



PennState Law

Center for Agricultural
and Shale Law





PennState Law

Center for Agricultural
and Shale Law

The Litigation over Dicamba Registration and Chlorpyrifos Use and Tolerances

2022 Pennsylvania Farm Show | Agricultural Law Symposium

Presented by Chloe Marie, Research Specialist

January 13, 2022, 2:15pm (EST)





Please visit our YouTube Channel and check our session on

[Pesticide Drama & Non-Target Liability](#)

2021 Pennsylvania Farm Show Agricultural Law Symposium

Presented by Jackie Schweichler, Staff Attorney and Chloe Marie,
Research Specialist



5-year EPA Registration for Dicamba

- The 2020 new registrations:
 - Are unconditional
 - Are for a new use on DT soybean and DT cotton only
 - Apply only in 34, including Pennsylvania
 - Expire on December 20, 2025
 - Prohibit soybean application after June 30 annually and cotton application after July 30 annually
 - Limit the states' authority to impose further regulations on pesticide use



Section 24 of FIFRA

« FIFRA section 24(c) allows states to register “additional uses of federally registered pesticides” to meet special local needs within the state, but it does not provide for states to issue more restrictive registrations. A separate provision under FIFRA – section 24(a) – is the appropriate authority for the states to rely on in the event that they want to establish a measure that restricts or narrows the uses authorized by an EPA-approved label.

[EPA Guidance on FIFRA 24\(c\) Registrations](#)

Issued in November 2020



EPA 2021 Incident Report on the Use of Over-the-Top Dicamba

“Dicamba incidents continue at high numbers relative to recent past. They occur over a large geographic range and damage occurs on a wide range of plant species. There is no change from previous years in the number, severity, or geographic extent of incidents. In 2020, EPA estimated that dicamba incidents were underreported by a factor of 25; no evidence suggest that underreporting has changed.”

[Status of Over-the-Top Dicamba: Summary of 2021 Usage, Incidents and Consequences of Off-Target Movement, and Impacts of Stakeholder-Suggested Mitigation](#) (EPA-HQ-OPP-2020-0492-0021; issued December 21, 2021).



Dicamba-Related Litigation

- *National Family Farm Coalition, et al. v. U.S.EPA, et al.*, Ninth Circuit, No. 20-73750
 - Plaintiffs alleged that EPA violated FIFRA and APA by: “(1) failing to support its unconditional registration conclusion of no reasonable adverse effects on the environment with substantial evidence ...” and “(2) refusing to hold notice and comment on the decision embedded in the Registration Decision to eliminate state pesticide restriction authority under Section 24 of FIFRA ...”



Dicamba-Related Litigation

- *Center for Biological Diversity, et al. v. U.S. EPA, et al.*, USDC Arizona, No. 4:20-cv-00555
 - “... the Registration Actions again either underestimate or ignore risks and costs to farmers and the environment from its decision.”
 - “... the decision also found separate ways to violate FIFRA beyond the substantive errors in the registrations.”
 - “... EPA also violated FIFRA and the APA by failing to provide a formal notice and comment period despite approval of a new use of these products.”
 - “... EPA took the occasion of issuing the Registration Actions approving three specific dicamba products also to make a sweeping rule change for not just those pesticides, but also *all* pesticides, and in a footnote no less.”



Dicamba-Related Litigation

- *National Farm Coalition, et al. v. U.S. EPA, et al., D.C. Circuit, No. 21-01043*
 - The Ninth Circuit ordered *Nation Farm Coalition, et al. v. U.S. EPA, et al.* to be transferred to the U.S. Court of Appeals for the District of Columbia
 - Consolidated with *American Soybean Association v. Jane Nishida, D.C. Circuit, No. 20-01441*
 - Petitioner American Soybean Association challenged the dicamba registration different grounds, argued that the three dicamba product registrations “violate [FIFRA], Endangered Species Act (“ESA”), and Administrative Procedures Act (“APA”) by imposing registration conditions that exceed statutory authority, are arbitrary and capricious, are an abuse of discretion, are not supported by substantial evidence when considered on the record as a whole and are not otherwise in accordance with law.”



Dicamba-Related Litigation

- In *Center for Biological Diversity, et al. v. U.S. EPA, et al.*, plaintiffs filed a motion to determine jurisdiction, arguing that jurisdiction lies in the Arizona Federal district court.
 - ... all parties agree that this Court has jurisdiction.” EPA asserted that “district court jurisdiction is proper because EPA failed to hold notice and comment on the 2020 registrations. Plaintiffs agree that there is supporting caselaw for this position.”
- Subsequently, in *National Farm Coalition, et al. v. U.S. EPA, et al.*, Petitioners filed a motion to voluntarily dismiss the petition in the D.C. Circuit – granted by the D.C. Circuit Court.
- The Arizona Federal district court denied Plaintiffs’ motion to determine jurisdiction and stayed the case pending resolution of the matter before the D.C. Circuit Court.



