GMO

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According to the 9th Circuit, other concerns about potential economic or environmental impacts cannot stop the agency from deregulating a genetically modified organism, or GMO, if it doesn't pose a plant pest risk.

At the time, the 9th Circuit's ruling was a serious blow to critics of biotechnology, who were trying to block the commercialization of GMO alfalfa because of the alleged hazards of cross-pollination with conventional and organic varieties.

Since then, however, several counties in Hawaii have adopted restrictions on GMOs, attempting to address worries over which USDA lacks authority.

The counties of Hawaii and Maui banned most GMOs, while Kauai County imposed mandatory reporting of where such crops are grown.

Federal judges have overturned all three ordinances, but now the validity of those rulings is being challenged before the 9th Circuit, which held oral arguments in these cases on June 15.

How these disputes are resolved could affect GMO restrictions in the nine Western states under the 9th Circuit's jurisdiction, including Oregon, Washington and California, where several counties have adopted GMO bans.

Dan Wheat/Capital Press file

Workers bag tassels of GMO corn to collect pollen in a Syngenta test plot about three miles northwest of Lihue on the island of Kauai. The pollen is used to pollinate another plot of corn genetically modified for pest and drought resistance. The 9th U.S. Circuit Court of Appeals is hearing three cases from Hawaii on the regulation of GMO crops.

GMO critics are now trying to use their previous defeat to justify state and local regulations of genetically engineered crops.

Since the USDA's "hands were tied" by its limited power over biotechnology, it only makes sense for local governments to step in with their own rules to protect organic and conventional growers, said George Kimbrell, executive director of the Center for Food Safety, a nonprofit involved in prominent GMO battles.

A federal judge ruled last year that Maui's GMO ban is pre-empted by federal law, but Kimbrell argued that reasoning doesn't make sense.

It's implausible that the Plant Protection Act, under which the USDA's authority is restricted to plant pests, would prevent states and counties from addressing concerns that the federal government cannot, Kimbrell said.

Threats from increased spraying of herbicide-resistant biotech crops, for example, are beyond the scope of USDA's authority but within the county's police power, said Bernie Bays, an attorney representing supporters of Maui County's ordinance.

"Our job is to regulate the farms and farm practices in Maui County," Bays said.

The local GMO ban isn't pre-empted by federal law because it doesn't deal with plant pests, which are solely the province of USDA, he said.

Biotech developers counter that GMO prohibitions are nonetheless federally pre-empted because the Plant Protection Act is meant to establish national uniformity for such crops.

States and counties are not allowed to "frustrate federal objectives" created by Congress, said Richard Bress, an attorney representing Monsanto and other biotech developers.

The USDA has established a "science-based scheme" to enable commerce in plants that are determined not to pose a credible danger to agriculture, Bress said.

"The counties are saying here they don't buy it," and have enacted restrictions that undermine the federal regulatory system, he said.

The question of federal pre-emption has the most potential to influence GMO policies in states and counties across the West, but the 9th Circuit is wrestling with several legal issues that may determine the outcome of Hawaiian GMO cases.

The question of federal pre-emption is complicated by the fact that two different judges ruled on the three county ordinances.

Maui County's GMO ban was held to be entirely pre-empted by federal law, but the ruling that invalidated Hawaii County's ordinance was more nuanced.

In that case, another judge found that its GMO ban was only pre-empted by federal law in regard to plants that were regulated by USDA.

In other words, federal law prevented Hawaii County from restricting GMOs that were still being field-tested under USDA's supervision, but the ordinance could prohibit crops that the agency had commercialized.

The requirement to report crop types and locations in Kauai County, on the other hand, was held to be free of conflicts with federal law.

In all three cases, though, the ordinances were found to be pre-empted by Hawaii's agricultural statutes, regardless of federal law.

It is possible for the 9th Circuit to simply rule that the ordinances are pre-empted by state law and not decide the federal issues.

However, that would leave an unresolved conflict between two federal court rulings, inviting further litigation and confusion, so it's unclear if the 9th Circuit would want to kick that can down the road.

Bentgrass

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"I think Scotts should be liable for what they did but they are pretty much walking away from it," said Malheur County farmer Rod Frahm. "Personally, I think since they created the problem, they should take care of it."

Scotts 'committed'

Molly Jennings, director of public affairs for Scotts, told Capital Press in an email that claims the company is walking away from its responsibility are unfounded. "We are committed, and have been, to a collaborative, long-term management plan with local landowners, irrigation managers and others."

