

Oral Argument Held on April 21, 2020

No. 19-70115

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL FAMILY FARM COALITION, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents,

and

MONSANTO COMPANY,
Intervenor-Respondent.

On Petition for Review of Agency Action
of the United States Environmental Protection Agency

**BRIEF OF AMICI CURIAE AMERICAN FARM BUREAU FEDERATION,
AMERICAN SOYBEAN ASSOCIATION, NATIONAL COTTON COUNCIL
OF AMERICA, NATIONAL ASSOCIATION OF WHEAT GROWERS,
NATIONAL CORN GROWERS ASSOCIATION, AND NATIONAL
SORGHUM PRODUCERS IN OPPOSITION TO PETITIONERS'
EMERGENCY MOTION AND IN SUPPORT OF RESPONDENTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the American Farm Bureau Federation, American Soybean Association, National Cotton Council of America, National Association of Wheat Growers, National Corn Growers Association, and National Sorghum Producers state that none of them has a parent corporation, nor does any publicly held corporation own 10% or more of the stock of any of them.

s/ Edmund S. Sauer

Edmund S. Sauer

Dated: June 16, 2020

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INTEREST OF AMICI CURIAE¹

These *amici*—the American Farm Bureau Federation, American Soybean Association, National Cotton Council of America, National Association of Wheat Growers, National Corn Growers Association, and National Sorghum Producers (together, “the Growers”)—are national trade associations that represent farmers, ranchers, and their families nationwide. The Growers have an immediate interest in the disposition of Petitioners’ Emergency Motion, which asks this Court to immediately prohibit Growers from using existing stocks of Xtendimax, Engenia, and FeXapan (collectively, the “Dicamba Products”) on dicamba-tolerant soybeans and cotton.

Granting the Petitioners’ motion mid-growing season could have catastrophic consequences for Growers and America’s agricultural community, which depend on being able to use the Dicamba Products for the next several weeks. The Court should respect EPA’s expertise in managing existing stocks of formerly registered pesticide products and deny Petitioners’ Emergency Motion.

¹ This brief is submitted with a motion for leave under Circuit Rule 29-2. Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Fed. R. App. P. 29.

ARGUMENT

I. SOYBEAN AND COTTON GROWERS RISK SUFFERING SIGNIFICANT HARM IF THEY CANNOT USE EXISTING STOCKS OF DICAMBA PRODUCTS.

Granting Petitioners' request to immediately ban Growers' use of existing stocks of the Dicamba Products would put America's soybean and cotton growers at risk for financial devastation. Growers have planted millions of acres of crops that depend on the use of Dicamba Products this growing season. Because no viable alternatives exist that can be deployed immediately, banning Growers' use of existing stocks of Dicamba Products could have disastrous consequences. The Court should not interfere in EPA's decision to allow growers to use the existing stock of Dicamba Products through July 31, 2020.

A. Soybean and cotton growers' massive investments in dicamba-tolerant crops could be devastated if this Court forbids the use of existing stocks of the Dicamba Products.

America's soybean and cotton growers would risk severe financial harm if prevented from using Dicamba Products this growing season.² Soybean and cotton farmers currently have an estimated 64 million acres³ of dicamba-tolerant crops under cultivation. These farmers have invested billions in seeds⁴ and hundreds of

² American Soybean Association Letter to EPA ("ASA Letter"), Ex. 3 at 1.

³ See Emily Unglesbee, *Soybean Decisions*, The Progressive Farmer (Oct. 17, 2019), <https://www.dtnpf.com/agriculture/web/ag/crops/article/2019/10/17/review-herbicide-tolerant-soybean> (estimating 54 million acres); National Cotton Council Letter to EPA ("NCC Letter"), Ex. 4 at 1 (estimating 9.630 million acres).

⁴ University of Missouri Extension, *Southeast Missouri Crop Budget*

millions of dollars in herbicides⁵ alone, not including labor, fertilizer, and other costs, expecting that over-the-top applications of dicamba would remain lawful during this growing season.⁶ Forbidding such use could leave soybean and cotton growers largely defenseless against weeds resistant to other herbicides, causing potentially significant financial consequences from yield losses (which, assuming the product was not available at all this season, could be 50% or more).⁷ Assuming such unavailability, overall financial losses could total: (i) for soybean growers, between \$2 and \$10 billion (assuming \$40 to \$200 in yield-loss per acre of soybeans),⁸ and (ii) for cotton growers, \$400 to \$800 million (assuming 50% yield

<http://extension.missouri.edu/scott/documents/Ag/crop-budgets/RR-Extend-Soybeans.pdf> (last visited June 16, 2020) (pricing dicamba-tolerant soybean seeds at \$62/acre); *see* University of Georgia, *Cotton Budgets*, <https://agecon.uga.edu/extension/budgets.html> (last visited June 16, 2020) (estimating costs of dicamba-tolerant cotton seeds at \$97/acre).

