



The Deal with Dicamba: *Examining the Ninth Circuit's Decision and Potential Impacts*

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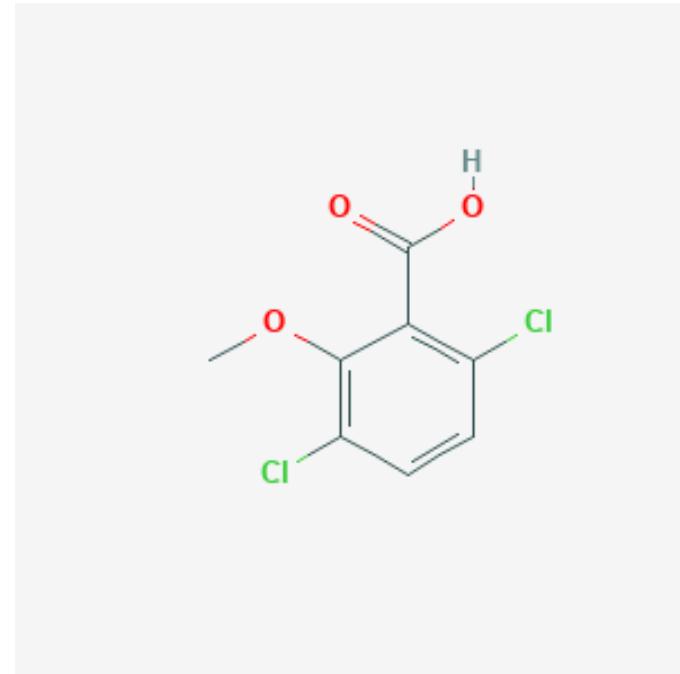
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What is Dicamba?

- A chemical herbicide designed to kill broad-leaved plants
- Used on weeds that have developed glyphosate resistance
 - Ex: *palmer amaranth* aka pigweed
- Prone to volatility – vaporizing into the air and traveling off target
- Historically applied as a preemergent in late winter and early spring to avoid volatility issues



How Did We Get Here?

- Monsanto, BASF, & Du Pont developed low volatility forms of dicamba for in-crop use with dicamba-resistant seeds
- **2016:** EPA registers Monsanto's XtendiMax under FIFRA with a two year registration
- **2018:** EPA re-registers XtendiMax for another two years; grants registration to BASF's Engenia and Du Pont's FeXapan
- **Consequences:** Lawsuit was filed in Ninth Circuit Court of Appeals challenging EPA's registration of all three herbicides
 - *Nat'l Family Farm Coal. v. U.S. Envtl. Prot. Agency*, No. 19-70115 (9th Cir. 2019)

