IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND PESTICIDES/NATIONAL COALITION AGAINST THE MISUSE OF PESTICIDES, et al. Plaintiffs, v. CHRISTINE T. WHITMAN, ADMINISTRATOR OF UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendant.	)	Case Number: 1:02CV02419 (RJL)

MEMORANDUM IN SUPPORT OF DEFENDANT'S PARTIAL MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(1) and (6), defendant Christine Todd Whitman, Administrator, United States Environmental Protection Agency (hereinafter "EPA") moves to (1) dismiss all claims asserted by plaintiffs other than an Administrative Procedure Act claim that EPA has unreasonably delayed in acting on plaintiffs' alleged FIFRA petitions, and (2) strike all requests for relief other than (a) a request that the Court order EPA to rule on plaintiffs' alleged FIFRA petitions and (b) plaintiffs' request for attorney's fees and costs.[1/]

Plaintiffs allege that EPA has failed to take appropriate action with regard to three wood preservative pesticides: pentachlorophenol ("penta"), creosote, and chromated copper arsenic ("CCA") (collectively the "wood preservative pesticides"). Plaintiffs' Complaint For

[1/]Because plaintiffs failed to comply with Fed. R. Civ. P. 10(b), which provides that each claim founded on a "separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth," it is impossible for EPA to itemize particular counts that should be dismissed. EPA has, therefore, organized this motion based on what appear to be plaintiffs' legal theories.

Declaratory And Injunctive Relief ("Complaint") ¶ 1. Specifically, plaintiffs contend that (1) EPA should have cancelled and suspended the pesticide registrations for all three products; and (2) EPA should have repealed a 1980 regulation that provides that arsenic-treated wood does not constitute hazardous waste. Id. ¶¶ 1, 64. Plaintiffs purport to seek relief under three different federal statutes: the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k; the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706. See Complaint ¶¶ 1, 8. Plaintiffs seek a variety of overlapping declaratory and injunctive relief under all three statutes. See Complaint ¶ 64(a) - (h); Plaintiffs' Reply To EPA's Opposition To Motion For Preliminary Injunction (Docket No. 20), p. 18. Although it is difficult to determine exactly what plaintiffs are asking for – or the legal basis on which they contend they are entitled to any of the particular relief they seek – their requests appear to fall into two broad categories: requests that EPA be ordered to take an action (such as ruling on plaintiffs' petitions), and requests that EPA be ordered to reach a particular result (such as cancelling and suspending certain wood preservative pesticide registrations, or revising conclusions allegedly reached in 1987).

To the extent that plaintiffs seek relief directly under RCRA or FIFRA, their claims must be dismissed. Plaintiffs' RCRA claim apparently challenges (1) a regulation that was promulgated in 1980; (2) EPA's alleged "constructive denial" of plaintiffs' petition requesting the repeal of that regulation; and/or (3) EPA's alleged unreasonable delay in acting on that petition. See Complaint ¶¶ 31-36, 60-61, 63. If plaintiffs are challenging the 1980 regulation itself, then they are far beyond RCRA's 90-day statute of limitations on such challenges. See 42

U.S.C. § 6976(a)(1). If plaintiffs are challenging an alleged constructive denial of their RCRA petition, then they are in the wrong court; under RCRA, "a petition for review of action of [EPA] in . . . denying any petition for the promulgation, amendment, or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." Id. (emphasis added). And because judicial review of EPA's grant or denial (constructive or otherwise) of a petition filed under RCRA may be had only in the Court of Appeals, any claim for unreasonable delay based on the fact that EPA has not yet ruled on plaintiffs' RCRA petition is restricted to the same court. See Telecommunications Research and Action Center v. Federal Communications Commission ("TRAC"), 750 F.2d 70, 75 (D.C. Cir. 1984) (where statute commits review of agency action to Court of Appeals, any suit seeking relief that might affect Circuit Court's future jurisdiction [e.g., a claim for unreasonable delay of such agency action] "is subject to the exclusive review of the Court of Appeals") (emphasis in original). Plaintiffs' RCRA claims thus must be dismissed for lack of subject matter jurisdiction.

