IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CROP PROTECTION ASSOCIATION 1156 Fifteenth Street, N.W. Suite 400 Washington, DC 20005 and CHEMICAL MANUFACTURERS ASSOCIATION 1300 Wilson Boulevard Arlington, VA 22209 and AMERICAN CORPORATE COUNSEL ASSOCIATION 1025 Connecticut Avenue, N.W. Suite 200 Washington, DC 20036 PLAINTIFFS v. U.S. ENVIRONMENTAL PROTECTION AGENCY 401 M Street, S.W. Washington, DC 20460 DEFENDANT	Case No.:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. In this action, Plaintiffs American Crop Protection Association (ACPA), Chemical Manufacturers Association (CMA) and American Corporate Counsel Association (ACCA), challenge a regulation issued by Defendant U.S. Environmental Protection Agency (EPA) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.* On September 19, 1997, EPA issued a final rule entitled Reporting Requirements for Risk/Benefit Information ("the Rule"). 62 Fed. Reg. 49370, codified at 40 CFR Part 159 (Attached as Exhibit 1); see also Final Rule Amendment and Correction, 63 Fed. Reg. 33580 (June 19, 1998); Final Rule Amendment to Defer Compliance Date, 63 Fed. Reg. 41192 (Aug. 3, 1998). The Rule implements section 6(a)(2) of FIFRA, which requires pesticide registrants to report information concerning "unreasonable adverse effects" of their products to EPA. The Rule exceeds EPA's statutory authority and impermissibly impinges the attorney-client privilege and work product doctrine, and therefore must be partially invalidated.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to FIFRA § 16(a). Plaintiffs' claims set forth federal questions for which this Court has jurisdiction pursuant to 28 U.S.C. § 1331 (1994). Additionally, under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 702, 703, 704, and 706 (1994), this Court has jurisdiction to grant declaratory and injunctive relief with regard to agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

VENUE

3. Venue is appropriate under 28 U.S.C. § 1391(e), as the Defendant is an agency of the United States located in the District of Columbia.

PARTIES

4. Organized in 1933, ACPA is the non-profit trade organization representing the major manufacturers, formulators and distributors of crop protection and pest control products, including bioengineered products with crop production and protection characteristics. ACPA member companies produce, sell and distribute virtually all the active compounds used in crop protection chemicals registered for use in the United States. ACPA's members are therefore subject to the Rule at issue in this litigation. ACPA's principal place of business is 1156 Fifteenth Street, N.W., Suite 400, Washington, D.C. 20005.

5. Plaintiff CMA is a not-for-profit trade association whose member companies represent 90 percent of the productive capacity for basic industrial chemicals in the United States. Many of the CMA's members produce, sell and/or distribute pesticides and are therefore subject to the regulation at issue in this litigation. One group of companies associated with CMA is the Biocides Panel (Panel). This Panel is composed of over 40 registrants of antimicrobial pesticides. All of these products are subject to registration by EPA under FIFRA, so all of the Biocides Panel members also are subject to the Rule at issue in this matter. The CMA's principal place of business is 1300 Wilson Boulevard Arlington, Virginia 22209.

6. The American Corporate Counsel Association (ACCA) is the only national bar association comprised solely of attorneys who practice law in the legal departments of corporations and other private sector organizations. As a non-profit entity, ACCA promotes the common interests of its members, contributes to their knowledge base and continuing education with programming and substantive resources, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. Since its founding in 1982, ACCA has grown to 11,000 individual members working in over 4,300 organizations in the U.S. and abroad. ACCA's members include corporate counsel for companies that produce, sell and distribute pesticides, and are therefore subject to the Rule at issue in this litigation. ACCA's principal place of business is 1025 Connecticut Avenue, N.W., Suite 200, Washington, D.C. 20036.

7. Defendant EPA is the federal agency responsible for implementing and enforcing FIFRA. EPA's principal offices are at 401 M Street, S.W. Washington, D.C. 20460.

BACKGROUND OF THE ACTION

I. THE STATUTORY REQUIREMENTS

8. As a general matter, pesticides may only be sold or distributed in the United States if they are registered with EPA under FIFRA. The statute authorizes and requires EPA to grant a registration if it finds, inter alia, that the product "will perform its intended function without causing unreasonable adverse effects on the environment;" and that when used in accordance with widespread and commonly recognized practice, the product "will not generally

cause unreasonable adverse effects on the environment." FIFRA § 3(c)(5). FIFRA defines "unreasonable adverse effects on the environment" as "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." FIFRA § 2(bb).

