

Pushing to End The Horror of Hazardous Wood Preservatives

Taking the case against toxic wood preservatives to court

By Jay Feldman

After calling on the Environmental Protection Agency (EPA) to end years of inaction on highly toxic wood preservatives, Beyond Pesticides filed a lawsuit (*Beyond Pesticides et al. v. Christine T. Whitman, Administrator, EPA*) on December 10, 2002 to ban the use of pentachlorophenol (penta), chromated copper arsenate (CCA), and creosote. Beyond Pesticides is joined in the case, filed in the U.S. District Court for the District of Columbia, by the Communications Workers of America (CWA) of the AFL-CIO, Center for Environmental Health (a California environmental group), and a Florida family poisoned by treated wood. While each wood preservative is restricted to certain wood products, together these chemicals, which are known cancer-causing, teratogenic (birth defects), and neurotoxic agents, account for nearly all of the pesticides used to treat lumber, plywood, fence posts, railroad ties and utility poles. In total, they account for 1.6 billion pounds of pesticides used annually, the second largest pesticide use only to chlorine disinfectant products.¹ In numerous reports² and communications with EPA, Beyond Pesticides and others have shared information on the availability of economically viable replacement chemicals and materials, such as recycled steel, composites, and cement, which would enable a swift transition in the marketplace.

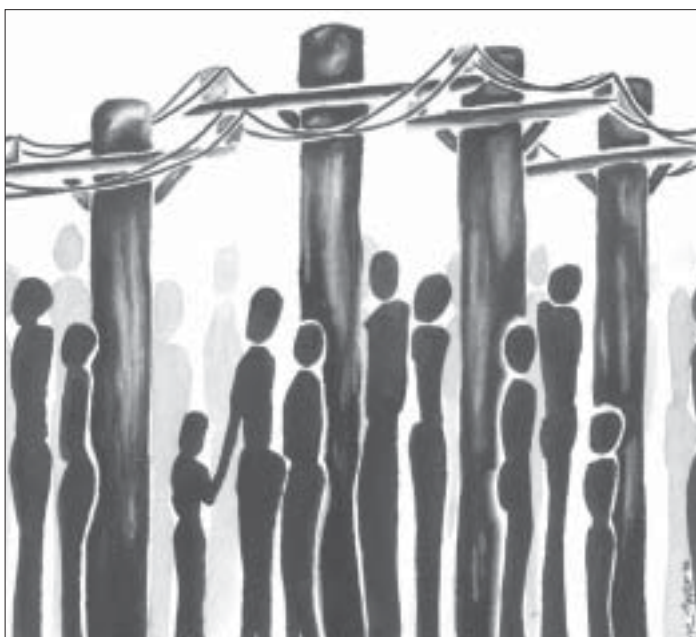
This is not the first time that EPA has faced the question of banning the three pesticides. In 1978, the agency issued a "special review" document, then called a "rebuttal presumption against registration" (RPAR), because it had evidence that the chemicals exceeded acceptable risk criteria for cancer, genetic mutations and birth defects. Over the next several years, EPA canceled the pesticide registrations for all uses of these pesticides except wood preservative use.

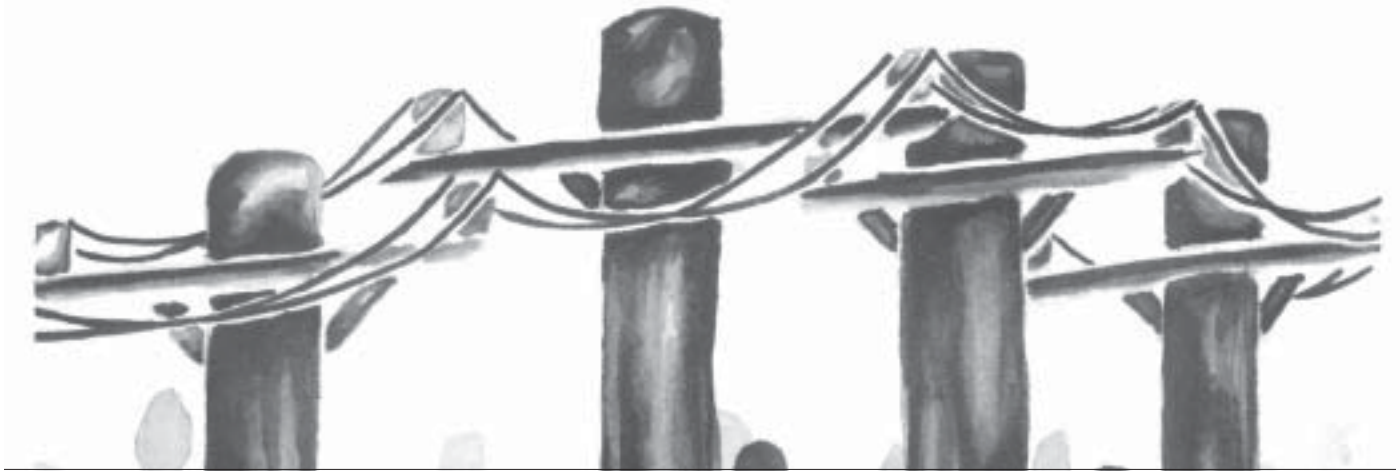
The agency concluded in 1984 that despite the excessively high associated risks the wood preservatives did not have economically viable alternatives that would lower risk. The agency only considered chemical alternatives and dismissed alternative materials. In February 2002, EPA announced a phase-out by the wood treatment industry of certain high-exposure uses of CCA-treated wood, such as that used on playground equipment, picnic tables, and decking surfaces. The phase out, slated for January 2004, leaves in use the majority of CCA-treated wood for construction and utility

