An Agricultural Law Research Article

No Relief for the Fertilizer Industry – *Fertilizer Institute v. Browner*, 163 F.3d 774 (3d Cir. 1998)

by

Jonathan Pavlovcak

Originally published in TEMPLE ENVIRONMENTAL LAW & TECHNOLOGY JOURNAL
21 TEMP. ENVTL. L. & TECH. J. 93 (2003)

No Relief for the Fertilizer Industry- *Fertilizer Institute v. Browner,* 163 F.3d 774 (3d Cir. 1998)

In affirming a grant of summary judgment in favor of the Environmental Protection Agency [hereinafter "EPA"], the Third Circuit recently ruled that: (1) the EPA could rely on the definition of "other chronic health effects" that did not require long-term exposure; (2) the Court of Appeals would not second guess the EPA's decision to list brucine and phosphine under acute health effects on its Toxic Release Inventory; (3) overlaps between EPA's interpretation of terms "other chronic health effects" and "serious or irreversible" did not render interpretation of "chronic" unreasonable; and (4) the plaintiff was given sufficient notice of EPA's usage of persistence-beyond-exposure as the basis for listing nitrate compounds, due to their chronic health effects.[1]

BACKGROUND

Factual History

Pursuant to the Emergency Planning and Right to Know Act of 1986 (hereinafter "EPCRA"),[2] in January of 1994, the EPA proposed a rule that would add 313 additional chemicals to the Toxic Release Inventory [hereinafter "Inventory"].[3] The EPA then adopted a final rule in November of 1994, which included 286 of the 313 originally proposed chemicals.[4] Among the chemicals added were nitrate compounds. The nitrate compounds were added because of the chronic health effects, specifically because nitrate compounds cause infants to develop methemoglobinemia, a condition damaging to vital organs.[5] This potential for damage to vital organs was characterized by the EPA as a "severe and irreversible . . . chronic health effect."[6]

Procedural History

In May of 1996, The Fertilizer Institute [hereinafter "TFI"][7] filed a

---

[1] Fertilizer Institute v. Browner, 163 F.3d 774 (3d Cir. 1998). The named defendant, Carol M. Browner, is the Administrator of the Environmental Protection Agency. *Id.*

[2] 42 U.S.C. §§ 11023(c)-(d) (1994).

[3] *Fertilizer Institute*, 163 F.3d at 776.

[4] *Id.*

[5] *Id.* Methemoglobinemia is a condition that prevents the proper transportation throughout the body of oxygen via red blood cells. *Id.*

[6] Fertilizer Institute v. Browner, 163 F.3d 774 (3d Cir. 1998). Severe and irreversible chronic health effects are one criteria contained in the statute. 42 U.S.C. § 11012(d)(2)(B) (1994).

[7] *Id.* The Fertilizer Institute is a trade association representing the fertilizer industry whose members use nitrate compounds. *Id.*

complaint in federal court in the District Court of Delaware challenging the EPA's placement of nitrate compounds on the Inventory.[8] In its challenge, TFI put fourth three reasons supporting its challenge:

(1) inadequate notice of the EPA's intent to place nitrates on the list under the EPA's interpretation and application of chronic health effects;

(2) inadequate response to the comments submitted by TFI; and

(3) misapplication of the statutory criteria, which resulted in the EPA's overstepping its authority under §11023(d).[9]

Both the EPA and TFI filed motions for summary judgment.[10]

After reviewing the record before it, the district court granted summary judgment in favor of the EPA.[11] The district court held that the EPA had in fact provided adequate notice, "particularly to sophisticated commentators like TFI who are familiar with nitrate compounds."[12] The district court also concluded that the EPA had adequately responded to the comments submitted by TFI and several other organizations.[13] The district court also observed that although TFI's criticisms challenged the EPA's conclusions, the evidence relied on in reaching those conclusions was not challenged.[14] In conclusion, the district court found the EPA had shown that the record supported its decision to include nitrates because of the chronic health effects produced in infants by nitrates.[15]

Following the grant of summary judgment in favor of the EPA, TFI filed a timely notice of appeal.[16] The Third Circuit exercised jurisdiction over the appeal.[17]

DISCUSSION

Standard of Review

The *Fertilizer* court[18] noted that its review of the grant of summary judgment is de novo, applying the same standard that was applied by the district court.[19] When reviewing an agency decision, as in the instant case, the

---

[8] *Id.* at 776.

