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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

AMERICA UNITES FOR KIDS, and PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY,

Plaintiffs,

v.

SANDRA LYON, JAN MAZE, LAURIE LIEBERMAN, DR. JOSE ESCARCE, CRAIG FOSTER, MARIA LEON-VAZQUEZ, RICHARD TAHVILDARAN-JESSWEIN, AND OSCAR DE LA TORRE,

Defendants.

Case No. 2:15-cv-02124-PA-AJW

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION OF DISCOVERY LIMITATION MADE IN THE COURSE OF RULING ON MOTION TO DISMISS

Hearing Date: September 21, 2015
Hearing Time: 1:30 p.m.
Judge: Hon. Percy Anderson
Courtroom: 15

Trial Date: 5/17/16
Final Pretrial Conference: 4/15/16
Motion Cut-off Date: 3/14/16
Discovery Cut-off Date: 3/7/16

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I. INTRODUCTION

In the course of its June 15, 2015 Order denying Defendants' Motion to Dismiss (the "June 15, 2015 Order") (Dkt. 53), the Court indicated that the discovery that Plaintiffs are entitled to under Fed. R. Civ. P. 34 should be limited. Plaintiffs are seeking to sample caulk and other building materials to determine the nature and extent of violations of TSCA's regulatory limit of 50 ppm PCBs in pre-1980 buildings at the Malibu Schools, as alleged in their First Amended Complaint ("FAC"). The Court stated that discovery should be limited initially to air and surface wipe sampling, and that the testing of caulk "or other more invasive discovery" should be allowed only if the initial air and wipe testing establish its necessity, *i.e.* if it reveals PCBs in excess of EPA's "health-based screening levels" set forth in its October 2014 approval of the District's handling of PCB remediation waste. June 15, 2015 Order at 5.

Plaintiffs seek reconsideration of this portion only of the June 15, 2015 Order for the reasons detailed below. The discovery matter was not before the Court and was not briefed in connection with the Motion to Dismiss. Thus, material facts and law on this issue were not presented to or considered by the Court. Plaintiffs request reconsideration of the matters detailed below and a revision of the June 15, 2015 Order to eliminate the restrictions on discovery. This motion complies with Local Rule 7-18 because the facts and law relevant to the discovery ruling were not presented to the Court before its decision.

II. ARGUMENT

A. The Primary Jurisdiction Doctrine Is Not An Appropriate Ground For Limiting Discovery Here

In the June 15, 2015 Order, the Court recognized case law holding that the primary jurisdiction doctrine is inapplicable where, as here, the suit is brought under a citizen suit provision. June 15, 2015 Order at 4-5. The cases cited by the Court hold that where Congress has provided for citizen suits, application of the doctrine

of primary jurisdiction would frustrate congressional intent "to facilitate broad enforcement of environmental-protection laws." *Id.*, quoting *Ass'n of Irritated Residents v. Fred Schakel Dairy*, No. 1:05-CV-00707 OWW MSM, 2008 WL 850136, at *12 (quoting *Sierra Club v. Tri-State Generation and Transmission Ass'n, Inc.*, 173 F.R.D. 275, 284 (D. Colo. 1997)). Although not finding any exception to this principle which would make the doctrine of primary jurisdictions applicable to this case, the Court went on to find that limiting discovery was necessary to avoid conflict with EPA's "analysis, policies or considered judgment." June 15, 2015 Order at 5. There is an inherent contradiction in recognizing that primary jurisdiction does not apply, and therefore Plaintiffs are authorized to pursue enforcement of TSCA here, and yet to apply the doctrine to restrict the legal tools normally available in a citizen suit to achieve enforcement – namely, discovery to obtain evidence to prove Plaintiffs' allegations of legal violations.

Moreover, as the Ninth Circuit stated, the primary jurisdiction doctrine should not be invoked unless "it would be inconsistent with the statutory scheme to deny the agency's power to resolve the issues in question." *United States v. Culliton*, 328 F.3d 1074, 1082 (9th Cir. 2003) (citation omitted). Given that TSCA expressly provides for citizen suits, it would not be inconsistent with the statutory scheme to deny the EPA the authority to determine what kind of discovery should be allowed in an action brought to enforce TSCA. To the contrary, application of the primary jurisdiction doctrine to prevent Plaintiffs from using the discovery procedures to enforce TSCA frustrates Congressional intent to facilitate broad enforcement of the statute. No case law supports use of the primary jurisdiction doctrine to restrict discovery.

