IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND PESTICIDES/ NATIONAL
COALITION AGAINST THE MISUSE
OF PESTICIDES, et al.,

Plaintiffs,

v. Civil Action No. 1:02CV2419
RJL

CHRISTINE T. WHITMAN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

PLAINTIFF'S REPLY TO EPA'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

EPA's Opposition to Plaintiffs' Motion for Preliminary Injunction continues EPA's irresponsible course of conduct with regard pentachorophenol ("penta"). EPA has declined to respond on the merits or explain why it has failed to act upon the extremely high risks it has found are posed by penta for over two decades. Instead, EPA attempts to avoid the uncomfortable issues posed by plaintiffs' motion and its own findings of up to a 340% risk of cancer, by advancing an unsupportable attack on the Court's jurisdiction and asking the Court to blindly accept its decision to re-assess penta by means of a re-registration review instead of cancellation or suspension, as well as its claim that 12 years of formal review are not enough and another 6 months to three years is needed.

In essence, EPA has asserted that it has unreviewable discretion to determine when, if ever, to invoke the cancellation and suspension provisions of FIFRA and has attempted to create

the incorrect impression that Congress in enacting the reregistration provisions of FIFRA somehow intended to divert the Agency from utilizing its suspension and cancellation authority. Furthermore, EPA has balked at producing any record documents to explain its course of action and has instead relied upon recently-generated litigation affidavits that state in conclusory fashion that, in effect, it is has made a determination to consider the registration status of penta in the context of a routine re-registration that may take three more years. EPA asserts that it should not be questioned concerning even the process for reviewing penta, not to mention the substantive bases for its determination that reregistration is the most appropriate process.

Congress provided critically important and judicially reviewable authority for EPA to take interim measures to prevent "imminent hazards" to public health and the environment caused by pesticides and provided a range of less immediate measures for EPA's use, along with elaborate procedural requirements to protect the rights of pesticide registrants. Controlling D.C. Circuit precedent clearly establishes the Courts' authority to review instances where EPA abuses its discretion under FIFRA by failing or postponing indefinitely the protective actions necessary under FIFRA's mandate to prevent unreasonable adverse effects. Congress intended FIFRA's cancellation and suspension provisions to be used to protect public health and the environment when a substantial question arises as to whether a pesticide meets the standards for registration. In reauthorizing FIFRA, Congress has continued to include these authorities and even expanded them in 1996, along with the provisions for more routine re-registration. Given the extremely high toxicity, carcinogenicity, fetotoxicity and mutagenicity which EPA has repeatedly found that penta poses (which EPA has relied upon as a basis for canceling all uses of penta other than as wood preservatives) and the decades of delays involved since these findings were first made,

penta's registration history raises the question of what level of danger would be necessary and what level of harm would suffice for EPA *ever* to be moved to utilize these statutory provisions.

Given the urgent and breathtakingly high risk findings EPA published over three and a half years ago, plaintiffs expected fairly prompt action from the Agency to address the hazards identified. Plaintiffs have sought to cooperate and urge action by EPA and have relied in good faith on its repeated assurances that action was forthcoming. Plaintiffs initiated this litigation as a last resort when every other avenue, including repeated petitions to the Agency had been exhausted and effectively denied. This Court has the authority to review EPA's exercise of discretion in determining the actions to take with respect to penta's registration, and furthermore has clear authority under the APA to issue a preliminary injunction ordering EPA to issue an emergency suspension, a remedy that is temporary and limited, merely preventing further harm while the Agency initiates cancellation proceedings to formally and publicly assess the merits of penta's continued registration. Other preliminary relief is also available, including an order to initiate cancellation proceedings or a remand to the Agency for a more explicit determination on plaintiffs' petitions. Plaintiffs urge this Court to act expeditiously to protect public health and the environment and to steer EPA back onto the procedural track enacted in FIFRA.

I. The Court Has Jurisdiction to Consider the Motion for Preliminary Injunction

Plaintiffs' challenge to EPA's inaction with regard to the cancellation and suspension of penta's registration is exactly the type of claim for which FIFRA and the APA provide review. EPA nevertheless argues against jurisdiction, alleging that FIFRA's judicial review section, 7 U.S.C. § 136n (§ 16(a) of FIFRA), waives sovereign immunity only when there is final agency action (PI Opp. at 18), and "simply does not provide for the review of agency inaction on a

petition for cancellation." *Id.* at 19. Thus, EPA apparently contends that FIFRA §16(a) overrides and negates the APA's authorization of review of agency action "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 702. At the same time, however, EPA asserts that its refusal to take a position on Beyond Pesticides' petition for cancellation and suspension "does not necessarily leave plaintiffs stranded in administrative limbo," and implies that review would be available if plaintiffs had "opted not to seek preliminary relief under the APA." *Id.* at 21-22. In fact, plaintiffs did seek injunctive relief under the APA. PI Opp. at 21-22.[1]

A. Plaintiffs' Motion for Preliminary Injunction is Reviewable under the APA

If EPA is arguing that review would be available here only if plaintiff's motion "seek[s] preliminary relief under the APA," PI Opp. at 21, this contention is easily disposed of. Plaintiffs' complaint rests, *inter alia,* on APA §§702, 555(b) and 706(1). Section 702 contains the APA's basic waiver of sovereign immunity for challenges to agency actions *and failures to act* (emphasis added).[2] EPA cites no authority, and plaintiffs know of none, which requires the jurisdictional

