

Green Groups Tell 9th Circ. EPA's Pesticide Approval Must Fall

By [Juan Carlos Rodriguez](#)

Law360 (February 17, 2021, 4:06 PM EST) -- Public health and green groups on Tuesday asked the Ninth Circuit to strike down the [U.S. Environmental Protection Agency's](#) decision to approve the pesticide sulfoxaflor for use on a wide range of crops without specific protections for honeybees.

The EPA authorized the spraying of the insecticide on crops including soybean, cotton, citrus, apples and strawberries in July, a move the Center for Food Safety and the [Center for Biological Diversity](#) say runs afoul of the Endangered Species Act and the Federal Insecticide, Fungicide and Rodenticide Act because it left out protective measures for bees that the agency had previously said were necessary.

Sulfoxaflor is a chemical that acts as a neurotoxin to insects and is used in pesticides that were developed by [Dow Chemical](#) Co., which has intervened in the case, but are now produced by spinoff [Corteva Inc.](#)

The groups said that the EPA has data that shows sulfoxaflor can harm honeybees, bumblebees, leaf cutter bees, native bees and wild bees but instead relied on an "inaccurate, skewed" analysis that compared sulfoxaflor to six highly toxic insecticides to find using it would actually be beneficial to the environment.

"Consequently, more than a decade after the initial application to register sulfoxaflor use, EPA still has 'no real idea whether sulfoxaflor [would] cause unreasonable adverse effects on bees,' not to mention endangered and threatened species," the groups said in their opening brief.

The brief comes on the heels of the Ninth Circuit's [January decision](#) to reject the EPA's bid to gain more time to reexamine sulfoxaflor's effects. The agency had asked for a chance to scrutinize the pesticide again after it admitted it hadn't done its job properly the first time, asking that the product be allowed to stay on the shelf in the meantime.

Sulfoxaflor was first registered in 2013 but was challenged in court, leading to the registration being vacated in 2015 on the grounds that there wasn't sufficient data to determine its impacts on bees. The EPA then granted registration for certain uses of sulfoxaflor in 2016. In 2019, the EPA allowed a host of new uses for the pesticide. This amended registration was challenged, with groups arguing the agency didn't justify its approval of the expanded uses.

The EPA admitted mistakes in October, when it asked for a remand without the court vacating the registrations. In its filing, it acknowledged the deficiencies related to the ESA, admitting that it never made "the procedural determination of whether the action has an effect on listed species." It said, however, that it wanted to fix the problem and that halting the sale of sulfoxaflor was improper because the error "may be remedied through further agency action."

"Our bees and pollinators are dying, and yet EPA went ahead and allowed another toxic insecticide to be sprayed across America without any care for their well-being," Sylvia Wu, an attorney at Center for Food Safety, said in a statement Tuesday.

The EPA declined to comment Wednesday. Dow referred comment to Corteva, which did not respond to a request for comment Wednesday.

The plaintiffs are represented by Sylvia Shih-Yau Wu, George A. Kimbrell and Amy van Saun of Center for Food Safety and Stephanie M. Parent of Center for Biological Diversity.

Counsel information for the EPA was not available Wednesday.

Dow is represented by Kirsten L. Nathanson, David Y. Chung, Amanda Shafer Berman, Tyler A. O'Connor and

Amy B. Symonds of [Crowell & Moring LLP](#).

The case is Center for Food Safety et al. v. Jane Nishida et al., number 19-72109 in the [U.S. Court of Appeals for the Ninth Circuit](#).