



**PennState Law**

Center for Agricultural  
and Shale Law

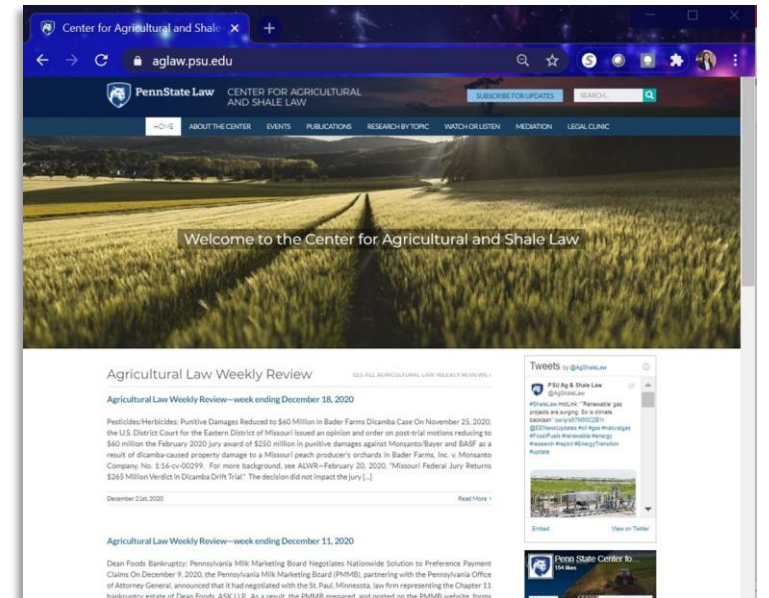




# Center for Agricultural and Shale Law

<https://aglaw.psu.edu>

- Agricultural Law Weekly Review
- Shale Law Weekly Review
- Agricultural Law Virtual Resource Rooms
- Shale Law Virtual Resource Rooms
- Agricultural Law Tracker
- Shale Law Tracker
- Agricultural Law Podcast
- Social Media
  - Twitter, Facebook, LinkedIn
- Presentations
- PA Ag Mediation Program





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# Our new Website

The screenshot shows the website [aglaw.psu.edu](http://aglaw.psu.edu) in a browser window. The header includes the Penn State Law logo and the text "CENTER FOR AGRICULTURAL AND SHALE LAW". A navigation menu contains links: HOME, ABOUT THE CENTER, EVENTS, PUBLICATIONS, RESEARCH BY TOPIC, WATCH OR LISTEN, MEDIATION, and LEGAL CLINIC. A search bar and a "SUBSCRIBE FOR UPDATES" button are also present. The main content area features a large image of a field with a path, overlaid with the text "Welcome to the Center for Agricultural and Shale Law". Below this, there are two sections for "Agricultural Law Weekly Review".

**Agricultural Law Weekly Review** SEE ALL AGRICULTURAL LAW WEEKLY REVIEWS >

**Agricultural Law Weekly Review—week ending December 18, 2020**

Pesticides/Herbicides: Punitive Damages Reduced to \$60 Million in Bader Farms Dicamba Case On November 25, 2020, the U.S. District Court for the Eastern District of Missouri issued an opinion and order on post-trial motions reducing to \$60 million the February 2020 jury award of \$250 million in punitive damages against Monsanto/Bayer and BASF as a result of dicamba-caused property damage to a Missouri peach producer's orchards in Bader Farms, Inc. v. Monsanto Company, No. 1:16-cv-00299. For more background, see ALWR—February 20, 2020, "Missouri Federal Jury Returns \$265 Million Verdict in Dicamba Drift Trial." The decision did not impact the jury [...]

December 21st, 2020 [Read More >](#)

**Agricultural Law Weekly Review—week ending December 11, 2020**

Dean Foods Bankruptcy: Pennsylvania Milk Marketing Board Negotiates Nationwide Solution to Preference Payment Claims On December 9, 2020, the Pennsylvania Milk Marketing Board (PMMB), partnering with the Pennsylvania Office of Attorney General, announced that it had negotiated with the St. Paul, Minnesota, law firm representing the Chapter 11 bankrupt estate of Dean Foods. ASK LLP. As a result, the PMMB created, and posted on the PMMB website, forms

**Tweets by @AgShaleLaw**

PSU Ag & Shale Law @AgShaleLaw

#ShaleLaw HotLink: "Renewable" gas projects are surging. So is climate backlash" [ow.ly/s57M50C2B1r](#)

@EENewsUpdates #oil #gas #naturalgas

#FossilFuels #Renewable #Energy

#Research #Report #EnergyTransition

#update

[Embed](#) [View on Twitter](#)

**Penn State Center fo...**

154 likes



# Logistics

- This webinar is being recorded
  - A link to the recording will be available on our YouTube channel:
  - [Center for Agricultural and Shale Law YouTube channel](#)
  - Materials will be available here:
  - <https://aglaw.psu.edu/event/agricultural-law-symposium/>
- Questions? Please use Q&A



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# Pesticide Drama and Non-Target Liability

