

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**BEYOND PESTICIDES /NATIONAL COALITION
AGAINST THE MISUSE OF PESTICIDES**

**701 E Street, SE
Washington, D.C. 20003
Plaintiff,**

and

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

**501 Third Street, N.W.
Washington, D.C. 20001**

Plaintiff,

and

CENTER FOR ENVIRONMENTAL HEALTH

**528 61st Street, Suite A
Okland, California 94609**

Plaintiff,

and

JOSEPH S. PRAGER AND ROSANNE M. PRAGER

**9409 S.W. 81st Way
Gainesville, Florida 32608,**

Plaintiffs

v.

**CHRISTINE T. WHITMAN, ADMINISTRATOR, UNITED
STATES ENVIRONMENTAL PROTECTION AGENCY,
in her official capacity**

**1101A, Ariel Rios Building,
1200 Pennsylvania, Ave, N.W. Washington, D.C. 20460
Defendant**

December 10, 2002

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1. Plaintiffs Beyond Pesticides/National Coalition Against Misuse of Pesticides (“Beyond Pesticides”), Communications Workers of America, AFL-CIO (“CWA”), Center for Environmental Health (“CEH”), and Joseph S. Prager and Rosanne M. Prager bring this action pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 555(b), 702, 706(1), the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136-136y, and the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901-6992, challenging the Environmental Protection Agency’s (“EPA’s”) delay and refusal to suspend and cancel the registrations of three wood preservative pesticides that EPA has repeatedly found cause unreasonable adverse effects, and EPA’s delay and refusal to rescind or amend its 1980 “interim final” regulation exempting arsenic-treated wood from the requirements for disposal of hazardous waste.

2. Wood preservative pesticides are used to protect wood from fungus, insects and decay. The three most common and most toxic wood preservatives in use in the United States today are creosote, pentachlorophenol (“penta”), and chromated copper arsenate (“CCA”). Currently, creosote is primarily used to treat wood used for railroad ties. Penta’s primary use is for utility poles. CCA is used for pressure-treating lumber intended for outdoor use in commercial and residential structures including decks, porches and railings, for landscaping and for playground equipment. CCA-treated wood is marketed to the general consumer via lumberyards, hardware stores and other retail outlets. CCA-treated lumber is sometimes recycled into wood chips which are sold to consumers as landscape mulch. CCA-treated wood is also used for utility poles, highway railings, roadway posts and barriers, bridges, bulkheads and pilings.

3. Wood preservatives represent the single largest pesticide use in the United States, and represent over one third of the total weight of pesticides used annually. As of 1995, approximately 1.6 billion pounds of pesticides were used annually to treat wood, including 138 million pounds of CCA, 656 million pounds of penta, and 825 million pounds of creosote.
4. Because of concerns about its health and environmental hazards, penta has been totally banned or severely restricted in many countries throughout the world. Penta and its contaminants are classified as a “persistent organic pollutants” by the United Nations Environment Programme (“UNEP”). Some of penta’s contaminants, hexachlorobenzene (“HCB”), dioxins, and polychlorinated dibenzofurans (“furans”), are restricted by the Stockholm Convention on Persistent Organic Pollutants, signed by the United States in 2001. In 2001, based on creosote’s potential to cause cancer, the Commission of the European Union severely restricted the use of creosote for wood treatment and the sale of creosote-treated wood. Because of health concerns, EPA submitted the inorganic arsenicals (which include CCA) to the United Nations as possible candidates for the international list of banned and severely restricted pesticides.
5. Beginning in 1978, because of concerns including cancer, genetic mutations and birth defects, EPA began a regulatory review called the Rebuttable Presumption Against Registration (“RPAR”) of creosote, penta and CCA. Over the next several years, EPA canceled the pesticide registrations for all uses of these pesticides except wood preservative use. EPA made a decision in 1984 to retain the wood preservative uses despite their elevated risks because of the claimed high economic benefits from their use and the lack of economically viable alternatives. EPA has not reevaluated the availability of safer alternatives since that time.
6. In 1980, EPA issued an interim final rule “to defer for an estimated three to six month period

applying RCRA Subtitle C [hazardous waste disposal] requirements to discarded arsenical-treated wood . . . in order to await further progress of the review” of the pesticide’s registration under FIFRA.¹ That rule remains in effect exempting wood treated with arsenic from the hazardous waste disposal requirements of RCRA subtitle C despite the fact that arsenic-treated wood fails EPA’s test for toxicity which would ordinarily require hazardous waste treatment.

7. Beyond Pesticides, CWA, CEH and Joseph S. Prager and Rosanne M. Prager bring this action to compel agency action unlawfully withheld or unreasonably delayed or both. Plaintiffs seek:

- a. A finding that continued registration of pentachlorophenol creates an imminent hazard to public health and the environment, and preliminary and permanent injunctions ordering EPA to issue immediately a notice of cancellation, and to suspend the registration of penta as a wood preservative on an emergency basis pursuant to FIFRA § 6(c)(3), 7 U.S.C. § 136d(c)(3).
- b. A declaratory judgment that EPA has unreasonably delayed in completing its regulatory actions on the three wood preservatives: penta, creosote and CCA which were initiated in 1978, and in responding to Beyond Pesticides’ petitions to cancel and suspend their registrations, and that it has arbitrarily failed to re-assess its 1984 finding that no economically viable alternatives exist to wood treated with these pesticides.
- c. An injunction ordering EPA to revise the now factually incorrect conclusions of the 1978 RPAR which concluded there were no adequate substitutes for pesticide-treated wood, to reflect the fact that adequate less-toxic and non-toxic substitutes now exist for

¹ 45 Fed. Reg. 78530 (1980).

all pesticide treated wood products. An injunction setting a schedule for EPA to expeditiously issue cancellation notices and initiate suspension proceedings pursuant to FIFRA § 6(b) and (c), 7 U.S.C. § 136d(b) and (c) for penta, creosote and CCA.

d. An injunction ordering EPA to grant all of the relief sought in Beyond Pesticides' petitions to cancel and suspend the registrations of penta, creosote and CCA, or in the alternative, setting a schedule for EPA to expeditiously rule upon all of the requests for relief in Beyond Pesticides' petitions.

e. A declaratory judgment that EPA's decision to exempt arsenical-treated wood from hazardous waste regulation, announced as a "temporary" rule at 45 Fed. Reg. 78530 (November 25, 1980), but kept in place based on a determination made in the course of the RPAR review of the wood preservatives under FIFRA, improperly relied upon determinations by the FIFRA program balancing pesticide risks and benefits rather than the appropriate RCRA hazardous waste characteristic test.

f. An injunction ordering that EPA to broaden its proposed "phase-out" of CCA to include all uses of CCA and to complete the phase-out within 90 days from the date of entry of said order, and to clarify that under EPA's treated article exemption all sales of CCA-treated wood must halt on the effective date of the phase out.

g. An order that EPA pay Plaintiffs' reasonable attorney's fees and costs related to this action pursuant to 28 U.S.C. § 2412(d).

h. Such additional relief as the Court deems just and proper.

