

SUPREME COURT OF ARKANSAS

No. CV-18-346

ARKANSAS STATE PLANT BOARD
AND TERRY WALKER, IN HIS
OFFICIAL CAPACITY AS
DIRECTOR OF THE ARKANSAS
STATE PLANT BOARD

APPELLANTS

V.

HARRY STEPHENS, STEPHEN
HIGGINBOTHOM, WEST
HIGGINBOTHOM, KIMBOROUGH
STEPHENS, HERSHELL
SCHWANTZ, JAMES RICKY
HELTON, DAVID R. GREGORY,
POINTER HALL, PHIL HALL,
VERNON JOE SMITH, JERRY D.
FLYNN, DONNIE DELINE, BOB
BILLINGSLY, KRISTA TAGGART,
LEVI CARLTON, BRIAN
ALUMBUGH, BOBBY BYRD,
TYLER MCCLENDON, LARRY
MCCLENDON, NEIL CULP, BLAKE
CULP, CHRIS CARNATHAN, JEFF
CARNATHAN, JOHN BRYANT,
MICHAEL TAYLOR, THOMAS
TURNER, TERRY TOLAR, JOHN
TOLAR, LYLE WHEELER, ALAN
HARGRAVES, BRIAN STONER,
EARNEST LARRY, BERNARD E.
CROWLEY, PACE HINDSLEY,
EUGENE HINDSLEY, JAMES V.
RICHMOND, JOHN V.
RICHMOND, HARRY G.
STEPHENS, JOHN KING, LENNIE
KYLE, GERE REEVES, ED
GREGORY, CLAY YOUNG,
CHARLES GALLOWAY, BARRY
JONES, KYLE CANNON, CHARLIE

Opinion Delivered: June 6, 2019

APPEAL FROM THE PHILLIPS
COUNTY CIRCUIT COURT
[NO. 54CV-18-101]

HONORABLE CHRISTOPHER W.
MORLEDGE, JUDGE

APPEAL DISMISSED.

BURRESS, TREY JACKSON,
LEONARD ROHRSCHEIB,
LEONARD ROHRSCHEIB, JR.,
KEATH GROVES, SHAWN
HARDESTY, GENE JOHNSON,
PAUL SELLERS, RAY DAWSON,
DANNY MAY, ROGER MAY,
KEITH FREELAND, SCOTT STEPP,
BILLY DON HINKLE, TIMOTHY
JONES, ALLEN LOVELESS, CALEB
HALL, MICHAEL YOUNG, LANCE
GRAY, KEITH WILKERSON,
ROGER WILKERSON, AND
DONNIE WILKERSON

APPELLEES

JOHN DAN KEMP, Chief Justice

Appellants Arkansas State Plant Board and Terry Walker, in his official capacity as director of the Arkansas State Plant Board (collectively, the Plant Board), appeal the circuit court’s temporary restraining order¹ that enjoined the Plant Board from enforcing its agency rule limiting the use of dicamba herbicides after April 15, 2018. Because the Plant Board has since repealed and replaced this rule, we dismiss the appeal as moot. *See Ark. State Plant Bd. v. Bell*, 2019 Ark. 164.

I. Facts and Procedural Background

Arkansas soybean farmers have long battled Palmer amaranth, a species of pigweed that is particularly competitive and aggressive. Palmer pigweed is one of the most difficult

¹See Ark. R. App. P.–Civ. 2(a)(6) (2018) (stating that an appeal may be taken from an interlocutory order granting an injunction).

weeds to control because it has developed a resistance to multiple weed killers. Dicamba-based herbicides have proven effective for the control of pigweed populations, but some formulations of dicamba are known to be volatile and prone to drift, meaning that they could cause damage to and affect the yields of off-target crops.² In 2016, the Environmental Protection Agency registered new dicamba formulations approved for in-crop, over-the-top use to control weeds on soybean plants that are genetically engineered to tolerate dicamba. The new dicamba was developed and marketed as less volatile and less prone to drift than the older versions of dicamba. In 2017, the Plant Board approved new dicamba for in-crop use by Arkansas farmers for the 2017 crop year.

