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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
AT SAN FRANCISCO

ASBESTOS DISEASE AWARENESS ORGANIZATION, et al., Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENC al., Defendants.	Case No. 19-CV-00871-EMC **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIMS UNDER THE ADMINISTRATIVE PROCEDURE ACT** **Date: November 12, 2020** **Time: 1:30 pm** **Judge: Hon. Edward Chen** **Courtroom: 5, 17th Floor**
STATE OF CALIFORNIA, by and through Attorney General Xavier Becerra, et al., Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants	Case No. 19-CV-03807-EMC

NOTICE OF MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on November 12, 2020 at 1:30 pm, before the Honorable Edward M. Chen, United States District Judge, in Courtroom 5, 17th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, plaintiffs, the Asbestos Disease Awareness Organization ("ADAO") and five other public health organizations, will and hereby do move for summary judgment in their favor pursuant to Federal Rule of Civil Procedure 56 and Civil Local Rule 56-1. This motion is based on the points and authorities below, the attached declarations and exhibits, the administrative record and any hearing on this motion.

Plaintiffs are entitled to summary judgment because the defendant Environmental Protection Agency ("EPA") violated the Administrative Procedure Act ("APA") by denying their September 25, 2018 petition for rulemaking under the Toxic Substances Control Act ("TSCA"). This petition, filed under section 21 of TSCA, asked EPA to initiate a rulemaking to amend the TSCA Chemical Data Reporting ("CDR") rule to require reporting on asbestos. Asbestos is among the most dangerous chemicals ever produced; the reporting sought by plaintiffs would have provided essential use and exposure information for EPA's evaluation of the risks of asbestos and subsequent regulation under TSCA. EPA denied the petition on December 21, 2018. As plaintiffs show below, EPA's unjustified refusal to use its TSCA rulemaking authority to obtain the minimum information necessary for informed and supportable conclusions about the impacts of asbestos on human health was arbitrary and capricious and contrary to law and should be set aside under the APA, 5 U.S.C Chapter 7. The Court should direct EPA to grant the ADAO petition and initiate a rulemaking to require reporting on asbestos use and exposure under the CDR rule.

Plaintiffs endorse and support the separate motion for summary judgment filed by the Attorney General (AG) plaintiffs in consolidated Case No. 19-CV-03807-EMC

DATED: July 14, 2020

Respectfully submitted.

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STATEMENT OF ISSUES

Plaintiffs are the Asbestos Disease Awareness Organization ("ADAO"), American Public Health Association ("APHA"), Center for Environmental Health ("CEH"), Environmental Working Group ("EWG"), Environmental Health Strategy Center ("EHSC"), and Safer Chemicals Healthy Families ("SCHF"). Plaintiffs, non-profit public health and environmental organizations dedicated to reducing the health risks of asbestos, seek to assure that the ongoing asbestos risk evaluation that the Environmental Protection Agency ("EPA") is conducting under the Toxic Substances Control Act ("TSCA") is informed by the best available information and science.

Plaintiffs invoked the citizens' petition process in section 21 of TSCA upon determining that asbestos was exempt from core TSCA reporting requirements and that EPA lacked rudimentary information about asbestos use and exposure in the US. This suit followed when EPA denied the petition and refused to use its TSCA reporting authority to collect essential information from importers and processors of asbestos and asbestos-containing products. The issue presented by this motion is whether the petition denial was arbitrary and capricious and contrary to law under the Administrative Procedure Act ("APA") because (1) EPA unjustifiably failed to use mandatory information collection mechanisms for asbestos that it has applied to thousands of less hazardous substances under TSCA and (2) the record and EPA's own admissions contradict its claim that it did not need these mechanisms for supportable risk evaluation on asbestos.[1]

STATEMENT OF THE CASE AND UNDISPUTED FACTS

Dangers of Asbestos Exposure. Few if any substances are as lethal as asbestos. Leading

[1] Plaintiffs have standing because, in section 21 of TSCA, Congress conferred on "any person" the right to challenge the denial of a petition seeking issuance or amendment of a reporting rule under section 8 and the asbestos education and disease prevention goals of the plaintiff organizations and their members will suffer concrete harm if asbestos use and exposure information is not collected and made available to plaintiffs under the section 8 rule requested in the section 21 petition.

regulatory and public health bodies determined that asbestos is a potent human carcinogen decades ago. Asbestos is known to cause lung cancer, malignant mesothelioma, ovarian cancer, and cancer of the larynx.[2] Asbestos also causes non-malignant diseases such as asbestosis and asbestos-related pleural thickening. Regulatory agencies and leading scientific bodies agree that there is no safe level of exposure to asbestos. Despite the voluntary elimination of many asbestos products and the cessation of asbestos mining in the US, the death toll from asbestos exposure remains alarmingly high. A recent study reported that asbestos-related diseases cause nearly 40,000 deaths in the United States annually.

