

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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STATE OF NEW YORK, STATE OF)
CONNECTICUT, STATE OF ILLINOIS,)
STATE OF NEW MEXICO, STATE OF)
WISCONSIN and THE TERRITORY)
OF THE UNITED STATES)
VIRGIN ISLANDS,)
)
Plaintiffs,)
)
- against -)
)
UNITED STATES DEPARTMENT OF)
HOUSING AND URBAN DEVELOPMENT and)
ALPHONSO JACKSON, SECRETARY,)
)
Defendants.)
-----X

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EV 04 3869

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

TOWNES, J.
LEVY, M.J.

PRELIMINARY STATEMENT

1. The States of New York, Connecticut, Illinois, New Mexico, Wisconsin and the Territory of the United States Virgin Islands seek declaratory and injunctive relief against the United States Department of Housing and Urban Development, and against its Secretary, Alphonso Jackson (collectively HUD), for their rejection of a rulemaking petition seeking HUD's compliance with a statutory obligation under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA). FIFRA requires HUD to "promote Integrated Pest Management through procurement and regulatory policies, and other activities." Integrated Pest Management (IPM) is a method of controlling pests that has been proven to be both effective and economical while reducing the use of toxic and carcinogenic pesticides. It thereby protects public housing residents, in particular children and the elderly, from both the adverse health effects of pest infestations and the adverse health effects related to unnecessary pesticide use in public housing

projects funded or assisted by HUD. Despite this mandate, and despite extensive evidence of the potential harms of pesticides, HUD has no regulatory policies that promote – or even mention – IPM. In addition, HUD has rejected a petition by eleven states that it develop such policies.

2. The States seek (a) a declaration that HUD's current regulations violate FIFRA's mandate to promote IPM through regulatory policies; (b) a declaration that HUD has violated FIFRA, 7 U.S.C. §136r-1, by carrying out pest management activities without using IPM techniques; (c) a declaration that HUD's IPM actions are arbitrary, capricious and not in accordance with law; (d) a declaration that HUD's denial of the States' rulemaking petition was arbitrary, capricious and contrary to law; and (e) an injunction requiring HUD to initiate a rulemaking proceeding to amend its regulations to require the adoption and implementation of IPM as part of the operational plans that state and local public housing agencies must submit to HUD on an annual basis or to adopt other regulatory policies that promote IPM.

JURISDICTION AND VENUE

3. The States' claims for relief arise under Section 303 of FIFRA, 7 U.S.C. § 136r-1, 42 U.S.C. § 1404a, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706.

4. This Court has jurisdiction over the matters raised under 7 U.S.C. § 136r-1 and 28 U.S.C. §§ 1331 and 1346. Venue is proper under 28 U.S.C. § 1391(e).

PARTIES

5. The States of New York, Connecticut, Illinois, New Mexico, Wisconsin are sovereign states and the United States Virgin Islands is a Territory of the United States. They bring this action on behalf of themselves and, as *parens patriae*, on behalf of the residents of public housing developments in their states and territory.

6. The States have broad interests in ensuring that residents of public housing in their states are not unnecessarily exposed to toxic and carcinogenic pesticides that can cause serious adverse health impacts, including cancer and neurological damage, particularly in infants and children whose developing body systems are more vulnerable to chemical disruption. Through state-funded medical facilities, schools, housing, insurance, and other programs, the States have direct sovereign and economic interests in the health of their residents, and therefore have an interest in ensuring that HUD obeys the federal law requiring it to promote IPM in its regulatory policies in order to reduce unnecessary pesticide use in federally supported low-income housing.

7. Pursuant to 5 U.S.C. § 101, HUD is an executive department of the United States, is responsible for advancing the policy of the United States to provide low-income housing, and proclaims as its mission the provision of "a decent, safe and sanitary home and suitable living environment for every American."

8. Alphonso Jackson is the Secretary of HUD and is sued in his official capacity (Secretary).

STATUTORY FRAMEWORK

FIFRA

9. FIFRA establishes an extensive regulatory system for controlling the sale, distribution and application of pesticides. Pesticides must be registered with the United States Environmental Protection Agency (EPA) before they may legally be distributed or sold within the United States. The Act also requires pesticides to be labeled in an approved manner and makes it unlawful for anyone to use the pesticide in a manner inconsistent with its labeling.

