American Soybean Association

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September 15, 2020

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

Dear Administrator Wheeler,

On behalf of the American Soybean Association (ASA), I write to provide supplemental comments regarding EPA's consideration of a new registration for the use of dicamba for over-the-top (OTT), post-emergent use on dicamba-tolerant (DT) crops. These comments are in addition to comments ASA provided on August 10, 2020. ASA represents all U.S. soybean farmers on domestic and international policy issues important to the soybean industry and has 26 affiliated state associations representing 30 soybean-producing states.

ASA's August 10 comments primarily addressed the timing of EPA's registration decision, as well as matters ASA has previously conveyed to the Agency that we feel are central to the content of a new registration. We felt it urgent and imperative to explain to EPA the importance of the timeframe in which the Agency may issue any new registration. As discussed in our previous letter, many growers make planting and purchasing decisions in late August or early September, and an end of October or later decision could pose significant risks of market disruption and erosion of regulatory confidence.

ASA's perspective on these matters has not changed since our August 10 correspondence. We still believe it is vital for the well-being of the U.S. agricultural community to make dicamba available for OTT, post-emergent use on DT crops in the new registration; that the new registration be issued for longer than two years; that it include mandatory applicator training and a practical, detailed label to mitigate off-target risks; and that EPA issue its registration decision as expeditiously as possible. However, there are other important issues on which we feel EPA should have soybean grower perspective regarding the future availability and use of OTT dicamba to ensure any new registration is sound and agronomically viable.

New Registration Content

There are several matters specific to the content and structure of the registration we felt may be valuable for EPA to consider as it contemplates a new registration for OTT dicamba use.

Dicamba Timing and Use Patterns

Growers only use crop protection tools as needed in order to maintain healthy, productive, sustainable operations. For some growers, this may mean planting DT seed and subsequently electing not to use the accompanying chemistry, as we discuss further below. However, for other growers – especially those in areas of high weed pressures – use of post-emergent dicamba is essential to their operational strategies, and applications regularly occur, even into July, to curb continuous weed emergence throughout the growing season.

There are several reasons why growers may decide not to apply crop protection tools if they have the flexibility to do so. Purchasing and applying pesticides is a significant variable cost for growers that reduces their net income. A January 2020 study from Iowa State University (ISU) placed the average cost of herbicide for herbicide-tolerant soybeans at $41.62 per acre. Using ISU's 50 bushels per acre model, this cost amounts to 9.4 percent of a grower's total operational costs for soybean production in that state.[1] Additionally, if local weed populations resistant to glyphosate or other chemistries have not yet emerged in a region, growers may choose to apply mixes absent dicamba – even if their crops are DT – to preserve the efficacy of the dicamba tool for future growing seasons. This is especially true if existing mixes and management techniques are sufficient to prevent the emergence of resistant weed varieties. Growers develop deliberate integrated pest management (IPM) plans several years in advance which include crop rotation, the strategic use of multiple chemistries, various soil management techniques, and other factors to keep pest levels manageable so as to limit the need for applications, incur the fewest costs possible, and maintain the efficacy of available tools.

However, some farmers do not have this flexibility. For growers that live in regions with greater seasonal weed pressures, weeds can be more aggressive, emerge later in the season, and require multiple applications for persistent management until crop canopies close. Also, certain weed varieties, such as waterhemp, tend to emerge later in the season and are particularly adept at developing resistance to control options.[2] These weeds may require multiple post-emergent options for effective, long-term management. Growers also regularly face weather-related challenges that postpone applications. If persistent spring rains or flooding delays a grower from planting or forces replanting, herbicide applications are regularly pushed back as well.[3] All of these circumstances can require a grower to apply dicamba OTT well into July. ASA urges EPA to continue to allow up to two dicamba OTT applications for soybeans and later into the season – assuming weather and other related label conditions permit – as part of its new registration.

Tank Mix Adjuvants

We understand EPA may be considering requiring the use of tank mix adjuvants when dicamba is present to increase the pH of the mix or in other ways minimize any residual off-target risks.