1976 Law. TSCA was enacted in 1976 to create a national program for assessing and managing the risks of chemicals to human health and the environment. Section 6(a) of the law gives EPA authority to regulate substances that present an "unreasonable risk of injury." Despite the high hopes of Congress for effective action under section 6, progress in regulating unsafe chemicals under the 1976 law was disappointing. A major setback involved EPA's unsuccessful efforts to protect against the dangers of asbestos. In 1989, the Agency issued a rule under section 6(a) of TSCA prohibiting manufacture, importation, processing or distribution in commerce of asbestos in almost all products. 51 Fed. Reg. Register 29460 (July 12, 1989). However, the Fifth Circuit Court of Appeals overturned the ban in 1991 because EPA had failed to clear several hurdles in the law. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991). Following this decision, importation and most uses of asbestos have remained lawful in the US.

2016 TSCA Amendments. Over time, *Corrosion Proof Fittings* became the poster child for the inability of TSCA to meaningfully regulate unsafe chemicals. After a multi-year effort, TSCA was comprehensively amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act

[2] For a summary of generally accepted conclusions about asbestos health effects, see plaintiffs' Petition under TSCA Section 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section 8(a), September 25, 2018 (Petition), at 4-6, EPA-HQ-OPPT-2019-0038-0004.

("LCSA"), which took effect on June 11, 2016. When signing LCSA into law, President Obama singled out asbestos as a prime example of why TSCA reform was necessary, stating that "… the system was so complex, so burdensome that our country hasn't even been able to uphold a ban on asbestos –a known carcinogen."[3]

The 2016 TSCA amendments enhance the chemical regulatory authorities in section 6 by establishing a new integrated process for (1) prioritizing chemicals, (2) conducting risk evaluations to determine whether on substances of concern present unreasonable risks to health or the environment and (3) promulgating rules under section 6(a) to eliminate unreasonable risks identified in these risk evaluations. Congress set strict deadlines for each of these steps and directed EPA to address a minimum number of chemicals. It also removed the impediments to effective regulation created by *Corrosion Proof Fittings.*[4]

TSCA Information Collection Authorities. Recognizing the need to base determinations of unreasonable risk on concrete use and exposure information for the chemical under evaluation, TSCA section 8(a)(1) provides that EPA "shall promulgate rules" that require each person who manufactures or processes a chemical substance to submit such reports as the "Administrator may reasonably require."[5] Under section 8(a)(2), such reports may include, inter alia, a substance's "categories of use", "the total amount [of the substance] manufactured or processed", and "the number of individuals exposed." Failure to comply with these reporting requirements is a "prohibited act" under section 15 of TSCA and gives rise to civil and criminal penalties under section 16. Under the old law, EPA promulgated numerous reporting

[3] https://www.bing.com/videos/search?q=President+Obama+Signs+the+Lautenberg+Chemical+Safety+Act&docid=608026798974504907&mid=4135D583FF575A338D834135D583FF575A338D83&view=detail&FORM=VIRE

[4] For example, the new law eliminates any consideration of costs and other non-risk factors in determining whether chemicals present an unreasonable risk of injury and directs EPA to impose requirements in section 6(a) rules that are "necessary so that the chemical no longer presents such [unreasonable] risk."

[5] The term "manufacture" is defined in section 3(9) of TSCA to include "importation."

rules under section 8(a). For example, to support its comprehensive rulemaking to ban most uses of asbestos in the 1980s, EPA required reporting in 1982 to collect information on industrial and commercial uses of asbestos.[6]

TSCA CDR Rule. In 2011, EPA used its section 8(a) authority to promulgate the comprehensive Chemical Data Reporting ("CDR") rule. 40 CFR. Part 711. This rule was intended to support EPA's risk assessment and reduction efforts by providing basic information about the manufacturing, use and exposure profiles of a wide cross-section of chemicals in commerce. Reporting requirements apply to all chemicals manufactured or imported at a site in amounts of 25,000 pounds or more in a given reporting year. For chemicals already regulated under certain TSCA provisions such as asbestos, the reporting threshold is set at 2,500 pounds per reporting year. Under the rule, CDR reporting is required every four years. The latest reporting cycle was completed in the fall of 2016; EPA recently updated the CDR rule to initiate the next reporting cycle, which will end on November 30, 2020.[7]

The Asbestos Loophole in the CDR Rule. In May of 2017, alarmed that substantial raw asbestos imports were not known to EPA or the public, the plaintiffs notified the Agency that Occidental Chemical Corporation, one of three US companies who use "asbestos diaphragm cells" to manufacture chlorine and caustic soda, had failed to report its asbestos imports (totaling several hundred tons) for the 2016 CDR update.[8] EPA responded by advising Occidental in a letter dated July 28, 2017 that asbestos imports were not subject to reporting because, under 40 CFR §711.6(a)(3), reporting is not required for "naturally occurring chemical substances" and asbestos is such a substance.[9] EPA's interpretation of the CDR rule

[6] 47 Federal Register 33207 (July 30, 1982) (40 CFR §763.60). Congress later enacted the Asbestos Information Act of 1988 imposing a one-time requirement for current and former manufacturers and processors to report asbestos-containing products to EPA. Pub. L. 100-577. To implement the law, EPA published a notice on April 18, 1989 (54 Fed. Reg. 15622) establishing a process and schedule for reporting information required by the Act.
[7] 85 Fed. Reg. 20122 (April 9, 2020).
[8] Petition at 10.
[9] The letter is attached to plaintiffs' section 21 petition.

means that no manufacturers or importers of asbestos or asbestos-containing products were required to report.