9. Section 6(a)(2) of FIFRA provides, "[i]f at any time after registration of a pesticide the registrant has additional **factual** information regarding unreasonable adverse effects on the environment of the pesticide, the registrant shall submit such information to the Administrator." (Emphasis added). According to its terms, Section 6(a)(2) requires a registrant to report adverse effects information to EPA only if the information is factual.

10. Section 10(d) of FIFRA provides that EPA shall disclose certain information concerning pesticides to the public, including: "any information concerning the effects of [a] pesticide on any organism or the behavior of such pesticide in the environment, including but not limited to, data on safety to fish and wildlife, humans and other mammals, plants, animals and soil . . ."

II. THE EPA FINAL RULE

11. On September 19, 1997 EPA issued its final rule implementing section 6(a)(2) of FIFRA. 62 Fed. Reg. 49370. This regulation became effective on August 17, 1998. See 63 Fed. Reg. 41192 (Aug. 3, 1998).

12. The Rule requires reporting not only of "factual" information, as authorized by FIFRA section 6(a)(2), but also of "opinion information." The Rule requires that opinions "relevant to the assessment of risks or benefits" of a pesticide must be reported if they are rendered by a person who falls within any of three broad categories established by EPA. 40 C.F.R. § 159.158(a). These include opinions of any person: (1) who is employed or retained by the registrant; (2) from whom the registrant requested the opinion; or (3) who is an expert. Id. See 62 Fed. Reg. at 49377-78.

13. Even though several commenters on the proposed rule noted that the statute limited the Agency to factual information, EPA decided to retain the requirement to report opinions in addition to factual information. 62 Fed. Reg. 49377-78. EPA's justification for doing so was that "the Agency is frequently obliged to make decisions in at least partial reliance on expert opinion." Id. at 49378.

14. The Rule requires reporting of opinions that include material otherwise protected under the attorney work product doctrine or attorney-client privilege. Significantly, under the Rule, opinions of any person "employed or retained" by the registrant, or "from whom the registrant requested the opinion(s) or conclusion(s)" must be reported. 40 C.F.R. § 159.158(a)(2). Thus, the requirement applies to all opinions of registrants' agents, including any expert with whom a registrant's attorney consults in preparation for litigation, whether or not the expert testifies. EPA expressly rejected suggestions from commenters that the reporting requirement not extend to attorney work product: "[t]he Agency does not believe there is any valid policy reason to

exempt from section 6(a)(2) reporting valuable information merely because it was developed at the suggestion of an attorney." 62 Fed. Reg. at 49377.

15. Information reported under section 6(a)(2) is generally available to the public. EPA has stated that most material submitted under section 6(a)(2) will be disclosed pursuant to FIFRA section 10(d) (Agency Response to Comments at 35-36 (July 3, 1996)); and that routine business confidentiality claims will not be honored for 6(a)(2) material. Id. at 36; 62 Fed. Reg. at 49377. Indeed, EPA has issued a "class determination" that safety and efficacy information submitted under Section 6(a)(2) is not entitled to confidential treatment. Class determination 1-99 (September 28, 1999). Under this class determination, all information reported under the Rule is presumptively subject to disclosure, with the possible, very limited exception of confidential business information that discloses trade secrets such as manufacturing processes.

16. Finally, the Rule makes clear that EPA will vigorously pursue enforcement, including potential civil and criminal penalties and cancellation of a product's registration, for failure to comply. In the preamble, EPA "serve[s] notice" that failure to comply with the Rule will be considered a violation of FIFRA's unlawful acts provisions, §§ 12(a)(2)(B)(ii) and 12(a)(2)(N), and could result in civil and/or criminal penalties under FIFRA § 14. 62 Fed. Reg. at 49372. The Agency also states that failure to comply with the Rule could "constitute grounds for cancellation under FIFRA Section 6 of some or all of a registrant's pesticide registrations . . ." Id.

