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' OPPOSITION TO
DEFENDANT'S PARTIAL MOTION TO DISMISS**

INTRODUCTION

Defendant EPA has moved for partial dismissal of plaintiffs' complaint on jurisdictional grounds, pursuant to Fed.R.Civ.P. 12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6). This motion is plainly frivolous and appears calculated to forestall the inevitable day when EPA must live up to its obligation to answer plaintiffs' complaint, produce its administrative record concerning the actions and inactions challenged in the complaint, and proceed with defending the merits of plaintiffs' complaint.

EPA *admits* that plaintiffs have stated a viable claim for unreasonable delay pursuant to the Administrative Procedure Act ("APA") with regard to EPA cancellation

and suspension action on the wood preservative pesticides.[1] Thus, EPA has admitted the existence of both jurisdiction and of a claim upon which relief can be granted with respect to all of the allegations in plaintiffs' complaint concerning the three wood preservative registrations.[2] Rather than advancing any legitimate grounds for dismissal, EPA is inappropriately trying to limit plaintiffs' legal theories[3] and requested remedies.[4] Yet, under settled legal standards, such issues are not grounds for Rule 12 dismissal, but are appropriately left to later stages of the proceeding so long as plaintiffs have met minimal "notice pleading" requirements.

EPA's decision to move for partial dismissal, in light of clear precedent indicating that its motion will be denied, strongly suggests that EPA is really attempting to "needlessly delay litigation on the merits of plaintiff's claims." Blank v. Baronowski,

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[1] Memorandum in Support of Defendant's Partial Motion to Dismiss (hereinafter "EPA Dismissal Memo") at 4, 18.

[2] Plaintiffs' complaint seeks cancellation and suspension and other relief with regard to the three wood preservative pesticides, pentachlorophenol ("penta"), chromated copper arsenate ("CCA") and creosote. Complaint ¶ 64a., 64b, 64c, 64d, and 64f. Plaintiffs also seek relief regarding EPA's exemption of CCA-treated wood from hazardous waste disposal requirements under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6692k ("RCRA"), Complaint ¶ 64e. While EPA has not admitted any basis for jurisdiction for plaintiffs' claim regarding the RCRA exemption, as discussed below, EPA misunderstands the limited nature of the declaratory judgment claim set forth in the complaint, over which this Court does have jurisdiction.

[3] EPA seeks to dismiss all claims based on the facts stated in the complaint except an APA claim that "EPA has unreasonably delayed acting on plaintiffs' alleged FIFRA petitions." EPA Dismissal Memo at 1.

[4] EPA seeks a pre-litigation order limiting the relief sought to "a request that the Court order EPA to rule on plaintiffs' alleged FIFRA petitions" and "plaintiffs' request for attorney's fees and costs." EPA Dismissal Memo at 1.

959 F. Supp. 172, 181 (S.D.N.Y. 1997). *See also*, Podell v. Citicorp Diners Club, Inc., 859 F. Supp. 701, 704 (S.D.N.Y 1994) ("In considering Rule 12(b)(6) motions, courts should remain faithful to the liberal nature of the modern federal rules of procedure and guard against the use of the rule to delay litigation and harass a party.")[5]

ARGUMENT

I. THE COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS

A. The Court Has Jurisdiction Over Plaintiffs' Claims Related to the FIFRA Registrations of the Wood Preservatives

Without ever identifying these particular claims, EPA asserts that the Court lacks jurisdiction over plaintiffs' "FIFRA claims."[6] EPA is correct that Plaintiffs seek judicial review pursuant to both FIFRA § 16(a) and the APA, 5 U.S.C. § 706(1) of EPA's inaction and delay with regard to cancellation and suspension of the wood preservative registrations. EPA admits to a cause of action under the APA for which there is jurisdiction, but asserts that plaintiffs' claims do not meet the jurisdictional requirements

[5] As one District Court lamented in ruling on such a motion: "Like the large majority of Fed.R.Civ.P. ("Rule") 12(b)(6) motions, in principal part this one has accomplished little except to delay the real commencement of litigation, keep the meters running for two sets of lawyers and occupy time of this Court and one of its clerks that would have been better spent on more constructive matters. Were fewer such motions filed there might be time available for an empirical study of just what percentage are the product of a refusal to acknowledge the notice pleading concept that has underlain the Rules from the beginning. As it is the Court has only its general sense of things to support the conviction that a rule making unsuccessful (and perhaps successful) Rule 12(b)(6) motions the predicate for awarding attorney's fees to the prevailing party would be a wholesome provision. At this point there is no real disincentive to file the typical groundless motion." Washington v. City of Evanston, 535 F. Supp. 638, 640 n.2 (N.D. Ill. 1982).-

[6] EPA Dismissal Memo at 3, 11-14.

of FIFRA § 16(a), 7 U.S.C. § 136n(a).