The Asbestos Risk Evaluation. TSCA section 6(b)(2)(A) requires EPA to initiate risk evaluations on 10 chemical substances within 180 days of the enactment of the amended law. In December 2016, EPA selected asbestos as one of these 10 substance.[10] EPA followed up with a June 2017 scoping document[11] and June 2018 problem formulation[12] defining the analytical approach and information on which it planned to base its risk evaluation. These documents indicated that the risk evaluation would address two categories of asbestos use.[13] The first was the import of raw asbestos, principally to construct "asbestos diaphragm cells" for use in US chlorine and caustic soda production. The second included several asbestos-containing articles imported into the US for use in various industries and by consumers, including sheet gaskets, oilfield brake blocks, aftermarket automotive brakes/linings, other vehicle friction products, asbestos cement products, other gaskets and packing and woven products.

Plaintiffs' Section 21 Petition. Asbestos is the only one of the first 10 risk evaluation chemicals not subject to CDR reporting. On September 25, 2018, plaintiffs petitioned EPA under TSCA section 21 to fill this gap by initiating rulemaking under TSCA section 8(a)(1) to amend the CDR reporting requirements as applied to asbestos. The petition asked EPA to modify 40 CFR. §711.6(a)(3) so that the exemption for naturally occurring chemical substances is inapplicable to asbestos. In addition, plaintiffs petitioned EPA to expand the CDR requirements so that they captured important asbestos conditions of use that would otherwise be exempt from reporting. These changes included:

[10] 81 Federal Register 91927 (December 19, 2016).
[11] EPA, Scope of the Risk Evaluation for Asbestos, June 2017 https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0086
[12] EPA. Problem Formulation of the Risk Evaluation for Asbestos, May 2018, https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0131 (Problem Formulation)
[13] Problem Formulation at 22.

1. Lowering the reporting threshold for asbestos to 10 pounds per year given the importance of identifying all asbestos uses in the absence of any safe level of exposure;
2. Removing the article exemption in 40 CFR § 711.10(b) so EPA is informed about the importation and use of asbestos-containing articles, the principal form of asbestos products now in commerce;
3. Removing the CDR exemption for import of a substance as an impurity or byproduct in 40 CFR. § 711.10(c) so that EPA is informed about the asbestos contaminants that have been detected in crayons and other imported consumer products; and
4. Requiring CDR reporting by processors of asbestos-containing products since importers themselves will generally be unable to provide the detailed information about use and exposure necessary to evaluate these products' risks.

The petition also asked EPA to determine that CDR reports on asbestos are not subject to protection as TSCA confidential business information (CBI), thereby assuring full public disclosure.

EPA notified ADAO's counsel of its denial of the petition on December 21, 2018 and the denial was published in the Federal Register on February 12, 2019. 84 Federal Register 3396.

On January 31, 2019, plaintiff ADAO requested that EPA reconsider its December 21, 2018 petition denial, enclosing a point-by-point rebuttal to the denial ("petition denial rebuttal"). Plaintiff ADAO requested that EPA consider the rebuttal when responding to the January 31, 2019 section 21 petition of the 15 AG plaintiffs in consolidated case 19-CV-03807-EMC. EPA never responded. [14]

STANDARD OF REVIEW

The APA requires agencies to engage in "reasoned decisionmaking," *Michigan* v. *EPA*, 576 U. S. 743, 750 (2015). It directs reviewing courts to overturn agency actions when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Supreme Court interpreted these standards in *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State*

[14] The rebuttal is attached to the Declaration of Linda Reinstein filed with this motion. It should be included in the record because it was clearly before EPA at the time that EPA acted on the AG petition and, because it specifically referenced that petition, was considered or should have been considered by the Agency. *See Thompson v. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). The rebuttal is properly before the Court because the two section 21 cases have been consolidated and have the same record.

Farm Mut. Automobile Ins. Co., 463 U. S. 29, 43 (1983). As described by the Ninth Circuit, the Court held that "[a]n agency action is arbitrary and capricious if the agency has: relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *WildEarth Guardians v. U.S. E.P.A*., 759 F.3d 1064, 1069–70 (9th Cir. 2014) (quoting *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt*., 698 F.3d 1101, 1109 (9th Cir. 2012)).

I. EPA's Refusal to Require Reporting Necessary for an Informed Risk Evaluation Was Contrary to TSCA and Arbitrary and Capricious

A. TSCA Requires EPA To Obtain Complete Information on a Chemical's Uses and Pathways of Exposure When Conducting a Risk Evaluation

Under TSCA section 6(b)(4)(A), EPA risk evaluations must determine whether a substance presents an unreasonable risk under its "conditions of use." This term is defined under section 3(4) as the "circumstances [under which the chemical] is intended, known or reasonably foreseen to be manufactured, processed, distributed in commerce, used or disposed of." The need for detailed use and exposure information is further underscored by TSCA section 6(b)(4)(F), which provides that risk evaluations must "integrate and assess available information on hazards and exposures for the conditions of use" and "take into account, where relevant, the likely duration, intensity, frequency, and number of exposures under the conditions of use."

