

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF COLUMBIA

3

4 BEYOND PESTICIDES/NATIONAL.

5 COALITION AGAINST THE .

6 MISUSE OF PESTICIDES, ET .

7 AL .

8 Plaintiffs, .

9 vs. . Docket No. CV02-2419 (RJL)

10 CHRISTINE T. WHITMAN, ET .

11 AL., . Washington, D.C.

12 Defendants. .

13 . January 21, 2003

14 . 11:00 a.m.

15 . . . . .

16 TRANSCRIPT OF MOTION HEARING  
17 BEFORE THE HONORABLE RICHARD J. LEON  
18 UNITED STATES DISTRICT JUDGE

18

19 APPEARANCES:

20

21 For the Plaintiff:	Paula Dinerstein, Esq. Lobel, Novins & Lamont 1275 K Street, N.W. Suite 770 Washington, D.C. 20005
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1 APPEARANCES (Continued):

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5 Court Reporter:                     Patty Artrip Gels, RMR  
  Official Court Reporter  
6   U.S. District Court  
  333 Constitution Avenue, NW  
7   Washington, D.C. 20001

8 Proceedings reported by machine shorthand, transcript produced  
9 by computer-aided transcription.

10   P R O C E E D I N G S .

11                     COURTROOM DEPUTY: Beyond Pesticides versus Christine  
12 T. Whitman, et al. CV02-2419. Will counsel state your  
13 appearances for the record, please?

14                     MS. DINERSTEIN: Paula Dinerstein for the Plaintiffs.

15                     MR. HANDLEY: James Handley for the Plaintiffs.

16                     MS. O'MELVENY: Mary O'Melveny for the Plaintiff,  
17 Communications Workers of America.

18                     MS. PURDY: Angeline Purdy for the EPA.

19                     THE COURT: All right. Well, thank you one and all  
20 for your briefs. They are well done. It is helpful in this  
21 complicated area.

22                     Before we proceed with the oral arguments, let me deal  
23 with a couple of preliminary matters because I am sure everyone  
24 is aware we have had an amicus brief filed or a Motion I should  
25 say For Leave To File an Amicus Brief and the Court is inclined

1 to grant the Motion; but only for briefing purposes, not for  
2 oral argument.

3           But it seems only fair that the Plaintiff should have  
4 an opportunity to respond.

5           So I would like to learn from the Plaintiffs if they  
6 would like to respond to the amicus brief and if so how long  
7 they would need to respond to the amicus brief.

8           MR. HANDLEY: Your Honor, yes, we would like to  
9 respond to the amicus brief.

10           COURTROOM DEPUTY: Counsel, would you approach the  
11 podium, please?

12           THE COURT: Yes.

13           MR. HANDLEY: Your Honor, may it please the Court,  
14 Plaintiffs would object to the amicus brief to the extent that  
15 it includes factual information that's not currently before the  
16 Court.

17           We rely on the Court's earlier order which says that  
18 the record for purposes of the Preliminary Injunction is  
19 complete.

20           THE COURT: All right.

21           MR. HANDLEY: And further we feel that this  
22 information is not part of the administrative record or at least  
23 we can't tell whether it was before the agency.

24           So for purposes of their making an appearance as  
25 amicus we don't object; but in terms of factual information,

1 additional information that's being asserted in their  
2 affidavits, we would object to those.

3           THE COURT: Well, why don't you file a combination  
4 Motion To Strike that portion of their amicus brief and any  
5 opposition that you would like to file with regard to the  
6 arguments that you are advancing so the Court can consider this  
7 point that you are making which seems like a worthy point to be  
8 considering which is whether or not -- I have not reviewed the  
9 amicus brief yet.

10           I didn't think it was appropriate to do that prior to  
11 today's hearing, but the Court generally is favorable to hearing  
12 from interested parties in an amicus situation at least for  
13 briefing purposes, not necessarily for oral argument.

14           So why don't you if you have concerns of that kind,  
15 why don't you include that in your response and I will take that  
16 into consideration in deciding to what extent I should be  
17 willing to accept the amicus brief for briefing purposes.

18           MR. HANDLEY: We will do that.

19           THE COURT: All right. What do you feel you would  
20 need? Would ten days be enough?

21           MR. HANDLEY: That's plenty.

22           THE COURT: All right. So the 31st. So you will file  
23 that. And then I don't know if the Government will want an  
24 opportunity; but if the Government wants an opportunity to  
25 respond, could you do that within a week thereafter or ten days

1 certainly thereafter?

2 MS. PURDY: I am sorry, your Honor, did you mean an  
3 opportunity to respond to Plaintiffs' submission or the amicus  
4 brief?

5 THE COURT: Both.

6 MS. PURDY: Both or either. Well, in terms amicus  
7 brief we don't oppose that at this point so we don't see a need  
8 to respond on that.

9 In terms of whether we would need to respond to  
10 Plaintiffs' submission, I think we will just have to take a look  
11 at what they file and see if there are issues there that we need  
12 address, but I think another ten days after that would be  
13 adequate for us to file any response.

14 THE COURT: In particular then when you get the  
15 Plaintiffs' submission if you would focus as I am sure you would  
16 anyway on the point that Mr. Handley's raising which is a point  
17 worthy of being carefully considered whether or not they are  
18 seeking in their amicus to really put before the Court  
19 information in fairness at this time appropriately before the  
20 Court and, if you join in their Motion To Strike in that regard,  
21 then obviously that would be important for the Court to know.

22 So if you could similarly review that, that would be  
23 appreciated.

24 MS. PURDY: Certainly. Thank you, your Honor.

25 THE COURT: Very good. So you will have ten days then

1 from --

2 MS. PURDY: Ten days from Plaintiffs' filing?

3 THE COURT: Right, from the Plaintiffs' filing. Now,  
4 the Court also has before it a Motion To Strike the affidavit  
5 submitted by the EPA with regard to its opposition to the  
6 Preliminary Injunction.

7 And, of course, the Government has opposed the Motion  
8 to strike.

9 The Court is going to deny the Motion To Strike on the  
10 grounds that it believes the agency has a right to defend itself  
11 in this type of situation where there is allegations of inaction  
12 by describing what it is that it has been doing and what the  
13 posture of the situation is and to the extent that there is  
14 anything contained in its affidavit that is of a substantive  
15 nature, the Court is not relying on that and will not rely upon  
16 that for purposes of resolving the Preliminary Injunction Motion  
17 that is before the Court.

18 Depending upon how that's resolved there may come a  
19 time later in this litigation where it would be appropriate to  
20 consider in evaluating the substantive basis of their decisions  
21 information that may be contained in the affidavit, but from the  
22 point of view of the procedural context in which this  
23 Preliminary Injunction is arising, the Court believes it is  
24 appropriate for the agency to be able to set forth the conduct  
25 that it has been engaged in in evaluating these chemicals and

1 the Court is only going to take into consideration the affidavit  
2 for that limited purpose.

3           So I am going to deny the Motion To Strike the  
4 affidavits.

5           So that gets us I think to where we had hoped to be in  
6 the first place anyway which is the argument itself on the  
7 Preliminary Injunction; and since it is the Plaintiffs' Motion,  
8 we should hear from the Plaintiffs first.

9           We will give you a chance after the Government  
10 responds, we will give you a chance for reply too.

11           MS. DINERSTEIN: Good morning, your Honor.

12           THE COURT: Good morning.

13           MS. DINERSTEIN: I would like to ask that Mr. Handley  
14 be able to do the reply and I will do the main argument.

15           THE COURT: That's fine.

16           MS. DINERSTEIN: We come before you as EPA has said we  
17 are asking for extraordinary relief, but the reason is that we  
18 are dealing with a pesticide, Pentachlorophenol, which has  
19 extraordinary risks and a record of extraordinary inaction and  
20 delay on EPA's part.

21           Back in 1984 the EPA found that this pesticide  
22 possessed excess risks of cancer, birth defects, toxicity to  
23 fetuses and it did so after a six year as it describes itself in  
24 depth detailed review of all the risks and benefits and which  
25 the registrants were able to participate and submitted evidence

1 attempting to rebut EPA's presumptions.

2           They submitted their own studies. They submitted  
3 critiques of EPA studies. And at the end of the six years, EPA  
4 concluded that their presumptions had not been rebutted and that  
5 Pentachlorophenol did in fact pose these risks.

