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. 1:02CV2419
(RJL)

CHRISTINE T. WHITMAN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S LITIGATION AFFIDAVITS AND TO CLARIFY ORDER DENYING PLAINTIFFS' MOTION TO COMPEL SUBMISSION OF THE ADMINISTRATIVE RECORD RELATING TO PENTACHLOROPHENOL

Plaintiffs hereby move to strike the litigation affidavits of Jack E. Housenger and Denise Keehner filed by Defendant in connection with its December 19, 2002 Opposition to Plaintiffs Motion for Preliminary Injunction. On January 10, 2003, the Court denied Plaintiffs' Motion to Compel, holding that no additional administrative record documents were required for purposes of resolving plaintiffs' Motion for Preliminary Injunction. However, the Court did not rule on the status of EPA's litigation affidavits. Plaintiffs contend that if the record underlying the claims in those affidavits is not to be produced, as the Court has ruled, the litigation affidavits may not be considered or credited by the Court. Thus, Plaintiffs move the Court either to clarify its January 20, 2003 Order, or

issue a new Order, as appropriate, to strike EPA's litigation affidavits.

Plaintiffs' Motion for Preliminary Injunction challenges Defendant's failure to act to cancel and suspend the pesticide registration for pentachlorophenol ("penta"), despite the fact that the FIFRA's standards ("imminent hazard," "unreasonable adverse effects" and "emergency") for cancellation and suspension are met[1] as evidenced by EPA's own findings.[2]

The Supreme Court held in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), that review of agency decision-making is to be based on "the full administrative record." *Id.* at 419. "To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires

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[1] As recited in Plaintiffs' Motion to Compel, the FIFRA standards are met by 1) EPA's 1984 final regulatory decision that the wood preservative use of penta posed excessive human health risks and to maintain penta's registration only because of the lack of viable alternatives; 2) EPA's final decisions to cancel the registrations for all other uses of penta because of excessive risk; 3) information submitted to EPA since 1984 and thus within EPA's knowledge concerning the availability of viable alternatives to penta-treated wood; and 4) the extremely high risk findings in EPA's 1999 draft risk assessment for penta, apparently including a 340% lifetime risk of cancer for workers performing retreatments of utility poles with penta, as well as risk findings hundreds to thousands of times EPA's "acceptable" level for other categories or workers and for children coming into contact with the soil around utility poles.

[2] In its Order denying Plaintiffs' Motion to Compel, the Court states that "from the face of plaintiffs' motion for preliminary injunction it appears that plaintiffs are *challenging* the preliminary finding that EPA made in 1999 regarding the health hazards presented by using penta as a wood preservative, and an EPA determination in 1984 regarding the risks associated with penta." (Italics added.) In fact, plaintiffs *do not challenge but rely on* and cite those findings to argue that having made such findings, EPA has a duty to act now to prevent unreasonable adverse effects.

review of the 'whole record.'" Boswell Memorial Hospital v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984)(citations omitted).

Despite the requirement of a full administrative record, the parties may *agree* on a partial record for purposes of judicial review. Crowley's Yacht Yard v. Pena, 886 F. Supp. 98, 101 n.5, (DD.C 1995) (citing Boswell). For purposes of the Motion for Preliminary Injunction, Plaintiffs are prepared to rely on the record evidence presented in the Complaint, the Motion for Preliminary Injunction and the Exhibits thereto, which are primarily the public documents and findings of EPA as well as the information submitted by Plaintiffs concerning alternatives to penta. This record presents compelling evidence that the Agency has sufficient information to meet FIFRA's standards for cancellation and suspension. But Plaintiffs are *not* willing to stipulate, and specifically object to a record that includes litigation affidavits filed by Defendant which contain numerous unsupported assertions based on documents that the Agency has not produced and which are thus not before the Court and cannot form the basis of a decision. These litigation affidavits are merely *post hoc* rationalizations of the kind which the Supreme Court found improper in Overton Park. (401 U.S. 402, 420)(litigation affidavits "clearly do not constitute the 'whole record' compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act.").

Specifically, Defendants have filed litigation affidavits of Jack E. Housenger and Denise Keehner which allude to additional information that the Agency has in its possession which it asserts would justify its delay and inaction on penta. Numerous

statements in Keehner's affidavit point to and make conclusory assertions based on information which is in the Agency's possession but has not been presented to the Court or to plaintiffs. For example the Agency relies on, but has not produced:

1) "benefits analysis currently being conducted by OPP." Keehner Affidavit at ¶ 5

2) "preliminary work ... on benefits assessments." *Id*. at ¶ 6.

3) documents to support the assertion that "the utility industry relies heavily on penta-treated wood products." *Id.* at ¶ 6.a.

4) documents relating to alternatives to penta showing that "CCA has had more success than copper napthelene in capturing market share..." *Id*. at ¶ 6.b.

5) "basic information on alternative pole materials that do not require treatment with pesticides. Most of this has been supplied by manufacturers..." *Id*. at ¶ 6.c.

6) the analysis performed and the evidence used to conclude that "BEAD [Biological and Economics Assessment Division] does not have scientifically valid data at this time to indicate whether the alternative materials are biologically and economically feasible as large scale alternatives to wood poles." *Id.* at ¶ 6.c.