EPA cannot fulfill these requirements unless it undertakes a diligent and comprehensive search for information on a chemical's use and exposure profile. Section 26(k) recognizes this in directing EPA to "take into consideration . . . hazard and exposure information, under the conditions of use, that is *reasonably available*" (emphasis added). EPA's risk evaluation framework rule defines reasonably available information as "information that EPA possesses or can reasonably generate, obtain, and

synthesize for use in risk evaluations." 40 CFR §702.33. The preamble to the rule underscores that "EPA will seek to generally ensure that sufficient information to complete a risk evaluation exists and is available to the Agency prior to initiating the evaluation" and agrees with commenters that it should "take full advantage of its new information gathering authorities."[15]

Consistent with these provisions, section 2(b) of TSCA declares that an overriding policy of the law is that:

> adequate information should be developed with respect to the effect of chemical substances and mixtures on health and environment, and that the development of such information should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.

Section 8(a) is the principal tool in TSCA for assuring that manufacturers and processors meet this "responsibility" to provide EPA with "adequate information" to determine the risks of chemicals. Thus, when it promulgated the CDR rule in 2011, the Agency explained that the new reporting requirements --

> will enhance the capabilities of the Agency to ensure risk management actions are taken on chemical substances which may pose the greatest concern. More in-depth reporting of the processing and use data, more careful consideration of the need for confidentiality claims, and adjustments to the specific data elements are important aspects of this action. By enhancing the data supplied to the Agency, EPA expects to more effectively and expeditiously identify and address potential risks posed by chemical substances and provide improved access and information to the public.

76 Fed, Reg. 50818, 30819 (Aug. 16, 2011). Justifying the need for reporting, EPA emphasized that this "exposure information is an essential part of developing risk evaluations and, based on its experience in using this information, the Agency believes that collecting this exposure information is critical to its mission of characterizing exposure, identifying potential risks, and noting uncertainties for [reportable] chemical substances." 76 Fed. Reg. at 50823.

[15] 82 Fed. Reg. 33726, 33732 (July 20, 2017).

Upon determining that asbestos was exempt from the CDR rule and was therefore not subject to reporting requirements, EPA could not simply ignore this gap in reporting. Instead, it was obligated to obtain all "reasonably available" information on asbestos use and exposure to inform its risk evaluation. Given that EPA has recognized that TSCA's "information gathering authorities" and the CDR rule itself are the proper vehicles for obtaining such information, EPA's refusal to add asbestos to the CDR rule was contrary to law.

B. Contrary to EPA, the CDR Asbestos Loophole is Comprehensive in Scope

EPA parries this obvious conclusion by denying that there is an asbestos loophole in the CDR rule. Remarkably, EPA's petition denial states that "[p]etitioners mistakenly seem to believe that no domestically manufactured or imported asbestos is currently required to be reported under the CDR rule as a result of the exemption for naturally occurring substances." 84 Fed. Reg. at 3400. Far from being a mistake, this conclusion is an inevitable consequence of EPA's own rationale for applying the exemption. As the Agency's July 28, 2017 letter to Occidental Chemical explains, asbestos is exempt from reporting as a naturally occurring chemical substance ("NCOS") because "prior to the point of import, the asbestos ha[s] only been processed by mechanical and gravitational means." This mode of processing applies to all raw asbestos imported into the US — it is not unique to Occidental's asbestos imports. [16] Moreover, the EPA letter is explicit that [p]ost-import activities are irrelevant to whether the imports themselves are entitled to the NOCS exemption;" the exemption is based solely on processing methods at the mining site.

[16] Under EPA's definition of a "naturally occurring chemical substance" at 40 CFR 710.4(b), a qualifying substance must be "unprocessed" or "processed only by manual, mechanical, or gravitational means." As examples, the definition cites "rocks, ores, and minerals." Asbestos is a mineral extracted from rock formations and prepared for commercial distribution without chemical processing. Only a handful of mines in the world still produce asbestos and it is very doubtful that their processing methods differ in any significant degree.

The only asbestos CDR reports EPA received in 2016 were from two importers of raw asbestos in the chlorine manufacturing industry;[17] under EPA's interpretation of its regulations, these companies reported unnecessarily because their import activities were identical to Occidental's. No other reports of imports of raw asbestos and asbestos-containing products were submitted for the 2016 CDR update.

EPA also claims that because "the purpose of domestic manufacturing or importing of raw asbestos is to make asbestos diaphragms, for which EPA already has use and exposure information, removing the exemption for reporting on naturally occurring substances for asbestos would not provide any additional data to EPA." 84 Fed. Reg. at 3401. Even if EPA is right, it ignores the application of the exemption to *products containing asbestos* – a central focus of the EPA risk evaluation as described below. The asbestos in these products undoubtedly is mined and processed in the same way (and likely from the same mines) as the raw asbestos used by the chlorine manufacturing industry and would similarly be subject to the NCOS definition. Thus, EPA could only require reporting on asbestos-containing products if it excluded asbestos from the NCOS exemption (as well as eliminating the CDR article exemption, as plaintiffs requested in their petition).

C. EPA's Claim that it Did Not Need CDR Information on Asbestos is Contradicted by Its Repeated Admissions that the Information in its Possession Was Inadequate

EPA's petition denial argues that, even if asbestos is exempt from the CDR rule, it did not need CDR reporting for its asbestos risk evaluation because –

> EPA does not believe that the requested amendments would result in the reporting of any information that is not already known to EPA. As noted in more detail in Unit IV, EPA conducted extensive research and outreach to develop its understanding of import information on asbestos-containing products in support of the ongoing asbestos risk evaluation. After more than a year of research and stakeholder outreach, EPA believes that the Agency is aware of all ongoing uses of asbestos and already has the information that EPA would receive if EPA were to amend the CDR requirements.