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[1] EPA further confuses the issue of whether review is available under the APA or FIRFA, or both, by arguing, in reliance on Defenders of Wildlife v. EPA., 882 F.2d 1294 (8th Cir. 1989), that EPA's actions may be reviewed only under FIFRA §16(a), and that the APA only states the scope of review. PI Opp. at 18. Reliance on Defenders, however, is misplaced. That case held that judicial review of agency action under FIFRA, although pursuant to the APA standards, is to be "obtained under the FIFRA framework." 882 F.2d at 1302. The "framework" applied in that case was the exhaustion of FIFRA administrative remedies by petitioning EPA to cancel the challenged registrations. *Id.* at 1298. The court implicitly interpreted the "refusal . . . to cancel or suspend a registration" language of § 16(a) to require a petition to cancel or suspend to have been filed before the Administrator could be considered to have "refused" to act. That case did not involve the question of whether inaction can amount to a "refusal" under § 16(a), which has been definitively addressed by the D.C. Circuit in the EDF line of cases discussed *infra* at Sec. I.B.

[2] Section 702 provides in relevant part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or

allegations of a complaint to be repeated in a motion for preliminary injunction. Moreover, any fair reading of plaintiffs' moving papers reveals that plaintiffs are challenging "agency action unlawfully withheld or unreasonably delayed"– namely EPA's failure to take timely action to cancel and suspend the registration of penta. *See, e.g.,* Pl. Mem. at 12, 19-24, 27-28.

EPA also appears to argue that jurisdiction over the preliminary injunction motion, as opposed to the complaint, cannot rest on the APA because the relief sought by Plaintiffs – an order directing EPA to issue an emergency suspension and cancellation of penta – is allegedly unavailable under the APA.[3] However, this court *can* order an agency to take specific action under APA §706(1) and this Circuit did so in Environmental Defense Fund ("EDF") v. Ruckelshaus, 439 F.2d 584, 595 (D.C. Cir. 1971), ordering EPA to issue a pesticide cancellation notice. Sec. IV.A, *infra*. The Court may also order other remedies based on the facts and law presented in Plaintiffs' preliminary injunction motion here, including, as EPA has suggested, issue "an order requiring EPA to act on plaintiffs' petition." PI Opp. at 17. *See*, Section IV.C, *infra.*

Moreover, contrary to EPA's position, the issue of the Court's ability to grant particular relief does not deprive the Court of *jurisdiction*. In Bell v. Hood, 327 US 678, 682 (1945), the

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employee thereof acted *or failed to act* in an official capacity under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States of that the United States is an indispensable party." (Emphasis supplied). Section 555(b) provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it.". 5 U.S.C. § 706(1) provides that "the reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." Plaintiffs' action was also brought pursuant to FIFRA and the Resource Conservation and Recovery Act (RCRA), Complaint ¶ 1, which are the substantive statutes which Plaintiffs allege EPA's actions and inactions have transgressed. *See*, Preferred Risk Mutual Ins.Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996).

[3] *See*, PI Opp.at 17: "Critically, Plaintiffs do not seek any preliminary relief on their "unreasonable delay" claim under Section 706(1) – they are not asking the Court simply to order EPA to act on their petition one way or the other."

Supreme Court ruled that:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well-settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.[4]

The fact that this Court could order a different remedy, based on the law and facts presented in the motion for preliminary injunction, including one that EPA views as proper under the APA (*see* PI Opp. at 17), underscores the fact that remedial options differ from jurisdictional issues.

B. FIFRA's Judicial Review Provision Permits Review Here

EPA also argues that FIFRA §16(a) absolutely precludes review of inaction on petitions to cancel or suspend. PI Opp. at 18-21. This argument contravenes D.C. Circuit precedent addressing the precise issues presented here and finding jurisdiction and reviewability, as well as judicial authority to order EPA to take cancellation action upon meeting the statutory standards. In EDF v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970), the court rejected defendant's[5] claim that there was no final reviewable order because it had neither granted nor denied much of the relief requested with regard to cancellation and suspension of the pesticide DDT:

> No subsequent action can sharpen the controversy arising from a decision by the Secretary that the evidence submitted by petitioners does not compel suspension or cancellation of the registration of DDT. In light of the urgent character of petitioners' claim, and the allegation that delay itself inflicts irreparable injury, the controversy is as ripe for judicial consideration as it can ever be.

Id. at 1098. The court also noted that

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[4] Bell was cited in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998), for the proposition that "[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case." (Emphasis in original).

[5] FIFRA was administered by the Secretary of Agriculture prior to the creation of EPA.

> when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.

428 F.2d at 1099 (footnote omitted). As to the request for interim suspension, the court ruled:

> we agree that inaction is tantamount to an order denying suspension. The suspension power is designed to protect the public from an "imminent hazard;" if petitioners are right in their claim that DDT presents a hazard sufficient to warrant suspension, then even a temporary refusal to suspend results in irreparable injury on a massive scale. . . . [T]he Secretary's inaction results in a final disposition of such rights as the petitioners and the public may have to interim relief.

Id. (footnote omitted).[6] The Court deferred the issue of whether inaction on the requests to cancel amounted to a final reviewable action until the agency either made a decision on the record to issue the cancellation notices or explained its reasons for not doing so. *Id* at 1100.