Plaintiffs' FIFRA claims are similarly beyond the Court's jurisdiction. FIFRA limits district court judicial review of agency actions to "the refusal of [EPA] to cancel or suspend a registration . . . and other final actions of [EPA]." 7 U.S.C. § 136n(a). There has been no refusal by EPA to cancel or suspend any of the pesticide registrations challenged by plaintiff, nor has there been any other final agency action subject to judicial review under FIFRA. To the extent that plaintiffs challenge alleged deficiencies in EPA's reregistration review of the wood preservative pesticides, jurisdiction over their challenge is, as with their RCRA challenges, limited to the Court of Appeals. See 7 U.S.C. § 136a-1(m) (EPA's failure to take action required by reregistration provisions subject to judicial review under procedures prescribed by section

136n(b) of FIFRA); 7 U.S.C. § 136n(b) (discussing review by Court of Appeals). Plaintiffs' FIFRA claims must therefore be dismissed.

EPA does not presently seek to dismiss plaintiffs' APA claim for unreasonable delay, although EPA believes this claim to be meritless. However, plaintiffs' remaining APA claims must be dismissed. Plaintiffs simply cannot use the APA to pursue a generalized claim based on their overall dissatisfaction with EPA's treatment of the wood preservative pesticides. See Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990) (plaintiff could not "seek wholesale improvement" of agency program "by court decree," but instead was required to "direct its attack against some particular agency action that cause[d] it harm"). The "agency actions" identified by plaintiffs either are not final (and thus are not subject to judicial review under the APA) or are well outside the statute of limitations. Moreover, to the extent that plaintiffs challenge agency inactions, the wide-ranging relief requested by plaintiffs extends far beyond that available under the APA. If the Court concludes that EPA has unreasonably delayed in acting on plaintiffs' FIFRA petitions, it can certainly order EPA to act on those petitions.[2/] It cannot, however, do what plaintiffs request and order EPA to reach a particular result. Still less does the APA grant the Court authority to make independent "findings" regarding the alleged hazards posed by the wood preservative pesticides, or to order EPA to revisit and "revise" conclusions reached over fifteen years ago. See Complaint ¶¶ 64(a), 64(c).

[2/]Plaintiffs identify a total of six "petitions" under FIFRA that allegedly have been either constructively denied or unreasonably delayed. See Complaint ¶¶ 39-40, 44-45, 50, 52-53, 63. For convenience, all six are referred to collectively herein as plaintiffs' "FIFRA petitions." EPA does not thereby concede that all of the communications identified by plaintiffs were in fact "petitions" requiring some response or action by EPA. The question of whether each of plaintiffs' communications to EPA constitutes a "petition" will be addressed in briefing on the merits of plaintiffs' unreasonable delay claim.

Plaintiffs' Complaint must therefore be dismissed to the extent that it (1) seeks relief under any statute other than the APA, and (2) seeks any relief other than an order requiring EPA to act on plaintiffs' FIFRA petitions regarding the pesticide registrations for the wood preservative pesticides.[3/]

I. STATUTORY BACKGROUND

A. RCRA

Congress enacted RCRA to address the serious environmental and health dangers arising from waste generation, management, and disposal. Congress was particularly concerned with the management and disposal of hazardous wastes, for which it mandated comprehensive "cradle-to-grave" regulation in RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e. Hazardous waste is broadly defined as "a solid waste" which may either "cause or significantly contribute to" an increase in mortality or serious illness, or "pose a substantial present or potential hazard to human health or the environment when improperly . . . disposed of, or otherwise managed." 42 U.S.C. § 6903(5). Congress delegated to EPA the task of developing criteria for identifying the characteristics of hazardous waste and listing hazardous wastes. 42 U.S.C. § 6921(a).

