



## New Ruling on Pesticide Drift Makes Spray Applicators Vulnerable to Trespass

By: Daryn McBeth, Minnesota Agri-Growth Council; Jeffrey Peterson and Jessica Mitchell, Gray Plant Mooty.

Due to a recent Minnesota ruling, pesticide drift to a neighboring property may now subject the spray applicator to a trespassing claim. The Minnesota Court of Appeals ruled in *Johnson, et al., v. Paynesville Farmers Union Cooperative Oil Co.*, No. A10-1596, A10-2135 (July 25, 2011) that neighboring property owners in Minnesota may assert a claim against a spray applicator for trespassing if the spray caused actual damages to the neighbor's crops.



### What's happening in Minnesota:

In *Johnson*, organic farmers Oluf and Debra Johnson (Johnsons) sued Paynesville Farmers Union Cooperative Oil Company (PFUC) alleging that PFUC's spray pesticide and herbicide applications drifted onto the Johnsons' adjacent cropped fields and caused damage. The Johnsons' claims included nuisance, negligence and trespass. Allegedly, drift occurred on multiple occasions and caused impacted crops to lose their organic certification along with the higher

prices they command in the marketplace. PFUC argued that drift spray was not a valid trespassing claim because there was no physical invasion; consistent with an earlier Minnesota case that held odors and gases were not trespassing because there was no physical invasion.<sup>2</sup> The Minnesota Court of Appeals held that pesticide overspray could qualify as an unlawful entry onto the plaintiffs' land because, unlike odor and gases which only interfere with the *enjoyment and use* of the property, pesticide drift "descends and clings to soil or plants" and remains on the property in a manner that interferes with the Johnsons' *right of possession*. *Johnson* adopts the "modern theory of trespass," consistent with decisions in Alaska and Washington State.

### What's happening in nearby states:

Other Midwestern states have similar case decisions on odor and gas emissions.<sup>3</sup> The Iowa Supreme Court ruled in 1942 that noxious gases and odors were not trespassing because the gases and odors were not a tangible matter. Although other Midwestern states have not adopted the "modern theory of trespass" endorsed by the Minnesota Court in *Johnson*, the trend is concerning. The trend is also concerning for genetic drift of patented technology. Although not at issue in the *Johnson* decision, one can expect that non-GMO producers will argue that genetic drift interferes with the non-GMO producer's right of possession. Based on the reasoning in *Johnson*, a court would only have to find that any cross-

pollination interfered with the non-GMO producers right of possession and that the non-GMO producer was damaged by the cross-pollination.

### Best Practices:

Besides compliance with existing state and federal laws, spray applicators should have policies and procedures to reduce and address any drift concerns.

A best practices policy to reduce a trespassing claim should include:

- **Review Insurance Policies.** Existing insurance policies may provide indemnification for any third party drift claims; indemnification that requires the insurance company to defend the lawsuit and pay any settlement or judgment within policy limits subject to the deductible/retained limit. Policies should be reviewed as to any indemnification provisions, the scope of products covered by the policies and any exclusions that policies may include as to the application of the products.

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This article addresses the *Johnson* decision in Minnesota, the status of the law in other Midwest states and what best practices should be implemented to reduce a trespassing claim.

Although the best practices discussed above may be applicable, this article is not intended to address the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Minnesota Pesticide Law, and other state common law claims including claims for negligence, nuisance and strict liability. This article also does not address best practices for product manufacturers.<sup>4</sup>

# Member In Focus

**Company:** Short Elliott Hendrickson (SEH)

**Website:** [www.sehinc.com](http://www.sehinc.com)

**Location:** Headquartered in St. Paul, MN; plus more than 25 offices in 7 states



Founded over 80 years ago, today SEH has more than 500 employees, is the largest engineering firm in Minnesota and one of the largest privately held engineering firms in the Midwest. The firm has successfully grown from its traditional municipal engineering roots into a multi-disciplined organization which works closely with agricultural, and food/beverage industry clients.

SEH works with a broad range of clients around the United States — from curb, gutter and sewer work in a community of 1,000 people to large-scale flood and dam work for local governments, regional and state agencies, federal agencies, and a wide array of private clients in the industrial, mining and development sectors. SEH's diverse range of agriculture, food and beverage related services include strategic environmental permitting and compliance; renewable energy; water/wastewater; stormwater management; sustainability; and design-build services.

## Q & A with Scott Sannes, PE, Co-Director of Energy and Sustainability:

### What is new with SEH?



SEH has been fortunate to navigate the recent challenging economy very successfully. Our strength and stability are based on strong client relationships,

committed staff and a willingness to invest in new markets.

