# Federal Pesticide Law Needs an Overhaul: Anti-Competitive Effects Hit Consumers, A Case Study

On Point
by Angela Logomasini
October 23, 2003

Most Americans believe that the federal regulatory process is simply designed to protect them from fraud and unnecessary public health and safety risks. But, all too often, federal regulation simply undermines a competitive marketplace—reducing consumer choice and even increasing risks. A key example is the federal pesticide law, which imposes a very expensive and lengthy registration process before products can be sold. Not only do such costs deter many registrations and innovation, some companies use the process to eliminate and preempt competition. A recent example involves the cancellation of certain products used to preserve outdoor wood structures.

This past summer, the U.S. Environmental Protection Agency (EPA) banned residential uses of the wood preservative chromated copper arsenate (CCA), which is most commonly used to make pressure-treated wood—the wood used in decks, playground equipment, docks, and other outdoor structures. The preservative protects these structures from pest damage and decay. The ban takes effect in January 2004.

Since the ban was finalized, wood processors and others discovered a previously overlooked potentially affordable and effective alternative, which was in use before CCA. But new regulatory proceedings at EPA may place that product in jeopardy of cancellation as well. Should this new product be cancelled, consumers may be left with few good alternatives. They may have to choose between buying an inferior product, which itself poses legitimate safety risks, or spending substantially more for plastic lumber or expensive woods like cedar and redwood.

Why Did EPA Initiate a Ban? When EPA announced in February 2002 that it intended to ban residential uses of CCA, it acted not because of safety concerns but in response to an industry request. The agency acknowledged that it "has not concluded that CCA-treated wood poses any unreasonable risk to the public or the environment."[i] EPA canceled the registration at the request of the four companies that make the preservative, and then indicated that it would not grant any other firm a registration for residential uses. Three of these companies had indicated that they would like to offer recently developed alternatives—copper azole (CA) and alkaline copper quaternary (ACQ)—which have not been competitive with CCA on the market.

These firms may have decided that, to recoup investments on the new products, they needed to eliminate competition from CCA. Another possibility is that these companies want to get out of the CCA business because trial lawyers have initiated class action lawsuits alleging the product has caused health problems for consumers. However, the companies haven't suffered many losses in these cases, as the plaintiffs' claims are shaky.[ii]

Cancellation of Alternative. Recent efforts to cancel another product raise more questions about whether the regulatory process is creating an anti-competitive market. After the CCA ban, some wood processors learned that another alternative remained registered, although it was not being marketed at the time. This product, acid copper chromate or ACC, was in wide use before CCA dominated the market. Many of the small businesses that treat wood with preservatives would prefer switching to ACC over ACQ or CA because it would not require a complete retooling of their plants—saving each small firm tens of thousands of dollars and providing consumers with a reasonably affordable option. ACQ and CA require expensive plant retooling because it is highly corrosive and must only be used with all-stainless steel equipment.

Last June two firms—Arch Wood Preservatives of Smyrna, Georgia and Forest Products Research Laboratory of Springfield, Oregon[iii]—asked EPA if they could register to sell ACC. Currently, ACC is legally registered for sale only by Osmose Wood Preservatives, which is one of the firms marketing ACQ and CA. The law allows for an expedited registration process—which otherwise can take years—for such "me too" registrations. But after EPA received the "me too" registration requests, Osmose contacted EPA requesting that the agency cancel the product.[iv] The agency is supposed to open such cancellations to public comment, but the Federal Register notice says that registrants have waived their comment period, even though these comment opportunities are designed to seek input from users and potential registrants. Before even publishing this notice, EPA indicated that it is likely to deny Arch and Forest Products the "me too"

registrations opportunity because of the cancellation request. In that case, it could take years for the companies to apply and reregister ACC, during which time consumers will be denied access to this product.

An EPA denial of the "me-too" registration goes against the sprit if not the letter of the law governing registrations. The Federal Insecticide Fungicide and Rodenticide Act (FIFRA) requires that all pesticides be registered with EPA for the sole purpose of ensuring safety. Once a product is deemed reasonably safe and is registered by one company, EPA is supposed to issue "me-too" registrations relatively easily to allow a free and competitive market. ACC had been studied and deemed safe and has not yet been cancelled. In addition, me too registration requests preceded the cancellation request. EPA can review the product's safety record while it is on the market, which is what the law directs it to do and which is what EPA currently does with all other safety reviews. The law should not be misused to preempt me-too registrations because one existing registrant wants to cancel a product and sell an alternative. The law is not supposed to become a barrier for entry into markets.

