

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

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

Plaintiffs,

v.

Case No. 02-2419 (RJL)

MICHAEL O. LEAVITT, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

SUPPLEMENT TO MOTION FOR SUMMARY JUDGMENT

Plaintiffs Beyond Pesticides, *et al.* file this Supplement to their Motion for Summary Judgment in order to inform the Court of developments which have occurred since the cross-motions for summary judgment were briefed. Plaintiffs' Motion for Summary Judgment was filed in this matter on June 28, 2004. Docket No. 43. Briefing was completed with EPA's Reply Brief on October 13, 2004. Docket No. 50.

In its summary judgment papers, EPA represented to the Court that it had completed draft preliminary risk assessments ("PRAs") on pentachlorophenol ("penta") and two of its contaminants, dioxins and hexachlorobenzene ("HCB").¹ According to EPA, these drafts had been through "initial error correction review," and were at that time being evaluated in "intra-Agency review." *Id.* These PRAs had been in "intra-Agency review" since March, 2003, when the registrants submitted their voluminous so-called "error correction" comments.² The administrative record submitted in this case contains two sets of three draft PRAs; one set dated

¹ EPA Summary Judgment Memo at 11-12, Docket No. 4, Att #1.

² *See*, Plaintiffs' Summary Judgment Memo at 7, 41-42, Docket No. 43, Att. #3.

November, 2002 and the other dated February, 2003. Each set includes a separate assessment for penta alone,³ for HCB,⁴ and for dioxins.⁵ As detailed in Plaintiffs' summary judgment brief, these assessments found cancer risks "exceed[ing] the Agency's level of concern" for penta alone and risks many times the "tolerable" levels for effects such as birth defects, neurotoxicity and immunosuppression from penta's contaminants.⁶

Twenty months after it received error correction comments on the draft PRAs, on November 30, 2004, EPA finally publically released *part* of the penta PRA.⁷ The portion of the PRA which was released addresses penta only. 69 Fed. Reg. at 69601. EPA stated that the PRA chapters on the contaminants would be released at an unspecified "later date." *Id.*, at 69602. On January 31, 2005, Plaintiff Beyond Pesticides and several other groups filed comments on the penta PRA, attached hereto as Exhibit 1. Beyond Pesticides pointed out that the belated issuance of the PRA without review of the HCB and dioxin contaminants, which are classified as carcinogens and persistent organic pollutants, was "wholly inadequate for the formulation of a PCP [penta] RED [reregistration eligibility document]." Ex. 1 at 1.

While the issuance of this partial PRA represents some very limited progress in EPA's review of the wood preservative pesticides, it also compellingly illustrates the glacial pace at

³ A.R. Penta Doc. 104 (Nov. 27, 2002) and A.R. Penta Doc. 108 (Feb. 10, 2003).

⁴ A.R. Penta Doc. 103 (Nov. 27, 2002) and A.R. Doc. 109 (Feb. 10, 2003).

⁵ A.R. Penta Doc. 105 (Nov. 27, 2002) and A.R. Penta Doc. 107 (Feb. 10, 2003).

⁶ Plaintiffs' Summary Judgment Memo at 29-33, Docket No. 43, Att. #3.

⁷ Notice of Availability of the Preliminary Risk Assessment for Pentachlorophenol. 69 Fed. Reg. 69600 (Nov. 30, 2004). The PRA itself is available at <http://www.epa.gov/edocket/>, Docket No. OPP-2004-0402.

which EPA is addressing this acknowledged serious health threat. EPA's own time line allots 30 days from the submission of registrant "error correction" comments to consider and incorporate those comments and publicly release the PRA.⁸ Here, after 20 months, the full PRA has yet to be released, and release of the crucial analysis of penta's contaminants remains stalled for the indefinite future. As the draft PRAs for the contaminants demonstrate, they pose highly excessive risks for grave human health effects. This latest delay has occurred, of course, in the context of a now *eight year* proceeding to re-analyze the risks and benefits of the wood preservatives, after an earlier analysis which consumed six years concluded with a finding of excessive risks. The use of the wood preservatives, and the health risks they pose, continue unabated while EPA's delay continues. As Plaintiffs have shown in their briefs, the existence of serious risks to human health, even if not conclusively proven, requires an agency to act promptly, and compels a finding of unreasonable delay when consideration stretches into several years, as has occurred here.⁹

In addition, in connection with the issuance of this partial PRA, EPA has yet again pushed back the estimated completion date for penta's reregistration eligibility decision ("RED"). EPA has projected continually receding completion dates for the wood preservative REDs, beginning with 1998.¹⁰ By the time EPA filed its summary judgment papers, the projected completion date

⁸ A.R. CCA Doc. 127 at 1, SJ Ex. 6. EPA represented to the Court over two years ago, in December, 2002, that it had "nearly completed" the issuance of a PRA for penta. Deft's Opp. to Preliminary Injunction at 3, Docket No. 9.

⁹ See, Plaintiffs' Summary Judgment Memo at 4, 9-11, 14, Docket No.43, Att. #3; Plaintiff's Opposition and Reply Memo at 11-12, Docket No. 49.

¹⁰ See, Plaintiffs' Summary Judgment Memo at 24-25, Docket No. 43, Att. 3.

had been pushed back *seven years*. EPA then represented to the Court that it would complete reregistration review of all three wood preservatives by September, 2005.¹¹ Now, in a Question and Answer document released with the partial penta PRA, EPA states that the penta RED is scheduled for the *end* of 2005.¹² This pattern of repeated failures to meet its own projected deadlines over a seven year period demonstrates that EPA's projected completion dates are essentially meaningless, and underscores the need for court intervention to insure that EPA concludes its consideration of the wood preservatives in a reasonable time and in accordance with meaningful deadlines.

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¹¹ EPA's Summary Judgment Memo at 11, Docket No. 44.

¹² Preliminary Risk Assessment for Pentachlorophenol ("Penta"): Questions and Answers, available at www.epa.gov/pesticides/factsheets/chemicals/pentachlorophenol.htm at Question 8.