EPA's inaction with regard to the cancellation of DDT returned to the court in EDF v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971). There the court observed that even though the then-applicable jurisdictional provision of FIFRA provided for review of "any *order* granting or denying the cancellation of a pesticide registration," "[t]he Secretary could defeat that jurisdiction by delaying his determination indefinitely." *Id.* at 593 (emphasis supplied; footnote omitted). With reference to the APA's provision for compelling action "unlawfully withheld or unreasonably delayed," the Court held that it had "jurisdiction to entertain a request for relief in the form of an order directing the Secretary to act in accordance with FIFRA." *Id.* Ultimately, the court ordered issuance of the cancellation notices, because it found that EPA's DDT findings satisfied FIFRA's standard for cancellation action. *Id* at 595.

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[6] This ruling was reaffirmed, regarding the review of the pesticides aldrin and dieldrin, in EDF v EPA, 465 F.2d 528, 533 (D.C. Cir. 1972), "[b]ecause of the potential for delay, and consequent possibility of serious and irreparable environmental damage from an erroneous decision on suspension, a refusal to suspend is a final order reviewable immediately."

EPA's effort to distinguish these controlling precedents fails (PI Opp. at 19-21 and n. 9).[7] First, the subsequent amendment of the judicial review provision interpreted in the EDF line of cases has no bearing on the holdings in those cases. As noted above, the previous provision allowed review of "the validity of any *order* under this section" (emphasis supplied), yet the D.C. Circuit in Ruckelshaus explicitly determined to apply the provision in the *absence of an order* granting or denying the plaintiffs' petition. 439 F.2d at 593. Both Ruckelshaus and Hardin set forth this Circuit's view that inaction on a petition to cancel or suspend amounts to an actionable denial of those petitions, reviewable for abuse of discretion. This reasoning applies with equal force to the language of the current provision, providing for review of "the refusal of the Administrator to cancel or suspend a registration . . . and other final actions of the Administrator not committed to the discretion of the Administrator by law . . . ." 7 U.S.C. § 136n(a).[8]

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[7] EPA also relies on a case from another district, Syngenta Crop Protection v. EPA, 202 F. Supp. 2d 437 (M.D.N.C. 2002) (PI Opp.at 18-19), to argue that §16(a) waives sovereign immunity only for final agency actions. Syngenta is not relevant here because it does not involve inaction on a petition to suspend, which the D.C. Circuit ruled is "tantamount to an order denying suspension," Hardin, 428 F.2d at 1099, or inaction on a petition to cancel, which the D.C. Circuit ruled is reviewable under the APA provision for compelling action unlawfully withheld or unreasonably delayed. Ruckelshaus, 439 F.2d at 593. Rather, Syngenta involved a totally different situation -- plaintiff's attempt to bar EPA from registering pesticides to other manufacturers, which registrations Syngenta claimed would be based on its exclusive use data. EPA had taken no action on the challenged pesticide registration applications, and plaintiff was simply relying on legal positions EPA had taken in other litigation and in correspondence with Syngenta. The court found that such statements did not preclude EPA from taking the action that Syngenta had requested, 439 F. Supp.2d at 448, and that little or no harm would likely occur in the interim before EPA did reach its final decision. *Id.* at 449-51. Also, Sygeneta's denial of review appears to rest on ripeness, rather than lack of jurisdiction. *See,* 439 F. Supp. 2d at 445 (EPA concedes that § 136n(a) explicitly waives sovereign immunity, but argues that the EPA has not taken any final agency action and thus the case is not ripe for review under § 136n(a)).

[8] In fact, EPA's brief to this Court now reveals that it plans to assess the risks and benefits of penta only in its "normal reregistration process," (PI Opp. at 25), and not to take any other regulatory action until that review is complete. PI Opp. At 29: "Common sense dictates

Moreover, FIFRA's definition of "imminent hazard" has not changed since Hardin, and thus there can be no argument against the continued viability of the holding there that because the "suspension power is designed to protect the public from an 'imminent hazard' . . . . inaction results in a final disposition of such rights as the petitioners and the public may have to interim relief." Hardin, 428 F.2d at 1099.

Equally important, the 1972 amendment to FIFRA's jurisdictional provision did not legislatively reverse the reviewability holdings in the EDF cases. There is no evidence that Congress intended to remove the previously existing waiver of sovereign immunity for these actions.[9] To the contrary, the purpose of the change was to divide jurisdiction over challenges to agency action under FIFRA between the district courts and the courts of appeals, not to narrow available review, revoke any waivers of sovereign immunity, or legislatively overrule settled court precedent.[10] According to the Senate Report,

> [t]he Committee has simplified the procedures for judicial review of agency actions by providing that all actions taken after a hearing shall be reviewed by the courts of appeals and all actions taken without a hearing, unless otherwise

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that a decision on plaintiffs' petitions, or completion of penta's reregistration, should not occur until EPA has completed the remaining steps in its penta reregistration process . . . ". This is an effective denial of Plaintiffs' petitions to cancel and suspend -- the very action for which § 16(a) provides review.

[9] Courts will "find a congressional intent to preclude review only if presented with clear and convincing evidence," Reno v. Catholic Services, 509 U.S. 43, 64 (1993)(internal quotations and citations omitted).

