POINT . . . AND COUNTERPOINT

Next year could be the year in which the U.S. Congress gets on with the job of amending the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). If so, one of the issues sure to come to Congress's attention involves the procedures under FIFRA for Section 6(b) for cancelling pesticides. Both environmental organizations and pesticide producers have problems with the current approach, as illustrated by the two expert analysts who address the issue in this month's feature:

EPA's Pesticide Cancellation Procedures Should Be Changed

by Thomas O. McGarity,
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Anyone who is familiar with the procedures that EPA must use in cancelling a pesticide under the Federal Insecticide, Fungicide and Rodenticide Act knows that they are extraordinarily cumbersome and expensive. As currently designed, pesticide cancellation hearings are full adjudicatory hearings that resemble courtroom trials. Each of the four relevant interest groups—pesticide manufacturers, pesticide users, environmental groups, EPA—and often many tangential groups, such as state agencies and the U.S. Department of Agriculture, present expert testimony, cross-examine expert witnesses and debate points of law. In this adversarial atmosphere, the objective of each participant is not so much to arrive at the "truth" as it is to puncture the opponent's positions. As a result, pesticide cancellation hearings are notorious for the time and resources that they consume. One early study concluded that cancellation hearings consumed an average of more than 1,000 days from referral for hearing to termination.[1]

The problem is not simply the failure of timid administrative law judges (ALJs) to gain control over the proceedings and move them forward expeditiously. Judge Perlman, who presided over two of the lengthiest cancellation proceedings, was one of the best in the business. The problem goes deeper to the nature of the issues that the agency must address when it decides whether to take a pesticide off the market.

The issues in a cancellation hearing are invariably extremely complex "science/policy" questions that require scientific judgment and the sensitive weighing of important policy considerations for their resolution. Nearly all of these "science/policy" questions are inappropriate for resolution in the adversarial context of the formal adjudicative hearing.

When two equally eminent scientists disagree about the nature of the tissue lesions that they observe under a microscope, no amount of cross-examination is likely to reveal that one of the two is lying. Pesticide cancellation hearings are not like automobile accident trials in which the accuracy of the observations of casual witnesses is at issue. The scientists know what they saw; they just draw different conclusions about the significance of what they saw. Such is the nature of scientific debate on the cutting edge where too little is known about the subject matter to state any conclusion with a high degree of certainty. While most good lawyers can whipsaw an expert into appearing befuddled or emotionally committed on the stand, it is unlikely that the spectacle enhances the quality of the agency's regulatory decisions.

Nor are formal procedural tools likely to be very useful in assessing the validity of the policy considerations that ultimately must guide a decisionmaker to a choice among competing inferences or interpretations. When the scientists disagree, the decisionmaker must act on the basis of policy considerations derived from the agency's statute. The

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Save the Hearings; Change the Rules

by Lawrence S. Ebner,
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Renewed activity in the FIFRA Special Review program has focused fresh attention on EPA's cancellation procedures. They are the FIFRA 6(b) statutory procedures EPA must follow whenever it decides to ban or restrict uses of a pesticide after completing a Special Review.

EPA officials complain that cancellation hearings take too long and delay implementation of necessary measures. Environmental organizations protest that they do not have the right to obtain a hearing when they believe a Special Review decision falls short of needed action. Pesticide producers and users lament that administrative hearings cost too much, and that they are stacked in EPA's favor. At least four major issues have emerged from this ongoing debate:

Who outside EPA should review cancellation notices before they are issued? Congress answered this question in 1975 by adding external review provisions to FIFRA. Sections 6(b) and 25(d) require EPA to send notices of intent to cancel to the FIFRA Scientific Advisory Panel (SAP) and the Secretary of Agriculture at least 30 days prior to issuance. Congress set up SAP as an independent check on the scientific bases for EPA's cancellation decisions. In the same vein, Congress wanted the Department of Agriculture to review cancellation notices to ensure that EPA fully takes into account the economic impacts of its regulatory actions.

The problem is not with these external review requirements, but with EPA's failure to implement them. EPA confines SAP and Agriculture to review of *preliminary* proposals and position documents (the agency further restricts SAP by limiting its deliberations to a few carefully worded questions drafted by the Office of Pesticide Programs). According to EPA, no further SAP or Agriculture Department input is necessary, even if years have passed since review of the preliminary proposal, and even if the final notice differs substantially. That simply is not what Congress intended.

FIFRA's external review requirements should be retained and congressional intent should be carried out. To avoid any ambiguity, Congress should make it clear that the substantive provisions of a cancellation notice must be submitted to SAP and Agriculture for review and comment prior to issuance by EPA.

Are administrative hearings necessary? Some EPA officials have suggested that the Special Review process makes most cancellation hearings superfluous. They would like to elevate Special Review into informal rulemaking, and replace administrative hearings with a right to appeal cancellation notices directly to federal courts.

The problem with this proposal is that Special Review—like informal rulemaking and judicial review of an administrative record—is primarily a paper exercise. There is no opportunity to confront EPA scientists and policy makers and test the

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arguments over which policy to apply need not be presented in a formal hearing; they are more appropriately aired in paper submissions.

In addition to being inadequate to the task of resolving most science/policy questions, adjudicatory procedures have several distinct disadvantages. The most important disadvantage is that, unless EPA wants to undertake the almost Herculean task of suspending the registration of a pesticide during the pendency of the cancellation hearings, the pesticide remains on the market and may continue to pose risks to humans and/or the environment while lawyers and scientists debate the risks and benefits of the pesticide in the lengthy hearings.

