

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PLAINS COTTON GROWERS, INC.,

Petitioner,

vs.

MICHAEL S. REGAN, Administrator,
U.S. Environmental Protection Agency,

and

MARIETTA ECHEVERRIA, Acting
Division Director, U.S. Environmental
Protection Agency, Office of Pesticide
Programs, Registration Division,

and

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

Case No.

PETITION FOR REVIEW

Under Federal Rule of Appellate Procedure 15, D.C. Circuit Rule 15, 7 U.S.C. § 136n(b), 5 U.S.C. § 706, and 16 U.S.C. § 1536, Petitioner Plains Cotton Growers, Inc. hereby petitions this Court for review of the final actions amending registrations of certain dicamba herbicide products (the “Registration Amendments”) taken by

the United States Environmental Protection Agency (“EPA”) on March 15, 2022.¹ EPA published the Registration Amendments to the Federal Docket Management System (Regulations.gov) under docket number EPA-HQ-OPP-2020-0492. The Registration Amendments include limited (but more stringent) product use restrictions, applicable to farmers in Minnesota and Iowa, on top of those already imposed by dicamba product registrations issued by EPA on October 27, 2020, titled: the Engenia Herbicide Registration (the “Engenia Registration,” a true and correct copy of which is attached as **Exhibit D**), the A21472 Plus VaporGrip Technology Registration (the “Tavium Registration,” a true and correct copy of which is attached as **Exhibit E**), and the XtendiMax with VaporGrip Technology Registration (the “Xtendimax Registration,” a true and correct copy of which is attached as **Exhibit F**) (collectively the “Original Registrations”).²

¹ True and correct copies of the Registration Amendments are attached hereto as **Exhibit A** (“Engenia Registration Amendment”), **Exhibit B** (“Tavium Registration Amendment”), and **Exhibit C** (“XtendiMax Registration Amendment”).

² EPA supported these registrations with several analysis and decision documents: Memorandum Supporting Decision to Approve Registration for the Uses of Dicamba on Dicamba Tolerant Cotton and Soybean (the “Dicamba Memorandum,” a true and correct copy of which is attached as **Exhibit G**); Dicamba Use on Genetically Modified Dicamba-Tolerant (DT) Cotton and Soybean: Incidents and Impacts to Users and Non-Users from Proposed Registrations (the “Incidents and Impacts Report,” a true and correct copy of which is attached as **Exhibit H**); Consideration of Newly Submitted Mutagenicity Data and Human Health Risk Assessment Summary (the “HRA Report,” a true and correct copy of which is attached as **Exhibit I**); Dicamba DGA and BAPMA Salts – 2020 Ecological Assessment of Dicamba Use on Dicamba-Tolerant (DT) Cotton and Soybean Including Effects Determinations for Federally Listed Threatened and Endangered Species (the “ESA Assessment,” a true and correct copy of which is attached as **Exhibit J**); Assessment of the Benefits of Dicamba Use in Genetically Modified, Dicamba-Tolerant Cotton Production (the “Cotton Benefits Assessment,” a true and correct copy of which is attached as **Exhibit K**); and Assessment of the Benefits of Dicamba Use in Genetically

This is a protective petition. Petitioner believes that the challenged decisions are “judicially reviewable by the district courts of the United States,” rather than this Court, as the decisions did “not follow[] a hearing and [are] final action[s] of the [EPA] Administrator not committed to the discretion of the Administrator.” 7 U.S.C. § 136n(a). As noted above, the Registration Amendments add new product-use restrictions in two states. Because FIFRA requires that challenges “to the validity of any order issued by the Administrator following a public hearing” be brought within sixty days, Petitioner submits this separate petition protectively, out of an abundance of caution, to preserve its claims as to the Registration Amendments. 7 U.S.C. § 136n(b).

