

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. )

**FILED**

JAN 10 2003

Clerk, U.S. District Court  
District of Columbia

Case Number 02-2419 (RJL)

**MEMORANDUM ORDER**

(January /06/2003) #4, #11

Plaintiffs (Beyond Pesticides/National Coalition Against the Misuse of Pesticides, et al.) bring a motion for preliminary injunction against the Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, seeking an order compelling the EPA to cancel or suspend the registrations of all products containing pentachlorophenol ("penta"), a product commonly used as a wood preservative. Plaintiffs contend that EPA is statutorily

required to either cancel or suspend penta's registration because penta poses significant health hazards, and there are economically viable alternative products in the marketplace.

Now before the Court is plaintiffs' motion to compel submission of the administrative record relating to penta. Plaintiffs contend that under *American Bioscience Inc. v. Thompson*, 243 F.3d 579, 582 (D.D.C. 2001) the Court must require the filing of an administrative record in order to rule on a motion for preliminary injunction that seeks to remedy agency action or inaction. The defendant opposes the motion on several grounds, mainly, that document production should be stayed until jurisdictional issues are resolved, that *American Bioscience* is not applicable here, and that an administrative record is unnecessary to resolve the motion to compel.

After reviewing plaintiffs' motion, the defendant's opposition thereto, the accompanying exhibits, and the parties' arguments presented at a hearing before the Court on the motion to compel, the Court hereby **DENIES** plaintiffs' motion to compel for the reasons set forth below.

In arguing that a order compelling the production of the administrative record is appropriate in this instance, plaintiffs rely chiefly on *American Bioscience*. The Court, however, believes that the situation presented in that case is distinguishable from the case at bar. In *American Bioscience*, the agency clearly and indisputably had taken final action, and the parties did not contest that an administrative record did, in fact, exist. Here, without prematurely judging the merits of plaintiffs' motion for preliminary

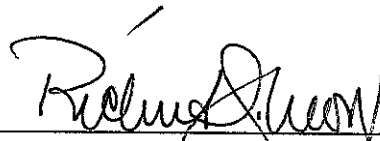
injunction, the Court is unable to determine that the agency has either taken final agency action, or has failed to act where it has a nondiscretionary statutory duty to do so, such that production of an administrative record is necessary. Further, from the face of plaintiffs' motion for preliminary 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. To the degree that these determinations or alleged findings by the EPA are the bases of plaintiffs' motion for preliminary injunction, the Court believes that the materials already before the Court are all that is necessary to resolve plaintiffs' motion.

To the extent that the upcoming hearing on plaintiffs' motion for preliminary injunction reveals the necessity of producing any portion, or all, of the administrative record, the Court would entertain a motion to do so at that time. However, on the record now before the Court, the Court finds that production of an administrative record is not appropriate to resolve plaintiffs' motion, and hereby

**DENIES** plaintiffs' motion to compel production of the administrative record; and hereby

ORDERS the parties to appear on January 21<sup>st</sup>, 2003, at 11AM, for a hearing on plaintiffs' motion for preliminary injunction.

**SO ORDERED.**



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RICHARD J. LEON  
UNITED STATES DISTRICT JUDGE