Since these two jurisdictional provisions are applied to the same allegations in plaintiffs' complaint, it is questionable whether an inquiry into whether *both* jurisdictional provisions are applicable is even necessary to deny EPA's 12(b)(1) motion to dismiss on jurisdictional grounds. If the Court determines that jurisdiction lies for plaintiffs' APA cause of action, as EPA admits, then jurisdiction lies for plaintiffs' so-called "FIFRA claims" based upon the same facts.[7] However, in fact, both sources of jurisdiction do apply.

1. The Court Has Jurisdiction Based on the APA

Plaintiffs' APA cause of action has its substantive basis in FIFRA. The APA supplies a cause of action in favor of persons aggrieved by agency action, Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984), "which applies universally," except, as provided by 5 U.S.C. § 701(a), to the extent that statutes preclude review or agency action is committed to agency discretion by law.[8] Bennett v. Spear, 520 U.S. 154, 175 (1997). However, while the APA provides a general cause of action to challenge

[7] Actually, the APA does not itself provide jurisdiction, as opposed to a cause of action. Rather, jurisdiction to review agency action under the APA is found under 28 U.S.C. § 1331, invoked in plaintiffs' complaint at ¶ 8. Chrysler Corp. v. Brown, 441 U.S. 281, 317 n. 47 (1979). Duke Energy Services Assets v. FERC, 150 F. Supp. 2d 150, 155 (D.D.C. 2001). Section 1331 confers jurisdiction on the federal courts to review agency action, subject only to preclusion of review statutes created by Congress. Califano v. Sanders, 430 U.S. 99, 105 (1977). EPA does not challenge plaintiffs' cause of action for unreasonable delay under the APA or the Court's jurisdiction under § 1331.

[8] "Agency action" is defined in the APA to include a "failure to act." 5 U.S.C. § 551(13).

agency action or inaction, there must be a statute or regulation which supplies the substantive basis for the complaint. *Id.* In this case, that statute is FIFRA. *See also*, Preferred Risk Mutual Ins. Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (While a plaintiff need not demonstrate that the substantive statute independently waives sovereign immunity, which is the function of the APA (5 U.S.C. § 702), the plaintiff must "identify a substantive statute or regulation that the agency has transgressed . . . ").

2. Jurisdiction Also Lies Under FIFRA Section 16(a)

In addition to jurisdiction pursuant to the APA, FIFRA § 16(a) provides an independent source of jurisdiction permitting judicial review of plaintiffs' claims with regard to EPA's refusal to cancel or suspend the wood preservative pesticides, based on the same factual allegations that support the admittedly-valid APA cause of action. As plaintiffs demonstrated in their preliminary injunction reply,[9] FIFRA § 16(a) *permits* this Court to review plaintiffs' claims.[10]

EPA has incorporated the jurisdictional challenge made in its opposition to plaintiffs' preliminary injunction motion[11] into this motion, but again cites no authority

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[9] Docket # 20 at 6-11, hereinafter "Pltfs. PI Reply," incorporated herein by reference.

[10] The Supreme Court has ruled that the relevant inquiry is whether a statute restricts the scope of jurisdiction under 28 U.S.C. § 1331, *see* Califano v. Sanders, 430 U.S. at 105-106, or invokes statutory preclusion of APA review under 5 U.S.C. § 701(a)(1). NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 130 (1987). Such statutory preclusion of judicial review "must be demonstrated clearly and convincingly. " 484 U.S. at 131.

[11] Docket # 9, hereinafter "EPA PI Opp."

directly supporting its contention that FIFRA §16(a) precludes jurisdiction over claims that EPA has failed to act or unreasonably delayed action to cancel and suspend pesticides. In its preliminary injunction filing, EPA cited only two cases that addressed jurisdiction under FIFRA, and neither one resolved the issue presented here.

The first, Defenders of Wildlife v. EPA, 882 F.2d 1294, 1298 (8th Cir. 1989), held that §16(a) limited review of EPA refusals to cancel pesticides, in APA terminology, "to the extent" of requiring an administrative petition to cancel before resorting to court. It did not address the question of whether inaction on such a petition was reviewable under § 16(a) or otherwise.[12] The second, Syngenta Crop Protection Inc. v. EPA, 202 F. Supp. 2d 437 (M.D.N.C. 2002), held that § 16(a) precluded review of non-final EPA action concerning the rights of pesticide registrants with regard to the data submitted in support of their registrations, and did not concern inaction on a petition to cancel or suspend. The court found there that EPA was still in a position to take the action sought by the plaintiff and that no substantial harm to plaintiff would be caused in the interim.

