



## Episode Title: FIFRA Hot Topic Issues -- A Conversation with Jim Aidala

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**Lynn L. Bergeson (LLB):** Hello, and welcome to *All Things Chemical*, a podcast produced by Bergeson & Campbell, P.C. (B&C®), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I'm Lynn Bergeson.

This week, I was really excited to sit down with Jim Aidala, Senior Government Affairs Consultant at B&C and its consulting affiliate, The Acta Group, to discuss FIFRA [Federal Insecticide, Fungicide, and Rodenticide Act] hot topics. For those of us who work in the complicated and ever-changing area of agricultural and biocidal products, federal and state regulation of agricultural products is often really hard to understand and monitor. Jim knows this space better than anyone, having worked on the Hill, having led EPA's Toxics Office, and is now serving the private sector. We discuss tip-of-the-spear issues in 2024, including what to expect in pesticides when electing -- after all, the 2024 elections are under way -- the Endangered Species Act and the regulation of agricultural chemicals writ large; Pesticide Registration Improvement Act (PRIA 5) issues, as they are known; new policies relating to so-called "free-of claims"; and the regulation of pesticide devices. It's an awful lot of real estate, but we enjoyed the ride. Now here's my conversation with Jim Aidala.

Jim, welcome back to the studio. I am always thrilled to speak with you.

**James V. Aidala (JVA):** Always thrilled to be here, Lynn, partly because I work for the firm. Other than that, I'll have a good time, too.

**LLB:** You are, in my humble opinion, Jim, one of the world's foremost authorities on all things FIFRA, so happily, that's what we're going to talk about today.

**JVA:** Yes, funny thing about that.

**LLB:** Let's kick it off and just kind of dial back a minute and look at the big picture for 2024. What do you see as the most important issues with which EPA and registrants in the space will be dealing?

**JVA:** Certainly for registrants, and even all of EPA -- and all federal agencies at some level -- if you haven't noticed, it's an election year. I just wanted to start a little bit with what it means, as a former political appointee of an administration facing both, literally, a reelect campaign as well as in particular, when I left the government, it was 2000, getting ready for -- and Al Gore was kind of a reelect, of a certain kind of way, even then. But I was around for the '96 reelect, too. That dynamic, I don't think, has changed.

What they'll face this year, anywhere across again any agency -- but I'll focus on EPA and pesticides even, of course, for our registrant community and any other stakeholders. Listening is -- you're going to talk about completing priorities, right? Again, the Administration's going to do that if you haven't seen the ads already. Promises made, promises kept, that kind of thing. For pesticides, that's especially going to be two things. One is PRIA was achieved, so how's PRIA going? But even moreso, the big sort of Damocles (and any other metaphor you want to use), the ESA [Endangered Species Act] progress. They have made a lot of progress. I'm sure we're going to be talking about that.

**LLB:** Right. Meaning the Endangered Species Act, for those listeners who may not be super familiar with that. Also PRIA is the Pesticide Registration Improvement Act.

**JVA:** Right. And if you're not familiar with ESA and you're a registrant, you've really got a problem. But that's another discussion.

Anyway, but then the -- again, we'll get to that and I'll explain in more detail why. But -- and then the usual press of business! There are registrations to get done, court decisions to deal with, like dicamba and chlorpyrifos. I think these are, again, things we're going to talk about this morning, then also juggling the budget and just getting the work done, because one of the most important things about the pesticide program at EPA is that it just moves a tremendous amount of decisions through the system. I used to like to say, "We make more decisions in a day than the rest of the Agency makes in a month, frankly, probably about a year," just because of the amount of decisions we'd have to go through. I think at one point - - I don't think the number's ever gone down -- it was about 5,000 decisions a year are made technically in the pesticide space.

That's what an election year means, and especially about trying to make sure that you've got your priorities, not only in sync with the Administration, but they'll ask for a list of what you've done, in other words, how you've been doing with your homework. From the White House, they ask that of all the appointees across the government, I suspect. I know at EPA, they did. You list those up, and you slice and dice them to show that again, promises made, promises kept. Last but not least, on the election year part, I'd say that yes, it is an election year. We kind of know who the candidates are going to be. If Mr. Trump is elected, I'm not going to try and be super partisan, but if Trump is elected again, you've got a real exodus from people at EPA, I would expect. So you'll see anybody at the GS [general schedule] 15 level and above really looking for the exits if they can retire, if there are other opportunities.

