

# The Agriculturalist Lawyer



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## Note From the Chair

By Allen H. Olson, Section Chair  
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This will be my final "Message from the Chair" as new officers will be elected at the section's annual meeting on Sept. 21. The annual meeting will be conducted in conjunction with the Second Annual Agricultural Law Conference to be held this year at Mercer Law School in Macon. I look forward to turning over the reins to Beth Crocker, our new chair. Nominations closed on Sept. 1 with only one change to the original slate as proposed by the Executive Committee. Matt Mattila has withdrawn his candidacy for secretary and has been replaced by Samuel Primm. Matt has indicated a willingness to stay active in the section but due to other commitments indicated that he would prefer not to be section secretary at this time. Nowell Berreth will serve as vice-chair.

I cannot thank Beth, Nowell, Matt and Samuel enough for all of the help they have given me in running the section for the past two years. They have been tireless in their efforts to promote agricultural law and the activities of the section. I also want to thank our Section Liaison Johanna Merrill for all her assistance in getting the section off the ground and running again. Johanna, we could not have done it without you.

This year's Agricultural Law Conference should prove quite exciting. We have more speakers this year than last covering a wider variety of topics. A panel of experts will address legal, policy and technical issues facing ethanol production. The former general counsel for Homeland Security will give our luncheon address on food security issues. Other speakers will talk about food safety law, agricultural bankruptcy, right-to-farm laws, immigration and labor law, and the upcoming Farm Bill. USDA and the Georgia Department of Agriculture will have interesting displays in the registration area. Our luncheon will feature all natural, grass-fed beef from White Oak Pastures, a Southwest Georgia, family-owned cattle operation, and, of course, we guarantee both food security and food safety at the luncheon. I look forward to seeing you all in Macon. To register for the conference, please contact ICLE.

This month's newsletter contains an article by Matt Mattila, Robert Denham and Adwoa Seymour titled

"USDA Arbitrarily Deregulates Genetically Modified Alfalfa—The Future of Agricultural Biotechnology Starts Here." Many thanks to Matt and his colleagues at Powell Goldstein LLP for their work in putting this piece together. Ag biotech issues are an increasingly important component of modern agricultural law. Please call Matt if you would like more information about the topic.

Finally, I would like to thank all the section members for their interest in agricultural law and their support of the section. We may be one of the smallest State Bar sections, but we make up for our small size with enthusiasm and competence in our field. I look forward to my continued association with all of you through future section activities.

# USDA Arbitrarily Deregulates Genetically Modified Alfalfa—The Future Of Agricultural Biotechnology Starts Here

By V. Robert Denham Jr, M. Lawrence Mattila and Adwoa Gharthey-Tagoe Seymour<sup>1</sup>

A federal court in California recently issued a landmark ruling with widespread implications for the biotech industry. The court closely analyzed how the United States Department of Agriculture (USDA or Agency) is regulating biotech crops, and found that the Agency acted arbitrarily.

In the case of *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, U.S. District Court Judge Charles R. Breyer of the Northern District of California issued a permanent injunction that barred the future planting of Monsanto's genetically modified "Roundup Ready" alfalfa. The court's May 3, 2007, ruling gave finality to an earlier Feb. 13 ruling, where the court imposed a preliminary injunction and admonished the USDA for approving the genetically modified alfalfa without fully considering the environmental implications.

In the Feb. 13 ruling, the court determined that the USDA arbitrarily deregulated Monsanto's genetically engineered Roundup Ready alfalfa, and failed to take a "hard look" at potential environmental impacts. Monsanto's product, like many others, is genetically engineered to resist glyphosate herbicide, allowing effective weed control without killing the crop. Approved deregulation petitions allow widespread commercial use and distribution of such biotech products, but critics question the overall environmental impact.

As one of several agencies regulating biotech crops, the USDA is required to analyze potential environmental impacts before approving deregulation petitions. The Agency first conducts an "Environmental Assessment" and then, after public comment, conducts additional review if it is unable to conclude that no significant impact exists. The additional review involves preparation of a more comprehensive "Environmental Impact Statement."