⁵ ASA Letter at 1; University of Georgia, *Cotton Budgets*, <https://agecon.uga.edu/extension/budgets.html> (estimating cost of Xtendimax at \$11.00/acre per application, for two applications).

⁶ ASA Letter at 1 (“Never before – at the height of growing season – have growers been immediately restricted from using hundreds of millions of dollars in legally purchased product”); *see also* American Farm Bureau Federation Letter to EPA, Ex. 2.

⁷ Weed Science Society of America, *Perspectives on Soybean Yield Losses Due to Weeds in North America*, <http://wssa.net/wp-content/uploads/WSSA-2016-Soybean-Yield-Loss-poster.pdf> (last visited June 13, 2020); NCC Letter at 1.

⁸ Based on 2019 average yields of 47.4 bushels/acre cash market price of soybeans at \$8.68/bushel from June 2020, Growers could lose \$205.72 per acre on any of the estimated 50 million acres planted with dicamba-tolerant soybeans. *See* Nat’l Ag. Statistics Service, *Crop Prod. 2019 Summ.* 3 (USDA Jan. 2020), https://www.nass.usda.gov/Publications/Todays_Reports/reports/cropan20.pdf; *Soybeans*, Business Insider,

loss on 20% to 40% of cotton fields.⁹ To be sure, losses are difficult to predict due to the unprecedented nature of losing an over-the-top herbicide in the middle of a growing season, but it is clear that billions of dollars in farmer investments are at risk.

These potentially devastating losses would exacerbate an already tenuous economic situation for America's cotton and soybean farmers, who face depressed market prices and uncertainty in commodity markets due to ongoing trade tensions. Since 2018, loss of market access in China prompted drops in cotton futures prices (from the mid-\$0.90s in June 2018 to the upper-\$0.50s in August 2019)¹⁰ and in soybean prices (from \$10.39 per bushel in May 2018 to \$8.68 per bushel in June 2020).¹¹

Moreover, the COVID-19 pandemic has caused unprecedented disruptions in the supply chains and markets for the U.S. and world soybean, cotton, and textile industries. As livestock producers reduced their herd sizes, demand for soymeal fell, further depressing soybean prices.¹² The COVID-19 pandemic also caused cotton

<https://markets.businessinsider.com/commodities/soybeans-price> (last visited June 16, 2020).

⁹ NCC Letter at 1.

¹⁰ National Cotton Council, *The Economic Outlook for U.S. Cotton* 41 (2020), https://www.cotton.org/econ/reports/upload/20annmtg_FullVersion_Final.pdf.

¹¹ *Soybeans*, Business Insider, <https://markets.businessinsider.com/commodities/soybeans-price>.

¹² Christopher Walljasper, *Grains—Soybeans Fall Further on Coronavirus Demand Risks*, Successful Farming (Apr. 14, 2020),

demand to collapse, which has been felt across the U.S. cotton industry, from textile manufacturers to producers, and all segments in between.¹³

B. Growers lack the tools to effectively mitigate these losses at this point in the growing season.

Most farmers made decisions on which seed varieties to plant in late 2019. Decisions on what to plant include assessing local needs against the technology available. When selecting seed varieties to plant in 2020, some farmers who selected dicamba-tolerant crops developed an integrated pest management plan with the intention of utilizing Dicamba Products. Growers relied on the availability of the Dicamba Products and cannot pivot mid-season or go back in time to plant different seeds or adopt a different cropping system. Yield losses resulting from weed infestations would be difficult, if not impossible, to mitigate because no viable alternatives to the Dicamba Products exist.

Glyphosate and glufosinate (on cotton only) are potential alternatives. However, glyphosate will not be effective against glyphosate-resistant weeds that can be controlled by dicamba, glufosinate has limitations under the circumstances, and the use of these herbicides alone risks increasing resistance in weed species that

<https://www.agriculture.com/markets/newswire/grains-soybeans-fall-further-on-coronavirus-demand-risks-0>.

¹³ USDA, *COVID-19 Spurs Record Downward Adjustments to Global Demand* (Apr. 2020), <https://downloads.usda.library.cornell.edu/usda-esmis/files/kp78gg36g/34850214n/w9505k169/cotton.pdf>.

Dicamba Products would otherwise control.¹⁴ Moreover, the marketplace lacks sufficient quantities of Tavium to meet farmers’ immediate demands.¹⁵

For weeds resistant to glyphosate and glufosinate, often the sole remaining option is weeding by hand. But that is practically no option at all. It is extremely difficult to find labor for manual weed control, let alone on the scale and with the immediacy necessary to replace Dicamba Products this growing season. This type of labor is in short supply as a result of COVID-19, recent immigration policy, and long-term strains on the H-2A visa system. And, even where it is available, labor costs can range from \$20 to \$60 per acre.¹⁶ Given the hundreds—and in many cases thousands—of acres growers have under their individual production, coupled with limited labor availability, there is no practical way growers could acquire the workers needed to meet a hand-weeding scenario even if they could absorb the enormous additional costs—and many cannot.