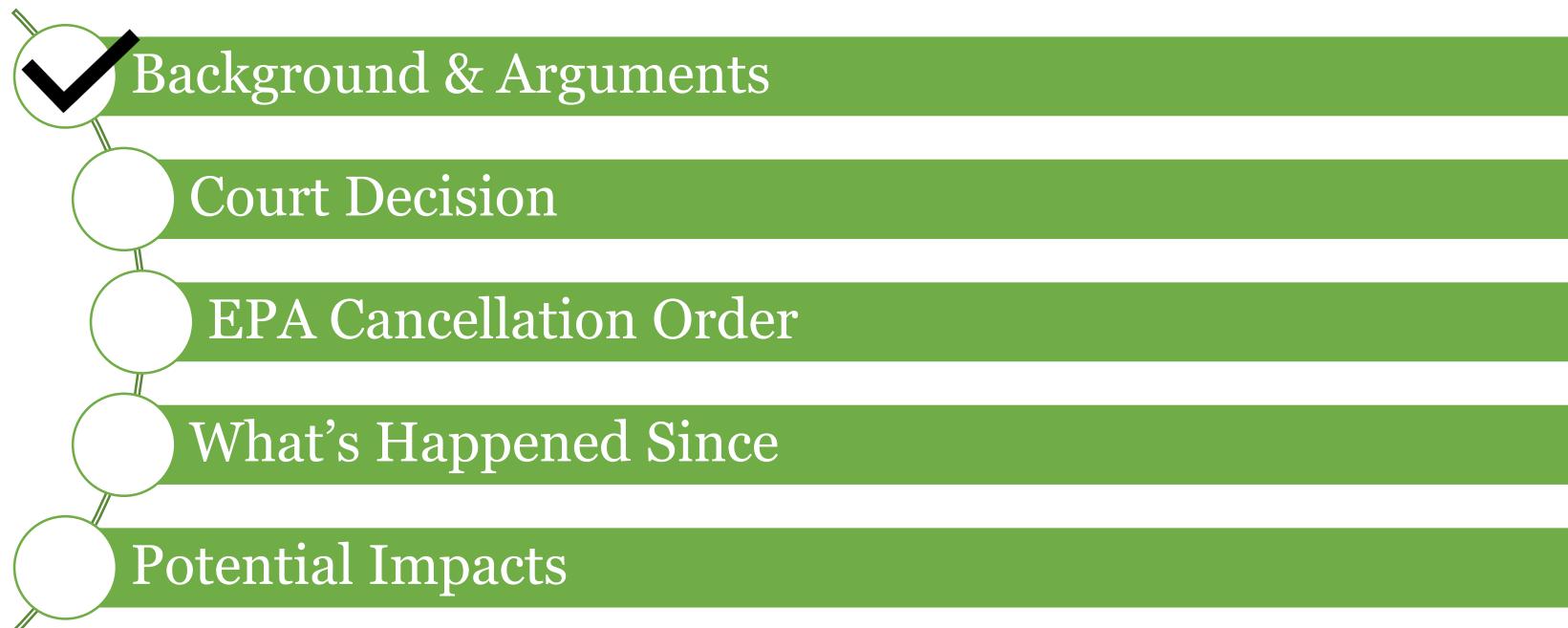


Note: Why the Ninth Circuit?

- Jurisdiction:
 - FIFRA allows courts of appeal to review any order issued by the EPA Administrator following a public hearing. 7 U.S.C. § 136n(b).
 - 2018 registrations were orders issued by EPA following a public hearing
- Venue:
 - FIFRA allows parties challenging an EPA order to file in the United States Court of Appeals for the circuit in which the plaintiff resides or has a place of business. 7 U.S.C. § 136n(b).
 - Plaintiff Center for Biological Diversity headquartered in Arizona



Nat'l Family Farm Coal. v. EPA



Background: *Nat'l Family Farm Coal. v. EPA*

- Lawsuit filed in the Ninth Circuit Court of Appeals by environmental organizations
- Allegations: EPA's 2018 registrations of XtendiMax, FeXapan & Engenia violated FIFRA and the ESA
 - Subsequent to 2017 filing with identical claims about EPA's 2016 registration of XtendiMax
 - Refiled after 2016 registration expired and XtendiMax was re-registered in 2018
 - Added 2018 conditional registrations of FeXapan & Engenia
- Requested relief: Asked court to vacate registrations



Plaintiffs' Arguments

- EPA violated FIFRA by re-registering three dicamba pesticides in 2018 without:
 1. Making necessary prerequisite findings
 2. Meeting the requirements to register the pesticides for conditional use
 3. Supporting the 2018 registration with substantial evidence
- EPA violated the Endangered Species Act (ESA) because:
 1. Applied the wrong standard to conclude that registering the pesticides would have “no effect” on listed species
 2. Applied the wrong standard when determining the effect the pesticides would have on designated critical habitat



Background & Arguments (FIFRA)

1. EPA violated FIFRA by failing to make prerequisite findings

- Rule:
 - EPA had to meet conditions it set in the 2016 registration in order to re-register dicamba for over-the-top use in 2018
- Argument:
 - 2016 registration of XtendiMax set to automatically expire in 2018 unless EPA determined that incidents of dicamba drift were not occurring at “unacceptable frequencies or levels”
 - Plaintiffs allege EPA did not make that finding
 - Although the 2016 registration was for XtendiMax only, the requirement that EPA meet certain conditions before re-registering in 2018 applied to all over-the-top uses of dicamba