Other provisions of FIFRA provide for registration of establishments producing pesticides, certification of pesticide applicators, regulations to promote proper storage and disposal, and the issuance of stop sale orders, recall orders and other enforcement measures.

10. In 1996, Congress passed the Food Quality Protection Act of 1996 (FQPA), in large part in response to the National Research Council study published in 1993, *Pesticides in the Diets of Infants and Children*. The study found that pesticide exposure has a qualitatively different impact on the developing body systems of infants and children, that food consumption patterns of infants and children differ significantly from that of the rest of the population, and that these factors must be considered in determining allowable levels of pesticide residues on foods.

11. In addition to more stringently limiting pesticide residues on foods, the FQPA also amended FIFRA in order to reduce other routes of pesticide exposure by promoting IPM. Specifically, the 1996 amendments require that:

Federal agencies shall use Integrated Pest Management techniques in carrying out pest management activities and shall promote Integrated Pest Management through procurement and regulatory policies, and other activities.

FIFRA, 7 U.S.C. §136r-1.

12. The 1996 amendment defines IPM as a “sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks.” 7 U.S.C. § 136r-1.

The Housing Act of 1937, As Amended

13. The United States Housing Act of 1937, as amended (the Housing Act), is designed to provide "decent, safe and sanitary dwellings within the financial reach of families of

low income," 42 U.S.C. §§ 1437, 1437b-1437i, and authorizes HUD to provide grants, low-interest loans and tax exemptions to local public housing agencies for both the construction and operation of low-income housing.

14. Pursuant to the Housing Act, a public housing agency is defined as "any state, county, municipality, or other governmental entity . . . which is authorized to engage in or assist in the development or operation of public housing." 42 U.S.C. § 1437a (b)(6)(A).

15. Pursuant to 42 U.S.C. §§ 1437f, 1437g, HUD provides grants, low-interest loans and tax exemptions to local public housing agencies for both the construction and operation of low-income housing and provides rent vouchers to tenants. Nationwide, there are about 1.3 million households living in public housing units, managed by some 3,300 state or local public housing agencies.

16. Each year that a public housing agency receives assistance from HUD, it must submit to the Secretary an annual public housing agency plan that includes, among other things, a section about the operation and management of housing it owns, assists or operates. That section must contain a statement of the housing agency's rules, standards, and policies governing maintenance and management and must include a description of "measures necessary for the prevention or eradication of pest infestation, including cockroaches." 42 U.S.C. § 1437c-1(d)(5).

17. HUD's regulations similarly require housing agency plans to include a description of "measures necessary for the prevention or eradication of pest infestation," including cockroach infestation. 24 C.F.R. § 903.7(e)(2).

18. By subsidizing the operational expenses of public housing agencies, HUD subsidizes their programs for the "prevention or eradication of pest infestation." For example, in

New York City, HUD funds the New York City Housing Authority's entire operational budget for public housing -- a budget which includes expenses for pest management activities.

FACTUAL BACKGROUND

Risks from Pesticide Exposure

19. Human exposure to chemical pesticides can cause serious adverse health impacts. Fetuses may be exposed to pesticides in utero and infants can be exposed to pesticides in their environment directly, or indirectly when their mother is exposed and passes the pesticide to the infant in mother's milk.

20. Commonly used pesticides can cause long-term neurological damage, developmental or reproductive disorders and cancer. For example, commonly used organophosphate pesticides are designed to disrupt the nervous systems of insects and are also damaging to the human brain and nervous system. Acute exposures can cause tremors, incoordination, visual disturbances and ultimately convulsions and coma. Repeated exposure to levels of organophosphates too low to cause acute effects can lead to anorexia, weakness, memory loss and other mental deficits persisting for months after exposure. Commonly used carbamate pesticides also kill insects by damaging their nervous systems and are also toxic to the nervous systems of humans.

