

AGRICULTURAL LAW

Fact Sheet



PennState Law

Center for Agricultural
and Shale Law

August 2021

CASL Publication No. FS22-009

Non-Target Pesticide Application: Liability Risks

Non-target application refers to the inadvertent overspray of pesticides or herbicides. This subject is frequently referred to as “pesticide drift” or “herbicide drift.” This fact sheet will help agricultural producers, landscapers, and other pesticide applicators better understand the potential legal risks associated with pesticide drift.

What is Pesticide Drift?

Depending on the liquid solution and chemical composition, pesticides and herbicides can travel through the air after their application to the intended location. Particles from these solutions can travel hundreds of feet as droplets and several miles as a vapor.

In some cases, herbicide drift is the result of an applicator’s noncompliance with the pesticide label instructions. However, drift may also occur as a result of natural conditions including low humidity, high winds, and when there is a temperature inversion. Temperature inversions are common in the morning when the cooler air near the ground is trapped beneath warmer air, suspending droplets and vapors in the air.

What Type of Damage is Caused by Drift?

Pesticide drift can cause harm to humans, plants, and the environment. Certain popular herbicides, like 2,4-D or Dicamba, may be essential to cultivate row crops but can be destructive to sensitive produce such as grapes, fruit crops, tobacco, and various trees. Herbicide damage can manifest on plants in various ways including low yield, damaged root systems, underdeveloped leaves, and complete plant loss.

When pesticides inadvertently come into contact with members of the public, some people may experience skin rashes, asthma, and other allergic reactions.

Theories of Legal Liability

There are four main legal theories under which lawsuits could be brought against pesticide applicators for damages. A landowner whose property is damaged by non-target pesticide application could sue the applicator for strict liability, trespass, nuisance, or negligence. Strict liability claims are tort-based theories and nuisance and trespass are property-based theories.

Negligence

Strict liability, trespass, and nuisance are possible liability claims, but the most likely claim to be brought in this type of case is negligence.

Negligence is the failure to act as a reasonable person would act under similar circumstances. The actions may be considered careless, thoughtless, or lacking oversight.

Under the negligence theory of liability, there are 4 factors that a landowner plaintiff would need to prove. First, was there a duty? In pesticide application, the law imposes a duty on the applicator to follow certain instructions to avoid spreading the pesticide to non-target areas.

The second factor asks whether there was a breach of duty. To answer this question, a landowner would need to review the standard of care for the pesticide applicator. The standard of care is what a reasonable person would do under similar circumstances. Did the applicator fail to act in a reasonable manner to prevent damage from the pesticide? If the applicator did not apply the pesticide in the method described by the label, the applicator is almost certainly failing to meet the standard of care.

In addition to following the label, the applicator must also follow best practices, as employed by others in their industry. Pesticide applicators, producers, and landscapers will be held to the

standard of care relating to their specific business. It is up to a jury to decide the standard of care and whether an applicator breached the duty of care.

The third factor in proving negligence is proximate causation. To determine proximate causation, the key question is whether the injury is a reasonably foreseeable result of the defendant's misconduct. The key words are "reasonably foreseeable." For example, if an applicator applies pesticides in an improper manner, it is reasonably foreseeable that the pesticide could damage someone's property.

The fourth negligence factor is actual damages. Did the pesticide actually damage property? If, for example, pesticide drift physically damages or inhibits the growth of grape vines, this would likely constitute actual damage. Conversely, if the pesticide drift damages weeds in an abandoned, unused field, there may be a question as to whether this would be considered actual damage.

Strict Liability

A person is strictly liable for an injury if they are involved in something that's considered inherently dangerous or if the activity could be considered "ultrahazardous." A popular example used in describing strict liability is the use or storage of explosives or hazardous chemicals.

If strict liability applies, the injured party does not need to prove that the person was negligent or that they intended the injury to occur. In addition, a person can be liable regardless of how careful they were during the activity.

Pennsylvania does not have laws specifying whether herbicide drift is a strict liability crime, nor is there specific case law to make this issue clear. That said, in *Villari v. Terminix Int'l, Inc.*, the court stated that a factor in reviewing the ultrahazardous nature of the activity is "the extent to which its value to the community is outweighed by its dangerous attributes." (663 F. Supp. 727 (E.D. Pa. 1987)). In other words, to avoid strict liability the community benefits from pesticide application must outweigh the danger of the pesticide.

Trespass

The next legal theory that could be brought in a pesticide injury case is trespass. Trespass is defined as the intentional, physical interference with the person or property of the plaintiff. Trespass also occurs when the defendant intentionally causing something to enter the plaintiff's land.

A landowner who experiences pesticide injury could file a suit under the theory that a pesticide applicator committed trespass by allowing droplets of a pesticide to enter their property and cause damage. Even if the pesticide applicator never physically enters the landowner's property, if the pesticide enters crosses the property line and causes damage, the landowner could potentially sue for trespass.