A second disadvantage of adjudicatory hearings involves the resources that they consume. At times, the pesticides division of EPA's Office of General Counsel has had to devote almost half of its legal staff to a single pesticide hearing, and the Office of Pesticides Programs has had to pull managers and experts away from other tasks to monitor and participate in the burdensome hearings. Public interest groups lack the resources to maintain an effective presence at such hearings, and when they do participate, they generally attempt to make their case through cross-examination, rather than through the presentation of original information.

Congress should change procedures along lines of other EPA rule-making.

A third disadvantage stems from the second. The threat of requesting a hearing provides a pesticide registrant with enormous leverage over agency employees in the negotiations that inevitably precede the issuance of a notice of intent to cancel a pesticide. If the choice that the agency faces is between modifying the terms of the cancellation action to satisfy registrant complaints and committing the agency to five or more years of expensive litigation, it is easy to predict how the agency will react. In theory, both registrants and environmental groups can threaten litigation, but the current FIFRA is written in an asymmetrical way so that environmental groups cannot request a hearing on whether a notice of intent to cancel does not go far enough.[2]

One solution to this problem is to amend the Act to allow environmental groups the same right to request a hearing that the registrants currently possesses, and Congress should do this whether or not it decides to change the procedures through which pesticides are cancelled. But I believe that Congress should go further and change pesticide cancellation procedures to more nearly resemble the rule-making procedures through which EPA makes most of its other decisions in areas of high complexity and scientific uncertainty. Rule-making procedures have served EPA and the public reasonably well when the agency sets standards for toxic pollutants under the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act. They should likewise prove adequate in the pesticide cancellation context.

. . . attractive and less expensive alternatives available . . .

It is possible that, for some questions that arise in a pesticide cancellation, formal procedures might aid the decisionmaker in arriving at the truth. For example, formal procedures are particularly useful in probing the basis for assumptions underlying mathematical models. In addition, formal procedures are more effective in insulating the decisionmaker from outside *ex parte* influences. It might be appropriate, therefore, for Congress to provide for a "hybrid rulemaking" approach to cancellations that would provide protections against *ex parte* contacts, provide for separation between the "prosecutorial" staff and the staff advising the decisionmaker, and allow formal procedures when the proponent of such procedures demonstrates that they are necessary to adequately ventilate particular issues.

We lawyers are generally partial toward expensive adversarial procedures, in part because they constitute the predominant decisionmaking paradigm of our law school education and in part because they help butter our bread. There are, however, attractive alternatives available, at a fraction of the cost of adjudicative procedures, that provide adequate opportunities to ensure that agency fact-finding is accurate within tolerable limits and, more importantly, that provide for broad public participation on the policy considerations that often dominate the resolution of the highly uncertain "science/policy" issues that arise in pesticide cancellations.

FOOTNOTES

[1] *Study on Federal Regulations, Vol IV, Delay in the Regulatory Process*, S. Doc. No. 72, 95th Cong., 1st Sess. 33 (1977).

[2] *See* Environmental Defense Fund v. Costle, 631 F.2d 922 (D.C. Cir. 1980), 10 ELR 20585, 15 ERC 1217, 1611, cert. denied 449 U.S. 1112 (1981).

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validity of their findings and conclusions in the presence of a judge. Administrative hearings after a Special Review and cancellation notice provide just such an opportunity. Without it, the EPA scientists and policy makers responsible for a cancellation action would be able to hide behind the pages of the Federal Register and agency position documents, insulating themselves from hard questions put to them by adversely affected producers and users.

Who should have the right to initiate a hearing? FIFRA 6(b) provides that registrants and other parties adversely affected by a cancellation notice have the right to request a hearing. EPA has construed this to mean that a hearing can be requested only to determine whether the regulatory actions in a cancellation notice go too far. If someone feels that EPA's actions do not go far enough, the only recourse under the statute is to convince a federal court that the agency's decision is arbitrary and capricious.

In 1980, the U.S. Court of Appeals for the District of Columbia upheld this interpretation in *EDF v. Costle*. [631 F.2d 922 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). 10 ELR 20585, 15 ERC 1217, 11] Ever since, environmental organizations have been lobbying to change the law. They claim that any affected party should have the right to a hearing, whether or not they have an "economic interest" in the pesticide.

This is a cleverly framed, but entirely specious, issue. The real issue is not *who* should be entitled to a hearing, but for *what purpose* should a hearing be held? To do its job, EPA needs the freedom to decide whether regulatory action on a pesticide is warranted, and if restrictive action is needed, how much action is enough. Subjecting EPA officials and staff to an administrative trial whenever they refrain from taking a particular action would pla the agency at the mercy of the handful of activi lawyers who purport to represent the public inte est on pesticides.

How can cancellation hearings be made mo efficient? Doing away with them is not the answe Nor is the inflexible approach of placing an art trary time limit on hearings a realistic solutio Instead, two relatively simple changes to EPA procedural rules in 40 C.F.R. 164 could great shorten the duration of cancellation proceedings

First, no discovery should be allowed if a Speci Review has been conducted. The parties' po tions—and the data the parties are relying on already should have been revealed in considerab detail during the Special Review. Eliminating di covery would save at least six months in a typic cancellation proceeding.

Second, the parties challenging a cancellati notice should be required to present their case fir That way, EPA would not have to spend mont preparing and presenting a defense of the enti cancellation notice before finding out what aspec of the notice the petitioners actually are contestin In turn, this approach would save substantial tin by reducing the number of witnesses and by mo narrowly focusing the issues in the hearing.

Undoubtedly, there are other similar expedient some of which an administrative law judge cou pursue under the current procedural rules. (F example, an ALJ could avoid evidentiary hassl by incorporating the Special Review record as whole into the record of the cancellation proce ing, and could induce the parties to enter into st ulations of fact.)

The point is that cancellation hearings are t valuable a right to give up without first attempti to improve the process from within.