Plaintiffs' RCRA claims are governed by Section 7006(a), which vests exclusive jurisdiction in the courts of appeals to review final actions of the Administrator. 42 U.S.C. § 6976(a). In pertinent part, RCRA section 7006(a)(1) provides that review of EPA's action in "promulgating any regulation" or "denying any petition for the promulgation, amendment or

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[3/]Plaintiffs also seek attorneys' fees and costs under 28 U.S.C. § 2412(d). While EPA does not believe that plaintiffs' sole cognizable claim (i.e., their unreasonable delay claim under the APA) has any merit, EPA recognizes that dismissal of plaintiffs' claim for fees and costs would be premature.

repeal of any regulation under [RCRA] may be filed only in the United States Court of Appeals for the District of Columbia" within ninety days after EPA's action. 42 U.S.C. § 7976(a)(1) (emphasis added).

B. FIFRA

Pertinent provisions of FIFRA are discussed in detail in defendants' opposition to plaintiffs' motion for a preliminary injunction, which is incorporated by reference herein. See Defendants' Memorandum In Opposition To Motion For Preliminary Injunction (Docket No. 9) ("Def. Mem.") pp. 6-10. In general, FIFRA requires federal registration of all pesticides sold or distributed in the United States. Def. Mem. p. 1 n.1, p. 6. FIFRA also gives EPA the authority to cancel the registrations for pesticides that do not comply with FIFRA and, if appropriate, to suspend those registrations pending the completion of cancellation proceedings. Def. Mem. pp. 6-8. All of EPA's determinations relevant to this proceeding regarding pesticide registration (including decisions regarding cancellation and suspension) are governed by the same cost/benefit balancing test, i.e., that a pesticide must not pose "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136a(c)(5), 136(bb). In 1988, Congress amended FIFRA to include a specific process for the reregistration of previously registered pesticides. 7 U.S.C § 136a-1; see Def. Mem. pp. 8-10. The wood preservative pesticides are undergoing a reregistration review consistent with the process created by Congress. Def. Mem. pp. 10-12.

FIFRA includes a narrow judicial review provision, which authorizes a district court to review "the refusal of [EPA] to cancel or suspend a registration . . . and other final actions of [EPA] . . . ." 7 U.S.C. § 136n(a). Section 4 of FIFRA, which established the reregistration

program, also contains a limited judicial review provision. Section 4(m) provides that "[a]ny failure of [EPA] to take any action required by this section shall be subject to judicial review under the procedures prescribed by section 136n(b) of this title." 7 U.S.C. § 136a-1(m). Section 136n(b), in turn, authorizes judicial review by the court of appeals, but not by a district court. 7 U.S.C. § 136n(b).

C. APA

Under the APA, a person "adversely affected or aggrieved" by certain agency actions is entitled to judicial review. 5 U.S.C. § 702. Reviewable agency actions are, however, limited to those "made reviewable by statute" and other "final agency action[s]." 5 U.S.C. § 704 (emphasis added). The right of judicial review extends to agency inaction as well as agency action; thus, a reviewing court may "compel agency action unlawfully withheld or unreasonably delayed" as well as setting aside final agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706.

II. STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction that may exercise only those powers authorized by Constitution and statute. Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). Therefore, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." Kokkonen, 511 U.S. at 377 (citations omitted). Unless Congress has consented to a cause of action against the United States, there is no jurisdiction in any court to entertain such suit. United States v. Sherwood, 312 U.S. 584, 587-88 (1941). Because plaintiffs cannot show that their claims fall within a statutory grant of jurisdiction under either RCRA or FIFRA, their

RCRA and FIFRA claims must be dismissed under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

A court must also dismiss a case under Federal Rule of Civil Procedure 12(b)(6) if a plaintiff can prove no set of facts consistent with the allegations in its complaint that would entitle it to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); see also Fitts v. Federal Nat'l Mortgage Ass'n, 44 F. Supp.2d 317, 321 (D.D.C. 1999). Rule 12(b)(6) motions serve the purpose of allowing the court "to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." Advanced Cardiovascular Sys. v. Scimed Life Sys., 988 F.2d 1157, 1160 (Fed. Cir. 1993) (citations omitted). With the exception of their unreasonable delay claim (which, while meritless, is at least cognizable), plaintiffs have failed to state a claim for which relief may be granted under the APA.