II. CAUSE OF ACTION, JURISDICTION AND VENUE

8. Plaintiffs' cause of action and claim for relief arise under the APA, 5 U.S.C. §§ 555(b), 702,

and 706(1); FIFRA, 7 U.S.C. §§ 136-136y; and RCRA, 42 U.S.C. §§ 6901-6992. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 2201, and FIFRA § 16(a), 7 U.S.C. § 136n(a). Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e).

III. PARTIES AND STANDING

9. Plaintiff Beyond Pesticides is a 501(c)(3) public interest organization incorporated in the District of Columbia. It has a membership of approximately 1,200 persons and organizations from every state. Beyond Pesticides promotes pesticide safety and the adoption of alternative pest management strategies that reduce or eliminate dependency on toxic chemicals as a means of controlling pests such as insects, rodents, weeds and fungi. Beyond Pesticides provides information to the public in the form of printed publications and electronically via the internet. Beyond Pesticides answers questions from concerned citizens about health effects of pesticides and alternatives to reduce or eliminate exposures to pesticides. Many of its members have been and continue to be exposed to penta, creosote or CCA because of EPA's delay and refusal to act and continued reliance on outdated findings.

10. Plaintiff CWA is an international labor organization with offices in the District of Columbia. CWA is the duly authorized collective bargaining representative for over 750,000 employees in the telecommunications industry as well as in printing and publishing, health care, automotive and electronics manufacturing and other industries located throughout the United States and Canada. At least ten percent of CWA-represented workers work in occupations in the telecommunications field which are potentially exposed to chemical wood preservative pesticides including creosote, penta and CCA. Of these workers, more than 25,000 come into regular contact with utility poles that are treated with these preservatives during the course of performing

pole installation, service and/or repair work. These CWA-represented workers have been and continue to be exposed to these preservatives because of EPA's failure and refusal to act to protect the public and the environment from documented hazards caused by their ongoing use on utility poles.

11. The Center for Environmental Health ("CEH") is a § 501(c)(3) non-profit corporation, incorporated in the State of California and based in Oakland, California, whose mission is to protect the public from environmental and consumer health hazards. It is committed to environmental justice, reducing the use of toxic chemicals, supporting communities in their quest for a safer environment, and corporate accountability. It works to change corporate behavior through education, litigation, and advocacy. CEH has engaged in litigation, and policy and legislative advocacy to stop the use of CCA-treated wood. CEH also field calls from members of the public who are concerned about arsenic, and educates the public through its website and newsletter and through the media. CEH has staff members and donors who have been and continue to be exposed to penta, creosote or CCA because of EPA's delay and refusal to act and continued reliance on outdated findings.

12. Joseph S. Prager and Rosanne M. Prager are individuals who were exposed to CCA-treated wood while working on a home improvement project. They believe that they and their then unborn child were injured as a result of their exposure to CCA. In late 1993 and early 1994 they worked on a deck and fencing project using CCA-treated wood. When they purchased the wood at Home Depot and Lowes stores in Gainesville, Florida, there were no warning labels or tags of any sort, and they were totally unaware that use of the wood posed any health hazards. As a result, despite the fact that Rosanne Prager was pregnant at the time, and was taking many other

precautions to protect her pregnancy, they handled the wood without gloves, masks or protective clothing, and sawed the wood in a closed garage, resulting in the inhalation of treated wood sawdust. Joseph and Rosanne Prager suffered various symptoms during the period they were working with the CCA-treated wood, including joint and muscle pains and anemia. In November, 1994, their daughter Sarah Prager was born with a cleft lip and cleft palate. Sarah Prager has undergone several surgeries, and currently requires orthodontic treatment and will require bone grafts to her jaw as a result of these birth defects. There was no family history of these birth defects. When EPA determined in the 1984 RPAR review of the wood preservatives that arsenical wood preservatives pose a risk of birth defects, it relied in part on studies of laboratory animals which produced offspring with cleft lip and cleft palate defects after exposure to arsenic.

As a result of their CCA wood exposures, the Pragers started the Web site, BANCCA.ORG (<http://www.bancca.org>) to inform other consumers of the potential hazards associated with CCA-treated wood. Their Web site now receives over 15,000 visitors per month worldwide, and is continuously updated with new information on the CCA and treated wood controversy.

13. Christine T. Whitman is sued in her official capacity as the Administrator of EPA.

IV. FACTS

EPA's Review of the Wood Preservative Pesticides:

14. Beginning in 1978, because of incident reports and scientific studies suggesting adverse effects including cancer, genetic mutations and birth defects, EPA began a regulatory review known as a Rebuttable Presumption Against Registration, ("RPAR") to evaluate the acceptability

of continued registration of creosote, penta and CCA.² The RPAR proceeding³ was initiated when EPA made findings that these three wood preservative pesticides exceeded the regulatory risk levels that would trigger cancellation of a pesticide's registration under FIFRA's continuing requirement that pesticides "not generally cause unreasonable adverse effects on the environment." EPA explained that the pesticides would be canceled unless information submitted by the registrants rebutted the presumption that these pesticides did not meet the registration standard.