Whether that's right or wrong, or they're extra paranoid about the political leadership that would be incoming and things, forget about all that for the moment. Just simply as a logistics consideration, if you have all those vacancies suddenly arise beyond the usual attrition rates, you're going to have a problem with everything from losing institutional memory. You're going to have vacancies that have to be filled. That takes time. You're going to have new positions that open up, and you have to recruit. And you'd be recruiting in a system where -- at a time, I'm sorry -- at a time when people are worried about what the politics of EPA may be and things like that. It'd just be another consideration of the

potential turmoil that would potentially ensue. In 2025, -- again, that's not a reason to elect anybody or not. I'm just saying that's a practical fact if Mr. Trump is elected. I'll stop there, and I think we can move on to some other particular issues.

**LLB:** Let's focus on the Endangered Species Act. It's one of these niche statutes that is not broadly talked about. It's not like the Clean Air Act, or Superfund, or stuff like that. Maybe you can help our listeners understand why it's important in the ag community and what might be in store for EPA's work on ESA the rest of this year.

**JVA:** Sure. ESA -- even though for an EPA hound -- it's not up there, as you say, but the Clean Air Act or Superfund or even the Clean Water Act. But for anyone that's in that space worrying about species protection and -- I'm just going to say broadly natural resource habitat preservation, and things. It's huge, right? It's *the* statute. The statute enacted in 1974, as applied to pesticide activities, because pesticide activities are a federal action, and ESA applies that you have to take considerations of potential harm to threatened and endangered species before you take any federal action, about any federal action. A pesticide registration is considered that.

As a result -- and this is not altogether news, even though this issue itself has been litigated over time -- EPA has tried to comply with ESA a number of different times in a number of different ways over the years, and in particular since about 2000, there's been a long list of litigations basically saying that EPA has not complied. The courts have found -- it's a sort of procedural matter. Where's your EPA -- does EPA have a piece of paper that says, "Here's the ESA assessment, and we think we comply," separately, whether that's true or not, in a certain way. "Where is your exchange of any blessing from the authorizing agency?" which in this case is the Department of Interior. That should perk up any student of bureaucracy, that "Hold it. I thought you said EPA."

"No, I'm talking about Department of Interior."

"Okay."

Let's not even talk about fish that are endangered, because the fisheries are controlled by the Department of Commerce, and so that's a separate bureaucracy, in addition to those other two I just mentioned. You've got an imposition by the courts that's saying, "That may be all very interesting and complicated, and it may be interesting that EPA does an ecological assessment." Of course, they worry about protection of species and habitat and everything when they okay your pesticide, but hold it; that's not your jurisdiction. You have to have, in effect, clearance under ESA, which is under the jurisdiction of someplace else. The net result has been an attempt by administrations starting in the early 2000s -- in other words, more than a few -- to try and figure out a way to make a clear integration between ESA and FIFRA, our statute that governs pesticide regulation. As a result, the problem has been interagency cooperation, which, I literally -- and I know this is just a podcast not doing slides -- but I have a slide of two snarling dogs, a depiction of interagency cooperation. It's kind of been like that.

**LLB:** Yes, forever.

**JVA:** Not nasty. In fact, the two dogs are our dog at the time and a neighbor's dog. They were very big friends, but they were snarling at each other. That's kind of how interagency cooperation happens in Washington. There have been many attempts -- as I like to say, sometimes, in my snarky mood, "Many have tried; all have failed." So many have tried, all

have failed to try and integrate the two programs. Current time is -- and the best news in recent history is -- that the Biden Administration has really spent a lot of time and energy -- successful energy, frankly -- to try and integrate the two programs. That's partly driven by the absolute need in light of court decisions, but it's also the leadership of a couple people they've appointed, in particular Jake Lee, who I think we've had on some other podcasts.

**LLB:** We have. He's been on the program.

**JVA:** Yes. Jake's a -- just a real leader in this. He's got incredible credibility with all sides of the issue. That's very important to try and come to some way to forge a path ahead. So they made a lot of progress, but by definition, it's such a tough issue that the progress doesn't come without whatever phrase you want to use: hiccups, problems, bumps in the road. Use your metaphor of choice today.

The net result now is they're making progress. They've announced what they -- I'll just go through some of the factoids, and it's in our Forecast document. I'm sure we're going to be talking about people should be referencing our Forecast document for more precise details about all things EPA in environmental and regulatory spaces. But that said, the particulars -- about two years ago, 2022? -- they put out a work plan that was very candid in its assessment of how troubled the ESA progress has been over the years. To cut to the bottom line, it said that -- in writing, which is part of the candid admission -- that the process that had evolved to be how to comply with the ESA for a pesticide registration, the current process at that point in 2022 would take 150 years at least -- and frankly, probably more like 350, to be honest -- to complete all of the ESA assessments for pesticides. That's simply unacceptable. By the way --

**LLB:** Yes, that's a wacky number.

**JVA:** Sure. And by the way, the courts kind of said that, too, in so many ways, sometimes rather explicitly. They said, "We're going to set off on a path to try and figure out a way to do it in some kind of reasonable time and reasonable way." Okay. About 15 months later -- I think that was in the summer of '23 -- they put out two things in short order after each other. One was the Vulnerable Species Pilot (VSP), which was an attempt to say, "Here's how we think a system could work for" -- I think it was 27 pilot species, showing some maps and particulars, not really naming individual chemicals in a sort of regulatory sense, but these kinds of chemicals, these kinds of species, and here's how it could work.

