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Pesticide Drama: *dicamba, glyphosate, chlorpyrifos*

2021 Pennsylvania Farm Show I Agricultural Law Symposium

Presented by Chloe Marie, Research Specialist
January 14, 2021 at 2:15pm (EST)

Dicamba – *A little background …*

- October 31, 2018 – EPA granted two-years conditional registrations for new uses of three dicamba-based pesticides on dicamba-tolerant (DT) soybean and cotton:
  - Bayer's *XtendiMax*
  - BASF's *Engenia*
  - Corteva's *FeXapan*

- January 11, 2019 – National Family Farm Coalition, Center for Food Safety, Center for Biological Diversity, and Pesticide Action Network North America petitioned the Ninth Circuit Court of Appeals for review of the registrations. *National Family Farm Coalition, et al. v. U.S. EPA, et al.,* no. 19-70115

Dicamba – Court-ordered Registration Cancellation

- June 3, 2020 – the Ninth Circuit Court of Appeals overruled EPA's registrations of the three dicamba products – *National Family Farm Coalition, et al. v. U.S. EPA, et al.,* No. 19-70115
  - EPA *"substantially understated risks that it acknowledged;"*
  - EPA *"failed entirely to acknowledge other risks."*
- June 8, 2020 – EPA issued a final cancellation order, effective retroactively to June 3, 2020, of the 2018 registrations

Dicamba – Court-ordered Registration Cancellation

- For parties in the distribution chain other than the registrant:
  - Existing stock already in possession as of June 3, 2020, may be distributed or sold only for the purpose of proper disposal or return to the registrant (or a registered establishment under contract with the registrant) until Jul. 31, 2020.
- For commercial applicators distribution:
  - Existing stock already in possession as of June 3, 2020, may be distributed until Jul. 31, 2020
- Use (by growers or commercial applicators) of existing stock already in possession as of June 3, 2020, is permitted, consistent with the previously approved labeling accompanying the product until Jul. 31, 2020.

Dicamba – New Registration Applications

- July 2, 2020 – Bayer and BASF filed applications for new registrations of XtendiMax and Engenia for use on DT cotton and DT soybeans.
- August 12, 2020 – Syngenta filed an application to extend the registration of Tavium, which was scheduled to run out on December 20, 2020.
- October 27, 2020 – EPA approve five-year registrations of the three dicamba products.

Dicamba – 5-year EPA New Registrations

- The 2020 new registrations:
  - Are unconditional
  - Are for a new use on DT soybean and DT cotton only
  - Apply only in 34, including Pennsylvania
  - Expire on December 20, 2025
  - Prohibit soybean application after June 30 annually and cotton application after July 30 annually
  - Require the dicamba products to be tank-mixed with a "pH-buffering agent" and that producers maintain a 24-foot "downwind buffer" and a 310-foot buffer in listed species locations

Dicamba – 5-year EPA New Registrations

- Require a mandatory training on dicamba application, including equipment cleanout following the pesticide application
- Prohibit applications during temperature inversions and at any time other than between one hour after sunrise and two hours before sunset in order to address high volatility issues
- Limit the states' authority to impose further regulations on pesticide use.

Section 24 of FIFRA

« FIFRA section 24(c) allows states to register "additional uses of federally registered pesticides" to meet special local needs within the state, but it does not provide for states to issue more restrictive registrations. A separate provision under FIFRA – section 24(a) – is the appropriate authority for the states to rely on in the event that they want to establish a measure that restricts or narrows the uses authorized by an EPA-approved label.

EPA Guidance on FIFRA 24(c) Registrations

Issued in November 2020

Dicamba – Ongoing Litigation

- *National Family Farm Coalition, et al. v. U.S.EPA, et al.,* Ninth Circuit, No. 20-73750
  - Plaintiffs allege that EPA violated FIFRA and APA by: "(1) failing to support its unconditional registration conclusion of no reasonable adverse effects on the environment with substantial evidence …" and "(2) refusing to hold notice and comment on the decision embedded in the Registration Decision to eliminate state pesticide restriction authority under Section 24 of FIFRA …"

Dicamba – Ongoing Litigation

- *Center for Biological Diversity, et al. v. U.S. EPA, et al.,* USDC Arizona, No. 4:20-cv-00555
  - "… the Registration Actions again either underestimate or ignore risks and costs to farmers and the environment from its decision."
  - "… the decision also found separate ways to violate FIFRA beyond the substantive errors in the registrations."
  - "… EPA also violated FIFRA and the APA by failing to provide a formal notice and comment period despite approval of a new use of these products."
  - "… EPA took the occasion of issuing the Registration Actions approving three specific dicamba products also to make a sweeping rule change for not just those pesticides, but also *all* pesticides, and in a footnote no less."