poles. *The New York Times* reported in December 2002 that the Bush administration is reconsidering the phase-out agreement because of costs to the industry. Meanwhile, at the end of 2002 the trade group representing the wood treatment industry, the American Wood Preservers Institute (AWPI), closed its shop, citing increasing costs of litigation. In addition, the largest producer of creosote treated products, Kerr McGee, announced it was getting out of the business.

In addition to seeking a ban, the litigation asks the court to reverse a 23-

year old temporary rule, which exempts CCA-treated wood headed for the landfill from being classified as hazardous waste, even though it exceeds EPA's toxic characteristic leaching potential (TCLP) standard. Despite meeting all the criteria for a hazardous waste classification, in 1980 EPA issued an interim final rule "to defer for an estimated three to six month period applying *Resource Conservation and Recovery Act* (RCRA) Subtitle C [hazardous waste disposal] requirements to discarded arsenical-treated wood... in order to await further progress of the review" of the pesticide's registration under the *Federal Insecticide, Fungicide and Rodenticide Act* (FIFRA).³





The case against hazardous wood preservatives

In the case, plaintiffs are seeking:

- A finding that continued registration of penta creates an imminent hazard to public health and the environment, and preliminary and permanent injunctions ordering EPA to issue immediately a notice of cancellation, and to suspend the registration of penta as a wood preservative on an emergency basis pursuant to FIFRA § 6(c)(3), 7 U.S.C. § 136d(c)(3).
- A declaratory judgment that EPA has unreasonably delayed in completing its regulatory actions on the three wood preservatives: penta, creosote and CCA which were initiated in 1978, and in responding to Beyond Pesticides' petitions to cancel and suspend their registrations, and that it has arbitrarily failed to re-assess its 1984 finding that no economically viable alternatives exist to wood treated with these pesticides.
- An injunction ordering EPA to revise the now factually incorrect conclusions of the 1978 RPAR which concluded there were no adequate substitutes for pesticide-treated wood, to reflect the fact that adequate less-toxic and non-toxic substitutes now exist for all pesticide-treated wood products. An injunction setting a schedule for EPA to expeditiously issue cancellation notices and initiate suspension proceedings pursuant to FIFRA § 6(b) and (c), 7 U.S.C. § 136d(b) and (c) for penta, creosote and CCA.
- An injunction ordering EPA to grant all of the relief sought in Beyond Pesticides' petitions to cancel and suspend the registrations of penta, creosote and CCA,⁴ or in the alternative, setting a schedule for EPA to expeditiously rule upon all of the requests for relief in Beyond Pesticides' petitions.
- A declaratory judgment that EPA's decision to exempt arsenical-treated wood from hazardous waste regulation, announced as a "temporary" rule at 45 Fed. Reg. 78530 (November 25, 1980), but kept in place based on a determination made in the course of the RPAR review of the wood

preservatives under FIFRA, improperly relied upon determinations by the FIFRA program balancing pesticide risks and benefits rather than the appropriate RCRA hazardous waste characteristic test.

- An injunction ordering EPA to broaden its proposed "phase-out" of CCA to include all uses of CCA and to complete the phase-out within 90 days from the date of entry of said order, and to clarify that under EPA's treated article exemption all sales of CCA treated wood must halt on the effective date of the phase out.

The health hazards

In its most recent review of penta, a 1999 draft science chapter that EPA prepared as part of current reregistration review, EPA found extremely high and "unacceptable" risks to children and workers. The lawsuit seeks emergency action for penta because of the extraordinary risks EPA identifies for workers who paint penta on the outside of utility poles, a 340% risk of contracting cancer.⁵ The numbers suggest that workers exposed in this way will develop an average of three cancers in their lifetime.

