

EPA Announces Update on Over-the-Top Uses of Dicamba

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On February 14, 2024, the U.S. Environmental Protection Agency (EPA) issued an [Existing Stocks Order for Dicamba Products Previously Registered for Over-the-Top Use on Dicamba-Tolerant Cotton and Soybean \(Existing Stocks Order\)](#). This [announcement](#) was needed in response to the February 6, 2024, ruling by the U.S. District Court of Arizona vacating the 2020 registrations for over-the-top (OTT) dicamba products. EPA states this Existing Stocks Order “addresses use of the formerly-registered dicamba products and authorizes limited sale and distribution of dicamba products that are already in the possession of growers or in the channels of trade and outside the control of the pesticide companies.”

EPA first registered dicamba products for OTT uses on dicamba-tolerant (DT) cotton and soybeans in 2016. In 2017 and 2018, EPA amended the registrations of all OTT dicamba products in response to reports that growers had experienced crop damage and economic losses resulting from the off-site movement of dicamba. In June 2020, the U.S. Court of Appeals for the Ninth Circuit vacated the 2018 registrations on the basis that “EPA substantially understated risks that it acknowledged and failed entirely to acknowledge other risks.” EPA issued an order following that ruling to address existing stocks for the affected products.

In October 2020, EPA issued new registrations for two dicamba products and extended the registration of an additional dicamba product until **2025**. According to EPA, these registrations included new measures to prevent off-target movement and damage to non-target crops and other plants. In 2022 and 2023, there were further state-specific amendments to the registrations.

On December 23, 2020, the Center for Biological Diversity and other groups initiated a lawsuit in response to the 2020 registrations. On February 6, 2024, the U.S. District Court of Arizona [vacated](#) (Court Order) the 2020 registrations for OTT dicamba products XtendiMax, Engenia, and Tavium, finding that EPA violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) by not providing notice and comment before issuing these “new use” pesticide registrations for OTT dicamba for DT crops (cotton and soybean). The court decided to vacate after weighing the seriousness of EPA’s errors against the disruptive consequences that would result from vacatur. The court found that EPA’s procedural error to issue unconditionally the “new use” 2020 dicamba

registration, without notice and comment, was serious, and that EPA is “unlikely to issue the same registrations on remand if it follows FIFRA procedures for notice and comment and hears from all stakeholders, especially those who have from the inception of OTT dicamba use been subjected to the risks of OTT dicamba offsite movement.” The court also found that despite the fact that “growers, through no fault of their own, will be placed in the difficult position of finding effective and legal herbicides to protect their DT crops if these registrations are vacated,” vacating the registrations of the products was the appropriate remedy due to the “fundamental flaws in the EPA’s analysis.” Court Order at 43, 46. As of February 6, 2024, these products are unregistered, and sale or distribution of these products would be unlawful unless EPA issues an existing stocks order pursuant to [FIFRA Section 6\(a\)](#), which provides that: “The Administrator may permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or canceled under [sections 3, 4, or 6 of FIFRA] to such extent, under such conditions, and for such uses as the Administrator determines that such sale or use is not inconsistent with the purposes of [FIFRA].”

EPA has issued an Existing Stocks Order to allow for the disposition of any existing stocks of these formerly registered products. “Existing stocks” means those stocks of previously registered pesticide products that are currently in the United States and were packaged, labeled, and released for shipment prior to February 6, 2024. A product has been released for shipment when the producer has packaged and labeled it in the manner in which it will be distributed or sold, or has stored it in an area where finished products are ordinarily held for shipment. 40 C.F.R. § 152.3. The Existing Stocks Order also prohibits the use of these dicamba products except where the use is consistent with the previously approved labeling, including but not limited to measures intended to reduce environmental damage caused by off-site movement of the pesticide.

EPA states the Existing Stocks Order is limited in time and scope. The sale and distribution of existing stocks of these formerly registered dicamba products for the 2024 growing season by registrants is prohibited (except for the purposes of proper disposal or to facilitate lawful export), but can continue for persons other than registrants and commercial applicators in certain circumstances for certain time periods as set forth in the Existing Stocks Order.

The Existing Stocks Order also sets forth terms for the use of existing stocks. According to EPA, millions of gallons of OTT dicamba had already entered the channels of trade prior to the February 6, 2024, ruling, so most growers, who “have already placed orders for dicamba-tolerant seed for the 2024 growing season . . . , are not able to pivot to another herbicide-tolerant seed and herbicide system.” Existing Stocks Order at 6. The Existing Stocks Order will allow growers who already possess OTT dicamba and/or have already purchased DT seeds and thus are reliant on the availability of specific products solely for the 2024 growing season to: (1) apply only dicamba formulations designed for OTT use of DT soybean and cotton; and (2) apply these OTT dicamba products consistent with restrictions intended to reduce off-site movement.

EPA states that under this Existing Stocks Order, end users of existing stocks may only use the formerly registered products consistent with the previously approved labeling for the products and must stop use of these products by the relevant dates laid out in the Existing Stocks Order. Additional details regarding restrictions on the sale, distribution, and use of these formerly registered products can be found in EPA’s [Existing Stocks Order](#).

Commentary

Once again, EPA has confronted what to do in light of a vacated pesticide registration of a widely used and widely distributed pesticide already in commerce. EPA’s Existing Stocks Order may seem

almost insubordinate to the court ruling, which includes long and detailed procedural and analytical defects in EPA's registration approval. Regardless of the merits or the rationale given in the opinion, when a pesticide registration is vacated, it leaves the products that are in the hands (or barns) of the users in a very unusual situation.

If a pesticide registration is vacated, it means those containers of the material are no longer a registered pesticide. They remain a pesticide — a product to prevent, kill, destroy, mitigate, remove, repel, or otherwise act against a pest (*e.g.*, weed) — but not a pesticide that can be lawfully sold, distributed, or even used. EPA then faces a problem that material with the now-vacated label could be used without binding requirements (*e.g.*, amount, application measures, buffer zones, and wind speed and direction restrictions).

In these cases, EPA has to explain and/or hope the court will allow some kind of existing stocks order. This would continue, in effect, to allow use according to the previously approved label, which is better than the alternative. EPA notes in its Existing Stocks Order that it believes the district court “did not foreclose, or intend to foreclose, issuance of an existing stocks order in these circumstances” because the court’s ruling noted, “without criticism” the fact that EPA issued an existing stocks order “in response to vacatur of the 2016, as amended in 2018, OTT dicamba registrations.”

In the dicamba case, EPA seeks to avoid the possibility of encouraging use of the now vacated, low-volatility products in commerce — and especially would want to avoid growers, now planting DT seeds, to use dicamba product that does not have low volatility. The court may have found flaws in EPA's record or found EPA's record of the decision deficient, but “old” formulation of dicamba could be expected to present an even greater level of threat to nearby crops or people from volatilization drift or other off-site movement.

The opinion in this case is rather harsh in describing what it found deficient in the record and seems to ridicule the logic EPA used to grant an approval. But at least the now-vacated label had instructions that EPA endorsed to minimize off-site movement of the herbicide — even if now the court, in effect, is telling EPA to go back and do better homework and build a better record to approve the low-volatility product.

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