

The Case Against Contaminated Compost

Court rejects USDA motion to dismiss lawsuit on allowed contaminants in compost in organic production

Photo by Ckgurney via Wikimedia.

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The Center for Environmental Health, Beyond Pesticides, and Center for Food Safety (CFS) appeared at a hearing in federal court in September, 2015, represented by CFS, to fend off a U.S. Department of Agriculture (USDA) challenge of the groups' right to sue the agency on its allowance of contaminated compost in organic production. USDA lost its argument. The court decision may begin to unravel a series of actions by USDA that many have challenged as process violations on decisions related to organic standards and allowed synthetic substances in organic production. Consumer and farm advocates argue that the growth of the organic market relies on public trust in the organic label. Critical to this is the public's belief in the integrity of the USDA decision making process with clear opportunities for public review and comment. Unilateral action by USDA without public input, it is argued, will erode public confidence in the value of the USDA organic label.

Preserving Public Voice in Organic Policy

The case, *Center for Environmental Health et al. v. Vilsack, USDA* (Case3:15-cv-01690), filed in April, 2015 in the U.S. District Court for the Northern District of California, points to the National Organic Program's (NOP) failure to follow proper legal procedures in making a substantial rule change to the organic standard through its contaminated compost guidance.

The new amended rule, which was adopted by the agency without notice and comment, weakens the long-standing prohibition of synthetic pesticide contaminants in organic production. Plaintiffs allege that the USDA's decision weakens the integrity of organic food production, not only by creating inconsistent organic production standards, but by undermining the essential public participation function of organic policy making. Since USDA never subjected the contaminated-compost decision to formal notice and public comment rulemaking, plaintiffs argue USDA failed in its duty to ensure that its regulation is consistent with the *Organic Food Productions Act* (OFPA) and the standards set forth for approving the use of synthetic substances.

Background

Years before *Center for Environmental Health v. Vilsack* was filed, Beyond Pesticides executive director Jay Feldman raised the red flag on USDA's contaminated compost decision. At the April 2010 meeting of the National Organic Standards Board (NOSB), board member Mr. Feldman had an exchange with Deputy Administrator Miles McEvoy about USDA's procedural violations in adopting a new rule, identifying the need for public comment as "critical" and highlighting the "implications for ongoing uses of composted materials" that the new rule would create. At the time, Mr. McEvoy stated, "We will be putting that into the program manual that will be going into a guidance type of document, that there will be the opportunity for public comment." Because that never happened, the groups pursued legal action.

Pesticide in Compost Triggers Policy

The case points to compost with residues of bifenthrin, a popular and persistent insecticide, to highlight how the rule change affects the organic standard. Bifenthrin is not on the National List of synthetic substances allowed for use in organic crop production, and therefore was prohibited in organic compost in California by agricultural officials when residues were found in 2009. As a result of NOP's contaminated-compost decision in 2010, however, the legal status of bifenthrin, as well as other pesticides, was changed, allowing their presence in green waste used for organic production. Plaintiffs contend that the overall integrity of the organic standard is undermined by the substance and process of the policy determination.

In its motion to dismiss the case, USDA argues that under the Federal Rules of Civil Procedure (FRCP), plaintiffs had both "failed to state a claim upon which relief could be granted" [FRCP 12(b)(6)], and that the plaintiffs lack subject matter jurisdiction to bring the case [FRCP 12(b)(1)]. The specifics of each of these claims, highlights from the judge's dialogue with the parties, along with an explanation of their significance, are addressed below.

Inside the Courtroom

Judge to USDA: I think we should start with the 12(b)(6), because I think it relates to the 12(b)(1) and your argument is that this wasn't a legislative rule, therefore no notice and comment was required, because it's an interpretive rule, or it's a guidance; correct?

When USDA was sued, it filed a motion to dismiss the case, citing two reasons under the Federal Rules of Civil Procedure. Under 12(b)(6), it claimed that the plaintiffs had failed "to state a claim upon which relief can be granted," arguing that even if there was a harm, there is nothing the court can do to redress that harm, so the case should be thrown out. USDA also filed a 12(b)(1) defense, claiming that the plaintiffs have a "lack of subject matter jurisdiction," and therefore the court cannot hear the case because the plaintiffs do not have the requisite standing to try a case in this specific court. In this exchange, the judge is trying to summarize the defendant's reasoning as to why she should grant the motion to dismiss.

USDA to Judge: Correct, Your Honor.

USDA is arguing that it was correct in not providing notice and comment because it was not issuing a legislative rule. A legislative or "substantive" rule issued by an agency has the force of law and is binding on all individuals and courts. Under the Administrative Procedure Act (APA), a legislative rule is required to be subject to public comment, providing the public with an opportunity to weigh in on the rule before it is final. An interpretive rule or guidance, on the other hand, differs in that it does not bind the public or have the force of law because it is viewed as agency interpretation of its existing governing laws or regulations. USDA wants the judge to find that the change to the existing compost regulations was interpretive instead of legislative in nature and therefore not subject to a notice and comment period.

Judge: And on an interpretive rule, it's not interpretive if any of three factors are met, the third one being that it effectively amends a prior legislative rule.