[10] The earlier provision directed all challenges to orders under FIFRA to the circuit courts of appeals, 7 U.S.C. § 135b(d) (1964)(repealed), cited at PI Opp. 20, n.9, while the provision substituted in 1972 divides review between the district courts (Sec. 16(a), 7 U.S.C. § 136n(a)) in situations where no hearing has been held, and the courts of appeals with regard to "any order issued by the Administrator following a public hearing." Sec. 16(b), 7 U.S.C.§136n(b). 7 U.S.C. §136n(c) also provides for enforcement of FIFRA in the district courts.

provided in the Act, shall be reviewable in district courts.[11]

As the Committee stated, "[t]he question is really that simple." *Id.*, at 4070. There is no hint in the legislative history of any intent to preclude review that was formerly available; indeed, contrary to any possible implication of overriding APA review, the Committee Reports states that: "*Judicial review in district courts will be in accordance with the law generally applicable to administrative procedure.*" *Id.,* at 4019 (emphasis supplied).

EPA's second basis for distinguishing the EDF line of cases is also unsupportable. EPA urges that these cases have somehow been silently overruled by its institution, at the direction of Congress, of a reregistration program that provides public proceedings to review the risks and benefits of pesticides even when a petition for cancellation or suspension is not acted upon. PI Opp. at 20-21, 24-27. Such an argument implies that, absent amendment of the judicial review provision itself, or any explicit statement in the statute or legislative history, Congress intended that institution of a re-registration program, while retaining the cancellation and suspension provisions, would revoke previously available judicial review for cancellation and suspension. This utter lack of evidence of congressional intent is far from the necessary "clear and convincing evidence" of congressional intent to preclude review. Reno, 509 U.S. at 64.

In sum, FIFRA §16(a) provides for judicial review of EPA refusals to suspend or cancel, and this Circuit has definitively held that even short-term inaction on a petition to or suspend constitutes a denial ("refusal"), as does unreasonable delay on a petition to cancel. The statute does not say, "however, if EPA is in a reregistration review, it need not act on a cancellation or

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[11] S. Rep. No. 92-838 (Committee on Agriculture and Forestry), *reprinted in,* 1972 U.S. Code. Cong & Admin. News 3993 at 4019.

suspension petition, and its failure to cancel or suspend is unreviewable, even if the reregistration proceeding takes a decade." Thus, this case (and therefore this motion) is reviewable under FIFRA § 16(a), as well as under the APA, whether viewed as a refusal to cancel or suspend penta registration occasioned by delay, as described in the EDF line of cases, or a refusal, based on EPA's statements in this litigation that it has "determined" to continue only on the reregistration track, rather than to cancel or suspend.

II. EPA's Inaction is Reviewable Under the Abuse of Discretion Standard

The Court's Order denying plaintiffs' motion to compel suggests that the Court may believe that plaintiffs must demonstrate that EPA "has failed to act where it has a nondiscretionary duty to do so." Memorandum Order of January 10, 2003 at 3. Plaintiffs do not contend that EPA has failed to carry out a non-discretionary duty. However, the D.C. Circuit ruled in EDF v. Ruckelshaus that while the language of FIFRA "vests discretion" with regard to cancellation decisions, those "decisions are reviewable for abuse of discretion." 439 F.2d at 593. *See also*, National Wildlife Federation v. Browner, 1996 U.S. Dist. LEXIS 15321 (D.D.C 1996)(the APA provides a means to challenge discretionary inaction if it constitutes an abuse of discretion, citing NAACP v. HUD, 817 F.2d 149, 160 (1st Cir. 1987)); Raymond Proffiitt Foundation v. Corps of Engineers, 128 F. Supp.2d 762, 767 (E.D. Pa. 2000)(a court can compel agency action when a failure to act is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law).

III. Preliminary Injunctive Relief is Appropriate Here

FIFRA's emergency suspension provision is intended to provide preliminary relief to prevent serious and irreparable damage to public health and the environment during the pendency

of cancellation proceedings. Thus, preliminary relief from the Court to obtain that relief is appropriate. Plaintiffs initiated this litigation because of EPA's failure to address the extremely elevated risks it identified from exposure to penta. EPA's risk findings dating back to the 1970's strongly suggest that every day of additional manufacture, distribution and use of pentachorophenol will result in cancers, birth defects and deaths to persons exposed to penta, particularly workers. Plaintiffs Memorandum in Support demonstrates that plaintiffs have satisfied the D.C. Circuit's four part test for a preliminary injunction. Plaintiffs' likelihood of success on the merits, as well as irreparable harm are established by EPA's own published reports and regulatory actions concerning penta. While defendants argue that an injunction should not be granted because it would injure other parties, the injuries they point to are monetary and limited. The irreparable harm to the public is in the form of loss of life and public health.

B. EPA's "Delay" Allegations Do Not Affect the Merits of Plaintiffs' Motion

EPA asserts (PI Opp. at 30) that in determining whether irreparable harm is occurring to support a preliminary injunction, "the court is entitled to consider plaintiffs' delay in seeking emergency relief." EPA's cited cases are inapposite. In Citibank N.A. v Citytrust, 756 F.2d 273, (2d Cir 1985), a trademark infringement case, Citicorp had waited for seven years before filing a lawsuit alleging that its customers were likely to be confused by Citytrust's allegedly similar trademark. Because the competing mark had been in use so long, the court questioned "what additional irreparable harm would result during the pendency of this action." *Id.* at 277. Here in contrast, the release of penta – a highly carcinogenic and dangerous substance -- into the environment due to EPA's delay is ongoing and cumulative. FIFRA's "emergency suspension" provision is an explicit recognition by Congress that where a pesticide causes unreasonable

adverse effects, the harm increases for each additional day that it is manufactured and distributed into commerce. Even if EPA ultimately issues a cancellation order, the penta-treated poles are likely to remain in place for decades and will eventually require disposal.

