

August 10, 2018

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Federal Court Orders EPA to Ban Chlorpyrifos; Jury Gets Glyphosate Cancer Case, Brazil Court Bans Use

Two of global production agriculture's most widely used crop chemicals are under serious judicial attack, as a federal appeals court this week ordered EPA to "quit stalling" and revoke all tolerances and cancel all registrations for the insecticide chlorpyrifos, just as a California state court jury began deliberation in a case alleging the pesticide glyphosate causes cancer. A Brazilian judge ordered all registrations of glyphosate suspended, as well.

In a 2-1 opinion, the 9th Circuit Court of Appeals gave EPA 60 days to effectively ban the use of chlorpyrifos, reversing a March, 2017, Trump administration decision to delay a safety review of the chemical until 2021. The majority opinion holds the Trump EPA action violated not only the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA), but also the federal Food, Drug & Cosmetic Act (FFDCA). Registered since 1965, EPA banned home use of the substance in 1980, and all indoor use of chlorpyrifos in 2000.

The Department of Justice is reviewing the decision prior to deciding whether to appeal it.

The ruling is a major victory for environmental, health care and farm labor groups which continually cited scientific reports indicating a link between chlorpyrifos exposure in food and water and neurological damage in children. The groups early on petitioned the Obama administration in 2007, to ban food uses of the product, then sued EPA in 2014. In the most recent court action brought by several activist groups, the states of New York, Vermont, Massachusetts, Maryland, California, Washington, Hawaii and the District of Columbia intervened on the side of the environmentalists.

Corteva Agriscience, the agricultural division of DowDupont, said in a statement that chlorpyrifos is a globally popular pest management product, used on corn, soybeans, alfalfa, citrus, produce, fruit, nut and other crops, including grass seed. The company said regulators in 79 countries have reviewed the science, "carefully evaluated the product and its significant benefits and continued to approve its use." The company said because the appeals court action was a split decision, "we agree with the dissenting judge's opinion, and we expect that all appellate options to challenge the majority's decision will be considered."

The judges said that when then EPA Administrator Scott Pruitt reversed an Obama EPA order to ban chlorpyrifos food tolerances, the agency "did not make a finding of reasonable certainty that the tolerances were safe" as required under the FFDCA. Instead, the agency found "significant uncertainty" as to any negative health impacts, a finding that doesn't comport with FFDCA requirements. Similarly, the court said "chlorpyrifos does not meet the statutory requirements for registration under FIFRA" which cites the FFDCA safety standard."

In the state action against glyphosate-maker Monsanto – the first case among 5,000 plaintiffs' actions to go to jury – the jurors received the case after listening to more than 30 days of testimony. The plaintiff, a school groundskeeper diagnosed with cancer in 2014, alleges Monsanto knew of the health risks of glyphosate exposure, but failed to warn consumers of the risks. There are other consolidated cases against Monsanto in Missouri, California and Delaware state courts, and a federal action pending in San Francisco.

Monsanto, now part of Bayer AG, argued there is no solid scientific evidence the chemical – the active ingredient in RoundUp and generic varieties of the most widely used weedkiller in the world – is a health risk to humans and that the groundskeeper cannot prove glyphosate exposure caused his illness.

In a related development, a judge in Brazil this week ordered the government to suspend all uses of glyphosate, according to reports. The judge said new products containing the ingredient could not be registered in Brazil and existing registrations must be suspended within 30 days, pending a reevaluation of toxicity by the government. The decision is likely to be appealed.

Federal Judge Orders White House to Reinstate DACA Program

President Trump's September, 2017, decision to suspend the Deferred Action for Childhood Arrivals (DACA) program providing deferred deportation and work permits for about 750,000 immigrants brought illegally to the U.S. as minor children, was ruled this week by a federal judge to be "arbitrary and capricious" and that the decision was "unlawful and must be set aside." The federal judge ordered the administration to reinstate the program.

U.S. District Court Judge John Bates, however, said he would delay his order until August 23, to give the administration time to decide if it plans to appeal. Bates is the judge who, back in April, ordered the White House to restart the DACA program, including taking new applications. He stayed that order for 90 days to give the government a chance to argue why DACA, a program created by President Obama by executive order, should be ended. The government failed to answer Bates' concerns in the earlier ruling, hence the order to reinstate DACA, he said.

Two federal courts – one in California and one in New York – previously ordered the DACA program to remain operational while legal challenges to Trump's decision were heard. There is a separate federal lawsuit in Texas seeking to kill DACA.

IRS Proposes Rules on Sec. 199A on Pass-Through Entities, Aggregation

The much-debated Sec. 199A of the Tax Cuts & Jobs Act of 2017 – the tax reform legislation signed last December – received proposed rules for implementation this week from the IRS, explaining how so-called "pass-through" entities – sole proprietorships, partnerships and S corporations – can aggregate income to qualify for a 20% deduction of qualified business income.

