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Monsanto Loss Hurts Farmers

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Back in September many of you probably read articles about a U.S. District Court issuing an opinion finding that USDA had violated a federal law which allowed genetically engineered sugar beets into the market and planted by farmers. A press release by Earth Justice put it succinctly: "...the Bush USDA's approval of genetically engineered (GE) "Roundup Ready" sugar beets was unlawful. The court ordered the USDA to conduct a rigorous assessment of the environmental and economic impacts of the crop on farmers and the environment." An environmental impact statement (EIS) is a lengthy and expensive process and document for USDA to undertake.

This is a setback for farmers not only in the sugar beet industry but also for others as well. After reading the articles, I decided to read the court's opinion to find out what really happened and how USDA lost the case. After reading the court's decision, it appears USDA should have lost the case.

First a note of self disclosure. I own Monsanto stock, plant Monsanto "Roundup Ready" seeds, and have in the past successfully represented Monsanto on Clean Air Act issues.

Judge Jeffrey S. White's U.S. District Court opinion of September 21, 2009, (No. C 08-00484 JSW) strongly suggests USDA and Monsanto did not understand how to handle a case under the National Environmental Policy Act, otherwise known as NEPA.

NEPA establishes a national policy that imposes procedural requirements on federal agencies to undertake analyses of environmental impacts of their proposals and actions. NEPA requires that an agency will carefully consider detailed information concerning significant environmental impacts, and of course, these impacts must be made known to the public in an EIS or a less thorough document, an environmental assessment (EA).

What were they thinking? When you read the court's opinion, you have to wonder what USDA and Monsanto were thinking when it was determined that an EIS need not be prepared regarding the handling of genetically engineered "Roundup Ready" sugar beets.

Monsanto had inserted a gene into the sugar beet to make it glyphosate-tolerant. USDA prepared only an EA which it is allowed to do under NEPA and concluded that it did not have to prepare a full EIS.

According to the court, this was a major mistake and assuming the court's opinion sets forth the facts accurately, it suggests that USDA does not understand how to defend its decisions when NEPA is involved.

None of the articles I read about this case said anything about Imperial Sugar Company, a sugar beet processor in California, being concerned about buyers of industrial and consumer sugars expressing "extreme reluctance or emphatic opposition" to receiving such genetically modified beets.

Imperial Sugar also claimed some countries would not allow genetically modified products to be imported. This issue clearly concerned the court, and it appears it was not adequately dealt with in the EA.

Amazing oversight According to the court, USDA failed to analyze the socio-economic impacts regarding genetically engineered sugar beets. This is an amazing oversight since every EIS trial I have ever handled addressed socio-economics which must be analyzed in environmental reviews when they are related to some natural or physical effect. To overlook this issue is baffling unless the court overstated what happened in this case.

The potential for cross pollination of genetically engineered sugar beet seeds with non-genetic sugar beets, swiss chard and red table beets deeply concerned the court.

Sugar beet seed production takes place in the Willamette Valley of Oregon and Oregon has rules requiring isolation distance of 1,000 meters between sugar beet varieties. These isolation distances are voluntary. USDA, according to the court, stated in a conclusory manner, "It is not likely that organic farmers or other farmers who chose not to plant transgenic varieties or sell transgenic sugar beets will be significantly impacted...."

The court went on to point out that USDA's action might eliminate a farmer's ability to grow non-genetically engineered crops because of the large distances pollen can travel by wind. The court made it clear that it disagreed with USDA's conclusion that the "...potential for the transmission of the genetically engineered gene is not significant, are not "convincing" and do not demonstrate the "hard look" that NEPA requires."

In a final attack on USDA and its agency, Animal Plant Health Inspection Service (APHIS), for its decision, the court said, "...[APHIS] did not consider the effects of gene transmission on conventional farmers and consumers of sugar beet seed or of gene transmission to the related crops of red table beets and Swiss chard. It did not consider the fact that the isolation distances are only voluntary. It did not examine whether the isolation distances were actually followed and likely to be followed in the future. Moreover, there is no support in the record for APHIS' conclusion that non-transgenic sugar beets will likely be sold and will be available to those who wish to plant it..."

This court is located in the Northern District of California, in San Francisco - not a friendly jurisdiction for agriculture. USDA and its lawyers at the Department of Justice know California courts are quite sensitive to environmental concerns.

I have not read the environmental assessment prepared by USDA so I cannot offer an opinion regarding its factual completeness. However, reading this judge's opinion strongly suggests USDA and Monsanto do not appreciate the intricacies and requirements of NEPA. As a result, the farmer loses.

The case is not over. Judge White, in his ruling, scheduled a case management hearing to address remedies for October 30, 2009. This date has been postponed, and a new hearing has been scheduled for this month.

This case is worth following if you are a farmer and want to use genetically engineered seeds. The path to obtaining them may become a lot more difficult as a result of environmental requirements of NEPA!

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