



FARM COMMONS

Chemical Drift Response Tipsheet

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DISCLAIMER: This guide does not provide legal advice or establish an attorney-client relationship between the reader and author. Always consult an attorney regarding your specific situation.

Who is responsible and what actions can the organic farmer take to recover damages from chemical drift?

Farmers who haven't yet been impacted by chemical drift but want to take proactive measures to prevent damages can check out the tipsheet *Chemical Drift Prevention: What actions can organic farmers take to protect their crops from chemical drift?*

For an organic farmer, it can be frustrating to hear the sound of a crop duster flying overhead or see ground sprayers out in force in the neighbor's crops. The threat of chemical drift looms. This tipsheet provides an overview of the law and outlines steps farmers can take if their farms fall victim to chemical drift.

Who is responsible for chemical drift in Minnesota and Wisconsin?

The laws in both Minnesota and Wisconsin require pesticide applicators to take steps to prevent chemical drift. Minnesota's pesticide law provides, "A person may not apply a pesticide resulting in damage to adjacent property," (Minn. Stat 18B.07). In Wisconsin, the state pesticide regulations are even more explicit: "No person may use or direct the use of a pesticide in a manner that results in pesticide overspray or significant pesticide drift," (ATCP 29.50). This law defines "significant" to mean that enough pesticide has moved off target to harm or potentially harm people, property, or the environment or be readily visible.

The law is clear: the applicator is responsible if and when chemical drift occurs and it causes harm. However, farmers face a long and unreliable road when seeking to recover any damages.

State agencies investigate and issue penalties, but do not provide compensation for damages to crops

The Minnesota Department of Agriculture's (MDA) Pesticide & Fertilizer Management Division handles chemical drift investigations. In Wisconsin, the Department of Agriculture Trade and Consumer Protection (DATCP) handles such investigations.

If a farmer believes that drift may have occurred, she can file a complaint with the state agency. An inspector or enforcement specialist will conduct a full investigation, including talking to both the farmer and the applicator as well as other witnesses, taking samples from the farm, and examining the applicator's records. These investigations can take up to six months.

The agencies are authorized to issue financial penalties if they conclude the applicator violated pesticide laws. They will also help answer questions and provide information about the investigation. However, except for bee kills in Minnesota, the state agencies do not seek compensation for farmers for any damages.

Beekeepers in Minnesota can seek compensation from the MDA for bee kills

In Minnesota, \$150,000 of state funding per year has been made available to compensate farmers for bee kills caused by pesticides. To be eligible for these funds, beekeepers must be registered with BeeCheck (<https://beecheck.org/>), a hive mapping registry administered by FieldWatch. If a bee kill caused by chemical drift is suspected, the beekeeper must file a written complaint with the MDA. The MDA will then conduct a thorough investigation and if all of the criteria are met, the beekeeper will be asked to complete a compensation claim form.

Wisconsin has recently adopted the Wisconsin Pollinator Protection Plan, which includes a list of recommendations or standards for avoiding chemical drift. The recommendations are voluntary and, as of yet, no funds are earmarked to compensate farmers for bee kills.

Farmers must seek recovery for crop and other damages on their own

Bottom line, farmers are entitled to compensation from the applicator for any damages resulting from chemical drift. The trouble is getting it. It's highly unlikely that the applicator will show up at the door and offer to pay for any losses themselves. Best case scenario, the farmer could try to work out a settlement. Most likely, this will be done through the applicator's insurance provider. Otherwise, the farmer could file a lawsuit. With that said, lawsuits involving chemical drift are time consuming and costly. Moreover, a favorable outcome is unreliable. The outcome often turns on idiosyncrasies in the law and very nuanced facts.

Chemical drift lawsuits typically involve one or more of four main claims: Trespass, nuisance, negligence per se, and negligence. Oftentimes lawyers will include all of these claims in a lawsuit, as one never knows what will actually stick once all the evidence is presented.

Notably, the Minnesota Supreme Court has ruled out trespass claims for cases involving chemical drift in Minnesota, see *Johnson v. Paynesville Farmers Union Cooperative Oil Co.*, 817 N.W.2d 693 (Minn. 2012). Other courts in the country have come to similar results, and the Wisconsin courts could very well follow suit. In *Johnson*, however, the Minnesota Supreme Court did conclude that negligence and nuisance claims could be pursued.

☐ *To prevail in a chemical drift lawsuit a farmer must provide evidence of actual damages and ideally that the applicator acted negligently*

Without getting steeped in the intricate details of the potential legal claims, the overarching takeaway message for farmers is that to prevail in a lawsuit the farmer

generally must present solid evidence that she incurred actual, tangible damages. Damages could include destroyed crops, lost sales, costs incurred from health impacts, recordkeeping and other burdens in connection to the investigation, costs required to undergo extra measures to control weeds, and so on. The mere presence of pesticide residue alone would likely not be enough.

