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11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO/OAKLAND DIVISION

14 CENTER FOR ENVIRONMENTAL HEALTH,
15 BEYOND PESTICIDES, AND PHYSICIANS FOR
16 SOCIAL RESPONSIBILITY

17 Plaintiffs,

18 v.

19 GINA McCARTHY, in her official capacity as
20 Administrator of the United States Environmental
21 Protection Agency,

22 Defendant.

Case No:

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

23 **INTRODUCTION**

24 1. Plaintiffs Center for Environmental Health, Beyond Pesticides, and Physicians for
25 Social Responsibility ("Plaintiffs") challenge the United States Environmental Protection Agency's
26 ("EPA") unreasonable delay in completing rulemaking to require manufacturers to disclose the
27 hazardous inert ingredients in their pesticide products.

28 2. Under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C.
§§ 136 *et seq.*, pesticide manufacturers must list on pesticide labels the "active" ingredients that
prevent, destroy, repel or mitigate a pest. Ingredients that are not "active" are considered "inert"

COMPLAINT

1 under the statute, but this does not necessarily mean biologically or chemically inert. These so-called
2 “inert” ingredients can be just as hazardous and may comprise 50 to 99 percent of a pesticide
3 product’s formulation. While these other ingredients are not subject to the same statutory labeling
4 mandates under FIFRA, EPA has the authority under the statute to require their identification and
5 listing.

6 3. On August 1, 2006, a coalition of 22 public health and environmental organizations,
7 including Plaintiffs, and a coalition of 15 state and territory Attorneys General, submitted to EPA
8 petitions requesting that EPA require pesticide labels to disclose the presence of over 370 chemicals
9 that are commonly used as inert ingredients and also appear on lists of chemicals determined by EPA
10 or Occupational Safety and Health Administration (“OSHA”) to present hazards to humans or the
11 environment.

12 4. In response, EPA granted the petition on September 30, 2009, stating it “intends to
13 effect a sea change in how inert ingredient information is made available to the public.” EPA
14 Response to Petition at 3 (attached as Ex. A).

15 5. On December 23, 2009, EPA initiated rulemaking with an advanced notice of
16 proposed rulemaking to require the disclosure of potentially hazardous inert ingredients. It has been
17 over four years since that advanced notice of proposed rulemaking, and EPA has taken no further
18 action to follow through on its commitment to adopt a rule.

19 6. EPA’s unreasonable delay continues to leave the public uninformed and unable to
20 protect themselves from the hazardous chemicals they are being exposed to through the use of
21 pesticide products. EPA’s failure to complete the rulemaking, or otherwise conclude the matter
22 presented in Plaintiffs’ 2006 Petition, violates the Administrative Procedure Act’s requirement that
23 an agency conclude matters presented to it in a reasonable time. This lawsuit seeks to compel EPA to
24 complete the rulemaking, to ensure the public, consumers, and workers have the information they
25 need to protect themselves from the full range of health and safety risks posed by pesticide products.

26 JURISDICTION AND VENUE

27 7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
28 question). This action arises under the APA, 5 U.S.C. §§ 551 *et seq.*

1 8. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because Plaintiff
2 Center for Environmental Health resides and maintains its headquarters in Oakland, California in the
3 Northern District of California.

4 9. Similarly, because Plaintiff Center for Environmental Health resides in Oakland,
5 assignment to the San Francisco/Oakland Division of this Court is proper under Civil Local Rule 3-
6 2(c) and (d).

7 **PARTIES**

8 10. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH is a non-profit public
9 interest organization with over 20,000 supporters, whose mission is to protect people from toxic
10 chemicals by working with communities, consumers, workers, government, and the private sector to
11 demand and support business practices that are safe for public health and the environment. Based in
12 Oakland, California, the Center teams up with other effective organizations, public health experts,
13 community groups, academics, and public officials to help the government develop and enforce
14 sensible measures to protect people from dangerous chemicals, litigates under California's Safe
15 Drinking Water and Toxic Enforcement Act (Proposition 65) to eliminate toxics from industrial
16 emissions and consumer products, supports communities that suffer the worst effects of chemical
17 pollution in their struggles for cleaner environments, and works with ethical businesses to clean up
18 the electronics and food industries, including the production, distribution, consumption, and disposal
19 of these products. In addition, the Center informs and educates supporters and the general public
20 regarding: legislation, regulations, and policy issues that affect health and the environment,
21 including federal and state pesticide regulations; effective corporate campaigns to protect public
22 health; and how the public can protect themselves and their families from toxic chemicals in
23 consumer products, food, and the environment.