In any event, the purpose of the primary jurisdiction doctrine (even if it did apply) is to allow "referral" to the administrative agency for initial decision making; it has nothing to do with restricting discovery. *See Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir. 1985) (where primary jurisdiction

applies, "the judicial process should be suspended and the issues referred to the appropriate administrative body for its views") (quoted in the June 15, 2015 Order at 4); *Davel Communs., Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086-1087 (9th Cir. 2006) ("'Referral' . . . means that a court either stays proceedings, or dismisses the case without prejudice, so that the parties may pursue their administrative remedies"). Because, as this Court found, these measures are not appropriate here, Plaintiffs should be accorded their full rights under TSCA's citizen suit provision to pursue enforcement through this litigation, including their rights to discovery under the Federal Rules of Civil Procedure.

B. EPA's Expertise And Policies Do Not Conflict With Plaintiffs' Proposed Sampling And Testing Of Caulk And Other Building Materials

Equally important, there is in fact no conflict between Plaintiffs' proposed discovery and any EPA policy, expertise, judgment, or approval related to the Malibu Schools. The June 15, 2015 Order recognizes that EPA's TSCA regulations contain a finding that items "with PCB concentrations of 50 ppm or greater present an unreasonable risk of injury to health within the United States," and that as a result, use of such items is forbidden. June 15, 2015 Order at 2, citing 40 C.F.R. § 761.20. The Order recognizes that even Defendants agree that TSCA "requires the removal of PCB-containing building materials when testing indicates that those materials contain PCBs in excess of 50 ppm." *Id.* It follows that in a citizen suit to enforce TSCA, Plaintiffs are entitled to discovery to prove allegations that building materials with 50 ppm or greater are present at the school in violation of TSCA and must be removed. *See, e.g.,* Fed. R. Civ. P. 26(b) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense....").

However, contradictorily, the June 15, 2015 Order also appears to agree with Defendants' claim that "EPA has authorized the District to allow PCB-containing

materials to remain at the school so long as air and surface wipe testing does not reveal heightened levels of PCBs." *Id.* at 2. The Court goes on to rely on EPA's October 2014 approval of the District's handling of PCB remediation waste to conclude that EPA "expertise and considered judgment" prevents caulk testing unless and until air and wipe sampling reveals PCBs in excess of EPA's "health-based screening levels." *Id.* at 5. Even assuming this is a correct understanding of EPA expertise and considered judgment, it would not change TSCA and the regulations thereunder, and could not prevent Plaintiffs from enforcing TSCA and its regulations as written, as authorized by TSCA's citizen suit provision.[1] However, the Court need not reach that question, because EPA's "expertise and considered judgment" in fact requires removal of materials containing PCBs in excess of 50 ppm regardless of levels found in air and surface wipe sampling, and does not prohibit caulk testing unless air and wipe testing first reveals exceedances of health-based screening levels.

First, EPA has no policy, guidance, expertise or considered judgment that would allow caulk and other building materials with PCBs in excess of 50 ppm to remain in place, regardless of the results of air and surface wipe testing. Such a policy would be in clear contravention of the prohibition of continued use of such materials in TSCA and its implementing regulations and has never been advanced

[1] EPA's public guidance documents generally contain disclaimers stating that they do not override the TSCA law and regulations. For example, EPA's "Current Best Practices for PCBs in Caulk Fact Sheet-Removal and Clean-Up of PCBs in Caulk and PCB-Contaminated Soil and Building Material ("Current Best Practices")," www.epa.gov/pcbs incaulk/caulkremoval.htm, states the following (at 3): "This fact sheet is intended solely for guidance and should be used as an informal reference. It does not replace or supplant the requirements of the Toxic Substances Control Act or the PCB regulations at 40 CFR part 761, and it is not binding on the Agency or individuals. Please refer to the regulations at 40 CFR part 761 for specific requirements relating to PCBs and PCB-containing materials." EPA's Current Best Practices is attached as Exhibit A to Plaintiffs' accompanying Request for Judicial Notice ("RJN").

by EPA. To the contrary, EPA has repeatedly stated, in its regulations, in general public guidance documents and in specific communications concerning the Malibu Schools that "[c]aulk containing PCBs at levels > 50 ppm is not authorized for use under the PCB regulations and must be removed." S*ee, e.g.*, Current Best Practices, RJN Ex. A, at 1.

From the first discovery of PCBs in excess of 50 ppm at the Malibu schools in November 2013, EPA has advised the District that that a PCB clean-up plan would be required which included "Removal and disposal of caulk material and any other sources of PCBs present at the school." (RJN, Ex. B, at 1-2). The October 31, 2014 EPA approval of the District's plan concerning remediation waste upon which the Court relies states:

> "As you know, the federal Toxic Substances Control Act (TSCA) and implementing regulations prohibit the use of caulk containing PCBs at or above 50 ppm. When such caulk is found, it must be removed and disposed of in accordance with TSCA."

(RJN, Ex. C, at 1).