17. In sum, EPA's Rule implementing section 6(a)(2) imposes broad reporting obligations that go well beyond any fair reading of the statute: it requires the submission of expert and nonexpert opinion information; and it requires reporting and likely public release of information otherwise protected from disclosure by the attorney-client privilege and the attorney work product doctrine. EPA does not have the authority to impose these obligations.

COUNT ONE

EPA Has No Statutory Authority to Require the Submission of Opinion Information Under FIFRA

18. The allegations in paragraphs 1-17 are incorporated by reference as if fully stated herein.

19. FIFRA § 6(a)(2) requires registrants to submit "additional factual information regarding unreasonable adverse affects on the environment of the pesticide." By including the qualifier "factual," Congress specifically limited the information subject to this provision. The statute is clear and unambiguous as to the type of information required to be submitted.

20. In § 159.158(a) of the Rule, EPA deliberately and unambiguously goes beyond the statutory grant of authority by requiring registrants to submit "opinions" in addition to "factual" information.

21. EPA has already been reprimanded by this Court for attempting to require the submission of opinions under § 6(a)(2). In 1978, the EPA issued a Memorandum reflecting the agency's interpretation of § 6(a)(2), which was challenged in Chemical Specialties Mfrs. Ass'n v. U.S. E.P.A., 484 F. Supp. 513 (D.D.C. 1980). Although this Court ultimately determined that the case was non-justiciable, the Court stated that EPA's attempt to require reporting of expert opinion exceeded its statutory authority. The Court noted "[i]f Congress had intended to give § 6(a)(2) such broad scope, it would not have limited the information required to facts." Id. at 518. Nonetheless, in the current rule, EPA continues to disregard the plain language of the statute and this Court's interpretation thereof.

22. EPA is without statutory authority to require the reporting of opinion information. Therefore, this Court should invalidate 40 C.F.R. § 159.158(a).

COUNT TWO

The Rule Impermissibly Impairs Pesticide Registrants' Reliance on the Attorney Work Product Doctrine and Attorney-Client Privilege

23. The allegations in paragraphs 1-22 are incorporated by reference as if fully stated herein.

24. The work product doctrine is an historical common law canon based on important public policies, even outside its usual civil discovery context. Upjohn Co. v. United States, 449 U.S. 383, 399-402 (1981). The doctrine protects attorneys' privacy in their work to promote efficiency and zealous advocacy. Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). The Supreme Court has described the work product doctrine as "essential to an orderly working of our system of legal procedure." Id. at 512.

25. The work product doctrine protects from disclosure both tangible items, such as documents produced in the course of trial preparation, and intangibles, such as attorney opinions and strategies or non-testifying expert opinions. Federal Rule of Civil Procedure 26(b)(3) codifies the work product doctrine as it relates to "documents and tangible things" in the context of pre-trial discovery. Rule 26(b)(3) categorizes work product into two classifications, ordinary and opinion. In cases of ordinary work product, such material may be discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." F.R.C.P. 26(b)(3). A party bears an even higher burden when attempting to view opposing party's "opinion work product" -- documents that reveal an attorney's "mental impressions, conclusions, opinions, or legal theories." Id.

26. Federal Rule of Civil Procedure 26(b)(4)(B) codifies the work product doctrine as it relates to "intangibles." Rule 26(b)(4)(B) provides that "facts known or

opinions held" by a non-testifying expert retained in anticipation of litigation are discoverable only "upon a showing of exceptional circumstances." (Emphasis added). Rule 26(b)(4)(B) thereby promotes fairness by precluding unreasonable access to an opposing party's trial preparation. Satisfaction of the "exceptional circumstances" standard required for disclosure of non-testifying expert information is limited to rare, specific fact patterns, such as fraud or obstruction of justice. Thus, for opinion work product, even substantial need is insufficient to overcome the privilege. It is clear that EPA would not meet the "exceptional circumstances" standard for the opinion work product it requires to be submitted under the Rule.

27. The attorney-client privilege is a common law canon that protects confidential communications between an attorney and a client from disclosure. See Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348 (1985). In some states the attorney-client privilege covers the contents of communications between an attorney and an investigator hired by the attorney to provide information upon which legal advice may be based. E.g., Tex. R. Civ. Evid. 503.

28. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Ensuring that clients engage in full and frank discussions with their counsel, the privilege provides both corporations and individuals with able representation while allowing attorneys to serve effectively as officers of the court. The privilege has been recognized as "perhaps . . . the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." United States v. Bauer, 132 F.3d 504, 510 (9th Cir. 1997).

29. EPA's Rule requires pesticide registrants to submit to EPA information protected by the attorney work product doctrine and the attorney-client privilege. Section 159.158(a) of the Rule requires **opinions** "relevant to the risks or benefits" of a pesticide to be reported if they are rendered by any person: (1) who is employed or retained by the registrant; or (2) from whom the registrant requested the opinion; or (3) who is an expert. 40 C.F.R. § 159.158(a). See 62 Fed. Reg. at 49377-49378. Thus, opinions formed by any agent of the registrant would need to be reported, including those of non-testifying experts, consultants, investigators, and even opinions of the registrant's in-house or outside counsel.

30. If an attorney consults with an expert in defending a product liability case involving a registered pesticide, and obtains opinion information regarding an adverse effect of the pesticide, the Rule states that the expert's opinion must be reported under § 159.158(a) – whether the registrant agrees with the expert's opinion or not. Once reported, such information will be made available to the public, thereby enabling adverse parties to obtain an expert opinion rendered to assist a defendant's attorney in trial preparation. The Rule would thereby eliminate the ability of attorneys to consult with experts and others to prepare for trial without fear of having the information disclosed.

31. Reporting privileged information under the Rule will also raise waiver issues.

The attorney-client privilege is generally deemed waived for information that is disclosed to persons outside the attorney-client relationship. In addition, work product protection is generally deemed waived for information that has been disclosed to third parties where its disclosure substantially increases the possibility that an opposing party could obtain the information. Plaintiffs in product liability litigation may therefore argue that any privilege for information submitted under the Rule will be waived because of the disclosure to EPA.

32. EPA expressly refuses to exempt privileged information from the Rule. In the preamble to the final rule, EPA states:

> Some commenters suggested that the Agency exempt from the reporting requirements of section 6(a)(2) material covered by the attorney-client or attorney work-product privileges. The Agency has no intention to broadly exempt information covered by the attorney work-product doctrine. Exempting attorney work-product from section 6(a)(2) reporting would make the reportability of investigative work hinge on whether the work was generated at the suggestion of an attorney or of a non-attorney associated with registrant. The Agency does not believe there is any valid policy reason to exempt from section 6(a)(2) reporting valuable information merely because it was developed at the suggestion of an attorney.

62 Fed. Reg. at 49377. Thus, EPA recognizes that the Rule requires the submission of privileged information and refuses to include an exemption for such material.

33. The failure to exempt privileged information from Section 159.158(a) of the Rule fundamentally impairs registrants' ability to prepare for litigation and communicate with counsel. The release of information concerning attorneys' strategies and opinions, as well as information gathered in preparation for litigation, will drastically bias any proceedings against registrants, as registrants cannot obtain any corresponding disclosure from adverse parties. To avoid such an outcome and still comply with the Rule, registrants and their attorneys would be forced to dramatically change the manner in which they prepare their cases. EPA's Rule therefore impairs registrants' right to rely on the attorney-client privilege and work product doctrine, completely prejudicing the legal process against them.

34. It is a well-established principle that an agency cannot abrogate the common law without clear and explicit statutory authorization. Both the work product doctrine and the attorney-client privileges are common law canons, and therefore cannot be impinged by administrative regulation without clear statutory authority.

35. Nothing in the statutory language or the legislative history of FIFRA even suggests an intent on the part of Congress to abrogate any common law privilege or to authorize EPA to do so. Thus, even if something less than "clear and explicit" statutory authority would be sufficient to authorize evisceration of the attorney-client privilege and work product doctrine, no such authority is

implied in FIFRA. Because the Act does not authorize abrogation of these common law privileges, the Administrator cannot issue a regulation that has such an effect.

PRAYER FOR RELIEF

36. WHEREFORE, Plaintiffs request that the Court issue an order declaring that § 159.158(a) of EPA's Rule is invalid as exceeding EPA's statutory authority in that it: 1) requires submission of opinion information; and 2) eviscerates the operation of common law privileges as to pesticide registrants. Plaintiffs further request that the Court permanently enjoin the implementation or enforcement of § 159.158(a) of the Rule.

Respectfully submitted,

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