In contrast with these basically irrelevant authorities relied upon by EPA, plaintiffs' jurisdictional argument relied on controlling D.C. Circuit precedent which holds that under FIFRA "inaction is tantamount to an order denying suspension" and thus reviewable, EDF v. Hardin, 428 F.2d 1093,1099 (D.C. Cir. 1970), and that unreasonable delay in acting on a petition to cancel is reviewable and remediable by "an order directing

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[12] EPA PI Opp at 18; Pltfs. PI Reply at 4, n.1.

the Secretary to act in accordance with FIFRA," which in that case, was an order to issue cancellation notices. EDF v. Ruckelshaus, 439 F.2d 584, 593 (D.C. Cir. 1971).[13] Plaintiffs refuted EPA's attempts to distinguish these controlling precedents in their preliminary injunction reply,[14] and EPA has not addressed them again in the current motion with regard to jurisdiction.[15]

Finally, as discussed in plaintiffs' preliminary injunction reply, FIFRA's judicial review provision, § 16(a) was amended in 1972 primarily to divide jurisdiction over FIFRA claims between the district courts and the courts of appeals, and there is no evidence of congressional intent to limit jurisdiction over APA claims involving FIFRA.[16] Congress assigned review of "refusals . . . to cancel or suspend a registration" to the district courts, because FIFRA does not provide for an adjudicatory hearing with regard to failure to cancel or suspend as it does for decisions *to* cancel or suspend, and Congress wanted to direct "all actions taken after a hearing . . . to the courts of appeals and all actions taken without a hearing" to the district courts.[17]

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[13] Pltfs. PI Reply at 6-7.

[14] *Id.*, at 8-11, including a showing that the changes in the language of the FIFRA jurisdictional provision and EPA's institution of a reregistration program subsequent to the decisions in the EDF cases have no bearing on the holdings in those cases that inaction and delay on petitions to cancel or suspend pesticide registrations are reviewable under FIFRA.

[15] EPA does address these cases in connection with its argument on remedial options. See pp. 22-23, *infra.*

[16] Pltfs PI Reply at 9-10.

[17] S. Rep. No. 92-838 (Committee on Agriculture and Forestry), *reprinted in*, 1972 U.S. Code & Admin. News 3993 at 4019.

Rather than meet these arguments, EPA discusses more general authority on finality in other contexts,[18] ignoring the fact that the D.C. Circuit has held in the EDF cases that inaction and delay on petitions to cancel and suspend pesticide registrations is "tantamount" to final action and thus reviewable under FIFRA.[19] EPA also argues that its decision to conduct a reregistration review of the wood preservative pesticides was not a "final action" because it still retains the authority to cancel or suspend the pesticides during the ongoing reregistration review, and has not "'decided' it will never cancel or suspend the pertinent registrations."[20] However, the D. C. Circuit specifically rejected the possibility of future cancellation or suspension action as a bar to judicial review of inaction on petitions to suspend or cancel, stating:

> no subsequent action can sharpen the controversy arising from a decision by the Secretary that the evidence submitted by petitioners does not compel suspension or cancellation of the registration of DDT. In light of the urgent character of petitioner's claim, and the allegation that delay itself inflicts irreparable injury, the controversy is as ripe for judicial consideration as it ever can be.

EDF v. Hardin, 428 F.2d at 1098. With regard to suspension specifically, the D.C. Circuit stated that "inaction results in a final disposition of such rights as the petitioners

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[18] EPA Dismissal Memo at 13.

[19] *Cf.*, Oil, Chemical and Atomic Workers Union v. OSHA, 145 F.3d 120, 122-23 (3rd Cir. 1998)(while the Occupational Health and Safety Act on its face grants jurisdiction to review OSHA standards already issued by the Secretary, the courts have interpreted this grant of jurisdiction, when read in conjunction with the APA, to enable judicial review of inaction and delay).

[20] EPA Dismissal Memo at 14.

and the public may have to interim relief." *Id.* at 1099.

3. EPA Has Effectively Denied Plaintiffs' Petitions

EPA's assertion that it is leaving the door open for cancellation or suspension action during the reregistration proceedings[21] is disingenuous given its statements to the Court in its preliminary injunction brief that it would complete the reregistration process before taking any other action:

> Although reregistration does not prevent the Agency from using the other tools given it by Congress (such as the ability to suspend a registration), courts should be reluctant to remove a pesticide from the normal reregistration process once EPA has determined that reregistration is the most appropriate method for reassessing the risks and benefits of that pesticide.

EPA PI Opp. at 25.

> Common sense dictates that a decision on plaintiffs' petitions, or completion of penta's reregistration, should not occur until EPA has completed the remaining steps in its penta reregistration process so that EPA is in a position to respond fully to public concerns and to evaluate those concerns with complete knowledge of the situation (including knowledge of the benefits of penta, which EPA has just begun to assess).