Background & Arguments (FIFRA)

2. EPA violated FIFRA by failing to meet the requirements to register the pesticides for conditional use

- Conditional use registration lets EPA register a new use for an already registered pesticide
- Rule:
 - “[EPA] may conditionally amend the registration of a pesticide to permit additional uses of such pesticide ... if [EPA] determines that (i) the applicant has submitted satisfactory data pertaining to the proposed additional use, and (ii) amending the registration in the manner proposed by the applicant would not significantly increase the risk of any unreasonable adverse effect on the environment...” [7 U.S.C. § 136a\(c\)\(7\)\(B\)](#)
- Argument:
 - EPA failed to make either finding



Background & Arguments (FIFRA)

3. EPA violated FIFRA by failing to support the 2018 registrations with substantial evidence

- Rule:
 - When EPA issues an order under FIFRA, such a change to a pesticide label, it must support the order with “substantial evidence”
 - [7 U.S.C. § 136n\(b\)](#)
- Argument:
 - EPA’s conclusion that the changes to the XtendiMax, Engenia, and FeXapan labels would prevent drift damage was not supported by substantial evidence
- Evidence:
 - Only one label change addressed volatility
 - Concluded that applicator error was the main cause of drift damage
 - EPA admitted that the label changes were minimal and would not completely eliminate drift damage



Background & Arguments (ESA)

- 1. EPA applied the wrong standard to conclude that registering the pesticides would have “no effect” on listed species, violating ESA**
 - Rule:
 - ESA standard: “may effect” listed species – triggers ESA consultation, low threshold
 - [16 U.S.C. § 1536\(a\)\(2\); 50 C.F.R. § 402.14\(a\)](#)
 - FIFRA standard: “unreasonable adverse effects” – high threshold
 - [7 U.S.C. § 136a\(c\)\(7\)\(B\)](#)
 - Argument:
 - ESA standard should be applied specifically when considering impact on listed species



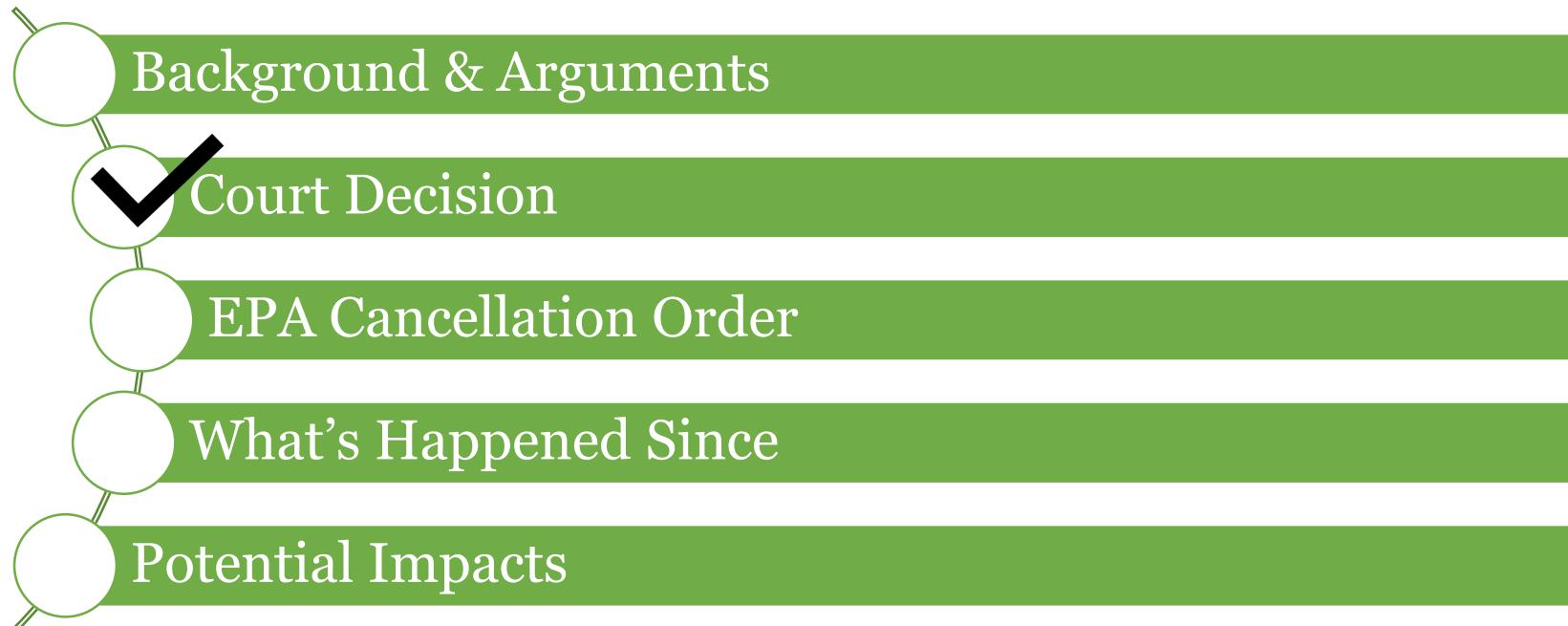
Background & Arguments (ESA)