Since EPA has not yet evaluated the impact of the contaminants of penta, including hexachlorobenzene, furans and dioxin, the following findings are based on the agency's review of penta alone:

- The lifetime cancer risk to children exposed to soil contaminated with penta leaching from utility poles is as high as 2.2 in 10,000 (2.2×10^{-4}), and that contact with the treated wood itself poses a cancer risk of 6.4 in one million (6.4×10^{-6}). These risks are, respectively, 220 and 6.4 times EPA's usual one-in-a-million threshold for "acceptable" risk.
- Residues of penta in drinking water, along with exposure from food and residential uses, "pose an unacceptable chronic risk to children."
- With regard to occupational exposures, despite risk reduction measures EPA had adopted in the 1980's, EPA found, based on "maximum protective measures," that 13 out of 14 exposure scenarios had unacceptable cancer risks. Cer-

tain categories of workers have lifetime cancer risks as high as 1.8 and 4.4 in 10, and 6.2 and 8.4 in 100, up to 4,400 times EPA's "acceptable" level of risk for occupational exposures. Utility pole installers are found to have a cancer risk of 6.6 in 1000, sixty-six times EPA's "acceptable" level. Most extreme, applicators of grease formulations of penta as groundline retreatments for existing utility poles had a risk of 3.4 out of one (apparently because an exposed worker who survived and continued in this occupation could be expected to incur additional cancers).

- Chronic non-cancer risks for occupational handlers "exceed the Agency's level of concern using maximum protective measures for all scenarios."
- EPA reaffirmed its earlier findings on the teratogenic (birth defect-inducing) and fetotoxic (toxic to fetuses) properties of penta.

The case for alternatives

Much has happened in the 18 years since EPA concluded the wood preservatives review with a determination that despite risks, which would otherwise mandate cancellation, continued use was justified by the lack of economically viable alternatives. A number of adequate substitutes for chemically-treated wood have become available, and the capacity for production of previously-known substitutes has increased to the point where the perceived "immense" "economic impact" that EPA relied upon as the basis for its decision to retain the registrations is no longer valid. At least since 1993, producers of alternative products to treated wood have had communications and meetings with EPA concerning the ability of their products to replace various uses of pesticide-treated wood.

Beyond Pesticides has communicated information about economical alternatives to pesticide-treated wood to EPA a number of times in various forms over the years since the conclusion of the 1984 RPAR. Most notably, its February 1997 report entitled, *Poison Poles: Their Toxic Trail and Safer Alternatives*, furnished to EPA in 1997, includes a detailed analysis of the available substitutes for penta, creosote and CCA, including cost comparisons. The report concludes by urging that "hazardous wood preservatives...be removed from the market." In June 1997, Dr. Howard Freed, M.D. and a group of eleven other noted public health scientists and physicians, including members of Beyond Pesticides, wrote to EPA calling attention to studies that found wood preservatives in the "body fluids and tissues of humans in the general population," which raised concern because of these chemicals' "association with cancer, birth defects, [and]

disruption of the endocrine system...". The scientists cited Beyond Pesticides' *Poison Poles* report, including its calculations showing that materials such as recycled steel and concrete could be used to begin replacing pesticide-treated wood cost-effectively as the wood is taken out of service. The scientists pressed the agency "to begin immediately an assessment of the various uses of treated wood and analyze the availability of alternatives that could replace the use of these very hazardous materials," and "as quickly as possible...to curtail the introduction of these chlorinated hydrocarbons [penta] into the environment..."

Conclusion and commentary

The lawsuit traces a long history of Beyond Pesticides' involvement in trying to stop the use of several pesticides that are among the most hazardous ever created. The lawsuit cites EPA findings going back nearly three decades and decision after decision that is intended to mitigate risks. The agency even adopted a Consumer Awareness Program as a part of its negotiations with the wood treatment industry in the 1980's that, by its own admission, failed to protect the public. In a letter to Beyond Pesticides in 2002, EPA said,

[A]lthough the agreement was voluntary, the Agency viewed effective distribution of the consumer information sheets as a major component of our administrative review and reevaluation.... We understand both from industry surveys and other sources that distribution of the consumer information sheets has not been as effective as anticipated. The Agency has also received several incident reports where consumers reportedly have been injured from misusing or improperly handling treated wood products.⁶

EPA concluded in its press release on consumer awareness that, "the previous consumer

awareness program was not adequately informing the public." So, what did EPA do? It established a new voluntary consumer awareness program.

