on the same data as the 2018 registration

EPA failed to show that the 2020 registration would not cause “unreasonable adverse impacts on the environment”



Dicamba: ESA Claims

Plaintiffs
also
raised
three
ESA
claims:

EPA failed to conduct ESA consultation – the agency applied the wrong standard to determine that consultation was not needed

EPA considered an incorrect “action area” when considering species impacts

EPA wrongly concluded that the 2020 registration decision would not harm critical habitat



Dicamba: Procedural Claims

- Separate from the substantive FIFRA and ESA claims, plaintiffs also raised two procedural claims
- First, plaintiffs argued that the 2020 registration decision violated the FIFRA process for “un-cancelling” a previously cancelled pesticide
 - When a pesticide is formally cancelled, FIFRA requires EPA to find “substantial new evidence” indicating that re-registration is warranted
 - Plaintiffs argue that EPA did not do this
- Second, plaintiffs claim that the 2020 registration decision did not follow notice-and-comment rulemaking requirements
 - FIFRA requires a 30-day public comment period if a pesticide registration would “entail a changed use pattern”
 - Plaintiffs argue that EPA should have provided this “new use” comment period because at the time EPA re-registered over-the-top use of dicamba it was a new use



The Court's Decision:

*Additional
Analysis:*



- The AZ district court found that EPA had violated FIFRA procedural requirements when registering OTT use in 2020
- FIFRA “new use” registrations mandate a period of public notice-and-comment
- EPA argued that the 2020 OTT registrations were not “new use,” but the court disagreed
 - EPA argued that because Tavium was not affected by the 2020 ruling, it could pursue a “me-too” registration for XtendiMax and Engenia
 - But because Tavium itself had been registered under FIFRA’s “me-too” provision, the court was not convinced
- The court also noted that when re-approving a cancelled registration, notice-and-comment is also required

Dicamba: Existing Stocks Order

EPA issued an Existing Stocks Order on Feb. 14

- Prohibits use of these products except as consistent with the labeling

The dicamba products are no longer registered under FIFRA, but existing stocks can be used during the 2024 growing season

- “Existing stocks” is defined as “those stocks of previously registered pesticide products that are currently in the United States and were packaged, labeled, and release for shipment prior to Feb. 6, 2024”
- A product has been “released for shipment” when the producer has “packaged and labeled it in the manner in which it will be distributed or sold, or has stored it in an area where finished products are ordinarily held for shipment”

EPA establishes cut-off dates for sale and use of existing stocks

- Dates vary by state, but no applications to soybeans can be made after June 30 or to cotton after July 30



Dicamba: What's Next?



- The future of over-the-top dicamba use post 2024 is murky
- Manufacturers are looking to reregister over-the-top use of their products, but the path forward is likely to be difficult
- Any future registration will likely face legal claims that it violates FIFRA and the ESA

Chlorpyrifos: Current Status



Chlorpyrifos will be available to growers for the first time since 2021



EPA has restored food tolerances of chlorpyrifos for eleven crops:

Alfalfa, apple, asparagus, cherry (tart), citrus, cotton, peach, soybean, sugar beet, wheat (spring), and wheat (winter)



FDA has withdrawn corresponding guidance to industry with instructions on how to treat food with traces of chlorpyrifos

Chlorpyrifos: How Did We Get Here? – A Tale of Two Lawsuits

League of United Latin Am. Citizens v. Regan

- Filed by environmental and farmworker groups in the Ninth Circuit
- Argued that because studies showed that chlorpyrifos could cause neuro-developmental harm, food tolerances should be revoked
- Ninth Circuit agreed, determined that once EPA had evidence the tolerances were not “safe,” they should have been revoked

Red River Valley Sugarbeet Growers Ass’n v. Regan

- Filed by grower groups in the Eighth Circuit
- Court concluded that EPA had been too hasty in revoking chlorpyrifos tolerances for all food crops
- Found EPA took “too narrow” a view of its own authority by failing to consider whether eleven food uses the agency had previously identified as safe could remain unaffected



Chlorpyrifos: What's Next?