2. EPA applied the wrong standard when determining the effect the pesticides would have on designated critical habitat, violating ESA

- Rule:
 - ESA requires federal agencies to ensure that their actions will not adversely effect any designated critical habitat
 - [16 U.S.C. § 1536\(a\)\(2\)](#)
- Argument:
 - EPA wrongly restricted the area it considered to only the crop fields that were likely to be sprayed
 - EPA wrongly concluded that it only had to consult about effects on critical habitat if listed species occupied fields likely to be sprayed



Nat'l Family Farm Coal. v. EPA



Court Decision

- Decision issued June 3, 2020 by a 3-judge panel of the Ninth Circuit
- Mandate issued on June 3, 2020 required the ruling to take legal effect the same day it was issued
- **Primary holding:** 2018 pesticide registrations violated FIFRA because EPA failed to show that they would not “significantly increase the risk of any unreasonable adverse effect on the environment”
 - Court focused on this argument to reach its decision
 - Did not reach ESA arguments or other FIFRA arguments
- **Ultimate result:** 2018 registrations for XtendiMax, FeXapan, and Engenia all vacated



Court Decision: Foundation

- FIFRA defines **adverse effects to the environment** as “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\(bb\)](#).
- EPA wrongly concluded that label amendments would not significantly increase adverse effects to the environment by:
 - (1) Substantially understating the three risks that it identified, and
 - (2) Failing to acknowledge three other risks



Court Decision: “Substantial understatement”

- Substantially understated risks:
 - (1) Amount of acreage planted with dicamba-resistant seeds in 2018
 - (2) Complaints of dicamba damage could have been either under-reported or over-reported
 - (3) No estimation of the amount of damage caused by application
- Understating the risks means EPA could not realistically consider whether 2018 registrations would have adverse effects on the environment



Court Decision: “Unacknowledged risks”

- Unacknowledged risks:
 - (1) Substantial non-compliance with label requirements
 - Amended labels for 2018 registrations were 40 pages long
 - All instructions must be completely/accurately followed for legal application
 - (2) Economic costs
 - Court claimed that Monsanto had created a “near monopoly” on dicamba-resistant traits with its seed technology
 - (3) Social costs
 - Court found that registration of “dicamba has torn apart the social fabric of many farming communities.”
- Because EPA failed to acknowledge these risks it did not adequately consider whether 2018 registrations would cause adverse effects to the environment