Beyond Pesticides argues in this lawsuit that EPA has failed to protect public health and the environment from wood preservatives. More than that, the case exposes an agency that lacks the will to act, even in the face of the most extreme evidence identified by its own scientists in accordance with its own standards. Because of EPA's failure, there are people whose health has been deeply and adversely affected. The Pragers of Florida unknowingly put themselves in harms way by buying treated wood and inhaling the sawdust in a building project. Their daughter was born with the same birth defects reported to EPA in animal studies required by the agency. These studies, among others, triggered the agency to order its highest level review in 1978. Then, last year there was a highly publicized poisoning

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of a Mississippi couple that became ill after being exposed to treated wood, like the Pragers, while building their dream house. These are the people who have been able to connect the dots between their illness and their exposure. There are millions of people who go about their daily lives unknowingly exposed to the toxic trail of these chemicals —inhaling toxic fumes while standing next to a utility pole at a bus stop; children playing in dirt around a utility pole; treated wood or reused wood from a pole taken out of service that ends up as a garden tie in a vegetable garden, or as a fence post or pole barn; living with contamination in a community with a wood preserving plant; and on and on. It is EPA's job to prevent these exposures to people and the environment, exposures that allow a daily assault of chemical contaminants recognized by international treaty⁷ as too hazardous to use at any level in a sustainable world.

To a critical, perhaps cynical, eye this EPA failure looks like collusion of the worst kind, industry exerting its control over the regulatory system. When evaluated with other similar EPA failures on highly toxic pesticides, the critical or cynical eye wonders whether EPA can muster the will to act in the public interest. This perspective questions whether the underlying statute and the Congress that wrote it really seek to protect people and the environment. To some students of government, this may simply appear to be another case of bureaucratic failure to put the pieces together.

In court, the Justice Department attorneys representing EPA tell the Judge that the plaintiffs are not patient enough, that the agency has a process that it must follow, a process for which it has no timetable. Beyond Pesticide attorneys tell the Judge that EPA has already evaluated these chemicals over the last 25 or more years. Rachel Carson warned about these chemicals in her book *Silent*

Spring in 1962. Now, EPA is studying and evaluating these chemicals again.

We pursue litigation in an effort to take back an EPA that has been overtaken by industry. We must try, despite the odds in courtrooms with politically appointed judges. If the Judge does not believe that EPA is governed by laws with standards

and reasonable time frames for action, then we must bring our case to lawmakers and ask whether our country, its citizens and residents, deserve protection from chemicals like the hazardous wood preservatives.

In addition to the lawsuit, we support trial attorneys who are increasingly suing on behalf of people who have been harmed, and we approach every utility, railroad and builder across the country to demand that they use alternatives to wood treated with hazardous wood preservatives. Two important movements over the last two decades, the explosion of organic food in the marketplace and communities taking pesticides out of schools, have proven that we can successfully move ahead despite the failures of EPA. We have the power to act to protect public health and the environment. Let's use it!

For action steps on approaching the major users of treated wood, please contact Beyond Pesticides for an action plan, How Does Your Utility Rate?, which can also be found at www.beyondpesticides.org.

This piece incorporates portions of the complaint, Beyond Pesticides et al. v. Christine T. Whitman, Administrator,

EPA (U.S. District Court, District of Columbia, Case No. 02-2419, December 10, 2002) filed by Paula Dinnerstein of Lobel, Novins and Lamont, Washington, DC, James Handley of Handley Environmental Law, Washington, DC, and Mary O'Melveny of the Communication Workers of America, AFL-CIO, Washington, DC. Jessica Lunsford is a contributor to this piece.



Endnotes

- ¹ American Wood Preservers Institute (AWPI), *The 1995 Wood Preserving Industry Protection Statistical Report*, September 1996. According to the 1999 EPA report Pesticide Industry Sales and Usage 1996 and 1997 Market Estimates, 733-R-99-001, November 1999, wood preservatives account for .66 billion pounds, which represents over 30% of all pesticides used in the U.S. excluding chlorine.
- ² Feldman, J., T. Shistar; *Poison Poles: A Report About Their Toxic Trail and the Safer Alternatives*; National Coalition Against the Misuse of Pesticides, 1997; Feldman, J., G. Kidd; *Pole Pollution: New Utility Pole Chemical Risk Identified by EPA While Survey Show Widespread Contamination*; Beyond Pesticides/National Coalition Against the Misuse of Pesticides, 1999.
- ³ 45 Fed. Reg. 78530 (1980).
- ⁴ Petition For Suspension and Cancellation of Pentachlorophenol, December 21, 2001; Petition For Suspension and Cancellation of Chromated Copper Arsenate December 21, 2001; Petition For Suspension and Cancellation of Creosote February 26, 2002.
- ⁵ Science Chapter for the Reregistration Eligibility Decision Document (RED) for Pentachlorophenol.
- ⁶ Letter from Frank Sanders, Director, Antimicrobials Division to Jay Feldman, Beyond Pesticides dated May 1, 2001
- ⁷ Stockholm Convention on Persistent Organic Pollutants, signed by the United States in 2001.