In Fund for Animals v. Frizzell, 530 F.2d 982, (D.C. Cir 1976)(also cited by EPA at PI Opp. 30), plaintiffs challenged Fish and Wildlife Service regulations that allowed the taking of endangered birds. The court found that a "preliminary injunction would be all but futile [because] the harvest of these birds... was admitted to be 'pretty well over' on the day the case was argued." *Id.* At 987. Such a finding – essentially one of mootness – has no bearing here, where EPA's continuing inaction on penta causes mounting harm to public health and the environment.

While "delay" in seeking a preliminary injunction "can undermine a claim of irreparable harm," Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs., 31 F.3d 1536 (10th Cir. 1994), it can only do so if defendants demonstrate prejudice. Foundation on Economic Trends v. Heckler 587 F. Supp. 753, 765 (D.D.C. 1984). In Kansas Health Care, the court rejected a delay argument where the plaintiff had tried to reach a settlement with the defendant and acted within three months of failing to reach such a settlement. *Id.* at 543. In Foundation on Economic Trends, the court found no prejudice to federal agency defendants, even though the plaintiffs waited five years to initiate litigation, because of the agency's statements that further inquiry into the challenged standards would be undertaken. Here, far from sleeping on their rights, plaintiffs have been trying for years to persuade EPA to take action on penta, by submitting information on alternatives and petitioning for agency action. In response, EPA has continued to hold out a promise of forthcoming action. Accordingly, Plaintiffs should not be now penalized for attempting to resolve this matter short of litigation and for relying on Defendant's repeated

assurances that action was imminent.[12] *See* Washington Post Co. v. Turner, 708 F. Supp. 405, 416 (D.C. 1989)("the Court cannot determine that plaintiff's delay in bringing suit was unreasonable in view of the fact that the use of newspapers hawkers apparently has been a regular subject of negotiation between plaintiff and WMATA").

In essence, EPA now complains that plaintiffs should have realized sooner that its repeated assurances that its was diligently addressing their concerns and intending to act promptly on penta's dangers were not credible. Such a position does not merit serious attention, and certainly does not undermine the merits of plaintiffs' request for injunctive relief. Moreover, EPA has not (and cannot) show any prejudice occasioned by plaintiffs not having filed this action earlier.

IV. The Court Should Order Emergency Suspension or Other Relief Here

A. The Court Can Order EPA to Take Specific Action Here

EPA claims that the only possible remedy for EPA's failure to act on penta is a remand to

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[12] The efforts of Beyond Pesticides and others to obtain EPA action to cancel and suspend penta, and EPA's responses are detailed in Appendix B to the Memo in Support of Plaintiffs' Motion for Preliminary Injunction, and the actual petitions and correspondence are attached as exhibits. These materials demonstrate that while EPA repeatedly revised its estimates as to when action on penta could be expected, each time it also assured Beyond Pesticides that its concerns were being considered and that responsive action would be forthcoming. For example, when members of Beyond Pesticides and other medical doctors and scientists first asked EPA to remove penta from the market in 1997, EPA replied that the Reregistration Eligibility Decision (RED) on penta was expected in FY 1998. Appendix B at ¶¶ 1 and 2. When Beyond Pesticides submitted a letter to EPA in July, 2,000 seeking penta's cancellation, EPA responded that it expected to complete the risk assessment on penta in 2001. Id. at ¶¶6 and 7. Later, EPA responded to an April 19, 2001 letter from Beyond Pesticides seeking cancellation and emergency suspension of penta, CCA and creosote, stating "We are giving this priority attention." Id. at ¶¶ 9 and 10. Even EPA's most recent letter of February 5, 2002, which stated that it was an "interim" reply neither granting nor denying Beyond Pesticides' petition, stated that the agency was "proceeding as rapidly as feasible to resolve your concerns."

EPA for a final decision on plaintiffs' petitions. PI Opp. at 22-23. While this relief is possible, the Court may also order the agency to take specific action. Most relevant here, the D.C. Circuit ordered EPA to issue cancellation notices in EDF v. Ruckelshaus, 439 F.2d at 595. Hondros v. U.S. Civil Service, 720 F.2d 278, 297-98 (3rd Cir. 1983), also ordered the defendant to take specific action, appointing the plaintiff to a permanent position. Public Citizen v. Heckler, 653 F. Supp. 1229 (D.D.C. 1986), is a case with striking similarities to this one. Reviewing agency inaction, the court found that the agency had studied the issue for many years, and had made findings that raw milk posed a significant health risks. It held that "[t]he appropriate remedy in this case, therefore, is an order compelling the agency to promulgate a regulation prohibiting the interstate sale of . . . raw milk products."

B. Emergency Suspension is Appropriate Here

As plaintiffs discussed in their Memo In Support at 22-25, emergency suspension is appropriate here based on EPA's own findings concerning penta, under EPA's own interpretation of the FIFRA standard for that action as "a threat of harm to humans and the environment so mmediate that the continuation of pesticide use is likely to result in unreasonable adverse effects during a suspension hearing."[13] EPA itself has found that penta poses "excessive" and "unacceptable" risks of cancer, birth defects, and other health problems.[14] And there can be no doubt that these risks would materialize even in the few months that it would take to hold a

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[13] *See,* Nagel v. Thomas, 666 F. Supp. 1002, 1005 (W.D. Mich. 1987); Dow Chemical Co. v. Blum, 469 F. Supp. 892, 902 (1979).

