Dicamba Registrations Cancelled – Or Are They?

Roger McEowen (roger.mceowen@washburn.edu) – Washburn University School of Law
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Overview

Spray-drift issues with respect to dicamba and the use of dicamba-related herbicides on dicamba tolerant (DT) soybeans and cotton increased substantially during the 2017 growing season across portions of the primary soybean (and cotton) growing parts of the country. The use of dicamba increased in an attempt to control weeds in fields planted with crops that are engineered to withstand it. Some states, notably Missouri and Arkansas, took action to ban dicamba products because of drift-related damage issues.

Now, the U.S. Circuit Court of Appeals for the Ninth Circuit has vacated the conditional new-use registrations of XtendiMax (by Bayer (formerly Monsanto), BASF's Engenia and Corteva's FeXapan for use on dicamba-tolerant (DT) soybean and cotton finding that the Environmental Protection Agency's (EPA's) late 2018 decision to extend the 2016 registrations violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The decision creates major problems for producers that purchased and planted DT seed because the associated weed control technology cannot be used.

What are the implications of the recent federal court's opinion? Does it apply nationwide? What are the drift issues associated with dicamba? What options do affected farmers have going forward?

Uniqueness of Dicamba

In many instances, spray drift is a straightforward matter. The typical scenario involves either applying chemicals in conditions that are unfavorable (such as high wind), or a misapplication (such as not following recommended application instructions). But, dicamba is a unique product with its own unique application protocol.

- Dicamba is a very volatile chemical and is rarely sprayed in the summer months. This is because when the temperature reaches approximately 90 degrees Fahrenheit, dicamba will vaporize such that it can be carried by wind for several miles. This can occur even days after application.
- The typical causes of spray drift are application when winds are too strong, a temperature inversion (temperature not decreasing with atmospheric height) exists or there has been a misapplication of the chemical.
- For the new dicamba soybeans, chemical manufacturers reformulated the active ingredient to minimize the chance that it would move off-target due to it volatility.
- Studies have concluded that the new formulations are safe when applied properly, but if a user mixes-in unapproved chemicals, additives or fertilizer, the safe formulations revert to the base dicamba formulation with the attendant higher likelihood of off-target drift.
- Soybeans have an inherit low tolerance to dicamba. As low as 1/20,000 of an application rate can cause a reaction. A 1/1000 of rate can cause yield loss.

- The majority of crops damaged from vapor drift *may not actually result in yield loss*. That's particularly the case if drift damage occurs before flowering. However, if the drift damage occurs post-flowering the likelihood of yield loss increases. Also, studies have shown that a slight rain event can stop the volatilizing of dicamba.
- The label is the law. This is particularly true with the new chemicals used on Xtend crops. The labels are very specific with respect to additives, nozzles, boom height, and wind speed and direction.

DT Seeds and Associated Herbicides

In 2015, the Obama Administration's USDA deregulated DT soybean and cotton seeds via the Plant Patent Act (PPA). At that point, Monsanto began to sell the DT seeds in advance of the 2016 growing season. This was done before EPA had approved the companion dicamba herbicides for over-the-top (OTT) use. In 2016, approximately 1.7 million acres of DT soybeans and 50,000 acres of DT cotton were planted. The prior versions of dicamba herbicides could not legally be used on the emergent DT crops, but some farmers applied those older, more volatile versions to the DT crops. In the fall of 2016, the EPA announced that it would grant two-year conditional registrations for three lower-volatility, OTT dicamba herbicides (Monsanto's XtendiMax; Dupont's FeXapan; and BASF's Engenia) in 34 states. The EPA has the authority to grant conditional registrations of pesticides and herbicides under FIFRA, and the EPA cited the benefits of the grant as providing an effective tool to treat noxious weeds and glyphosate-resistant weeds. The EPA noted that the lower-volatility formulations posed little-to-no risk of adverse environmental effects if used according to the label.

Throughout the 2017 growing season, complaints of alleged dicamba-caused damage to commercial crops and other plants increased. Bayer/Monsanto proposed label changes to XtendiMax for use during the 2018 growing season to address off-site drift. The EPA approved additional label restrictions for OTT dicamba products for the 2018 growing season. In late 2018, the EPA granted conditional extensions to the 2016 registrations for two more years. The EPA determined that doing so would provide growers with an additional tool to help manage weeds that are difficult to control for which few alternatives are available, and would provide a long-term benefit by delaying resistance to other herbicides when used appropriately. The EPA also noted that, based on field trials and land-grant university research, non-DT crops could be damaged by off-site drift that could result in yield reductions if the drift occurred during the reproductive growth states of the non-DT crops and, as a result, imposed more restrictions on OTT applications of the dicamba herbicides to DT soybeans and cotton.