Glyphosate – Status of Settlement

"Bayer announced today a series of agreements that will substantially resolve major outstanding Monsanto litigation, including U.S. Roundup™ product liability … The main feature is the U.S. Roundup™ resolution that will bring closure to approximately 75% of the current Roundup™ litigation involving approximately 125,000 filed and unfiled claims overall. The resolved claims include all plaintiff law firms leading the Roundup™ federal multi-district litigation (MDL) or the California bellwether cases, and those representing approximately 95% of the cases currently set for trial, and establish key values and parameters to guide the resolution of the remainder of the claims as negotiations advance.

Bayer's News Release (June 24, 2020)

Glyphosate – Status of Settlement

"The total costs of the executed and additional inventory settlements for all outstanding claims are currently expected to be up to US$9.6 billion. Monsanto expects that a substantial number of the outstanding claims can be settled in the coming months. The company intends to make an additional payment of US$1.25 billion to support a separate class agreement between Monsanto and plaintiffs' counsel to address potential future litigation."

Bayer's Half-Year Financial Report as of June 30, 2020 (p. 49)

Glyphosate – Status of Settlement

July 6, 2020 – Pretrial Order No. 214 (In re Roundup Products Liability Litigation, USDC N.D. Cal., 3:16-md-02741)

"Even with the consent of both sides, it's questionable whether it would be constitutional (or otherwise lawful) to delegate the function of deciding the general causation question (that is, whether and at what dose Roundup is capable of causing cancer) from judges and juries to a panel of scientists.

Even if it were lawful to delegate this function to the panel, it's unclear how the delegation proposed here would benefit a class of Roundup users who either have cancer but have not yet sued Monsanto or have not yet developed cancer …

In an area where the science may be evolving, how could it be appropriate to lock in a decision from a panel of scientists for all future cases? …"

Glyphosate – Status of Settlement

- July 21, 2020 – Pretrial Order No. 216: *"Under normal circumstances, the Court would be reluctant to issue a stay of this kind … But because the pandemic has delayed all litigation substantially, and because it is unclear when civil trials can resume, the Court's and the parties' time is best spent on effectuating the settlements reached in the MDL."*

- September 14, 2020 – Attorneys for plaintiffs: Baum, Hedlund, Aristei & Goldman, PC, Andrus Wagstaff, PC, and Moore Law Group, PLLC "entered into a fully-executed and binding Master Settlement Agreement with Monsanto."

- December 2, 2020 – Joint Case Management Statement and Litigation Plan

Glyphosate – *Bellwether* cases

- **Johnson v. Monsanto**
  - Cal. Supreme Court, No. S264158
  - California Court of Appeals, First Appellate District, No. A155940, A156706
  - San Francisco County Superior Court, Cal., No. CGC-16-550128
- **Hardeman v. Monsanto**
  - Ninth Circuit, No. 19-16636
  - USDC N.D. California, No. 3:16-cv-00525
- **Pilliod v. Monsanto**
  - California Court of Appeals, First Appellate District, No. A158228
  - Alameda County Superior Court, Cal., No. RG17862702

Glyphosate – *Johnson v. Monsanto*

- October 21, 2020 – The California Supreme Court denied Bayer's petition for review.
- August 4, 2020 – Bayer filed a petition for review before the California Supreme Court of the California Court of Appeals' findings and verdict in favor of Dewayne Johnson.
- July 20, 2020 – the California Court of Appeals issued an opinion affirming liability but reducing a state trial court's 2018 jury verdict against Monsanto. The Court of Appeals affirmed the jury's finding that Roundup caused Mr. Johnson's non-Hodgkin's lymphoma but reduced the award as excessive, from $298.3 million ($39.3 million in compensatory damages and $250 million in punitive damages) to $20.5 million (compensatory and punitive damages of $10.25 million each)

Glyphosate – *Hardeman v. Monsanto*

- August 21, 2020 – Hardeman filed a reply brief to uphold the 80.3 million verdict and reverse the district court's July 17, 2019 order.
- December 13, 2019 – Monsanto appealed the $25.3 million reduced jury verdict
- August 15, 2019 – Monsanto filed a notice of appeal with the Ninth Circuit Court of Appeals
- July 17, 2019 – Order entered amending judgment and reducing total damages, from $80.3 million to $25.3 million

Glyphosate – *Pilliod v. Monsanto*

- July 31, 2020 – The Pilliods filed a reply brief seeking approximately $575 million in total damages for the couple.
- August 28, 2019 – The Pilliods cross-appealed the reduced verdict.
- August 26, 2019 – Monsanto appealed amended final judgment and the reduced award.
- July 26, 2019 – The Alameda County Superior Court amended prior final judgment and reduced total damages award to approximately $87 million for the couple.