6           And the only reason at that time that they did not  
7 suspend or cancel Penta's registration is because it said that  
8 there weren't viable alternatives at that time.

9           Those findings have never been reneged on by EPA,  
10 questioned, reduced. As far as we know, they have never even  
11 been challenged by the registrants. They still stand.

12           Subsequently in 1987 EPA cancelled most of the  
13 remaining uses of Pentachlorophenol besides wood preservatives  
14 based on those same risk findings that it found in 1984. And I  
15 would just like to read you a quote from EPA's finding in 1987  
16 on Pentachlorophenol.

17           It said: The agency is concerned about the ubiquity  
18 of Pentachlorophenol, its persistence in the environment, its  
19 phytotoxic interatigenic -- that's birth defect inducing  
20 properties, its presence in human tissues and its oncogenic  
21 meaning cancer causing risks because of the presence of dioxins  
22 in the technical material.

23           So EPA there was saying that not only is  
24 Pentachlorophenol causing -- does it pose these risks, but it is  
25 actually everywhere in the environment and it is in human

1 tissues. It is actually getting into human bodies. And that is  
2 why we are cancelling it.

3           And when it made that finding it specifically  
4 addressed why it was cancelling those uses but not wood  
5 preservative uses. And it said because the registrant asked:  
6 Well, why can't you just institute the same kind of protective  
7 measures like protective clothing and masks and so forth that  
8 you did on wood preservatives and not cancel it. And EPA  
9 answered that the reason was because even though these different  
10 uses posed the same risks that in the case of the wood  
11 preservatives, there weren't viable alternatives.

12           So it confirmed that that was the only reason that it  
13 had not cancelled the wood preservatives. And in light of the  
14 purpose for which EPA has quoted that the primary purpose is to  
15 protect human health and the environment from unreasonable risks  
16 of pesticides, EPA has a continuing duty to determine that  
17 pesticides that are registered don't pose unreasonable risks and  
18 we believe that once EPA made these findings of excessive risks  
19 and once it went ahead and cancelled other uses because there  
20 weren't alternatives, it had a duty to go back and look to see  
21 if there were alternatives to the wood preservative use and  
22 cancel those when the time came that there were alternatives.

23           Now, we don't have the complete record. We think  
24 there is probably more in there than we know about, but we know  
25 that at least since 1993 producers of alternatives to utility

1 poles treated with Pentachlorophenol have been coming into EPA,  
2 giving them information about their products, about the fact  
3 that utilities are actually using them, that there are viable  
4 alternatives to Pentachlorophenol.

5           And since 1997 one of the Plaintiffs, Beyond  
6 Pesticides, has been submitting this kind of information to EPA  
7 and asking for cancellation and suspension.

8           Despite all this and the risks that EPA found, EPA  
9 apparently didn't think that it needed to look at those  
10 submissions or take them seriously because it has come to the  
11 Court just a few weeks ago and said that its analysis of  
12 alternatives has just begun after 19 years since they found  
13 excessive risks and that cancellation would be appropriate if  
14 there were alternatives.

15           So EPA took no action. What it did was that in 1997  
16 instead of taking the cancellation and suspension action that is  
17 provided for under the statute, it decided to begin a  
18 reregistration review.

19           Plaintiffs' position is that that was not even  
20 necessary to go back to square one and reanalyze everything  
21 after they had a six year review and come up with a final  
22 decision before.

23           THE COURT: Now, let me ask you about that. The  
24 choice that they had at that time between those two options,  
25 obviously I know which one you are advocating was the preferable

1 one, but was that not a decision that they had the discretion to  
2 choose between, between a cancellation suspension track versus a  
3 reregistration review track?

4           That's completely within their discretion, is it  
5 not?

6           MS. DINERSTEIN: It is within their discretion, but it  
7 is not unreviewable discretion. It is reviewable for abusive  
8 discretion. And we have cited case to that effect. The EDF  
9 line of cases which did review EPA's inaction on petitions to  
10 cancel or suspend pesticides.

11           THE COURT: So when you say in the brief that there  
12 was a nondiscretionary mandatory duty to act, I think that's on  
13 page 20 of your brief, it is still -- it is not quite  
14 nondiscretionary?

15           MS. DINERSTEIN: I don't have a brief in front of me,  
16 but I don't believe that we do say it is a nondiscretionary  
17 mandatory duty. We say that the statutory standards for  
18 cancellation and suspension have been met and that the case law  
19 holds that when EPA's own findings meet the statutory standards  
20 for those actions that the Court can order EPA to in fact do  
21 those actions.

22           But the standard of review is abusive discretion or  
23 arbitrary and capricious.

24           THE COURT: So what is the essence of your argument as  
25 to why choosing the reregistration path was an abusive

1 discretion as opposed to the cancel and suspension track?

2           MS. DINERSTEIN: The reregistration provisions of  
3 FIFRA were really put in there to ensure that older pesticides  
4 met current standards because there were pesticides that were  
5 registered before EPA did really even any kind of review,  
6 scientific studies and so forth, and then there were others that  
7 had some studies but not up to current standards.

8           And so EPA -- Congress picked the date, I think 1984,  
9 that any pesticide that was registered before 1984 had to be  
10 rereviewed. And this is really just to prevent pesticides from  
11 being so to speak grandfathered without review up to current  
12 standards.

13           It was not intended for pesticides which EPA had  
14 already found posed excessive risks because when you do a  
15 reregistration proceeding and EPA has been doing this particular  
16 reregistration proceeding for going on six years already and  
17 they have said it might take three or four years more, at the  
18 end of that entire proceeding, if they decide it is not  
19 appropriate for reregistration, then they begin cancellation  
20 proceedings.

21           So what we have here is an extremely long detour  
22 before you get to the actual regulatory action that could result  
23 in getting the pesticide off the market.

24           And while EPA admits in their brief that the  
25 reregistration provisions were not intended to keep them from

1 cancelling or suspending or taking other regulatory action, the  
2 whole tenor of their brief is that in fact Congress intended  
3 them to only reregister; and that's simply not the case.

4           In fact, there is language in the statute that says  
5 nothing in this reregistration section shall affect EPA taking  
6 any other regulatory action.

7           What EPA is doing here is they are essentially despite  
8 all the risk findings they have made, they haven't responded to  
9 any of this in their brief before the Court and they are sort of  
10 pretending that this is just a routine pesticide that's  
11 appropriate for a routine review and along with hundreds of  
12 other pesticides that they are reviewing simply because they  
13 were registered before 1984.

14           And they haven't even put Pentachlorophenol with its  
15 extreme risks and I haven't gotten to the ones they found in '99  
16 yet, they haven't even put it in front of the line as far as  
17 reregistration goes.

18           They said that they did their first RED, which is a  
19 Reregistration Eligibility Decision, in 1991 it was finished and  
20 Pentachlorophenol is supposed to be finished somewhere between  
21 2003 and 2006 or later.

22           So for all we can tell from what EPA has told us, they  
23 are reviewing these pesticides in alphabetical order. It has  
24 nothing do with the risks they pose.

25           THE COURT: Now, would the reregistration review by

1 its very nature though require them in order to accomplish it to  
2 do an assessment of the type that you had previously alluded to  
3 which is an assessment of what alternatives were on the market  
4 that would be acceptable under the circumstances for the use of  
5 Pentachlorophenol in that specific type of -- for that specific  
6 type of purpose, the wood treatment purpose?

7 MS. DINERSTEIN: It should. In the past one of the  
8 letters that we have in our exhibits, EPA said we are going to  
9 do -- we might do a benefits review after we complete the  
10 reregistration review.

11 Now, in their brief they have said that they do do a  
12 benefits review, an alternatives review in that context and  
13 certainly they should because the outcome of the proceeding is  
14 to determine whether the risks exceed the benefits or vice  
15 versa.

16 THE COURT: All right.

17 MS. DINERSTEIN: However, they have said that they are  
18 not going to even begin the benefits review until they complete  
19 the risk review and the risk review still has quite a ways to  
20 go. They are talking about they have a new draft and that's  
21 going to be subject to comment from the registrants and then  
22 comments from the public and then EPA may make revisions based  
23 on those comments.

24 And then after that, they are saying it may take six  
25 months to three years to complete the total review of the

1 benefits. And from our point of view, this is just interposing  
2 delay in a situation where they have already found excessive  
3 risks and really the only question should be alternatives.