1. Damages from taking crops out of organic production may not be recoverable

Organic farmers must take special note that in *Johnson*, the Minnesota Supreme Court concluded that damages from loss of organic certification and taking crops out of production are not recoverable in a chemical drift case. That's because the court interpreted the National Organic Program (NOP) regulations governing pesticide contamination and organic certification—namely 7 C.F.R. § 205.202(b)—to not apply when contamination is caused by drift, as opposed to the intentional application by the farmer. The *Johnson* case was brought by organic farmers who detected pesticide levels from chemical drift on their organic crops. A certifying agent from the Organic Crop Improvement Association (OCIA) told them that they had to take their organic crops out of production and revert their transitional crops back to the beginning. The farmers did exactly that and obviously incurred damages as a result. However, the court disagreed with the OCIA certifying agent's interpretation of the NOP regulations. The court concluded that these steps weren't required by law. In other words, because it wasn't necessary to take the crops out of production, the farmer couldn't recover related damages.

The lesson here for organic farmers is to not presume that organic crops must be taken out of production if they are damaged from chemical drift. The farmer should seek clarification from the certifying agent. The farmer could also challenge a certifying agent's decision to withdraw certification or require organic crops to be removed from production if it feels appropriate. Otherwise, the farmer might not be able to recover any resulting damages.

2. It's helpful to show the applicator acted negligently

In addition to actual damages, ideally a farmer would be able to show that the applicator acted negligently—or failed to act like a reasonable person would in similar circumstances. An applicator may be found negligent if, for example, she applied the pesticides on an extremely windy day or in amounts above and beyond what are generally used, if the crop duster missed the target crop, and so on. Part of acting negligently may include that the applicator should have taken special care because she knew that the adjacent property was certified organic.

What should I do if chemical drift occurs?

With the overview of the law in mind, farmers can take the following steps if their farm falls victim to chemical drift.

Be safe

The health and safety of anyone exposed to chemical pesticides is top priority. For medical emergencies call 911 immediately. Call the Poison Center at 800-222-1222 if people have been exposed to find out exactly what to do—even if there are no symptoms. Change out of any contaminated clothes, and put them in a plastic bag for testing if desired.

Report the incident as soon as possible

Report drift complaints immediately. Delay may prevent the agency from conducting a thorough investigation and finding violations.

To report chemical drift in Minnesota, call the MDA Duty Officer at 800-422-0798 anytime. You can also call the MDA Complaint Line, 651-201-6333, Monday through Friday, 8 a.m. to 4 p.m. Or you can file a written complaint online through the MDA website: www.mda.state.mn.us/chemicalcomplaints. You must file a written complaint to seek compensation for a bee kill.

To report chemical drift in Wisconsin, call 608-224-4500 between 7:45 a.m. and 4:30 p.m. weekdays. For more information, you can also email DATCPpesticideinfo@wi.gov.

Record everything surrounding the incident

Any information you can collect during or immediately after the incident will help the state agency inspector resolve questions about potential drift issues. This evidence can also be used in a lawsuit to recover damages, if necessary. Take pictures or videos of any noticeable damage to crops or of the applicator in action. Write down the applicator company's name, vehicle markings or colors, airplane applicator's N-number, or ground applicator's registration number if you can see them. Take written notes of anything odd about the equipment being used or the site being treated. Be sure to also collect information on the wind speed and direction and notable weather conditions such as temperature and precipitation.

Assess and keep records of any damages

To assess your damages, ask questions such as: What's the value of my production? How has the drift impacted it? If crops are damaged and produce is unsellable, be sure to maintain former sales records to prove lost sales. Take note of the going market prices for these crops at the time. Keep records of any money and time spent on the investigations and recovery, including testing samples, replanting crops, adding weed control measures, and so on. If anyone incurred health issues, keep records of hospital or doctor bills and other related expenses.

Contact the applicator's insurance provider

The applicator is responsible for having insurance to cover pesticide misuse, including drift. If the state agency finds that the applicator violated the law and issues a financial penalty, the insurance company might agree to a settlement with the farmer to cover some or all of the damages incurred. The state agency inspector should be able to provide the insurance contact information. If not, you might have to contact the applicator directly to ask them for it. You might decide to do this yourself, or have a legal representative do it on your behalf.

Consult with an attorney to evaluate whether to pursue a lawsuit

If you're not able to recover damages directly through the applicator or their insurer, your last resort may be to file a lawsuit. Pesticide drift lawsuits involve rather complex legal claims and strategies. It can be a very timely and expensive journey, and there's no guaranteed outcome. Oftentimes these sorts of cases are settled out of court. An attorney can help advise you on the strength of your case and what the best route is going forward.