The portions of this October 2014 approval which the Court cites concerning best management practices (BMPs) and air and surface wipe samples "address[] the PCBs remaining in the substrate (known as PCB remediation waste) after PCB-containing caulk is removed at both schools." (*Id.*) The BMPs and air and wipe sampling are to be employed to insure that there will be no unreasonable risk posed by the remediation wastes remaining in place after the caulk is removed and the substrate is either encapsulated or decontaminated with a solvent. (*Id.*, attachment at 1-2.) The requirements in the October 2014 approval for BMPs and air and wipe sampling come into play only after illegal caulk has been removed, and certainly do not purport to mandate or permit leaving illegal caulk in place. As this Court recognized when it ruled on Plaintiffs' Motion for Preliminary Injunction, this October 2014 approval concerns only the remediation waste, and has no bearing on

the treatment of PCB-containing caulk. Dkt. No. 47 at 1-2.

In short, the October 2014 approval allows remediation wastes to remain in place after the removal of illegal caulk and the encapsulation or decontamination of the remaining substrate, if BMPs and air and wipe samples are employed to insure that the substrate poses no unreasonable risk. It in no way authorizes caulk or other building materials with PCBs in excess of 50 ppm materials to remain in place based on BMPs and air and surface wipe testing.

Second, nothing in EPA's policies, approvals, expertise or considered judgment prevents the testing of caulk and other building materials to identify violations of TSCA, either by the District itself or by third parties such as Plaintiffs. While it is true that EPA stated in a communication with the District in August 2014 that it did not "recommend" additional caulk testing unless air or dust samples failed to meet EPA's health-based guidelines (Dkt. 43, Ex. C, at 2), subsequent communications make clear that EPA never directed the District not to test caulk, and actually anticipated that there would be further caulk testing, which in fact has occurred.[2]

The October 2014 approval explicitly contemplates further caulk testing, stating that the District had committed to removing any "newly discovered PCB-containing caulk." (RJN, Ex. C, at 1) Caulk containing PCBs could only be "newly discovered" by testing the caulk. On April 17, 2015, EPA confirmed in an email to Plaintiff America Unites that "[n]othing in the [October 2014] approval limits the District's ability to perform additional caulk sampling or removal provided the [removal] work is performed consistent with TSCA regulations at 40 C.F.R. § 761.62(a) or (b)." (Accompanying Declaration of Jennifer DeNicola ("DeNicola

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[2] At the time EPA stated that it did not "recommend" further caulk testing in August 2014, it only referenced four rooms where caulk over 50 ppm had been identified. There have been no communications from EPA as to its recommendations now that the District has identified 10 additional rooms with extremely high levels of PCBs.

Decl."), Ex. A). In fact, the District did perform additional caulk testing in March 2015 and found TSCA violations in all of 24 samples in 10 rooms (FAC ¶¶ 128-29), which the District told the Court it would remediate in the summer of 2015.

EPA has also indicated that it expects the District to remediate caulk that is found to contain 50 ppm or more PCBs not only based on the District's own testing, but also based on third party testing similar to what would occur in discovery here. For example, on December 11, 2014, Steve Armann, the manager of EPA Region 9's Corrective Action Office, emailed Jennifer DeNicola, President of America Unites, stating: "Regarding the issue of independent tests of PCBs over 50 ppm, you and I exchanged email on September 30/October 1 where I explained that the District's plan includes removal of all caulk tested and verified to have PCBs greater than 50 ppm. This includes caulk tested by independent parties." (DeNicola Decl., Ex. B.) The District has indicated that in accordance with EPA direction, it will remove caulk testing above 50 ppm in independent tests verified by the District, regardless of the fact that air and dust testing in those rooms did not exceed EPA's health guidelines. (Declaration of Douglas Daugherty, April 2, 2015, Dkt. No. 34 at p. 20, Sec. VI.2.b-d.) In other words, when caulk above legal limits is identified by anyone's testing, which would include testing conducted in discovery in this case, EPA policy requires removal in accordance with TSCA, regardless of air and dust test results.

In sum, the doctrine of primary jurisdiction does not apply here and cannot support the restriction of discovery in this case. Even if it could, there is absolutely no conflict between Plaintiffs' proposed sampling of caulk and other building materials and EPA policy, expertise, considered judgment, or approvals, or any conflict with TSCA and it implementing regulations.

