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National Family Farm Coalition v. USEPA—Ninth Circuit vacates EPA's conditional registration of dicamba herbicides

Monsanto Company (now Bayer CropScience), as well as two other agrochemical companies, developed a new herbicide—dicamba—and genetically modified dicamba-tolerant seeds to address resistance that had formed to glyphosate, the main ingredient of Monsanto's Roundup brand name product commonly used to treat those crops. It and the competitors applied for, and received, in 2016 conditional registration from the Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 to 136y, for a two-year period encompassing the 2017 and 2018 growing seasons in 34 States. In fall 2018, EPA approved conditional registrations for an additional two-year period. Four advocacy groups challenged the new registration decision, arguing that the agency violated FIFRA and the Endangered Species Act, 16 U.S.C. § 1531 to 1544. The groups had previously challenged the 2016 conditional registration, but the Ninth Circuit dismissed the petition on mootness grounds following issuance of the 2018 registration. They had more success with the new petition: the court of appeals granted it and vacated the registration under FIFRA. *National Family Farm Coalition v. USEPA*, No. 19-70115, 2020 WL 2901136 (9th Cir. June 3, 2020). The panel did not address the ESA claim.

Under FIFRA § 136a(c)(7)(B), EPA could conditionally amend the registration of dicamba only if it determined "that (i) the applicant has submitted 'satisfactory data,' and (ii) the amendment will not 'significantly increase the risk of any unreasonable adverse effect on the environment.'" Section 136(bb) further "EPA to consider, as part of a cost-benefit analysis, "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." In an extensive review of the administrative record, the panel held that EPA's decision was not supported by substantial evidence when considered against the latter two requirements, thereby deeming it unnecessary to "decide whether substantial evidence supports the EPA's conclusion that 'satisfactory data' had been submitted."

The agency found two benefits from the new dicamba herbicides—"providing soybean and cotton growers an additional tool for managing difficult-to-control weeds, and delaying weed resistance to other herbicides"—"amply supported." The problems attendant to dicamba use included the herbicide's extreme toxicity "to broadleaf plants, bushes, and trees. It can damage or kill fruiting vegetables, fruit trees, grapes, beans, peas, potatoes, tobacco, flowers, and ornamental plants. It can also damage or kill many species of large trees, including oaks, elms, and maples." Dicamba's toxicity, moreover,

> is magnified by its tendency ... to move off a field where it is sprayed. Dicamba droplets can drift during or shortly after spraying if the wind is blowing too hard or the spraying equipment is moving too fast. Dicamba vapor can drift if dicamba is applied during a temperature inversion—an atmospheric condition in which cool air at the earth's surface traps warmer air above it, allowing the vapor to remain in a concentrated cloud

> and move off-field during a light wind. And dicamba vapor can drift if dicamba volatilizes after it has come to rest on plants or the ground. Dicamba can volatilize hours or even days after it has been applied, and it does so more easily and in greater volumes as the temperature rises. During temperature inversions, or after volatilizing on hot days, dicamba can drift long distances, sometimes a mile or more.

The panel first concluded in its record review that EPA underestimated the acknowledged risks of dicamba by (1) underestimating the probable acreage subject to use; (2) expressing "purported agnosticism" as to "whether dicamba damage [for 2017 and 2018] was under-or over-reported" when that the "overwhelming record evidence[d] that dicamba damage was substantially under-reported[;]" and (3) "refus[ing] to quantify or estimate the amount of damage caused by [over the top] application of dicamba herbicides, or even to admit that there was any damage at all." It next found that EPA failed to acknowledge dicamba-use risks in view of (1) the substantial non-compliance with label restrictions on when and how dicamba could be used because of their extreme detail and complexity; and (2) the economic cost to the farm industry because, just as "Monsanto's glyphosate-resistance trait, and accompanying glyphosate herbicide, had achieved a near-monopoly[,]" so, too, were "[p]atented dicamba-tolerant seeds and the three new dicamba herbicides [apparently] well on their way to the same degree of market dominance"—a "likely anti-competitive effect" that "EPA at no point identified or took into account." Third, EPA "entirely failed to acknowledge a social cost that had already been experienced and was likely to increase. The record contains extensive evidence that OTT application of dicamba herbicides has torn apart the social fabric of many farming communities." The "'off-target dicamba injury[,]'" according to one weed scientist's article, " 'pitt[ed] neighbor against neighbor.'" The article also pointed to one landowner "'who spoke on the condition of anonymity to protect her from reprisals in her community, has suffered severe damage to a wide variety of trees ... as well as ornamental plants, shrubs and a vegetable garden.'" A respondent to a 2018 survey added that "'[i]n 43 years of business I have never seen a more divisive product among neighbors both farm and non-farm.'"

The final issue was the appropriate remedy. EPA and Monsanto requested remand without vacatur given the fact that "'[v]acatur could leave [dicamba seed] growers with an unusable pesticide technology system and force them to expend additional money on alternative seeds and pesticides.'" The panel stated the general rule that it could "order remand without vacatur 'only in limited circumstances'" but concluded those circumstances did not exist:

> The EPA made multiple errors in granting the conditional registrations. As described above, the EPA substantially understated the risks it acknowledged, and it entirely failed to acknowledge other risks. We conclude that the "fundamental flaws" in the EPA's analysis are so substantial that it is exceedingly "unlikely that the same rule would be adopted on remand." ... [¶] We acknowledge the difficulties these growers may have in finding effective and legal herbicides to protect their [dicamba-tolerant] crops if we grant vacatur. They have been placed in this situation through no fault of their own. However, the absence of substantial evidence to support the EPA's decision compels us to vacate the registrations.

Note: The only State in the Ninth Circuit to which the vacated registration applied was Arizona. Tenth Circuit affected States were Colorado, Kansas, New Mexico and Oklahoma. All Eighth Circuit States were affected (i.e., Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota).

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/06/03/19-70115.pdf