

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

5.

Civil Action No. 1:02CV2419
RJL

CHRISTINE T. WHITMAN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

SUPPLEMENT TO PLAINTIFFS' MOTION TO
COMPEL SUBMISSION OF THE ADMINISTRATIVE RECORD
REGARDING EUROPEAN UNION ACTION ON PENTACHLOROPHENOL

At the hearing of January 7, 2003 on Plaintiff's Motion to Compel Submission of the Administrative Record and Defendant's Cross-Motion for Protective Order, the Court posed a question concerning the European Union's (EU) ban of pentachlorophenol ("penta") as a wood preservative and how long it took the EU to research and institute that ban. Plaintiffs referred to the EU ban and cited an EU document on the internet with regard to that ban in their Memorandum in Support of their Motion for Preliminary Injunction, p. 4 and n. 8. To answer the Court's question and for the Court's convenience, Plaintiffs here summarize the EU action and attach the relevant documents in electronic form.

In 1991, the EU prohibited the use and marketing of penta, with the exception of wood preservative use (with some restrictions), and three other minor uses. At that time,

the content of certain dioxin impurities in the penta that could still be used was restricted, and use was generally restricted to “industrial and professional use.”¹ The 1991 Directive also provided that the exceptions to the ban were to be reconsidered “in light of the changes in knowledge and technology no later than three years after the implementation of the Directive.”² The first review was carried out in 1995, and at that time a decision was made not to amend the 1991 Directive, because “the assessment of possible substitutes had not led to acceptable results and needed further examination.” *Id.* That further examination was concluded in 1998, resulting in the adoption of Commission Directive 1999/51/EC (attached as Exhibit 2), which “amounts to a ban on the use of substances and preparations to which PCP [penta] and its salts and esters have been added intentionally.”³ The total ban was based on the conclusion of the 1998 review that “in fact less dangerous alternatives were available.”⁴

¹ Council Directive 91/173/EEC, described in Commission Decision of October 26, 1999, (1999/831/EC), attached as Exhibit 1, at I.1. (2) and (3).

² *Id.*, at I.1(4).

³ Exhibit 1 at I.1.(5).

⁴ *Id.*, at III.3.1.1(62).

The 1999 Directive recited that “pentachlorophenol still poses a risk to health and to the environment despite the restrictions introduced [previously].”⁵ It was dated May 26, 1999, and required the Member States to adopt implementing legislation by February 29, 2000, and for its provisions to take effect September 1, 2000.⁶ With regard to the “oceanic maritime Member States,” where “certain uses of [penta] are still necessary, for technical reasons,”⁷ France, Ireland, Portugal, Spain and the United Kingdom were permitted to choose not to apply the total ban until Dec. 31, 2008, but rather abide by the 1991 restrictions, with the amount of allowable dioxin impurities further reduced from the 1991 Directive.⁸

⁵ Exhibit 2 at (4).

⁶ Exhibit 2 at Article 2.

⁷ *Id.*, at (4).

⁸ Exhibit 2, Annex at ¶ 2.

Long before the total ban directed by the European Union, some Member States had already implemented total bans on penta. The Netherlands had banned all uses, including the wood preservative use of penta in 1989.⁹ Germany also instituted a total ban in December of 1989.¹⁰ Denmark has prohibited the use of penta in wood preservatives since 1977, while giving the Danish Environmental Protection Agency power to authorize exceptions to the ban. However, as of the EU ruling on the Danish law in 1996, the exception powers had never been used.¹¹ Sweden replaced penta as a wood preservative in 1981.¹² In addition to the European Union countries, Beyond Pesticides has submitted information to EPA concerning complete bans of penta in Benin, Columbia, Costa Rica, Dominican Republic, Egypt, Guatemala, Hong Kong, India, Indonesia, Jamaica, Korea, Liechtenstein, Malaysia, Moldava, Nicaragua, Panama, Paraguay, Taiwan, and Yemen.¹³

Plaintiffs contend that these actions by the European Union, European Union Member States and other countries throughout the world demonstrate that alternatives to

⁹ Exhibit 1, at III.3.1.2.(56).

¹⁰ *See*, 94/783/EC: Commission Decision of 14 September 1994 concerning the prohibition of PCP by the Federal Republic of Germany, 1994 Official Journal L316, pp. 43-48, attached as Exhibit 3, at I.1.

¹¹ 96/211/EC: Commission Decision of 26 February 1996 concerning the prohibition of pentachlorophenol (PCP) notified by Denmark, Official Journal L068, 19/03/1996, pp. 0032-0040, Exhibit 4 at II.(3).

¹² *See*, Exhibit 4 at II.(4).

¹³ *See*, Plaintiffs Memorandum in Support of Motion for Preliminary Injunction at 4 and n.8, citing *inter alia*, Exhibits 6 and 7.

the use of penta-treated wood not only exist but have been successfully used to replace penta in many entire countries, in some cases for decades. Information concerning these bans and the use of alternative materials, including the European Union study which was completed in 1998 and concluded that “in fact less dangerous alternatives were available,” have been either actually supplied to EPA or are in the public domain and available for EPA’s consideration of penta’s registration. EPA’s administrative record on its review of alternatives, which the Motion to Compel seeks, should reveal whether EPA has in fact considered these materials and information, and in what manner, and what conclusions were drawn from them; or whether, on the other hand, EPA has failed to consider these materials which are highly relevant to the question of whether penta continues to meet the statutory standards for pesticide registration.

Respectfully submitted this 9th day of January 2003,

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