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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

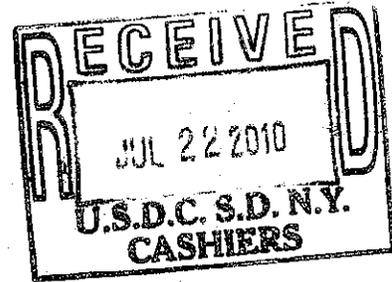
NATURAL RESOURCES DEFENSE COUNCIL )  
and PESTICIDE ACTION NETWORK NORTH )  
AMERICA, )

Plaintiffs, )

v. )

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY and LISA P. )  
JACKSON, EPA Administrator, in her official )  
capacity, )

Defendants. )



\_\_\_\_\_ Civ. \_\_\_\_\_ ( )

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

## INTRODUCTION

1. Chlorpyrifos is a dangerous organophosphate insecticide that threatens the health of people and the environment. This case challenges the failure of the United States Environmental Protection Agency (“EPA”) to take required steps to protect the public and the environment from chlorpyrifos, despite being presented with scientific evidence of its harm almost three years ago.

2. Specifically, plaintiffs Natural Resources Defense Council and Pesticide Action Network North America challenge EPA’s failure to respond to a September 12, 2007 petition to revoke all tolerances and cancel all registrations for chlorpyrifos because of serious threats to human health. Plaintiffs are statutorily entitled to a response to that petition within a reasonable period of time, but nearly three years have passed, and plaintiffs have not yet received that response.

3. Although EPA opened a two-month public comment period on the petition that ended on December 17, 2007, EPA has since failed to issue a final decision on the petition.

4. EPA’s failure to respond to plaintiffs’ September 12, 2007 petition constitutes unreasonable delay and failure to act in violation of the Administrative Procedure Act (“APA”), the Federal Food, Drug, and Cosmetic Act (“FFDCA”), and the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). Plaintiffs seek declaratory and injunctive relief requiring EPA to issue a final decision on the petition within a court-ordered, 60-day deadline.

5. EPA’s unreasonable delay exposes plaintiffs’ members to increased risk of harm, deprives plaintiffs of the response to their petition to which they are entitled, and violates the APA’s requirement that the agency conclude matters presented to it in a reasonable time.

## JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question). This action arises under the APA, 5 U.S.C. § 551 et seq., the FFDCA, 21 U.S.C. § 301 et seq., and the FIFRA, 7 U.S.C. § 136, et seq.

7. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) as plaintiff NRDC resides and maintains its headquarters in the Southern District of New York.

## PARTIES

8. The plaintiffs in this action are:

A. Natural Resources Defense Council (“NRDC”), a not-for-profit corporation organized and existing under the laws of the State of New York. NRDC is a national environmental organization with more than 520,000 members. More than 46,000 of these members live in the State of New York. In addition to its headquarters in New York, NRDC also maintains offices in Washington, D.C., San Francisco, Los Angeles, Chicago, and Beijing. NRDC’s institutional purposes include protecting public health and the environment from the risks and harms associated with exposure to pesticides. NRDC has long been active in efforts to prevent and reduce risks associated with pesticide exposures and to strengthen the regulation of pesticides in this country. NRDC has filed litigation, participated in administrative processes, testified before legislative bodies, and issued reports to the public, all in an effort to protect human health and the environment from pesticide-associated risks.

B. Pesticide Action Network North America (“PANNA”), a San Francisco-based non-profit organization that serves as an independent regional center for Pesticide Action Network International, a coalition of over 600 public interest organizations in more than 90 countries. For more than 20 years, PANNA has worked to replace hazardous and unnecessary pesticide uses with ecologically sound pest management across North America. PANNA

provides scientific expertise, public education, access to pesticide data and analysis, policy development, and other support to its approximately 225 member organizations. PANNA has approximately 2,700 individual members nationwide. PANNA's U.S. membership includes a number of groups who directly represent or advocate on behalf of farmworkers and whose membership includes farmworkers and persons living on or near farms. PANNA and its foreign affiliates have long campaigned for more stringent regulation of chlorpyrifos.