[14] *See* Pltfs Memo at 5-6 and App. A at ¶¶ 1-7, regarding EPA's conclusions in the RPAR proceeding; *id.* at 5-6 and App. A at ¶ 7 regarding EPA's cancellation of all other uses of penta due to excessive risk, and *id.* at 6-7 and App. A at ¶ 8 regarding EPA's post- RPAR assessments of penta.

suspension hearing. Hundreds of thousands of newly-penta treated poles would be installed, resulting in the adverse effects which EPA has identified for the workers who manufacture the penta, pressure-treat the wood, install and service the poles, and perform reapplications of penta to the poles, as well as to children exposed to the soil around the poles. Once installed, these poles will continue to present a hazard for decades to come. *See*, Pltfs Memo at 23-24.

In keeping with its general approach here, EPA does not directly respond to these contentions. EPA does not even deny that findings it has already made with regard to penta meet the standard for emergency suspension. Instead, EPA asserts that plaintiffs are asking the court to substitute its judgment for EPA's. PI Opp. at 3. This is simply not the case. Plaintiffs explicitly rely on EPA's own findings about the risks of penta and on information in EPA's possession concerning alternatives. EPA's only other argument is that it has chosen to evaluate penta in its reregistration process instead of taking other regulatory action such as suspension, *id.,* at 25, 29, and that it must know everything possible about the risks of penta, and the costs, risks and benefits of alternatives before it can act. *Id.,* at 11-12, 35.

However, Congress gave EPA emergency suspension authority precisely so that EPA could protect the public from what appear to be serious short-term risks based on limited information *prior to* conducting a full, detailed risk/benefit analysis or subjecting that analysis to adversary adjudicatory hearings in cancellation and suspension proceedings. As the court noted in Dow Chemical v. Blum, 469 F. Supp. at 902, the legislative history of the emergency suspension provision states that its purpose was to "give EPA the authority, if necessary to prevent an

imminent hazard, to suspend without a hearing *if more information needs to be gathered."* [15] "[T]he function of the suspension decision is to make a preliminary assessment of evidence, and probabilities, not an ultimate resolution of difficult issues." EDF v EPA, 465 F.2d at 537.

The function of suspension and emergency suspension did not change when Congress instituted the current reregistration program in 1988. Not only did Congress retain the provisions for cancellation, suspension and emergency suspension, but it also made explicit that "[n]othing in this subsection [reregistration] shall prohibit the Administrator from undertaking any other review of a pesticide pursuant to this chapter." 7 U.S.C. § 136a(g)(1)(B). The most recent amendments to FIFRA in 1996 actually made it easier for EPA to take emergency suspension action without making out its full case on risks and benefits, by amending the provision which formerly required EPA to issue a cancellation notice at the same time it issues and emergency suspension, to allow a cancellation notice to be issued 90 days afer the emergency suspension order.[16] Thus, the pendency of EPA's reregistration process is irrelevant to EPA's duty to take emergency suspension action when the statutory standards for that action are met, and EPA's Opposition provides no cogent reason why the Court should not order emergency suspension here.

C. The Court May Order Other Relief Based on the Facts and Law Presented by Plaintiffs' Motion

As shown above, (Sec. IV.A), the Court may order EPA to take specific action, and the standards for emergency suspension are met by EPA's own findings. Sec. IV.B. Thus, plaintiffs

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[15] Senate Report 92-270 (Commerce Committee), 1972 U.S. Code Cong. and Admin. News at 4112 (emphasis supplied).

[16] *See*, House Report 104-669(I) (Committee on Agriculture), 1996 U.S. Code Cong. and Admin. News at 1216. The amended provision is codified at 7 U.S.C. § 136d(c)(3).

believe that emergency suspension is the appropriate remedy. Nevertheless, there are several other forms of relief that the Court could order on the facts and law which plaintiffs have presented.

If the Court is concerned about ordering EPA to take action which becomes immediately effective, the Court could order EPA to issue an order of suspension rather than emergency suspension. Then, interested parties would be entitled to an expedited adjudicatory hearing before EPA on the question of "imminent hazard" before penta was removed from the market. Likewise, the Court could order EPA to issue a notice of cancellation, the remedy in EDF v. Ruckelshaus. Interested parties would be entitled to a full adjudicatory hearing at EPA before any restrictions could take effect. If the Court chooses not to take any of these actions, it could nevertheless order a remand to EPA to promptly rule upon plaintiffs' petitions for cancellation and suspension,

> [with] either . . . a fresh determination on the question of suspension, or . . . a statement of reasons for his silent but effective refusal to suspend . . . . If he persists in denying suspension in the face of the impressive evidence presented by petitioners, then the basis for that decision should appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review. In view of the emergency nature of the claim, we retain jurisdiction to permit respondents to provide us, within thirty days, with the record necessary for review.

EDF v. Hardin, 428 F.2d at 1100 (footnote to the APA, 5 U.S.C. § 706). Also, based on EPA's inaction and unreasonable delay, the Court could order EPA to reach a final regulatory decision on penta within a set timetable. Finally, the Court could order EPA to re-open the RPAR, which had concluded that cancellation would be warranted but for the lack of viable alternatives, solely to re-examine the availability of alternatives and take appropriate action.