Renewable energy and sustainability are good examples of markets where we have transitioned some existing skills such as wastewater treatment to meet new needs such as harnessing waste by-products to generate energy. SEH has factored in

sustainable principles into its work for several decades as our mission is to make our world a better place. We know that our local solutions have a global impact, and we are stewards to generate sustainable solutions. At SEH, we strive to use sound business practices that help safeguard the environment, conserve energy and resources, minimize waste and limit any negative impact to the surrounding environment. We also support and contribute to the advancement, innovation and education of environmental policies and performance.

We've added staff as well, with the expertise to evaluate one, or several geographically-related organizations, to determine how an entire community, or individual ag producers can achieve cost and other savings through sustainability strategies.

### What are the key trends affecting your industry?

SEH understands the ag industry faces the traditional challenges of delivering competitively priced goods and services that satisfy hunger, quench thirst and enhance the quality of life for consumers. Our role as your consultant has evolved. While we can still meet your traditional needs, we are committed to working hand in hand with successful producers to protect the environment, meet economic goals and address social concerns—all while achieving top quality on thin margins, accelerating time-to-market and collaborating with suppliers.

### What are your legislative priorities?

SEH's legislative priorities are driven by the needs of our clients. We are committed to a vibrant agricultural economy, a thriving environment and strong communities.



The Minnesota Agri-Growth Council is an advocate for the state's food and agriculture industry. Founded in 1968, the Council is a nonprofit, nonpartisan organization that represents the shared interests of its 200-plus members, which include food and agriculture businesses, organizations and producers, as well as the service industries that support them.

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# Trade Mission to South Korea Expected to Shed Light on Farm Exports

Minnesota Governor Mark Dayton plans to lead a trade mission to South Korea from September 25 through October 1 to help Minnesota companies build business relationships and increase exports to the Asian countries; he also plans to visit Japan.

Japan and South Korea are two of Minnesota's largest export markets, with Japan purchasing \$930 million in products from Minnesota manufacturers last year and South Korea accounting for another \$605 million in sales. Japan is the third-largest export market for Minnesota companies, while South Korea ranks sixth, up from ninth in 2009 and 14th one decade ago.

Dr. Brian Buhr, head of the Department of Applied Economics at the University of Minnesota, visited South Korea in late-August ahead of Governor Dayton's trade mission. He met with the Korea Rural Economic Institute (KREI) and discussed global agricultural trade potential and food security issues for importers such as Korea.

According to KREI, South Korea is only about 26% food self sufficient; meaning that given their arable crop acreage, they can only produce about 26% of the food needs for their domestic consumption. Buhr noted

that due to the increasing grain and oilseed prices caused by lower world stocks, there is increasing competition from other importing countries for global grain supplies. Korea, as well as other importing countries, is looking to develop stronger ties to dominant exporting countries, including the U.S. By the same token, as shown in the South Korean soybean imports chart above, the U.S. faces increasing competition from other exporters and must maintain its competitiveness through effective trade policies and encouraging trade agreements that support fair access to markets and bi-lateral trade in agricultural products.

Koreans' growing incomes have also led to increased demand for meat products in Korea. Additionally, the animal sector has recently undergone domestic supply disruptions due to an outbreak of Foot and Mouth Disease (FMD) in early 2011; the declining corn used for feed in Korea as shown in the chart to the right is a direct result of the FMD outbreak. Korea represents the fourth largest importer, by value, of both beef and pork products from the U.S. and may surpass Japan as the third largest market for beef prod-

"South Korea ranks in the top five destinations for U.S. pork, beef and corn exports and within the top ten in soybeans and soybean meal."

– Brian Buhr

Applied Economics, University of Minnesota



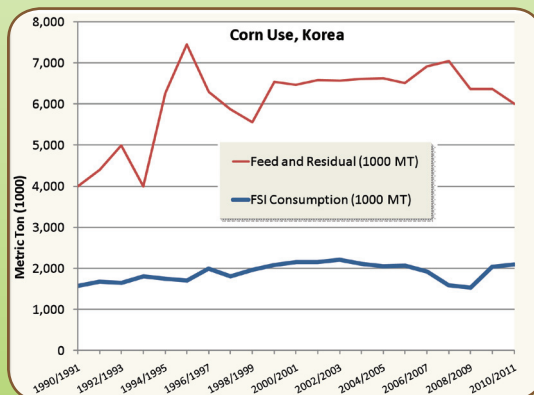
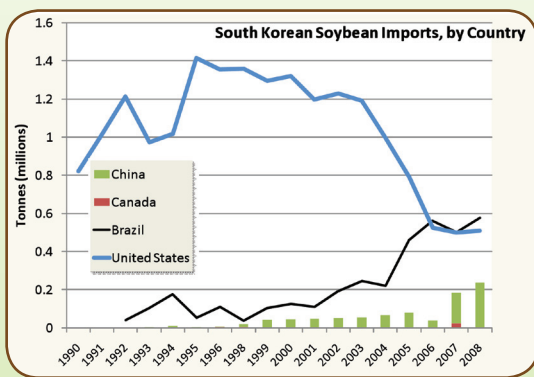
ucts very soon. It is likely that as meat consumption grows, U.S. exports of higher valued meat products will continue, particularly for pork and beef, which are the number one and two meat products consumed in Korea.