Under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the Court should view a complaint's factual allegations in the light most favorable to the plaintiff and draw all reasonable inferences in favor of the plaintiff. See Fitts, 44 F. Supp. 2d at 321. The Court should not, however, accept conclusions of law or legal allegations of subject matter jurisdiction as true. Id.

III. ARGUMENT

A. Plaintiffs' RCRA Claim Must Be Dismissed For Lack Of Subject Matter Jurisdiction.

Plaintiffs assert three claims under RCRA. Plaintiffs challenge a 1980 regulation that provides that arsenic-treated wood and wood products are not hazardous waste. Complaint ¶ 32, 64(e); see also 40 C.F.R. § 261.4(b)(9). Plaintiffs also allege that EPA has either (1) constructively denied or (2) unreasonably delayed action on their July 2002 petition to repeal

that regulation.[4] Complaint ¶¶ 60-61, 63. This Court lacks jurisdiction over all of plaintiffs' RCRA claims.

1. Plaintiffs' challenge to the 1980 regulation is both time-barred and in the wrong court.

Under RCRA, a petition for review challenging any "action of [EPA] in promulgating any regulation" must be filed "within ninety days from the date of such promulgation," and must be filed in the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 6976(a)(1). The regulation that plaintiffs object to was promulgated over twenty years ago, and was explicitly stated to be "final for purposes of the 90-day petition deadline under Section 7006 of RCRA." 45 Fed. Reg. 78530 (November 25, 1980). The most recent activity that plaintiffs point to with regard to this regulation is a 1990 Federal Register notice, which plaintiffs allege demonstrates that EPA improperly "made a determination regarding the disposal of treated wood pursuant to RCRA in the course of its FIFRA proceeding."[5] See Complaint ¶¶ 34 -35, 64(e). Plaintiffs therefore seek "a declaratory judgment that EPA's decision to exempt arsenical-treated wood from hazardous waste regulation . . . improperly relied upon

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[4]Plaintiffs identify their July 2002 RCRA petition as having allegedly been constructively denied or unreasonably delayed. Complaint ¶ 63. Plaintiffs do not, however, include this petition in paragraph 64(d), which requests "[a]n injunction ordering EPA to grant all of the relief sought in Beyond Pesticides petitions to cancel and suspend the registrations of [the wood preservative pesticides] or, in the alternative, setting a schedule for EPA to rule expeditiously upon all of the requests for relief in Beyond Pesticides' petitions." Complaint ¶ 64(d) (emphasis added). Even assuming that plaintiffs also intended to request an injunction requiring EPA to rule on their RCRA petition, their claim would lie in the Court of Appeals. See infra at 10-11.

[5]The "FIFRA proceeding" to which plaintiffs refer is EPA's review of the wood preservative pesticides through the Special Review (or Rebuttable Presumption Against Registration) process. Complaint ¶ 33. This process is discussed in more detail in defendant's opposition to plaintiffs' Motion for Preliminary Injunction. See Def. Mem. pp. 8-9, 10.

determinations by the FIFRA program balancing pesticide risks and benefits rather than the appropriate RCRA hazardous waste characteristic test." Complaint ¶ 64(e). Even assuming that EPA's 1990 statement in a Federal Register Notice was a final agency action subject to judicial review, plaintiffs would still be over ten years too late – and they would still be required to proceed in the Court of Appeals. Plaintiffs' challenge to the 1980 regulation should thus be dismissed for lack of subject matter jurisdiction, and any associated requests for relief should be stricken.

2. The Court of Appeals has exclusive jurisdiction over any claim that EPA has unreasonably delayed in acting on plaintiffs' RCRA petition.

Plaintiffs contend that EPA has either constructively denied, or has unreasonably delayed taking action on, their July 2002 petition requesting that EPA repeal the 1980 regulation.[6/] If the petition had been denied (which it has not), judicial review would, again, lie solely in the Court of Appeals. 42 U.S.C. § 6976(a)(1) (petition for review of EPA action in "denying any petition for the . . . repeal of any regulation under this chapter may be filed only in" Court of Appeals) (emphasis added).[7/] Any claim for unreasonable delay would also lie solely in the Court of Appeals. See Telecommunications Research and Action Center v. Federal Communications Commission ("TRAC"), 750 F.2d 70 (D.C. Cir. 1984).