9. NRDC and PANNA are harmed by EPA's failure to respond to their petition and to take the actions requested in the petition. EPA's failure has deprived plaintiffs of a decision on its petition and the benefits and information to the organization and its members that such a decision might afford, and has made it more difficult for plaintiffs to achieve their institutional objective of protecting its members, the public, and the environment from excessive risks associated with chlorpyrifos. By failing to respond to the 2007 petition, EPA has also deprived plaintiffs of valuable information concerning the reasons and justifications for failing to carry out the actions requested in the petition.

10. Members of plaintiff organizations and their children are also harmed by EPA's failure to respond to the petition. NRDC and PANNA members and their children are exposed to chlorpyrifos through residues on food and drift from agricultural applications. As a result of EPA's unreasonable delay and failure to act, plaintiff organizations' members and their children will continue to be put at risk of harm from exposure to this pesticide.

11. The aesthetic, conservation, recreational, and scientific interests of the plaintiffs and their members in minimizing harm to people and the environment from the use of chlorpyrifos, as well as in the compliance with law by EPA, have been, are being, and, unless the relief prayed for is granted, will continue to be directly and adversely affected by the failure of

defendants to comply with the law. Plaintiffs' requested declaratory and injunctive relief, mandating that EPA comply with its statutory obligations and respond to plaintiffs' petition, would remedy these harms.

12. The defendants in this action are:

A. United States Environmental Protection Agency, an agency of the United States charged with implementation of federal pesticide statutes, including the FFDCA and FIFRA.

B. Lisa P. Jackson, Administrator of EPA. Ms. Jackson is the chief officer of EPA; she is the federal official ultimately responsible for EPA's administration and implementation of its legal duties. Administrator Jackson is sued in her official capacity.

#### BACKGROUND

A. Chlorpyrifos

13. Chlorpyrifos is an organophosphate insecticide. Organophosphate insecticides were derived from nerve gas developed in World War II. Chlorpyrifos is acutely toxic and causes systemic illnesses by inhibiting the body's ability to produce cholinesterase, an enzyme necessary for the proper transmission of nerve impulses. EPA included organophosphates in the first group of pesticides slated for tolerance reassessment and FIFRA re-registration because organophosphates are among the pesticides that "pose the greatest risk to public health." 65 Fed. Reg. 42,021 (Aug. 4, 1997).

14. Exposure to just a few drops of chlorpyrifos can cause harmful effects to humans. Symptoms of cholinesterase inhibition caused by chlorpyrifos poisoning include muscle spasms, confusion, dizziness, loss of consciousness, seizures, abdominal cramps, vomiting, diarrhea, cessation of breathing, paralysis, and death. Acute poisonings can cause chronic (long-term) effects, such as permanent nerve damage, loss of intellectual functions, and neurobehavioral effects. In addition to cholinesterase inhibition, scientific studies associate exposure to

chlorpyrifos with other harmful human health effects, such as asthma, in utero developmental brain impairments, low birth weights, and endocrine disruption.

15. Workers are exposed to chlorpyrifos primarily through inhalation and dermal contact when they mix, handle, or apply the pesticide or come into contact with treated crops. People are also exposed to chlorpyrifos from eating food with chlorpyrifos residues. Children are exposed to chlorpyrifos from being exposed to drift, eating contaminated food, and having contact with residues on treated surfaces, clothing, or soils.

16. Chlorpyrifos is one of the most widely used organophosphate insecticides in the United States. It is used on various food and feed crops, on golf courses, as a non-structural wood treatment, and as an adult mosquitocide. Approximately 10 million pounds are applied annually in agricultural settings. According to EPA's chlorpyrifos fact sheet, use on corn comprises the largest market.

17. EPA cancelled most residential uses of chlorpyrifos ten years ago.

B. EPA's Statutory Duties

18. EPA regulates pesticides under two statutes, the FFDCA, 21 U.S.C. § 346a, and the FIFRA, 7 U.S.C. § 136 et seq.

19. The FFDCA authorizes EPA to set tolerances (maximum allowable levels) for pesticide residues in food or to grant exemptions from the requirement to have a tolerance. 21 U.S.C. §§ 346a(b) & (c). EPA may "establish or leave in effect a tolerance for a pesticide chemical residue in or on a food only if the Administrator determines that the tolerance is safe." Id. § 346a(b)(2)(A)(i). The FFDCA explicitly requires that EPA, in establishing a tolerance, must assess the risk that a pesticide poses to infants and children in particular. Id. § 346a(b)(2)(C).