Soon followed by literally what they called the herbicide strategy, which is how a plan could work for all herbicides. Again, to cut to some of the real bottom lines -- because as you might imagine, these documents are long. The supplements to them are in some cases hundreds of pages, how it could work, and the details, and all that, which obviously we're not going to get into this morning. It said, "We're going to take the kind of mitigations that we're used to in the pesticide space for labels" -- which are basically buffer zones, 100-foot buffer, a 300-foot buffer from the treated area, maybe because of potential drift through the air -- aerial drift -- or potential soil offsite -- soil movement through the soil. We're going to have a buffer zone or require buffer strips where you plant crops around the edge of the field, and then if some pesticide might have some potential runoff, it would have to go through that buffer strip and then basically, a pad, if you will, to absorb some of the potential small residues coming off the field, to make the residues at the end of that buffer to be even less.

These will all reduce potential exposures to all the critters near that place of application. In particular then, it matters whether those “non-target species” -- in the jargon of the way EPA does things -- those non-target species that could be threatened or endangered -- which is a term of art from ESA -- that would be “not in harm’s way.”

That is a concept that resulted in we’ll have basically off-the-shelf kind of 100-, 300-foot buffers. Another document -- or another part of the proposal on the herbicide strategy -- was to then say that we will have a point system. If you have a buffer strip, you get so many points. If you use contour plowing, because that reduces the potential for off-site movement through the soil in a certain way -- and EPA has got all this figured out over the years of regulating pesticides -- you get so many points. You get so many points if you use certain aerial application techniques, thicker droplet size, for example. Heavier droplets have less drift off site through the air, and so on and so on. I like to say, “This works on paper.”

You’re going to figure out what species are nearby. You’re going to figure out from the maps from the Endangered Species Department, meaning Department of Interior and Department of Commerce, where the particular critters that need to be protected are. You would then apply those mitigation techniques to the label. And by the way, EPA proposed that we’re going to have a label system that is going to be electronic. Therefore, we could change these labels instantly, literally, with the push of a button, when we make these decisions about what mitigations and what techniques will be needed, in light of where the species are, the habitat maps and things.

We can instantly make this system protect the species on that, quote, “labeled use” of the pesticide. Again, it very much works on paper, in concept if you will. But then, we put this out, during these documents I’ve just described, in light of the species plan and the herbicide strategy. By the way, the herbicide strategy will be soon followed by the insecticide strategy, the disinfectant strategy, the fungicide strategy. And the reason we’re calling them an herbicide strategy is we can’t go through all -- I think it’s a couple hundred, maybe more, herbicides one by one. Again, if we have a system that’s going to take hundreds of years. We’re going to just say, “These are the kind of mitigations we’re going to impose on all herbicides,” given characteristics of the ecological profile from the long-standing EPA ecological assessment as part of your registration, the net effect.

The net effect is there’s going to be a whole lot of change. There’s going to be a whole lot of these large buffer strips. It’s not clear what some of the mitigation options are going to be that are practical for a grower. Then we have to talk about the response to all this. What’s the response? The response is “Okay, this is interesting. But how reliable are the maps?” Real issues there. “I really don’t think that the map that says there’s literally hundreds of thousands of acres that need to be protected in this area for a particular species. It really is something much more limited.” How do you -- who’s going to judge that? Who’s going to say about that? Who’s going to determine what that map really ought to be? Those are some of the responses back, as well as the mitigation options.

“I don’t -- I can’t do contour plowing, given the nature of my operation. I can’t have a buffer strip.” Apparently, 40 percent of farming operation land is leased. In other words, “I don’t own the land. I can’t put a buffer strip in. I don’t control the land. I might think it was a good idea, but I don’t own it.” Things like that. The pushback was pretty strong in some of the comments. Some of the comments -- I don’t think it’s unfair to say they -- and literally I could cite things where the quote is virtually, the same as the following: “This will end agricultural production in America if we had to this.”

**LLB:** In your view, Jim, that's not an overly dramatic assessment. This looked like a great plan on paper, but operationally, it was DOA [dead on arrival], I take it.