15. When it initiated the RPAR review in 1978, EPA found that penta (or its contaminants) cause defects in the offspring of laboratory animals. EPA found that creosote causes cancer in laboratory animals, is associated with skin cancer in workers occupationally exposed to creosote, and causes mutagenic effects (gene defects) in bacteria and laboratory animals. EPA found that inorganic arsenicals (including CCA) were associated with cancer in humans who drank water or breathed air contaminated with arsenic, and posed teratogenic (birth defect-inducing), mutagenic, reproductive and fetotoxic risks. The RPAR notices provided opportunity for the public to

² 43 Fed. Reg. 48154 (Oct. 18, 1978). EPA issued separate RPAR notices for creosote, 43 Fed. Reg. 48154, inorganic arsenicals, 43 Fed. Reg. 48267, and penta, 43 Fed. Reg. 48443. Nevertheless, EPA determined to consider all three of these wood preservatives together in the risk-benefit part of the RPAR review process. 43 Fed. Reg. 48154.

³ Former 40 C.F.R. 162.11. The RPAR for the wood preservatives was completed under the current Special Review regulations, which are found at 40 C.F.R. § 154.1 *et seq.*

submit comments, evidence in rebuttal of the presumptions, and benefits information. EPA set forth a tentative schedule which would have concluded with a final regulatory decision on all three wood preservatives in the second quarter of 1980. Nevertheless, the proceeding did not finally conclude until 1987, and sale and use continued without any additional restrictions until 1986.

16. On February 19, 1981, EPA published its Preliminary Determination for the RPAR.⁴ EPA determined that the wood preservatives “continue to exceed the risk criteria ... for the adverse effects on which rebuttable presumptions against registration were issued,”⁵ and that the rebuttal information submitted had been insufficient to overcome the presumptions.⁶ In addition, based on information received since the RPAR was issued, EPA determined that penta posed cancer risks because of the presence of dioxin contaminants, which also had the potential to produce teratogenic and fetotoxic effects.⁷

EPA stated that it was “very concerned about reducing the possible high risks to [wood] treatment plant workers.” EPA asserted that in order to reduce these risks, it would have had to cancel all three of the wood preservatives, because elimination of one would lead to substitution

⁴ 46 Fed. Reg. 13020.

⁵ *Id.* at 13021.

⁶ *Id.* at 13023.

⁷ *Id.* at 13021.

with one of the others. EPA determined to retain the wood preservative registrations, conditioned upon adoption of its proposed risk mitigation measures, because it asserted that:

“Due to the non-substitutability of the wood preservative compounds and the lack of acceptable non-wood or other chemical alternatives for many use situations, the economic impact which would result from across-the-board cancellation would be immense.”⁸

In addition, EPA declared its intention to “propose regulatory measures for the safe use and disposal of treated wood products pursuant to the Toxic Substances Control Act.” (TSCA).⁹ These measures were to include labels distributed to end users of treated wood containing use and disposal precautions.¹⁰

17. EPA’s preliminary decision was referred for review to the Secretary of Agriculture and the Scientific Advisory Panel and comments were solicited.¹¹

18. On July 13, 1984, EPA issued its notice concluding the RPAR process.¹² EPA adopted its 1981 preliminary determination, which it described as follows:

In light of the very high economic benefits resulting from the use of the wood

⁸ *Id.* at 13032.

⁹ *Id.* at 13022.

¹⁰ *Id.* at 13035.

¹¹ *Id.* at 13036.

¹² 49 Fed. Reg. 28666.

preservative chemicals, the Agency determined that the use of the wood preservative chemicals in accordance with the[] modifications [proposed in 1981] would be expected to satisfy the statutory standard for registration.

Id. After reevaluating the available data, EPA concluded that its earlier conclusions “regarding the [excessive] risks posed by the wood preservative chemicals remain intact.”¹³

EPA adopted the risk reduction measures proposed in 1981 with some modifications. These measures included restricting the sale and use of penta, creosote and CCA wood preservative chemicals (but not the pesticide-treated wood) to certified applicators, a requirement for protective clothing and the use of respirators in high exposure situations and a requirement that the manufacturers of penta reduce the levels of dioxin to less than one part per million within 18 months. EPA required a warning label on penta wood preservative chemicals (but not the pesticide-treated wood) stating that “The U.S. EPA has determined that pentachlorophenol can produce defects in the offspring of laboratory animals. Exposure to pentachlorophenol during pregnancy should be avoided.”¹⁴

EPA also required registrants to conduct a mandatory "Consumer Awareness Program" (“CAP”) to inform users of pressure treated wood or treated wood products of proper uses and precautions. EPA stated that “[s]uch a program is necessary to assure that the use of pressure-treated wood does not pose an unreasonable adverse effect.”¹⁵ EPA further stated that due to its adoption of the CAP, it had decided not to implement a rulemaking under TSCA at that time. *Id.*

Since the conclusion of the RPAR, EPA has not reevaluated the premise of the decision

¹³ *Id.* at 28668.

¹⁴ *Id.* at 28673.

¹⁵ *Id.* at 28682.

to retain the registrations despite their elevated risk: the finding that safer alternatives were unavailable.

19. On July 11, 1984 EPA issued a press statement describing the decision and the risk reduction measures it was requiring of the wood preservative registrants. EPA emphasized that it was requiring the commercial wood treatment industry to participate in a CAP to reduce risk by instructing consumers about the use of protective gloves, coveralls and face masks when sawing treated wood, as well as other use precautions. EPA said, "without these restrictions, the risk to public health from using these pesticides would outweigh the benefits."

20. As a result of requests for hearings on the 1984 notice by several registrants and trade associations, EPA stayed the effective date of the risk reduction measures adopted in that decision. After negotiations with the parties to the hearings, EPA published a modified set of risk reduction measures in 1986.¹⁶ Among other changes to the 1984 final action, EPA deleted the mandatory CAP in favor of a voluntary CAP undertaken by industry. EPA stated:

Because this voluntary program is expected to satisfy the Agency's public health protection goals, the Agency has determined that the risk-benefit balance will not be affected by eliminating the mandatory Consumer Awareness Program from the labeling. Should the voluntary program fail to meet the agency's expectations, the agency is prepared to issue a rule pursuant to the Toxic Substances Control Act directed to alert all purchasers and users of treated wood to appropriate information about the use of such products.¹⁷

¹⁶ 51 Fed. Reg. 1334 (Jan. 10, 1986).

¹⁷ *Id.* at 1338.

