Judge McKeown of the 9th Circuit Court of Appeals recently wrote of the EPA, "*Although filibustering may be a venerable tradition in the United States Senate, it is frowned upon in administrative agencies tasked with protecting human health*." Yikes. What did the EPA do to elicit such a reaction from a federal judge?

The short answer: they took too long to act. The statement was part of a decision granting the extraordinary remedy of writ of mandamus compelling the EPA to respond to an administrative petition. After nine years, the EPA had still not issued a final response to an administrative petition requesting the complete ban of the pesticide chlorpyrifos.

Strike One: Failing to Respond to a Request to Ban A Pesticide

In 2000, the EPA banned home and garden use of chlorpyrifos, which at the time was the most commonly used pesticide in homes, buildings, and schools. The ban was based on the pesticide's neurotoxicity, and was designed to protect children who are considered more susceptible because of both biology and exposure. Then-EPA Administrator Carol Browner said as part of that announcement, "*[Chlorpyrifos] belongs to a family of older, riskier pesticides called organophosphates, some of which date back 50 years or more. The time has come to review these pesticides for safety, and, where the science dictates, remove those chemicals that pose an unreasonable threat to human health and move to newer, safer alternatives.*" Shortly thereafter, the EPA issued decisions permitting the continued use of chlorpyrifos for agricultural use.

Pesticide Action Network-North America (PANNA) and the Natural Resources Defense

Council took issue with the continued approval of Dow's chlorpyrifos for agricultural use, and filed an administrative petition requesting a total ban of chlorpyrifos in 2007. That, according to the Ninth Circuit, is when the waiting began. Three years later, PANNA filed a suit in federal district court in New York demanding a response to the administrative petition. They withdrew the suit a few months later based on an EPA promise that they would issue a human health risk assessment by June 2011 and a final decision by November 2011. The risk assessment was a month late, but the final decision on the administrative petition never materialized.

In 2012, PANNA petitioned the Ninth Circuit for a writ of mandamus compelling the EPA to provide a final response to its now five year old administrative petition. At the time, the Ninth Circuit denied PANNA's request for a writ of mandamus, noting that the EPA presented a concrete timeline for response and had a number of competing regulatory priorities. When the EPA failed to meet its own concrete timeline, PANNA again petitioned for a writ of mandamus. The EPA asserted the delay stemmed from new human health concerns that convinced it to take more aggressive action to restrict chlorpyrifos. The Ninth Circuit was unmoved by the EPA's argument. On August 10, 2015, it granted the petition for writ of mandamus noting it "*was necessary to end the EPA's cycle of incomplete responses, missed deadlines, and unreasonable delays*." The Ninth Circuit required the EPA to issue a full and final response by October 31, 2015. On October 30, the EPA proposed revoking all tolerances of chlorpyrifos residue on food, and on November 6, the EPA opened a 60 day comment period on this proposed near total ban. The EPA expects to issue a final rule in December 2016.

Strike Two: Unconditional Approval of A Neonicotnoid

The chlorpyrifos case was not the only time the Ninth Circuit dinged the EPA on pesticide regulation recently. In September, a different Ninth Circuit panel vacated the EPA's unconditional approval of sulfoxaflor, a neonicotinoid. The suit was brought by Earthjustice (who also represented PANNA) on behalf of beekeeping organizations. They effectively argued that initial evidence of toxicity to bees precluded EPA from unconditionally registering the pesticide without further data. They were helped by the fact that the EPA itself initially proposed to conditionally register sulfoxaflor and require more studies from Dow, the manufacturer, but then unconditionally registered the pesticide without receiving the additional data.

The Bottom Line: Environmental NGOs Are Holding EPA to Account, and the Ninth Circuit Is Helping

A major take away from these two cases seems to be that there is increased scrutiny on EPA's pesticide registration practices, and it's being led by environmental NGOs. Whether you think what the NGOs are doing is important or obtrusive likely depends on your world view, but either way it's happening.

Here's why it might not be a bad thing to shine light on pesticide approval. There is a regulator, who should be a neutral party, and an applicant, who has a strong interest in successful registration with as few restrictions as possible. While there are myriad guidelines that govern the regulator's analysis and public comment periods that allow other parties to weigh in, it's hard not to notice that the registration system itself isn't structured like an adversarial system. One way this manifests itself is an information imbalance. The applicant conducts most studies the registration is based on, but the vast majority of those aren't publicly available. And applicants are happy to summarize deficiencies in unfavorable academic studies for the EPA (see, e.g., Dow's critique of a Columbia University epidemiological study linking pre-natal exposures to chlorpyrifos to brain abnormalities). As a result, the public has access to academic studies, documents trying to discredit those academic studies, and regulators' summaries of industry studies on which the registration decision is largely based, but not the bedrock studies themselves. Questioning the quality and results of scientific studies is core to the practice of science, but right now most people don't have access to the vast majority of studies registration decisions are based on.

Access to information isn't the only place where this structure leads to actions and incentives that seem to favor registration. While there hasn't been a lot of work on it, there is evidence of regulators discounting or ignoring data that would support limiting registration (see, e.g., an extensive report UCLA Law's Timothy Malloy co-authored on failures of risk governance at the California state pesticide regulator, including adopting tolerances proposed by regulators rather than more conservative estimates suggested by the agency's own scientists).

Pesticides are a thorny issue. We need food, and pesticides play an enormous role in increasing agricultural production. But that doesn't justify delaying or denying environmental protections codified in FIFRA and elsewere. The Ninth Circuit, it seems, would tend to agree.