In TRAC, the D.C. Circuit held that where judicial review of final agency action is committed to the Court of Appeals, that court "has exclusive jurisdiction to hear suits seeking

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[6/]Plaintiffs petitioned EPA under Section 7004 of RCRA, which provides that any person may petition EPA for the repeal of any regulation under RCRA. 42 U.S.C. § 6974(a). EPA is required to take action on such petitions "within a reasonable time." Id.

[7/]Plaintiffs do not dispute that EPA has not actually denied their RCRA petition. EPA has stated only that it has not yet acted on plaintiffs' RCRA petition. Complaint ¶ 61.

relief that might affect its future statutory power of review." TRAC, 750 F.2d at 72, 75 (emphasis added). The court reasoned that because the Court of Appeals' statutory obligation to review final agency actions on the merits could be frustrated if an agency fails to act promptly, "a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction." Id. p. 76; see also Sierra Club v. Thomas, 828 F.2d 783, 792 (D.C. Cir. 1987) (where there is no date-certain deadline for EPA action, but EPA must nevertheless avoid unreasonable delay, jurisdiction over claim of unreasonable delay lies in Court of Appeals). The D.C. Circuit further concluded that its jurisdiction over unreasonable delay claims in such cases is exclusive, because "[b]y lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power." TRAC, 750 F.2d at 77.[8/]

As explained above, jurisdiction to review EPA's final action in either granting or denying a RCRA petition lies solely in the Court of Appeals. Therefore, under TRAC, jurisdiction over a claim that EPA has unreasonably delayed in granting or denying a RCRA petition would also lie exclusively in that court. Plaintiffs' claim of unreasonable delay based on EPA's failure to act on their RCRA petition must thus be dismissed for lack of subject matter jurisdiction, and any associated requests for relief must be stricken.

B. Plaintiffs' FIFRA Claim Must Be Dismissed For Lack Of Subject Matter Jurisdiction.

Plaintiffs allege that EPA has improperly failed to cancel and suspend the pesticide

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[8/]The court reasoned in part that appellate courts develop expertise in the matters assigned to them for review, and that "[e]xclusive jurisdiction promotes judicial economy and fairness to the litigants by taking advantage of that expertise." TRAC, 750 F.2d at 78.

registrations for the wood preservative pesticides, either through simply failing to act or through "constructive denial" of plaintiffs' FIFRA petitions. See Complaint ¶ 63. Included within this claim is what appears to be an overall challenge to EPA's reregistration review of the wood preservative pesticides. Id. (alleging EPA has "failed over the course of two decades" to address certain issues). Although plaintiffs' request for relief on their FIFRA claim is re-stated in a variety of forms, in the end plaintiffs appear to be asking the Court to determine that the wood preservative pesticides pose an unreasonable risk and, therefore, to order EPA to cancel and suspend the relevant registrations. See Complaint ¶¶ 64(a), (b), (c), (d).

As already discussed in defendants' opposition to plaintiffs' Motion for Preliminary Injunction, which is incorporated by reference herein, Section 16(a) of FIFRA allows for judicial review only where EPA has refused to cancel or suspend a pesticide registration or taken some other "final action." 7 U.S.C. § 136n(a); Def. Mem. pp. 17-21.[9/] Because EPA has not yet taken final agency action with regard to plaintiffs' cancellation and suspension petitions, Section 16(a) does not apply.[10/] Def. Mem. pp. 21-22. Nor have plaintiffs identified any other reviewable

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[9/]Unlike many environmental statutes, FIFRA does not include a "citizen suit" provision allowing for claims based on an agency's alleged failure to carry out its statutory duties; indeed, Congress actually rejected a proposed citizen suit provision. See Def. Mem. p. 18 n.18. There is thus no mechanism in FIFRA itself (other that Section 4(m), discussed below in note 10) whereby plaintiffs could pursue a claim based on EPA's lack of action. Any claim based on agency inaction or unreasonable delay would lie solely under the APA.