4 THE COURT: So you would prefer the kind of special  
5 review you referred to in your brief under 50 Federal Regs  
6 49003?

7 MS. DINERSTEIN: Yes, the review they did that ended  
8 in 1984, it used to be called ARPAR, A Rebuttal Presumption  
9 Against Registration. Now they call it special review. They  
10 have already done a special review and although we have asked  
11 the Court to order an emergency suspension because that is the  
12 only action that would actually protect the public right now,  
13 another possible remedy we have suggested several other possible  
14 remedies would be to reopen that ARPAR proceeding and say:  
15 Okay, we have already found excessive risks and in the  
16 reregistration proceeding those -- they did reevaluate and they  
17 not only did not find less risks than in '84, but they found  
18 greatly more risks.

19 And so if the Court doesn't find that they already  
20 have enough information on alternatives which we are saying that  
21 they do, then at the least they should be ordered to very  
22 quickly finish their assessment of alternatives and go ahead to  
23 action.

24 THE COURT: Now, from your point of view, what if any  
25 factual developments have occurred since '97 or even more

1 recently that would warrant the type of extraordinary relief  
2 that you are requesting factual developments that have occurred  
3 with regard to hazards, new evidence, or data that shows higher  
4 risk or occurrence of hazards from the use of Pentachlorophenol  
5 in the wood treatment realm?

6           Has there been any developments of a recent vintage  
7 over the last even year or two years that would warrant this  
8 type of extraordinary relief?

9           MS. DINERSTEIN: Well, the 1999 risk assessment found  
10 very extraordinary levels of risk, including 340 percent chance  
11 of cancer for one occupational category and for 13 out of 14 of  
12 the categories they reviewed they found in their own words  
13 unacceptable risks of cancer and 14 out of 14 category for  
14 noncancer risks.

15           So that is certainly one thing. But more basically in  
16 answer to your question the risks posed by Pentachlorophenol  
17 have been around for a long time. They haven't changed. That's  
18 not what we are saying.

19           And it is tragic that nothing has been done about them  
20 for all these years, but that does not mean the additional risk  
21 that is added each day is not worthy of relief and we have shown  
22 that -- and EPA's data agrees -- that is approximately one  
23 million new Penta poles put up every year and that means  
24 hundreds of thousands in the space of a few months that it might  
25 take to rule on the merits of this case or for EPA to hold a

1 suspension hearing.

2           And the risks that EPA has found associated with  
3 putting up those poles to the manufacturers of the  
4 Pentachlorophenol, to the treaters of the wood, to the  
5 installers and utility people who work on the poles to small  
6 children who might play in the dirt around the poles are very  
7 great and the fact that there has been years and years and years  
8 of these risks doesn't mean that we haven't made a case for a  
9 lot of additional risk within just a few months' time.

10           THE COURT: As I understand your position, you want  
11 to, and correct me if I am wrong, I think what you want the  
12 Court to do is basically cancel this usage right now, is that  
13 correct, this registration?

14           MS. DINERSTEIN: Well, our primary relief that we are  
15 asking for is we are asking the Court to order an emergency  
16 suspension and that is an interim remedy that Congress has given  
17 to EPA to take a product off the market when it believes there  
18 are serious risks pending further investigations and hearings.

19           THE COURT: Now, why wouldn't you advocate the less  
20 extreme position of having the Court cancel the reregistration  
21 review and order the EPA to engage in cancellation suspension  
22 review as opposed to actually, you know, suspending the use of  
23 it?

24           MS. DINERSTEIN: Right.

25           THE COURT: Why did you go to the outer edge here?

1 MS. DINERSTEIN: The reason we went to the outer edge  
2 is because that's the only remedy that has an immediate impact  
3 in protecting the public.

4 However, in our reply brief we have made several other  
5 suggestions of remedies, you know, if you don't want to go that  
6 far.

7 One would be to do a suspension or a cancellation  
8 which would require a hearing at EPA before anything actually  
9 happens. Another one would be to order EPA within a time set by  
10 the Court to respond to our petitions and actually tell us why  
11 they haven't cancelled or suspended, why they think  
12 reregistration is appropriate given this level of risk.

13 Another would be as I mentioned before to reopen the  
14 ARPAR proceedings solely to consider alternatives on an  
15 expedited basis, and another one which we didn't mention but is  
16 also a possibility is that the Court could order some relief  
17 just on that one usage, the ground lying usage where they found  
18 340 percent risk of cancer. There seems to be no reason not to  
19 at least move on that one.

20 So there are many forms of relief that the Court could  
21 order based on the case that we have made.

22 THE COURT: All right. Anything else that you --

23 MS. DINERSTEIN: Give me a moment, please.

24 THE COURT: Of course.

25 MS. DINERSTEIN: One thing I wanted to address even

1 though you haven't asked a question about it is but I think it  
2 might naturally occur to anybody is if Pentachlorophenol has  
3 been around so long and it is so hazardous, you know, why aren't  
4 there people dropping like flies on the street kind of thing?

5 THE COURT: Yes, why wouldn't there be evidence of,  
6 for example, in areas where it is used, evidence of increased  
7 reporting of cancer by children or workers or whatever in the  
8 areas where it is clearly being used?

9 I am not aware of any data of that kind here.

10 MS. DINERSTEIN: Well, the answer to that, and we can  
11 make a submission to the Court if you like, but we were trying  
12 to rely just on EPA's record is that there are some studies and  
13 some personal injury actions and so on concerning workers,  
14 concerning people who lived in homes that were treated with  
15 Pentachlorophenol, that sort of thing.

16 But the risks that EPA relied on for its actions in  
17 the past of cancer and birth defects and fetal toxicity like  
18 miscarriages and low birth weight, that sort of thing, are not  
19 easily traced in individual cases.

20 Cancer for one has a latency period of 20 to 30 years  
21 sometimes and so it is very difficult to prove that a particular  
22 exposure caused a particular effect especially when the effects  
23 are something that commonly occurs for other reasons. It is not  
24 a unique effect.

25 And so the way EPA did its risk analysis and the way

1 the information that it relies on regularly and even needs to be  
2 held to do consistently is that it uses animal data. It is not  
3 ethical to experiment on humans. We can't feed  
4 Pentachlorophenol to humans and see what happens and so they do  
5 it to animals.

6           And based on this data and what happened to the  
7 animals and how fast they got cancer and whether their offspring  
8 had birth defects, they extrapolate that to humans and they  
9 found very, very high risks, over 100 percent in some cases.

10           And so without necessarily having to prove that an  
11 individual cancer or an individual birth defect was caused by  
12 Pentachlorophenol, they conceded that as a whole, as a  
13 statistical matter based on the animal studies that this many  
14 cancers are likely to have been caused by Pentachlorophenol.

15           THE COURT: What does the data indicate as to how long  
16 it takes from exposure to Pentachlorophenol when it is used in  
17 the wood treatment setting to the manifestation of the cancer,  
18 from exposure to it, manifestation?

19           Does it take a matter of years or a matter of decades  
20 or what does the data show on that?

21           MS. DINERSTEIN: I actually don't have information on  
22 that specifically.

23           THE COURT: Okay.

24           MS. DINERSTEIN: Perhaps EPA does, but I know that  
25 commonly cancers can have 20 years or more latency period.

1 THE COURT: So it could be that exposures that  
2 occurred a couple of decades ago just haven't manifested  
3 themselves yet?

4 MS. DINERSTEIN: That's right. And I mean we know  
5 there is a very high cancer rate in this country but we don't  
6 really know what to trace it to so this could be one of the  
7 things.

8 THE COURT: Then the question for the Court would be  
9 whether or not in absence of that data would be telling to your  
10 ability to get this type of extraordinary relief. Remember now  
11 we are focusing only on the Preliminary Injunction, not the  
12 ultimate complaint here in the case, but the short term relief  
13 that you are seeking prior to the ultimate resolution of the  
14 case.

15 Let me ask you this: The failure to act on the part  
16 of the agency's part, failure to act in the way that you want  
17 them to act, they argue is not a final agency action.

18 First of all, do you disagree with that from the point  
19 of view of review and, if you don't disagree with it, then what  
20 would be the actual -- what if any final decision that they have  
21 made would be the subject of review at this point by them?

22 MS. DINERSTEIN: First of all, we have cited  
23 controlling case law in the D.C. Circuit that holds that in the  
24 case of suspension since it is supposed to present -- prevent a  
25 short term imminent hazard that even short delays represent a

1 denial which is reviewable, represent in effect a final agency  
2 action.