Buhr adds, "Americans are becoming more familiar with Korean brands such as LG, Samsung (electronics and appliances) and Hyundai and Kia (automotive), but – as in many trade relationships – Minnesota has a particular trade advantage in the agricultural sector. Korea and Minnesota have a mutual interest in assuring access to food and agricultural products. Trade missions, such as the Governor's, can help foster long term beneficial trade relationships for both parties."

The South Korea trade mission will include a briefing at the U.S. Embassy in Seoul and site visits to Minnesota companies with operations in the country. Meetings also are planned with industry leaders, government officials and representatives from companies interested in investing in operations in Minnesota. "The goal of the trade mission is to make contacts and build relationships that will help Minnesota companies increase exports to that part of the world and create more jobs here," Dayton said. Minnesota companies participating in the trade mission will also have an opportunity to meet with Korean companies through a business-to-business matchmaking service.

The Governor also plans to speak at the Midwest U.S.-Japan Conference, a major international economic development conference. Minnesota will sponsor the Midwest U.S.-Japan Conference in 2012, and it is customary for the host governor to welcome Japanese companies

the year prior. Other plans include meeting with Noriyuki Inoue, chairman and CEO of Osaka-based Daikin Industries, whose worldwide holdings include McQuay International in Plymouth.



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## NEW RULING ON PESTICIDE DRIFT MAKES SPRAY APPLICATORS VULNERABLE TO TRESPASS, CONTINUED FROM PAGE 1:

- *Review Product Label and Follow the Label Directions.* Federal law requires that product labels provide guidelines for when the product should and should not be used.
- *Use Specialized Equipment.* Set up and calibrate application equipment with drift reduction nozzles, lower pressure settings, and lower boom heights to minimize drift. Utilize special nozzles that create larger droplets reducing the likelihood of drift. Also consider using spray shields, electrostatic sprayer, or air-assisted sprayers.
- *Discuss with Neighbors and Identify Potential Risks.* Have conversations with adjacent property owners to identify potential application risks. Also consider software programs that identify sensitive areas. For example, Driftwatch™ is now available in Minnesota, Wisconsin, Michigan, Indiana, and Illinois. Driftwatch helps pesticide applicators, specialty crop growers, and stewards of at-risk habitats communicate more effectively to protect pesticide-sensitive areas. The site features an easy-to-use Google Maps™ interface that shows applicators the locations of registered areas so they can take the appropriate precautions before they spray.
- *Assess Weather Conditions.* Know the temperature, wind direction and speed. Wind and humidity increase the likelihood of drift. Avoid spraying any pesticides when winds are greater than 10 mph. Spray when there is a steady wind is between 3-10 mph, and blowing away from the sensitive areas. Be ready to stop an application if weather conditions change.
- *Create a Buffer Strip.* Use buffer zones to reduce the risk of product drift.
- *Keep Detailed Records.* Records should include more than just the date the product was applied and the location. A checklist should be created to evidence that the policies and procedures have been complied with each time product is applied.

<sup>1</sup> In Minnesota, Iowa, North Dakota and South Dakota, claims against the product manufacturers for negligence and strict liability in product packaging may be preempted by the Federal Insecticide, Fungicide, and Rodenticide Act. See *Hardin v. BASH Corp.*, 397 F.3d 1082 (8th Cir. 2005) (holding that claims against a product manufacturer for negligence and strict liability in product labeling or for a failure to warn were regulated under FIFRA and the producer could not assert separate state law claims).

<sup>2</sup> See *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. App. 2003), which held that offensive odors cannot support a claim for trespass.

<sup>3</sup> See generally, 2 A.L.R. 4th 1054.

<sup>4</sup> See *Ryan v. Emmetsburg*, 4 NW2d 435 (Iowa 1942).