

WRIT OF MAN-DANGEROUS: HERBICIDE 2,4-D AND THE EPA'S FAILURE TO ACT

Background

Herbicide 2,4-dichlorophenoxyacetic acid (2,4-D) is one of the most pervasive pesticides in the consumer market.¹ Used in the United States since the 1940s, it is the most common active ingredient in commercial weed killer. Some studies have linked exposure to 2,4-D with cancer, birth defects, irregular endocrine function, decreased immune function, and abnormal reproductive capacities.² A 2005 study by the Environmental Protection Agency (EPA) found that 25 percent of 2,4-D samples were contaminated with dioxins, which are carcinogenic, mutagenic, and cause reproductive problems even at minute doses.³ However, the EPA has discredited some of these studies, stating that they lack a measure of "2,4-D exposure that would allow for an establishment of 2,4-D as the source of any observable effects."⁴

Because of the alleged adverse health risks that 2,4-D poses, the Natural Resources Defense Council (NRDC) filed a petition in November 2008 with the EPA requesting: (1) that the EPA revoke the tolerance limits set for exposure to Herbicide 2,4-D residues; and (2) that the EPA cancel all registrations to sell or distribute products containing 2,4-D.⁵ The petition specifically addressed the concerns that: (1) exposure to 2,4-D is disruptive to the endocrine system; and (2) the Personal Protection Equipment (PPE) the EPA mandates for workers who handle 2,4-D offers inadequate defense from these risks.⁶

Procedural History

Under the Federal Food, Drug and Cosmetic Act, the EPA Administrator shall:

after giving due consideration to a petition filed under paragraph (1) and any other information available to the Administrator --

(i) issue a final regulation ...;

(ii) issue a proposed regulation ...; or

(iii) issue an order denying the petition.⁷

And indeed, the EPA initially took some steps to begin the rulemaking process; it published notice of the petition in the Federal Register on December 24, 2008, and subsequently informed the NRDC that it was “reviewing the comments and anticipated incorporating data from a new study in its response to the petition,” in a letter to the NRDC dated June 2009.⁸ However, between June 2009 and February 2012, the EPA did not take any action, nor did it provide any guidance to the NRDC on where it stood in the process.⁹ As a result of this inaction, the NRDC filed a petition in the Court of Appeals, D.C. Circuit on February 23, 2012, seeking a writ of mandamus to compel EPA action on their initial petition.¹⁰ The NRDC claimed that the EPA had failed to meet their duty under the Administrative Procedure Act to “respond to petitions without unreasonable delay,” and it was therefore proper for the Court to compel the agency to issue a ruling¹¹

EPA’s Denial of the NRDC Petition

Before the D.C. Circuit Court of Appeals had an opportunity to rule on the writ of mandamus, the EPA issued a final ruling on the NRDC’s petition on April 9, 2012.¹² The D.C. Circuit Court of Appeals subsequently dismissed the case on April 11, 2012, as a result of the NRDC’s petition for voluntary dismissal.¹³ Based on its authority to regulate pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), the EPA applied a “risk-benefit” test in denying the petition.¹⁴

The test applied is a balancing test that requires that the EPA to examine whether or not a pesticide poses “any unreasonable risk to man or the environment,” while also “taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.”¹⁵ When applying this test, the EPA first examines whether or not the pesticide poses any “meaningful risk.”¹⁶ If there is a real risk to public health, the EPA then examines whether or not changes to the terms and conditions of use of the pesticide can “feasibly and effectively mitigate the risk to levels that do not exceed levels of concern.”¹⁷ The statutory standard for cancellation of a pesticide is that the pesticide “when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment.”¹⁸

In its discussion of the risks of 2,4-D, the NRDC presented evidence of a substantial risk.¹⁹ However, according to the EPA, the NRDC failed to establish that this harm is likely to occur at the current exposure levels and that this harm is unreasonable when weighed against the pesticide’s benefits to society.²⁰ Further, the NRDC failed to establish that the common and generally practiced usage of 2,4-D causes unreasonable adverse health effects. Because of this flaw in NRDC’s argument, the EPA denied the petition to revoke tolerance limits and cancel all licenses to sell 2,4-D.²¹

The NRDC has until June 18, 2012, to file an appeal.²²

Recommendations

Regardless of a person’s stance on the alleged dangers of 2,4-D, it is clear that three years were wasted. On the one side, an enormous industry (commercial weed killer) was left to wonder whether or not the market would be forever changed, and on the other a potentially serious health risk was made direr by the population’s continued exposure. The EPA is busy, for certain, but it must respond to petitions in a more efficient and timely manner.