24 11. Plaintiff BEYOND PESTICIDES is a non-profit public organization based in
25 Washington, D.C., with over 930 members and supporters, whose mission is to work with allies in
26 protecting public health and the environment to lead the transition to a world free of toxic pesticides.
27 The organization's primary goal is to effect this change through local action, by providing the public
28 and community organizations information about the risks of conventional pest management

1 practices, and by promoting non-chemical and least-toxic management alternatives so that
2 individuals and local communities can make informed choices about pesticide use. This information
3 assists the public in protecting themselves and their families from unnecessary exposure to pesticides
4 and enables communities to effect changes on community-wide pest management decisions and
5 policies, such as pesticide uses in parks, schools, and other public areas. Beyond Pesticides provides
6 various resources regarding pesticides to the public and its members, including a pesticides hazards
7 database on its website, a quarterly magazine, daily news blog, and factsheets about conventional
8 and alternative pest management practices.

9 12. Plaintiff PHYSICIANS FOR SOCIAL RESPONSIBILITY (“PSR”) is a non-profit
10 organization based in Washington, D.C., with 23 chapters in the U.S., including the San Francisco
11 Bay Area. PSR works to prevent the use or spread of nuclear weapons and to slow, stop and reverse
12 global warming and the toxic degradation of the environment, by giving voice to the values and
13 expertise of medicine and public health. PSR has over 35,000 members and activists, many of whom
14 are medical, health care, and public health professionals. With respect to its program for
15 Environment and Health, PSR engages in chemical policy reform, climate policy advocacy, and
16 practitioner education. These efforts include advocating for policies to hold industry accountable for
17 the safety of their chemicals and products and developing practitioner education to prevent the
18 public’s exposure to toxic chemicals. For example, PSR has developed a Pediatric Environmental
19 Health Toolkit that trains doctors, medical residents, and staff and community health workers of the
20 Head Start Seasonal and Migrant Farmworker program and provides health education materials on
21 preventing exposures to toxic chemicals and other substances that affect infant and child health.

22 13. Plaintiffs’ members use, purchase, and/or work with pesticides or products to which
23 pesticides have been applied, as well as live in communities, have children that attend schools, and
24 work in buildings and environments where pesticides are applied. Plaintiffs’ members also treat
25 patients suffering adverse health effects from pesticides. Their members wish to know the identities
26 and hazards of inert ingredients contained in these pesticides, so that they can make informed
27 choices as to how to best protect themselves, their families, their crops, the environment, and their
28 communities from harmful inert ingredients, choose less hazardous alternatives, ensure that less

1 hazardous alternatives are used in their communities to minimize risks to health and the
2 environment, and/or provide appropriate and timely treatment to patients who have been exposed to
3 pesticides. They are adversely affected by the non-disclosure of inert ingredient information and
4 EPA's failure to timely complete the rulemaking requested in Plaintiffs' Petition. The adverse effects
5 of EPA's failure and the lack of access to this information include actual or threatened harm to their
6 health, their families' health, their patients' health, and their professional, educational, and economic
7 interests.

8 14. EPA's failure to timely complete the rulemaking requested in Plaintiffs' Petition also
9 frustrates and harms Plaintiffs' efforts to assist their members and the public in protecting their
10 children, families, and communities from toxic chemicals. Without disclosure of inert ingredient
11 information on pesticide labels, the public is in the dark about the risk of many pesticides, health-
12 care providers are thwarted in providing appropriate and timely treatment to patients exposed to
13 pesticides, and manufacturers have little incentive to use less toxic alternatives. As a result, the
14 public, workers, and the environment are subject to *unknown* or higher risks of adverse health effects
15 and unreasonable environmental impacts from pesticide exposure, and Plaintiffs must expend
16 significant resources to conduct outreach and educate their members, the public, and/or constituents
17 on how to reduce, avoid, and prevent pesticide exposure, to counteract these risks. These activities
18 drain and divert time and resources away from Plaintiffs' other programs and activities to carry out
19 their mission.

20 15. The legal violation alleged in this Complaint has injured and continues to injure the
21 interests of Plaintiffs and their members. Granting the relief requested in this lawsuit would redress
22 these injuries by compelling EPA to complete the rulemaking requested in Plaintiffs' Petition, or
23 otherwise conclude the matter presented in the Petition.