Court Decision: ESA

- Ninth Circuit did not reach the ESA arguments
 - Granted plaintiffs' desired remedy based on FIFRA arguments alone
- The question of whether EPA should have applied FIFRA standard or EPA standard when deciding whether to consult on registrations was not answered
 - Note: Not the only lawsuit to raise this question
 - Litigation over Enlist Duo makes a similar argument
- Although the court did not reach the ESA issue in this case, it may be reached in another case



Court Decision: Outcomes

- 2018 registrations for XtendiMax, FeXapan, and Engenia have been vacated, all three pesticides no longer federally registered under FIFRA
 - Violation of FIFRA to sell or distribute unregistered pesticides
 - Ability to buy, sell, and use the pesticides during the 2020 growing season thrown into question
- Possible precedent set for what EPA must consider when it is registering a pesticide
 - To register a pesticide, EPA must determine that the pesticide will not cause unreasonable adverse effects to the environment when it is used for its intended function
 - After this case, will EPA have to consider whether a pesticide is being used to create a “near monopoly” or whether it will “tear apart the fabric of farming communities” before registration?



Nat'l Family Farm Coal. v. EPA



Background & Arguments



Court Decision



EPA Cancellation Order



What's Happened Since



Potential Impacts



EPA Cancellation Order

- **Issues:**
 - What happens to existing stock of XtendiMax, FeXapan, & Engenia following Ninth Circuit decision?
 - Can farmers still spray in 2020?
- **Answer:**
 - EPA issued a [Cancellation Order](#) for the pesticides on June 8, 2020 with directions for handling existing stocks
 - “Those stocks of the formerly registered pesticide products [...] which are currently in the United States and which were packaged, labeled, and released for shipment prior to the time of the [court’s] order on June 3, 2020...”



What is a cancellation order?

- FIFRA gives EPA the authority to cancel pesticide registrations
- It is a violation of FIFRA to sell or distribute a pesticide with a cancelled registration
- EPA can use a cancellation order to allow for limited distribution, and for use of existing stocks of a cancelled pesticide



Why a cancellation order?

- FIFRA definition of “distribute” includes shipping
 - Without a cancellation order, existing stocks of cancelled pesticides cannot be shipped back to the registrant. [7 U.S.C. § 136j\(a\)\(1\)\(A\)](#).
- It is not a violation of FIFRA to use cancelled pesticides, but is a violation of FIFRA to violate a cancellation order. [7 U.S.C. § 136j\(a\)\(1\)\(K\)](#).
 - EPA uses cancellation orders to require existing stocks of cancelled pesticides be used according to their labels
- EPA interprets FIFRA to allow the agency to issue a cancellation order whenever a pesticide has been sold with the expectation of being used with a valid registration has that registration cancelled
 - EPA has previously issued cancellation orders when a court vacates a pesticide registration
 - Examples: sulfoxaflor, spirotetramat



EPA Cancellation Order

	Registrant	Wholesaler/Retailer	Commercial Applicator	End User
Use			According to the label until July 31, 2020.	According to the label until July 31, 2020.
Distribute	Only for purposes of proper disposal.	For purposes of proper disposal or to return to registrant.	Only to “facilitate use” by July 31, 2020.	For purposes of proper disposal or to return to registrant.
Sale	Prohibited as of June 3, 2020.	Prohibited as of June 3, 2020.	Only to “facilitate use” by July 31, 2020.	