**JVA:** Operationally, I wouldn't say DOA, just operationally, "You've got some explaining to do." How can you make this work? We don't think this will work for large fractions, *i.e.*, all, current production methods. Then EPA, along the way, had said at various briefings -- as you might imagine, with something this large and complicated, there are lots of briefings and lots of forms, lots of different staffers talking -- ones who are, for lack of a better phrase without portfolio, and others that are people that are just trying to do their day-to-day job. With all due respect to all those players, some of the rhetoric around it was, "We want to have time to really look at additional data to refine all this. We've got court deadlines. We've got 1,100 active ingredients. We have so much work to do. We're just going to put these mitigations on a label, and see you later." Certainly it was taken that way, since some of the rhetoric about "This is going to end ag production."

The bottom line, EPA has now come back and said literally, in the past literal few months, in November 2023, they issued an "update," quote, unquote. The update seemed to say that there is a lot more potential flexibility. Not so much flexibility in how to -- if you need this mitigation, you need the mitigation -- but how it's going to be refined. EPA *will* find a way to take the time about where precisely the endangered habitat critters in their habitat maybe take more time to say, precisely what are the application methods, and the application rates, and all this sort of, shall we say, more site-specific information about use, and the chemical, and its characteristics. That flexibility would be allowed to be considered before something became final, whatever final means in this sense.

At the same time, they also, notably to me, announced that they were going to suspend the VSP project. In other words, all that was listed in that first document I mentioned would be suspended, and further considered, and refined, and adjusted, and things like that. To me, that was a real sign of acknowledging that they needed some kind of flexibility. Not sure what that's going to look like. It's got to be incorporating some kinds of better mapping, better, precise information about exactly what the chemical is and the critters involved.

Then, that was followed, just recently, literally in the past month or so, in February of this year, 2024, with a further set of announcements about -- I'm sorry, I think that's when they bailed on the VSP, on the species pilot. It was just this February, not last November. Sorry. But the point is that just now, they're announcing all these ways to try and be more flexible. The update in November 2023 did announce that they wanted to be more flexible. They will be responding to comments and other things. The net effect was they did suspend it now in 2024. Again, it won't -- it doesn't mean it's going to go away. It just means we need to take that time out and think more.

**LLB:** Would you expect that to be this year pre-election, Jim, or is this something that's going to percolate along and kind of roll out?

**JVA:** Both. I'm sorry to cut you off there, but both. The reason is because there are some court deadlines about getting some of these things done. The herbicide strategy is to be done by, I think, July 31 of this year. They'll probably be late on that, but it'll be this year. One of the deadlines -- this was a settlement to one of the many cases involved in the litigation -- and it has a deadline. I don't know why. It says it's January 17, 2025. Hmm. That's exactly the last day of business for the current EPA.

**LLB:** Sounds awfully close to inauguration.

**JVA:** Yes. If Mr. Trump is elected, that's the last day EPA's in business, on Friday before the inauguration next Monday. Or reinauguration of Mr. Biden, which will make everyone feel relieved in many quarters, and disappointed in others. The upshot is that they can't take another ten years or 20 years to figure this out. That's to their credit, and part of the press of trying to figure this out sooner than later, finally. Again, this has officially been a requirement since 1974. It's not like, "We need to have a few more months." It's like you've already had a little bit of time, and that's some of what the judges are saying in some of this litigation. The threat is out there. They need to get this under way. Showing some flexibility, some ways to try and incorporate better mapping. Part of the February announcement was better -- an MOU [memorandum of understanding] with USDA [the U.S. Department of Agriculture] about revising those maps. It's an incredibly important linchpin to all this is exactly where the critters are that need to be protected, and then go from there about what's the best way to protect that habitat and things. Those are all the important components. I spent a lot of time on this because it really is important, and this really will be a dominant issue for this year.

**LLB:** Yes, it's just an insanely complicated area. You're dealing with three government bureaucracies, highly technical issues, very fact-specific, very regionally diverse. I think, Jake, and EPA leadership, get a lot of credit for moving this analysis through. Unsurprisingly, the rollout that has been since tweaked, the VSP, is a work in progress, but at least it's moving the needle, right?

**JVA:** Absolutely. I'd agree with that and be even more laudatory. But again, it doesn't make the issues less complicated or less potentially fraught with risk, either to species or the farmers. Either way, because again, if this isn't done right -- sounds another easy cliché. If it's not done right, it could really cause some harms, again, to species or for farmers. That's the concern, and EPA is -- the good news is EPA is aware of it. The bad news is this is pretty complicated.

**LLB:** Let's move on to PRIA. Maybe you can begin, Jim, by explaining a little bit why this is such a huge concern for many of our clients and others in the FIFRA community. There's been a lot of talk about it. Where has it been, and where is it going, in your view? Maybe evaluate what progress is being made and what you see as some of the major challenges for further progress in PRIA.