24 16. Defendant GINA McCARTHY is sued in her official capacity as the Administrator of
25 the EPA. She is responsible for taking various actions to implement and administer EPA's legal
26 duties, including implementing FIFRA and performing the actions sought in this Complaint.

27 **STATUTORY BACKGROUND**

28 17. EPA regulates the sale, distribution, and use of pesticides in the United States

1 pursuant to authority provided under the Federal Insecticide, Fungicide, and Rodenticide Act. 7
2 U.S.C. §§ 136 *et seq.*

3 18. FIFRA was enacted to “protect man and his environment’ from the deleterious
4 effects of [pesticides].” *New York State Pesticide Coal., Inc. v. Jorling*, 874 F.2d 115, 117, 119 (2d
5 Cir. 1989) (quoting S. Rep. No. 92-838, p. 1 (1972)).

6 19. Before a pesticide may be sold or used in the United States, EPA must “register” the
7 pesticide. *See generally* 7 U.S.C. § 136a.

8 20. Registration requires, among other things, EPA’s determination that the pesticide
9 “will not generally cause unreasonable adverse effects on the environment.” *Id.* § 136a(c)(5)(C) and
10 (D).

11 21. FIFRA defines “unreasonable adverse effects on the environment” to mean “any
12 unreasonable risk to man or the environment, taking into account the economic, social, and
13 environmental costs and benefits of the use of any pesticide....” *Id.* § 136(bb).

14 22. Accordingly, EPA has a “basic obligation under... FIFRA of determining the risks
15 which may be posed by a pesticide and imposing the necessary regulatory requirement to adequately
16 control an unreasonable risk. Depending on the risk involved, the [EPA] Administrator is authorized
17 by the amended FIFRA to ... require specific label statements” for pesticide products. 40 Fed. Reg.
18 28242, 28252 (July 3, 1975).

19 **FACTUAL BACKGROUND**

20 23. Over five billion pounds of pesticides are dispersed throughout the United States each
21 year, entering the nation’s food supply, homes, schools, public lands, and waterways.

22 24. The public knows very little about the chemicals contained in most pesticides.

23 25. Under FIFRA, manufacturers are required to list on pesticide labels the “active”
24 ingredients, *i.e.*, those that “will prevent, destroy, repel or mitigate any pest.” 7 U.S.C. § 136(a)(1),
25 (n).

26 26. “Inert” ingredients, those chemicals added to improve the delivery, durability, or
27 other properties of the pesticide product, are not subject to the same mandatory listing requirements
28 as “active” ingredients. *See id.* § 136(n).

1 27. Under FIFRA, “inert” means only that these ingredients are “not active,” *id.*
2 § 136(m); it does not mean they are actually biologically or chemically inert.

3 28. Indeed, an ingredient may be active in one pesticide and inert in another. According
4 to EPA’s Substance Registry System, 516 inert ingredients are currently, or were at one time,
5 registered as active ingredients.

6 29. EPA has identified a list of inert ingredients commonly found in pesticides. *See* “Inert
7 Ingredients in Pesticide Products,” 52 Fed. Reg. 13305 (April 22, 1987).

8 30. Of those identified common inert ingredients, over 370 are either hazardous or
9 suspected toxins. These chemicals included:

- 10 • two chemicals that are classified as carcinogenic to humans by the International Agency
11 for Research on Cancer (IARC);
- 12 • 17 chemicals that are classified as possibly carcinogenic to humans by the IARC;
- 13 • 13 chemicals that EPA has listed as “extremely hazardous substances” under the
14 Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 1102(a);
- 15 • 93 chemicals that EPA has listed in the Toxics Release Inventory, which includes
16 chemicals “known to cause or [that] can reasonably be anticipated to cause in humans”
17 “significant adverse acute human health effects,” “cancer or teratogenic effects,” “serious
18 or irreversible reproductive dysfunctions, neurological disorders, heritable genetic
19 mutations, or other chronic health effects,” 42 U.S.C. § 11023(d)(2); and
- 20 • 96 inert ingredients that EPA “believes are potentially toxic” and has identified as “high
21 priority for testing” under FIFRA, in part, because they “are structurally similar to
22 chemicals known to be toxic,” 52 Fed. Reg. at 13306.

23 31. Some of these ingredients identified as “inert” are known to cause developmental
24 abnormalities, damage to vital organs, reduced fertility, and/or genetic mutations.

25 32. Inert ingredients in pesticide products often comprise 50 to 99 percent of their
26 formulations.