The court determined that the USDA should have prepared an Environmental Impact Statement, and that several important questions needed to be answered before Roundup Ready alfalfa could be deregulated. In particular, the USDA should have considered:

- whether Roundup Ready alfalfa would "contaminate" conventional alfalfa through "gene transmission;"

- whether Roundup Ready alfalfa would result in increased weed resistance to glyphosate; and
- whether glyphosate herbicide use would increase as a result of deregulation and impact the environment.

In the Feb. 13 decision, the court recognized that determining whether the decreased availability or elimination of non-genetically modified varieties constituted a significant environmental impact was a "question of first impression."

The USDA unsuccessfully argued, among other things, that cross-contamination of the alfalfa crop was a non-issue since it had already determined that Roundup Ready alfalfa was not harmful to humans and livestock. Without disputing the safety of the biotech crop, the court emphasized that other factors must be considered, including the effect on conventional alfalfa and resulting economic impacts. For example, the Agency had no basis for concluding that exports to Japan would be unharmed without identifying quality control measures that would prevent exceedances of Japan's 1 percent transgenic threshold for imported alfalfa.

The court further rejected the USDA's attempt to shift the burden of preventing cross-contamination to organic and conventional farmers, particularly because the Agency failed to identify whether such farmers could even prevent gene transmission. The court seemed skeptical about the ability to prevent genetic drift based on the "high geographic concentration of seed farms" and the potential for pollination "by bees that can travel more than two miles."

After rejecting the USDA's arguments, the court issued a preliminary injunction that enjoined future planting of Roundup Ready alfalfa as of March 30, 2007. The court ultimately granted permanent injunctive relief on May 3, 2007, and found that "contamination" of conventional alfalfa is "irreparable environmental harm" and "cannot be undone." By this time, Monsanto and others had intervened in the litigation, but the court found that any economic harm to them was outweighed by the harm to conventional alfalfa farmers and consumers.

The court did not enjoin the harvest or sale of Roundup

Ready alfalfa seed or forage that was already planted. Instead, the court determined that the financial burden on seed growers who had already planted Roundup Ready alfalfa pursuant to certain contracts outweighed the environmental harm, and plaintiffs did not seek to enjoin the harvest or sale of planted forage. Among other things, the court required the USDA to regulate growers' labeling practices and equipment cleaning procedures in order to mitigate the environmental harm.

The court recently amended its judgment to address certain details, but the overall impact of the decision remains the same. Roundup Ready alfalfa cannot be commercially planted until the USDA completes an Environmental Impact Statement and deregulates the biotech crop. In the meantime, Roundup Ready alfalfa is subject to the USDA's permit process for regulated articles.

The court's decision has long-term implications for Monsanto and other biotech companies. In effect, the USDA can no longer rubberstamp petitions for deregulation. Now, the Agency may take a more rigorous approach to regulating biotech crops, potentially stifling the development and distribution of agricultural biotech products. Several deregulation petitions are currently pending, including petitions for other biotech products that tolerate glyphosate.

For the biotech companies, this decision could also mean more litigation because of an increased focus on adverse economic impacts to organic and conventional farmers. The so-called "biological contamination" of conventional crops has routinely created trade issues with Japan and the European Union, which strictly regulate imports of biotech crops. Domestic farmers and other potential litigants suffering economic loss will likely point to this court's decision, which acknowledges that economic impact may warrant the need for additional biotech crop regulation.

Monsanto has already reacted to the Geertson ruling by filing an appeal with the Ninth Circuit. Although this case is not yet over, it appears that courts may be taking an increasingly "hard look" at how agricultural biotechnology affects farmers and others, as well as the environment. While the United States feeds the world, biotech crops are likely here to stay—but the emerging question may be which biotech crops?

#### **Endnotes**

1. Denham is a partner in the Tort Litigation and Environmental Practice Group at Powell Goldstein, LLP, where he specializes in a wide range of environmental and business litigation matters. Mattila and Seymour are associates in the Environmental Practice Group at Powell Goldstein, LLP. The authors welcome comments to the article and can be reached at the following e-mail addresses: [bdenham@pogolaw.com](mailto:bdenham@pogolaw.com); [mmattila@pogolaw.com](mailto:mmattila@pogolaw.com); or [aseymour@pogolaw.com](mailto:aseymour@pogolaw.com).