

Pesticide & Toxic Chemical News

March 13, 2006

Article

Groups see methyl bromide ruling as potential signal of limits on court access.(AIR)

By Larry Pearl

A federal appeals court ruling that the Natural Resources Defense Council (NRDC) lacks standing to challenge an EPA methyl bromide rule could have broad implications for citizen access to the courts to enforce environmental laws, environmental groups said last week.

A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit March 7 denied NRDC's petition for review of EPA's December 2004 rule, saying that the chance of any NRDC member incurring any injury as a direct result of the rule, a primary criteria for showing standing, is "infinitesimal."

"This is the most egregious instance in which a court says an injury doesn't count," David Doniger, a senior attorney for NRDC who argued the case before the D.C. Circuit, told Pesticide & Toxic Chemical News. Normally, a court will rule against a plaintiff if it believes there is no injury, but here the court is saying that even if someone is suffering an injury, it doesn't count, he noted.

The rule

EPA's December 2004 rule authorizes new production and consumption of methyl bromide, as well as the use of existing stocks, per the March 2004 dictates of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer.

Methyl bromide is a broad-spectrum pesticide typically used as a pre-plant soil fumigant. It is also has significant ozone depleting potential and, under the Montreal Protocol, its production and consumption were scheduled to be phased out by Jan. 1, 2005.

But the Protocol permits so-called "critical use exemptions" for the chemical when its absence would result in significant market disruption, if there is no technically and economically feasible alternative, and if it "is not available in sufficient quality and quantity from existing stocks of banked or recycled methyl bromide."

NRDC argued, in a lawsuit filed Dec. 23, 2004, that EPA's final rule violated this provision of the protocol by failing to properly take into account existing U.S. stocks of methyl bromide. In addition, EPA let noncritical users dip into existing stocks of methyl bromide, which is illegal, NRDC argued.

EPA spokeswoman Enesta Jones told PTCN via email that EPA "continues to believe that the amount of new methyl bromide production and import for critical uses in 2005 was appropriate."

She said "the critical use exemption process balances public health protection with meeting the critical needs of American farmers as they make the transition to alternatives."

A question of standing

But the judges did not rule on the substantive merits of NRDC's opposition to EPA's final rule, instead

confining themselves to the procedural question of whether the group has "standing" to bring the case in the first place.

Under Article III of the U.S. Constitution, a plaintiff has standing only if they--or in this case one or more of NRDC's members--have incurred an actual injury as a result of the defendant's action and only if a decision in the plaintiff's favor has the potential to redress that injury.

NRDC claimed its members have standing since EPA's final rule, by slowing down the phase-out of an ozone depleting substance, increases their risk of getting skin cancer, cataracts and other ailments associated with a diminishing ozone layer.

But the court severely criticized arguments put forth by the group in support of its claims. NRDC relied on an affidavit by Sasha Madronich, a senior scientist at the National Center for Atmospheric Research, which said "it is reasonable to expect" more than 10 deaths, 2000 non-fatal skin cancer cases and 700 cataract cases to result from the 2004 methyl bromide consumption and production rule.

The court said it had reasons to doubt Madronich's methodology and assumptions, but even if his conclusions were accurate, "the estimated effect on the subset of the U.S. population who are NRDC members (490,000) is infinitesimal."

The ruling quotes from the affidavit of Louis Anthony Cox, Jr. who testified on behalf of the Methyl Bromide Industry Panel of the American Chemistry Council, an intervenor in the case. Cox heads an independent Denver-based applied research company specializing in health risk analysis and operations research modeling.

"Even if all NRDC members were immortal we could expect to wait approximately 12,000 years ... before seeing the first ... methyl bromide exemption-related death," Cox wrote.

Looking to the broader issue of what constitutes "injury" for the purposes of showing standing, the ruling points to a couple of Supreme Court decisions which found that an alleged injury must be "actual or imminent, not conjectural or hypothetical."

"The chance that one may develop cancer can hardly be said to be an 'actual' injury--the harm has not yet come to pass. Nor is it imminent in the sense of temporal proximity," the ruling states. In addition, the court cites its own precedent that an injury be "substantially probable." While not defining exactly what that means, the court says there must be a "non-trivial chance of injury," a criteria that NRDC has not met, the court said.

The ruling further notes that several other courts of appeals have suggested that any increase in the probability of injury due to government action or in-action constitutes "injury" for the purpose of showing standing. "Strictly speaking, this cannot be correct," the ruling states. "For example, if the original probability of harm is 1 in 100 billion per person per year, doubling the probability to 2 in 100 billion would still leave an individual with a trivial chance of injury ... The law of this circuit is that an increase in the likelihood of harm may constitute injury in fact only if the increase is sufficient to 'take a suit out of the category of hypothetical'" and that is not the case here.

Court access

NRDC's Doniger blasted the ruling, saying the court not only miscalculated the risk of injury to NRDC members by only considering the risk of death (as opposed to other serious injuries, like skin cancer) over a time frame that is much too long, but he argued the ruling is also out of step with the U.S. Supreme Court and other federal appeals court circuits. The Supreme Court has said that citizens have standing

where they have a reasonable basis of concern for injury and change their behavior accordingly, while other circuits have said that any increase in risk of injury constitutes standing, Doniger noted. The D.C. Circuit's decision "just parrots an affidavit by an industry intervenor," he said.

The decision is particularly surprising, since EPA agreed that NRDC met the criteria for standing, Doniger told PTCN. "It is a symptom of this particular court trying to shut the courthouse door through the standing doctrine ... it immunizes illegal government action from challenge by anyone," he added. **"It's another disturbing decision cutting back on access [to the courts]," Glenn Sugameli, senior attorney at Earthjustice, told PTCN.**

Sugameli agreed it would be difficult to define precisely what constitute a "substantial probability" of injury, making the approach used by several other federal courts of appeal--basing standing on an increased risk of injury--the proper approach.

He said access to the courts has been an issue of concern for Earthjustice and other environmental groups with respect to a number of Bush judicial nominees, including the two new members of the Supreme Court--Chief Justice John Roberts and Justice Samuel Alito.

But Nancy Sandrof, manager of ACC's Methyl Bromide Industry Panel, said there is little evidence that use of methyl bromide poses any additional risk to NRDC members or the general population. ACC supports EPA's critical use exemption process, she added.

Industry lawyer Larry Ebner, who heads up the appellate practice group at McKenna Long & Aldridge said the ruling gives groups like NRDC "a reality check on stringent criteria that must be met when trying to establish standing based on an alleged risk to their members."

The ruling reflects "a carefully considered, factually based, scientific approach to determining standing of a public interest group when the claim of standing is based on increased risk of injury to its members," Ebner said.

"We think it will help prevent plaintiffs from bringing cases based on hypothetical and speculative harm," Ted Waugh, ACC's assistant general counsel, added.

NRDC can ask for a rehearing by all 13 judges on the D.C. Circuit or petition the Supreme Court and is considering all its options, Doniger said. The group also filed a similar complaint last month in the same court challenging EPA's process for authorizing methyl bromide consumption and production for 2006.

"But it's not just about methyl bromide issues," Doniger said. "We need to deal with the standing issue or else we'll run into the same problem."

--Larry Pearl

larry.pearl@informa.com