

EPA Request For Court To Vacate a Pesticide Registration Denied

By

In an important decision enforcing FIFRA's procedural protections for pesticide registrants and recognizing limits on EPA's ability to cancel or suspend registrations, the United States Court of Appeals for the Ninth Circuit denied EPA's request that the court vacate the registration of Dow AgroScience's Enlist Duo. The Ninth Circuit also granted EPA's request to send the matter back to EPA so that EPA can review further information, a request that DAS did not oppose.

Enlist Duo contains both 2,4-D choline and glyphosate, and was designed to be used with genetically modified crops that are resistant to those pesticides. The product, and EPA's October 2014 decision to register it, has been controversial. Shortly after EPA granted the registration, several environmental groups asked the Ninth Circuit for a preliminary stay of the registration decision on the grounds that EPA did not adequately consider human cancer risks and harm to monarch butterflies allegedly posed by the product.

Although the Ninth Circuit denied the request for a preliminary stay of the registration, the litigation proceeded. In November 2015, EPA asked the Court to vacate the registration for Enlist Duo. In addition, EPA asked the Court to send the question of whether Enlist Duo meets FIFRA's registration standard back as to the Agency. EPA based these requests on "new information regarding potential synergistic effects between the two ingredients on non-target plants" that it argued DAS had not provided to the Agency at the time it made its registration decision.

DAS did not object to EPA's request that the issue be remanded to the Agency so that it can review information it believes to be relevant. However, DAS strenuously objected to EPA's request that the Court vacate the registration EPA issued as an attempt to "short-circuit [FIFRA's] regulatory scheme and abdicate the responsibilities Congress assigned to the agency." As DAS explained, FIFRA provides "a detailed procedural mechanism for the agency to cancel or suspend an existing pesticide registration," and EPA must follow that process. While the Ninth Circuit's decision is brief, it is in full accord with DAS' position that the regulatory processes must first unfold at the Agency and, as described by DAS, a court cannot "summarily vacate" an existing registration.

This decision represents another important recognition on the limits of EPA's ability to circumvent the regulatory processes for cancellation and suspension, and the procedural protections FIFRA provides for registrants.