21. Certain pesticides are more toxic than others. For example, according to the EPA, organophosphates pose a greater hazard, especially to young children, than other pesticides.

22. Some pesticides, such as pyrethrins, are classified by EPA as likely human carcinogens; pyrethrins are also allergenic and may trigger asthma attacks. Some rodenticides, such as coumarin and inandione, are anticoagulants and cause widespread internal bleeding in

rats. A child who swallowed as little as one bite of some anticoagulant rodenticides may develop potentially fatal internal bleeding. According to EPA, rodenticides account for a disproportionate number of all pesticide exposures in children under the age of six and result in a disproportionate number of medical treatments and hospitalizations.

23. According to EPA's Office of Children's Health Protection, children face greater risks from pesticide exposure than most adults. They play on floors and lawns where pesticides are applied, they have more frequent hand to mouth contact than adults, and pound for pound of body weight, children breathe more, eat more and have a more rapid metabolism than adults, and thus ingest more pesticides in relation to their size. Moreover, a child's nervous system, reproductive organs and immune system grow and develop rapidly during the first years of life and these developmental processes may be irreversibly disrupted by toxic environmental substances.

24. EPA has recognized that the exposure of children to pesticides around their homes and in schools, playgrounds or daycare centers is an important and inadequately understood problem. In particular, EPA has characterized older urban public housing projects as "settings of special concern" in regard to children's exposure to pesticides.

Integrated Pest Management

25. EPA describes IPM as a "safer, and usually less costly option for effective pest management A[n] IPM program employs common sense strategies to reduce sources of food, water and shelter for pests . . . and take[s] advantage of all pest management strategies, including judicious careful use of pesticides when necessary." *Pesticides: Controlling Pests*, at www.epa.gov/pesticides/ipm.

26. IPM relies substantially, but not exclusively, on non-toxic pest control approaches and uses chemical pesticides only as a last resort.
27. An IPM program generally has the following components:
- a. Regular inspections to identify any pests present, to delineate specific areas actually infested and to identify conditions that allow or contribute to pest infestations, such as leaks, wall damage or poor sanitary conditions;
 - b. Pest prevention efforts designed to deny pests access to the home by repairing conditions, such as cracks and holes in walls, that contribute to pest infestations, and to deny life's necessities to pests, such as food and water, by plugging leaks and properly storing food and food garbage;
 - c. Reliance on physical and mechanical pest controls as a first line of defense; and
 - d. Careful evaluation of the toxicity and exposure potential associated with the use of chemicals and selection of those which minimize the potential for adverse impacts when their use is necessary to control pests. Application methods that minimize human exposure, such as targeted bait traps or gels, are used instead of sprays or fumigation "bombs."
28. Studies have shown IPM to be both more effective and less expensive than traditional pesticide application methodology. IPM can provide long-term pest control and elimination. In contrast, chemical pesticides generally suppress pest populations only in the short term. They must be repeatedly used and therefore cause repeated human exposure to their toxic and carcinogenic effects.

Prior Proceedings

29. HUD's regulations governing the elements of public housing agencies' annual plans do not promote IPM. Instead, the regulations simply require the plans to describe measures necessary for the prevention or eradication of pest infestation, but they do not promote the use of IPM; indeed they do not mention IPM at all.

30. None of HUD's other regulations or regulatory policies promote IPM.

31. Moreover, HUD funds pest control budgets at Public Housing Agencies by subsidizing their operational budgets and in doing so, HUD carries out pest management activities within the meaning of 7 U.S.C. §136r-1. However, HUD does so without ensuring that IPM is the pest control method used.

32. On October 8, 2003, the states of New York, California, Connecticut, Illinois, Massachusetts, Minnesota, Mississippi, New Mexico, Oklahoma, Rhode Island and the United States Virgin Islands petitioned HUD to amend its rules governing the contents of public housing agencies' annual plans to require that public housing agencies adopt and implement IPM policies as part of those plans. The petition is attached and incorporated as Exhibit A.