[17] A printout showing CDR submissions on asbestos for the 2012 and 2016 reporting periods is in the certified index to the administrative record for the ADAO petition filed with the Court by EPA on February 18, 2020.

84 Fed. Reg. at 3399. These claims collapse in the face of EPA's own repeated admissions that it lacks critical information on asbestos use and exposure, its paltry research and outreach, and the considerable information CDR reporting would have supplied that was not otherwise obtained by the Agency.

Data Gaps in Problem Formulation. In their petition, plaintiffs emphasized that EPA's June 2019 problem formulation identified several imported asbestos-containing products but "provided virtually no information about the quantities of asbestos contained in these products, the volumes in which they were produced or imported, the sites where they are used and the number of exposed individuals."[18] The petition cited several examples of the problem formulation's acknowledgement of these data deficiencies: [19]

> "[T]he problem formulation indicates that EPA identified one company that imports asbestos-containing brake blocks for oil field use, but fails to quantify the amount of these imports or how and where they are used and acknowledges that '[it] is unclear how widespread the continued use of asbestos brake blocks is for use in oilfield equipment.'"
>
> "Similarly, the problem formulation identifies a chemical manufacturer, Chemours, which uses imported sheet gaskets containing 80 percent asbestos but does not address how many other manufacturers use these gaskets, the aggregate amount of asbestos they contain, and the conditions of use that may result in release of and exposure to asbestos fibers.
>
> "The problem formulation also cites USGS experts who, based on import records, believe that 'asbestos-containing products that continue to be imported include . . . asbestos brake linings (automotive brakes/linings, other vehicle friction products), knitted fabrics (woven products), asbestos rubber sheets (i.e., sheet gaskets) and asbestos cement products.'[20]

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[18] Petition at 7.

[19] Id. at 7-8.

[20] While EPA's petition denial emphasizes its reliance on USGS's knowledge of asbestos imports, USGS itself has acknowledged that "insufficient data were available to reliably identify" all asbestos uses and that, in 2016, an "unknown quantity of asbestos was imported within manufactured products, possibly including brake linings and pads, building materials, gaskets, millboard, and yarn and thread, among others." https://minerals.usgs.gov/minerals/pubs/commodity/asbestos/mcs-2017-asbes.pdf. These statements hardly provide reassurance that USGS (let alone EPA) is aware of all asbestos products being used in the US and the quantities of asbestos they contain. For example, as noted in plaintiffs' petition at 8, a search of import databases for shipments arriving in the Seattle and Tacoma ports over the last few years identified imports of asbestos-containing wallboard and floor tiles. Petition at 8. The problem formulation does not identify these products as in use in the US. Similarly, comments on the EPA asbestos scoping document submitted by Safer Chemicals Healthy Families, Environmental Health Strategy Center

Continued on the next page

> However, no information is provided on who is importing these products, what quantities are imported, where they are distributed and how they are used. As EPA acknowledges, '[i]t is important to note that the import volume of products containing asbestos is not known."
>
> "EPA recognizes that consumer exposure could occur from 'changing asbestos-containing brakes or brake linings or cutting or using asbestos-containing woven products, and handling of asbestos waste that may result from these activities.' However, it then acknowledges that "'[c]onsumer exposures will be difficult to evaluate since the quantities of these products that still might be imported into the United States is not known.'"

Information Available under the CDR Rule. Even if EPA had identified all asbestos-containing products entering the US, TSCA's requirements for a detailed assessment of use and exposure compelled it to obtain an in-depth understanding of the specific conditions of use of asbestos. The problem formulation fails to provide this information, but EPA would have obtained it from CDR reporting. The rule requires manufacturers and importers to report the following:[21]

- Each site where the reported chemical is manufactured or imported
- The volume of the chemical produced or imported at the site
- The quantities of the chemical used on site and distributed off-site
- The physical form of the chemical
- The maximum concentration of the chemical at the time it is sent off-site
- The number of exposed workers at each site

Reports must also include considerable information about downstream industrial uses of the reported chemical, including:

- The type of process or use
- The sector and industrial function category of the use
- The amount of the chemical distributed for the use
- The number of processing and use sites
- The number of exposed workers for each use

The rule also requires similar information about products distributed for consumer and commercial uses:

- The type of use
- The quantities devoted to each use

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and Healthy Building Network on March 15, 2017 (Safer Chemicals Comments) documented asbestos use in window caulking, recycled asphalt shingle scrap, adhesive mastic, gaskets for motorcycles and pads for ATVs and scooters. See EPA-HQ-OPPT-2016-0736. There is no indication that EPA investigated these conditions of use.