Businesses which boast more than one identity can be combined – “aggregated” – to claim the new deduction if they have common ownership, and rental income is included. The aggregation language is meant to prevent single-purpose companies, such as law firms, from splitting into separate operations or “restructuring,” based on function to qualify for the deduction.

The American Farm Bureau Federation (AFBF) told Politico this week that cash rent or crop-share landlords likely won’t qualify for the deduction. “We have a lot of absentee landowners out there. They hold on to family farmland, even though they’re not living there, and rent it to someone else. In that case the income wouldn’t rise to the level of trades or business. That’s the threshold,” AFBF said.

The deduction, which effectively reduces the pass-through business income tax rate to almost the 21% rate enjoyed by corporate taxpayers, is effective for tax years beginning January 1, 2018, and eligible taxpayers can claim the 20% on 2018 taxes filed next year, the IRS said. Qualified business income includes domestic income from trade or business. However, employee wages, capital gains, interest income and dividend income are excluded, the IRS said. Included in the proposed rule is Notice 2018-64, which gives methods for calculating W-2 wages for purposes of the deduction.

Generally eligible for the deduction are taxpayers whose 2018 taxable income streams fall below \$315,000 for joint returns and \$157,500 for others. The deduction is equal to the lesser of 20% of qualified business income plus 20% of qualified real estate investment trust dividends and qualified publicly traded partnership income, or 20% of taxable income minus net capital gains, the IRS explained. The agency warned, however, that deductions above the income levels may be limited, with limitations explained in the proposed rule. The full proposed rule and instructions for commenting, can be found by going to <https://www.irs.gov/pub/irs-drop/reg-107892-18.pdf>. An FAQ document can be found by going to <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-provision-11011-section-199a-deduction-for-qualified-business-income-faqs>.

Trade Update

Trump Targets \$16 Billion More in Chinese Exports for 25% Tariff – It was President Trump’s turn to throw down this week in the on-going U.S.-China tariff war, when he announced that on August 23, he’ll hit another \$16 billion in Chinese exports to the U.S. with a 25% tariff. This brings to \$50 billion the total tariff action Trump pledged, building on the \$34 billion imposed in July. The list of commodities includes about 279 of the 284 products identified by the White House as targets in June, including electronic parts, rail cars, plastics, chemicals and batteries. Left off the list were some types of farm equipment. For its part, China last week announced its list of \$60 billion in retaliatory tariffs on 5,270 U.S. products, including levies on hides, skins and leathers, whey protein, hops, coffee, honey and industrial chemicals, with tariff rates ranging from 5% to 25%. The list also includes milking machines and parts. The Chinese government, in various statements, called for the U.S. to “come to its senses” and to “calm down,” after the U.S. retaliated against the Chinese because they retaliated against us.

USDA Farmer “Tariff Aid” Could Violate WTO Rules – The \$12-billion farmer aid package to offset the economic pain of President Trump’s tariff battles with China, Canada, Mexico, the

European Union (EU) and other major U.S. trading partners could push direct government farmer payments to their highest level since the late 1990s, and might violate World Trade Organization (WTO) rules. It also creates yet another roadblock to the much-heralded U.S.-EU talks on “zero subsidies, zero barriers” on bilateral trade. Another irony in the White House plan to protect farmers is that some producers may be paid twice for losses, depending on which income support program and crop insurance products they sign up for. The current WTO cap on “trade distorting farm subsidies” or direct payments is \$19.1 billion, so it all comes down to how the tariff payments are classified and how they’re made. Farmers are still waiting for USDA to release details of the payment program in advance of the September 4 sign-up kick off.

NAFTA 2.0 Talks Continue with Mexico; Canada Still in Mix – Mexico continues to be the loudest cheerleader for continuing progress toward a successful conclusion to NAFTA 2.0 negotiations this month, as well as the primary voice insisting Canada, the U.S. and Mexico remain dedicated to a tripartite trade treaty. However, while Mexico and the U.S. have continued high-level meetings wrapping about two-thirds of the deal, those talks have continued without Canadian participation. Mexican Economy Minister Ildefonso Guajardo – “I am constructively engaged” – has met six times in three weeks with U.S. Special Trade Representative (USTR) Robert Lighthizer, remaining in Washington, DC, past announced dates for his return to Mexico. Guajardo said his team is “doing its best to do it as fast as possible.” Insiders say Canadian Foreign Minister Chrystia Freeland will resume negotiations when bilateral U.S.-Mexican issues are resolved, and the Canadian team is expected to be Washington next week, according to one report. President Trump has publicly said he’d just as soon craft two bilateral deals, then marry them into a single treaty, an option so far publicly rejected by Mexico and Canada. The Business Roundtable in Washington, DC, this week also warned against splitting NAFTA into two separate bilateral treaties and urged the U.S. to drop its demand for a five-year “sunset” review of the treaty, an item expected to be resolved at the very end of negotiations.