3           And in the case of cancellation, if the agency  
4 unreasonably delays acting, it is a reviewable action. As to  
5 whether they have made a final action or not, that was actually  
6 less clear before they filed their brief in this case because  
7 when they most recently responded to Beyond Pesticides'  
8 petition, they said this is an interim reply and we are neither  
9 granting nor denying your petition.

10           But now before the Court they have said that they have  
11 made a determination to proceed by reregistration review and  
12 that it would be inappropriate to do anything else until that  
13 review is finished.

14           And so we regard that now with that additional  
15 explanation as a denial of our petition.

16           THE COURT: So would the decision to proceed on a  
17 reregistration path, would that decision be in your judgment a  
18 final agency action that's reviewable?

19           MS. DINERSTEIN: I think that it is because they have  
20 foreclosed doing anything else in the meantime. They have said  
21 we are not going to take any regulatory action until we complete  
22 this action, but it is not necessary to decide that because the  
23 inaction and delay is also reviewable.

24           THE COURT: Okay. Anything else?

25           MS. DINERSTEIN: I wanted to point out that EPA has

1 tried very hard not to address the risks of Pentachlorophenol in  
2 its brief. They haven't answered on the merits anything that we  
3 have said.

4           What they have done is they have tried to get a  
5 jurisdictional dismissal so they will never have to face the  
6 merits. They have tried to imply that they have unreviewable  
7 discretion and, therefore, there are certain questions that we  
8 think that they should answer that they have avoided totally and  
9 these questions --

10           THE COURT: This is in the context of the Preliminary  
11 Injunction Motion?

12           MS. DINERSTEIN: Pardon me.

13           THE COURT: Are these questions you believe they have  
14 to answer in the context of this --

15           MS. DINERSTEIN: Yes. Yes.

16           THE COURT: -- even in this posture where we are only  
17 focusing on the extraordinary relief, Preliminary Injunction?

18           MS. DINERSTEIN: Yes. Yes. That in order to rule on  
19 the Preliminary Injunction, we feel that they should answer what  
20 would it take for EPA to cancel or suspend? What kind of risks  
21 findings would take a pesticide out of the line of hundreds of  
22 pesticides and routine reregistration review and put it into the  
23 regulatory mode of action?

24           You know, if not this level of findings, then what?

25 And EPA they have made a big point of that they are '99 document

1 is a draft and is not the last word, but they haven't disclaimed  
2 anything in it. They haven't said that their new draft finds  
3 lower risks and more basically they haven't responded to: Well,  
4 what is an agency supposed to do when it finds a 340 percent  
5 risk of cancer in a draft?

6           Yes, we agree it is a draft, but when you get that  
7 kind of alarm bell going off, don't you quickly go back and  
8 see: Is this true? Did we make a mistake? And if it is true,  
9 we better do something.

10           THE COURT: Is there any type of, from your point of  
11 view, any type of guidance from the courts to give some sense of  
12 what an acceptable schedule for this reregistration review in  
13 terms of a time table is?

14           MS. DINERSTEIN: Well, when Congress amended FIFRA in  
15 1972, they were trying obviously -- they didn't succeed -- to  
16 expedite getting chemicals off the market and the legislative  
17 history shows that they thought that a year to two years was  
18 much too long; that cancellation proceedings were taking a year  
19 to two years and that when pesticides pose serious risks, they  
20 should be able to move faster than that.

21           And so in comparison this is really an egregious  
22 delay. They did a six year review in the '80s. They have done  
23 going on six years in this review and they have asked the Court  
24 to just give them carte blanche, not even set any time for them  
25 to finish this review.

1 THE COURT: All right.

2 MS. DINERSTEIN: I think I have completed most of what  
3 I intended to say here.

4 THE COURT: All right.

5 MS. DINERSTEIN: I would just like to conclude with  
6 the fact that given the risks that have been found and the  
7 extreme delay and EPA's continuing to tell the Plaintiffs next  
8 year, next year, next year and not acting that we can no longer  
9 rely on EPA to take prompt action as it should under the statute  
10 and according to what is required.

11 THE COURT: Thank you very much. We will hear from  
12 Miss Purdy.

13 MS. PURDY: Thank you, your Honor. I would like to  
14 start by focusing on a couple of lines that the Plaintiffs are  
15 trying to blur and I think the Court has already recognized one  
16 of those lines and that's the line between what they are asking  
17 for in their Complaint and what they are entitled to in a Motion  
18 for Preliminary Injunction. Those are two very different  
19 things.

20 They have said that we are trying to somehow insulate  
21 EPA from judicial review and most recently that we are asking  
22 for carte blanche to do whatever we prefer.

23 We have never said that these issues are necessarily  
24 wholly unreviewable, only that they have failed to meet the  
25 standard for Preliminary Injunction.

1           And there is a second standard that's very important  
2 here that again Plaintiffs are trying to kind of gloss over and  
3 that is the distinction between FIFRA and the Administrative  
4 Procedure Act. There are certain types of relief and review  
5 that are available under FIFRA. There are other types of relief  
6 and review that are available under the APA.

7           The Plaintiffs have tried to kind of mush these into  
8 one giant argument and one giant remedy and play mix and match  
9 and get things that they would only be entitled under the APA  
10 through FIFRA.

11           As it happens we don't think that they would prevail  
12 on a Preliminary Injunction Motion under either statute; but in  
13 the either event, they are analytically distinct and they need  
14 to be looked at separately.

15           THE COURT: All right.

16           MS. PURDY: And there is one other thing that the  
17 Plaintiffs I think keep trying to gloss off and that's really  
18 the truly extraordinary nature of the relief that they are  
19 seeking here.

20           It is well established that courts ordinarily are not  
21 going to substitute their judgment for an agency's on matters  
22 involving agency expertise. What Plaintiffs are asking the  
23 Court to do is not just to substitute judgment but to actually  
24 pre-empt that judgment, to take a step that EPA has said that it  
25 is not yet ready to take and to balance the risks of

1 Pentachlorophenol against its benefits.

2 I heard a lot about the risks of Pentachlorophenol  
3 here. I heard almost nothing about the benefits. That is  
4 something that the Plaintiffs have consistently glossed over and  
5 overlooked. FIFRA requires a balancing of costs and benefits.  
6 It requires the agency to look at that before it does anything.  
7 Before it even issues an emergency suspension order, there has  
8 to be some finding that there is an unreasonable adverse effect  
9 which is defined as risks succeeding benefits.

10 THE COURT: You would be in a better position to know  
11 this than I would, Miss Purdy, have any of the other Judges in  
12 this Court issued such an order suspending the products of this  
13 kind, not this particular product, but the kind of extraordinary  
14 relief that's being sought here?

15 Is there any precedent for it in this District?

16 MS. PURDY: There is none that I am aware of for an  
17 emergency suspension. There is none the Plaintiffs have cited  
18 for an emergency suspension.

19 THE COURT: All right.

20 MS. PURDY: Now, they rely on a trio of cases from the  
21 1970s, the Environmental Defense Fund cases, in which the Court  
22 did in one case order I believe a suspension proceeding.  
23 However, the critical thing about those cases is that the most  
24 the Court ever did was to order EPA to commence an  
25 administrative proceeding.

1           It never came in and said: You have to withdraw this  
2 from the market or we believe that the risks exceed the  
3 benefits. Just said: Start the proceeding.

4           THE COURT: So in this situation if this Court were  
5 to, for example, to -- I haven't made any decision obviously --  
6 but hypothetically if the Court were to say, well, you must  
7 commence a proceeding to consider the possibility of a  
8 cancellation as opposed to ordering a cancellation or  
9 suspension, that would be a little closer to what's maybe  
10 occurred in the past?

11           MS. PURDY: Yes, your Honor, it would. I would note  
12 that the ongoing review of Pentachlorophenol although it is not  
13 apparently proceeding as quickly as Plaintiffs would like is  
14 examining already precisely the issues that would be examined in  
15 a cancellation proceeding. What are the risks? What are the  
16 benefits? What are the alternatives out there?

17           Ultimately when all of that is pulled together, do the  
18 risks outweigh the benefits or not?

19           THE COURT: So when they chose that path then, to go  
20 the reregistration path as opposed to the cancellation  
21 suspension path, the kinds of inquiries they had to make by  
22 going down that route are similar in many ways?