21. On January 2, 1987, as a result of a settlement with two registrants who had requested a hearing, EPA issued a notice amending the risk reduction measures adopted in 1986.¹⁸ The settlement resulted in increasing the permissible level of dioxin in penta above the one part per million level permitted by the 1984 and 1986 decisions, which EPA had previously concluded was necessary to reduce the risk to levels such that benefits would outweigh the risks.

22. Between 1987 and 1993 EPA canceled the registrations of creosote, CCA and penta for all uses other than as wood preservatives because of excessive risk.¹⁹

23. When EPA canceled the herbicidal, fungicidal, disinfectant and insecticidal uses of creosote in 1985, EPA found that studies on laboratory animals and reports in the literature of skin cancer in people exposed to creosote “suggest that these chemicals are human carcinogens.”²⁰ EPA also found that creosote was potentially mutagenic in mammals including humans, and that the use of creosote for all nonwood purposes posed a risk of oncogenic and mutagenic effects to the

¹⁸ 52 Fed. Reg. 140.

¹⁹ 50 Fed. Reg. 41943 (Oct. 16, 1985) (cancellation of all but one of the non-wood uses of creosote); “Status of Pesticides in Registration, Reregistration, and Special Review, (Rainbow Report),” (EPA 1998) at 32., available at www.epa.gov/oppsrrd1/Rainbow/98rainbo.pdf (cancellation of all remaining non-wood uses of creosote May 15, 1986); 58 Fed. Reg. 7848 (Feb. 9, 1993) (cancellation of last remaining non-wood uses of penta); 58 Fed. Reg. 64579 (Dec. 8, 1993) (cancellation of last remaining non-wood uses of inorganic arsenicals).

applicators. *Id.*

²⁰ 50 Fed. Reg. at 41945.

24. In 1987, when EPA canceled most non-wood use penta products, including herbicides, antimicrobials, disinfectants and defoliant, it stated, “The Agency is concerned about the ubiquity of pentachlorophenol, its persistence in the environment, its fetotoxic and teratogenic properties, its presence in human tissues and its oncogenic risks from the presence of dioxins in the technical material.”²¹ EPA rejected the option of adopting risk reducing measures similar to those adopted for the wood preservative uses, noting that the wood preservative registrations were maintained with modifications because “those uses entailed very high benefits. Here, with similar risk concerns, the risk/benefit balance weighs heavily on the side of risk because of the low benefits.”²²

25. In 1988, when EPA determined to cancel most non-wood uses of the inorganic arsenicals, the Agency stated that the effects of concern were oncogenicity, mutagenicity, teratogenicity and acute toxicity. EPA noted that its Office of Health and Environmental Assessment (OHEA) had prepared a report reviewing the existing scientific literature, including “[h]uman epidemiology studies ... [which] provided the most persuasive evidence linking exposure to inorganic arsenic to an increase in cancer in humans.”²³ EPA also noted that its Carcinogen Assessment Group had classified inorganic arsenic as a Group A carcinogen, meaning that there was sufficient *human*

²¹ 52 Fed. Reg. 2282, 2283 (Jan. 21, 1987).

²² *Id.* at 2288.

²³ 53 Fed. Reg. 24787, 89 (June 30, 1988).

data to determine that inorganic arsenic is carcinogenic to humans. *Id.* When EPA finally canceled the last non-wood use of the inorganic arsenicals in 1993, it determined not to modify its earlier risk/benefit assessment.²⁴

²⁴ 58 Fed. Reg. 64579, 64581 (December 8, 1993).

26. EPA's most current assessments and statements concerning the wood preservative pesticides not only affirm the risk findings made in the RPAR process, but also add to risk concerns. A 1999 draft science chapter prepared for a Reregistration Eligibility Decision on penta found extremely high and "unacceptable" risks to children and workers. See ¶ 43, *infra*. EPA has set the Maximum Containment Level Goal for penta in drinking water as zero, because EPA believes this is required to prevent damage to the central nervous system from short-term exposure, and reproductive effects, damage to liver and kidneys and cancer from long-term exposure.²⁵ With regard to CCA, a Sept. 25, 2001 EPA Office of Pesticide Programs report states that "the scientific literature that describes chronic human exposure shows a clear relationship between chronic exposure to inorganic arsenic and the development of skin cancer as well as cancers of the lung, liver, and bladder."²⁶ In addition, "there is a large body of epidemiology studies and case reports which describe neurotoxicity in humans after both acute and chronic exposures ...".²⁷ The form of chromium (hexavalent) found in CCA has also been found by EPA to be a known human carcinogen.²⁸ An EPA "Product Matrix" on "Wood Preservatives" states that "[c]reosote and inorganic arsenic compounds have been shown to cause cancer in humans, pentachlorophenol in lab animals. In addition, creosote has been linked to

²⁵ Consumer Fact Sheet on: Pentachlorophenol, available at www.epa.gov/safewater/dwh/c-soc/pentachl.html.

²⁶ FIFRA Scientific Advisory Panel Background Document, "Hazard Identification and Toxicology Endpoint Selection for Inorganic Arsenic and Inorganic Chromium," Sept. 25, 2001 at 4-5, available at www.epa.gov/oscpmont/sap/2001/october/hazard_final_document.pdf

²⁷ *Id.* at 7.

²⁸ U.S. EPA, 1998. Integrated Risk Information System: Chromium (VI), (CASRN 18540-29-9) at Sec. II.A.1, available at <http://www.epa.gov/iris/subst/0144.htm#11>.

genetic damage, inorganic arsenic compounds are related to both genetic damage and birth defects, and pentachlorophenol is associated with birth defects and fetal toxicity.”²⁹

Failure of the Consumer Awareness Program

27. At least since 1991, EPA has received reports, through its Office of Pesticide Programs’ Incident Data System, of injuries to people exposed to CCA-treated wood, including persistent rashes, eye irritation and neurological symptoms.

²⁹ Available at <http://www.epa.gov/seahome/housewaste/house/woodpre.htm>.