Id. at 29. As noted at the oral argument on the preliminary injunction motion, plaintiffs contend that these statements represent an actual denial of their administrative petitions to cancel and suspend, going beyond the inaction "tantamount to an order denying" such petitions found reviewable in the EDF cases. Preliminary Injunction Tr. at 21-23.

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[21] EPA Dismissal Memo at 14.

Contrary to EPA's argument here,[22] as already addressed in plaintiffs' preliminary injunction reply, at 20-21, a reregistration proceeding is no substitute for a cancellation or suspension proceeding, and a decision to proceed on a reregistration track instead of a cancellation/suspension track has enormous legal and practical consequences. A cancellation or suspension action is final regulatory action, which becomes effective in 30 days unless a hearing is requested by an adversely affected party. 7 U.S.C. § 136d(b). In the case of an emergency suspension, the pesticide is immediately removed from the market even if a hearing is requested. 7 U.S.C. § 136d(c)(3). In contrast, if EPA finds at the conclusion of its multi-year reregistration proceeding that the pesticide is not eligible for reregistration, "this determination is not itself a final agency action."[23] At that point EPA would *begin* the cancellation or suspension proceedings which plaintiffs seek immediately.[24] Thus, EPA's protestations that it is in a reregistration proceeding do not undermine jurisdiction over plaintiffs' claims, nor do they moot plaintiffs' need for urgent relief.[25]

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[22] EPA Dismissal Memo at 14-15.

[23] EPA PI Opp. at 9.

[24] 7 U.S.C. § 136a-1(g)(2)(D); *see also*, 7 U.S.C. § 136a(g)(1)(A).

[25] Apart from the fact that precedent under other statutes cannot overrule the holdings in the EDF cases concerning jurisdiction under FIFRA, this major legal and practical difference between a reregistration proceeding and a cancellation or suspension proceeding serves to distinguish the cases cited by EPA for the proposition that a decision to proceed on another administrative "track" from that requested by the plaintiff is not a final actionable agency action. *See*, EPA Dismissal Memo at 13. In Action on Smoking and Health v. Dept. of Labor, 28 F.3d 162 (D.C. Cir. 1994), the plaintiff petitioned OSHA to *propose* a regulation concerning

B. Plaintiffs' RCRA Claims Seek Relief Explicitly Available Under the Declaratory Judgment Act: A Declaration That EPA Has Improperly Applied FIFRA Standards to the Disposal of Arsenical-treated Wood

Plaintiffs recognize that RCRA's judicial review provision, 42 U.S.C. § 6976(a)(1) vests in the D.C. Circuit Court of Appeals the authority to review EPA's final determinations of whether or not to designate a particular waste as "hazardous waste" under RCRA, and as well review of EPA's denial of a petition for the promulgation, amendment or repeal of a regulation such as plaintiffs filed with EPA.[26] But in this

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environmental tobacco smoke ("ETS"). The Court of Appeals found that claim to be moot, because after the case was filed OSHA did issue a proposed regulation which included ETS as part of an omnibus rulemaking. 28 F.3d at 164. The Court rejected the plaintiff's claim that it was arbitrary and capricious not to regulate ETS in a separate proceeding, stating that because "no legal consequences presently attach to OSHA's inclusion of ETS in the proposed omnibus rulemaking, it is premature for us to consider petitioner's challenge to the omnibus nature of OSHA's proposed rulemaking." 28 F.3d at 165. Thus, the court was comparing the issuance of one proposed rule to another, and determined that it was too early to determine whether inclusion of ETS in an omnibus rule would delay final action on ETS. The court noted, however, that "[t]he teachings of TRAC should remind both parties that petitioner may renew its petition if OSHA fails to pursue its rulemaking with due dispatch." 28 F.3d at 165. Here, in contrast, there is no question but that EPA's decision to proceed by reregistration, which in itself has no regulatory force, rather than by cancellation or suspension, which could actually result in removing the wood preservatives from the market, is a decision to which "legal consequences presently attach." Likewise, DRG Funding Corp. v. Sec. of Housing and Urban Development, 76 F.3d 1212 (D.C. Cir. 1996) is inapposite. There, the court found that an "interlocutory" administrative decision to collect a debt from the plaintiff via an offset to funds owed the plaintiff in another proceeding was not final reviewable action because the administrative decision was subject to further administrative review. Obviously, no consequences attached to this interlocutory decision comparable to the impact here of EPA's determination to proceed by reregistration instead of cancellation or suspension action. Nevertheless, the DRG court noted that if the plaintiff thought the administrative process was taking too long, it could seek relief under the APA. 76 F.3d at 1216.