20. The FFDCA specifically provides for a process through which any person may file a petition to revoke a tolerance for a pesticide chemical residue in or on a food. 21 U.S.C. § 346a(d). That section of the FFDCA describes the contents required in such a petition and requires EPA to publish a notice of a petition that has met those content requirements. Id. § 346a(d)(2) & 3. The FFDCA requires that the EPA Administrator “shall, after giving due consideration to a petition ... and any other information available to the agency” either issue a final regulation establishing, modifying, or revoking a tolerance, issue such a proposed regulation, or deny the petition. Id. § 346a(d)(4)(i-iii).

21. FIFRA establishes a registration scheme for pesticides. Under FIFRA, a pesticide may generally not be sold or used in the United States unless it has an EPA registration for a specified use. 7 U.S.C. § 136a(a). To register or re-register a pesticide, EPA must determine, among other things, that its use “will not generally cause unreasonable adverse effects on the environment.” Id. § 136a(c)(5)(D). FIFRA defines “unreasonable adverse effects on the environment” to mean “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 . . . .” Id. at § 136(bb).

22. EPA has the authority to cancel a pesticide registration whenever the “pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment.” Id. § 136d(b).

C. The 2007 Petition

23. On September 12, 2007, NRDC and PANNA jointly served upon EPA a petition for agency action entitled “Petition to Revoke All Tolerances and Cancel All Registrations for the Pesticide Chlorpyrifos.”

24. The petition presented evidence that EPA's risk assessment for chlorpyrifos failed to account for the full spectrum of toxicity, and that a proper risk assessment must include consideration of genetic evidence of vulnerable populations, evidence of long-standing effects from early life exposure in children, evidence from rodent developmental neurotoxicity studies showing that there is no safe level for chlorpyrifos, evidence of endocrine disrupting effects, evidence of cancer risks, and evidence that there are potential adverse effects at levels below 10% cholinesterase inhibition

25. The petition argued that EPA's cumulative risk assessment misrepresented risks and failed to apply the required safety factor for early life exposure.

26. The petition also argued that EPA over-relied on data submitted to EPA by the pesticide registrant, failed to incorporate inhalation routes of exposure, and failed to consider hazards associated with chlorpyrifos use in other countries – creating a health and environmental hazard in those countries, and a risk of contaminated food re-entering the United States.

27. On October 17, 2007, EPA filed a notice in the Federal Register requesting public comments on the petition. 72 Fed. Reg. 58,845 (Oct. 17, 2007). That notice established a deadline of December 17, 2007 for any comments.

28. To date, EPA has issued no final decision on the 2007 petition.

29. On April 7 and June 11, 2010, plaintiff NRDC discussed the 2007 petition with representatives from EPA. On both occasions, the EPA representatives present at the meetings declined to agree to take final action on the petition by a date certain, and declined even to provide a proposed schedule for final action on the petition.

CLAIM FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the Administrative Procedure Act for Failure to Respond to  
2007 Petition to Revoke All Tolerances and Cancel All Uses of Chlorpyrifos

30. By failing to respond to plaintiffs' 2007 petition to revoke all tolerances and cancel all registrations for chlorpyrifos, EPA has unreasonably delayed agency action. This failure to act is particularly unreasonable as chlorpyrifos' continued agricultural use exposes farmworkers, bystanders, consumers, and children to harm from this highly toxic pesticide.

31. EPA's unreasonable delay and failure to act violates the APA, which directs each federal agency "to within a reasonable amount of time . . . conclude a matter presented to it." 5 U.S.C. § 555(b).

32. The FFDCA specifically requires EPA to respond to the 2007 petition in one of three ways, 21 U.S.C. § 346a(d)(4); under FIFRA, EPA may evaluate pesticide uses "at the suggestion of any interested person." 40 C.F.R. § 154.10.

33. This Court is authorized to judicially review EPA's unreasonable delay and failure to act as "final agency action" under the APA, 5 U.S.C. § 551(13); the APA further mandates that the Court "shall compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

- A. Adjudge and declare that EPA's failure to issue a final decision on the 2007 petition violates the APA;
- B. Order EPA to make a final decision on the 2007 petition within 60 days;
- C. Retain jurisdiction of this matter until EPA has fulfilled its legal and Court-

ordered obligations as set forth in this complaint;

D. Award plaintiffs their reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412.

E. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 22<sup>nd</sup> day of July, 2010.



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