[9] *Id.*

[10] *Id.*

[11] Fertilizer Institute v. Browner, 163 F.3d 774 (3d Cir. 1998).

[12] *Id.* (quoting the Dist. Ct. Mem. Op. at 19).

[13] *Id.* (quoting the Dist. Ct. Mem. Op. at 22).

[14] *Id.* (quoting the Dist. Ct. Mem. Op. at 21-22).

[15] *Id.* at 776-77 (quoting Dist. Ct. Mem. Op. at 24-25) (granting the EPA's summary judgment motion).

[16] Fertilizer Institute v. Browner, 163 F.3d 774, 777 (3d Cir. 1998).

[17] *Id.* The Third Circuit exercised jurisdiction over the appeal pursuant to 28 U.S.C. §1291 (1994). *Id.*

[18] *Id.* at 774. The three judge panel consisted of Circuit Judges Sloviter and Cowen, along with the Honorable Louis H. Pollack, of the Eastern District of Pennsylvania, sitting by designation. Circuit Judge Sloviter wrote for the panel. *Id.*

[19] *Id.* at 777 (citing Carlisle Area St. v. Scott P., 62 F.3d 520, 526 (3d Cir. 1995)).

appellate court reviews the agency record directly.[20] The court noted that as directed under the Administrative Procedures Act,[21] the agency decisions should be upheld absent a finding that the action was "arbitrary, capricious, or an abuse of discretion."[22] The court stated that one of the grounds under which a reviewing court may conclude an agency has acted arbitrarily and capriciously, is when the agency relies on factors outside of those Congress intended be considered.[23] Moreover, an agency's action may be found arbitrary and capricious when the agency completely fails to consider an important aspect of the problem, or the agency's explanation of its action is "contrary to, or implausible in light of, the evidence."[24]

Courts have held that when an appellate court is reviewing agency action, the reviewing court should not substitute its own judgment for the scientific expertise of the agency.[25] Furthermore, the appellate court should defer to an agency's interpretation of a statute when "Congress has been either 'silent or ambiguous' on the question under consideration."[26]

The Emergency Planning and Community Right to Know Act

The EPCRA authorizes the EPA to add chemicals and compounds to the Inventory under three separate criteria.[27] In its relevant part, the EPCRA states:

> A chemical may be added if the Administrator determines, in his judgment, that there is sufficient evidence to establish any one of the following:
>
> (A) The chemical is known to cause or can reasonably be anticipated to cause significant health effects at concentration levels that are reasonably likely to exist beyond facility site boundaries as a result of continuous, or frequently recurring, releases.
>
> (B) The chemical is known to cause, or can cause reasonably be anticipated to cause, in humans—
>
> (i) cancer or tratogenic effects, or
>
> (ii) serious or irreversible—
>
> (I)reproductive dysfunctions,

---

[20] *Id.* at 777.

[21] 5 U.S.C. § 706(2)(A) (1994). The act provides that a reviewing court should "set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

[22] Fertilizer Institute v. Browner, 163 F.3d 774, 777 (3d Cir. 1998).

[23] *Id.*

[24] *Id.*; *see also* Pennsylvania Dep't of Pub. Welfare v. United States Dep't of Health and Human Servs., 101 F.3d 939, 943 (3d Cir. 1996) (reversal appropriate if agency action is irrational, not based on relevant factors, or outside statutory authority).

[25] *Fertilizer Institute*, 163 F.3d at 777 (citing Southwestern Pa. Growth Alliance v. Browner, 121 F.3d 106, 117 (3d Cir. 1997)).