C. Blocking the use of existing stocks risks exacerbating resistance and undermining the efficacy of existing herbicides in future years.

The harm from immediately banning use of existing stocks of Dicamba Products may not be limited to this year or to these fields. Dicamba Products “provide[] a long-term benefit as a tool to delay resistance of other herbicides” by

¹⁴ NCC Letter at 2.

¹⁵ Bill Spiegel, *Now What?*, Successful Farming (June 5, 2020), <https://www.agriculture.com/news/crops/now-what>.

¹⁶ NCC Letter at 2.

reducing their use and destroying resistant weeds before they can pass their traits to future generations.¹⁷ Additionally, the loss of over-the-top dicamba this growing season may result in reduced efficacy of glufosinate due to resistance development.¹⁸ Thus, weeds that would have been killed by dicamba could survive, go to seed, and pass on their resistance to seed banks that can persist in the fields for decades.¹⁹

Petitioners themselves have noted that herbicide-resistance poses significant threats to agriculture—*e.g.*, “[g]lyphosate-resistant Palmer amaranth . . . can render land unusable for agriculture;”²⁰ “glyphosate-resistant weeds threaten world food production;”²¹ and “[w]eed resistance poses a serious threat to rural communities.”²² As a practical matter, the Dicamba Products are the only available short-term solution to these specific weed problems.

¹⁷ EPA, *Over-The-Top Dicamba Products for Genetically Modified Cotton and Soybeans: Benefits and Impacts*, 16–17 (Oct. 31, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPP-2016-0187-0966>.

¹⁸ NCC Letter at 2.

¹⁹ See Eric Sfiligoj, *The Weed Resistance Problem: A Matter of Billions*, CropLife (April 1, 2014), <http://www.croplife.com/crop-inputs/herbicides/the-weed-resistance-problem-a-matter-of-billions/>; Robert Norris, *Never Let 'Em Seed*, <http://wssa.net/wssa/weed/articles/wssa-neverletemsetseed/> (last visited June 16, 2020).

²⁰ Pls.’ Mem. in Supp. of Permanent Inj. at *17, *Ctr. for Food Safety v. Vilsack*, Case No. 3:08-cv-00484-JSW (N.D. Cal. Apr. 9, 2010).

²¹ *Id.*

²² Center for Food Safety, *National Weed Summit Tackles Epidemic of Herbicide-Resistant “Superweeds”* (May 10, 2012), <https://www.centerforfoodsafety.org/press-releases/708/national-weed-summit-tackles-epidemic-of-herbicide-resistant-superweeds>.

D. Granting Petitioners’ requested relief risks returning to the uncertainty and confusion that followed this Court’s vacatur.

Vacatur of the dicamba registrations caused widespread uncertainty and confusion in the agricultural community. For example, the Oklahoma Secretary of Agriculture recognized that “farmers are in their busiest season of doing what they do best—producing food and fiber—the [vacatur] of Dicamba products brings on tremendous uncertainty and confusion at this most critical time.”²³ Other officials recognized that banning Dicamba Products in this growing season risks financially devastating Growers. Missouri’s Director of Agriculture concluded that “[a]n overnight decision making this tool illegal is not something that should be done mid-growing season.”²⁴

Nearly all states to consider the question concluded that this Court’s vacatur did not preclude continued use of the three Dicamba Products in this growing season.²⁵ The EPA’s Cancellation Order resolved much of the remaining confusion. It implements this Court’s opinion vacating the registrations, while orderly winding

²³ *Oklahoma Secretary of Agriculture Comments on Ninth Circuit’s Dicamba Ruling*, Oklahoma Farm Report (June 5, 2020), http://www.oklahomafarmreport.com/wire/news/2020/06/00010__BlayneonDicamba06052020_125609.php#.Xukx85NKjOQ.

²⁴ Missouri Dep’t of Agric, *Statement on Dicamba Status* (June 5, 2020), <https://agriculture.mo.gov/news/newsitem/uuid/48dc40af-e9b4-4f88-a496-879a0edfe0b8/departement-of-agriculture-issues-statement-on-dicamba-status>.

²⁵ Emily Unglesbee, *The States of Dicamba*, <https://www.dtnpf.com/agriculture/web/ag/crops/article/2020/06/08/states-enter-uncertain-legal-dicamba> (last visited June 15, 2020).

down and authorizing limited use of existing stocks, just as FIFRA permits. There is no emergency need for this Court to undo EPA’s administrative order, nor does this Court possess the authority to do so, as explained below. The immediate and substantial risks to Growers weigh strongly against Petitioners’ Emergency Motion.