7) documents the agency relies on to conclude that "There is some use in the U.S. of utility poles made from alternative materials such as steel, concrete and composites.." *Id.* at ¶ 6.c.

8) the evidence supporting the assertion that "OPP's current information suggests that steel and concrete have about 2% of the market share." *Id.* at ¶ 6.c.

9) the studies, documents and data in support of the assertions that "The use of

composite materials for utility poles is still in the early stages and data are limited," and "alternative materials may be more expensive and there may be additional costs associated with alternatives such as disposal of existing wooden poles and a requirement for special installation equipment." *Id.* at ¶ 6.c.

10) the information from a contractor in a preliminary report on penta "scheduled for submission... later in December [2002]." *Id.* at ¶ 7.

11) the basis for the claim that EPA does not have sufficient information to "predict the impact of suspending or canceling one or more of the wood preservatives" (*Id.* at ¶ 8.), or to answer a list of questions including the cost of switching preservatives in treatment facilities and of changing to alternative materials to utility poles, what the effect of the sudden availability of wood preservatives have on the utility industry's ability to put up poles on short notice, to what extent the industry is switching to alternatives, and what has been the experience of European countries and other nations concerning the wood preservatives and alternative materials. *Id.* at ¶ 8.

Similarly, in Housenger's affidavit, the Agency refers to, but does not produce:

1) its worker exposure studies: "Between April 1999 and September 2001 AD [Antimicrobials Division] received worker exposure studies for each of the three wood preservatives. The study on penta [which in ¶ 22, he says was done in 1999] has been incorporated into a new draft of the preliminary risk assessments for penta." Housenger Affidavit at ¶ 20.

2) its correspondence with the public: "Since the start of the reregistration process

for penta and the other two wood preservatives, OPP staff have met and corresponded with various stakeholders... to receive additional information..." *Id.* at ¶ 21.

3) the new draft risk assessment which the agency says is undergoing internal review and will be forwarded to registrants of penta during January 2003. *Id.* at ¶ 23.

4) the basis for his assertion that after issuance of the preliminary risk assessment "it would be expected to take 6 - 8 months to complete a RED [Registration Eligibility Document]... [or] "as long as 3 years in the unusual situation." *Id.* at ¶ 25.

And finally, the Agency has not disclosed the documents that form the basis for the assertion in its Opposition and the Keehner Affidavit that its alternatives analysis must await completion of the risk assessment, and, by implication could not have been conducted beginning in 1984 or at any time since then. EPA Opposition at 11; Keehner Affidavit at ¶¶ 3, 6.

The Court's review must be confined to the administrative record already in existence, not some new record completed initially in the reviewing court, EDF v. Costle 657 F.2d 275, 284 (D.C. Cir 1981). The Agency's unsupported litigation affidavits amount to *post hoc* rationalizations in lieu of the full administrative record. The Court may not rely on a party's *post hoc* rationalizations where no rationale was set forth before. Cartlon v. Babbitt, 900 F. Supp. 526, 531 (D.D.C. 1995), Common Sense Salmon Recovery v. Evans, 217 F. Supp. 2d 17, 20 (D.D.C. 2002). [3]

[3] EPA has never ruled on the various petitions to cancel and suspend filed by Beyond Pesticides and others, or elsewhere explained why it has not taken those actions.

In summary, as set forth in plaintiffs' papers concerning their Motion to Compel, plaintiffs are willing to stipulate that the administrative record for purposes of the Motion for Preliminary Injunction may be confined to plaintiffs' submissions to the Court. However, plaintiffs specifically object to the inclusion of Defendant's litigation affidavits, because these include unsupported assertions based on administrative record evidence that is not before the Court, and thus amount to prohibited *post hoc* rationalizations of the agency's inaction rather than a complete administrative record. Plaintiffs therefore move to strike the affidavits of Denise Keehner and Jack E. Housenger. Plaintiffs further request that the Court clarify its January 10 order denying their motion to compel to make clear that plaintiffs do not *challenge* the preliminary finding that EPA made in 1999 regarding the health hazards presented by using penta as a wood preservative, and EPA's determination in 1984 regarding the risks associated with penta, but instead that plaintiffs challenge the Agency's inaction in the face of these determinations and the other evidence submitted by plaintiffs.

Plaintiffs' counsel have consulted with Defendant's counsel regarding this Motion, and report that Defendant will oppose this motion, and will file an Opposition by Friday, January 17, 2003, in order that the Court may review it prior to the hearing on the Motion for Preliminary Injunction set for Tuesday, January 21, 2003.

Respectfully submitted,

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ORDER

Upon consideration of Plaintiffs' Motion To Strike and to Clarify, the Court determines that Plaintiffs' Motion should be GRANTED. Accordingly, it is this _____ day of _____, 2003, hereby

ORDERED, that the affidavits of Denise Keehner and Jack E. Housenger shall be *stricken* and that the January 10 order be clarified to indicate that Plaintiffs do not challenge the preliminary finding that EPA made in 1999 regarding the health hazards presented by using penta as a wood preservative, and EPA's determination in 1984 regarding the risks associated with penta.

_____
Richard J. Leon
UNITED STATES DISTRICT JUDGE