[26] *See*, Complaint ¶¶ 60 and 61. Plaintiffs' petition seeks a repeal of the regulatory exclusion from hazardous waste treatment, such that CCA-treated wood would be subject to the appropriate hazardous waste disposal requirements of RCRA.

instance, plaintiffs challenge EPA's *de facto* regulation which never actually applied the RCRA standards and never purported to be a final RCRA regulation whose review would be committed to the jurisdiction of the Court of Appeals. This Court has jurisdiction to resolve plaintiffs' claims under the Declaratory Judgment Act, 28 U.S.C. § 2201 and 2202, and plaintiffs have explicitly sought such relief by asking the Court to declare that EPA has proceeded (by default) to erroneously and unlawfully regulate disposal of arsenical-treated wood under the standard for registration of a pesticide under FIFRA, under a temporary rule which it has allowed to remain in place indefinitely, rather than applying the RCRA standards for determination of which waste streams are designated as "hazardous." Complaint ¶ 64e.

As described in Plaintiffs' Complaint,[27] on November 25, 1980, EPA issued a regulation to "defer *temporarily* the full impact of characterizing arsenical-treated wood as a hazardous waste until the pending RPAR [Rebuttable Presumption Against Registration, review under FIFRA] has progressed further."[28] EPA acted in response to a petition by the American Wood Preservers Institute (AWPI).[29] AWPI had requested a delay in the classification of arsenical-treated wood as a hazardous waste under RCRA pending the completion of the RPAR review of the wood preservatives' registrations as pesticides under FIFRA. In response, EPA noted

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[27] See Complaint, ¶ 31.

[28] 45 Fed. Reg. 78530 at 31 (emphasis added).

[29] *Id.* at 78530.

> [s]ubstantial differences in the statutory mandates of RCRA and FIFRA [which] 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.[30]

Nevertheless, EPA agreed that 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.[31]

EPA explained 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 arsenic-impregnated 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 the standards of the two statutes are entirely distinct:

> [T]he 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 hazardous waste disposal] 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 is 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.[32]

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[30] *Id.*

[31] *Id.* at 78531 (emphasis added).

[32] *Id.* Emphasis supplied.

EPA promulgated the temporary 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. Despite its declared intention to do so, EPA has never responded to the comments or finalized the "interim" "temporary" regulatory exclusion of arsenical-treated wood from regulation as a hazardous waste under RCRA.. Therefore, the exclusion, codified at 40 C.F.R. 261.4(b)(9), remains in effect:

> (b)... 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.

Thus, despite EPA's recognition of the "substantial differences in the statutory mandates of RCRA and FIFRA," EPA has *de facto* allowed the continued "ordinary" disposal of arsenical-treated wood simply by leaving the "temporary" rule in place for the past *23 years*. By deferring the RCRA decision until completion of the RPAR under FIFRA, and then not acting to apply the RCRA standards, EPA has, in effect, applied the FIFRA standards -- which involve a balancing of a pesticide's risks and benefits -- to the

completely different question of how to safely dispose of arsenical-treated wood.[33] By contrast, EPA has failed to apply RCRA's mandated standards -- which involve decisions about whether arsencial-treated wood's "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness and other hazardous characteristics"[34] -- require disposal in lined landfills to prevent migration of arsenic into the environment. In fact, absent the challenged exemption, such disposal would be required, since EPA's exclusion of arsenical-treated wood,[35] recognizes that the material "fails the test for the Toxicity Characteristic for Hazardous Waste" and thus would otherwise be regulated as hazardous.[36]

By withholding its actions from the judicially-reviewable RCRA rulemaking procedure, EPA has deprived the public of notice that the Agency was creating a permanent exclusion, and foreclosed any meaningful opportunity for public comment on

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[33] EPA confirmed in a 1990 Federal Register Notice that it had granted the RCRA exemption under FIFRA standards: "In its review of the wood preservative chemicals under FIFRA . . . the Agency decided to allow the disposal of treated wood by means of ordinary trash collection, burial or incineration." 55 Fed. Reg. 11796, 11389 (March 29, 1990).

[34] See RCRA § 6921, 42 U.S.C. § 6921, "Identification and listing of hazardous waste."

[35] 40 C.F.R. 261.4(b)(9), quoted above.

[36] *Id.* The Toxicity Characteristic Leaching Procedure or "TCLP," is intended to simulate conditions in a landfill. In the absence of the special exemption, 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.

this exclusion.[37] Thus, for EPA now to assert that plaintiffs' challenge is barred by RCRA's 90-day statute of limitations on challenges to "final regulations" at 42 U.S.C. § 6976(a)(1) is disingenuous, at best. Plaintiffs do not challenge the Agency's original action to enact a *temporary* rule, but rather its failure to complete the action as it promised in that rulemaking *23 years ago*, and its maintenance of what became a permanent exclusion which had been justified based on its temporary nature and based on standards under the wrong statute, FIFRA instead of RCRA.