[21] 40 CFR §711.15

- Whether the product is intended for use by children
- The maximum concentration of the chemical in the product
- The number of exposed commercial workers

This information would provide the detailed picture of the conditions of use of raw asbestos and asbestos-containing products that EPA is required to obtain and consider in conducting risk evaluations under TSCA.[22]

Using the CDR rule, EPA has acquired such information for the other nine chemicals subject to TSCA risk evaluations. EPA's anomalous refusal to require CDR reporting for asbestos – which is uniquely hazardous even when compared to other substances of high concern -- was thus arbitrary and capricious because it "entirely failed to consider an important aspect of the problem."

EPA's Minimal Outreach and Research. EPA's bald assertion that it would not have learned anything from CDR reporting because it "conducted extensive research and outreach to develop its understanding of import information on asbestos-containing products" has no support in the record. This "outreach" consisted of a handful of meetings and calls with trade associations and individual companies; the records of these meetings in the docket provide no indication of what if any concrete use and exposure information was shared with the Agency.[23] In contrast to mandatory reporting under section 8(a), this

[22] For example, the problem formulation recognizes that worker and consumer exposure could occur from "changing asbestos-containing brakes or brake linings." Problem Formulation at 39. The record indicates that at least 900,000 US mechanics who regularly do car and truck repairs could be exposed to asbestos in imported brake linings and pads and in asbestos engine and exhaust gaskets. These exposures could be at concentrations of airborne asbestos dust hundreds of times higher than the current OSHA permissible exposure limit. Dr. Barry Castleman, *Continuing Public Asbestos Exposure in the US* (Castleman Report), March 29, 2018, at 6, EPA-HQ-OPPT-2016-0736-0122. To assess these risks, EPA needs to know the amount of asbestos in brakes or brake linings entering the US, the concentrations of asbestos in these products, how many job sites are using them, and the number of workers exposed. CDR reporting would go far to provide this information (assuming the scope of reporting were expanded to include articles and processing activities, as plaintiffs requested in their petition.)

[23] E.g., EPA-HQ-OPPT-2016-0736-0071 (Motor and Equipment Manufacturers Association), EPA-HQ-OPPT-2016-0736-0073 (Aerospace Industries Association), EPA-HQ-OPPT-2016-0736-0118 (American Friction), and EPA-HQ-OPPT-2016-0736-0119 (Chemours, Branham and American Chemistry Council). The three companies in the chlorine manufacturing industry did provide information about workplace exposure to asbestos, but these companies were importers and processors of raw asbestos, not asbestos-containing products, for which the absence of information on conditions of use was most glaring.

voluntary information exchange did not encompass all (or even many) of the importers and processors of asbestos-containing products and thus was unrepresentative,[24] and companies providing information had no legal obligation to assure that it was complete and accurate, as a section 8(a) rule would require.

EPA's Admissions of Inadequate Information in the Draft Risk Evaluation. EPA's draft asbestos risk evaluation ("DRE"), released on April 3 for public comment and peer review,[25] conclusively demonstrates that EPA's "research and outreach" did **not** in fact fill the serious information gaps revealed in the problem formulation. Throughout the draft risk evaluation, EPA admits that it does not know the quantities of asbestos included in asbestos-containing products, the companies and number of facilities using these products, the nature of the use operation and the number of workers and consumers exposed. Thus, the Executive Summary of the draft evaluation notes that:

> Only two workers were identified for stamping sheet gaskets, and two TiO2 manufacturing facilities were identified in the U.S. who use asbestos-containing gaskets. However, EPA is not certain if asbestos-containing sheet gaskets are used in other industries and to what extent. For the other COUs, no estimates of the number of potentially exposed workers were submitted to EPA by industry or its representatives.[26]

Similarly, EPA acknowledges that, outside the chlor-alkali industry,[27]

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[24] For example, as plaintiffs discussed in their petition at 8, the problem formulation states that EPA "had originally identified an asbestos-containing adhesive for use as a mirror adhesive but later determined after contacting the supplier that it is no longer sold." Problem Formulation, at 19. The comment of a single supplier does not mean that there are no other suppliers manufacturing or selling the adhesive. Moreover, a voluntary oral statement made in a telephone call with EPA does not carry the same indicia of accuracy and completeness as a formal written submission in compliance with an EPA rule.

[25] 85 Fed. Reg. 18954 (April 3, 2020). The DRE is posted on the EPA asbestos docket at https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0501-0002. The Court may take judicial notice of the DRE because it was generated by EPA, posted on EPA's website, and announced in the Federal Register, and therefore, comprises "matters of public record" that are not "subject to reasonable dispute." *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (quoting *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001)); see, e.g., *Sierra Club v. EPA*, 762 F.3d 971, 975 n.1 (9th Cir. 2014) (taking judicial notice of an EPA memorandum as a public record). Thus, in *Safer Chemicals v. EPA*, 943 F.3d 397, 420, n. 13 (9th Cir. 2019), the Ninth Circuit took judicial notice of EPA's TSCA scoping document for 1,4 dioxane in reviewing EPA's risk evaluation framework rule. Here, the Court should consider the DRE because it directly bears on the credibility of and accuracy of EPA's claims that it did not need CDR reporting because it had all the use and exposure information required for its risk evaluation.

[26] DRE at 22-23

[27] Id at 203.