Nuisance

Nuisance is defined as the interference or disruption of a person's private use and enjoyment of their land. In general, nuisance is an activity that is designated as harmful or annoying. An unwanted pesticide that causes damage to property and personal health could certainly disrupt the use and enjoyment of property. In this instance, "use of land" could be interpreted to include the cultivation of produce, a home garden, or even routine outdoor activities. If herbicide drift damages a landowner's vineyard or a flowering shrub, the landowner's use of those plants has been disrupted and they could therefore, theoretically, bring a nuisance claim.

Considerations for Avoiding Legal Liability

The first step in putting yourself in the best position to avoid legal liability as a pesticide applicator is to comply with all laws and regulations. This includes following the application instructions printed on the pesticide label. The label should explain how to apply the pesticide in a way that reduces or eliminates drift or non-target application. In addition to carefully reading the label, prudent pesticide applicators should carefully review state and federal law, such as the Federal Insecticide, Fungicide, and Rodenticide Act. In Pennsylvania, minimum risk pesticides must be registered according to Pennsylvania's Pesticide Control Act.

The second step in avoiding legal liability is to follow best practices by staying up-to-date on responsible application methods. Applicators should consider talking to other professionals in the field, signing up for a newsletter, watching educational videos, and carrying out independent research. For a negligence claim to succeed, an applicator puts themselves at risk by ignoring industry standards, even if that particular procedure isn't required by law.

For example, an applicator should closely consider adjustments affecting droplet size, as smaller droplets are more likely to drift. A prudent applicator might review spray nozzles, pressure, and rate of spray. The applicator could also review different spray thickeners and consider whether

those would be appropriate for their particular formulation. In addition, an operator should review the height of the spray to make sure it is as close to the intended target as possible. As mentioned earlier, natural conditions can be difficult to navigate when avoiding drift and an applicator should pay close attention to the weather. To determine the best time to spray, an applicator should perform routine and frequent checks on temperature, wind speed, wind direction, and humidity.

Insurance

Even if a pesticide applicator complies with all laws and follows best practices, risk of liability still exists and that is where the scope and limits of liability insurance needs to be understood.

Agricultural producers and farmers with existing farm policies of insurance should first review their liability coverage within that policy with their agent to determine whether it contains a "pollution exclusion." A pollution exclusion means that herbicide drift is most likely not covered under the liability portions of that policy. In this situation, an agricultural producer must purchase an endorsement with additional coverage that acts as a rider to a farm insurance policy. Interested producers should work with their agent to procure an endorsement or separate liability coverage that covers "chemical drift."

It is also important to note that insurance policies will contain other exclusions, including the exclusion from coverage for:

- Damage to the landowner's property, crops, or animals
- Damage that you expect or intend to occur
- Bodily injury to people
- Government mandated testing or clean-up of pollutants

A liability insurance policy never covers damage to a landowner's own property or products. For example, if a landowner applies pesticides on a field and the resulting drift damages another field they

own, liability insurance is unlikely to does not cover that loss.

Commercial Applicators

Commercial pesticide applicators who are covered by Commercial General Liability Policies, should also review their policies for pollution exclusions and work with their agent to procure liability coverage that covers damage claims from third parties caused by herbicide drift.

Avoiding Lawsuits with Mediation

Despite an applicator's best efforts, herbicide drift still may occur and cause injury. When this happens, the resulting lawsuit can be exceeding expensive and time consuming to both the applicator and the injured party. It is generally in the best interest of both parties to settle the situation out of court. One method of resolution is to request mediation through Pennsylvania's Agricultural Mediation Program.

The Pennsylvania Agricultural Mediation Program is a USDA funded program that provides mediation services to farmers and landowners involved in certain disputes, including pesticide-related disputes. At mediation, a third-party mediator engages with participants to help discuss and explore their issues in a useful, non-confrontational manner. Mediation can be accomplished in one meeting or may take several sessions depending on the complexity of the issues and the number of participants. If an agreement is not reached, the case is closed, and all parties remain free to pursue other available administrative appeals and/or legal action. Mediation is generally low-cost or free, determined on a case-by-case basis.

For more information on the mediation program, check out our website.

Website: www.PAAgMediation.com

Email: AgMediation@PennStateLaw.psu.edu



Authors

Brook Duer, Staff Attorney
Jackie Schweichler, Staff Attorney
Ross H. Pifer, Director

Selected References

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This material is provided as part of a partnership with the National Agricultural Law Center and is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture.

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**PENN STATE CENTER FOR
AGRICULTURAL AND SHALE LAW**

329 Innovation Blvd., Suite 118
University Park, PA 16802
Phone: 814-865-4290
Fax: 814-865-3851
Website: AgLaw.psu.edu

PROFESSIONAL STAFF

Center Director **Staff Attorney**
Ross H. Pifer Jackie Schweichler
rpifer@psu.edu jks251@psu.edu

Staff Attorney **Research Specialist**
Brook Duer Chloe Marie, LL.M.
dhd5103@psu.edu cjm445@psu.edu

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