Chlorpyrifos Registration Status

- Banned for residential use since 2001, but not for agricultural use
- Initially registered as a pesticide in 1965; lastly re-registered on July 31, 2006. EPA concluded that chlorpyrifos is safe to use.
- EPA is currently undergoing a registration review of Chlorpyrifos
 - Statutory deadline set on October 1, 2022.
 - December 7, 2020 – EPA issued a Proposed Interim Decision for chlorpyrifos.



EPA Actions on the Federal Food, Drug, and Cosmetic Act (FFDCA) 2007 Petition

- [Petition to revoke all tolerances and cancel all registrations for the pesticide chlorpyrifos](#)
 - Filed on September 12, 2007, by the Natural Resources Defense Council (NRDC) and Pesticide Action Network North America (PANNA)
 - “Robust data shows that any use restriction on chlorpyrifos would still not be health-protective and that all food tolerances must be revoked. EPA’s decision to reregister chlorpyrifos and retain food tolerances violates FIFRA and the FFDCA. EPA failed to consider important studies and improperly disregarded others. Furthermore, the Agency relied on a biased selection of available, weak data, in favor of the robust data, leading to an unsupported risk assessment.”



EPA Actions on the Federal Food, Drug, and Cosmetic Act (FFDCA) 2007 Petition

- [March 29, 2017, EPA Order denying 2007 petition in full](#)
 - “To the extent petitioners are asserting that human exposure to chlorpyrifos spray drift and volatilized chlorpyrifos present neurodevelopmental risks for infants and children, EPA is denying this claim ... EPA believes that, given the uncertainties associated with this identified risk concern, the appropriate course of action is for EPA to deny the Petition and work to further resolve this area of unsettled science in the time remaining for the completion of registration review under section 3(g) of FIFRA.”
- [July 24, 2019, EPA Order denying objections to March 2017 petition denial order](#)



Ninth Circuit-Related Litigation

- *LULAC, et al. v. Regan, et al.*, Ninth Circuit, No. 19-71979
 - A coalition of environmental organizations petitioned the Ninth Circuit Court seeking review of EPA Mar. 29, 2017, and Jul. 24, 2019, orders.
 - The case was consolidated with *State of New York, et al. v. Michael Regan, et al.* Ninth Circuit, No. 19-71982
 - April 29, 2021 – the Ninth Circuit Court vacated 2017 and 2019 EPA orders and remanded the matter and ordered EPA to either modify chlorpyrifos tolerances or prohibit any chlorpyrifos tolerances.



Ninth Circuit-Related Litigation

- *LULAC, et al. v. Regan, et al.*, Ninth Circuit, No. 19-71979
 - The Ninth Circuit stated, “In short, the EPA has spent more than a decade assembling a record of chlorpyrifos’s ill effects and has repeatedly determined, based on that record, that it cannot conclude, to the statutorily required standard of reasonable certainty, that the present tolerances are causing no harm. Yet rather than ban the pesticide or reduce the tolerances to levels that the EPA *can* find are reasonably certain to cause no harm, the EPA has sought to evade, through one delaying tactic after another, its plain statutory duties.”



EPA's Final Decision to Revoke Chlorpyrifos Tolerances

- August 30, 2021 – EPA invalidated all chlorpyrifos tolerances, effective February 8, 2022, following the Ninth Circuit's decision ([86 FR 48315](#))
- EPA concluded that “the current aggregate exposures from use of chlorpyrifos do not meet the legally required safety standard that there is a reasonable certainty that no harm will result from such exposures.
- What does it mean? Food treated with chlorpyrifos after February 8, 2022, will be considered adulterated and will not be distributed in the commerce.



Impacts on U.S. Farmers and Food Producers

- October 19, 2021 – several producer groups petitioned the U.S. EPA challenging its decision to revoke all chlorpyrifos tolerances after February 8, 2022. [Formal Written Objections and Request to Stay Tolerance Revocations: Chlorpyrifos \(EPA-HQ-OPP-2021-0523\)](#).
 - “We object to the tolerance revocation of all uses, as EPA’s own risk assessments show some uses meet the legal standard under FFDCA. Additionally, this action will leave thousands of growers across the country defenseless to devastating pests, which is why we also request that EPA stay implementation of this rule until the Agency can thoroughly consider and respond to objections. To lose the ability to use chlorpyrifos, as would occur through implementation of the rule, would unnecessarily result in significant and immediate economic and environmental damage.”