**JVA:** PRIA fundamentally is one of the anchors of funding for EPA's work in the pesticide space. By definition, it's pretty important coming out of the gate. It's that part of the budget that comes from fees that are submitted by registrants when they put in a label for review. In some cases, it can be -- I think it's north of \$1 million now for some of the biggest, most complicated kind of applications, a new use, a new food use, active, and that kind of thing, as well as more quote "routine" things, like adding a use to a label, important to all registrants and all of our, the regulated community.

It's important because it *does* matter tremendously how much -- first of all, just how much money is involved. That's step one. But step two is how do you know when you're going to get a decision out of the system? PRIA has deadlines. But because of the budget issues in the government, EPA-wide, it's not OPP, but EPA-wide, government-wide. There are concerns about being able to meet those deadlines that are in the statute. Another little trick of PRIA is that Congress is supposed to be guaranteeing a certain amount of federally appropriated dollars to be there, shall we say, the government share of the deal, if you're going to charge these fees from the regulated community. Congress, in the last number of

years, not just the last year or two, but seemingly in recent history, has been not appropriating the share that's in the statute for the federal contribution.

The net effect is a shortfall, if you will. As a result, you got problems with meeting all the things that had to get done. It's hundreds of different kinds of actions that EPA takes, complex table of what it's going to cost you, the applicant, and so forth. That effect, though, is, "When am I going to get my decision? And can I predict it?" Because businesses really love predictability. In the pesticide business, if you miss by a couple of months, it might mean a year, because getting an approval in December ready for the next growing season, comparing getting it in March, when people are already planting their crops, you lose a year of potential market access. That becomes a problem when EPA [says], "We just missed it by a little bit." Well, hold it. That little bit just cost me a year, or whatever, more.

**LLB:** No, it has huge consequences.

**JVA:** PRIA deadlines become the issue. That's a long-winded way to say why PRIA deadlines are very important, and EPA's had trouble meeting them. Now, under the statute, *per se*, they rarely miss a PRIA deadline, *per se*, when they report back because they basically go to a registrant and say, "Sorry. We didn't get finished. We have to extend your PRIA deadline." You might want to initially say, "But no. I need it!" And they might say, "Tell you what. If you really need a decision, we'll just deny your application." That doesn't happen. There have been very few pesticide registrations that have been submitted that have affirmatively been denied. Most of the time, if you find out it's not going to make it -- say, for safety reasons, important stuff, let alone logistics, let alone market changes, whatever it is -- they withdraw the application. But if you get rejected, that's a bit of a black mark. So very, very few clients -- it's sort of a trivia question: How many times has anyone ever been rejected? Most of us, even us old-timers, can't really think of one. Maybe somewhere in the bowels of the system there is, but it's almost never rejected. You suffer through --

**LLB:** If I recall, Jim, too, even if it *is* rejected, isn't there a waiting period before you can actually challenge that in court?

**JVA:** Sure.

**LLB:** People might say, "We'll just sue EPA." Well, not so fast.

**JVA:** I'm glad you said -- when you started there with "two," I thought you were going to tell me there were two of our clients. Anyway, but the --

**LLB:** No, no, no.

**JVA:** No, the upshot is no, you'd have to wait two years to even litigate if you felt so strongly that the deadline being missed was so horrible. The net effect is you have to suffer through these extensions, and that's been an issue. That was a huge issue in the current reauthorization, what's called PRIA 5, which is the fifth reauthorization -- excuse me -- fourth reauthorization, the fifth time PRIA has been tinkered with, since the early 2000s, which is when it all started. The PRIA 5 has provisions in there, to -- yes, you're going to get an increase in fees, because every time, of course, the fees go up; they don't go down. As a result, you have accountability measures attempted to be built in more and things like that.

EPA is trying to respond to that in earnest, trying to have better tracking systems, better disclosure of all that. Just because we say we met the deadline, how many of those were



because of a lot of renegotiations or just because of missing it on the merits, if you will? A lot of times, EPA misses it because there's information that's missing as they go further along that they need -- or they believe they need -- by the end of the assessment process. But then you get into an issue of, "Hold it. If you would have told us sooner, we would have gotten back to you sooner," and so on and so forth. That's all part of attempting to figure out a way to reduce the need for the renegotiations, be more transparent and accountable, and one of the Holy Grails, by the way, is to have a kind of an Amazon or Fedex package tracking. "Where's my PRIA package?" And you could pull it up on your desk.

**LLB:** Wouldn't that be nice?

**JVA:** Yes, and know where it is precisely, and when to expect it. Not kidding. I mean, that would be nice, and they're working on it, and they hope to get that. I'll just stop there for now on PRIA for the moment, because there's one more thing that we'll get to, I think, when we talk about environmental justice, which is as part of PRIA 5, they put in a requirement to have bilingual labels, and that's an important environmental justice issue as part of better, clear, and predicting better able to be communicating to at least some large fraction of the farmworker community since a lot of those folks are Hispanic and speak Spanish.