Plaintiffs' request for declaratory relief under these circumstances serves the interests of judicial economy, because it could resolve issues which could limit or obviate the need for further relief.[38] Accordingly, this Court has jurisdiction over plaintiffs' claims that EPA has, by making the status of arsenical-treated wood waste depend on a FIFRA proceeding and conclusions reached in that proceeding, incorrectly applied the FIFRA registration standard rather than the appropriate RCRA hazardous waste standard.

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[37] EPA's 1980 Federal Register notice merely suggested that the Agency intended to *briefly* defer a decision until potentially relevant information was developed by a sister office. 45 Fed. Reg. 78530 at 31.

[38] For a variety of reasons, further proceedings may eventually be needed in the Court of Appeals. Nevertheless, a determination at this stage and in this court that EPA has in fact applied the incorrect statutory standard could resolve the disposal issue. Such a finding, voiding the 1980 exclusion, would automatically mean that RCRA's hazardous waste standard applies to arsenical-treated wood because, as EPA states in its regulation this waste stream fails the TCLP test for hazardous designation. 40 C.F.R. § 261.4(b)(9). Under 28 U.S.C. § 2201(a), the remedy of declaratory judgment is available "whether or not further relief is or could be sought."

II. DISMISSAL IS NOT WARRANTED UNDER FED.R.CIV.P. 12(b)(6)

A. Legal Standard

Under Fed.R.Civ.P. 12(b)(6) "a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). "The issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Any more heightened pleading requirement would

> conflict[] with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' . . . . This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and to dispose of unmeritorious claims.

Swerkiewicz v. Sorema, N.A., 534 U.S. 506, 512 (2002). "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' Hishon v. King & Spalding, 467 US 69, 73 (1984)." Swerkiewicz, 534 U.S. at 513.

Therefore, a Rule 12 motion to dismiss

> is generally viewed with disfavor and rarely granted. . . . For purposes of such a motion, the factual allegations of the complaint must be taken as true, and *any* ambiguities or doubts surrounding the sufficiency of the claim must be resolved in favor of the pleader.

Doe v. Department Of Justice, 753 F.2d 1092, 1102-03 (D.C. Cir. 1985)(citations

omitted, emphasis in original). "[A]s a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on their face that there is some insuperable bar to relief." Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 (8th Cir. 1997)(internal quotations and citation omitted).

These settled standards mean that such a motion will be denied even if plaintiff has not identified the correct legal theory entitling him to relief or has asked for a remedy which cannot be granted, as long as *some* relief can be granted under some legal theory. As Justice Blackmun has explained:

> It is a well-settled principle of law that a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.

Bowers v. Hardwick, 478 US 186, 201 (1986) (dissenting opinion of Blackmun, J.)(internal quotation marks and citation omitted). *Accord,* Wagner v. Devine, 122 F.3d 53, 55 (1st Cir 1997), *cert. denied*, 522 U.S. 1090 (1998) (dismissal for failure to state a claim proper "only if it clearly appears that, on the facts alleged, the plaintiff cannot recover on any viable theory"); Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir. 1992) ("a complaint sufficiently raises a claim even if it points to the wrong legal theory as a basis for that claim, as long as relief is possible under any set of facts that could be established consistent with the allegations") (internal quotation marks and citation omitted); ACLU Foundation of Southern California v. Barr, 952 F.2d 457, 467 (D.C. Cir. 1991) ("If a complaint's factual allegations, and the reasonable inferences

derived from them, would support a legal theory entitling the plaintiff to some relief, a Rule 12(b)(6) motion should be denied.”).

As to the relevance of the remedy requested in a complaint to a 12(b)(6) motion, this Circuit has stated:

> Courts are traditionally encouraged to adjudicate the basic legal claim, even where the plaintiff has failed to seek the precisely correct relief but has instead relied on a general request for ‘other appropriate relief’. . . . [I]t need not appear that the plaintiff can obtain the *specific* relief demanded as long as the court can ascertain from the face of the complaint that *some* relief can be granted.

Doe v. Dept. of Justice, 753 F.2d at 1104 (emphasis in original). Doe reversed the grant of a motion to dismiss even though it found it “unassailable” the district court’s conclusion that the proper remedy for the conduct complained of was not the remedy plaintiff had sought in the complaint. The court held that in such circumstances, leave to amend to seek the proper remedy should be granted, or the catch-all “such other relief” clause of the complaint should be read to include the proper remedy.[39] *See also*, Build of Buffalo v. Sedita, 441 F.2d 284, 288 (2d Cir. 1971), holding:

> The question of the propriety of remedies prayed for by plaintiffs, however, is not the issue on this appeal [of a 12(b)(6) dismissal]. The question here is whether plaintiffs might conceivably have some remedy, whether or not suggested by them, and on the face of this complaint we cannot say ‘to a certainty’ that they will not be able to make out a case . . . calling for at

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[39] The Doe court, 753 F.2d at 1104, n.11, also quoted American Jewish Congress v. Vance, 575 F.2d 939, 950-51 (D.C. Cir. 1978)(Robinson, J., dissenting in part) to the effect that “plaintiffs frequently ask for the stars, and a complaint is not dismissible simply because its proof would at most entitle the plaintiff to something less . . .”.

least part of the equitable relief they request, or some other appropriate relief.

