

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

Civil Action No. _____

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

Defendant.

**PLAINTIFFS' REQUEST FOR EXPEDITED HEARING ON
MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Beyond Pesticides/National Coalition Against the Misuse of Pesticides (“Beyond Pesticides”), Communications Workers Of America, AFL-CIO (“CWA”), Center for Environmental Health (“CEH”), Joseph S. Prager and Rosanne M. Prager seek expedited hearing on their motion for a preliminary injunction filed this date, to compel defendant Christine T. Whitman, Administrator of the Environmental Protection Agency (“EPA”) and EPA, to: 1) issue a notice of cancellation of the registrations of all products containing pentachlorophenol (“penta”) intended for use as wood preservatives, pursuant to 7 U.S.C. § 136d(b)(1), and 2) at the same time to issue an emergency order pursuant to 7 U.S.C. § 136d(c)(3) to suspend immediately those registrations. Local Rule 65.1(d) provides that on request of the moving party, hearings on applications for preliminary injunctions shall be set no later than 20 days from the date of the application. Because of the urgent nature of this matter and its widespread impacts on public

health and the environment and because of the unreasonable delays that have accumulated to date, Plaintiffs request that a hearing on this motion be granted no later than 20 days from this date. This hearing would not require live testimony; instead the motion for preliminary injunction may be decided on the pleadings and facts alleged in the Complaint, the Memorandum of Points and Authorities in Support of the Motion for Preliminary Injunction, the exhibits and affidavits attached thereto, and any responsive documents filed by Defendants.

Plaintiffs urge an expedited hearing because EPA's own findings indicate that widespread and serious unreasonable adverse effects are being caused by EPA's delay in acting to cancel and suspend penta. As more fully explained in Plaintiffs' motion for preliminary injunction, the adverse effects on human health and the environment vastly¹ exceed EPA's thresholds for regulatory action and each day of delay results in additional human exposures through the manufacture, distribution and disposal of utility poles treated with penta. Of particular concern is the exposure to workers, some of whom are members of plaintiff, CWA,² but the continued use of penta also creates unnecessary exposures to children and other persons who live, work or

¹ In some instances, EPA has found the health risks posed by penta are as much as 3 million times its usual action threshold of one cancer in a million.

² In 1999, EPA's Risk Assessment and Science Support Branch (RASSB)/ Antimicrobial Division produced a preliminary Science Chapter on penta for a Reregistration Eligibility Decision document ("RED"). Hereinafter "EPA Penta Science Chapter," Exhibit 3 to the Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction (hereafter "Memo in Support"). In that report, EPA found *inter alia*, that despite risk reduction measures EPA had adopted in the 1980's, with "maximum mitigation measures," 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 more than four thousand times EPA's "acceptable" level of risk for occupational exposures, and more than 400,000 times the "acceptable" level EPA applies for the general population. Most extreme, applicators of grease formulations of penta as groundline retreatments for existing utility poles had a risk of 3.4 out of 1.

travel near such utility poles.³ Because penta-treated poles are very widely used, the exposures affect virtually every person in the United States.⁴ Furthermore, the manufacturers, distributors and vendors of more environmentally benign products (such as poles made of fiberglass or steel) are being constrained in their ability to market their products because of the imprimatur that EPA's registration lends to penta-treated poles and utilities' consequent reluctance to switch to alternatives. In effect, EPA is in the ironic position of tilting the playing field in favor penta by maintaining its registration when non-toxic alternatives are available at competitive cost⁵ and would emerge in a fair marketplace. EPA's registration sends the inaccurate message to the marketplace that penta is "safe" and should compete equally with other products including those that are non-toxic.

In this instance immediate action is essential to protect public health and the environment and an expedited hearing is a logical extension of the FIFRA statutory scheme, which provides for cancellation as a long-term remedy for pesticides that do not meet the statutory standards (for

³ EPA's Preliminary Science Chapter reported that 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.

⁴ The American Wood Preservers Institute reported that approximately 656 million pounds of penta were used annually. 1995 Wood Preserving Industry Protection Statistical Report 1996, p. 12. Exhibit 4 to the Memo in Support. Based on utility and industry data, plaintiff Beyond Pesticides estimated in 1997 that there were over 116 million wood preservative-treated utility poles in the United States, approximately 45% of them (over 52 million) treated with penta. These utility poles are ubiquitous; along roadways and on residential and school yards, parks and playgrounds.

⁵ See Affidavits of Robert G. J. Jack and Joseph W. Reilly, Exhibits 1 and 2 to the Memo in Support.

instance because of unreasonable adverse effects) and suspension in the interim when an emergency exists necessitating a preventive approach while the cancellation proceeding is underway.⁶ An expedited hearing on the motion for preliminary injunction is simply a way to assure that this interim emergency remedy is available at the earliest possible date, in order to protect public health and the environment. In this instance, the evidence of harm developed by EPA is strong, and the findings are supported by numerous studies.⁷ Workers, children and the general public are being exposed to risks up to millions of times EPA's long-established action threshold. With such strong evidence of serious and widespread harm, an expedited hearing is essential to insure protection at the earliest date possible and without further unjustified delay.

Respectfully submitted,

⁶ *E.g.*, Love v. Thomas, 858 F.2d 1347, 1350, n.3 (9th Cir. 1988), *cert. denied sub nom AFL-CIO v. Love*, 490 U.S. 1035 (1989).

⁷ *See*, EPA Penta Science Chapter, Exhibit 3 to the Memo in Support.

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ORDER

Upon consideration of Plaintiffs' Request for Expedited Hearing on Motion for a Preliminary Injunction and the Opposition thereto, the Court determines that Plaintiffs' motion should be GRANTED. Accordingly, it is this _____ day of _____, 2002, hereby

ORDERED, that a hearing for oral argument on the Motion for Preliminary Injunction will be held on the _____ day of _____, 2002, at _____ a.m./p.m.

United States District Judge

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