[10/]FIFRA contains a separate judicial review provision that governs challenges to pesticide reregistration. Section 4(m) of FIFRA provides that "[a]ny failure of the Administrator to take any action required by this section [i.e., the reregistration provisions] shall be subject to judicial review under the procedures prescribed by section 136n(b) of this title." 7 U.S.C. § 136a-1(m). Section 136n(b) in turn is titled "Review by court of appeals," and describes the procedures for such review. 7 U.S.C. § 136n(b). Thus, to the extent that plaintiffs allege that EPA's reregistration review of the wood preservative pesticides somehow fails to meet the pertinent (continued...)

"final actions."

To be final, agency action must "mark the consummation of the agency's decisionmaking process." Bennett v. Spear, 520 U.S. 154, 177-78 (1997). The action "must be one by which rights or obligations have been determined or from which legal consequences will flow." Id. (citations omitted); see also Action on Smoking and Health v. Department of Labor, 28 F.3d 162 (D.C. Cir. 1994). In Action, plaintiffs challenged an agency's choice to pursue one regulatory path rather than another. Specifically, the plaintiffs contended that the agency's proposal to regulate environmental tobacco smoke ("ETS") through an omnibus rulemaking, rather than through a separate proceeding, was arbitrary and capricious. Action, 28 F.3d at 165. The D.C. Circuit concluded that there was no final agency action, in part because "no legal consequences presently attach[ed]" to the agency's inclusion of ETS in the omnibus rulemaking. Id.; see also DRG Funding Corp. v. Secretary of Housing and Urban Development, 76 F.3d 1212, 1214-15 (D.C. Cir. 1996) (administrative order requiring plaintiff to proceed with a particular administrative process was not reviewable final agency action; interim action had "not directly affected the parties or determined their rights or obligations").

In various filings, plaintiffs have identified two alleged "final actions" that, they claim, are subject to challenge under FIFRA (and/or the APA – the definition of "finality" is the same in either case). Plaintiffs point to an alleged 1997 EPA "decision" to conduct a reregistration review of penta rather than pursuing cancellation proceedings, and a similar "decision point" in 1999 when EPA allegedly "decided to continue along the reregistration track." See Plaintiffs'

[10/](...continued)
statutory standards, any claim would lie only in the Court of Appeals.

Motion To Compel Submission Of The Administrative Record Relating To Pentachlorophenol (Docket No. 11), pp. 5-6; Plaintiffs' Reply To Defendant's Opposition To Plaintiff's Motion To Compel And Opposition To Cross-Motion For Protective Order (Docket No. 15), pp. 8-9. Initially, EPA is never faced with a choice between either conducting a reregistration review of a pesticide or issuing a notice of intent to cancel that pesticide. Congress required EPA to reregister pesticides registered before 1984 (with certain limited exceptions); however, in mandating reregistration, Congress did not repeal EPA's authority to cancel or suspend pesticide registrations. Even while a pesticide is undergoing reregistration review, EPA retains the authority to initiate cancellation and suspension proceedings if it appears that the pesticide "generally causes adverse unreasonable effects on the environment." Def. Mem. pp. 6-9. The fact that EPA is currently reviewing the wood preservative pesticides through the reregistration process does not, therefore, mean that EPA has "decided" it will never cancel or suspend the pertinent registrations.

In addition, the information considered and the applicable statutory standards will be the same regardless of whether EPA considers the wood preservative pesticides through the reregistration process or in the course of cancellation proceedings. In either case, EPA will be required to conduct a cost/benefit analysis and determine whether those pesticides pose "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use" of the wood preservative pesticides. 7 U.S.C. §§ 136a(c)(5), 136(bb). Because the substantive standards are the same regardless of the regulatory process, there is no legal consequence to EPA's choice to pursue its reregistration review of the wood preservative pesticides for now rather than immediately issuing notices of

intent to cancel those pesticides.

EPA's decision to initiate or continue the reregistration review of the wood preservative pesticides thus does not constitute final agency action. As such, it is not reviewable under FIFRA (or, for that matter, the APA), and plaintiffs' FIFRA claims must be dismissed.