Judge: And we would agree that [the original compost rule] is a prior legislative rule that was adopted after notice and comment.

USDA: Yes, Your Honor, that's correct.

Judge: And that rule says that compost —that a product cannot be labeled as organic if the compost used in the production of that product contains a synthetic substance not included on the National List of permissible synthetic substance... period; right?

USDA: Correct.

Judge: Now, the [new] guidance actually adds two additional substances... It now reads you cannot use compost that contains a synthetic substance OR in which the synthetic substance is not directly applied during the composting process.

USDA: Correct, that's one prong.

Judge: But why isn't that amending the rule? I mean, the rule was very clear. You can't use compost that contains a synthetic substance unless it's on this list. Now you've added another exception OR if the synthetic substance isn't applied directly during the composting process. I mean, that's just adding —now it's one, two, three.

Here the judge points to the heart of the matter. Where USDA is arguing that the change in the rule was merely a result of an agency interpretation, she focuses on the substantive nature of the outcome. She and USDA go back and forth about possible definitions of the word "contained," as USDA is arguing that she should apply neither the dictionary definition or the common sense interpretation of the word "only," but instead a third definition the agency wants her to use. To this she says:

Judge: How does whether something contains a substance, how does that depend on how it gets there? I mean, why [does] how it gets there make a difference as to whether it contains it?

USDA: ... The interpretation you're pushing towards with that question is a valid possible interpretation.

Judge: Doesn't that mean I have to deny your motion, because this is a 12(b)(6) motion, and the question is whether [the plaintiff's] interpretation is plausible?

When a defendant makes a motion to dismiss, the judge must look at all the evidence in a light most favorable to the plaintiff, since it is the defendant calling for the dismissal. Here, the judge



is saying that since the plaintiffs' interpretation of the word "contained" is plausible, the plaintiffs could get relief from the court if it found in favor of their interpretation over USDA's, and therefore the 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted must be denied.

Judge: I can't grant the 12(b)(6) on either, so let's talk about standing then.

The judge moves on to address the 12(b)(1) claim by USDA that plaintiffs don't have standing to bring this suit.

Judge: [Plaintiffs] argue that they're harmed by the fact that now... when they go to the store, they have to do additional research if they want to be sure that the product they're buying was not produced with non-organic compost. Why isn't that an injury?

USDA: It's not an injury because there's no ability to connect this policy preference of "I don't like the fact that synthetic pesticides are used generally" to an actual effect on the food that's purchased. I don't think that view by itself gives you a right to come into federal court based on a concrete—

Judge: Why not?

USDA: Because there is no concrete personal harm.

Judge: But why doesn't my preference to buy food that's produced in such a way that reduces the amount of pesticides just being introduced into the environment in general, why isn't that a harm?

USDA: I think that the argument that, well, there's something about this I don't like, and even though it doesn't actually affect directly the product I'm buying, I have a right to come into court and complain about it, that just becomes a staggeringly broad thing that basically nullifies the injury-in-fact requirement.

The injury-in-fact requirement mandates that a plaintiff must have suffered or imminently will suffer an injury, economic or

otherwise, in order to have the ability to bring a claim (standing) before a court.

Judge: Who would have standing to challenge this action [then]? Who?

USDA: Your Honor, as I stand here now, I'm not sure who would.

Judge: Of course that's the argument USDA is going to make, that we can do this, and nobody can challenge it.

The problem is, the Department didn't want to open it up to notice and comment so they could actually have a robust discussion about whether that [the degradation of the quality of organic food] would be the case. I mean, why not – that's what I don't get, is why not just do that? What are they afraid of?

The judge then asked the plaintiff what they believe the injury to be.

Plaintiffs: The fundamental injury here is that a new loophole has been created that previously didn't exist that allows a new source of synthetic substances, including pesticides, into the organic production stream.

Judge: You're arguing notice and comment, so really what you're arguing is the injury is...to be denied the opportunity to make your argument to the USDA as to why they should not adopt such a loophole; right?

Here the judge highlights the importance of process, and how the violation of that process can be, and in this case is, cognizable injury to the plaintiffs.

Judge: I'm inclined to find standing as well. I mean, standing is not there to protect the government from being sued, but to ensure that those plaintiffs who sue have a concrete interest so they actually represent and have an injury, and that they're pursuing the interests of everyone... so I think I'm inclined to find standing.

The judge is essentially denying the 12(b)(1) motion to dismiss for lack of standing, once again touching on the importance of process and allowing the case to move forward to the trial.

Conclusion

The decision by the judge to deny USDA's motion to dismiss on both the 12(b)(6) and 12(b)(1) is a decisive process victory for the plaintiffs in this case. After first bringing this procedural violation to light at the 2010 NOSB meeting, Beyond Pesticides believes that the growth of the organic sector is directly related to maintaining an open and transparent standard setting process that seeks public input. With this perspective, the lawsuit becomes necessary to ensure USDA's accountability to public process. The judge acknowledges the important role that proper procedure plays in safeguarding the public from an abuse of power by administrative agencies through their rulemaking authority. This public process, to some degree, serves as a check against undue influence by the regulated industry, and contributes to transparency in government decision making.