27 33. These ingredients can also magnify the exposure to active pesticide ingredients by:
28 increasing the absorption or penetration of active ingredients through the skin; reducing the

1 effectiveness of protective equipment, such as gloves; adversely affecting laundry removal of
2 pesticides from clothing; and affecting the volatilization of active ingredients, resulting in increased
3 inhalation exposures.

4 34. Under current EPA regulations, these chemicals must only be identified as “inert
5 ingredients” with a total weight percentage listed. 40 C.F.R. § 156.10(g)(1); *see also* 7 U.S.C.
6 § 136(n)(1).

7 35. The result is that pesticide labels mislead the public into thinking that these “inert”
8 ingredients are innocuous. *See* EPA, Pesticide Registration Notice 97-6: Use of Term “Inert” in the
9 Label Ingredients Statement (Nov. 1, 1997), available at [http://www.epa.gov/PR_Notices/pr97-](http://www.epa.gov/PR_Notices/pr97-6.html)
10 [6.html](http://www.epa.gov/PR_Notices/pr97-6.html) (last visited March 4, 2014) (noting “many consumers have a misleading impression of the
11 term ‘inert ingredient,’ believing it to indicate water or other harmless ingredients”).

12 36. Consumers therefore have a false sense of the safety of pesticide products.

13 37. In addition, consumers and workers lack the information they need to protect
14 themselves and their communities from harmful inert ingredients, or to choose less hazardous
15 alternatives.

16 38. Both conventional farmers and organic farmers cannot accurately assess the
17 environmental impacts of pesticides on necessary environmental support systems, such as
18 pollinators, and choose less harmful alternatives. Organic farmers also cannot meaningfully assess
19 damage from pesticide drift on crops that must meet organic standards.

20 39. Relatedly, without inert ingredient information on pesticide labels, medical
21 professionals cannot quickly and accurately diagnose patients exposed to pesticides or appropriately
22 treat such patients.

23 40. Requiring disclosure of hazardous inert ingredients in pesticide products would
24 encourage the use of less toxic ingredients, reducing the presence of hazardous ingredients in
25 pesticide products and thus harmful exposure to these ingredients overall. *See* 74 Fed. Reg. at 68217
26 (noting that when, in 1987, EPA required disclosure of approximately 50 “inerts of toxicological
27 concern,” “most [of these] ingredients disappeared from pesticide formulations”).

28 41. On August 1, 2006, a coalition of 22 public health and environmental organizations,

1 and a coalition of 15 state and territory Attorneys General, each petitioned EPA to require the
2 disclosure of inert ingredients that EPA and OSHA had already identified as hazardous, citing the
3 above reasons for requiring disclosure, among others.

4 42. Nearly three years later, EPA had failed to take any action on the Petition.

5 43. On June 25, 2009, plaintiff Center for Environmental Health filed a complaint in this
6 Court to compel EPA to act upon the petition.

7 44. Shortly thereafter, EPA granted the petitions on September 30, 2009, stating that “the
8 public should have a means to learn the identities of hazardous inert ingredients in pesticide
9 formulations,” and adding that “[t]he Agency believes that increased transparency could lead to
10 better informed decision-making and to better informed pesticide use.” EPA Response to Petition at
11 2.

12 45. EPA’s response to the Petitions noted the Agency’s “intention to pursue rulemaking
13 to achieve the type of disclosure described in the petitions.” *Id.* at 3.

14 46. On December 23, 2009, EPA issued an Advanced Notice of Proposed Rulemaking
15 (“ANPR”) soliciting comment on two alternative proposals--one that would require listing of
16 “potentially hazardous” inert ingredients and another that would require listing of most or *all* inert
17 ingredients. 74 Fed. Reg. at 68219.

18 47. In the ANPR, EPA recognized that public disclosure of hazardous inert ingredients in
19 pesticides could:

- 20 • “enable consumers and users of pesticides to make more informed decisions when
21 choosing or using pesticide products”;
- 22 • “provide important information regarding the use of a pesticide, potentially enabling the
23 consumer to avoid choosing a particular product to use in a situation where one or more
24 of the inert ingredients might have an adverse health or ecological impact”; and
- 25 • “lead the market to provide more product choices that could reduce overall exposures to
26 potentially hazardous chemicals.”

27 *Id.* at 68219.

28 48. In the ANPR, EPA acknowledged its authority to require public availability of

1 potentially hazardous inert ingredients, which “can be found in the registration requirements of
2 FIFRA section 3, the definition of ‘unreasonable adverse effects on the environment’ in FIFRA
3 section 2(bb), and EPA’s rulemaking authority under FIFRA section 25(a).” *Id.* at 68222.