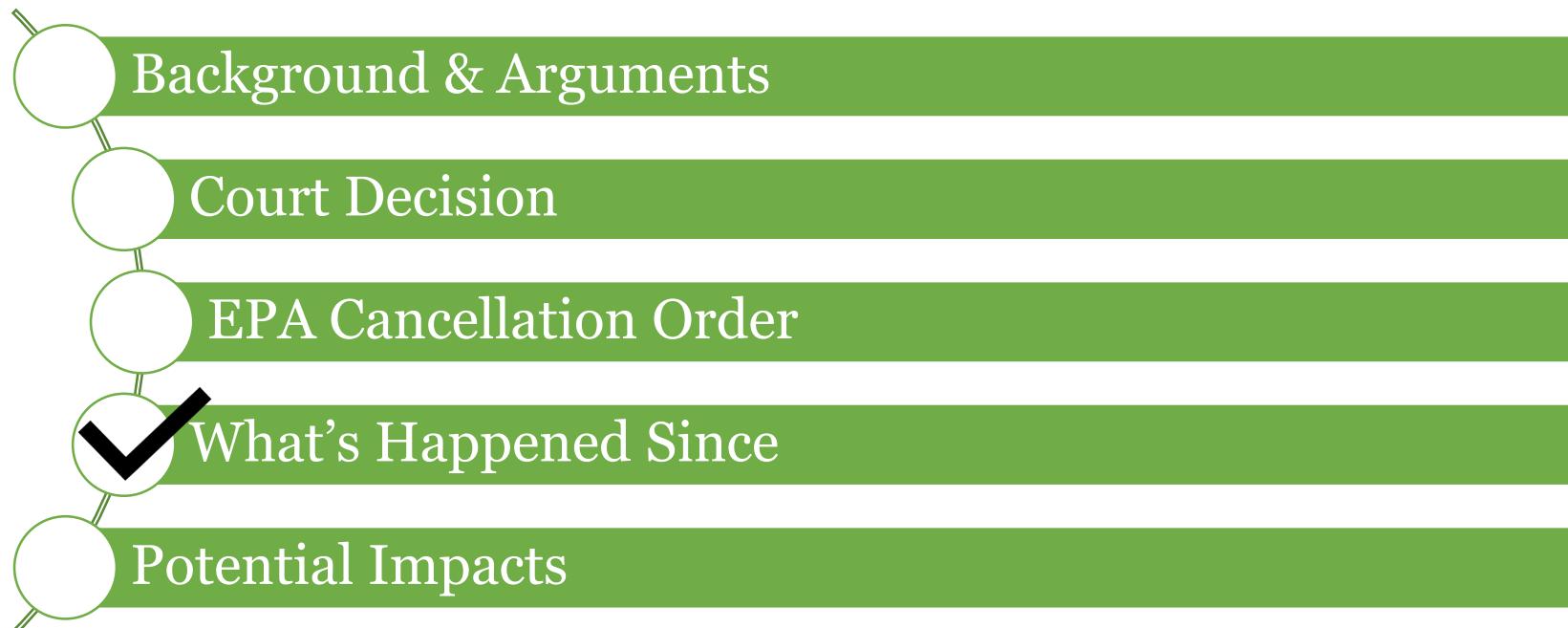


EPA Cancellation Order: Remaining Questions

- Cancellation Order does not address what the status of XtendiMax, FeXapan, and Engenia purchased and/or delivered between June 3 and June 8
 - Many states permitted sale or distribution of the pesticides after the court's order prior to EPA issuing the Cancellation Order – did that violate the Cancellation Order?
- Does not address retailers that both sell dicamba pesticides and apply as custom applicators
- Does not define “facilitate use” – does that include paying for the pesticides? Ordering them? Having them delivered? When does “facilitating use” become sale/distribution?
- How can commercial applicators ensure they are selling or distributing the products only to “facilitate use”?



Nat'l Family Farm Coal. v. EPA



What's Happened Since

June 3

- Court issues order and mandate

June 8

- EPA issues Cancel Order

June 11

- Plaintiffs file motion to overturn Cancel Order

June 16

- EPA & BASF file response
- CLA files *amicus* brief

June 17

- AFBF files *amicus* brief

June 18

- Court rejects plaintiffs' motion & issues schedule for argument on BASF's motion