28. In 1998, the South Dakota Department of Agriculture (SDDA) conducted a statewide on-site survey of 40 retail lumber yards to determine awareness of and compliance with EPA's voluntary CAP. It found that less than 10% of retailers were furnishing consumer information sheets to customers who purchased treated lumber. SDDA notified the EPA regional office in Denver that the voluntary agreement to implement the CAP for treated wood was not being implemented in South Dakota. In response, EPA headquarters "indicated that there is a nationwide lack of participation in the voluntary CAP; however they [EPA] are unable to force participation."³⁰

29. Last year, EPA confirmed in a letter to Beyond Pesticides that

[a]lthough the agreement was voluntary, the Agency viewed effective distribution of the consumer information sheets as a major component of our administrative review and reevaluation. . . . We understand both from industry surveys and other sources that distribution of the consumer information sheets has not been as effective as anticipated. The Agency has also received several incident reports where consumers reportedly have been injured from misusing or improperly handling treated wood products.³¹

EPA concluded in a public press release that "the previous consumer awareness program was

³⁰State FIFRA Issues Research and Evaluation Group, Issue Paper: Elimination of Mandatory Consumer Awareness Program for Creosote, Pentachlorophenol, and Inorganic Arsenical Treated Wood. Presented at SFIREG meeting in Seattle, May 18-19, 1998.

³¹ Letter from Frank Sanders, Director, Antimicrobials Division to Jay Feldman, Beyond Pesticides dated May 1, 2001.

not adequately informing the public."³²

30. In May and June, 2001, EPA held meetings concerning the voluntary CAP for CCA-treated wood. Despite the failure of the voluntary program over the previous 15 years, and EPA's statements in the 1984 and 1986 RPAR decisions that without an effective CAP, the use of pressure-treated wood would pose unreasonable adverse effects, and despite its statements that it would adopt a mandatory program if the voluntary program was not successful, EPA determined to continue the voluntary program with some modifications.

EPA's Exemption of Arsenical-Treated Wood from Hazardous Waste Disposal Requirements

³² Environmental Protection Agency, Headquarters Press Release: Stronger Consumer Information Program, Scientific Advisory Panel Meeting Announced for CCA-Treated Wood. July 3, 2001. Available at <http://yosemite.epa.gov/opa/admpress.nsf/>.

31. On November 25, 1980, EPA issued an “Interim final amendment to rule and request for comments” in response to a petition by the American Wood Preservers Institute (AWPI).³³ AWPI had requested a delay in the classification of arsenical-treated wood as a hazardous waste under RCRA, 42 U.S.C. § 6921, pending the completion of the RPAR review of the wood preservatives’ registrations as pesticides under FIFRA. In response, EPA stated that it

believe[d] that substantial differences in the statutory mandates of RCRA and FIFRA militate against deferring RCRA regulation until the completion of RPAR reviews. RPAR reviews do not include analyses of waste streams and thus do not relate directly to concerns about hazardous waste.

Id. Nevertheless, EPA agreed that in that situation, the RPAR review

could provide meaningful information with respect to the risks presented by disposal of arsenical-treated wood and that it is appropriate for the Agency to defer *temporarily* the full impact of characterizing arsenical-treated wood as a hazardous waste until the pending RPAR has progressed further.³⁴

EPA noted that analysis of the risks posed by ground-contact uses of arsenical-treated wood to be examined in the RPAR would be relevant to the risks of land burial of the wood. *Id.* EPA therefore determined “to defer, for an estimated three to six-month period” applying RCRA requirements to arsenical-treated wood. EPA made clear, however, that

³³ 45 Fed. Reg. 78530.

³⁴ *Id.* at 78531 (emphasis added).

The decision to await further progress of the RPAR review does not signify that discarded arsenical-treated wood and wood products will be excluded permanently from . . . [RCRA] requirements if the Agency's Office of Pesticide Programs determines that certain ground uses of arsenical wood preservatives do not present unreasonable risks. Such a determination under FIFRA does not necessarily mean that the pesticide is not hazardous; it may mean that the economic benefits of a pesticide are great enough that the risk should be tolerated. This conclusion – if it reached by the Agency's Office of Pesticide Programs – would not necessarily indicate that the disposal of arsenical-treated wood at the expiration of its useful life should not be subject to safeguards imposed under RCRA.³⁵

EPA promulgated the exclusion in “interim final” form, without prior notice and comment, stating that “[t]he purpose of the temporary exclusion is to defer imposing the full [RCRA] Subtitle C requirements for only a few months to await further development of pertinent information.” *Id.* EPA solicited post-promulgation comments and asked a series of questions about disposal of arsenical treated wood.

32. EPA never finalized the “interim” “temporary” regulatory exclusion of arsenical-treated wood from regulation as a hazardous waste under RCRA.. Nevertheless, the exclusion remains in effect and is codified at 40 C.F.R. 261.4(b)(9), which reads as follows:

(b) Solid wastes which are not hazardous wastes. The following solid wastes are not hazardous waste: ... (9) Solid waste which consists of discarded arsenical-treated wood or wood products which fails the test for the Toxicity Characteristic for Hazardous Waste Codes D004 through D017 and which is not a hazardous waste for any other reason if the waste is generated by persons who utilize the arsenical-treated wood and wood product for these materials' intended end use.

³⁵ *Id.*

33. In the July 13, 1984 notice concluding the RPAR process,³⁶ in response to a comment by the Secretary of Agriculture objecting to EPA's proposal that wood wastes in excess of 1,000 kilograms per site be disposed of in accordance with RCRA, EPA decided against more stringent regulation of these quantities of wood waste and stated that it had addressed the disposal issue via the Consumer Information Sheets to be required under the CAP, which provided for disposal by ordinary trash collection or burial.³⁷

34. In addressing the arsenical-treated wood exemption from RCRA in a 1990 Federal Register notice, EPA confirmed that "In its review of the wood preservative chemicals under FIFRA . . . the Agency decided to allow disposal of treated wood by means of ordinary trash collection, burial or incineration."³⁸

35. Thus, despite EPA's recognition of the "substantial differences in the statutory mandates of RCRA and FIFRA" it appears that EPA made a determination regarding the disposal of treated wood pursuant to RCRA in the course of its FIFRA proceeding.

36. The exclusion from RCRA hazardous waste regulation permits disposal of arsenical-treated wood as ordinary trash in unlined landfills despite the fact that the treated wood fails EPA's test for leaching of toxic material. This test, the Toxicity Characteristic Leaching Procedure or "TCLP," is intended to simulate conditions in a landfill. In the absence of the special exemption,

³⁶ 49 Fed. Reg. 28666.