“Farmers for Free Trade” Launches Anti-Tariff Campaign – The coalition of rural, farm and agribusiness interests frustrated with the White House tariff tit-for-tat with most of this country’s major trading partners, and its increasingly negative economic impact on farmers and ranchers, this week launched its media campaign, spending about \$800,000 on radio, print, television and online messaging in Illinois, Iowa, Indiana, Kansas, Michigan, Minnesota, Nebraska, Ohio, South Dakota and Wisconsin. “Tariffs Hurt the Heartland” is the name of the campaign – “President Trump: Stop the Trade War” is one message nugget – and will include town hall events running through September. The current media buy is part of \$2.5 million expected to be spent on a national anti-tariff effort. “We are taking the message that tariffs hurt ag directly to farmers at their breakfast tables, on their combines and on the farm news outlets they check every single day,” said Sara Lilygren, board president of the group, and former senior vice president of Tyson Foods.

USDA to Move ERS, NIFA Out of Washington, DC

Part of Secretary of Agriculture Sonny Perdue’s on-going USDA reorganization, the department this week announced its intent to move the Economic Research Service (ERS) – currently part of the

USDA's research, education and economics mission area – and the National Institute of Food & Agriculture (NIFA) out of the “National Capital Region.”

ERS will be shifted back to the Office of the Chief Economist, which reports to Perdue, and the ERS/NIFA move is expected to be completed by the end of 2019, the secretary's office said in a statement.

“It's been our goal to make USDA the most effective, efficient and customer-focused department in the entire federal government...with the ultimate goal of ensuring the best service possible for our customers, and for the taxpayers of the U.S. In some cases, this has meant realigning some of our offices and functions, or even relocating them, in order to make more logical sense or provide more streamlined and efficient services,” Perdue said.

A major incentive for moving the two agencies out of Washington, is that with increasing turnover, it's become difficult to get qualified candidates, many of whom are working at land grant universities, to move to Washington because of its high cost of living and long commutes. The move also allows the department to place the services of ERS and NIFA closer to those who benefit directly, and lastly, the move will generate “significant savings on employment costs and rent.”

No new location(s) for ERS and NIFA have been identified, and it's possible, the secretary said, the two could be co-located. “Every employee who wants to continue working will have an opportunity to do so, although that may mean moving to a new location for most,” the department said. USDA is also seeking White House permission to offer voluntary early retirement and voluntary separation incentive payments.

White House Cedes Sec. 404 Water Permitting to States; 10 States Seek to Preserve Sec. 401 Authority

A coalition of local and state officials from 10 jurisdictions and led by the Western Governors' Assn. (WGA) is urging GOP congressional leaders to reject any move to restrict states' authority to rework or deny federal water permits under Clean Water Act (CWA) authority.

A letter to House and Senate leaders urges lawmakers to reject efforts to change state authority under Sec. 401 of the CWA, a section governing discharges into rivers, streams and wetlands. The authority jumped into the spotlight when some states were alleged to be using existing Sec. 401 authority to block new pipeline construction and new hydropower dam licensing.

The states argue the authority is critical because each state is unique. “We urge Congress to reject any legislative or administrative effort that would diminish, impair or subordinate states' ability to manage or protect water quality within their boundaries,” the states wrote.

Meanwhile, EPA and the U.S. Army Corps of Engineers began streamlining the procedural process under which states can take over the so-called Sec. 404 water permitting program as dictated by the

Clean Water Act (CWA). The administration hopes to short-cut the lengthy and expensive dredge-and-fill permit processes, a move the two agencies say will encourage states to eventually take over the program entirely.

The Trump White House says it wants to streamline the Sec. 404 process, a permit application program that plagues mining, homebuilders, as well as gas and oil production. The federal agencies would retain oversight authority over waterways used for interstate movement, allowing the states to take jurisdiction over most wetlands and streams within their borders, EPA said.

The administration was careful to explain it will spend no money to facilitate those states which wish to take over the permitting program, and acknowledged that in the past, the cost of running the program has been the biggest deterrent to state take-overs.

The move comes after more than 15 states approached EPA to take over the program in whole or in part, the White House said. "This is an administrative change that is harmonizing our coordination with the states," the administration explained. Florida has begun the process of assuming permitting responsibility. Michigan and New Jersey already control the dredge-and-fill permit process.

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