Topic: civil liability for non-target property damage from dicamba and  
other pesticides/herbicides  
January 14, 2021 at 2:15pm (EST)





# What are the Current Legal Issues?

- Applicator legal liability
  - strict liability, trespass, nuisance, & negligence
- Products Liability
  - Claims against manufacturers





# Applicator Legal Liability – Legal Theories

- Strict Liability
- Trespass
- Nuisance
- Negligence



# Applicator Legal Liability – Strict Liability

- Strict Liability
  - A person who engages in an “ultrahazardous activity” or “abnormally dangerous activity” is strictly liable for injuries proximately caused by the activity
  - Typical Examples: Use or storage of explosives or hazardous chemicals





# Applicator Legal Liability – Strict Liability

- *Villari v. Terminix Int'l, Inc.* 663 F. Supp. 727 (E.D. Pa. 1987)
  - Pesticide application in the home was not an ultrahazardous activity
  - (the court, however, did allow a strict products liability claim)
- *Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312 (1961)
  - Crop dusting is ultrahazardous
- *Bennett v. Larson Co.*, 118 Wis. 2d 681, 348 N.W.2d 540 (1984)
  - “pesticide spraying should **not** be considered an ultrahazardous activity”



# Applicator Legal Liability – Strict Liability

- *Villari v. Terminix Int'l, Inc.* 663 F. Supp. 727 (E.D. Pa. 1987)
  - [Pennsylvania section 519 and 520 Restatement \(Second\) of Torts](#)
  - Factors of abnormally dangerous:
    - High risk of harm and likelihood of great harm
    - Inability to eliminate risk
    - Not common activity
    - Inappropriate location
    - Value to the community versus danger



# Applicator Legal Liability – Strict Liability

- National Agricultural Law Center, [“50-State Survey: Landowner Liability for Pesticide Drift”](#)



# Applicator Legal Liability – Trespass

- Trespass
  - intentionally physically interfering with the person or property of the plaintiff, or intentionally causing something to enter the plaintiff's land.



# Applicator Legal Liability – Nuisance

- Nuisance
  - Interference or disruption of a person's private use and enjoyment of their land.



# Applicator Legal Liability – Negligence

- Negligence is the primary theory
  - Trespass, nuisance, & strict liability are generally “tack-on claims”
- What is negligence?
  - Failure to act as a reasonable person would act under similar circumstances
  - Carelessness, thoughtlessness, oversight



# Applicator Legal Liability – Negligence

- Negligence
  - Duty
  - Breach of Duty
    - What is the “Standard of Care”?
    - *Did the applicator fail to act in a reasonable manner to prevent damage from the pesticide/herbicide?*
  - Proximate causation
  - Actual Damages





# Applicator Legal Liability – Negligence

1. What should a reasonably prudent herbicide applicator do to protect against non-target injury and potential lawsuits?
  1. Comply with laws & regulations
  2. Comply with best practices



# Insurance

- Insurance term: “Chemical drift”
- Landowners who apply for insurance:
  - Typical “farm policy” liability coverage may have some form of “pollution exclusion”
  - Talk to your agent; buy a “chemical drift liability endorsement”



# Insurance

- Commercial applicators who apply for insurance:
  - Commercial General Liability Policy
  - Avoid insurance that has a pollution exclusion



# Insurance

- Possible other exclusions:
  - Damage to *your* property, crops, or animals
  - Damage that you expect or intend to occur
  - Bodily injury to people
  - Government mandated testing or clean-up of pollutants



# Insurance

- Insurance coverage may be different for aerial application
- All claims should be reported to insurance carrier asap
- Delaying the investigation can lead to coverage reservation or denial



# Insurance

- Additional reading:
  - [Liability Coverage for Chemical Drift](#), The Grapevine (6/29/2020)



# Avoid Negligence Claims

- Know & follow all [EPA](#) & [PDA guidance](#)
  - If you don't follow the rules/laws, your insurance company can't help you

The screenshot shows the PDA website with a navigation bar at the top including links for Animals, Business & Industry, Consumer Protection, Food, and Plants, Land & Water. Below the navigation bar is a horizontal menu with icons for About, PA Farm Bill, Online Services, COVID-19, Food Security, Workforce Development, Mental Wellness, and Blog. The main content area is titled "Pesticide Programs" and includes a paragraph about the Bureau of Plant Industry, Division of Health and Safety. It lists four bullet points: Registration of pesticides distributed in the Commonwealth, Certification of pesticide applicators making applications in the Commonwealth, Notification requirements for pesticide applications in schools, and Administration of the EPA Worker Protection Standard. Below this, it mentions an interactive Pesticide Business Map. At the bottom, there are six blue buttons with white text: "Notification of Pesticide Treatments in...", "Pesticide Product Registration", "Pesticide, Certified Applicators and...", "Sponsor a Pesticide Course", "Herbicide Drift", and "Dicamba for Soybeans in Pennsylvania".





## Herbicide Drift and Sensitive Plants: What to do if Drift is Suspected

If herbicide drift is suspected on sensitive plants, certain procedures must be followed to properly investigate and document the situation. Read below for more details.