23           MS. PURDY: The kinds of increase that are going to be  
24 made in the reregistration process are similar, yes. The  
25 statutory standard is ultimately the same. Regardless of the

1 process by which you get there, EPA still has to ask itself the  
2 same questions. It is the same standard that has to be met.

3           So those questions, yes, are already being examined  
4 through the reregistration review process. A separate  
5 cancellation hearing although, yes, it would be closer to what  
6 the Court has actually granted in the past, it would really be  
7 duplicative of a process that's already ongoing.

8           THE COURT: I see.

9           MS. PURDY: So we would note that Plaintiffs have in  
10 their reply and again in argument today suggested a number of  
11 other alternative reliefs that the Court could grant. They have  
12 just kind of thrown out a laundry list. None of those were  
13 mentioned in their Motion for Preliminary Injunction.

14           We really have not had an opportunity to consider each  
15 one of those and the standards and whether or not that would be  
16 appropriate and we would object to their efforts to retool their  
17 Motion and revise the relief that they are actually seeking  
18 through their rely.

19           Now, with regard to the specific standards applicable  
20 to their Motion for Preliminary Injunction, the standards are  
21 well known. The Plaintiffs have to show that they would suffer  
22 an irreparable injury if the Motion isn't granted, that they are  
23 likely to succeed on the merits, that an injunction would not  
24 injure third parties, and that an injunction furthers the public  
25 interest.

1           In this case because the Plaintiffs are seeking a  
2 mandatory Preliminary Injunction that would order EPA to take  
3 action to immediately suspend Penta's registration, they face a  
4 heightened standard.

5           They have to show that they are clearly entitled to  
6 relief and that extreme or very serious damage would result from  
7 a denial.

8           Starting with the irreparable injury, one of the  
9 things that the Court is entitled to consider is their delay in  
10 seeking relief and I think the Court has already raised this and  
11 addressed this.

12           Plaintiffs really couldn't identify anything that has  
13 happened recently that made it -- that has created an urgency  
14 such that they need a preliminary injunction.

15           THE COURT: This isn't like the classic situation  
16 where a house is about to be torn down that may have historic  
17 value and you got to stop the bulldozers from tearing it down.

18           MS. PURDY: Precisely. I mean depending on which  
19 point you look at in the history of contacts that Plaintiffs  
20 have laid out, their delay has been anything from ten months to  
21 several years. Again, we are not making a latches argument or  
22 saying that they should not have somehow filed their Complaint.

23           We are just saying that that delay undercuts their  
24 claim of irreparable injury.

25           We have cited several cases in which courts have

1 considered even much lesser delays, periods of weeks instead of  
2 months or years as suggesting that in fact that there is no  
3 irreparable injury and so including the D.C. Circuit case in  
4 which the D.C. Circuit characterized a 44 day delay as  
5 inexcusable and that was a factor that counseled, one of the  
6 factors that counseled granting a Preliminary Injunction.

7           Plaintiffs have cited to some cases where there have  
8 been negotiations, where dialogue with the agency, I don't think  
9 those cases are apt here is because what has happened is  
10 Plaintiffs have gone to EPA on several occasions and said: We  
11 think you should cancel and suspend the registration for  
12 Pentachlorophenol. And EPA has said: No, we are considering it  
13 through the reregistration process.

14           There hasn't been a dialogue, an effort to, you know,  
15 well, maybe we could this; no, we don't like that. Maybe there  
16 is some other solution.

17           EPA's position has been consistent. And again, if  
18 Plaintiffs believe that there has been some sort of unreasonable  
19 delay here, they are entitled to go ahead and proceed with the  
20 lawsuit, but that doesn't get them a Preliminary Injunction.

21           There is something else that undercuts their claim of  
22 irreparable injury and that is there is really no guarantee that  
23 the urgent relief that they have requested will solve the  
24 problems they identified. Even if the sale and distribution of  
25 Pentachlorophenol treated products is stopped tomorrow, there

1 are still Pentachlorophenol treated telephone poles out there.

2           Utility companies may or may not have stocks of those  
3 treated telephone poles and, if they do, those could still be  
4 used for replacement. Plaintiffs haven't offered any evidence  
5 that an order saying, you know, as of tomorrow you can no longer  
6 sell or distribute Pentachlorophenol would actually solve any of  
7 the problems that they are pointing to.

8           THE COURT: Right.

9           MS. PURDY: So for those --

10           THE COURT: And your position in that regard would be  
11 that they would need to demonstrate how much more evidence to --  
12 I mean certainly you are arguing more than they have shown, but  
13 is it your position that they would have to be able to  
14 demonstrate some necessary consequence of a positive nature if  
15 the injunction were granted that would flow from it? Would they  
16 have to go quite that far?

17           MS. PURDY: I don't know that they have to go that  
18 far. It is a little difficult to discuss in the abstract. I am  
19 not sure that there is some absolute quantum, but given that  
20 they are asking for an injunction that would have a really an  
21 extraordinary, a potentially extraordinary impact -- I mean I  
22 understand that the Court has not yet reviewed the amicus  
23 briefs.

24           However, just the fact that they have been submitted  
25 suggests that there are third parties out there who don't agree

1 with Plaintiffs that this would be an insignificant action.

2           And if what Plaintiffs are concerned about is exposure  
3 to Pentachlorophenol, you know, the presence of  
4 Pentachlorophenol in treated utility poles, that concern isn't  
5 necessarily served by an emergency suspension.

6           Now, as to whether that can be addressed through the  
7 underlying litigation, again, that's a different question.

8           THE COURT: In assessing the various standards that  
9 the Court has to look at in evaluating the Preliminary  
10 Injunction, would the Court necessarily have to be concerned  
11 about the injury that would befall others, people in this  
12 industry, for example, if an injunction were granted in this  
13 type of situation?

14           MS. PURDY: Yes, absolutely. You know, the injuries  
15 to third parties. Also the public interest which in this case  
16 to some extent dovetail.

17           THE COURT: They intertwine.

18           MS. PURDY: Yes, absolutely. Those are factors that  
19 the Court would consider. Presumably that's with why the amicus  
20 has spoken up because they have interests that they wish to be  
21 considered.

22           And Plaintiffs have really offered nothing other than  
23 some position papers and some unsupported assertions to  
24 establish that in fact if Pentachlorophenol products were  
25 suddenly unavailable, it would just be no big deal. There would

1 be readily available alternatives. Those could be geared up at  
2 a moment's notice.

3           They really haven't offered anything to let the Court  
4 know what the consequence of this order would be. They are  
5 really asking for an order on kind of blind trust that it is all  
6 going to work out and that these alternatives will be available  
7 and there really won't be any impact on third parties.

8           THE COURT: In effect, the EPA if I understand it  
9 correctly in conducting its reregistration procedure is not only  
10 taking into consideration, for example, other alternatives that  
11 may be out there; but really the consequences beyond the health  
12 which are paramount, of course, but nevertheless also the  
13 collateral consequences that denying registration would have on  
14 society. It is not just limited to the health.

15           MS. PURDY: That's part of the cost benefit analysis  
16 that FIFRA contemplates because a pesticide that poses very high  
17 risks may nonetheless have very high benefits. EPA has to  
18 balance that and to look at the benefits. Yes, there are  
19 necessarily considerations other than purely what are the health  
20 risks that EPA has to look at carefully and thoroughly through  
21 that administrative process.

22           THE COURT: Okay.

23           MS. PURDY: I think we have managed to get to three of  
24 the four Preliminary Injunction factors which leaves us with the  
25 likelihood of success on the merits. Again, we are talking

1 about two analytically distinct statutes: FIFRA which is the  
2 statute under which Plaintiffs originally sought relief and the  
3 Administrative Procedure Act.

4 Under FIFRA, there is a jurisdictional provision that  
5 allows for judicial review only in a narrow set of  
6 circumstances. It allows review for the refusal of EPA to  
7 cancel or suspend a registration or to change a classification  
8 not following a hearing and other final actions.

9 So there has to be a final action. And they have  
10 cited the 1970s cases for the proposition that there somehow has  
11 been a final action here.

12 First of all, those cases were not construing the same  
13 statute. Waivers of sovereign immunity have to be explicit.  
14 They have to be expressed. The plain language of the statute  
15 now says there has to be final action and there hasn't been  
16 final action.

