



12/13/73 Environmental Defense Fund v. Environmental Protection

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Tamm, Robinson and Wilkey, Circuit Judges.

1. Environmental Defense Fund Appendix at 50.
2. The chemical name for DDT is 1,1,1-trichloro-2,2-bis(pchlorophenyl) ethane. EDF Appendix at 105.
3. 7 U.S.C. §§ 135-135k (1970). Originally FIFRA was enforced and administered by the Secretary of Agriculture. However, a reorganization in 1970 placed responsibility in the Administrator of EPA. See Reorganization Plan No. 3 of 1970, in Appendix to Title 5, U.S.C.
4. Environmental Defense Fund v. Hardin, 138 U.S. App. D.C. 391, 428 F.2d 1093 (1970) [The court granted EDF standing to contest the failure to cancel all DDT registrations and remanded to the Secretary of Agriculture to reconsider and give reasons.]; Environmental Defense Fund v. Ruckelshaus, 142 U.S. App. D.C. 74, 439 F.2d 584 (1971) [The court directed the Administrator of EPA, now in charge of FIFRA, to initiate cancellation proceedings because of substantial questions of safety of DDT, and to reconsider suspension of use].
5. EPA PR Notice 71-1. Also TDE, a related chemical, suffered cancelled registrations by PR Notice 71-5.
6. FIFRA establishes an elaborate procedure for registrants who wish to challenge proposed cancellations. Registrants may request an advisory committee of scientific experts be selected by the National Academy of Sciences to review the proposed action. Additionally, registrants may file objections and request a public hearing. 7 U.S.C. § 135b(c). Both options were utilized here.
7. Environmental Defense Fund v. Ruckelshaus, Order (No. 71-1256, 22 Sept. 1971).
8. Environmental Defense Fund v. Ruckelshaus, Order (No. 71-1256, 9 Dec. 1971).
9. The official title for the Hearing Examiner is now Administrative Law Judge. See 37 Fed. Reg. 16787 (1972); 5 C.F.R. § 930, Subpart B (1973).
10. EDF Appendix at 100.
11. Examiner's Proposed Orders, in EDF Appendix at 207-218.
12. See Brief of Respondent, William D. Ruckelshaus, et al., at 21.



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13. See Brief of Petitioner, Environmental Defense Fund, et al., at 30.

14. 7 U.S.C. § 135b(a) (1970).

15. 7 U.S.C. § 135b(c).

16. 7 U.S.C. § 135a(a)(5).

17. 7 U.S.C. § 135(z)(2)(g).

18. 7 U.S.C. § 136a(c)(5)(Supp. II, 1972).

19. 7 U.S.C. § 136a(c)(5). The statute defines "unreasonable adverse effects" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb).

20. 7 U.S.C. § 135b(c) (1970).

21. 7 U.S.C. § 135b(d) (1970).

22. 7 U.S.C. § 136n(b) (Supp. II, 1972).

23. Brief of Petitioner, Coahoma Chemical Co., at 15; Brief of Petitioner, EDF, at 32.

24. During seven months of hearings, 125 witnesses appeared to testify and 365 exhibits were placed in evidence. The transcript of the hearings was over 9,000 pages long. Brief of Petitioner, Coahoma Chemical Co., at 5.

25. 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938).

26. 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951).

27. 383 U.S. 607, 620, 86 S. Ct. 1018, 1027, 16 L. Ed., 2d 131 (1966).

28. Ibid.

29. See, e.g., *Deutsch v. U.S. Atomic Energy Commn.*, 130 U.S. App. D.C. 339, 401 F.2d 404 (1968).

30. The public disclosure of these summaries is sought under the Freedom of Information Act, 5 U.S.C. § 552 (1970), in a companion case, *Montrose Chemical Corp. v. Ruckelshaus*, Nos. 73-1443 and 73-1444.

31. See Brief of Respondent, *Ruckelshaus*, at 28-43.



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32. See *id.* at 43-85.