[+ Save For Later](#) [Print](#)

 NEWS | UPDATED: MAY 15, 2019



**Soybeans injured due to herbicide drift. (Source: Penn State Extension, D. Lingenfelter)**

Herbicides are commonly used in Pennsylvania to control unwanted weeds and vegetation and are a valuable tool when used correctly. Sometimes herbicides move off-target for various reasons and can injure or kill desirable crops or other plants. When this happens, it is critical to take action quickly to determine the potential cause. Certain herbicides such as the plant growth regulators (PGR) can be more prone to drift and will be the focus of this article. But keep in mind, if any kind of herbicide drift is suspected, it can be useful to report it immediately. Below are some

### RELATED PRODUCTS



[Agronomic Pesticide Update](#)

 WORKSHOPS



[Brown Marmorated Stink Bug as a Pest of Corn and Soybeans](#)

 ARTICLES



[The Penn State Agronomy Guide](#)

 GUIDES AND PU...



[Mid-Atlantic Field Crop Weed](#)

# Options for Dealing with a Pesticide Drift Incident

Michael O'Donnell, Purdue Extension Educator, Delaware County  
Roy Ballard, Purdue Extension Educator, Hancock County  
Fred Whitford, Director, Purdue Pesticide Programs  
Joe Becovitz, Pesticide Investigator, Office of Indiana State Chemist

When farmers, businesses, government agencies, and homeowners use pesticides (insecticides, herbicides, and fungicides) to protect plants and property against insects, weeds, and diseases, the pesticide product must remain on the target site. When any pesticide moves through the air away from the target site and onto someone else's property — known as pesticide drift — the pesticide can damage non-target crops, landscape plants, and gardens. Drift can also injure people, companion animals, livestock, and wildlife.

Drift can have serious long-term economic consequences, too. If pesticide drift affects a neighbor's organic crop, that drift incident may knock the field out of the organic program for up to three years.

Pesticide drift can occur virtually anywhere — between neighboring farms, farms and residential properties, or neighboring residential properties. Whether it's a next-door neighbor or a farmer who owns the field adjacent to your property, they have the legal right to apply pesticides to their property or property they lease. However, pesticide applicators also have the legal obligation to keep those products on their side of the property line, and you have the right to not have pesticides drifting onto your property.

It's important to note that, according to Indiana law, "drift" does not include instances when pesticides run off in water, soil, erosion, or windblown soil particles.

## When Can Pesticide Drift Occur?

When thinking about pesticide drift, know that it:

- Can occur in all weather conditions including high and low wind speeds.
- Can occur on your own property and in public areas such as parks, pools, and schools.
- May or may not be associated with a strong chemical smell.
- May have occurred on your property even if there is no immediate evidence of physical injury.

## What Are Signs of Drift?

Pesticide drift can harm human health or damage plants and other properties. Here are some things that may occur that should make you consider pesticide drift:

- You felt a pesticide application spray physically touch you. Direct exposure to pesticides is a serious matter and you should never treat it lightly. Pesticide exposure may require immediate action. If you come in contact with a pesticide, remove your clothing and shower. Retain your clothes in a separate bag. Seek medical advice about any further actions.
- You observe distorted or discolored leaves on your trees, landscape or garden plants, or crop plants.
- You observe spray mist moving onto your property.
- You notice dead honeybees, dead fish, or areas where vegetation has yellowed or died suddenly.





# Pennsylvania Agricultural Mediation Program



- Who can request mediation?
  - USDA-related issues:
    - Agricultural Loans
    - Wetlands determinations
    - Compliance with farm programs, including conservation programs
    - National organic program established under the Organic Foods Production Act of 1990
    - Agricultural Credit
    - Rural water loan programs
    - Grazing on National Forest System land
    - Pesticides
  - Non-USDA issues:
    - Lease issues; including land leases and equipment leases.
    - Family farm transition.
    - Farmer-neighbor disputes





# Pennsylvania Agricultural Mediation Program

- Who conducts mediation?
  - Impartial 3<sup>rd</sup> party mediator
- If an agreement is not reached, the requestor may seek appeals or legal action



# Pennsylvania Agricultural Mediation Program

Contact us:

Jackie Schweichler, Program Coordinator

329 Innovation Blvd.

University Park, PA 16802

(814) 746-4619

[AgMediation@PennStateLaw.psu.edu](mailto:AgMediation@PennStateLaw.psu.edu)

Website: [www.PAAgMediation.com](http://www.PAAgMediation.com)



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# Thank you!

**Jackie Schweichler**

Staff Attorney

Center for Agricultural and Shale Law

Penn State Law

329 Innovation Boulevard, Suite 118

University Park, PA 16802

(814) 746-4619

[jks251@psu.edu](mailto:jks251@psu.edu)





# Thanks to Our Partners!

- Programs of the Center for Agricultural and Shale Law are supported by:
  - The National Agricultural Law Center
  - National Agricultural Library
  - Pennsylvania Department of Agriculture



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PDA