**LLB:** Great explanation, Jim. Appreciate that. Just quickly, I know the 2018 Farm Bill is up for reauthorization. I'm guessing we're not expecting much in that regard, except perhaps to have it reauthorized, right? Or extended?

**JVA:** Yes. Congress, in its wisdom, like many things. They -- in 2018, it was a five-year Farm Bill, so it had to be renewed, or bad things happen if a Farm Bill expires. It's a longer story that real experts know about. Bad things happen, and that would have happened in 2023, so they extended, in a not surprising way. They just reauthorized it for another year, to 2024. That's now. Do you really think they're going to be trying to get -- it would expire this year on October 1. Gee, that's only a month before the election, so it's expected that they'll just extend it another year and punt, in the greatest congressional traditions of punting it into next year.

Could it have a few tinkering before, as part of the reauthorization, quote unquote, "simple" reauthorization for another year? Again, there's some speculation about a couple of things, but mostly it's expected just to be reauthorized for a year and punted into next year. And when it happens, people have asked, "Pesticides really doesn't have much to do with the Farm Bill." That's sort of true, generally. However, in particular, if it is done at all this year, which again, I just predicted is probably not going to happen much this year. But if and when it did, Senator Stabenow, Chairman of the Ag Committee, she's retiring at the end of this year, leaving the Senate. But as Chairwoman, she is saying that she really doesn't want to spend any time on pesticide issues. It's especially a reason why, even if there was a big Farm Bill push this year -- not expected, but if there was, you wouldn't see much pesticide action.

When you do it, if that's next year, the speculation is, again, if there's a -- depending on who's in control, right? Republicans or Democrats in the House, or the Senate, or both, or one, or whatever. Again, to be determined, let alone the White House, as we discussed earlier. Some of the issues for registrants are things like clarifying that you can't have states saying different things than EPA does about the safety of a pesticide. If a state doesn't like a pesticide or thinks it's unsafe for whatever reasons, especially as it might be applied in their state, well, they can just not grant a state label. Then you can use it in the state, but not say something on their approved state label, contrary to what EPA's label says, which on its

face, is the current statute. But I think that's especially about things like cancer warnings and some other stuff. I think the -- it's a Prop 65 (Proposition 65) kind of issue because there has been some back and forth on a couple things with California -- the People's Republic of California.

**LLB:** Right, right, and First Amendment rights.

**JVA:** And stuff like that. There are things like that that are part of it. But then, also things like the long-standing issue of water -- needing a Water Act permit -- NPDES [National Pollutant Discharge Elimination System] -- for discharge of pesticides over waterways. Well, hold it. I thought EPA worried about that. That's what EPA said, even under Obama. They said -- they told the courts it was unnecessary to have some kind of redundant permit process under the Clean Water Act, but the courts disagreed, so EPA has a water permit program, and some people think we should just eliminate the kind of duplicative bureaucratic thing, and a few other things that go on in the pesticide space. That could be part of a Farm Bill, if and when it comes. Again, won't be before 2025, probably.

**LLB:** Jim, you mentioned environmental justice a moment ago, and in your opening remarks noted, that, in an election year, there's always some emphasis on promises made and promises kept. How might that play out, if at all, with regard to the Office of Pesticide Programs?

**JVA:** Again, the good news for the Pesticide Program as a bureaucracy is that they've had long standing for about 30 years to work on protection programs, something -- when I first joined up in the Administration under Mr. Clinton in '93, it was a hot issue because it was all brand new. We managed to -- there was some opposition and other things, old history. But we got it through, put in place.

The Obama Administration had an update to it, a pretty significant update, changed a number of things: enhancements and better and more training requirements and other things. That is all put in place. Things take a long time. I think by now all but one state -- if there's one holdout left on changing the certification and training programs under the states. The worker protection program is very clearly an environmental justice initiative. This Administration has also emphasized that in a number of their decisions on pesticides, including, for example, it might be some manufacturing facilities of pesticides and worrying about that, some of the places where pesticides are used in a concentrated way, other kinds of things that just talk about, again, the general initiative of environmental justice and potential impact on disadvantaged communities. It has been an emphasis for this Administration. It's not that it's been absent from past decisions in the pesticide space, but it seems to be something --

**LLB:** It's just more prominent now, I think. That's my take.

**JVA:** Sure. Again, not just sort of the farmworker directions on the label of the pesticides, but again, nearby communities. It's not that people at EPA never worried about bystander risk. That's been an emphasis for a number of years now across administrations, because this is part of the current way of you evaluate a pesticide before getting a label approved. But bystander risk, especially for what kind of communities live nearby an area that may be a concentrated agricultural production area, and things like that. So those are just emphases that when -- not too much is added -- they're not new, but they're emphasized, an enhanced concern -- I guess I'll use that phrase -- for this Administration.

