

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

NATURAL RESOURCES DEFENSE)	
COUNCIL,)	
)	
ENVIRONMENTAL JUSTICE)	
HEALTH ALLIANCE FOR CHEMICAL)	
POLICY REFORM, and)	
)	
THE BREAST CANCER FUND,)	16-cv-9401
)	ECF Case
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES CONSUMER)	
PRODUCT SAFETY COMMISSION,)	
)	
Defendant.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Chemicals known as phthalates are used to soften plastics. These chemicals are common in toys and child care products. Phthalates leach from plastics, creating human exposure through the mouth and skin.

2. Phthalates interfere with hormone production and have been associated with reproductive abnormalities. Interference with natural hormone levels is especially problematic during infancy and childhood. Human exposure to phthalates during sensitive periods of development may cause permanent reproductive harm. A number of studies have linked exposure to certain phthalates with decreases in testosterone, genital malformations, and reduced sperm production, among other adverse effects.

3. In the Consumer Product Safety Improvement Act (CPSIA), Congress directed the United States Consumer Product Safety Commission (CPSC, or the Commission) to promulgate a final rule regulating phthalates in children's products, in order to protect public health. The CPSC has missed the statutory deadline to publish this rule by almost two years and counting. Plaintiffs bring this case to compel the agency action required by law.

4. Defendant's failure to comply with its mandatory duty to regulate phthalates in children's products exposes the public to serious health risks from exposure to harmful chemicals. Plaintiffs ask this Court to order the CPSC to publish the final regulation required by Congress as soon as possible.

PARTIES

5. Plaintiff Natural Resources Defense Council (NRDC) is a national, non-profit environmental and public health membership organization with around 300,000 members. NRDC works to eliminate health risks posed by exposure to toxic chemicals. NRDC has a long-standing interest in improving the regulation of chemicals in consumer products, especially products intended for use by children or pregnant women. NRDC seeks to ensure that these products are safe and comply with governing laws.

6. Plaintiff Environmental Justice Health Alliance for Chemical Policy Reform (Environmental Justice Health Alliance) is a collective of over thirty community-based environmental justice organizations located in thirteen states. These organizations work to eliminate the disproportionate impacts of chemical

exposure and other environmental harms on people of color and low-income communities. Environmental Justice Health Alliance uses intergenerational organizing strategies to transform its members' local areas into healthy, sustainable, and just communities for youth, elders, and families.

7. Plaintiff the Breast Cancer Fund is a non-profit organization that works to prevent breast cancer by eliminating exposure to toxic chemicals and radiation linked to the disease. The Breast Cancer Fund translates the growing body of scientific evidence linking breast cancer and environmental exposures into public education and advocacy campaigns that protect public health and reduce breast cancer risk. The Breast Cancer Fund has 65,000 supporters across the country.

8. Plaintiffs bring this action on behalf of their members and their members' children. Plaintiffs' membership includes individuals and families who are concerned about the health risks to their children from exposure to phthalates in toys and child care articles. The CPSC's failure to publish a final rule regulating phthalates in children's products creates a risk of harm to plaintiffs' members and their children. Plaintiffs' members have been and continue to be injured by the CPSC's unlawful delay in publishing the final phthalate regulation. That harm would be redressed by an order directing the CPSC to publish the required final rule as soon as possible.

9. Defendant the CPSC is an agency of the United States government. The CPSC is responsible for implementing the requirements of the Consumer Product Safety Improvement Act at issue in this case.

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

11. The Court has authority to issue declaratory relief pursuant to 28 U.S.C. § 2201(a).

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1)(C), because plaintiff NRDC resides in the Southern District of New York and no real property is involved in this action.

STATUTORY AND REGULATORY FRAMEWORK

13. Congress enacted the Consumer Product Safety Improvement Act in 2008. The CPSIA amends several consumer protection laws, including the Consumer Product Safety Act, to limit exposure to toxic chemicals like phthalates in children's products. *See, e.g.*, 15 U.S.C. § 2057c.

14. Among other things, the CPSIA permanently banned the manufacture, sale, distribution, or import, beginning February 2009, of children's toys and child care articles that contain more than 0.1 percent of any of three different phthalates, known as DEHP, DBP, and BBP. *Id.* § 2057c(a). Plaintiff NRDC successfully sued the CPSC in this Court in 2008 to enforce this ban. *NRDC v. U.S. Consumer Prod. Safety Comm'n*, 597 F. Supp. 2d 370 (S.D.N.Y. 2009).

