

Dicamba Update

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Overview

My blog article of February 11 discussed the Arizona federal district court opinion vacating the registrations of three Dicamba products. Since then, the EPA made an “existing stocks” ruling that will help some producers through the 2024 growing season. That makes an update in order.

Updated Dicamba information – it’s the topic of today’s post.

Background

Farmers have used Dicamba for decades on broadleaf plants and, more recently, have used it to control weeds that have become glyphosate-tolerant. However, until 2016 the use of Dicamba was used only as a pre-emergent herbicide. It was then that the Environmental Protection Agency (EPA) registered certain low-volatility forms of Dicamba that had a low likelihood of drift problems for over-the-top usage on growing soybean and cotton crops resulting from Dicamba-resistant seeds. The EPA was sued on the basis that the registration process violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as well as the Endangered Species Act (ESA). The case became moot by the expiration of the registration, but when the EPA again registered Dicamba for over-the-top use in 2018, a new case was filed. In 2020, the U.S. Court of Appeals for the Ninth Circuit vacated the registrations for XtendiMax, Engenia and FeXapan. *National Family Farm Coalition v. United States Environmental Protection Agency*, 960 F.3d 1120 (9th Cir. 2020). The court determined that the EPA had failed to follow the procedural rules of the Administrative Procedure Act, the FIFRA and the ESA. Those statutes require the EPA to provide public notice and a chance for the public to make comments and attend a hearing on the registration issue. The court also said that the EPA failed to assess risks and costs for non-users of over-the-top Dicamba.

The EPA again issued another registration for over-the-top Dicamba use for the 2020 and 2021 growing seasons and made further amendments in 2022 and 2023 along with approval for new uses.

2024 Court Decision

On February 6, 2024, a federal district court vacated the registrations of three Dicamba products (XtendiMax, Engenia, and Tavium) that EPA had approved for over-the-top applications. *Center for Biological Diversity v. United States Environmental Protection Agency*, No. CV-20-00555-TUC-DCB, 2024 U.S. Dist. LEXIS 20307 (D. Ariz. Feb. 6, 2024). The decision came at a time when many soybean and cotton farmers have already purchased seed and chemicals and will soon be planting the 2024 crop. The court said the EPA didn’t follow the notice and comment provisions of the Federal Insecticide,



Fungicide, Rodenticide Act (FIFRA) when it issued the registrations and also violated the Administrative Procedure Act (APA) (and the Endangered Species Act) by not allowing public input on whether over-the-top Dicamba has unreasonable adverse effects on the environment.

The ruling canceled any benefits of planting Dicamba seeds, with the concern that there might not be enough supply of other traits to replace the Dicamba market share. The immediate impact of the ruling was that it could force farmers to plant Dicamba trait soybeans or cotton without the correct chemical to utilize the gene, resulting in the likely use of alternatives. Those alternatives could, in turn, magnify the known issues of the Dicamba chemical problems.

Comment: While the timing of the court's decision was awful, the result is good overall in that it held the "feet" of the EPA to the "fire" of the administrative process. It also raised the question of whether the EPA deliberately violated the public notice and comment procedures that are clearly established in the law. It's difficult to believe that the EPA lawyers, particularly after losing in the Ninth Circuit on virtually the same issue in 2020, didn't know that failing to follow the procedural rules for approving the registrations would lead to the registrations being invalidated.

EPA reaction. On February 14, the EPA issued an order to allow existing stocks of XtendiMax, Engenia, and Tavium to be applied directly onto crops so long as the pesticides were "labeled, packaged, and released for shipment" before the court's decision. The order will allow these products purchased before February 6 to be used this growing season. The EPA order also provides instructions for how to dispose of unwanted or unused dicamba products.

The Future

What does the future hold for over-the-top Dicamba? Of course, the EPA could appeal the court's decision, but any appeal would be to the Ninth Circuit. Going back to the same court on the same shortcomings as in the 2020 decision probably wouldn't end well for the EPA. Perhaps a better idea is for the EPA to re-register over-the-top use of Dicamba by actually following the law's requirements for providing public notice and comment, and giving the public the opportunity to attend a hearing on the registration.

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