In an email response, USDA Public Affairs Specialist Andre Bell also rejected the notion that the agreement allows Scotts to walk away from the problem.

Scotts, in conjunction with Monsanto Corp., was developing the genetically modified creeping bentgrass to be resistant to glyphosate, the active ingredient in Roundup, Monsanto's popular weed killer.

But the grass escaped from field trials in 2003 due to what USDA describes as a "wind event" and took root in Malheur and Jefferson counties in Oregon.

According to Jennings, two wind storms resulted in seed heads scattering from the field trial control area in August 2003.

The plants were identified outside the control area in 2004.

Scotts has been surveying for and controlling the plant for several years.

According to Scotts, the company identified 424 plants in Malheur County and 441 plants in Jefferson County during spring spraying this year. A small number of the plants were found in Canyon County, Idaho, which is adjacent to Malheur County.

10-year agreement

During a March meeting with a top USDA official and Scotts representatives, some local farmers and irrigation district representatives challenged the terms of the agreement, reached in September.

The agreement requires Scotts to continue to survey for and try to eradicate the bentgrass in 2016. In years 2 and 3, the company must provide technical assistance to affected farmers and irrigation districts and provide incentives for the adoption of best management practices to control the grass.

Sean Ellis/Capital Press

Malheur County farmer Jerry Erstrom points out a genetically engineered creeping bentgrass plant June 14 in an onion field just south of Ontario, Ore. The grass, which was genetically modified by Scotts Miracle-Gro Co. to resist the Roundup weed killer, escaped from field trials in 2003 and has taken root in Malheur and Jefferson counties in Oregon and part of Canyon County in Idaho.

The company will also conduct outreach and education programs.

In years 4 through 10, Scotts will pull back a little while continuing to analyze the situation, educate growers and provide technical assistance, Sid Abel, assistant deputy director of USDA's Biotechnology Regulatory Services, said during the March meeting.

Scotts will continue to work with Oregon State University researchers to try to identify herbicides that can effectively manage the grass, especially in aquatic and semi-aquatic environments.

USDA "essentially let them off the hook," said Erstrom. "What Scotts is doing to Malheur County is not right."

The plant proliferates on and in irrigation ditches and is clogging and changing the flow of some ditches, said Erstrom and Frahm, who is on his local ditch board.

"The plant does extremely well on ditch banks," said Jay Chamberlin, manager of the Owyhee Irrigation District, which provides irrigation water to 118,000 acres in Eastern Oregon and part of Southwestern Idaho. "Once it gets in there, it can contaminate the whole system."

Because creeping bentgrass is genetically modified, if traces of it end up in alfalfa hay or other crops, they can be rejected by overseas customers that don't accept GMO crops, Erstrom said.

$100 bounty

Between the plant's impact on irrigation ditches and its possible impact on foreign shipments, "The potential is there for disaster," he said.

Malheur County declared the plant a "Class A" noxious weed two months ago, which means it's mandatory for anyone who finds it on his property to control it.

Erstrom said there is now a $100 bounty on any of the bentgrass found in areas where it hasn't already been detected, such as north of Ontario or along the Snake River.

Jennings said glufosinate is the primary tool used by the contractor hired to control the grass but other herbicides work as well. A list of them can be found online at http://scottsmiracle-gro.com/gtcbanswers/

Abel said Scotts has agreed never to sell or distribute the grass variety and USDA has documented that all of the commercial grade seed stock has been destroyed, although Scotts was allowed to keep research-grade materials.

At the same time, Scotts has petitioned USDA to deregulate the genetically engineered grass, a move that Erstrom suspects is intended to allow the company to wash its hands of the issue.

Jennings, the director of public affairs for Scotts, said the bentgrass meets all of the scientific and environmental criteria for deregulation and "we believe this is an important step to upholding the gold standard set by the USDA as it relates to the review and approval of all future plants and crops produced through genetic modification."

Deregulation would also "provide more flexibility in long-term management of this plant," she added. "If this bentgrass is deregulated, as we think it should be, this will in no way change our commitment to the current management plan for the next decade."

Jennings said the cost of controlling the bentgrass is modest and involves mostly the cost of the herbicide used to kill it.

She said the company is evaluating the possibility of subsidizing or donating herbicides that manage creeping bentgrass.

