

Center for Regulatory Effectiveness

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April 19, 2004

Regulation by Litigation Examples

#3. NRDC. v. EPA

#4. Center for Biological Diversity v. Leavitt

Dear Attorneys:

On April 8, the Center for Regulatory Effectiveness (CRE) wrote you expressing our concerns with Regulation by Litigation. We notified you that to educate the public and affected parties, we had selected four ongoing lawsuits exemplifying Regulation by Litigation. These examples are posted for public discussion on our website under *Lawsuits Exemplifying Regulation by Litigation* on *CyberActivist.US*.

This letter is of particular pertinence to those interested in our Examples #3 and #4, cited above.

We are writing you now to raise a concern. We urge that you not selectively ignore a provision in the Federal Rules of Civil Procedure Rule 65, Injunctions, particularly the provision found in subsection (c):

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The complaint in Example #3 includes in its Request for Relief that the District Court enjoin the use of a pesticide until after an interagency consultation process has been completed (Paragraph 68). The complaint in Example #4 includes in its Prayer for Relief that the District Court enjoin the use of pesticides to enter the Barton Springs watershed until an interagency consultation process has been completed (Request 5).

While both complaints seek the Court to issue injunctions, it does not yet appear that the

plaintiffs have sought a specific restraining order or preliminary injunction. Were that to happen, however, we urge the applicants to be ordered to post proper security.

We express this concern because an injunction banning the use of the pesticide constitutes Regulation by Litigation. Not only would the injunction bypass the EPA administrative process established by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), but also would effectively bypass the completion of the consultation sought by the plaintiffs. Thus, the plaintiffs are seeking a regulatory action without:

1. An administrative record;
2. The interagency consultation process required by Congress;
3. Deliberation and decision by the agency designated by Congress to make pesticide decisions; and
4. Public participation by stakeholders.

Thus, the plaintiffs are seeking to have the Court substitute its own judgment in place of:

1. The scientific judgement of EPA and FWS, the agencies authorized by Congress to evaluate the scientific issues; and
2. The administrative process, including the appeals process, created by Congress for regulating pesticides.

In other words, the plaintiffs are seeking to use Regulation by Litigation to avoid having to use the legally established procedures to limit the use of pesticides and to avoid having the burden of demonstrating the scientific reasons for doing so. The rights of affected parties should be protected by the plaintiffs posting proper security against any effort to obtain a specific restraining order or preliminary injunction in furtherance of such Regulation by Litigation.

Sincerely,

/s/

Jim Tozzi
Member, Board of Advisors

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