- Chlorpyrifos use allowed for now, but challenges may lie ahead
 - Future lawsuits or use restrictions are possible
- Even without future litigation, chlorpyrifos use is now limited to eleven food crops
- Some states have taken matters into their own hands
 - California, Hawaii, Maryland, and New York have all banned chlorpyrifos, and Oregon has greatly restricted its use
- The Ninth Circuit established a standard for when EPA should modify or revoke food tolerances for pesticides – any time the agency has evidence showing the tolerance is not “safe”
 - Seems like a low bar to clear
 - Another avenue for future litigation?



FIFRA Preemption: The Basics

- State authority under FIFRA:
 - (a) A state may regulate the sale or use of any federal registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
 - (b) Such State shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different from* those required under this subchapter.
 - 7 U.S.C. § 136v.
- Supreme Court in *Bates v. Dow Agrosciences* established preemption test:
 - “For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement ‘*for labeling or packaging*’[.] Second, it must impose a labeling or packaging requirement that is ‘*in addition to or different from* those required under this subchapter.’”
 - This can include common law requirements that affect labeling or packaging of pesticides



FIFRA Preemption: Misbranding & Failure to Warn

Misbranded:

- A pesticide is misbranded if [...] the labeling accompanying it does not contain directions for use which [...] are adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(F).

Unlawful acts:

- It shall be unlawful for any person in any State to distribute or sell to any person [...] any pesticide which is adulterated or misbranded. 7 U.S.C. § 136j(a)(1)(E).

Failure to warn claims:

- To prove failure to warn, plaintiff must show that the manufacturer did not adequately warn of a particular risk, and that the risk was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution



FIFRA Preemption: 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



FIFRA Preemption: *Carson v. Monsanto*

- The Eleventh Circuit has declined to provide an *en banc* review of the three-judge panel's most recent decision in *Carson v. Monsanto*
 - Panel's decision will stand
- The panel determined that Carson's failure-to-warn claims were neither expressly or impliedly preempted by FIFRA
 - Found that the failure-to-warn claims ran parallel to FIFRA's misbranding requirements
 - Determined that it was not "impossible" for Bayer to add a cancer warning to the federal label
- What's next?
 - Ninth Circuit has also found that failure-to-warn claims are not preempted by FIFRA – no circuit split means it is less likely SCOTUS would review
 - State legislatures and Congress have considered legislation that would seek to prohibit failure-to-warn claims being brought for federally registered pesticides – would that stand up to the "parallel" argument?



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- Recent Litigation*
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- Sustainable Pest Management*
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What's Going On?



- In early 2022, EPA announced that it was developing a new policy to increase its compliance with the ESA when taking actions under FIFRA
- The work plan released later that year outlined a series of “early mitigations” that EPA would develop to reduce pesticide impacts to species listed under the ESA
- If implemented as proposed, this new policy is likely to impact all pesticide users



ESA: The Basics

The ESA was enacted in 1973 for the purpose of conserving threatened and endangered species and the ecosystems on which they depend

The ESA is administered by FWS and NMFS who are responsible for identifying and listing threatened and endangered species, and designating critical habitat

Listed species and designated critical habitat receive ESA protections



ESA: Section 7 Consultation

- ESA Section 7 requires all federal agencies to ensure that any actions they take will not jeopardize listed species or destroy critical habitat
 - “Action” = any action an agency has “authorized, funded, or carried out”
- Informal consultation is the first step – here, the action agency determines whether its action “may affect” any listed species or critical habitat
 - Low threshold to clear, includes actions that are “not likely to adversely affect” and actions that are “likely to adversely affect”
- If the action agency finds that its action is “likely to adversely affect” listed species or critical habitat, then it should proceed to formal consultation



ESA: Formal Consultation

Formal consultation involves the creation of a Biological Opinion (“BiOp”) issued by the consulting Service. The BiOp will:

- Detail expected impact to listed species and critical habitat
- Identify “reasonable and prudent alternatives” if the proposed action is likely to result in jeopardy
- Provide levels of “incidental take”
- Provide mandatory “reasonable and prudent measures” to minimize impacts of incidental take
- Identify ways the action agency can conserve species or critical habitat
- Provide an administrative record to establish an environmental baseline for future BiOps

Once the BiOp is issued, consultation is complete

- The agency may decide to adopt the BiOp’s recommendations, move forward without them, reinitiate consultation, or take other steps to reduce harm to species

FIFRA: Agency Actions



- Other FIFRA agency actions include:
 - Modifying a pesticide label by adding a new use
 - Registering a new pesticide active ingredient
 - Reregistering a pesticide
 - Carrying out registration review
- Each action would require ESA consultation

How Did We Get Here?

For decades, EPA has failed to fully consult over its FIFRA actions

This resulted in a mounting series of lawsuits, typically resulting in outcomes favorable to the plaintiffs

To reduce lawsuits and come into full ESA compliance, EPA is launching a new ESA-FIFRA policy



New ESA-FIFRA Policy

- Broadly, EPA’s new ESA-FIFRA Policy focuses on “early mitigations”
 - These are new restrictions that will be added to pesticide labels to reduce impacts to listed species and critical habitat
- The goal of introducing early mitigations is to reduce the number of future ESA consultations that result in findings of “jeopardy” or “adverse modification”
- EPA is developing these early mitigations in two ways:
 - Broadly across different groupings of pesticides (herbicides, insecticides, rodenticides, etc.)
 - Tailored to address species that are considered particularly vulnerable to pesticides



Draft Herbicide Strategy

Outlines “early mitigations” that EPA expects to include on all herbicide labels

Early mitigations fall into two main categories – reducing pesticide spray drift, and reducing pesticide runoff/erosion

Mitigation measures EPA finds are necessary across the entire pesticide use area will be included in the product’s general label

Mitigation measures only necessary in specific geographic areas will be posted to EPA’s website Bulletins Live! Two



Draft Herbicide Strategy: Mitigations

Spray Drift Mitigations

- Additional buffer requirements in the form of windbreaks, hedgerows, hooded sprayers, and application rate reduction depending on level of risk

Runoff/Erosion Mitigations

- A “mitigation menu” of limitations – applicators choose which methods are right for them to achieve the necessary number of “points”
- Includes: weather-based restrictions; methods of application; in-field management activities to reduce runoff; management adjacent to sprayed fields; activities to increase water retention



Vulnerable Species Pilot Program

Introduces early mitigation measures targeted at “vulnerable species” which EPA has identified as being at the greatest risk of pesticide exposure

Areas where mitigation measures are required are called Pesticide Use Limitation Areas or PULAs

Mitigations would apply broadly to conventional pesticide active ingredients and fall into two broad categories – avoidance and minimization

Avoidance mitigation (or avoidance PULAs) refers to areas where pesticide applications would be prohibited

Minimization mitigations (or minimization PULAs) focus on reducing spray drift, and runoff/erosion

Because VSPP mitigations are geographically specific, they will be posted to Bulletins Live! Two



VSP: Mitigations

Spray Drift Mitigations

- Spray drift buffers
- Prohibition of application methods or droplet sizes

Runoff/Erosion Mitigations

- No applications when soil is saturated
- No applications when rain is in the forecast
- Requirement of land use practices designed to reduce runoff or erosion



VSPP: November 2023 Updates

- In November 2023, EPA released a brief update to the VSPP primarily to address comments received on the draft version of the program and outline next steps
- Primary takeaways from the update include:
 - EPA is planning to improve species maps for species included in the VSPP to better identify geographic areas where VSPP mitigation measures will apply
 - EPA will clarify potential exemptions to the VSPP, revisit how vulnerable species are identified and selected, and develop a consistent approach to the strategies used to reduce pesticide exposure
- EPA plans to provide further updates by fall 2024



Next Steps

A final draft of the Herbicide Strategy is due by August 30, 2024

EPA plans to issue a draft Insecticide Strategy by July 30, 2024

EPA intends to continue developing bulletins for the original 27 species included in the VSPP while expanding the program to include more species

Currently unclear when these mitigation measures will begin appearing on pesticide labels



Outline:

-  *Recent Litigation*
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-  *Sustainable Pest Management*
-  *Final Thoughts*

What's Going On?