> while there may be some knowledge about the potential number of workers/consumers in a particular COU, there is a lack of information/details on the market share of asbestos-containing products available to both workers and consumers. This makes it difficult to assess level of both certainty and confidence estimating the potential number of impacted individuals using asbestos for the COUs (except for chlor-alkali) in this draft risk evaluation. For ONUs and bystanders, there is a similar lack of understanding of the potential number of potentially impacted individuals

Overall, because EPA received only a "handful" of voluntary submissions from industry, "there are many uncertainties with respect to the extent of use, the number of workers and consumers involved and the exposures that might occur from each activity."[28]

These information gaps extend to the number of facilities using asbestos-containing products and the processing conditions at these facilities. Thus, aside from a single company, "it is unknown if other U.S. companies import asbestos-containing sheet material to stamp gaskets"[29] and whether such companies "perform this same stamping activity."[30] Because EPA could not "identify other companies that cut/stamp asbestos-containing sheet gaskets in the United States, . . . it is not known how many sites cut or stamp imported asbestos-containing sheet gaskets."[31] As a result, while EPA had limited monitoring data from the single processor of asbestos-containing sheet material, it "is uncertain if these monitoring data are representative of the entire U.S. population of workers that are potentially exposed during asbestos-containing sheet gasket processing."[32]

Downstream use of sheet gaskets represented another area of large uncertainty. EPA noted that "[a]sbestos-containing gaskets are used primarily in industrial applications with extreme operating conditions, such as . . . in many chemical manufacturing and processing operations." However, despite efforts "to identify all industrial uses of asbestos-containing gaskets, . . . the primary use known to the

[28] Id at 193.
[29] Id at 71.
[30] Id at 74.
[31] Id. at 74-75.
[32] Id. at 77.

Agency is among titanium dioxide manufacturing facilities."[33] Even for this sector, moreover, "no estimates of the number of potentially exposed workers were submitted to EPA by industry or its representatives" and while EPA received information from one manufacturer, "[o]ther titanium dioxide manufacturing plants that operate under similar conditions in the United States are thought to use asbestos-containing gaskets to prevent chlorine leaks, but EPA does not have information to confirm this."[34]

The potentially widespread use of asbestos in oil field brake blocks likewise could not be meaningfully assessed because of limited information. While EPA identified one company that "imports asbestos-containing brake blocks on behalf of some clients for use in the oilfield industry, [i]t is unclear if any other companies fabricate or import asbestos-containing brake blocks, or how widespread the continued use of asbestos brake blocks is in oilfield equipment."[35] Even for the one importer, it is "unknown how many customers receive brake blocks from the sole facility identified by EPA."[36] Thus, "EPA was not able to identify the volume of imported asbestos-containing brake blocks, the number of brake blocks used nationwide, nor the number of workers exposed as a result of installation, removal, and disposal activities."[37] Finally, while EPA attempts to assess consumer exposures during "do it yourself" brake and gasket repair and replacement, "[t]he number of consumers impacted by these COUs is unknown because the number of products containing asbestos for these COUs is unknown."[38]

It is hard to imagine a more unequivocal recognition of the inadequacy of EPA's information gathering efforts and the degree to which it compromised EPA's ability to determine asbestos risks with any precision and accuracy. These Agency admissions eliminate any doubt that the petition denial was arbitrary and capricious because EPA has "offered an explanation for its decision that runs counter to the

[33] Id at 78.
[34] Id at 79.
[35] Id. at 83.
[36] Id at 84.
[37] Id at 86.
[38] Id. at 107.

evidence before the agency [and] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *WildEarth Guardians, supra, at* 1069–70.

II. EPA Had Ample Time to Amend the CDR Rule Before Completing The Asbestos Risk Evaluation And In Any Case Needs CDR Data For Its Upcoming Risk Management Rulemaking

EPA's petition denial asserts that "even if EPA believed that the requested amendments would collect information on any new ongoing uses, EPA would not be able to finalize such amendments in time to inform the ongoing risk evaluation or, if needed, any subsequent risk management decision(s)." 84 Fed. Reg. at 3399. This basis for denying the petition was arbitrary and capricious.

Plaintiffs' petition asked that EPA conduct a narrowly focused asbestos-specific rulemaking to amend the CDR rule to "require immediate submission of reports on asbestos for the 2016 reporting cycle."[39] Had EPA initiated this rulemaking promptly after receiving plaintiffs' petition on September 25, 2018 or even earlier when it determined that the CDR rule did not apply to asbestos on July 28, 2017,[40] new reporting requirements for asbestos could have been in place well before the completion of the EPA risk evaluation,[41] which is now not expected until the end of 2020, if not later.[42] That EPA has dragged

[39] Petition at 2. Under this approach, while reporting would have occurred later for asbestos than for other CDR chemicals, submitters would still have been required to report their activities during the 2012-2016 period in accordance with the 2016 CDR Update.

[40] EPA's claim that it would need 18 months for this straightforward rulemaking is untenable. 84 Fed. Reg at 3399. EPA has completed more complex rulemakings under TSCA in under six months. For example, a compliance date extension for the TSCA formaldehyde emission standards for composite wood products, 82 Fed. Reg. 44533 (September 25, 2017) was finalized 5 months after proposal.

[40] Petition, at 2.