17 THE COURT: Why wouldn't the decision by the agency to  
18 choose to go the reregistration route as opposed to go the -- to  
19 look into a cancellation and suspension route, why wouldn't that  
20 decision in and of itself be a final action for the purposes of  
21 review?

22 I assume that's your position; is it not, right? So  
23 why wouldn't it be since they chose a path and obviously they  
24 are going down that path, the Plaintiffs feel that that was the  
25 wrong path to choose and that the decision was an abuse of

1 discretion I believe was the way it was characterized, so why  
2 would you say legally that's really not a final action of the  
3 kind necessary for a Court to be in a position to be reviewing  
4 it?

5 MS. PURDY: Well, a couple of issues there. First of  
6 all, it is not clear that their Preliminary Injunction Motion  
7 really challenges that decision; but to the extent that it does,  
8 I am not sure that there has been a decision, that it was quite  
9 as formal as they are trying to define it.

10 And a decision to follow, even assuming there has  
11 been, a decision to follow one administrative process or another  
12 does not impose any kind of consequences or create any kind of  
13 legal obligations or rights in the way that a final action  
14 ordinarily does.

15 All that EPA did was to say: Well, we are looking at  
16 Pentachlorophenol through the reregistration process. We are  
17 not going to initiate a parallel cancellation proceeding. They  
18 still haven't made any final decision about whether or not Penta  
19 is going to be reregistered, whether additional restrictions are  
20 appropriate.

21 It just isn't at a point where there have been any  
22 consequences or concrete kind of effect of that decision.

23 So returning briefly to the Environmental Defense Fund  
24 cases that Plaintiffs cite, it is true that in those cases there  
25 is some statements to the effect that inaction had the same

1 impact on the rights of the parties as denial of relief and that  
2 therefore inaction was in essence final action.

3           The problem is that the statute has changed  
4 significantly since those cases were decided. Specifically the  
5 reregistration program has come into effect so that it is no  
6 longer the case that if EPA simply sits on a cancellation  
7 petition, the administrative process may be indefinitely  
8 stalled. The issues are being looked at through that  
9 administrative process.

10           Even if Plaintiffs could get past that jurisdictional  
11 hurdle, they couldn't succeed on the merits of their FIFRA  
12 claim. I think we have already discussed a lot of this, but  
13 what it comes down to is that at every step of the FIFRA process  
14 you have to balance costs or risks against benefits. And  
15 Plaintiffs have not presented anywhere near sufficient evidence  
16 to establish that in fact the risks outweigh whatever benefits  
17 may be out there.

18           They are asking us to just take their word that there  
19 really aren't any benefits to FIFRA any more that aren't  
20 adequately served by these alternatives.

21           Again, the Environmental Defense Fund cases that they  
22 rely on in part to, you know, to show that somehow the benefits  
23 don't matter once you find the risks, again those were decided  
24 under a very different statutory regime. The Courts were  
25 extremely concerned with creating a public process and allowing

1 for public participation and input in EPA's work.

2           That process exists through the reregistration. It is  
3 transparent. There are going to be opportunities for public  
4 comment at every major step. Those concerns just aren't present  
5 any more.

6           And finally as I have already noted even in those  
7 cases the Courts simply did not go as far as Plaintiffs and even  
8 on what were not Preliminary Injunction cases, the Courts did  
9 not go nearly as far as Plaintiffs are asking the Court to go  
10 here on a Motion for Preliminary Injunction.

11           Now, all of that doesn't mean that Plaintiffs are  
12 simply stuck until EPA acts. The APA authorizes review of  
13 agency inactions. Plaintiffs didn't assert an unreasonable  
14 delay claim in their Motion for Preliminary Injunction and even  
15 if they had done so, they wouldn't be able to show a likelihood  
16 of success on the merits on that claim.

17           And the D.C. Circuit has set the standards that apply  
18 to an unreasonable delay claim commonly known as the track  
19 factors. Plaintiffs suggest in their rely that these are kind  
20 of an optional alternative test that the Court can look at.  
21 They are not. They are the standards that apply to an  
22 unreasonable delay claim.

23           The relevant factors are discussed in our brief, but I  
24 think just a couple of points that they have raised in their  
25 reply should be addressed.

1           First of all, they say that EPA hasn't identified any  
2 priorities that might compete with its consideration of  
3 Pentachlorophenol and recently today they have said that as far  
4 as they know we may just be considering pesticides in  
5 alphabetical order.

6           Congress did some set some priorities first of all.  
7 When Congress established the reregistration program, it  
8 required EPA to start with certain categories of pesticides. So  
9 that's one set of priorities.

10           And in addition while Plaintiffs are very focused on  
11 Pentachlorophenol, as Mr. Hausering's declaration explains,  
12 there are over 600 active ingredients, pesticide active  
13 ingredients, that EPA is considering as part of this process.

14           In light of these priorities and in light of the  
15 hundreds of other ingredients that EPA is looking at, it is  
16 certainly within -- the time that this has taken is certainly  
17 within the rule of reason which is all that's required by  
18 track.

19           And second with regard to the sort of public health  
20 and welfare issues that they have raised, to some extent  
21 everything that EPA does is both public health and welfare so  
22 that's always going to be an issue but Plaintiffs are making  
23 some really hyperbolic claims about the entire population being  
24 at risk without I think as, your Honor, has noted without really  
25 submitting any kind of evidence that connects causally the risk

1 assessment numbers to any actual exposures or any actual impact.

2           So we don't think the Plaintiffs have shown that they  
3 are likely to succeed on the merits of their claim under FIFRA  
4 and we don't think that they have shown that they are likely to  
5 succeed on a claim for unreasonable delay even if they asserted  
6 that claim.

7           And I would just like to close by noting again what  
8 the Court or what Plaintiffs are asking the Court to do which is  
9 really to take an extraordinary step really on almost blind  
10 faith that it is all going to work out, that there won't be  
11 serious consequences. There will be alternatives available.

12           These are the kinds of things that EPA needs to  
13 consider, consider carefully, consider thoroughly hearing from  
14 everyone, hearing from Plaintiffs and other Pentachlorophenol  
15 opponents, hearing from Pentachlorophenol registrants, industry  
16 representatives, taking all of that, considering of all of it  
17 and coming to a conclusion.

18           And Plaintiffs just have offered no justification for  
19 asking the Court to do that kind of balancing in this kind of an  
20 expedited proceeding. For all of those reasons we believe that  
21 their Motion should be denied.

22           THE COURT: Thank you, Miss Purdy. Mr. Handley. I  
23 note at the outset, Mr. Handley, judicial economy prohibits me  
24 from giving you the exact amount of time that I have given each  
25 of these advocates.

1           Since it is a reply, if you could maybe keep it to ten  
2 minutes or something like that.

3           MR. HANDLEY: I will do my best. There was an awful  
4 lot there and, as you have seen from the briefs, we have a lot  
5 to say. We have used a lot of pages to do it.

6           THE COURT: You do.

7           MR. HANDLEY: I guess I would like to start with the  
8 last point that EPA is saying that the Court is being asked to  
9 rely on blind faith. I don't think that's a fair  
10 characterization of the situation at all; but if they feel that  
11 way, we certainly wanted to get their record and especially  
12 focus on the information they have about alternatives.

13           We have submitted information about alternatives in  
14 the form of affidavits that talks about information and  
15 summarizes information that our clients have submitted to the  
16 agency. So what we are suggesting is this is the minimum amount  
17 of information that the agency currently has in its records  
18 concerning alternatives and with that information it strongly  
19 suggests that these alternatives would work, they are available  
20 and, for example, the steel producers say that they could meet  
21 current demand.

22           So the suggestion that we just don't know enough about  
23 what would happen if there was a suspension, we have attempted  
24 to refute that. We would certainly like to have the agency's  
25 full record on alternatives and be able to examine all the

1 questions that they raised about what needs to be considered in  
2 an alternatives analysis so that the Court could do a complete  
3 analysis on that; but in the absence of that, we have provided  
4 what we know about in terms of alternatives and in terms of the  
5 benefits that do exist for this pesticide.

6           THE COURT: Now what about the point that Miss Purdy  
7 is making with regard to the extraordinary nature of the action  
8 you are seeking, the relief you are seeking here?

9           Do you admit that there isn't really any precedent and  
10 certainly in recent memory in this Court of issuing the type of  
11 suspension that you are seeking under your Motion?