[26] *Id.* (quoting Southwestern Pa. Growth Alliance v. Browner, 121 F.3d 106, 116 (3d Cir. 1997)).

[27] Fertilizer Institute v. Browner, 163 F.3d 774, 777-78 (3d Cir. 1998). The three general criteria, described broadly, are: (1) acute effects; (2) chronic effects; and (3) environmental effects. *Id.* Only the first two criteria were relevant to the *Fertilizer Institute* case. *Id.*

(II) neurological disorders,

(III) heritable genetic mutations, or

(IV) other chronic health effects.[28]

Subsection (A) of this act governs chemicals that have acute effects and imposes two determinations on the EPA: (1) significant adverse human effects, and (2) a minimum level of exposure.[29] Conversely, the chronic effects standard in subsection (B) requires only a determination of "serious or irreversible . . . chronic health effects," and does not refer to any level of exposure.[30]

Meaning and Application of "Chronic Effects"

In its challenge, TFI asserted that the EPA changed its definition of "chronic health effects," and applied the new definition when it added nitrates to its Inventory without explaining the reasons for doing so.[31] In the Draft HAG, the EPA stated that chronic health effects "result from long-term *exposure* to a chemical."[32] In contrast, the final EPA list for nitrates is premised on the long-term *consequences* of methemoglobinemia.[33]

The *Fertilizer* court noted that according to well-established law, an agency may not depart from "established precedent without announcing a principled reason for such a reversal."[34] Furthermore, an agency may not "change course by rescinding a [promulgated] rule" without providing "a reasoned analysis for the change."[35] Either of these actions would be arbitrary and capricious, justifying the court's reversal of the EPA's action.[36]

The court concluded that the EPA had not abandoned its prior practices requiring an explanation.[37] The court concluded that the EPA was free to exercise its discretion and expert judgment in relying on a definition of other chronic effects not requiring long-term exposure.[38]

TFI also asserted that the EPA has used the phrase "other chronic effects" inconsistently in the rule at issue in this case.[39] TFI argued that because the

---

[28] 42 U.S.C. § 11023(d)(2) (1994).

[29] *Fertilizer Institute*, 163 F.3d at 777.

[30] *Id.*

[31] *Id.* at 778. TFI compares the language in the EPA's Hazard Assessment Guidelines for Listing Chemicals on the Toxic Release Inventory, Revised draft (26 May 1992) [hereinafter "Draft HAG"], with the determination made in the final rule. *Id.*

[32] Fertilizer Institute v. Browner, 163 F.3d 774, 778 (3d Cir. 1998) (quoting the Draft HAG at 29) (emphasis added).

[33] *Id.* (emphasis added).

[34] *Id.* (quoting Donovan v. Adams Steel Erection, Inc., 766 F.2d 804, 807 (3d Cir. 1985)).

[35] *Id.* (quoting Motor Vehicles Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983)).

[36] *Id.*

[37] Fertilizer Institute v. Browner, 163 F.3d 774 (3d Cir. 1998).

[38] *Id.* The court agreed with the D.C. Circuit's conclusion that the EPA did not abandon any long-held policy in promulgating this rule. *Id.* (citing Troy Corp. v. Browner, 120 F.3d 277, 287 (D.C.Cir. 1997)).

[39] *Id.*

EPA now views persistence beyond the period of exposure as a characteristic of chronic effects, four chemicals[40] that it listed under acute effects[41] should have been listed instead under chronic effects[42] because they may cause permanent injury.[43] In response, the EPA conceded that it did remove two of the chemicals from the Inventory,[44] however, with regard to the remaining two chemicals,[45] the EPA asserted that it considered such factors as the manifestation period and duration of the effect in concluding that these chemicals "kill too quickly to be considered 'chronic.'"[46] The court noted that the application of this distinction was precisely the type of scientific expertise the court should not second guess.[47]