**LLB:** What pesticides, or chemicals, ag chemicals in particular, might we be hearing more about later this year?

**JVA:** Two in particular, for sure. One is chlorpyrifos, the active ingredient that keeps on giving, for suppliers and bureaucratically, because there's been such a long history since the earliest days of FQPA [Food Quality Protection Act]. EPA, when this Administration came in, they basically seemed to say very resoundingly, "We're going to revoke all the tolerances on chlorpyrifos. There will be no more use of chlorpyrifos." Of course, they still have other organophosphates to evaluate as part of the general registration review program. Those are to follow, but for chlorpyrifos, revoke all tolerances, and therefore all the uses will have to be canceled.

That was challenged. Long story short, there were, even in EPA's document supporting revoking *all* tolerances, it said that there were 11 tolerances that, at least in partial use, would still pass FQPA, with all the bells and whistles in FQPA: extra 10X safety factor, consideration of children, all the things that registrants have come to know and love about FQPA, and other stakeholders, too, that like various provisions and support those strong protections in FQPA. The judge, in a certain -- I admit I don't know -- it's in Missouri. Fifth district? You're the lawyer, Lynn. It said that the -- not Fifth District, Eighth.

**LLB:** Yes. Yes, I think it was Eighth.

**JVA:** Eighth District. I'm sorry, Your Honor.

**LLB:** It's Eighth Circuit, right?

**JVA:** The Eighth Circuit said that EPA was arbitrary and capricious when they revoked *all* tolerances when, by their own documentation, some uses still potentially met the FQPA standard. Along the way, the judge threw out the entire revocation rule, so all the tolerances have now been put back on the books. But none of the uses are there, except for some other last uses. They were all canceled, quote, "voluntarily," and all cases were voluntarily canceled by the registrants. But some uses were the last ones to go and ones that reflect this partial use.

For example, cherries in Michigan, I believe, is one of them as an example. Soybeans, a certain part of the soybean production regions, could pass. Maybe not about soy, but certain crops. Again, there's only 11 uses, I believe. It is expected that those will now have to be considered by EPA for registration to be put back on the books. I think there's going to be issue -- that's the factual state of play as we speak.

At the same time, assume EPA gets those petitions to -- excuse me -- the applications for registration for some of those uses. There's going to be a requirement for EPA to then consider that as part of the cumulative risk cup for organophosphates. That may complicate things. By definition, I can't predict whether that means they would be used or not used, or approved or not approved. That's just going to be one of the new hurdles EPA is going to have to wrestle with, to say whether that product should be allowed to be continued in whatever crops in even a partial way, and everything else. Because it's got to be consistent with the cumulative risk cup, as required -- also by FQPA -- for the OP [organophosphate] assessments.

The last one -- the other one -- in the big headline news, again, because of some court activity, is dicamba, where the current registration of dicamba, which is for what's called

the over-the-top uses, which means it's designed to be used with the genetically modified seeds that are able to tolerate dicamba application after the corn (or soybeans, or whatever product and cotton, in particular) are growing, so over the top. It's a post-emergent use, and they can -- previously that would have killed the crop. Now with these new GMO [genetically modified organism] seeds, it'll tolerate dicamba application.

The court found that EPA had not followed all the right procedures and whatever else, and as a result, vacated that registration, right before the growing season started, at least in certain parts of the Deep South, where plants are starting being put in the ground. There was a lot of chaos for a short time: what's the status? Can you use it? Should you use it? What would happen? So on and so forth. EPA then went out with an existing stocks order. With all due respect to the judges that do any of these vacatur, it puts the actual pesticide that's in the hands of the farmer in weird limbo status. It is a pesticide, as you and I would call it, but not subject to federal registration if it's already in your barn. If you would follow -- Do you have to follow the label? Well, no, the label was just vacated. There's just nothing. It's just a can of stuff on your property, and should you use it or not? And so on and so forth. Depends on the tolerance in terms of the treated food down there.

Anyway, all that gets clarified when EPA is able to issue an existing stocks order that imposes some order on all that. The net effect for dicamba: they can use the material already in possession or in transit to the farmer, and can use that following the conditions that are on the label. Those are of controversy, in part because there's still a number of incidents that are often reported, even when the grower is purported to have followed the label. It's one of the issues behind the dicamba registration. So that's something EPA is going to have to chew on during -- what are they going to do about dicamba for the future? Okay, this year's sort of settled because of the existing stocks order. What's it going to mean for 2025, 2026, and so on?