15. Beginning on the same date, the CPSIA also banned, on an interim basis, the manufacture, sale, distribution, or import of a subset of children's toys (those that can be placed in a child's mouth) and child care articles that contain more than 0.1 percent of any of three other phthalates—known as DINP, DIDP, and DnOP. 15 U.S.C. § 2057c(b)(1).

16. The CPSIA directed the Commission to convene a Chronic Hazard Advisory Panel (CHAP) “to study the effects on children's health of all phthalates and phthalate alternatives as used in children's toys and child care articles.” *Id.* § 2057c(b)(2)(A). The CHAP was tasked with recommending to the Commission whether any phthalates or phthalate alternatives, in addition to those already banned, should be prohibited. *Id.* § 2057c(b)(2)(C). Under the statute, the CHAP's final report to the Commission is due two years after the CHAP is appointed. *Id.* § 2057c(b)(2)(B), (C).

17. Based on the CHAP's recommendations, the Commission must determine whether to continue the interim prohibition of DINP, DIDP, and DnOP in children's products “in order to ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals with an adequate margin of safety.” *Id.* § 2057c(b)(3)(A). In addition, the Commission must decide whether to ban children's products containing any other phthalates, “as the Commission determines necessary to protect the health of children.” *Id.* § 2057c(b)(3)(B).

18. The CPSIA directs that the CPSC “shall . . . promulgate a final rule” regulating phthalates in children’s products not later than 180 days after receiving a final report from the CHAP. *Id.* § 2057c(b)(3).

19. The Administrative Procedure Act provides for judicial review of an agency’s failure to act, 5 U.S.C. §§ 702, 551(13), and directs that “[t]he reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1).

FACTS

20. The Commission appointed a panel of scientific experts to comprise the CHAP in April 2010. The CHAP’s final report was due two years later, 15 U.S.C. § 2057c(b)(2)(B), (C), or by April 2012.

21. The CHAP submitted its peer-reviewed final report to the Commission on July 18, 2014.

22. The CHAP’s final report included a comprehensive examination of animal and human studies bearing on the potential health effects of exposure to phthalates. The CHAP concluded that many of the phthalates studied are associated with harmful effects on male reproduction, neurobehavioral functions, and other health endpoints. The CHAP recommended continuing the interim ban for one of the phthalates listed in the statute (DINP), and recommended banning four more phthalates not specifically mentioned in the statute (DIBP, DPENP, DHEXP, and DCHP). The CHAP’s recommendation to permanently ban five

phthalates in children's products was based largely on the risk of harm to male reproductive development caused by exposure to these phthalates.

23. In response to the CHAP report, the CPSC published a proposed rule on December 30, 2014. The Commission proposed to follow the CHAP's recommendations and make permanent the interim statutory ban on one of the phthalates (DINP) and ban four additional phthalates in children's toys and child care articles (DIBP, DPENP, DHEXP, and DCHP). *See Prohibition of Children's Toys and Child Care Articles Containing Specified Phthalates*, 79 Fed. Reg. 78,324, 78,334-37 (Dec. 30, 2014).

24. The Commission was required to publish a final rule regulating phthalates in children's products no later than 180 days after receiving the CHAP's final report, 15 U.S.C. § 2057c(b)(3), or by January 14, 2015 at the latest.

25. To date, the CPSC has not published the final rule regulating phthalates in children's products required by law, and that rule is now almost two years overdue.

26. The CPSC's delay is causing continued human exposure to five phthalates that would be banned from children's products if the proposed rule were finalized as proposed.

CLAIM FOR RELIEF

27. Plaintiffs incorporate by reference all preceding paragraphs.

28. By failing to promulgate a final rule regulating phthalates in children's products by January 14, 2015, the CPSC has unlawfully withheld agency action required by law. 15 U.S.C. § 2057c(b)(3); 5 U.S.C. §§ 702, 706(1).

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment against the CPSC as follows:

- A. Declaring that the CPSC's failure to promulgate a final rule as required by 15 U.S.C. § 2057c(b)(3) to regulate phthalates in children's products and "ensure a reasonable certainty of no harm to children, pregnant women, or other susceptible individuals" is unlawful and a violation of the Consumer Product Safety Act, as amended by the CPSIA;
- B. Ordering the CPSC to promulgate the required final rule by a Court-imposed deadline that is as soon as possible;
- C. Awarding Plaintiffs their costs and reasonable attorneys' fees; and
- D. Granting such other relief that the Court considers just and proper.

Respectfully submitted,

/s/ Mitchell S. Bernard
Mitchell S. Bernard (MB 5823)
Natural Resources Defense Council
40 West 20th Street, 11th Floor
New York, NY 10011
T: (212) 727-4469
F: (415) 795-4799
mbernard@nrdc.org

Counsel for Plaintiffs

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