In rejecting TFI's pursuit of the inconsistency argument,[48] the court noted that the EPA had listed nitrates based on chronic health effects rather than on the duration of exposure, consistent with the approach taken with respect to hydrogen sulfide.[49] The court concluded that because the EPA had not based this listing on duration of exposure, TFI could not argue the EPA was being inconsistent with the hydrogen sulfide listing.[50] Accordingly, the *Fertilizer* court concluded that the EPA was not arbitrary and capricious in listing nitrates under subsection (B).[51]

Statutory Construction

TFI next argued that by "listing the nitrates the EPA interpreted the statutory language of 'serious and irreversible'[52] in a way that makes the term 'chronic' superfluous," an impressible act.[53] TFI specifically argued "that the

---

[40] *Id.* The four chemicals being methyltrichlorosilane, trimethyltrichlorosiilane, brucine, and phosphine. *Id.*

[41] *Supra* note 28 and accompanying text, subsection (A) of the EPCRA.

[42] *Supra* note 28 and accompanying test, subsection (B) of the EPCRA.

[43] Fertilizer Institute v. Browner, 163 F.3d 774, 778 (3d Cir. 1998).

[44] *Id.* (methyltrichlorosilane and trimethyltrichlorosilane).

[45] *Id.* (brucine and phosphine).

[46] *Id.* (citing the EPA's brief at 31).

[47] *Id.* (citing Southwestern Pa. Growth Alliance v. Browner, 121 F.3d 106, 117 (3d Cir. 1997)).

[48] TFI's argument referred to related litigation over a 1994 Rule. *See* Troy Corp. v. Browner, 120 F.3d 277 (D.C. Cir. 1997) (affirming in part and reversing in part National Oilseed Processor's Ass'n v. Browner, 924 F. Supp. 1193 (D.D.C. 1996)). The *Troy Corp.* court considered, *inter alia*, objections to the EPA's listing of bronopol as a chronic toxicant. Fertilizer Institute v. Browner, 163 F.3d 774, 778 (3d Cir. 1998). In doing so, the EPA relied on the duration of exposure in placing the chemical under subsection (B) of the EPCRA, even though that subsection does not have an exposure requirement. *Id.* The concern for the *Troy Corp.* court was that when previously dealing with hydrogen sulfide the EPA had looked to the length of the effect as opposed to the length of exposure. *Id.* The *Troy Corp.* court, therefore, directed the EPA to reconsider its listing to determine whether it was consistent with its approach in earlier cases. *Id.* at 778-79 (citing Troy Corp. v. Browner, 120 F.3d 277, 291 (D.C. Cir. 1997)).

[49] Fertilizer Institute v. Browner, 163 F.3d 774, 779 (3d Cir. 1998).

[50] *Id.*

[51] *Id.*

[52] 42 U.S.C. § 11023(d)(2)(B)(ii)(IV).

[53] *Fertilizer Institute*, 163 F.3d at 779; *see also* Babbit v. Sweet Home Chapter of Communities for Great Oregon, 515 U.S. 687, 698 (1995); United Steelworkers v. North Star Steel Co., 5 F.3d 39, 42 (3d Cir. 1993).

fact that an adverse effect may persist past the period of exposure is simply another way of stating that the effect is 'serious and irreversible.'"[54] In response, the EPA argued that not all chronic effects are irreversible.[55] Moreover, the EPA argued that not all "chronic effects are necessarily serious."[56]

The court found that the mere existence of overlap between the terms did not render the EPA's interpretation of the statutory language so unreasonable that it could not be accepted.[57] In doing so, the *Fertilizer* court cited *Babbit v. Sweet Home Chapter,*[58] wherein the court held that an agency's interpretation of statutory language creating an overlap with other words in the statute was merely a function of the act's purposes, not agency unreasonableness.[59] Thus, the court concluded that the "deference we owe to an agency's interpretation of its own statute, particularly one this technical, requires at least that much."[60]

Notice of the Definition of "Chronic Effects"