What's Happened Since

- EPA released the Cancellation Order on June 8
- Since then:
 - Plaintiffs asked the court to overturn the Cancellation Order, issue a stricter mandate, and reconsider the ESA argument
 - BASF and Corteva have been allowed to intervene
 - Parties have the right to intervene in a case if they have an interest in the outcome of the case
 - BASF and Corteva have an interest in their pesticide registrations
 - As intervenors, BASF and Corteva can file motions and make their own arguments
 - BASF filed a motion asking the court to prevent the decision to vacate the registrations from having immediate legal effect
 - Agricultural groups have filed *amicus* briefs
 - *Amicus* briefs give non-litigants who have a strong interest in the case an opportunity to advise the court of information or arguments the court may not have considered
 - Court decides whether to consider each *amicus* brief



What's Happened Since: Plaintiff Request

- *Plaintiffs asked the court to overturn the Cancellation Order*
 - [Filed June 11, 2020](#)
 - Requested relief:
 - Asked the court to lift the June 3 mandate and enforce its decision to prevent use of existing stocks of the dicamba pesticides
 - Asked for court to reach a decision on the ESA argument
 - Argument:
 - Argued that the court's order applied only to over-the-top use of the pesticides
 - Claimed EPA had no authority to issue Cancellation Order



What's Happened Since: EPA response

- *EPA response*
 - [Filed June 16, 2020](#)
 - Argued for keeping Cancellation Order in place
 - Claimed that the court's decision vacated the entire registrations of all three pesticides not just the part of the registration allowing over-the-top use
 - Argued that EPA had authority to issue the Order
 - Stated that court did not need to reach ESA issue because it granted plaintiffs their requested remedy through FIFRA



What's Happened Since: BASF Motion

- *BASF asked court to prevent its decision from having immediate legal effect*
 - [Filed June 16, 2020](#)
 - Requested relief:
 - Asked court to deny plaintiffs' motion to lift the June 3 mandate and enforce its decision to prevent further use of the pesticides
 - Argued that instead, court should lift the June 3 mandate and reissue a mandate on a schedule according to FRAP 41 so that BASF has time to file for a rehearing of the case
 - BASF argues that without a rehearing, it will not have had a right to be heard in this litigation because it was not aware that Engenia would be affected by the Ninth Circuit's decision



What's Happened Since: *Amicus*

- *Agriculture groups have filed amicus briefs*
 - [CropLife America](#) filed June 16, 2020 and a coalition of groups led by [AFBF filed June 17, 2020](#)
 - Both argued that the Cancellation Order should not be overturned
 - CropLife America argued that EPA has authority to issue the Cancellation Order
 - AFBF argued that farmers planning to use any of the three pesticides would experience financial injury without the Cancellation Order
 - Both briefs accepted by the court



What's Happened Since

- On June 18, 2020, court denied plaintiffs' motion to overturn the Cancellation Order
- Court also allowed further argument on BASF's motion to recall the mandate after making BASF and Corteva official parties to the case
 - “Mandate” is the judicial command enforcing a remedy
 - Typically filed 7 days after the end of the time period when parties can ask for the court to rehear the arguments– if one party is a federal agency that time period is generally 45 days ([FRAP 41](#))
 - In this case, the mandate would have gone into effect 51 days after the court order was issued on June 3
 - [Ninth Circuit local rules](#) allow a 3-judge panel to issue a mandate on the same day as the decision is issued in “exceptional circumstances” (which BASF argues is not applicable)
- Plaintiffs ordered to respond to BASF motion by June 23
- BASF ordered to respond to plaintiff's response by June 24
- Possible result:
 - If court recalls the mandate, registrations for the three dicamba pesticides may be reinstated for a limited amount of time



What's Happened Since: Plaintiffs Respond to BASF

- Plaintiffs filed [their response](#) to BASF's motion to lift the mandate on June 23, 2020
 - Argued that the mandate should not be lifted because BASF had a right to file as an intervenor and be heard before the Ninth Circuit issued its opinion but chose not to do so
 - Plaintiffs state that their case targeted the 2018 registration which included Engenia and FeXapan as well as XtendiMax so BASF should have known that Engenia's registration could have been affected
 - If the court does recall the mandate, plaintiffs argue that the mandate should be recalled only as it applies to Engenia and FeXapan



Nat'l Family Farm Coal. v. EPA



Background & Arguments



Court Decision



EPA Cancellation Order



What's Happened Since



Potential Impacts



Potential Impacts

- Ninth Circuit opinion raises many questions:
 - Impact on 2021 registration of XtendiMax, FeXapan, and Engenia?
 - Has precedent been set for future pesticide cases?
 - Impact on Enlist legislation?
 - What about the ESA?