Chlorpyrifos – *Registration Status*

- Banned for residential use since 2001, but not for agricultural use
- Initially registered as a pesticide in 1965; lastly re-registered on July 31, 2006. EPA concluded that chlorpyrifos is safe to use.
- Currently under EPA's registration review process (EPA-HQ-OPP-2008-0850)
  - September 22, 2020 – EPA made available three risk assessment documents as part of chlorpyrifos registration review process.
  - December 7, 2020 – EPA issued a Proposed Interim Decision for chlorpyrifos. Public comment period is open until February 5, 2021.

Chlorpyrifos – *EPA's 2016 Proposed Rule*

- November 6, 2015 – EPA issued in the Federal Register a proposed rule, entitled "*Chlorpyrifos; Tolerance Revocations*" (80 FR 69079):

  "At this time, the agency is unable to conclude that the risk from aggregate exposure from the use of chlorpyrifos meets the safety standard of section 408(b)(2) of the Federal Food, Drug, and Cosmetic Act (FFDCA). Accordingly, EPA is proposing to revoke all tolerances for chlorpyrifos."

Chlorpyrifos – *State Actions: Hawaii*

- First state to ban the use of chlorpyrifos.
- June 14, 2018 – Signed into law Act 45 (Section 149A-31, Revised Statutes) prohibiting the use and application of any pesticide with chlorpyrifos as an active ingredient as of January 1, 2019;
  - The state Department of Agriculture retains the right to grant a temporary permit to use chlorpyrifos products until December 31, 2022.

Chlorpyrifos – *State Actions: California*

- October 9, 2019 – CalEPA's Department of Pesticide Regulation announced the reaching of an agreement to virtually end all uses of chlorpyrifos by February 6, 2020.
  - The agreement provides that pesticide manufacturers are prohibited from owning or using chlorpyrifos products in California as of December 31, 2020.

Chlorpyrifos – *State Actions: Maryland*

- June 5, 2020 – The Maryland Department of Agriculture (MDA) adopted a phase-out plan to ban the use of chlorpyrifos (Section 15.05.01, Code of Maryland Regulations).
- The phase-out plan prohibits:
  - The aerial application of chlorpyrifos products as of June 15, 2020
  - The use of chlorpyrifos or seeds that have been treated with chlorpyrifos as of December 31, 2020.
  - The use of chlorpyrifos or treated seeds for the treatment of snap bean seeds and the trunks and lower limb of fruit trees after June 30, 2021.
  - The MDA retains the right to grant a temporary authorization to use chlorpyrifos "if the Secretary has determined that there are no effective alternatives for the particular use" until December 31, 2021.

Chlorpyrifos – *State Actions: New-York*

- December 10, 2019 – Governor Andrew Cuomo's Press Office announced an immediate action plan to ban the aerial use of chlorpyrifos in the state. Governor Cuomo also asked the Department of Environmental Conservation (DEC) to develop regulations by December 2020 to prohibit all uses of chlorpyrifos by July 2021.

- December 23, 2020 – Governor Cuomo signed bill S6502A into law, prohibiting the use of chlorpyrifos on state properties.

Chlorpyrifos – *Other State Actions*

- New Jersey
  - February 10, 2020 – Senate Bill 1301 would prohibit "the sale, purchase, use, and application" of chlorpyrifos in the state.
  - Continued on the 2021 legislative session calendar
- Pennsylvania
  - December 2, 2019 – House Bill 2091 would have banned the use of chlorpyrifos in the state
  - Died in the House
  - The Department of Agriculture is currently discussing whether a ban on chlorpyrifos use would be appropriate
- Virginia
  - January 17, 2020 – House Bill 1706 would prohibit "the manufacture, distribution, sale, offer for sale, use, offer for use" of chlorpyrifos products
  - Continued on the 2021 legislative session calendar

Chlorpyrifos – *Ongoing Multistate Litigation*

- ***New York, et al. v. Wheeler, et al.*, Ninth Circuit, No. 19-71982**
  - August 7, 2019 - A group of states, including New York, California, Washington, Maryland, Vermont and Massachusetts, filed a petition for review of EPA's 2019 final order denying objections to March 2017 petition denial order to ban chlorpyrifos nationally.
  - October 16, 2019 – The Court of Appeals agreed to hear the matter and consolidated the case with ***LULAC II, et al. v. Wheeler, et al.*** **No. 19-71979** (lead case)
  - November 8, 2019 – the Court of Appeals granted the states of Oregon and Hawaii's motions to intervene in the case in support of petitioners
  - July 28, 2020 – Oral arguments were held.

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Thank you!

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