TFI's last argument was that during the duration of the rulemaking process, "the EPA failed to adequately notify the public that the basis for its listing the nitrate compounds as 'chronic' was that they produce health effects that persist past the period of exposure."[61] Had TFI known the EPA was applying what it asserts is the "new 'chronic effects' definition," TFI argues it would have commented.[62] The EPA responded by noting first that this issue was not raised below before the district court.[63] TFI did not dispute that the basis of its lack of notice argument in the district court was different from the argument made to the appellate court, which alone would have supported the court in ruling against TFI.[64] Regardless, the court found that the record indicated that TFI was adequately apprised of the definition that the EPA used.[65]

The court stated that the "rulemaking process requires an agency 'to fairly apprise interested parties of all significant subjects and issues involved' so that they can participate in the process."[66] The policy is just as important when the agency promulgates a final rule that does not mirror precisely the rule first

---

[54] Fertilizer Institute v. Browner, 163 F.3d 774, 779 (3d Cir. 1998) (citing TFI's brief at 25).

[55] *Id.* To demonstrate its point, the EPA gave the example of a stomach ulcer that may develop over a long period of time and last long being "chronic," but may be medically reversible rather than irreversible. *Id.*

[56] *Id.* The EPA noted that a minor effect may last a long time, being "chronic" but not serious. *Id.*

[57] *Id.*

[58] 515 U.S. 687, 698 (1995).

[59] *Id.*

[60] Fertilizer Institute v. Browner, 163 F.3d 774, 779 (3d Cir. 1998).

[61] *Id.* (rejecting TFI's statutory construction argument).

[62] *Id.*

[63] *Id.* The EPA noted that in the district court TFI raised the lack of notice argument with regard to the effects other than methemoglobenemia as the basis for the listing of nitrates. *Id.*

[64] *Id.*

[65] Fertilizer Institute v. Browner, 163 F.3d 774, 779 (3d Cir. 1998).

[66] *Id.* (quoting American Iron & Steel Institute v. EPA, 568 F.2d 284, 291 (3d Cir. 1977)).

proposed and outlined in the initial notice.[67] A "substantially different" rule is only permissible if the participants had sufficient notice at the start of the process to voice their comments.[68]

The EPA argued that the notice given "sufficiently apprised the interested parties of its persistent effect rationale for listing the nitrates under the chronic effects category, and that it merely applied what was a commonly used interpretation of 'chronic effects.'"[69] To support this argument, the EPA noted it had listed the scientific literature upon which its conclusions were based in the notice to interested parties.[70] The court stated that "just as TFI could understand that it was not the methemoglobinemia condition itself, but the extended consequences of that condition, that warranted a listing under chronic effects, it could conclude that the EPA was relying on the persistent consequences after exposure."[71] Thus, TFI had sufficient notice of the EPA's usage of persistence beyond exposure as a basis for listing the nitrates, and this final challenge also was rejected.[72]

CONCLUSION

In summary, the Third Circuit concluded that TFI had failed to demonstrate that the EPA acted arbitrarily and capriciously when it listed nitrates on the Toxic Release Inventory because of their "serious or irreversible . . . chronic health effects."[73] Therefore, the Third Circuit affirmed the district court's grant

Jonathan Pavlovcak

---

[67] *Id.*

[68] *Id.* (quoting American Iron & Steel Institute, 568 F.2d at 293); *accord* Association of Oil Pipe Lines v. FERC, 83 F.3d 1424, 1432 (D.C.Cir. 1996).

[69] *Fertilizer Institute*, 163 F.3d at 779 (quoting American Iron & Steel Institute, 568 F.2d at 293).

[70] Fertilizer Institute v. Browner, 163 F.3d 774, 779 (3d Cir. 1998). The EPA further noted that at least one commenter understood that the EPA would consider an effect chronic based on the effect's duration. *Id.*

[71] *Id.* at 779-80.

[72] *Id.* at 780.

[73] *Id.*