"We feel that the plan we have developed will best address the needs of growers and irrigation managers, but we are open to working with stakeholders to develop the best possible approach," she said.

Abel, of USDA's Biotechnology Regulatory Services, said the grass will never be eradicated in the affected counties, but it can be controlled.

Erstrom said his concern is that once Scotts stops actively controlling the plant, it will make a comeback and spread rapidly.

The onus will fall on growers and irrigation districts that lack the expertise and financial means to control it, he said.

State's position

In a Feb. 17 letter to Scotts officials, Oregon Department of Agriculture Director Katy Coba said that according to the agreement, "after three years all responsibility for (glyphosate-tolerant creeping bentgrass) management, including financial, will fall on growers, irrigation managers and other affected parties whereas Scotts will only be responsible for maintaining a website."

"ODA is concerned that without Scotts' leadership and financial support, that research efforts and coordinated control efforts will eventually subside and GTCB population levels will escalate and the area of infestation will expand," Coba stated.

While ODA and some farmers such as Frahm and Erstrom have concerns about Scotts' future role in controlling the grass, others say the company has done a good job so far of controlling it.

At the same time, they admit they are concerned about the terms of the agreement with USDA.

"I'm very happy with what Scotts has done at this point," said Bruce Corn, an Eastern Oregon farmer and member of the Owyhee Irrigation District board of directors. "The concern is that at some point, they would walk away from taking the control measures they are now and (the plant) will come back."

In the early years after the grass was first discovered in Malheur County, it was everywhere and there were blankets of it in some places, Chamberlin, the Owyhee Irrigation District manager, said. But the local contractor hired by Scotts to control it has done a good job of knocking it way back, he added.

"So far, they have done what they said they would do. I hope that continues," he said about Scotts. "But the language in the agreement with USDA is very concerning."

Water

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The ruling is significant for other farmers because it undermines the "plowing exemption" to Clean Water Act regulations, said Tony Francois, an attorney with the Pacific Legal Foundation, a property-rights group that represents Duarte.

The U.S. Army Corps of Engineers claims the tillage operation on Duarte's property doesn't qualify as plowing because it "relocated earthen material into ridges," unlawfully raising the elevation of the soil in the wetlands with "fill material."

Under this interpretation, the plowing exemption to the Clean Water Act would essentially be rendered meaningless, said Francois.

"There's no way you can plow without displacing soil from the track of the plow into a little ridge next to it," he said.

Duarte has asked U.S. District Judge Kimberly Mueller to reconsider her ruling, with a hearing on his motion scheduled for July 1 in Sacramento.

If the judge refuses to reconsider the ruling, Duarte will request permission to challenge it before the 9th U.S. Circuit Court of Appeals, said Francois.

"She didn't really look at our evidence that all Duarte did was plow," he said.

In her recent decision, Mueller agreed with the federal government that by moving soil horizontally across the wetland portions of his field, Duarte unlawfully redeposited it into the "waters of the United States" and thereby "discharged a pollutant."

Duarte didn't qualify for the plowing exemption because he was converting a pasture that had long been used for grazing to grow wheat, which meant that tillage wasn't an "established and ongoing" farm activity on the property, according to Mueller.

Such an overly narrow understanding of the Clean Water Act's plowing exemption has "no basis" in the actual statute, which wasn't intended to stop farmers from changing what's grown in fields that include wetlands, said Francois.

Tillage operations would only be prohibited under the Clean Water Act if they were performed for a non-farming use, such as preparing a field for building construction, he said.

The idea that growers must obtain a Clean Water Act permit to switch a field from grazing to growing crops or planting an orchard is based on a misinterpretation of the law by the U.S. Army Corps of Engineers, he said.

"They're basically saying if you want to deviate from what you've been doing, you need our permission," Francois said.

Duarte's problems with the U.S. Army Corps of Engineers began in 2012, when the agency ordered him to "cease and desist" tillage in the field because it contained temporary "vernal pools."

He filed a lawsuit against the agency claiming it had violated his due process rights — an argument that was rejected by the judge — to which the Corps responded with a counterclaim alleging the Clean Water Act violation.

Because the judge hasn't yet decided on a punishment for Duarte, the litigation isn't finished, and he can't appeal to the 9th Circuit without her permission.

Such an "interlocutory appeal" would be warranted in this case because it has the potential to end the lawsuit without having to go through the "remedies" phase, according to a court document filed by Duarte.