PennState Law

Center for Agricultural
and Shale Law

”Waters of the United States” and Related Litigation

2022 Pennsylvania Farm Show | Agricultural Law Symposium

Presented by Chloe Marie, Research Specialist

January 13, 2022, 2:15pm (EST)





Proposed Revision of WOTUS Definition

- June 9, 2021 – The U.S. EPA and the Corps [announced](#) a **review** of the definition of “waters of the United States”
 - “The forthcoming rule will propose to restore the regulations defining “waters of the United States” in place for decades until 2015, updated to be consistent with relevant Supreme Court decisions. The agencies will also pursue a second rulemaking process that further refines and builds upon that regulatory foundation.”
- This follows President Joe Biden’s [Executive Order](#) on *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, directing agency heads to immediately review all agency actions taken between January 20, 2017, and January 20, 2021, that may conflict with the Biden administration’s policies.



Conservation Law Foundation, et al. v. U.S. EPA, et al.

- June 9, 2021 – The U.S. EPA and the Corps motioned the U.S. District Court for the District of Massachusetts (No. 1:20-cv-10820), to **remand *without vacatur*** the 2020 Navigable Waters Protection Rule (85 FR 22250) and to dismiss the case.
 - “A remand would avoid potentially unnecessary litigation in this Court over aspect of the NWPR that will be reconsidered in a new rulemaking, would conserve the parties’ limited resources, and would best serve the interest of judicial economy.”
- i.e., the Navigable Waters Protection Rule would remain in effect until EPA and the Corps revise or replace the 2020 Rule.



Pasqua Yaqui Tribe et al. v. U.S. EPA

- June 22, 2020 – Pasqua Yaqui Tribe, et al. filed a complaint before the USDC for the District of Arizona against U.S. EPA requesting the court to **vacate and set aside** the 2019 Repeal Rule (which repealed the 2015 Clean Water Rule) and the 2020 Navigable Waters Protection Rule, and to **reinstate** the 2015 Clean Water Rule. *No. 4:20-cv-266*.
- August 30, 2021 – The district court **vacated and remanded** the 2020 Navigable Waters Protection Rule.
 - The court reinstated the pre-2015 regulatory regime; the 2019 Repeal Rule remains in effect until further proceedings of the court on the challenge to the 2019 Repeal Rule.



EPA Puts Full Stop On NPWR Implementation

“In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule (“NWPR”- nationwide and are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until further notice. The agencies are working expeditiously to move forward with the rulemakings announced on June 9, 2021, in order to better protect our nation’s vital water resources that support public health, environmental protection, agricultural activity, and economic growth.³

[EPA’s Statement](#) (September 3, 2021)



Pasqua Yaqui Tribe et al. v. Arizona Rock Products Ass'n, et al.

- October 25, 2021 – A group of industry intervenors filed an appeal in the Ninth Circuit Court of Appeals (No. 21-16791) seeking review of the U.S. district court’s decision vacating the 2020 Navigable Waters Protection Rule.
- And a motion to stay the district court’ vacatur pending the appeal (No. 4:20-cv-266).
- “(1) the Court did not weigh the seriousness of the NWPR’s errors because it has not ruled on Plaintiffs’ challenges to the NWPR, which is a prerequisite for vacatur under the APA, and (2) vacatur of the NWPR and return to the pre-2015 regime pending issuance of yet another new rule by the Agencies will be unduly disruptive to the regulated community, and those harms far exceed any speculative injury asserted by Plaintiffs.”



Pasqua Yaqui Tribe et al. v. Arizona Rock Products Ass'n, et al.

- December 22, 2021– U.S. EPA and the Corps filed a motion to dismiss for lack of appellate jurisdiction
 - “The district court’s order vacated one of the two rules challenged by Plaintiffs and remanded to the Agencies. But the claim challenging the other rule remains pending in district court, so the order is not final and appealable under 28 U.S.C. § 1291.”
- January 4, 2022 – Industry intervenors filed a motion to dismiss the case voluntarily
 - Granted on January 12, 2022.



PennState Law

Center for Agricultural
and Shale Law

Thank you!

Chloe Marie

Research Specialist

Center for Agricultural and Shale Law

Penn State Law

329 Innovation Boulevard, Suite 118

University Park, PA 16802

cjm445@psu.edu





PennState Law

Penn State Center for Agricultural and Shale Law

Phone: (814) 865-4290

Website: www.PennStateLaw.psu.edu/casl

www.PennStateAgLaw.com

Twitter: [@AgShaleLaw](https://twitter.com/AgShaleLaw)

Facebook: www.facebook.com/AgShaleLaw/

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



United States Department of Agriculture

National Agricultural Library



PDA