During the 2017 crop year, soybean farmers planted genetically modified dicamba-resistant soybean seeds and treated their crops with the new dicamba. Throughout that summer, the Plant Board received an unprecedented number of complaints alleging off-target dicamba-herbicide injury. In response, Plant Board Director Walker and Secretary of Agriculture Wes Ward convened and co-chaired a task force to address dicamba-related complaints and propose new rules for dicamba use in the 2018 crop year. As recommended by the task force, the Plant Board proposed a new rule prohibiting the use of dicamba from April 16 through October 31. Farmers opposing the April 15 cutoff date suggested that the

²Volatility “measures the tendency of a chemical to vaporize.” Robert L. Zimdahl, *Fundamentals of Weed Science* 444 (3d ed. 2007). Herbicides can volatilize “several hours after application and lift and move elsewhere to condense on plant or other surfaces.” Tom Barber et al., *Dicamba in Arkansas—Frequently Asked Questions* (Univ. of Ark., Div. of Agric., Research & Extension), <https://www.uaex.edu/publications/pdf/FSA-2181.pdf>. Drift is the “movement of spray particles and vapors off-target.” Thomas J. Monaco, Stephen C. Weller, and Floyd M. Ashton, *Weed Science Principles and Practices* 156 (4th ed. 2002).

cutoff date should be extended to May 25, which would allow Arkansas farmers to use dicamba while still preventing off-target injury. Notwithstanding these contentions, on January 19, 2018, the Arkansas Legislative Council approved the rule prohibiting the use of dicamba from April 16 through October 31. The rule went into effect ten days later.

On April 13, 2018, appellees—a group of farmers who intended to use dicamba herbicides in 2018—filed a complaint against the Plant Board for declaratory judgment and injunctive relief. They sought to enjoin the Plant Board’s dicamba ban and to obtain a ruling that the actions of the Plant Board were illegal. Appellees also filed a motion for temporary restraining order or preliminary injunction asking the circuit court to enjoin the Plant Board from enforcing the April 15 cutoff date. Specifically, appellees asserted that an injunction was necessary because they had already planted dicamba-resistant beans for the 2018 growing season; without the use of dicamba herbicides after April 15, they would have no means to prevent the pigweed from overtaking their soybean crops; and once the damage to the crops was done, they would suffer business and crop harms that could not be “unwound.”

On April 13, the circuit court granted the *ex parte* TRO and enjoined the Plant Board from enforcing its rule. On April 16, the Plant Board filed a motion to dissolve the TRO, but two days later, before the motion was resolved, the Plant Board filed a notice of appeal of the TRO to this court. The Plant Board also filed a motion for stay of the circuit court’s order pending the appeal, which this court granted on April 25, 2018.

II. *Mootness*

The TRO in this case was entered to enjoin the Plant Board from enforcing the April 15, 2018 cutoff date for the 2018 crop year. While the appeal was pending, the Plant

Board promulgated a new rule that repealed the April 15 cutoff date.³ The new rule was filed with the Secretary of State's office on February 27, 2019, and it became effective on March 9, 2019. Under the new rule, in-crop dicamba application is allowed through May 25 of each year. Ark. Code R. 209.02.4-XIII(B)(1)–(2).

Generally, a case becomes moot when any judgment rendered would have no practical legal effect on a then existing legal controversy. *Kiesling v. Ark. Prof'l Bail Ass'n*, 2017 Ark. 346, 532 S.W.3d 567. If the repeal of a challenged rule eliminates the controversy between the parties, then the case is moot. See *Warren Wholesale Co. v. McLane Co.*, 374 Ark. 171, 286 S.W.3d 709 (2008).

Here, the rule mandating the April 15 cutoff—the basis for the entry of the TRO—is no longer in effect. Because judgment on this appeal would have no practical legal effect on the TRO's enforceability, we dismiss this interlocutory appeal as moot. See *Bell*, 2019 Ark. 164 (dismissing as moot the appeal of the TRO entered to enjoin enforcement of a Plant Board rule prohibiting the use of dicamba after April 15, 2018, because the rule had been repealed while the appeal was pending); *Ark. Dep't of Human Servs. v. Ledgerwood*, 2019 Ark. 121, ___ S.W.3d ___ (holding that the adoption of a new rule rendered the TRO against the emergency rule moot).

Appeal dismissed.

Leslie Rutledge, Att'y Gen., by: *Jennifer L. Merritt*, Senior Ass't Att'y Gen., for appellant.

³This court may take judicial notice of rules and regulations promulgated by administrative agencies. *Warren Wholesale Co. v. McLane Co.*, 374 Ark. 171, 173, 286 S.W.3d 709, 710 (2008).

Stoner Law PLLC, by: *Kyle Stoner*, for appellees.