Potential Impacts: 2021 Registration

- 2018 registrations of XtendiMax, FeXapan, and Engenia were set to expire December 20, 2020
 - Unless EPA approved a registration for 2021, the three pesticides would have no longer been registered under FIFRA after the expiration date
- Unclear how court's ruling will affect 2021 registration
- FIFRA requires EPA to determine that a pesticide will not cause “adverse impacts to the environment” before it can be registered
 - Possible that EPA may have to address “adverse impacts to the environment” concerns raised by court for 2021 registrations to withstand FIFRA challenge
- New proposed registrations for all three products currently being considered by EPA, decision expected in the fall



Potential Impacts: Future Precedent

- Possible precedent set for FIFRA definition of “adverse impacts to the environment”
- Three unacknowledged risks identified by court may need to be considered in future registration decisions
 - Substantial non-compliance with label requirements; economic costs in the form of a “near monopoly”; and social costs that have “torn apart the social fabric of many farming communities”
 - How will EPA factor those considerations into registration decisions?
 - Will the considerations be applicable beyond challenges brought in the Ninth Circuit?
- Likely need to wait and see



Potential Impacts: Enlist Litigation

- Lawsuit challenging Enlist Duo brought by same plaintiffs as dicamba litigation
- Similar arguments:
 - EPA violated ESA by failing to consult with wildlife agencies on impacts of registration
 - EPA violated FIFRA by applying wrong standard and failing to ensure that the registration would not cause “adverse impacts to the environment”
- Court in dicamba litigation did not reach the ESA question
 - Result: not likely dicamba litigation will affect ESA ruling in Enlist litigation
- “Adverse impacts to the environment” definition may impact Enlist



Potential Impacts: ESA Argument

- Court did not reach plaintiffs' ESA argument so no precedent has been set
- Plaintiffs asked for rehearing but did not get it
- Issue of when to consult on pesticide registration could be decided in another case



Take-Aways:

Situation is ongoing and changing rapidly

Currently, use of existing stocks is permitted until July 31, 2020 by applicators and farmers already in possession of the stock

Possible precedent set for definition of “adverse impacts to the environment”

Unclear what this means for 2021 registration



Additional Resources

Blog Postings

- [The Deal with Dicamba: Overview \(1/22/2020\)](#)
- [The Deal with Dicamba: Lanham Act claims \(1/29/2020\)](#)
- [The Deal with Dicamba: State law failure to warn claims \(2/12/2020\)](#)
- [The Deal with Dicamba: Civil conspiracy claims \(2/26/2020\)](#)
- [The Deal with Dicamba: Trespass and nuisance claims \(3/11/2020\)](#)
- [The Deal with Dicamba: Sherman Act claims \(3/25/2020\)](#)
- [**The Deal with Dicamba: ESA and FIFRA claims \(4/8/2020\)**](#)
- [The Deal with Dicamba: Arkansas state court cases \(4/15/2020\)](#)
- [The Deal with Dicamba: Ninth Circuit Vacates EPA Registration \(6/5/2020\)](#)
- [The Deal with Dicamba: EPA Issues Cancel Order for Dicamba Herbicides \(6/10/2020\)](#)
- [The Deal with Dicamba: Plaintiffs Challenge EPA Cancellation Order \(6/18/2020\)](#)

Previous Webinars

[The Deal with Dicamba: An Overview of Dicamba Related Litigation \(4/15/2020\)](#)





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