

Court's ruling leaves in place EPA's phase-out schedule for AZM

Pesticide and Toxic Chemical News
Monday May 26 2008

A federal judge last week dismissed part of a lawsuit brought by several environmental and farmworker advocacy groups challenging EPA's phase-out schedule for the organophosphate insecticide azinphos methyl (AZM). But the ruling focused on a jurisdictional matter and did not address the substance of the groups' complaint.

On May 16, Judge Ricardo Martinez of the U.S. District Court for the Western District of Washington granted a motion to dismiss that was filed by intervenors Bayer CropScience and Makhteshim-Agan of North America (MANA) who argued that, under FIFRA, plaintiffs should have filed their complaint in the court of appeals and not district court. The ruling leaves in place EPA's current phase-out schedule for AZM. Section 136n(b) of FIFRA states that any person adversely impacted by an EPA order, may, following a public hearing, obtain review of the order by filing an action in federal appellate court.

But the plaintiffs asserted that another part of FIFRA — Section 136n(a), which allows district courts to review such matters — is applicable because while there was notice and comment held on EPA's AZM decisions challenged by the plaintiffs, there was no actual "public hearing" before EPA.

However, Judge Martinez agreed with the industry intervenors, holding that EPA's actions since it issued an interim re-registration eligibility decision (IRED) for AZM in 2001 effectively constituted a public hearing.

In making this determination, he noted, "since EPA issued its initial 2001 IRED, hundreds of public submissions were made regarding the reregistration of AZM" and referred to the "lengthy administrative record, consisting of EPA's determinations, public comments, and other supporting documentation."

Road to dismissal

In 2004, United Farm Workers and four other organizations filed an initial complaint in the district court arguing that EPA's IRED for AZM — which found eight uses eligible for reregistration if certain conditions were met — was arbitrary and capricious. In 2006, plaintiffs and EPA entered into a settlement agreement in which the agency agreed to consider new evidence and make determinations on the continued use of AZM.

On Nov. 16, 2006, EPA issued a final determination on the phase-out schedule for AZM adopting the same timeline presented in Bayer CropScience's amendment to its

AZM applications. EPA allowed the continued use of AZM on apples, blueberries, cherries, parsley and pears until 2012. EPA also agreed to continue to assess the need for AZM during the phase-out period and evaluate whether to amend the cancellation order phasing out all AZM use if it concludes that there remains a demonstrated need for AZM to address key pests.

On April 27, 2007, plaintiffs filed an amended complaint alleging that EPA's final determination and six-year phase-out schedule for AZM is arbitrary and capricious because the agency failed to conduct an adequate risk-benefit analysis to validate its decision.

Plaintiffs moved for summary judgment on their claim. Bayer CropScience and MANA intervened in the lawsuit alleging that the court lacked jurisdiction to hear the case. David Weinberg, one of the attorneys representing Bayer and MANA, said they are happy with the court's decision. Weinberg believes Judge Martinez "got it right" in ruling that the district court lacked jurisdiction to hear the case, holding that, under Section 136n(b) of FIFRA, plaintiffs should have filed their case in the court of appeals. Joshua Osborne-Klein, an EarthJustice attorney representing the plaintiffs, said they are obviously disappointed with the court's ruling. Plaintiffs believe that reregistration decisions need to be subject to the review of the district courts in order to ensure continued scrutiny of EPA and pesticide companies, he told *Pesticide & Toxic Chemical News*. The groups are consulting with their attorneys on the court's ruling and will likely file an appeal with the 9th Circuit.

The initial complaint also challenged EPA's IRED for phosmet, but that part of the case was subsequently put on hold pending a decision on AZM.

— Shawna Bligh

*** This article was reproduced with permission from Agra Informa. Further use of this article is prohibited without the express written permission of the publisher. For more information about *Pesticide & Toxic Chemical News*, *Food Chemical News* or other Agra Informa publications, go to: www.foodregulation.com .**