D. The Court Should Order EPA Action on Penta's Registration

While there are several possible remedies the Court could order which would be appropriate based on the facts and law here, the result that EPA advocates – to do nothing –

cannot be justified. EPA essentially asks the Court to take on faith both its decision to proceed by reregistration rather than by cancellation, suspension, or RPAR/Special Review; and the extremely long time EPA claims is needed to complete its review of penta. By granting no relief, the Court would leave the time frame for EPA action on penta completely open, such that EPA would not be held even to its current maximum estimate of three years from issuance of the preliminary risk assessment to completion of the RED. EPA Opp. at 3. This would allow EPA to delay completion of the reregistration process beyond 2006, *9 years* after it began. If EPA at that time determines not to reregister, it would then be required to *begin* the cancellation and/or suspension process. The Court's acquiescence in such a time frame, given EPA's findings with regard to the extreme risks posed by penta, would indeed be extraordinary relief.

1. EPA's Decision to Engage in a Reregistration Process Instead of Taking Cancellation and Suspension Action Was Arbitrary and Capricious and Contrary to Law

EPA does not explain *why* it chose to engage in a six to nine year reregistration review when it had "already completed a [six-year] in-depth review of the risks and benefits of penta," PI Opp. at 26, and finally determined in 1984 that penta posed excessive risks of cancer, birth defects and fetotoxicity that would merit cancellation but for the lack of viable alternatives.[17] EPA has never withdrawn or even questioned the findings made then. Given the huge expenditure of taxpayer dollars involved in these multi-year reviews, as well as the public's continuing exposure to a highly toxic pesticide in the meantime, the Court cannot simply accept EPA's bald assertion that it "has determined that reregistration is the most appropriate method for reassessing the risks and benefits of that pesticide." PI Opp. at 25. The record before the Court indicates that in order

[17] *See*, Pltfs. Memo at 5-6; App. A at ¶¶ 1-3.

to meet FIFRA's statutory command to protect the public from unreasonable adverse effects, EPA was and is required to instead take regulatory cancellation and suspension action, or at the least, reopen the RPAR proceeding solely to examine the question of whether, since 1984, "alternatives that would be viable as large-scale replacements for penta have in fact been developed . . .". EPA Opp. at 32, n.11.

As this case amply demonstrates, a reregistration proceeding does not afford the same relief as a cancellation or suspension action. As EPA admits, "reregistration does not prevent the Agency from using the other tools given it by Congress (such as the ability to suspend a registration) . . . ." PI Opp. at 25.[18] When EPA "determine[s] that reregistration is the most appropriate method for reassessing the risks and benefits of [a] pesticide," *id.,* this necessarily means that it is *not* taking prompt action to remove the pesticide from the market by use of these "other tools given by Congress." Ironically, even the Reregistration Eligibility Decision (RED) which EPA projects to be made six to nine years from the start of the review is not even considered by EPA to be "a final agency action." PI Opp. at 9. Instead, only if EPA determines that the pesticide should not be reregistered, would it then be directed to take "appropriate regulatory action," *id.*, 7 U.S.C. § 136a-1(g)(2)(D), such as cancellation or suspension.[19] Thus, not until the end of the entire reregistration process, would EPA be in a position to begin the

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[18] In fact the reregistration provision of FIFRA explicitly provides: "Nothing in this subsection shall prohibit the Administrator from undertaking any other review of a pesticide pursuant to this subchapter." 7 U.S.C. § 136a(g)(1)(B).

[19] *See also,* 7 U.S.C. § 136a(g)(1)(A) ". . . . No registration shall be canceled as a result of the registration review process unless the Administrator follows the procedures and substantive requirements of section 136d of this title [relating to cancellation and suspension]."

cancellation and suspension actions which plaintiffs seek immediately.[20]

Even if it had been appropriate, despite its earlier findings on penta, for EPA to begin a lengthy reregistration process in 1997, EPA would have been required to change course when it completed its draft of the penta risk assessment in 1999. EPA makes much of the fact that this document was a draft and not its "final word" on penta, PI Opp. at 4. But EPA never confronts the issue of what an agency should do when a draft assessment finds a 340% lifetime risk of cancer, as well as other "unacceptable" risks up to thousands of times EPA's usual action threshold. Whether EPA may have been justified in taking a short time to confirm or revise these findings, or to make a quick assessment of the impacts of removing penta from the market before it acted is now a moot question. Certainly, EPA could not, in accordance with its congressional mandate to protect the public from unreasonable adverse effects, do nothing except take over 3 ½ years to complete a new draft (which it has refused to produce in this case), and then still claim to be six months to three years away from completion of its review, much less regulatory action.

As EPA admits, the reregistration provisions of FIFRA do not preclude the agency from taking cancellation or suspension action. PI Opp at 25. However, if EPA will not remove a pesticide from the routine reregistration track based on the kind of risk findings it has made with regard to penta, then it would never do so. Plaintiffs know of no instance in which EPA has found risks this high for any other pesticide. Accepting EPA's claim that it is appropriate to

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[20] Plaintiffs assert that cancellation and suspension action was and is required without the need for any reregistration process, based on EPA's final findings in the 1984 RPAR and subsequent developments concerning alternatives to the use of penta-treated wood. Pltfs Memo at 20-21.

continue a routine reregistration review of penta would in effect be a ruling reading the cancellation and emergency suspension provisions out of FIFRA, despite clear statutory language to the contrary, and EPA's admission that this cannot be done.