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C. Testing Of Caulk And Other Building Materials Is The Only Way To Identify Violations Of TSCA's 50 PPM Limitation, And Thus The Only Means To Obtain Evidence To Support The Allegations In The FAC

As shown above, EPA has not precluded caulk testing, and it would make no sense to do so, since it is the only way to identify TSCA violations in the form of continued use of building materials with 50 ppm or more PCBs, which EPA has found to "present an unreasonable risk of injury to health." 40 C.F.R. § 761.20. Air and surface wipe samples simply cannot identify whether or not building materials contain illegal concentrations of PCBs and are required to be removed under TSCA. The Court's direction to perform air and surface wipe sampling as a prerequisite to building material testing is not necessary to avoid conflict with any EPA policy, guidance or Malibu-specific approval, and would entail an unnecessary layer of additional testing and cause significant delay in reaching the discovery which could actually provide irrefutable evidence of TSCA violations.[3] If air and dust samples do not exceed EPA's health guidelines, material testing would be precluded altogether, even though the air and wipe results would not indicate that there are not illegal levels of PCBs in building materials which, as Defendants admit, would

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[3] While 40 C.F.R. § 761.20 prohibits continued use of items with PCBs in concentrations of 50 ppm or greater, and does not mention surface concentrations, 40 C.F.R. §761.1(b)(3) states that the provisions of the regulations "that apply to PCBs at concentrations of [>] 50 to < 500 ppm apply also to contaminated surfaces at PCB concentrations of >10/100 cm<2> to < 100 [mu]g/100 cm<2>." Thus, it is possible that surface wipe samples could reveal an actual violation of TSCA, if the surface concentration is more than 10 micrograms per 100 square centimeters of the surface, rather than just an exceedance of EPA suggested health guideline, which is 1 microgram per 100 cm^2. *See* June 15, 2015 Order at 3, quoting EPA's October 2014 approval regarding remediation wastes. However, as noted above, surface wipe testing does not reveal whether TSCA's prohibition against continued use of materials containing concentrations of PCBs at levels of 50 ppm or greater is being violated. The most direct and certain way to identify violations of TSCA is to test building materials to determine the concentrations of PCBs.

require removal under TSCA regardless of air and wipe results.

Defendants' steadfast refusal to test any more building materials and their opposition to Plaintiffs' discovery seeking to do so is a transparent effort to evade TSCA's legal requirement to remove building materials containing PCBs at or above 50 ppm. Defendants well know that illegal caulk is highly likely to exist throughout the Malibu Schools, based on the high levels of PCBs already found in caulk in several school buildings, and that the same PCB-containing caulk was installed throughout those buildings and likely also in other buildings built at the same time. Defendants know that by testing only air and dust, these likely TSCA violations would never be identified. Denying Plaintiffs the right to test building materials would prevent Plaintiffs from obtaining evidence to support their allegations of violations of TSCA, thus undermining the intent of the citizen suit provision to allow citizens to enforce TSCA when EPA is not doing so.

D. Caulk And Building Material Sampling Is Not Destructive Or Invasive

It appears that the Court may believe that air and surface wipe sampling is preferable to determine the need for caulk or building material testing because the latter is destructive and invasive. However, this is not the case. Testing of building materials involves removal of tiny samples barely noticeable to the naked eye, and would be limited to a maximum of 3 or 4 samples per room, followed by repair of the sampled areas with fresh, clean material, as described in Plaintiffs' discovery request. It will be carried out by experienced professionals who have done this type of testing in many other schools under EPA supervision and in accordance with EPA guidance. As Defendants' consultant ENVIRON describes in its own Sampling and Analysis Plan for the Malibu Schools, caulk sampling involves cutting out a 3 to 10 gram sample with a metal chisel or sharp knife. (RJN, Ex. D, at 4, Sec. 2.1.1, and Appendix A at 8, Sec. 9.2.2-9.2.3). Samples are placed in 2 ounce glass jars which can hold roughly 90 grams of sample. (*Id.*, Appendix A at 10, Sec.

10.1.)

When complete, the sampling would not be noticeable, even assuming the sampled areas were not repaired, which they will be. ENVIRON stated in this case that their experts could not identify where caulk samples had been taken for independent testing in the Malibu Schools because there were so many existing gaps in the caulking. (Dkt. No. 34, at 15, V.4.)

The samples would be placed in sealed containers and taken off site for analysis in EPA-certified laboratories, posing no danger of exposure to anyone. (Ironically, of course, this is the material which, in much larger amounts, teachers and students are exposed to every day). The sampling will be conducted over a short period when school is not in session and will avoid any conflict with the District's activities on campus. Sampling the caulking is the least expensive and most reliable way to identify TSCA violations.

III. CONCLUSION

For the foregoing reasons, the Court should reconsider the limitation of Plaintiffs' discovery contained in the June 15, 2015 Order initially to air and surface wipe testing, and only allowing testing of caulk and other building materials if the air and wipe testing reveals exceedances of EPA's suggested health guidelines as stated in EPA's October 2014 approval concerning remediation waste. Plaintiffs request that the Court amend its June 15, 2015 Order to remove this limitation.

Dated: August 24, 2015

Respectfully submitted,
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Dated: August 24, 2015

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