33. The petition contained evidence that public housing agencies in New York State routinely rely on chemical pesticides as the first line of defense against pest infestation and routinely apply them in resident apartments, and in common areas such as hallways, staircases, lobbies, laundry rooms, community rooms, and day care centers, whether or not pests have been sighted. Public housing agencies also routinely apply chemical pesticides in playgrounds and pocket parks, and on lawns and landscaped areas. The evidence was presented in a study by the

New York State Attorney General's office regarding the pest control practices of five public housing agencies in five large cities in New York State.

34. The States' petition to HUD also contained descriptions of successful IPM pilot programs in public housing projects in New York City and Chicago. In those programs, pest infestations were dramatically reduced in the buildings in which IPM was instituted, in contrast to buildings in the same project in which conventional chemical pest control methods were used.

35. HUD denied the petition in a two-page December 2003 letter from its general counsel to the office of the New York State Attorney General. HUD did not dispute the accuracy of the evidence presented in the petition. Rather, HUD argued that it satisfied all of its obligations under 7 U.S.C. § 136r-1 by taking the following actions: (1) informing Public Housing Agencies of a telecast about IPM sponsored by the Department of Health and Human Services; (2) requiring Public Housing Agencies to include provisions on housekeeping and waste removal in leases; (3) publishing and distributing a booklet with information on pest management that encourages IPM techniques; and (4) creating "Healthy Homes" initiatives through which HUD hopes to gain knowledge about housing-related health hazards. One of these initiatives concerns the use of IPM in multi-family housing. HUD's IPM actions constitute final agency action under the Administrative Procedure Act.

FIRST CLAIM FOR RELIEF

36. HUD's regulations governing the contents of the annual plans required from public housing agencies do not promote IPM.

37. None of HUD's other regulations or regulatory policies promote IPM.

38. HUD has violated FIFRA's requirement that it promote IPM through its regulatory policies.

SECOND CLAIM FOR RELIEF

39. HUD carries out pest management activities without using or requiring the use of Integrated Pest Management techniques in violation of the mandate of 7 U.S.C. § 136r-1.

THIRD CLAIM FOR RELIEF

40. HUD's denial of the States' rulemaking petition was arbitrary, capricious and not in accordance with law.

FOURTH CLAIM FOR RELIEF

41. HUD's IPM actions are arbitrary, capricious and not in accordance with law, because they do not satisfy the requirement of 7 U.S.C. § 136r-1 that HUD promote IPM through its regulatory policies.

PRAYER FOR RELIEF

WHEREFORE, the States request that the Court:

- a. Declare that HUD has violated FIFRA, 7 U.S.C. §136r-1, by failing to promote IPM in its regulatory policies;
- b. Declare that HUD has violated FIFRA, 7 U.S.C. §136r-1, by carrying out pest management activities without using IPM techniques.
- c. Declare that HUD's IPM actions are arbitrary, capricious and not in accordance with law, and do not satisfy the requirements of 7 U.S.C. § 136r-1.
- d. Declare that HUD's denial of the States' rulemaking petition was arbitrary, capricious and not in accordance with law;

e. Enjoin HUD to grant the petition and to initiate a rulemaking proceeding to modify 24 C.F.R. § 903.7(e)(2) (Public Housing Agency Annual Plan regulation) to promote IPM by requiring that public housing agencies adopt and implement IPM as part of their annual plans.

f. Grant such other relief as the Court deems just and proper.

Dated: New York, New York
September 9, 2004

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A handwritten signature in cursive script, reading "Patricia Madrid", written over a horizontal line.

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Sir: Please take notice that the within is a true copy of duly filed and entered in the office of the Clerk of the County, on the day of , 19

Yours, etc.,
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Sir: Please take notice that the within

will be presented for settlement and signature herein to the Hon. one of the judges of the within named Court, at in the Borough of City of New York, on the 19 , at M. , 19

Dated, N.Y.,
Yours, etc.
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF ILLINOIS, STATE OF NEW MEXICO, STATE OF WISCONSIN and THE TERRITORY OF THE UNITED STATES VIRGIN ISLANDS, Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and ALPHOSO JACKSON, SECRETARY, Defendants.

SUMMONS AND COMPLAINT

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