³⁷ *Id.* at 28688.

³⁸ 55 Fed. Reg. 11796, 11839 (March 29, 1990).

failure of the TCLP test would dictate disposal of CCA-treated wood in the same manner as other hazardous waste: in lined landfills designed to prevent infiltration of water and release of contaminated leachate into the environment. *See* 40 C.F.R. 261.24.

Submissions of Alternatives Information and Petitions to Cancel and Suspend the Registrations of the Wood Preservatives and to Rescind the RCRA Exemption for Arsenical-Treated Wood

37. In the 18 years since EPA concluded the wood preservatives RPAR with a determination that despite risks which would otherwise mandate cancellation, continued use was justified by the lack of economically viable alternatives, a number of adequate substitutes for chemically-treated wood have become available, and the capacity for production of previously-known substitutes has increased to the point where the perceived “immense” “economic impact” that EPA relied upon as the basis for its decision to retain the registrations is no longer valid.

38. At least since 1993, producers of alternative products to treated wood have had communications and meetings with EPA concerning the ability of their products to replace various uses of pesticide-treated wood.

39. Beyond Pesticides has communicated information about economical alternatives to pesticide-treated wood to EPA a number of times in various forms over the years since the conclusion of the 1984 RPAR. Most notably, its February 1997 report entitled, “Poison Poles: Their Toxic Trail and Safer Alternatives,” furnished to EPA in 1997, includes a detailed analysis of the available substitutes for penta, creosote and CCA, including cost comparisons. The report concludes by urging that “hazardous wood preservatives . . . be removed from the market.”

40. On June 2, 1997, Dr. Howard Freed, M.D. and a group of eleven other noted public health scientists and physicians, including members of Beyond Pesticides, wrote to EPA calling

attention to studies that found wood preservatives in the "body fluids and tissues of humans in the general population," which raised concern because of these chemicals' "association with cancer, birth defects, [and] disruption of the endocrine system...". The scientists cited Beyond Pesticides' "Poison Poles" report, including its calculations showing that materials such as recycled steel and concrete could be used to begin replacing pesticide-treated wood cost-effectively as the wood is taken out of service. The scientists pressed the Agency "to begin immediately an assessment of the various uses of treated wood and analyze the availability of alternatives that could replace the use of these very hazardous materials," and "as quickly as possible...to curtail the introduction of these chlorinated hydrocarbons [penta] into the environment...".

41. On July 9, 1997, Dr. Lyn Goldman, Assistant Administrator for EPA's Office of Pollution Prevention and Toxic Substances ("OPPTS") replied, assuring the scientists that their concerns were being addressed. She specified a timetable in which EPA expected to complete the Registration Eligibility Decision ("RED") on pentachlorophenol:

Penta and all of the currently registered wood preservatives will be reassessed as part of EPA's ongoing reregistration program, which was established by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) Amendments of 1988. As part of the reregistration review, EPA is requiring manufacturers (registrants) to submit additional data, including exposure data on wood treatment plant employees and the general population. Once the required studies are submitted, EPA will complete its analyses and issue a Reregistration Eligibility Decision (RED) on the continued use of pentachlorophenol on wood utility poles. A RED on penta is expected in FY 1998 by OPP's new Antimicrobial Division, which is currently hiring more scientists to perform reregistration reviews. This analysis will include additional consideration of the chemical's impact on human health and potential endocrine disruption effects.

In response to the scientists' submission on the use of alternative materials instead of treated wood, the letter stated: "After the Agency completes the penta RED, it may make sense to carry

out such a reassessment.”

42. When the RED for penta had yet to be issued in February of 1999, Beyond Pesticides sought and was granted a meeting with Frank T. Sanders, director of EPA’s Antimicrobial Division and his staff. Beyond Pesticides was informed that the penta RED was only in its draft stages, and the preliminary science chapter would not be available for public review until late 1999. The EPA representatives promised to share their preliminary findings with the public.

43. EPA released its draft Science Chapter to the wood treatment industry in the early summer of 1999. Beyond Pesticides obtained a copy in September, 1999. In the memorandum accompanying the report, EPA stated that the report addressed only penta as the active ingredient, and not its dioxin and furan microcontaminants. Based on its analysis of penta alone, EPA made the following findings:

- The lifetime cancer risk to children exposed to soil contaminated with penta leaching from utility poles was as high as 2.2 in 10,000 (2.2×10^{-4}), and that contact with the treated wood itself posed a cancer risk of 6.4 in one million (6.4×10^{-6}). These risks are, respectively, 220 and 6.4 times EPA’s usual one-in-a-million threshold for “acceptable” risk.
- Residues of penta in drinking water, along with exposure from food and residential uses, “pose an unacceptable chronic risk to children.”
- With regard to occupational exposures, despite risk reduction measures EPA had adopted in the 1980’s, EPA found, based on “maximum protective measures,” that 13 out of 14 exposure scenarios had unacceptable cancer risks. Certain categories of workers had lifetime cancer risks as high as 1.8 and 4.4 in 10, and 6.2 and 8.4 in 100, up to 4,400 times EPA’s “acceptable” level of risk for occupational exposures. Utility pole installers were found to have a cancer risk of 6.6 in 1000, sixty-six times EPA’s “acceptable” level. Most extreme, applicators of grease formulations of penta as groundline retreatments for existing utility poles had a risk of 3.4 out of 1 (apparently because an exposed worker who survived and continued in this occupation could be expected to incur additional cancers).
- Chronic non-cancer risks for occupational handlers “exceed the Agency’s level of concern using maximum protective measures for all scenarios.”
- EPA reaffirmed its earlier findings on the teratogenic (birth defect-inducing)

and fetotoxic (toxic to fetuses) properties of penta.