To ensure this, Congress should enact legislation requiring an EPA ruling on a petition within ninety days of the end of the public comment period. This is more than sufficient time for the EPA to render a decision; it is twice the amount of time that the NRDC requested the Court of Appeals give the EPA in this case.²³ If a petition is unresolved at the end of ninety days, the petition to revoke or alter limits should be automatically granted. The benefit of this is that if the EPA chooses to ignore a credible public health risk, the products are quickly removed from the market. Further, this incentivizes the pesticide industry to encourage the EPA to act, so as not to lose a license. Any license that is automatically revoked by this process should certainly be subject to an appeal. In the case that an appeal is granted and the automatic revocation reversed, the EPA should be liable for damages proximately caused by its inaction. This creates the proper incentive structure for the EPA to act quickly and efficiently.

The FDCA currently provides for “expedited review” of certain petitions.²⁴ However, these are only for petitions proposing

the issuance of a tolerance or exemption for a pesticide chemical residue, and only when the pesticide residue presents a lower health risk to human health than a pesticide chemical residue for which a tolerance or exemption is already in effect.²⁵ In this case, the Administrator has one year to complete action on the petition.²⁶ If one year is sufficient time for the EPA to approve a tolerance or exemption, then ninety days is certainly enough time to respond to a petition citing serious potential risks to public health.

Such legislation should be considered to avoid the bureaucratic delay experienced by Herbicide-2,4-D and alleviate the already enormous case load of the Federal Court of Appeals in the D.C. District from these unnecessary writs of mandamus.

Footnotes

¹ Northwest Center for Alternatives to Pesticides, Herbicide Factsheet 2,4-D (2006), available at <http://www.pesticide.org/get-the-facts/pesticide-factsheets/factsheets/24d-factsheet>.

² Id.

³ Id.

⁴ Letter from Stephen P. Bradbury, Director of the Office of Pesticide Programs, Environmental Protection Agency, to Gina Solomon, Senior Scientist and Mae Wu, Program Attorney, Natural Resources Defense Council (Apr. 7, 2012), available at http://www.epa.gov/pesticides/chem_search/reg_actions/24d/24d-fifra-response.pdf.

⁵ Brief for Petitioner at 2-3, In re Natural Resources Defense Council, No. 12-1222 (D.C. Cir. Feb. 23, 2012), available at [http://op.bna.com/env.nsf/id/fwhe-8rrruj/\\$File/NRDC%20Lawsuit.pdf](http://op.bna.com/env.nsf/id/fwhe-8rrruj/$File/NRDC%20Lawsuit.pdf) [hereinafter ““Petition””].

⁶ See Letter from Stephen P. Bradbury to Gina Solomon and Mae Wu, *supra* note 4.

⁷ 21 U.S.C. §§ 346a(d)(4)(A)(i)-(iii) (2007).

⁸ Petition, *supra* note 5, at 14.

⁹ Id. at 15.

¹⁰ Id. at 1.

¹¹ Id. at 5.

¹² See Letter from Stephen P. Bradbury to Gina Solomon and Mae Wu, *supra* note 4.

¹³ Order Granting the Petitioner’s Motion for Voluntary Dismissal, In re Natural Resources Defense Council, No. 12-1222 (D.C. Cir. Apr. 11, 2012).

¹⁴ Id.

¹⁵ Federal Insecticide, Fungicide, Rodenticide Act §§ 2(bb) and 3(c)(5), 7 U.S.C. §§ 136(2)(bb) and 136a(c)(5).

¹⁶ See Letter from Stephen P. Bradbury to Gina Solomon and Mae Wu, *supra* note 4.

¹⁷ *Id.*

¹⁸ 7 U.S.C. § 136d(b).

¹⁹ See Letter from Stephen P. Bradbury to Gina Solomon and Mae Wu, *supra* note 4.

²⁰ *Id.*

²¹ *Id.*

²² 2,4-D; Order Denying NRDC's Petition to Revoke Tolerances, 77 Fed. Reg. 23,135, 23,135 (Apr. 18, 2012) (to be codified at 40 C.F.R. pt. 180).

²³ Petition, *supra* note 5, at 1.

²⁴ 21 U.S.C. § 346a(d)(4)(C) (2010).

²⁵ *Id.* § 346a(d)(4)(C)(i).

²⁶ *Id.*