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[1] Plastina, Alejandro. January 2020. "Estimated Costs of Crop Production in Iowa – 2020," *Ag Decision Maker*. Iowa State University: Extension and Outreach.

[2] Gunsolus, Jeffery L. June 18, 2018. "As June transitions into July what soybean weed management options are still available?" *Minnesota Crop News*. University of Minnesota: Extension. https://blog-crop-news.extension.umn.edu/2018/06/as-june-transitions-into-july-what.html

[3] Unglesbee, Emily. May 26, 2020. "Dicamba Cutoffs Coming Too Soon for Some Farmers – DTN." *AgFax*. https://agfax.com/2020/05/26/dtn-dicamba-cutoffs-coming-too-soon-for-some-farmers/

ASA relies primarily on EPA, registrants, manufacturers, academics, and other technical experts to assess efficacy and best practices for the safe use of products like adjuvants. However, if EPA determines that any adjuvants would meaningfully reduce any residual off-target risks, then ASA would be supportive of their inclusion in a new registration. Growers and applicators are familiar with and already use adjuvants in conjunction with a great number of products, including dicamba, which would ease adoption.[4] Additionally, any information needed to safely and effectively mix, clean, store, or otherwise use adjuvants could be easily integrated into existing applicator training programs. ASA views tank mix adjuvants capable of meaningfully reducing residual off-target risks as a welcome potential registration improvement.

Ninth Circuit Court of Appeals Ruling – National Family Farm Coalition v. U.S. EPA

ASA also wishes to briefly address the June 3 Ninth Circuit ruling in *National Family Farm Coalition v. U.S. EPA*. ASA believes the Ninth Circuit's decision was misguided and deeply flawed in many respects. While we and other grower organizations have conveyed our views on the case directly to the Court in several *amici* briefs, we have not had the opportunity to offer EPA more detailed thoughts on the Court's decision.

Risk Assessment

As ASA and other growers noted in our *amicus* brief to the Court, the Ninth Circuit failed to properly defer to EPA's regulatory expertise and its robust, thorough risk assessment. The Court inappropriately applied FIFRA's substantial evidence standard to justify vacating the registrations, in part through its *post factum* establishment of risks that EPA should have supposedly considered in its risk assessment – risks that EPA is given broad latitude to consider and weigh under FIFRA. Additionally, the Court largely disregarded the well-documented yield preservation, operational cost reduction, conservation, and other benefits of the products. We believe that evidence in the record was sufficient support EPA's registration decision.

Label Compliance

The Court also cited the purported difficulty in label compliance as supporting vacatur. As EPA is aware, ASA's membership includes thousands of growers who are certified applicators. These applicators understand how to adhere to very specific label requirements for a variety of restricted use pesticides (RUP). Dicamba applications under the vacated labels had very specific parameters, and grower applicators took these label requirements seriously. They appreciate that strict adherence to application requirements is essential for the safe and responsible use of the product – as is the case with every RUP – and strive for excellence in compliance with these directives.

Social Fabric & Competitiveness Costs

Finally, the Court also concluded that EPA failed to consider anti-competitive costs of farmers purchasing DT soybeans as a prophylactic measure from neighbors' dicamba applications, as

[4] Pucci, Jackie. March 3, 2020. "Adjuvants Gain 'Cred' in Dicamba Era." *CropLife*. https://www.croplife.com/dicamba/adjuvants-gain-cred-in-dicamba-era/

well as the impacts to the social fabric of farming communities resulting from dicamba-related disputes. As we articulated to the Court in our *amicus* brief, EPA should not be expected to predict court-devised, *post factum* objections in its cost-benefit analyses, particularly when these criticisms largely fall under the statutory responsibilities of other governmental bodies. If an administrative action were invalidated every time a Court raised a purported cost that an agency did not expressly consider, it is hard to imagine what agency actions could survive judicial scrutiny. This is another instance of what we believe to be the Court misapplying FIFRA's substantial evidence standard.

We thank you for your continued work and attention to this important matter, and we stand ready to assist EPA in its registration efforts as necessary and appropriate.

Sincerely,

Bill Gordon
President

CC: The Honorable Alexandra Dunn