C. With The Exception Of Their Claim For Unreasonable Delay, Plaintiffs Have Failed To State A Claim For Which Relief May Be Granted Under the APA.

1. Plaintiffs cannot use the APA to challenge EPA's overall treatment of the wood preservative pesticides.

Although plaintiffs' specific legal theories are difficult to identify, the tenor of plaintiffs' claim is clear: they do not like the way EPA has handled the wood preservative pesticides, particularly penta, over the last two decades. Plaintiffs recently characterized one aspect of their claim as follows:

> Issues presented by the Motion [for Preliminary Injunction] include, for example, whether, given EPA's final agency decision in 1984 that the wood preservative uses of penta posed excessive risks which would warrant cancellation but for the lack of economically viable alternatives, and the subsequent cancellation of all other uses of penta for which there were viable alternatives, EPA had a duty to revisit the issue of penta's wood preservative registration when it was informed of alternatives to penta-treated wood, and to take regulatory action based upon the information it has concerning alternatives. Another issue is whether EPA was justified, after a six year exhaustive regulatory review of penta from 1978 to 1984, and given the "excessive risks" that were found both in 1984 and since then, in essentially going back to square one in its reregistration review of penta, from 1997 to the present and continuing on into the future for an estimated 8 months to 3 years. Or whether, on the other hand, the record and findings which EPA currently has on penta warrant immediate regulatory action.

Plaintiffs' Reply To Defendants' Opposition To Plaintiffs' Motion To Compel & Opposition To Cross-Motion For Protective Order (Docket No. 15) p. 4. It is difficult to see this as anything other than a global objection to EPA's overall handling of penta. Judging by plaintiffs' complaint, their dissatisfaction extends to EPA's overall handling of the wood preservative

pesticides generally. See Complaint ¶ 63.

The APA was not intended to allow plaintiffs to express generalized dissatisfaction with an agency's overall course of conduct. See Lujan v. National Wildlife Federation, 497 U.S. 871, 890 n.2, 893-94 (1990). The Supreme Court made clear in Lujan that broad attacks on agency "programs" do not meet the final agency action requirement. Instead, a plaintiff "must direct its attack against some particular 'agency action' that causes it harm." Id. at 891 (emphasis added). In Lujan, plaintiffs aimed their challenge at programmatic agency failure, alleging that "violation of the law [was] rampant" within a particular Bureau of Land Management program. Id. at 890.[11/] The Court held that, under the APA, plaintiffs could not "seek wholesale improvement of this program by court decree . . . ." Id.; see also Found. on Economic Trends v. Lyng, 943 F.2d 79, 86 (D.C. Cir. 1991) (dismissing challenge to USDA's "germplasm program" because "the many individual actions referenced in the record, and presumably actions yet to be taken as well – cannot be laid before the courts for wholesale correction") (internal quotation omitted); Ecology Center, Inc. v. U.S. Forest Serv., 192 F.3d 922, 925 (9th Cir. 1999) (plaintiffs "cannot demand general judicial review of day-to-day operations" without a statutory mandate authorizing such review) (internal quotation omitted).

Plaintiffs appear to seek "wholesale correction" of EPA's approach to the wood preservative pesticides. Under Lujan, such an attack is not permissible under the APA. Plaintiffs claim thus must be dismissed to the extent that plaintiffs have failed to challenge

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[11/]In Lujan, an environmental group challenged numerous aspects of a Bureau of Land Management program, including the alleged "failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, [and] failure to provide adequate environmental impact statements." 497 U.S. at 891.

specific agency actions or inactions.

2. Plaintiffs have not identified any reviewable final agency actions.

As discussed above, see supra at 13-14, an agency action is not "final" until it determines legal rights, obligations, or benefits. The only recent "actions" identified by plaintiffs are not final by this definition, and therefore are not subject to challenge under the APA. Id. Plaintiffs do identify some final actions with regard to the wood preservative pesticides – for example, EPA's 1987 amendment of certain risk reduction measures. Complaint ¶ 21. This is, however, the most recent "final action" that plaintiffs can point to – and it is far too late to challenge that action now (if in fact plaintiffs seek to do so). There is a six-year statute of limitations applicable to civil actions against the United States. 28 U.S.C. § 2401. Plaintiffs are thus out of time to the extent that they seek to challenge any agency actions occurring before December 10, 1996.

