EPA Issues Order Governing Existing Stocks of Dicamba Products with Registrations Vacated by the Ninth Circuit Decision, and the Petitioners Have Moved for Emergency Relief to Enforce the Vacatur and to Hold EPA in Contempt

Article By
Lisa M. Campbell
Timothy D. Backstrom
James V. Aidala
Bergeson & Campbell, P.C.
Pesticide Law and Policy Blog

- Environmental, Energy & Resources
- Administrative & Regulatory
- All Federal

Tuesday, June 16, 2020

On June 8, 2020, the U.S. Environmental Protection Agency (EPA) announced the issuance of an existing stocks order under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Section 6(a)(1) governing further sale, distribution, and use
of existing stocks of three reduced volatility dicamba products (XtendiMax®, EngeniaTM, and FeXapanTM) with conditional registrations that were vacated by the June 3, 2020, decision of the Ninth Circuit Court of Appeals in National Family Farm Coalition v. EPA. EPA explained its action by stating that the existing stocks order would provide “clarity to farmers” in light of the Court decision. Because EPA believes that vacatur made those stocks of the three dicamba products that were already in channels of trade unregistered pesticides, and the Court’s decision did not specifically address or establish any regimen to govern these unregistered existing stocks, EPA concluded that issuance of an existing stocks order was a practical necessity. The existing stocks order includes provisions that: (1) prohibit all sale and distribution of existing stocks of the three vacated dicamba products by the registrants, and by persons other than commercial applicators except for disposal of the products or returning the products to the registrants or their contract agents, (2) allow commercial applicators to use existing stocks of the vacated dicamba products in their possession in a manner consistent with existing labeling until July 31, 2020, and (3) prohibit end users from using existing stocks of the vacated dicamba products in their possession except in a manner consistent with existing labeling and from using such stocks in any manner after July 31, 2020.

**Need for an Existing Stocks Order**

To understand EPA’s position concerning the need for an existing stocks order for the three dicamba products with registrations vacated by the Ninth Circuit decision, it is important to review the legal status of those existing stocks after issuance of the decision. In the absence of further EPA action, all stocks of the three dicamba products subject to the vacatur order that were already in channels of trade became unregistered pesticides. Under FIFRA, as unregistered pesticides, these products could not be distributed or sold, which would prohibit stock of the unregistered products from being returned to the registrants or disposed, absent further EPA action. Stocks of the three products that were labeled for uses other than soybeans and cotton (the uses extended by the conditional registration decision vacated by the Court) also became unregistered and thus also could not be distributed or sold absent further action by EPA. Without further action by EPA, stocks of the three products already in the hands of end users could be lawfully used without any kind of restriction because although FIFRA Section 3(a) prohibits sale or distribution of unregistered pesticides, FIFRA does not include any provision prohibiting or limiting use of unregistered pesticides. Thus, the Court’s vacatur action created a situation in which EPA needed to act expeditiously to establish a rational regimen governing existing stocks of the three dicamba products. EPA was able to issue an order creating such a regimen because EPA construes the vacatur of the product registrations by Court action as a type of cancellation, which is how EPA has construed vacatur orders in the past. FIFRA Section 6(a)(1) expressly authorizes EPA to issue orders governing sale, distribution, and use of canceled pesticides.

**EPA Policy for Existing Stocks Orders**

EPA adopted a policy in 1991 (56 Fed. Reg. 29362) outlining six factors it generally considers in adopting existing stocks orders for canceled pesticides under FIFRA Section 6(a)(1): (1) the quantity of existing stocks at each level in channels of trade, (2) the risks resulting from use of existing stocks, (3) the benefits resulting from use
of existing stocks, (4) financial expenditures users and others have already spent on existing stocks, (5) the risks and costs of disposal or alternative disposition of existing stocks, and (6) the practicality of implementing restrictions on the distribution, sale, or use of existing stocks. EPA applied this policy to the current situation and determined that “[e]ach of the six factors weighs heavily in support of allowing end users to use existing stocks of these dicamba products that are in their possession.” Since use of these unregistered pesticides is not otherwise prohibited by FIFRA as discussed above, EPA adopted prohibitions of use of the products not in accordance with the current labeling and of any use after July 31, 2020. The only action taken by EPA to authorize further use of the three products involved stocks held by commercial applicators, which EPA allowed the commercial applicators to use according to the current labeling until July 31, 2020.

EPA Administrator Wheeler stated, “At the height of the growing season, the Court’s decision has threatened the livelihood of our nation’s farmers and the global food supply. Today’s cancellation and existing stocks order is consistent with EPA’s standard practice following registration invalidation, and is designed to advance compliance, ensure regulatory certainty and to prevent the misuse of existing stocks.”