EPA's only other justification for not taking regulatory acting on penta is that it allegedly has insufficient evidence on alternatives to determine whether the risks of penta exceed the benefits. EPA Opp. at 11-12, 32-33. First, as discussed above, Sec. IV.B, final regulatory conclusions on risks and benefits are not necessary for suspension action. In any event, because the Court has determined to decide the motion for preliminary injunction without any administrative record production by EPA, EPA's claims of lack of adequate information on alternatives are without evidentiary support. What *is* in the record before the Court are plaintiffs' submissions concerning alternatives, including submissions by producers of non-wood alternatives to treated wood utility poles, all of which were submitted or communicated to EPA, beginning as early as 1993. Pltfs Memo at 7-9, and Exhibits 1, 2, 5, 7 and 16. In addition, there is evidence cited by plaintiffs and available in public documents concerning the actions by other nations banning penta, including the European Union, which completed a study of alternatives and concluded that "in fact less dangerous alternatives were available,"[21] and in which many countries have lived without penta for years.[22] Thus, the record supports the conclusion that viable alternatives to penta are available and that the lack thereof is not justification for failure to remove penta from the market.

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[21] Commission Decision of October 26, 1999, (1999/831/EC), at III.3.1.1(62), attached as Exhibit 1 to the Supplement to Plaintiffs' Motion To Compel Submission of the Administrative Recordegarding European Union Action on Pentachlorophenol.

[22] Pltfs' Memo at 4-5 and n. 8 and Supplement to Plaintiff's Motion to Compel.

Even if the Court were to credit EPA's contentions that non-wood alternatives to penta "*could* be more expensive, more difficult to install or use, not suitable for all conditions in which penta-treated poles are used, or have other limitations," PI Opp. at 34 (emphasis supplied), these potential disadvantages of the alternatives (and thus benefits of penta) are not of the type that could not possibly balance out the magnitude of risks EPA has found with regard to penta. EPA has taken the position that cancer risks from occupational exposures higher than 1 in 100 "are considered unreasonable within the meaning of FIFRA section 2(bb) [7 U.S.C. § 136(bb) [defining "unreasonable adverse effects on the environment," the FIFRA standard for cancellation, 7 U.S.C. § 136d(b), and suspension, 7 U.S.C. § 136(l); 136d(c)].[23] Even in 1984, EPA found occupational risks as high as 1 in 100, Pltfs Memo, App. A at ¶ 2, and the risks found in the 1999 assessment are much higher, reaching 3.4 out of 1.

2. EPA's Failure to Take Action on Penta Constitutes Unreasonable Delay

Plaintiffs' initial brief in support of their motion for preliminary injunction analyzed EPA's inaction on penta primarily within the framework of the ruling in EDF v. Ruckelshaus that a court should order EPA to cancel a pesticide when EPA's own findings meet the statutory standards for that action, 439 F.2d at 595, even where EPA takes the position "that investigations are still in progress, [and] final determinations have not yet been made . . .". 439 F.2d at 592. However, as EPA points out, EPA Opp. at 27-28, plaintiffs' allegations can also be analyzed under the framework for unreasonable delay claims set forth in Telecommunications Research & Action

[23] "Inorganic Arsenicals, Preliminary Determination to Cancel," 56 Fed. Reg. 50576, 50584 (Oct. 7, 1991) (cited in Pltfs Memo at 21, n. 47). EPA took that position even though it found in that proceeding that there were "moderate benefits" and that "alternatives were not as efficacious." *Id.*

Center v. FCC ("TRAC"), 750 F.2d 70 (D.C. Cir. 1984). Plaintiffs intend to fully address the TRAC factors in their forthcoming Motion for Summary Judgment on all of the claims in their complaint. However, in the event that the Court prefers to use that analysis with regard to the preliminary injunction motion, plaintiffs briefly address those factors here.

First, it is not within the "rule of reason" for EPA to have found in 1984 that penta's use as a wood preservative posed excessive risks of serious and life-threatening health effects which would merit cancellation but for the lack of alternatives, and then claim 19 years later in 2003 that it has "just begun" it analysis of alternatives to penta. PI Opp at 32. Nor is it within the "rule of reason" to take 6 to 9 years to complete a reregistration analysis *after* a previous six year exhaustive analysis, especially when human lives are at stake.[24]

Second, while there are no statutory deadlines for regulatory cancellation or suspension action in FIFRA, EPA's actions in this regard should be evaluated in light of "the Congressional intent [in FIFRA] that potentially dangerous pesticides should be removed from the market without delay." Dow Chemical v. Blum, 469 F. Supp. at 900. Third, clearly human health and welfare are at stake here. Fourth, EPA has identified no competing priorities, other than its routine reregistration of hundreds of pesticides, and certainly has not identified any ongoing or planned proceeding involving a pesticide which poses higher risks than those it has already found with regard to penta. Fifth, the interests prejudiced by the delay are the health of the entire population of the United States, all of whom are potentially exposed to penta-treated utility poles,

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[24] *See*, *e.g.,* Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1154 (D.C. Cir. 1983)(three years from announced intent to regulate to final rule is unreasonable where lives are at stake); In re Chemical Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992)(six years "is an extraordinarily long time, in light of the admittedly serious health risks . . .").

with highly elevated risks identified with regard to wood treatment and utility workers and children.

Again, EPA asks the Court to simply accept its word that it is "moving expeditiously" on this issue, EPA Opp. at 28, despite extremely long time periods involved, especially in relation to the identified risks, and to credit its claims of competing priorities without any explanation as to what they are and why they are more important that action on penta.

CONCLUSION

For the foregoing reasons, the Court should order EPA to issue an order suspending the registration of penta on an emergency basis, or in the alternative, order one of the other forms of relief discussed here.

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