Petitioner also filed an initial protective Petition for Review in this Court challenging the Original Registrations on November 13, 2020. *See Plains Cotton Growers, Inc. v. EPA, et al.*, No. 20-61055 (5th Cir.). That case was subsequently transferred to the D.C. Circuit and consolidated with related cases filed by the American Soybean Association. *See Am. Soybean Ass’n v. EPA, et al.*, No. 20-1441 (D.C. Cir.). Those actions are currently pending in the D.C. Circuit, with briefing schedules in place.³ Petitioner plans to amend its earlier petition to address the

Modified, Dicamba-Tolerant Soybean Production (the “Soybean Benefits Assessment,” a true and correct copy of which is attached as **Exhibit L**).

³ Petitioner Plains Cotton Growers and the American Soybean Association have filed a single district court challenge to the Original Registrations in the United States District Court for the District of Columbia. *See Am. Soybean Ass’n, et al. v. EPA, et al.*, No. 20-cv-03190 (D.D.C.).

Registration Amendments. Because its petitions challenging the Original Registrations and Registration Amendments involve common questions of fact and law, Petitioner requests that this petition be transferred to the D.C. Circuit, to be consolidated with its petition challenging the Original Registrations.

Petitioner submits that the Registration Amendments violate the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), Endangered Species Act (“ESA”), and Administrative Procedures Act (“APA”) by imposing registration conditions that exceed statutory authority, are arbitrary and capricious, are an abuse of discretion, are not supported by substantial evidence when considered on the record as a whole, and are not otherwise in accordance with the law. *See, e.g.*, 7 U.S.C. §§ 136(a), 136n(b); 5 U.S.C. § 706; 16 U.S.C. § 1536. Thus, Petitioner respectfully requests that this Court, if necessary, hold those registration conditions unlawful, remand the Registration Amendments, and supporting analysis and decision documents to Respondents without vacatur, hold the remainder of the Registration Amendments, and the supporting analyses and decision documents lawful, award Petitioner its costs and reasonable attorneys’ fees, and grant such further relief as may be just and proper.

That action is stayed pending the outcome of Petitioners’ case in the D.C. Circuit. Petitioners intend to seek leave to amend their district court complaint to challenge the Registration Amendments at issue in this petition.

Dated: March 24, 2022

Respectfully submitted,

/s/ Edmund S. Sauer

Edmund S. Sauer, Esq.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

- Plains Cotton Growers, Inc. (Petitioner) – Plains Cotton Growers is a non-profit cotton producer organization comprised of regional cotton producers from across the Texas High Plains cotton production region. Plains Cotton Growers has no parent companies and no publicly held company holds ten percent or greater ownership interest in Plains Cotton Growers.
- National Cotton Council (shares Plains Cotton Growers’ financial interest)
- American Soybean Association (shares Plains Cotton Growers’ financial interest)
- Sygenta Crop Protection, LLC (product registrant)
- BASF Corporation (product registrant)
- Bayer CropScience LP (product registrant)
- Bartholomew J. Kempf, Edmund S. Sauer, Kyle W. Robisch, and Bradley Arant Boult Cummings LLP (counsel for Plains Cotton Growers)
- United States Environmental Protection Agency (Respondent)
- Michael S. Regan, Administrator, United States Environmental Protection Agency (Respondent)
- Marietta Echeverria, Acting Director, United States Environmental Protection Agency, Office of Pesticide Programs, Registration Division (Respondent)
- Merrick B. Garland, Attorney General, U.S. Department of Justice (counsel for Respondents)

- Jeffrey Prieto, General Counsel, U.S. Environmental Protection Agency
(counsel for Respondents)
- Todd Kim, Assistant Attorney General, Environment and Natural Resources
Division, U.S. Department of Justice (counsel for Respondents)

Dated: March 24, 2022

Respectfully submitted,

/s/ Edmund S. Sauer

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Review and Rule 26.1 Disclosure Statement on Respondents through First Class U.S. Mail, return receipt requested, to each of the following addresses on this 24th day of March 2022.

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Administrator
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