Challenge to the Registrations

In *National Family Farm Coalition v. United States Environmental Protection Agency, No. 19-70115, 2020 U.S. App. LEXIS 17495 (9th Cir. Jun. 3, 2020),* a coalition of activist groups sought review of the EPA's 2016 registration decision for XtendiMax, and then amended the petition to include the 2017 label amendments. Oral argument in the case was held in August of 2018. However, the EPA granted the additional two-year conditional registrations before the court decided the case. As a result, the court dismissed the petition. The plaintiffs again sued in early 2019, challenging the EPA's late 2018 decision to extend the registrations for the OTT dicamba herbicides for two more years. The court did not hear oral arguments in the case until15 months later.

Under FIFRA, the EPA must determine that any amendment to a pesticide/herbicide registration "would not significantly increase the risk of any unreasonable adverse effect on the environment." Such effects include

"any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide…". *7 U.S.C. §136(bb)*. The court determined that the EPA "substantially understated the risks that it acknowledged" and "entirely failed to acknowledge other risks." The court believed that the EPA understated the DT seed acreage plantings in 2018, failed to account for substantial non-compliance with label restrictions, and didn't account for social cost of DT soybeans and DT cotton achieving a monopoly or near monopoly due to farmers planting DT seeds simply to avoid drift problems. But, the court failed to mention that some farmers refused to plant DT seeds for the express purpose of possibly being drifted upon and suing for damages. The court also made no mention of the fact that numerous drift complaints in 2017 did *not* result in any yield loss and in some cases resulted in a yield bump.

The court also determined that the EPA didn't account for the social cost of "divisiveness" that dicamba-related issues was creating in rural communities.

As a result, the court vacated the registrations even though it noted the harshness that its decision would have on growers that had already purchased DT soybean and cotton seeds and the associated dicamba products.

Comments on the Court's Decision

The court's decision to vacate the registrations has implications for farmers in the 34 states where the conditional registrations allowed OTT dicamba. At least that's the general belief expressed in farm (and other) media. It is true, that any case brought via the Administrative Procedure Act (APA) gives rise to the possibility that the court could vacate the administrative decision or rule with respect to all persons and in all areas of the country, rather than simply with respect to either the parties to the lawsuit or the areas within the court's jurisdiction. However, the U.S. Supreme Court recently held that the text of the APA does *not* permit that broad of a remedy. *Trump v. Hawaii, 138 S. Ct. 2392 (2018)*. 5 U.S.C. §706 states in relevant part as follows:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— "(2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;…"

As applied in the dicamba case, the provision doesn't specify whether the registrations should be set aside on their face or as applied to the plaintiff. There is also no clear statement in the APA that the traditional rules of fundamental fairness (equity) are displaced. Given this, and the guidance from the Supreme Court's recent APA decision, the appropriate remedy for the Ninth Circuit to utilize is equitable in nature – determining the rights of the parties to the case rather than a vacatur that impacts farmers in all 34 states involved.

It is also worth noting that the Ninth Circuit delayed hearing oral arguments for 15 months with full knowledge that waiting until planting season was beginning to hear the case and render its decision would cause maximum damage to impacted farmers, again points to an equitable remedy instead of a wholesale vacatur.

In his First Inaugural Address, President Abraham Lincoln stated, "At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent

practically resigned their Government into the hands of that eminent tribunal." President Lincoln was speaking of the Supreme Court and pointing out that Supreme Court opinions are not the supreme law, the Constitution is. Likewise, for a lower court to render a decision vacating DT seed registrations impacting farmers in areas of the country outside of the court's jurisdiction is contrary to Supreme Court precedent and principles of equity.

So what's next? It depends on what the EPA chooses to do. EPA could seek a full en banc review by all of the Ninth Circuit judges rather than the three-judge panel that heard the case. The EPA could also request the court stay its opinion until the soybean and cotton growing seasons are over. The EPA could also simply choose to ignore the court's opinion outside the Ninth Circuit. In that event, only farmers in Arizona would be impacted by the court's decision. This approach, for example, is a tactic that the IRS often employs in tax cases that it loses. It issues a "non-acquiescence" to the court's opinion, explains why the court was wrong, and continues audit activity in areas outside the court's jurisdiction. If the EPA were to do that, the major soybean and cotton growing regions would not be impacted in 2020.

Presently, disaffected farmers and ag retailers are considering what changes to plans need to be made. Some are also inquiring about refunds for technology fees associated with the seed purchases. But, for many farmers, perhaps the largest hurdle going forward will be the lack of alternative products to compensate for the increase of acres. The supply chain was not counting on the millions of acres currently attributed to DT traits being impacted in such a manner.

Conclusion

The Ninth Circuit's opinion potentially creates havoc for many soybean and cotton farmers. The next few days should be instructive in learning how far reaching the court's decision will be for the present growing season. It may just be time for the EPA to tell the Ninth Circuit to go "pound sand" in terms of the court trying to impose its decision outside of the states within the Ninth Circuit.