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Soybean producers are familiar with the special dicamba products first sold in 2017 for use on Xtend soybeans to control glyphosate-resistant weeds. Dicamba can be applied as a post-emergent spray to kill weeds that germinate after soybeans have been planted. With the control of these weeds, producers reap increased yields. However, the use of dicamba products led to significant offsite injury to vegetation including non-dicamba-resistant soybeans. Damages to neighbors' properties from dicamba usage strained the social relations of people living in many rural communities.

For four years, the U.S. Environmental Protection Agency (EPA), in consultation with manufacturers, revised the labels on the dicamba products in an attempt to end offsite injuries. It was felt that new requirements for applications could control spray drift and volatilization that were responsible for the offsite injuries. Yet offsite injuries continued. The uncompensated injuries led a coalition of farm, food, health, and environmental groups to challenge the 2018 dicamba registrations in the *National Family Farm Coalition v. Environmental Protection Agency* lawsuit. In June 2020, a federal court canceled three dicamba registrations. Further sales of these products were illegal, causing producers to contemplate how they would control weeds for the 2021 crop year.

In November 2020, the EPA issued three new registrations for dicamba products. Soybean producers again have the option of managing weeds with dicamba. The labels on the products require applicators to tank-mix dicamba products with an approved "volatility reduction agent" prior to a spray application. Applicators will consult the manufacturer's website and follow the directions to comply with the product's label. Mandatory record-keeping requirements require applicators to list the agent that was tank-mixed with the dicamba product, its use rate, date applied, location of application, and the applicator's name. Additional requirements for endangered species and sensitive plants are also incorporated in the labels.

For the issuance of the 2020 dicamba registrations, the EPA's ecological assessment concluded that the use of a volatility reduction agent with other label changes would preclude offsite injuries "with a high (89%) degree of certainty." This conclusion was based on observations from field studies conducted to determine offsite injuries and assumed that applicators would comply with all the mandatory control measures set forth in a product's label. While a substantial majority of applicators follow label requirements, 30% of the commercial applicators responding to a survey by the Illinois Fertilizer & Chemical Association acknowledged that label requirements were not always followed.

The EPA adopted a downwind 240-foot in-field setback which would provide a 90% confidence that no adverse effects to non-target plants would result at the downwind edge of the treated field. Thus, the EPA acknowledged that the use of dicamba products might be accompanied by spray drift and volatilization injuries to offsite vegetation.

The 2020 registrations have been challenged by various groups. One set of plaintiffs again contend that the EPA failed to consider all the risks accompanying spray applications. By not considering all risks, the EPA lacked substantial evidence concerning damage costs to support its

decisions in issuing the registrations. The 2020 registrations have also been challenged by soybean and cotton trade associations due to spray application requirements that increase production costs. The courts will need to determine whether the EPA complied with federal law in issuing the registrations.

Soybean producers choose to use dicamba products because of the accompanying financial benefits in higher crop yields. However, if offsite injuries cannot be controlled, the products are adversely affecting neighbors' property rights. State law recognizes that property owners have a right to be free from offsite pesticide drift and volatilization that adversely affect their property. The uncompensated property damages that have accompanied dicamba spray applications show a lapse in recognizing the sanctity of property rights. To uphold private property rights, property owners suffering injuries need to be compensated. Governments have a responsibility not to facilitate the destruction of private property.

While it is not known whether the use of a volatility reduction agent will be successful in curtailing injuries, it is known that the EPA's ecological assessment admitted that some injuries may occur. The EPA also did not consider injuries associated with applicator misuse. If too many injuries continue to occur, the uncompensated damages could justify the cancellation of the 2020 registrations.

Since many soybean producers would benefit from being able to use dicamba to control resistant weeds, a mechanism to provide compensation to neighbors suffering injuries might be considered. Compensating injured property interests could remove a major cost that was cited by the *National Family Farm Coalition* court in its decision that led the EPA to cancel the 2018 registrations.

One approach for providing compensation would be a crop insurance program that incorporates obligations already used in insurance law and workers' compensation programs. Neighboring properties would be insured under the program and those suffering damages from dicamba applications would be compensated. In this manner, the property rights of neighbors would be recognized, damage costs would be reduced, and courts would be more likely to find that the registrations complied with federal law.

A dicamba compensation program would be grounded on the principle that those benefitting from using dicamba would pay for related injuries. This could occur by having all users of dicamba products pay a fee on each gallon of dicamba used to fund the program. The funds collected under the program would be used to compensate property owners suffering offsite injuries related to dicamba spray applications. For an administrative structure, the program would have a board of directors with appropriate powers to employ personnel and adopt rules to govern the operations of the program. The personnel would be under a state agency subdivision created to oversee the collection of funds, proof of claims, evaluation of offsite injuries, payouts to property owners suffering injuries, and enforcement.

Authorizing legislation for a dicamba compensation program could include the power to collect funds as an occupational fee on applicators using dicamba products. In this manner, it would be a service fee and avoids constitutional issues of property taxation. The compensation program would adopt the workers' compensation principle that all valid injury claims need to be compensated. Injured property owners would be required to establish their claims through lab testing that confirms the presence of dicamba residues from an offsite source. They would also need to prove damages.

With dicamba injuries being insured, property owners suffering damages could file claims under the program. Neighbors would not be sparring with each other and private lawsuits would not be needed. The administrative unit would handle all complaints and would make payouts when injuries from dicamba were established. By instituting an insurance program with payments for injured property, dicamba products could qualify for registration and producers could continue to use dicamba products that are beneficial to agricultural production.

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