Consumer and Small Business Repercussions of an ACC Cancellation. While the cancellation of ACC might benefit some business interests, it would likely cost consumers dearly by forcing them to choose between ACQ and CA or more expensive wood and plastic lumber. The most obvious impact is substantially higher costs for decks and other structures. By some estimates ACQ and CA would increase costs by 20-30 percent. Since decks can cost thousands of dollars, these increases could be quite substantial. In addition, there is no assurance that the new products will preserve the wood as long as CCA or ACC—which have demonstrated records of success after decades of use. Potentially more frequent deck replacements will prove costly.

Additional problems with the new products could complicate things for consumers further. When Home Depot and others tried to stock and sell these alternatives instead of CCA, the alternatives didn't sell.[v] Ed Harris, a registered professional engineer who provides services to 50 CCA wood treatment plants,[vi] documented many problems that make the wood less marketable than CCA.[vii] Alternatives are not only more expensive, they quickly became moldy—while in stock and before sale—despite the fact that the product is supposed to inhibit mold growth.[viii] Stores returned moldy wood to the wood processors, who had to add additional moldicides to reduce that problem, which increased the price even further and also raised new safety issues for workers who process the wood. If ACC is not available as an alternative, consumers may be left with these new problems or have to buy plastic or substantially more expensive woods like cedar and redwood.

Another problem is the fact that ACQ and CA are highly corrosive to standard screws and nails used in deck building. Switching to all-stainless steel nails and fasteners and nails will again jack up deck costs because stainless steel is substantially more expensive than regular nails and fasteners. A potentially greater problem is that some consumers may use the wrong screws and nails, leading to an increase in deck failures and related injuries and deaths. Ironically, the only real problem with CCA was that people did not follow label directions. Shouldn't we expect the same with the alternatives? Collapsing decks pose a very real and significant public safety risk.

Small businesses that add the preservative to the wood will also suffer. About 350 firms will have to switch to all-stainless steel machinery if they are forced to switch to ACQ and CA, which can cost tens of thousands of dollars. Some firms may go out of business as a result. If they were allowed to use ACC, such plant conversions would be unnecessary.

Conclusion. Traditional regulatory oversight bodies have not policed FIFRA to address its anticompetitive effects, and resulting adverse impacts on consumers. The problem is that FIFRA registrations and cancellations are not considered regulatory actions. Instead, cancellations are considered voluntary. No emphasis is placed on the impediments on commerce, the fact that consumers face less choice and higher prices, or the fact that businesses are denied the opportunity to operate. Clearly, someone needs to step up to the plate. Executive branch officials should oversee their own agencies to prevent such behavior, and members of Congress should revise the law if necessary to remedy defects and prevent such abuse.

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[i] U.S. Environmental Protection Agency, “Manufacturers to Use New Wood Preservatives, Replacing Most Residential Uses of

CCA," February 12, 2002, www.epa.gov/pesticides/factsheets/chemicals/cca_transition.htm. The Consumer Product Safety Commission has alleged that CCA poses risks, but there are serious problems with their study on the issue. For analyses see: Kenneth Brown, Comments on CPSC's Analysis of Cancer Risk to Children from Contact with CCA-treated Wood Products, March 28, 2003, www.cei.org/pdf/3445.pdf; and Angela Logomasini, Written Comments to the Consumer Product Safety Commission Regarding the use of Chromated Copper Arsenate in Playground Equipment, March 28, 2003, www.cei.org/gencon/027,03468.cfm.

[ii] Many of the cases against CCA-treated wood are failing. Few have brought rewards and none has been above six figures, and consumer failure to follow safety precautions on the product label is a key problem. For a discussion of some of the legal issues see: David Hechler, "The Poisoned Wood Mystery," *National Journal*, March 20, 2003, http://www.law.com /jsp/article.jsp?id=1046833573563.

[iii] Forest Products sent in a request some time before June 17. EPA

[iv] EPA's *Federal Register* notice states that it received the cancellation request on July 14. The letter was dated June 30, 2003. 68 *Federal Register*, no. 188, (September 29, 2003), pp. 55952-55954.

[v] Meeting with Kent Knutson, Vice President for Government Relations of Home Depot on December 16, 2002.

[vi] Telephone conversation with Ed Harris, February 18, 2003; see also Ed Harris, Comments to the Environmental Protection Agency dated March 21, 2002; docket control number OPP-66300.

[vii] Ed Harris, "Deep in Chemicals," *Timber Processing*, April 2003, http://www.timberprocessing.com/vserver /hb/display.cfm?MagazineKey=5&IssueKey=267&SectionKey=274&ArticleKey=3229.

[viii] "Chemical Specialties, Inc. (CSI), based in Charlotte, N.C., Offers Arsenic-free ACQ Preserve® Wood Preservative Technology," Press Release, March 4, 2002, http://www.treatedwood.com/news/arsenic_free_acq.html.

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