4 49. Specifically, it explained that under FIFRA’s requirement for EPA to ensure that any
5 pesticide it registers “will perform its intended function without unreasonable adverse effects on the
6 environment,” it must take into account “the economic, social, and environmental costs and benefits
7 of the use of any pesticide.” *Id.* (citing 7 U.S.C. §§ 136(bb), 136a(c)(5)(C)). Because “formulations
8 that contain hazardous inert ingredients as a general matter may have a less favorable cost/benefit
9 ratio than similar formulations that perform the same function and do not contain potentially
10 hazardous inert ingredients,” EPA had the authority to take measures to reduce the use of hazardous
11 inert ingredients in pesticides, including making inert ingredient information public. *See id.*; *see also*
12 EPA Response to Petition at 2.

13 50. The ANPR also stated: “EPA considers pesticides containing potentially hazardous
14 inert ingredients to be in a separate class from formulations that do not contain such ingredients, and
15 believes it appropriate to use its FIFRA section 25(a) rulemaking authority to take action to reduce
16 the presence of potentially hazardous ingredients.” 74 Fed. Reg. at 68222 (citing 7 U.S.C. §
17 136w(a)(1) (allowing EPA to prescribe regulations that “shall take into account the difference in
18 concept and usage between various classes of pesticides ... and differences in environmental risk”)).

19 51. EPA solicited public comment on the proposed rulemaking. On February 22, 2010,
20 EPA extended the public comment period by 60 days, until April 23, 2010.

21 52. Over seven-and-a half-years have passed since EPA received the petitions for
22 rulemaking and over three-and-a-half years have passed since it closed public comment on the
23 ANPR. To date, EPA has taken no further action to complete the rulemaking, failing to follow-
24 through on its commitment to adopt a rule.

25 **CLAIM FOR RELIEF**

26 **EPA Is in Violation of the Administrative Procedure Act Because It Has Failed to Conclude**
27 **the Matter Presented in the Petition**

28 53. Plaintiffs reallege each and every allegation set forth above, as if fully set forth

1 herein.

2 54. Under the Administrative Procedure Act, each agency “shall give an interested person
3 the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e).

4 55. The APA further provides that, “within a reasonable time, each agency shall proceed
5 to conclude a matter presented to it.” 5 U.S.C. § 555(b).

6 56. Where agencies have failed to conclude matters within a reasonable time, the APA
7 empowers courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C.
8 § 706(1).

9 57. After Plaintiffs submitted the Petition on August 1, 2006 and EPA initiated a
10 proposed rulemaking on December 23, 2009, EPA was obligated to complete the rulemaking, or
11 otherwise conclude action on the Petition’s request for rulemaking within a reasonable time.

12 58. EPA has taken no action to complete the rulemaking or conclude action on the
13 Petition’s request for rulemaking since the close of the public comment period on April 23, 2010.

14 59. This failure to complete the rulemaking or otherwise conclude action on the Petition’s
15 request for rulemaking constitutes a violation of the APA’s requirement to conclude a matter
16 presented to it “within a reasonable time,” 5 U.S.C. § 555(b), and constitutes agency action
17 “unreasonably delayed.”

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs respectfully request the Court to grant the following relief:

20 1. DECLARE that EPA has:

21 (a) unreasonably delayed concluding action on the Petition’s request for
22 rulemaking; and

23 (b) unreasonably delayed completion of the rulemaking proposed in the ANPR.

24 2. ISSUE an injunction directing EPA to:

25 (a) publish a notice of proposed rulemaking for a rule requiring the public
26 disclosure of hazardous inert ingredients or all inert ingredients within 60 days
27 of the Court’s determination that EPA’s delay is unreasonable and publish a
28 final rule within 180 days of the notice of proposed rulemaking; or

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(b) otherwise conclude action on the Petition's request for rulemaking within 60 days of the Court's determination that EPA's delay is unreasonable.

3. RETAIN jurisdiction over this matter until such time as EPA has complied with its duties to conclude action on the Petition's request for rulemaking;
4. AWARD to Plaintiffs their costs of litigation, including reasonable attorney and expert witness fees; and/or
5. GRANT such additional relief as the Court may deem just and proper.

DATED: March 5, 2014

Respectfully submitted,

/s/ Wendy S. Park
WENDY S. PARK
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Attorneys for Plaintiffs