12           MR. HANDLEY: Well, the EDF case did order an  
13 emergency suspension and that's still as far as we know good law  
14 in the District of Columbia. They make -- the EPA makes the  
15 argument that the law has changed, that FIFRA is somehow  
16 different than it was at that time and they point to the  
17 jurisdictional judicial review provision to say that that  
18 changes the review standard.

19           There is no indication in the legislative history that  
20 Congress intended to narrow judicial review when it revised that  
21 provision. In fact, the point of that was to allocate the  
22 responsibilities between the District Court and the Court of  
23 Appeals there.

24           And, in fact, the new provision talks about failure to  
25 suspend or cancel. So I think it is even in some ways clearer

1 in the new provision what was intended to be reviewed which was  
2 when the agency was asked to do something and failed to do it.  
3 And the only case that EPA cites is this Cengenta case which was  
4 decided on rightness grounds to suggest that the Court doesn't  
5 have jurisdiction or the ability to review this issue.

6           But to answer your question more directly in terms of  
7 extraordinary relief, yes, this is extraordinary relief; but  
8 when we have a 19 year history of delay, we have unrefuted  
9 findings that have if anything escalated during that period of  
10 time concerning risk, we have correspondence going back and  
11 forth asking for action, promising to do it and not fulfilling  
12 those promises, there has to be a point where something gives.

13           And we are saying that the Court has reached the point  
14 where it can order this extraordinary relief and the  
15 extraordinary relief I would point out is limited in time and in  
16 scope. It is to start an agency process. We are not saying  
17 that the Court would pre-empt the agency process.

18           In fact, this is in some ways an easy case for the  
19 Court in terms of reviewing agency action. The scientific  
20 issues that the agency -- the scientific findings that the  
21 agency has made are not really an issue here. No one is saying  
22 that these risks findings -- you didn't hear Miss Purdy say that  
23 the risk findings they have made, that they don't agree with any  
24 more or they have changed their mind or that they have moderated  
25 or reduced those.

1           Those are all in the record and the Court doesn't have  
2 to take our word for the reliability of those. They are  
3 uncontested. The agency has made those findings and continues  
4 to stand by those.

5           THE COURT: But the emergency Motion you are asking,  
6 emergency suspension that you are asking for in effect would  
7 last for quite awhile, would it not?

8           MR. HANDLEY: Well, it would start a process under  
9 which the agency would begin to conduct hearings and determine  
10 what to do about Penta on an expedited basis.

11           And in that process it would have to consider the  
12 benefits as well which seems to be the thing that the agency is  
13 stuck on. They have gone back it appears to us doing this  
14 reregistration process which Congress mandated to get rid of  
15 grandfathered pesticides. It really wasn't intended as a  
16 substitute for the suspension, cancellation provisions.

17           And, in fact, when Congress reauthorized the statute,  
18 it left in those cancellation and suspension provisions. There  
19 was no decision to okay, everything is going to go through a  
20 reregistration process and we won't need the suspension and  
21 cancellation provisions. No, we still have this emergency  
22 provision in there to get us off the slow track in case there is  
23 a finding, in case there is a need, in case there is a public  
24 health emergency that suggests we need to do something faster  
25 than that.

1           And the suspension/cancellation process is a process.  
2 It is not an end in itself.

3           During that process the registrants and affected  
4 parties would be able to submit information and the agency would  
5 make a reasonable decision about the final outcome of that. So  
6 the suspension is an interim measure that begins the process and  
7 gets the agency towards the whole adversary proceeding that  
8 cancellation is.

9           THE COURT: Remind if you would, does the suspension  
10 process envisioned by the regulations have any set time frame in  
11 which it must be completed?

12           MR. HANDLEY: I would have to check on that. I do  
13 believe that it does, but I am not sure about that. But  
14 certainly the Court could order a time frame for, you know, for  
15 a suspension hearing to be set; and that's the kind of relief  
16 that we are asking for is put the agency on a schedule.

17           One of the other points that was made was we are  
18 somehow changing our tune here by asking for different relief.  
19 Well, of course, our Motion for Preliminary Injunction recited  
20 such other relief as the Court may deem just or some words to  
21 that effect.

22           THE COURT: Right.

23           MR. HANDLEY: EPA in its own documents had said that  
24 suspension hearings take three to four months. That's to answer  
25 your question there. The EDF case I am corrected here ordered a

1 cancellation as opposed to a suspension. But the suspension is  
2 the interim remedy to stop the harm that's accumulating while  
3 the process gets under way.

4           One of the other points that was raised here is that  
5 we don't have enough information or enough of a case on imminent  
6 harm. The daily accumulation of Pentachlorophenol in the  
7 environment, the daily manufacture of it, the incremental use of  
8 it, we are talking about a million poles per year being put into  
9 service is additional harm.

10           And although you don't have the same kind of situation  
11 that you mentioned where a house is about to be knocked down,  
12 you do have a situation where a public health is being  
13 incrementally impacted by each of these additional burdens.

14           In fact, there is evidence to suggest that some of  
15 these chemicals have cumulative effects. So the fact that there  
16 have been 18 years of delay certainly shouldn't excuse further  
17 delay.

18           THE COURT: For example, is there any evidence that  
19 people, pole workers, people who are in constant contact with  
20 these poles that have been treated, has there been any other  
21 over the last year or two or three any marked increase in the  
22 their instances of cancer?

23           MR. HANDLEY: I wouldn't be able to say that it has  
24 increased over the past few years, but we do have information  
25 about personal injury lawsuits over the lifetime of the

1 registration.

2 THE COURT: There has been more suits?

3 MR. HANDLEY: Relating to Pentachlorophenol, and we  
4 have more information about some coming on more recently. But  
5 you can't really draw very much of a conclusion about that.

6 THE COURT: Yes. That might just be evidence that more  
7 lawyers have figured out that's brought a good basis to bring a  
8 lawsuit than there has actually been more harm befalling  
9 people. It is hard to say what that really proves.

10 MR. HANDLEY: Right. And so we can't point to any  
11 sort of new kind of harm that's occurred say since the 1997  
12 petition started flowing into the agency or since the 1999  
13 decision or risk assessment that the agency published showing  
14 these elevated findings.

15 But I think the new thing at least in our way of  
16 thinking about it is, the new thing is the agency has continued  
17 to say that it would move into a faster track and it hasn't done  
18 so and it has made these elevated findings in 1999 which have  
19 not yet been acted on. It seems to us that at a minimum such  
20 elevated findings would trigger the agency to look at the  
21 alternatives analysis which it is said all the way back in 1984  
22 was the piece of the puzzle that it lacked to go the whole way  
23 and cancel Pentachlorophenol.

24 So without even needing to go over the whole risk  
25 analysis again, the '84 analysis stands unrefuted and the only

1 piece missing is the benefits analysis which it said was the  
2 only reason, was essentially but for causation, if you will, for  
3 not going ahead with cancellation of Pentachlorophenol.

4           They said but for those lack of alternatives, we would  
5 cancel. We have enough information about risk and harm to  
6 justify that. It is the lack of alternatives, the fact that  
7 there isn't a substitute available that prevents us from going  
8 that full distance.

9           THE COURT: What about the public interest argument  
10 that Miss Purdy has raised? As you know under the standards  
11 that are required to be evaluated for issuing a Preliminary  
12 Injunction, the Court has to evaluate the public interest and  
13 the harm to others that may occur as a result of issuing the  
14 injunction.

15           What do you say to the issue that issuing some  
16 extraordinary relief of this kind would have negative  
17 consequences on people in the public that the Court shouldn't be  
18 insensitive to or indifferent to? The Court has to take that  
19 into consideration.

20           MR. HANDLEY: I certainly agree with that, that there  
21 is a balance involved here and the case law so holds. It is  
22 important to note that EPA's policy statements concerning  
23 registration standards clearly indicate that the agency does not  
24 consider effects on the manufacturers and the registrants of the  
25 pesticides in making the risk benefit balance that it makes.

1           The benefits that it talks about in registration  
2 relate to the users of the product. So in the analysis that's  
3 appropriate here, the users would be the appropriate framework;  
4 and then you are talking about public utilities and the public's  
5 ability to get electricity and telephone service, for example.