**LLB:** Got it. I'd like to close out our conversation, Jim, with two thoughts, two topics that I think are super important. One is EPA's recent "free-of" claims policy, which many of us believe represents a reversal of decades of EPA policy. And then what activity is ongoing with respect to pesticide devices? Maybe you can comment quickly on both.

**JVA:** On both of those, I agree that it's unclear what "free-of" claims can be made. EPA was trying to parse something like bleach as a claim. "This product doesn't contain bleach." Bleach is a pesticide. Can be, depending on what you say about it. As a cleaning thing, it's not a pesticide. If it disinfects, it *is* a pesticide, even though it's the same chemical, and so on and so forth. But "bleach-free" is one thing because of not always a pesticide. They're now saying that you can extend that to things like "DEET-free" for a mosquito repellent. DEET is a particular active ingredient. Previously, for our listeners, they may recall that the law and regulations in interpreting the law have said that you can't have comparative claims. It's one thing to say, this isn't a cleaning product that has this stuff in it that can pull color out of your fabric and things like that -- bleach -- should you not realize it's bleach, even though it doesn't say it's a pesticide.

Along the way with DEET-free, which DEET's only real purpose is as a pesticide. So why isn't that a comparative claim? That's one of the things that the people looking at this, as you put it, a change. It certainly looks like a change in that regulation about comparative claims. To me, it's further extending out to -- could you say -- we just talked about chlorpyrifos? Some people think chlorpyrifos is really a material that should not be used. Could you claim your new insecticide product in Home Depot is chlorpyrifos-free? Isn't that a comparative claim, like DEET-free? Or something like that? It can say "dicamba-

free” and pick your -- whatever’s in the news that you think may be a problem. That, I think, is part of what EPA is going to have to wrestle with as they implement this so-called further interpretation of the comparative claim issue.

Then you ask about devices and simply that. Pesticide devices are a bit of another part of the black art of pesticide fine print, like treated articles. Have you registered your shower curtain lately? You don’t need to right now, but it’s another discussion. But the point is simply on devices, it’s a pesticide device. Is it regulated as a pesticide now? It’s regulated as a device. You don’t have to -- in simple summary, you don’t have to do near as much as a pesticide registration with a label in there and all the rest.

But again, EPA is trying to say, well, sometimes that whole world may need further clarification in what is and what is not a kind of claim or device. You say it’s just a device by trying to get out of the burden of filing a pesticide label and things like that. And in addition to the need, perhaps as pesticide devices become more important out there in the world, or just more prevalent, you’ve got an issue with the enforcement of all this. You don’t want companies who make these products to be caught in some regulatory net they didn’t even know they were part of. They weren’t trying to avoid any regulation. They just didn’t know. That’s always a classic case of when a regulatory agency starts to redefine who’s in, who’s out, and who has to do what. That’s always a concern, and that’s something -- if you’re in that space of “pesticide devices,” quote unquote, you want to keep an eye on it.

**LLB:** I really want to emphasize that, Jim, because we lawyers get kind of twitchy when EPA’s views -- and if you import a product in New York, Region 2, or import a product in EPA Region 4, in Atlanta, or EPA Region 9, in California, there’s an enormous diversity of views as to what is a pesticide device and what claims can be made with regard to the product. Many of us applaud EPA’s initiative to harmonize guidance on what is and is not a pesticide device. The space has become very, very populated as a consequence of COVID and post-COVID. The good news is relief may be on the way. The bad news is the divergence of views and interpretations among the regional offices continues to be kind of a real pain in the neck. Some of us wish the Agency would get on with that new guidance. The Agency has stated it will be a collaborative process, including stakeholders, so that’s something to look for later this year.

**JVA:** Yes, that’s another “Stay tuned, sports fans.”

**LLB:** Stay tuned.

**JVA:** You really don’t want to get me started on, quote, “divergent regional activities” in the pesticide space, as having been at EPA headquarters, having to deal with “Region blank did what?”

**LLB:** Right. Yes. We won’t go there now, Jim.

**JVA:** Yes, not my problem anymore.

**LLB:** But I do want to thank you, Jim, for a wonderful overview of things to watch for in 2024. Our listeners may wish to view our webinar, Hot Topics on FIFRA, which is now on our website, where Jim and our colleague Lisa Burchi go into many of these topics in additional detail.

And also, download our 2024 Forecast document. We have a large section on FIFRA, both pesticide issues here in the United States and also biocide and ag issues in the rest of the world. Our 100-plus page document is there for your viewing, and feel free to take a peek at it.

Jim, thank you so much for being here today. Your understanding and ability to explain these complicated topics are always refreshing and interesting. Really appreciate your time.

**JVA:** Sure. Happy to help.

**LLB:** Thanks again to Jim for speaking with me today about FIFRA Hot Topics. As promised, Jim delivered on providing insightful comments on agricultural policy and regulation and what to look for in 2024.

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