

June 12, 2020

Activist Lawsuit Results in EPA's Nationwide Cancellation of Dicamba Approval Leaving Farmers in the Lurch

In yet another blow to an already struggling agricultural industry, on June 8, 2020, the U.S. Environmental Protection Agency (EPA) issued an order canceling the registration of over-the-top (OTT) uses of three dicamba-based herbicides: Xtendimax, Engenia, and FeXapan. This cancellation order follows the Ninth Circuit Court of Appeals' June 3, 2020 vacatur of EPA's approval of the dicamba registrations. The ruling from the California based federal court resolved a 2017 lawsuit filed by environmental activist groups arguing that EPA violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) when it registered XtendiMax, Engenia, and FeXapan.

The nation-wide cancellation order prohibits distribution or sale of these three products which are post-emergent herbicides used heavily in soybean and cotton production. The EPA order does provide farmers and commercial applicators some short-term relief to utilize existing product inventories that were purchased prior to the vacatur. The order specifies that farmers and commercial operators may use existing stocks of Xtendimax, Engenia, and FeXapan that were already in their possession as of June 3, 2020. Use must be consistent with the products' previously approved labels and may continue until July 31, 2020. The order does ban the further sale or distribution of the products not already in inventory as of June 8, 2020.

But the Activists plaintiffs are not done. Last night, they filed an emergency motion for contempt against EPA given the June 8 order allows the limited continued use of the product inventory. It is unclear whether this is proper procedure or whether the challenge should have been brought as a challenge to the June 8, 2020 EPA Order.

The order applies across the country, to all farmers and ag retailers in the U.S. In its cancellation order, the EPA noted

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that it received numerous phone calls and emails, after the Ninth Circuit decision, expressing concern and the potential for devastation to cotton and soybean crops, which could result in a crisis for the industry. The EPA aimed to incorporate this consideration in its order and mitigate some of what EPA views as the economic hardship imposed on farmers by the Court's decision, particularly during the stressful circumstances of the COVID-19 public health emergency.

What happens next is largely up to the chemical manufacturers. There are reregistration proceedings that are available, and it may be a race against the clock to find replacement products given that most growers pre-purchase inputs in the fall for spring planting and application. We will continue to monitor these important developments. To understand the impacts of this order, feel free to contact your Michael Best attorney in our Environmental and Natural Resources practice group.

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