

## For a second time, US court bans dicamba weed killers, finds EPA violated law

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February 2024

*For years, Bayer and BASF have blamed other factors than their weed killers, including illegal use of older chemicals, for the damage. Each year, the EPA and states have put in new restrictions, but those aren't working, the judge wrote.*



*Image is of dicamba injury. Photo by Amit Jhala via University of Nebraska-Lincoln*

Dealing a blow to three of the world's biggest agrochemical companies, a US court this week banned three weed killers widely used in American agriculture, finding that the Environmental Protection Agency (EPA) broke the law in allowing them to be on the market.

[The ruling](#) is specific to three dicamba-based weed killers manufactured by Bayer, BASF and Syngenta, which have been blamed for millions of acres of crop damage and harm to endangered species and natural areas across the Midwest and South.

This is the second time a federal court has banned these weed killers since they were introduced for the 2017 growing season. In 2020, the Ninth Circuit Court of Appeals issued its own ban, but months later the Trump administration re-approved the weed killing products, just one week before the presidential election at a press conference in the swing state of Georgia.

But a federal judge in Arizona ruled late Monday that the EPA made a crucial error in re-approving dicamba, finding the agency did not post it for public notice and comment as required by law.

US District Judge David Bury wrote in a 47-page ruling that it is a "very serious" violation and that if EPA did do a full analysis, it likely would not have made the same decision.

Bury wrote that the EPA did not allow many people who are deeply impacted by the weed killer – including specialty farmers, conservation groups and more – to comment.

The lawsuit was filed by farmer and conservation groups that said EPA violated two laws in its approval: the Federal Insecticide, Fungicide, and Rodenticide Act and the Endangered Species Act.

EPA spokesman Jeffrey Landis said the agency is still reviewing the ruling but declined to comment further.

“Time and time again, the evidence has shown that dicamba cannot be used without causing massive and unprecedented harm to farms as well as endangering plants and pollinators,” said George Kimbrell, legal director of the Center for Food Safety, which litigated the case.

### **Scientific concerns**

Documents filed in the lawsuit show that the EPA was in a rush to approve dicamba in October 2020, with scientists complaining that they did not have enough time to do a proper analysis, [The New Lede found](#).

One year later, the EPA issued a report in December 2021 that found despite new restrictions, dicamba was still moving off of where it was applied, and it was doubtful that dicamba, used on tens of millions acres of cotton and soybean crops in the US, could legally be kept on the market.

Bury wrote that if the EPA considered the 2021 report, comments from state agriculture agencies, specialty farmers and others, it likely would not reapprove dicamba.

“We’re relieved that once again the court has seen straight through the EPA’s ploys to ram through a product that is far too dangerous to be on the market,” said Lori Ann Burd, environmental health program director for the Center for Biological Diversity, which sued alongside other nonprofits National Family Farm Coalition, Pesticide Action Network.

“No matter how far EPA goes to contort itself to do industry’s will, it just can’t pass legal muster. It is our hope that they will finally get the message and stop approving this incredibly dangerous product.”

The ruling impacts Bayer’s dicamba-based XtendiMax herbicide, which it inherited when it acquired Monsanto in 2018, as well as Syngenta’s Tavium weedkiller and BASF’s Engenia weedkiller.

In a statement issued after the ruling, Bayer said it disagrees with the court ruling and are “assessing” how to respond. “Our top priority is making sure growers have the approved products and support they need to safely and successfully grow their crops.”

BASF also said in a [statement](#) that it was assessing its legal options and awaiting direction from the EPA in light of the order. Syngenta did not provide an immediate response to a request for comment.

The news comes at a particularly bad time for Bayer, which is reeling from other Monsanto-related weed killing product problems, notably mass litigation over Monsanto’s glyphosate-based Roundup herbicides, which has so far cost Bayer billions in jury verdicts and settlements and eroded shareholder confidence. Plaintiffs allege Roundup causes non-Hodgkin lymphoma.

Syngenta is also facing nationwide litigation over its paraquat herbicide, which thousands of plaintiffs claim causes Parkinson’s disease.

## **Prone to drift**

The court decision notes that farmers have other options than the affected dicamba products, including the Enlist soybean system manufactured by Corteva (formerly DowDupont) that uses the chemical 2,4-D, to kill weeds in the interim. That system is the main competitor to Bayer's dicamba-based system.

Dicamba was introduced to American agriculture in 1967, but was never widely used during warm months because it was well known that the chemical can volatilize and move long distances when temperatures climb. Volatilization is when dicamba particles turn from a liquid to a gas in the hours or days after the herbicide is applied, effectively turning into clouds of weed killer and causing landscape level damage.

Dicamba is also prone to drifting on the wind far from where it is applied; as well, it can move into drainage ditches and bodies of water as runoff during rain events.

Monsanto, along with the chemical giant BASF, introduced new formulations of dicamba herbicides they said would not be as volatile, and they encouraged farmers to buy Monsanto's newly created dicamba-tolerant crops. Farmers buying the specialized seeds could spray dicamba on fields while the crops were growing, killing the weeds, but not the precious commodities.

The system mirrored the "Roundup Ready" system of glyphosate-based herbicides Monsanto had long sold farmers to be used in conjunction with glyphosate-tolerant corn, soybeans and other genetically modified crops. As glyphosate lost effectiveness, farmers could use dicamba to tackle stubbornly resistant weeds, the companies pledged.

Dicamba-resistant crops have been planted on as many as 65 million acres, the EPA estimated, an area larger than the state of Oregon.

The EPA [first approved versions of dicamba touted to be less likely to move off target made by Monsanto and BASF](#) for the 2017 growing season. Since then, dicamba has caused millions of acres of crop damage, and has been the subject of several lawsuits. Discovery documents turned up in the litigation showed [the companies knew](#) that their dicamba weed killers would likely lead to off target crop damage.

For years, Bayer and BASF have blamed other factors than their weed killers, including illegal use of older chemicals, for the damage. Each year, the EPA and states have put in new restrictions, but those aren't working, the judge wrote.

"While the EPA has been highly confident control measures would eliminate any such risk to only a minimal effect, the incident reports filed year after year complaining of offsite movement of OTT dicamba reflect otherwise," Bury wrote.

In February 2020, a federal jury in Missouri [awarded](#) the state's largest peach farmer \$265 million for damage to his farm, though that total was later reduced by a federal judge. BASF and Bayer split the \$15 million in compensatory damages, and Bayer and Bader settled punitive damages for a confidential amount, court records show.

In June 2020, Bayer announced a \$400 million settlement with soybean growers that had been damaged by non-target drift.

A three-judge panel of the 9th Circuit Court of Appeals [vacated the 2018 approval](#), finding that the EPA had rendered flawed analyses and “substantially understated” risks associated with the dicamba herbicides sold by Monsanto and BASF, making the EPA’s approval illegal. Additionally, an examination of the 2018 approval by the EPA’s Office of the Inspector General (OIG) found that political appointees working in management at the EPA [violated the agency’s scientific integrity policy](#), altering scientists’ analyses and conclusions.

(A version of this story was co-published by [The Guardian](#).)