Three days after EPA issued the dicamba existing stocks order, on June 11, 2020, the Petitioners in the National Family Farm Coalition case submitted a motion requesting that the Court provide emergency relief “to enforce its vacatur” decision and that the Court hold EPA and Administrator Wheeler in contempt. According to the Petitioners, EPA’s entire rationale for issuing an existing stocks order is based on false premises. In the Petitioners’ view, existing stocks of the three dicamba products are not “unregistered” because the vacatur order only invalidated certain newly authorized uses, and the existing stocks should not be deemed to be “cancelled” either, although the conditional registration decision for the products has been vacated. In their motion, the Petitioners also assert that EPA is wrong because, “When read in context, FIFRA clearly prohibits the use of unregistered pesticides.” In addition to their request that the Court take emergency action to enforce its decision and hold EPA in contempt, the Petitioners also requested that the Court adjudicate their Endangered Species Act (ESA) claims, an action that would require that the Court recall the mandate and issue another decision on the ESA claims it previously declined to reach.

On June 12, 2020, the Court issued an order requiring EPA to file its response to the motion by 5:00 p.m. PDT on June 16, 2020, and the Petitioners to file any reply by 5:00 p.m. PDT on June 18, 2020.

In another development, BASF Corporation and E.I. DuPont de Nemours each filed separate “emergency motions” to intervene in the case on June 12, 2020. Each company asserts that it was not afforded notice that the Court might take adverse action concerning the registration for its dicamba product until after the decision vacating that registration was issued by the Court. At this juncture, the Court has not yet indicated whether it will consider these emergency intervention motions or whether it would be willing to allow any further briefing on the merits of the case.

Additional information on the Ninth Circuit Court of Appeals decision is available on our blog.
Commentary

The Court’s June 3, 2020, decision stated, “We are aware of the practical effects of our decision,” but it is not clear from the discussion that follows whether the Court fully considered the chaotic effects of issuing a vacatur decision that did not specifically address the fate of existing stocks of the dicamba products with vacated registrations. On May 21, 2020, EPA asked for leave to file information on its plans to issue a cancellation order governing existing stocks of products with vacated registrations, but the Court declined to allow that filing. In any case, it should not have been surprising that EPA would construe its vacatur order as a form of cancellation, because that is what EPA did when the Ninth Circuit previously issued a vacatur order for sulfoxaflor products in 2015.

The Petitioners’ motion rejecting the basic legal premises underlying the EPA existing stocks order reflects a novel view of pesticide registration that is difficult to reconcile with the plain language and established constructions of FIFRA. Under FIFRA, EPA issues registrations for specific pesticide products, which may be labeled only for those uses that EPA has previously determined meet applicable requirements. Under FIFRA Section 6(b), EPA can decide that particular uses no longer meet the standard for registration and must be removed from an existing product label, but the only means by which EPA can effectuate that determination is by taking action to cancel any product for which the registrant does not agree to make the necessary changes. The Court vacated EPA’s conditional registration decision that authorized three registered dicamba products to be labeled for use on dicamba-tolerant soybeans and cotton but did not direct or establish any process for EPA to consider amending the product labeling or restoring the prior registrations. Under these facts, EPA has concluded that under FIFRA, existing stocks that are labeled for those uses became unregistered pesticide products because the labeling no longer conforms to the product registrations as they have been altered by the Court. In the absence of an existing stocks order, stocks of the affected products labeled for the disallowed uses could not be lawfully distributed for any purpose, including voluntary recall by the registrant, disposal, or relabeling to remove the disallowed uses.

Despite the assertions by the Petitioners that FIFRA prohibits use of unregistered pesticides, FIFRA has not been construed in this manner. While it a violation of FIFRA to distribute or sell any pesticide product with labeling that does not conform to a valid registration, FIFRA does not include any similar prohibition on use of an unregistered pesticide. Thus, in the absence of an existing stocks order, stocks of the three dicamba products with vacated registrations that are already in the hands of end users could be lawfully used without restriction. This notion is reflected in the provisions addressing end users in the order. No provision in the order authorizes end users who have the three dicamba products in their possession to do anything. Rather, the order prohibits end users from using the three products except in compliance with the existing labeling and from using the products at all after July 31, 2020.

Of course, it is not surprising that EPA applied its established criteria for existing stocks orders in the manner that it did. Representatives of affected growers argued that prohibiting all use of the products in the middle of the 2020 growing season
would lead to billions of dollars in damages, at a time when the entire agricultural economy has already been severely impacted by the Covid-19 pandemic.

In addition to arguing that an existing stocks order was necessary to establish a practical regimen governing distribution and use of those stocks of the three dicamba products in channels of trade when the Court’s decision was issued, EPA will likely argue that the Circuit Court lacks jurisdiction to review the existing stocks order.

©2020 Bergeson & Campbell, P.C.