44. On December 21, 1999, Beyond Pesticides submitted comments on the draft Penta Science Chapter to EPA. The comments called for cancellation of penta's registration. With the comments, Beyond Pesticides transmitted a copy of its report entitled "Pole Pollution—New Utility Pole Chemical Risks Identified by EPA While Survey Shows Widespread Contamination." This report reviewed EPA's draft science chapter on penta, noting EPA's findings of extremely high risks to wood treatment and utility workers and children, and reported a survey of utility companies which revealed that approximately 70% of the respondent utilities gave or sold their discarded poles to be reused by the public, resulting in exposures not considered by EPA in the Penta Science Chapter or elsewhere. Based on responses to the survey concerning the cost to utilities of various types of poles, the report concluded that "the cost differential between treated wood and recycled steel poles is negligible in the short-term and benefits steel in the long-term." The report concluded that by calling for the removal of penta from the market "because it is no longer needed."

45. On July 21, 2000, David C. Vladeck, of the Public Citizen Litigation Group, wrote to the EPA administrator on behalf of Beyond Pesticides, supplementing the June 7, 1997 letter from the physicians and scientists and making a "formal request to the agency to initiate a proceeding to cancel the remaining registration for Penta as a wood preservative." The letter recounted the history of Beyond Pesticides' efforts to have EPA remove penta from the market and summarized and resubmitted Beyond Pesticides' 1997 "Poison Poles" and 1999 "Pole Pollution" reports. The letter stated that EPA's failure to "reassess" penta in accordance with its previous commitments was in violation of the Administrative Procedure Act and of FIFRA. It further

stated that rather than bring a court action at that time, Beyond Pesticides preferred to work with EPA, and was therefore renewing and supplementing its 1997 requests. The letter concluded by asking for a response within 30 days including EPA's projected timetable for action on penta.

46. On September 8, 2000, EPA responded to Mr. Vladeck's letter in a letter signed by Acting Assistant Administrator Susan H. Wayland. EPA's letter acknowledged Beyond Pesticides' request to "initiate proceedings to cancel the remaining registration for pentachlorophenol (penta) as a wood preservative." The letter further stated that data requested from the registrants on penta had been received, but data on CCA had not yet been received and was expected in the fall. "A decision was made to review the data for wood preservatives collectively." The letter further stated that the agency's reassessment of dioxin (a carcinogenic contaminant of penta) was expected to be completed by the end of the calendar year, and that the agency expected to finish the risk assessment on penta and begin the public review process in 2001.

47. Since that September, 2000 letter, EPA has not given any public indication of any progress on its assessment of penta, nor issued the RED originally promised for 1998. Nor has EPA issued RED documents for creosote or CCA.

48. On November 9, 2000 Connie Welch, Chief of EPA's Regulatory Management Branch II, Antimicrobials Division, attended a meeting on non-wood alternatives sponsored by Beyond Pesticides. Several producers of non-wood alternatives to wood preservative-treated products were present. Ms. Welch gave a presentation concerning the regulatory status of the wood preservatives. She informed the group that Richard Michell of EPA had been assigned to collect information from and about manufacturers of alternatives to treated wood products.

49. On August 23, 2001, Mr. Joseph Reilly, president of a company which produces a fiberglass

alternative to treated wood utility poles, made a presentation concerning the economic, environmental and performance advantages of his product to Richard Michell and Karen Angulo of EPA.

50. On April 19, 2001 Beyond Pesticides wrote to EPA requesting that EPA "immediately begin" action to cancel, and suspend on an emergency basis, the registrations for CCA, penta and creosote. The letter noted that

EPA's current review, which has dragged on since 1998 and is expected to continue through 2003, is unacceptable in meeting the urgent need to protect children from daily exposure to known human carcinogens, endocrine disruptors and highly neurotoxic chemicals.

The letter stated that there were alternatives to treated wood for utility poles, lumber, marine piles and railroad ties, and noted Beyond Pesticides' concern with the disposal of treated wood in unlined landfills and the regulation that exempts treated wood from hazardous waste designation.

51. EPA responded to Beyond Pesticides' April, 19, 2001 petition for cancellation in a letter dated May 16, 2001 signed by Stephen L. Johnson, Acting Assistant Administrator for OPPTS. EPA's letter explained that the Agency was "currently reassessing CCA, pentachlorophenol and creosote as part of the Agency's ongoing effort to ensure that older pesticides meet current safety standards." Mr. Johnson assured Beyond Pesticides that "We are giving this priority attention." The letter also stated that EPA was evaluating the disposal of CCA-treated lumber in unlined landfills. No timetable was offered for completion of these assessments.

52. On December 21, 2001, Beyond Pesticides again petitioned EPA seeking immediate suspension and cancellation of penta and CCA based on EPA's previous findings in the 1978 RPAR as well as new evidence of risk from these pesticides and additional information about available alternatives to penta- and CCA-treated wood that had been submitted to EPA by

Beyond Pesticides and others. Beyond Pesticides' petitions also asked for disposal of CCA-treated wood as hazardous waste, a prohibition on the recycling, burning and mulching of used CCA-treated wood products and a Consumer Awareness Program for re-used products treated with penta.

53. On February 26, 2002 Beyond Pesticides again petitioned EPA to suspend and cancel the registration for creosote and also petitioned EPA to set national standards for safely disposing of all used creosote-treated wood, including a ban on the recycling of used wood products containing creosote and stricter enforcement for illegally dumping creosote railroad ties.

54. On February 22, 2002, EPA published in the Federal Register an announcement that it intended to accept a voluntary phase-out of CCA that will result in a cancellation of the registration of CCA for certain non-industrial uses that will take effect in at the beginning of

2004. According to an EPA Q/A document,

[a]fter December 31, 2003, wood treaters will no longer be able to use CCA to treat wood intended for use in decks, picnic tables, landscaping timbers, gazebos, residential fencing, patios, walkways/boardwalks, and play-structures. Wood treated prior to this date, however, can still be used in residential settings.

55. On March 25, 2002, Beyond Pesticides submitted comments on this proposal informing the Agency of its urgent concern that the almost two year delay before the effective date for cancellation of non-industrial uses of CCA, the limited scope of the phase-out which retains many dangerous uses, and the failure to address disposal of CCA-treated wood as hazardous waste do not adequately or timely protect human health and the environment, and asking the Agency to phase CCA out much faster.