6           The fact that it might have an adverse effect on a  
7 particular industry, the industry making Penta, for example, is  
8 not to be weighed one way or the other because there is an  
9 offsetting benefit. For example, the steel industry, the  
10 Fiberglas industry, the concrete history would be able to  
11 benefit from the agency's change in position in terms of the  
12 registration of Pentachlorophenol.

13           So the adverse effects and the public interests should  
14 not consider the effect on the industry per se but rather the  
15 affect on the users as a whole. So I am not sure that answered  
16 your question.

17           THE COURT: Well, is there evidence at this point on  
18 the record that would indicate that the consequence of issuing  
19 such an order would have a minimal effect or no effect of a  
20 negative kind on those other interests in the public?

21           MR. HANDLEY: We submitted affidavits from steel  
22 producers and from Fiberglas producers and the steel producers  
23 suggested that, and they have submitted information to the  
24 agency, that they are in a position now to meet the demand for  
25 replacement telephone poles. So that certainly suggests to us

1 that there is adequate capacity for a replacement to begin  
2 today.

3           And Miss Purdy talked about the fact that even if you  
4 ordered our remedy, it wouldn't address the harm because the  
5 telephone poles are already in the market or out in people's  
6 backyards and so forth. That in effect is true. We are not  
7 asking the agency to order all the telephones poles in the  
8 United States to be ripped up and replaced with steel or  
9 concrete. That's not obviously not what we are talking about.

10           THE COURT: How many? It would be millions and  
11 millions and millions of poles, aren't there, right now in  
12 existence?

13           MR. HANDLEY: That's not anywhere near -- we are not  
14 even talking about that.

15           What we are saying stop the incremental harm that's  
16 happening from continuing to introduce more of this into the  
17 marketplace. Obviously there will have to be disposal and other  
18 issues when the existing Pentachlorophenol poles are taken out  
19 of service and that's another whole question; but what we are  
20 talking about now is EPA's responsibility to stop the continued  
21 distribution of this product into the market when it knows that  
22 the risks are much too high for it to continue registration and  
23 there is no offsetting benefit when there are alternatives  
24 available, three different kinds that we have noted.

25           THE COURT: Okay. I will give you a minute if you

1 want to wrap up.

2           MR. HANDLEY: Yes, I just wanted to kind of look  
3 through my notes here. I was writing furiously. (Pause.)

4           I wanted to address the question of sort of FIFRA  
5 versus the APA and how they fit together.

6           EPA is saying that we somehow confused those two.  
7 They fit together. FIFRA sets a standard for registration and  
8 the APA sets a standard for review of unreasonable delay or  
9 unlawfully withheld action.

10           Whether we couch this as a Preliminary Injunction  
11 Motion under the four part standard in the D.C. Circuit or under  
12 the track analysis, you get some of the same factors and the  
13 public interest becomes really the most important one in our  
14 view.

15           So I don't think -- we could certainly argue this the  
16 same way under the track analysis and I think we would come to  
17 the same conclusions.

18           Oh, I wanted to point out that you suggested that you  
19 hadn't looked at the amicus filings, but in the footnote eight  
20 of the brief, there is an interesting revelation that Europe  
21 does not use Pentachlorophenol for telephone poles. It is used  
22 for other uses. So that suggests that in terms of the harm to  
23 the public or the balancing of the public interest here is an  
24 entire continent that essentially gets by without having  
25 Pentachlorophenol treated telephone poles suggesting that

1 alternatives are available, that they work; and, as I said  
2 before, the telephone and electricity services seem to work  
3 reasonably well in Europe.

4 THE COURT: That might be a subject of different  
5 opinion.

6 MR. HANDLEY: Well, they are not the same.

7 THE COURT: The Court has no opinion on that subject,  
8 but it might be subject to a different opinion. I can't take  
9 judicial notice on that.

10 MR. HANDLEY: One of the things that the agency is  
11 talking about is they have suggested that we are asking the  
12 Court to sort of jump the gun and get ahead of what the agency  
13 has already done and to essentially pre-empt the agency's review  
14 concerning benefits.

15 One of the remedies that we have suggested in our  
16 papers is order the agency to do benefits analysis that is  
17 apparently outstanding and has not been completed and which  
18 according to its '84 findings would complete the project and let  
19 us know whether the benefits outweigh the risks or not. So look  
20 at the alternatives. Do the alternative analysis.

21 They have revealed recently that they have just begun  
22 the benefits analysis. This is indeed a troubling situation  
23 after 19 years of delay that the benefits analysis has only  
24 begun when that was identified as the missing piece as far back  
25 as 1984.

1 I think that will do it.

2 THE COURT: All right, Mr. Handley. Thank you very  
3 much. Miss Purdy, I will give you two minutes. That's it.

4 MS. PURDY: That should be easy because I just have a  
5 couple of very minor points I would like to address here.

6 One is that as Mr. Handley has just characterized the  
7 1984 assessment as having said, well, we haven't done a benefits  
8 analysis. That's not at all what it said. Based on the risks  
9 and benefits of Pentachlorophenol at that time, EPA concluded  
10 that for certain uses the benefits of Penta outweighed the  
11 risks.

12 It is reexamining that issue through the  
13 reregistration process to determine whether now that balance  
14 comes out the same way. That's not the same thing as having  
15 never simply looked at the benefits.

16 And the other, I would just briefly like to note that  
17 since Mr. Handley has --

18 THE COURT: Let me ask you a question about that.

19 MS. PURDY: Yes.

20 THE COURT: It just occurred to me. With regard to  
21 the reregistration process, does the agency as part of its  
22 decision to conduct a reregistration process, does it set at the  
23 outset any kind of -- well, let me put it this way: Does it  
24 indicate externally as opposed to internal decision-making, does  
25 it externally indicate a time table in which it will be

1 conducting the reregistration; or is that just an internally  
2 known decision as to what its goal is as to how long it is going  
3 to spend or try to spend on the process?

4 MS. PURDY: A couple of points there. First of all,  
5 in terms of its decision to conduct the reregistration process,  
6 in some sense that decision was made by Congress. I mean  
7 Congress said you have to do this reregistration for all  
8 pesticides registered before 1984.

9 There were a couple of limited exceptions so there  
10 isn't a pesticide by pesticide decision that we are going to do  
11 reregistration or we are going to do something else.

12 THE COURT: All right.

13 MS. PURDY: So that's the first question. In terms of  
14 there being sort of a time table, I believe Mr. Hausering's  
15 declaration discusses the different phases that the process has  
16 gone there. I don't know if there is some sort of formal  
17 guidance or document on that. I am not aware of one. I could  
18 certainly check on that for the Court but Mr. Hausering's  
19 declaration discusses generally the phases EPA has gone through  
20 in the reregistration review of all pesticides.

21 THE COURT: Okay.

22 MS. PURDY: And I believe that that is it if I could  
23 just take a look at my notes for a moment here.

24 THE COURT: Sure.

25 MS. PURDY: I think just again with regard to the

1 relationship between FIFRA and the APA, in some senses they may  
2 fit together or exist along parallel tracks; but it still  
3 doesn't change the fact that they are separate statutes. You  
4 look at them separate. Made out of claim under one, made out a  
5 claim under the other. It is an entirely separate analysis  
6 instead of just kind of muddling everything into one big bowl  
7 and trying to say: Well, we need FIFRA. Therefore, it has been  
8 unreasonable delay. Therefore, we get this remedy that  
9 ordinarily would be available under the APA.

10           And I have nothing further. Oh, excuse me. I am sorry.  
11 I believe counsel for Plaintiffs may have corrected this, but  
12 just to make clear in case I misspoke, none of the Environmental  
13 Defense Fund cases actually ordered an emergency suspension.  
14 They did order EPA to issue a Notice of Cancellation at one  
15 point to commence proceedings but there weren't any suspensions  
16 ordered. So thank you.

17           THE COURT: Okay. All right. Well, I want to thank  
18 both sides for their very good briefs and oral arguments today.  
19 The Court needs to take this under consideration and under  
20 advisement.

21           Obviously we are going to be getting some follow up  
22 pleadings too so I look forward to reviewing those especially as  
23 they may relate to one of the issues that we have talked about  
24 with regard to the granting of the Preliminary Injunction in  
25 this case.

1           So I will look forward to receiving those in the  
2 future and then reviewing them and hopefully give you a decision  
3 shortly thereafter. Thank you very much. We will stand in  
4 recess.

5           (Whereupon, the proceedings were concluded at 12:22  
6 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

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