33. See *id.* at 86.

34. See *id.* at 106.

35. 340 U.S. 474, 496, 71 S. Ct. 456, 95 L. Ed. 456 (1951).

36. 349 U.S. 358, 75 S. Ct. 855, 99 L. Ed. 1147 (1955).

37. 138 U.S. App. D.C. 152, 157, 425 F.2d 583, 588 (1970).

38. See note 30 (*supra*).

39. Brief of Respondent, Ruckelshaus, at 16.

40. It appears that most of the DDT now in use in the United States is for control of cotton pests, primarily the bollworm. In fact, at least 70% of all DDT is used in the cotton-growing areas, especially the Southeast. Brief of Respondent, Ruckelshaus, at 86. The Intervenor, National Cotton Council of America, et al., suggest in their Brief at 4 that cotton accounts for an even greater percentage of use. Their figure of 99% reflects the cancellation of registrations for a variety of uses in 1969-1971.

41. See notes 32-34 (*supra*). For the EPA's argument directed towards cotton pests, see Brief of Respondent, Ruckelshaus, at 86-99.

42. Brief of Petitioner, EDF, at 91-92.

43. Brief of Respondent, Ruckelshaus, at 106-107.

44. 42 U.S.C. § 4332(2)(1970). The statement is required to include consideration of (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. *Id.*

45. The two cases noted by Coahoma are *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971) [re Corps of Engineers], and *Anaconda v. Ruckelshaus*, 352 F. Supp. 697 (D. Colo. 1972) [re EPA]. The first of these cases was dismissed as moot by this Circuit. See *Portland Cement Ass'n v. Ruckelshaus*, 158 U.S. App. D.C. 308, 486 F.2d 375, 385 (1973). The second case was observed by us in *Portland Cement* to have a "myopic" view. *Ibid.*

46. 33 U.S.C. § 1371(c) (Supp. II, 1972).



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47. The FIFRA amendments are contained in the Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136 (Supp. II, 1972). A similar argument was put forth in the Portland Cement case, but was dismissed by the court there as providing a "hazardous basis for inferring the intent of the earlier Congress." 486 F.2d at 382 citing to *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968).

48. Supplemental Brief of Respondent Ruckelshaus, at 2.

49. 158 U.S. App. D.C. 308, 486 F.2d 375 (1973).

50. Supplemental Brief of Respondent, Ruckelshaus, at 2-3, n. 1. The EDF supports the limited stand of EPA. Supplemental Brief of Petitioner, EDF, at 13.

51. 42 U.S.C. § 1857c-6 (1970).

52. 486 F.2d at 381.

53. *Id.* at 14.

54. *Id.* at 16.

55. *Id.* at 19.

56. See note 44 (*supra*).

57. As EPA points out, the NEPA objection was only first raised in the briefs to this court; in none of the earlier proceedings was any mention made of NEPA requirements. The raising of the objection so late in the proceedings makes the Coahoma position look more like a delaying tactic than a real concern with the environment. However, our recent decision in *Arizona Public Service Co. v. FPC*, U.S. App. D.C., 157 U.S. App. D.C. 272, 483 F.2d 1275, 1283 (1973), noted that "the tardiness of the parties cannot excuse an agency from complying with its responsibilities under NEPA."

58. *International Harvester Co. v. Ruckelshaus*, U.S. App. D.C., 155 U.S. App. D.C. 411, 478 F.2d 615, 650 n. 130 (1973). The court in *International Harvester* noted that the requirements of NEPA should be subject to a "construction of reasonableness." Although we do not reach the question whether EPA is automatically and completely exempt from NEPA, we see little need in requiring a NEPA statement from an agency whose *raison d'être* is the protection of the environment and whose decision on suspension is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework. *Ibid.*

59. 157 U.S. App. D.C. 272, 483 F.2d 1275 (1973).

60. 483 F.2d at 1282.



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61. Id. at 1280-81.