56. On August 15, 2002, CWA submitted comments to EPA concerning the proposed CCA partial phase-out in support of those previously submitted by Beyond Pesticides. CWA

expressed concern that the proposed phase-out would not adequately protect human health and the environment due to the unreasonable risks and documented harm posed by continued use of CCA. CWA also discussed existing alternatives to CCA-treated wood utility poles and other products, and called on EPA to shorten the phase-out period and cancel all uses of CCA. EPA provided no substantive response to CWA's comments and provided no details or timetables regarding the proposed phase-out.

57. EPA regulations in 40 C.F.R. 152.25(a) exempt certain treated articles and substances from regulation under FIFRA if specific conditions are met. The specific regulatory language is:

Section 152.25: Exemptions for pesticides of a character not requiring FIFRA regulation

(a) Treated articles or substances. An article or substance treated with, or containing, a pesticide to protect the treated article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), *if the pesticide is registered for such use.*

(Emphasis added.) Continued sale of CCA-treated wood for residential uses after the cancellation of CCA for those uses would violate FIFRA § 12(A)(1)(a) because sale of such wood would constitute sale of an unregistered pesticide which would no longer be exempt as a treated article.

58. On March 5, 2002 EPA responded to Beyond Pesticides December 21, 2001 petitions for cancellation and suspension of CCA and penta in a letter signed by Assistant Administrator Stephen L. Johnson, stating, "this interim reply to your petition constitutes neither a denial nor an acceptance of your petition." The letter stated that the wood preservative pesticides were undergoing reregistration review and that the agency was "proceeding as rapidly as feasible to resolve your concerns." It offered no timetable for completion of review.

59. To date, Beyond Pesticides has not received any response to its February 26, 2002 petition

for the cancellation and suspension of creosote.

60. On July 22, 2002, Beyond Pesticides submitted to EPA a formal petition under RCRA to repeal the exemption of arsenical-treated wood from hazardous waste regulation found at 40 C.F.R. § 261.4(b)(9). The petition pointed out that the regulation exempting treated wood was procedurally and substantively defective and requested a reply within 45 days.

61. On August 30, 2002, EPA responded to Beyond Pesticides' RCRA petition in a letter signed by Assistant Administrator Marianne Lamont Horinko. The letter stated that the Agency was giving the petition "careful consideration," but that "45 days is simply not enough to respond to the issues it raises. At this time, therefore, we are not yet in a position to act on your petition."

V. ALLEGATION: UNREASONABLE DELAY AND / OR CONSTRUCTIVE DENIAL OF THE PETITIONS

62. EPA has a duty to proceed to conclude matters presented to it within a reasonable time, pursuant to 5 U.S.C. §§ 555(b), 706(1).

63. By failing over the course of over two decades to address the issues raised in its RPAR of 1978 and by accepting the voluntary phase out of CCA which will take effect beginning in 2004, EPA has either unreasonably delayed or constructively denied Beyond Pesticides' June 2, 1997, December 21, 1999, July 21, 2000, April 19, 2001, December 21, 2001, February 26, 2002, and July 25, 2002 petitions insofar as they seek 1) immediate suspension and cancellation of *all* uses of penta, CCA and creosote, 2) mandatory consumer awareness programs for re-used products treated with penta; prohibition of the recycling, burning or mulching of CCA-treated wood, and a ban on the recycling of used wood products containing creosote, 3) the establishment of national standards for the safe disposal of creosote-treated wood and 4) rescission of the special exemption

at 40 C.F.R. 261.4(b) which exempts hazardous CCA-treated wood from the disposal requirements that pertain to waste that is considered hazardous because sufficient quantities of toxic substances leach from the material that it fails EPA's TCLP test. Such a denial is arbitrary and capricious and contrary to the purpose and intent of FIFRA, which requires as a condition of continued registration that pesticides not cause unreasonable adverse effects, and of RCRA, which requires regulation of the disposal of all hazardous wastes.

VI. PRAYER FOR RELIEF

64. WHEREFORE, Plaintiffs pray that the Court grant the following relief:

- a. A finding that continued registration of pentachlorophenol creates an imminent hazard to public health and the environment, and preliminary and permanent injunctions ordering EPA to immediately suspend the registration of penta as a wood preservative on an emergency basis pursuant to FIFRA § 6(c)(3), 7 U.S.C. § 136d(c)(3).
- b. A declaratory judgment that EPA has unreasonably delayed in completing its regulatory actions on the three wood preservatives: penta, creosote and CCA which were initiated in 1978, and in responding to Beyond Pesticides' petitions seeking cancellation and suspension of the registrations of these pesticides, and that EPA has arbitrarily failed to re-assess its 1984 finding that no economically viable alternatives exist to wood treated with these pesticides.
- c. An injunction ordering EPA to revise the now factually incorrect conclusions of the 1978 RPAR which concluded there were no adequate substitutes for pesticide treated wood to reflect the fact that adequate less-toxic and non-toxic substitutes now exist for all pesticide treated wood products. An injunction setting a schedule for EPA to

expeditiously issue a notices of cancellation and initiate suspension proceedings pursuant to FIFRA § 6(b), 7 U.S.C. § 136d(b) for creosote, penta and CCA.

d. An injunction ordering EPA to grant all of the relief sought in Beyond Pesticides' petitions to cancel and suspend the registrations of penta, creosote and CCA, or in the alternative, setting a schedule for EPA to rule expeditiously upon all of the requests for relief in Beyond Pesticides' petitions.

e. A declaratory judgment that EPA's decision to exempt arsenical-treated wood from hazardous waste regulation, announced as a "temporary" rule at 45 Fed. Reg. 78530 (November 25, 1980), but kept in place based on a determination made in the course of the RPAR review of the wood preservatives under FIFRA, improperly relied upon determinations by the FIFRA program balancing pesticide risks and benefits rather than the appropriate RCRA hazardous waste characteristic test.

f. An injunction ordering that EPA to broaden its proposed "phase-out" of CCA to include all uses of CCA and to complete the phase-out within 90 days from the date of entry of said order, and that EPA clarify that under EPA's treated article exemption all sales of CCA-treated wood must halt on the effective date of the phase out.

g. An order that EPA pay Beyond Pesticides' reasonable attorney's fees and costs related to this action pursuant to 28 U.S.C. § 2412(d).

h. Such additional relief as the Court deems just and proper.

Respectfully submitted this 10th day of December, 2002.

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