B. EPA's Attacks on Plaintiffs' Legal Theories and Remedies Do Not Support Dismissal

EPA makes two basic arguments in support of its motion for dismissal for failure to state a claim under Fed.R.Civ.P. 12(b)(6). The first is that except for plaintiffs' unreasonable delay claim, plaintiffs' have failed to identify specific "agency actions" to challenge under the APA. EPA claims that plaintiffs are seeking "wholesale correction" of EPA's approach to the wood preservatives.[40] Second, EPA urges that plaintiffs have sought relief beyond that which the agency believes is available -- namely, an order of the court for EPA to act on plaintiffs' administrative petitions.[41] Neither argument supports a motion to dismiss.

With regard to its "wholesale correction" argument, EPA fails to identify any particular claims (as opposed to remedies) in the complaint which suffer from this alleged infirmity which are separate from the unreasonable delay claim which EPA admits *is* viable. Instead, EPA quotes plaintiffs' reply concerning their motion to compel production of the administrative record, which identifies "issues presented by the Motion [for Preliminary Injunction]."[42] Even if *issues* were the same as *claims* subject to 12(b)(6) dismissal, which they are not, all of the *issues* identified by plaintiffs in their

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[40] EPA Dismissal Memo at 15-17.

[41] *Id.* at 17-19.

[42] *Id.* at 15.

reply were related to plaintiffs' central claim concerning EPA's inaction and delay in canceling and suspending the wood preservative registrations.

Even if EPA had been able to identify any distinct claims subject to its "wholesale correction" argument, no such claims could be dismissable under the rule announced in Lujan v. NWF, 497 U.S. 871 (1990) that claims which attack the continuing operation of an entire agency program cannot be brought under the APA. In Lujan, plaintiffs were attempting to challenge

> the entirety of petitioners' so-called 'land withdrawal review program' . . . . [which was] simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands as required by the FLPMA.

497 U.S. at 890. Such an entire agency program, the Court held, "is no more an identifiable 'agency action' . . . than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." *Id.* Here, plaintiffs are not challenging EPA's entire "pesticide registration" or "pesticide reregistration" program. Instead, plaintiffs challenge EPA's failure to act to cancel and suspend three particular pesticides. FIFRA § 16(a) itself establishes that such a challenge is actionable by explicitly providing for judicial review of "the refusal of the Administrator to cancel or suspend a registration . . .".

Similarly, Foundation on Economic Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991), involved an attack on the Department of Agriculture's ("USDA") "germplasm preservation program." In rejecting plaintiff's challenge, the court found that this program

was not a particular "agency action" within the meaning of the APA. 943 F.2d at 86. Unlike EPA's specific failure to cancel and suspend the three wood preservative registrations at issue here, the court found that no statute specifically authorized USDA involvement in a germplasm program, set any standards for USDA participation in such an endeavor, or in any way directed USDA to take any actions to preserve germplasm, but that the Department had taken on certain activities related to germplasm on the basis of its broad authority to conduct research on issues affecting agriculture and to procure and propagate seeds and plants. 943 F.2d at 30-31. The court rejected plaintiff's claims because they were "attack[ing] a broad program, involving a wide array of activities, and assert[ing] that the daily operation of that program should be handled differently." 943 F.2d at 86. Such a broad programmatic attack is simply not at issue here.[43]

Next, EPA seeks to have the Court, without considering the merits of plaintiffs' claims, limit its own equitable discretion in fashioning a remedy by striking all requests

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[43] Ecology Center, Inc. v. U.S. Forest Service, 192 F.3d 922 (9th Cir. 1999) is also inapposite here. There the plaintiff challenged the Forest Service's failure to fully comply with its statutory duty to monitor a particular national forest. The plaintiff admitted that it could not "complain of a concrete agency action that caused it harm," but claimed that inadequate monitoring deprived it of information necessary to participate in overseeing the agency's actions. 192 F.3d 925. The court held that the relevant statute did not provide for any public participation requirements in the conduct of monitoring, and that absent that, the plaintiff could not demand general judicial review of day-to-day operations. *Id.* In contrast, here plaintiffs complain of a specific and concrete "agency action" that has caused them harm, in the form of a failure to act to cancel and suspend the wood preservative registrations and grant other relief sought in plaintiffs' administrative petitions.

for remedies except plaintiffs' request that EPA rule on plaintiffs' petitions.[44] As noted above, a 12(b)(6) motion for failure to state a *claim* must be directed at *claims,* not remedies, and does not authorize the dismissal of requested remedies or dismissal of a claim because the plaintiff has sought a remedy which cannot be granted.