II. GROWERS RELY ON EPA’S ORDERLY REGULATION OF EXISTING STOCKS OF FORMERLY REGISTERED PRODUCTS.

The Court should deny Petitioners’ Emergency Motion for another reason. Granting Petitioners’ requested relief would short circuit the proper administrative and judicial-review framework that Congress prescribed for existing stocks under FIFRA. Farmers use countless FIFRA-regulated pesticide products, including herbicides, insecticides, and fungicides. They make planting decisions and significant, up-front financial investments, based on the rules and regulations in place at the time plans are made. Farmers depend on the rules not changing in the middle of the game—they need certainty.

Fortunately, Congress provided that certainty by equipping EPA with “existing stocks” authority that it has exercised here. EPA’s long-established policy and practice under FIFRA provides for an orderly management of the distribution, sale, and use of a formerly registered pesticide product, including in the context of vacatur. *Existing Stocks of Pesticide Products; Statement of Policy*, 56 FR 29362-01 (June 26, 1991) (“Existing Stocks Policy”). Indeed, “[FIFRA] assure[s] that the economic interests of farmers and other consumers [are] fully considered before any

pesticide [is] withdrawn from the market.” *McGill v. E.P.A.*, 593 F.2d 631, 635 (5th Cir. 1979).

EPA’s existing stocks policy is particularly important when, as here, multiple products become formerly registered in the middle of a growing season. Growers have no mechanism for returning a field to the *status quo ante* before it was planted. Neither a mid-season cancellation nor a vacatur unplants a seed, retroactively tills a field, or clears a storehouse of products purchased under the prior registration. As a result, Growers depend on EPA to make reasoned decisions about whether the risks of continuing to use existing stocks of a particular pesticide that season outweigh the risk to the supply chain for food, fuel, feed, and fiber if those supplies are not used.

Notably, EPA’s guidance and authorization to use existing stocks was unusually important here because of the scope of this Court’s opinion. As BASF Corporation (“BASF”) and E.I du Pont de Nemours and Company (“EID”) argue,²⁶ the conditional new-use registrations of Engenia and FeXapan were not squarely before the Court when it issued its Final Order, so the Growers had no notice that the Court would vacate the registration of all three Dicamba Products. The expanded scope of the Court’s Order magnified the harm to Growers, particularly if it is interpreted as precluding all use of existing stocks of the products.

²⁶ Growers support BASF and EID’s motions to intervene. Dkt. 129 & 130. BASF and EID have a unique and critical perspective regarding the harm caused by their products becoming subject to the vacatur.

Finally, Congress entrusted EPA with the responsibility for balancing the need for pesticides with the environmental risks of those products in the first instance. *See, e.g.*, S. Rep. No. 92–838, *as reprinted in* 1972 U.S.C.C.A.N. 3993, 4032. The Court of Appeals is to “affirm or set aside the order complained of in whole or in part,” 7 U.S.C. § 136n(b), without taking on tasks initially “reserved for the EPA,” *Love v. Thomas*, 858 F.2d 1347, 1364 (9th Cir. 1988). This is consistent with the general approach to agency decisions, where “it is normally desirable to let the agency develop the necessary factual background” and give the agency the “first chance to exercise that discretion or to apply that expertise.” *McKart v. United States*, 395 U.S. 185, 194 (1969).

Here, EPA had not made the decision as to existing stocks of the products at issue when the Court issued its Final Order. Amici therefore find no merit in Petitioners’ argument that the Court has already decided the existing-stock issue implicitly through its mention of the potential economic impact in the last paragraph of its decision. The Final Order does not expressly mention existing stocks or the applicable framework. But if the Court *did* intend to decide this issue, that approach would be inconsistent with FIFRA’s statutory scheme. Under FIFRA, judicial review properly occurs after a full factual record has been developed and EPA has balanced the applicable factors in the first instance. *See* 7 U.S.C. § 136n(b); S. Rep. No. 92-838 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993. Here, EPA simply had

not yet decided the existing stocks issue, so the issue was not before the Court at the time of the Final Order. Further, EPA has now decided this issue without a hearing, so *this* Court has no jurisdiction to decide it now either. That matter should be left to a district court. 7 U.S.C. § 136n(a).

CONCLUSION

For these reasons, the Court should deny Petitioners' Emergency Motion.

Dated: June 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), Federal Rule of Appellate Procedure 29(a)(5), Federal Rule of Appellate Procedure 32(g)(1), Federal Rule of Appellate Procedure 32(a)(5)–(6), and Ninth Circuit Rule 32-1, this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, and contains 2,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Dated: June 16, 2020

s/ Edmund S. Sauer

Edmund S. Sauer

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

s/ Edmund S. Sauer
Edmund S. Sauer