3. Plaintiffs' remedy would be limited to an order requiring EPA to act on plaintiff's petitions.

Included in plaintiffs' lengthy and duplicative laundry list of potential relief are demands that the Court, inter alia, (1) order EPA to cancel and suspend all three wood preservative pesticide registrations; (2) order EPA to revise conclusions reached in its prior review of the wood preservative pesticides; (3) find that EPA has erred in failing to re-assess findings made in 1984; and (4) order EPA to "broaden" a proposed phase-out of CCA. Complaint ¶¶ 64(b), (c), (d), (f) Plaintiffs' reach far exceeds their grasp. The Supreme Court has stated that "the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] . . . for reconsideration. . . . [The court lacks the] power to exercise an essentially administrative function." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17,

20-21 (1952) (citations omitted) (appeal from judicial modification of agency issued license). Accordingly, even if this Court were to find that EPA has unreasonably delayed in acting on plaintiffs' FIFRA petitions, the only appropriate remedy would be an order compelling EPA to exercise its discretion to either grant or deny those petitions. See 5 U.S.C. § 706(1) ("The reviewing court shall . . . compel agency action . . . unreasonably delayed"); see also Johnson v. Philadelphia Hous. Auth., No. 93-2296, 1995 WL 395950, at *2 (E.D. Pa. June 29, 1995) ("Section 706(1) does not give the court power to order an agency to correct the problems caused by unreasonably delayed actions. Rather, an order compelling an agency to take the action it has unreasonably or unlawfully failed to take represents the only available remedy under section 706(1).").

Even in the EDF cases relied on by plaintiffs (which are of questionable validity under the current version of FIFRA), the most that the court ever did was to order EPA to initiate an administrative process through which it could review a pesticide's risks and benefits.[12/] As discussed in defendants' opposition to plaintiffs' motion for preliminary injunction, at the time the EDF cases were decided, there was no specific process in FIFRA whereby EPA could re-assess a registered pesticide. Def. Mem. pp. 19-21, 24-27. As the court noted in EDF v. Ruckelshaus, however, Congress had granted the public "a role in deciding important questions

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[12/] See Environmental Defense Fund Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Environmental Defense Fund Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Environmental Defense Fund Inc. v. Environmental Protection Agency, 465 F.2d 528 (1972). As established in defendants' opposition to plaintiffs' Motion for Preliminary Injunction, these cases are both factually and legally distinguishable. See Def. Mem. pp. 19-27. Moreover, in two out of three of these cases, all that the court did was to remand the matter at issue to EPA for further consideration and/or development of an administrative record. See Hardin, 428 F.2d at 1199-1100; EPA, 465 F.2d at 541.

of public policy" under FIFRA. Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 594 (D.C. Cir. 1971). Under the then-existing structure of FIFRA, the only way to ensure public participation was for EPA to issue notices of intent to cancel a pesticide registration and thus "commence the administrative process." See Ruckelshaus, 439 F.2d at 594-95; Def. Mem. pp. 25-27.

The Ruckelshaus court therefore ordered EPA to initiate an administrative process by issuing notices of intent to cancel the pesticide at issue – but that is all that it did. There simply is no precedent in the EDF cases (or anywhere else that EPA is aware of) for the sweeping relief requested by plaintiffs. Any requests for relief beyond an order requiring EPA to act on plaintiffs' FIFRA petitions must therefore be stricken.

CONCLUSION

For the foregoing reasons, (1) all claims asserted by plaintiffs other than their Administrative Procedure Act claim that EPA has unreasonably delayed in acting on plaintiffs' FIFRA petitions should be dismissed, and (2) all requests for relief other than (a) plaintiffs' request that the Court order EPA to rule on those petitions and (b) plaintiffs' request for attorney's fees and costs should be stricken.

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Respectfully submitted,

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