EPA does not and cannot dispute that the Court has broad discretion to order equitable remedies under the APA. *See,* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its] jurisdiction"); Webster v. Doe, 486 U.S. 592, 596, 632 (1988) (In APA action, the District Court should address the propriety of equitable remedies, including reinstatement to employment, paid administrative leave or a re-evaluation of the employment decision with a statement of reasons).

In fact, EPA's argument ignores this Circuit's directly applicable precedent ordering the agency to issue exactly the type of relief sought here – the issuance of a pesticide cancellation notice. EDF v. Ruckelshaus, 439 F.2d at 595. EPA's cited cases do not preclude or overrule the result in Ruckelshaus,[45] because that case does not authorize

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[44] EPA Dismissal Memo at 17-19. The absurdity of EPA's attempt to limit the Court's equitable discretion in granting a remedy is illustrated by the fact that EPA apparently seeks to strike plaintiffs' request for "Such additional relief as the Court deems just and proper." Complaint ¶ 64h.

[45] *See*, EPA Dismissal Memo at 17-18, citing Federal Power Com'n v. Idaho Power Co., 344 U.S. 17 (1952) and Johnson v. Philadelphia Housing Authority, No. 93-2296, 1995 WL 395950, 1995 USDistLEXIS 9363 (E.D. Pa. 1995).

the court to override EPA's ability to make the substantive determination as to whether pesticides merit cancellation or suspension pursuant to FIFRA, and plaintiffs do not seek such a result here. Instead, this Circuit found, as plaintiffs allege here, that the Secretary had already made findings amounting to the agency's own standards for the regulatory action sought by the plaintiff. 439 F.2d at 595.[46]

In addition, EPA is wrong in suggesting that the sole remedy for inaction on petitions for regulatory action is an order to rule on the petition, rather than remedies directed to the underlying matters raised by the petition seeking agency action. In fact, courts routinely review the agency's failure to act on the underlying matter, not just the petition, and grant remedies well beyond the limits argued here by EPA. *See, e.g.*, Public Citizen Health Research Group v. Chao, 314 F.3d 143 (3rd Cir. 2002) (even though OSHA did, after oral argument, commence a rulemaking proceeding as requested by the plaintiff's petition, court ordered mediation between the parties to set a timetable for completion of the rulemaking, and indicated intention to promulgate appropriate schedule if parties did not reach an accord in 60 days); Radio-Television News Directors Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000) (ordering vacation of FCC rules); In re Intnl

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[46] The Ruckelshaus case has never been overruled, and in fact the D.C. Circuit reaffirmed its holding with regard to ordering specific action when the preconditions for that action have been met in Sierra Club v. Thomas, 828 F.2d 783, 793, n. 70 (D.C. Cir. 1987). Public Citizen Health Research Group v. FDA, 740 F.2d 23, 38-39 (D.C. Cir. 1983) also cited to that holding in Ruckelshaus, while finding it inapplicable in that case: "Nor is this a case like EDF v. Ruckelshuas, supra, where the agency has made – and not recanted – specific findings and then failed to set in motion a procedural mechanism that the statute mandates upon such findings." Furthermore, as discussed above, the existence of an ongoing reregistration procedure does not, as EPA claims, obviate the need for the remedy ordered in Ruckelshaus.

Chemical Workers Union, 958 F.2d 1144 (D.C. Cir. 1992) (court imposes deadline for completion of rulemaking); Public Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (remand to either adopt the standard advocated by plaintiff or explain why it is not needed); Public Citizen Health Research Group v. FDA, 740 F.2d at 44 ("If the [district] court [on remand] finds unreasonable delay, it must fashion an appropriate remedy, which may include ordering rulemaking to begin immediately and proceed expeditiously, and ordering periodic reports to the court concerning the pace of the rulemaking."); Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983) (ordering issuance of proposed rule in 30 days and completion of rulemaking in one year).

CONCLUSION

By putting forth a meritless jurisdictional challenge and by attacking legal theories and remedies, which can never be the source of a Rule 12 dismissal, EPA has succeeded in delaying the filing of its answer to the complaint and its administrative record, in requiring the Court to consider and rule upon an unnecessary motion, and in diverting the plaintiffs from preparation of their summary judgment motion on the merits. Further delay should not be countenanced. Plaintiffs request that the Court act promptly to deny the motion and allow this case to go forward.

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