- In January 2023, California announced that it would be working to “accelerate” the state’s transition to sustainable pest management and the elimination of prioritized by-risk pesticides by 2050
- CalEPA released its Sustainable Pest Management Roadmap for California which presents a 20-year plan for how the transition will occur
- As goes California... Very possible this could have impacts beyond the state’s borders



What is SPM?

According to the SPM Roadmap, sustainable pest management is:

- “A holistic, whole-system approach to managing pests in agricultural and other managed ecosystems and urban and rural communities that builds on the concept of integrated pest management to include the wider context of the three sustainability pillars: human health and social equity, environmental protection, and economic vitality.”

SPM is considered an “evolution” of the concept of integrated pest management

- IPM focuses on prevention of pests through a combination of techniques with pesticides only applied after monitoring indicates they are needed, and treatments are made only to remove the target organism

SPM asks people to consider:

- Links between broader environmental issues
- Impacts on communities
- Broader consideration of economic benefits



Two Main Goals

1

Eliminate the use of
“priority pesticides”
by 2050

2

Adopt SPM as the de
facto pest
management system
in California by 2050

“Priority Pesticides”

The SPM Roadmap defines “priority pesticides” as:

- “Pesticide products, active ingredients, and groups of related products [...] that have been deemed to be of greatest concern and warrant heightened attention, planning, and support to expedite their replacement and eventual elimination. [...] Priority Pesticides are a subset of high risk pesticides. We define high risk pesticides as active ingredients that are highly hazardous and/or formulations or uses that pose a likelihood of, or are known to cause, significant or widespread human and/or ecological impacts from their use.”

California Department of Pesticide Regulation will identify “priority pesticides” by considering various factors, including:

- Hazard and risk classifications
- Availability of alternative products
- Pest management situations that could cause adverse impacts



Keystone Actions:

SPM Roadmap



- **Prioritize prevention:**
 - Use biosecurity and invasive pest mitigation system to prevent new invasive pest species, and eliminate pest-conducive conditions
- **Coordinate state-level leadership:**
 - Embed SPM principles across agencies, and improve coordination between agencies and programs for pest management
- **Invest in building SPM knowledge:**
 - Invest in SPM research, outreach, and training for both agricultural and urban pest management
- **Improve CA’s pesticide registration process to bring more alternative products to market:**
 - Prioritize “safer, more sustainable alternative products”
- **Enhance monitoring and data collection:**
 - Expand and fully fund health and environmental monitoring infrastructure, data, collection, and interpretation

Lingering Questions & Concerns

During a comment period for the SPM Roadmap, commentors raised many questions and concerns:

- Questions related to economic impacts, particularly for small farms
- Concerns related to increased pest pressures from changing weather patterns and invasive species
- Concerns about increased regulation
- Concerns about whether the Roadmap is based on the best available science



Possible Impacts

- “As goes California...”
- California often sets trends that are replicated in other states, including pesticide bans
 - CA was an early adopter of a chlorpyrifos ban, early to begin phasing out neonicotinoids, etc.
- Could bans on “priority pesticides” move to other states?
- Will SPM become more common?
- Many pesticide manufacturers are beginning to explore different types of pest control technologies – how will the SPM Roadmap impact that space?
- May take some time to know what the ultimate impacts will be



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Final Thoughts



- This is a rapidly changing area; staying on top of new developments is crucial to assisting clients who work with pesticide products
- Increased shift towards species protection and SPM means more changes ahead
- Probably not going back to where we were even 5 or 10 years ago
- But not all doom and gloom! EPA is prioritizing judicially defensible labels to help protect access to products

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