[41] EPA acknowledges that, even under its unrealistic estimate of the time required to add asbestos to the CDR rule, reports could have been in EPA's possession by March 2020. 84 Fed. Reg. at 3400. This would have been a month *before* the draft evaluation was released in April 2020 and eight months before the projected completion date for the final evaluation. Had EPA initiated rulemaking to add asbestos to the CDR rule in July 2017 and completed it by the end of the year, EPA would have received reports in the first half of 2018, when the DRE was at an early stage.

[42] Under section 6(b)(4) of TSCA, EPA is obligated to complete risk evaluations within 3 years, with a possible 6 months extension. EPA has missed these deadlines for all but one of the first 10 evaluations. The EPA Science Advisory Committee on Chemicals (SAAC) met to peer review the asbestos DRE on June 8-11. https://www.epa.gov/tsca-peer-review/peer-review-draft-risk-evaluation-asbestos-0. Its report

Continued on the next page

its feet for three years in using its information collection authorities despite the compelling need for reporting on asbestos should not enable it to present the public with a *fait accompli.*

Equally important, the petition was not solely predicated on the need for CDR information to bolster the asbestos risk evaluation. It also highlighted the value of reporting for risk management under TSCA.[43] If EPA's risk evaluation concludes that the conditions of use addressed in the evaluation present an unreasonable of injury,[44] TSCA section 6(c)(1) requires it to initiate rulemaking to restrict asbestos exposure under TSCA section 6(a). This provision provides a detailed menu of possible restrictions, ranging from a ban on all or some uses to warnings and labeling, and directs EPA to "apply one or more [these] requirements . . . to the extent necessary so that the chemical substance no longer presents such [unreasonable] risks." Without detailed information about the conditions of use and exposure that present an unreasonable risk and the nature and magnitude of that risk, EPA will be unable to make an informed selection of the specific requirements necessary to achieve the statutory goal. In fact, section 6(c)(2)(A)(i) requires EPA to make findings on the "effects of the chemical substance or mixture on health and the magnitude of exposure" and section 6(c)(2)(A)(iv) requires it to determine the "costs and benefits" and "cost-effectiveness" of the "proposed regulatory action and of the 1 or more primary alternative regulatory actions considered" by the Agency. EPA could not possibly make these findings for asbestos without the detailed use and exposure information that it admits it lacks.

Section 6(c)(1) of TSCA requires EPA's risk management rulemaking to be completed in 2-4 years after a final risk evaluation.[45] Since the risk evaluation may not be completed for several more months,

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will likely be issued in August and EPA will then need to address the many concerns and recommendations of the SAAC and public commenters before finalizng the evaluation. This could be a lengthy process.

[43] Petition, at 2.

[44] The DRE proposes to make such unreasonable risk determinations for asbestos. DRE at 24-27.

[45] Section 6(c)(1)(A)-(B) provide that EPA must propose a section 6(a) rule within a year of the final risk evaluation and finalize the rule one year later. Under section 6(c)(1)(C), EPA may extend these deadlines by up to two years, less any extension granted to complete the risk evaluation.

there is ample time to amend the CDR rule for asbestos and obtain additional reports to inform selection of the most effective restrictions that will eliminate asbestos's unreasonable risks under section 6(a) and the required findings in section 6(c)(2)(A).[46] EPA's cursory dismissal of the utility of reporting for its risk management rulemaking (84 Fed. Reg.3400) was thus arbitrary and capricious because it "entirely failed to consider an important aspect of the problem." *WildEarth Guardians, supra,* at 1069–70.[47]

III. EPA Failed to Provide a Rational or Plausible Basis for Rejecting Expanded CDR Reporting Requirements

Plaintiffs' petition proposed a number of modifications to CDR reporting requirements necessary to assure that EPA would receive the use and exposure information required for an informed risk evaluation and risk management rulemaking on asbestos. EPA's summary rejection of these modifications did not meet the APA standard for reasoned decisionmaking.

A. Reducing the Reporting Threshold

The petition asked EPA to reduce the reporting threshold for asbestos (assuming it was added to the CDR rule) from 2500 pounds to 10 pounds for any year in the reporting period because of "the absence of any safe level of exposure to asbestos and the need for comprehensive use and exposure information for the ongoing risk evaluation."[48] EPA's response was that "[s]ince asbestos is no longer mined in the United States and the only importation of raw asbestos is for production of asbestos diaphragms, for which yearly imports for each site well exceed the threshold of 2,500 pounds, lowering the reporting threshold

[46] EPA's petition denial claims that it "would not be able to finalize [CDR] amendments in time to inform the . . . risk management decision(s)." 84 Fed. Reg. 3399. This is manifestly incorrect.

[47] Plaintiffs' petition stressed another important benefit of CDR reporting. According to the petition at 12, "information to be reported under the requested amendments to the CDR rule will be invaluable not only to EPA risk and exposure assessors but to workers and members of the general public. Knowledge of which entities are importing and using asbestos, where and how these activities occur and the quantities of asbestos involved is critical to identifying exposed populations and pathways of exposure and taking steps to reduce risks." EPA has identified "increasing public access to information about chemical substances" as a central goal of CDR reporting. 76 Fed. Reg. at 50819. This goal is independent of how and when EPA uses CDR reports for regulatory purposes.

[48] Petition at 11.

would not provide additional information to EPA."[49] This misses the point. While EPA assumes that all imports of raw asbestos exceed the current reporting threshold, it does not in fact know because it lacks a mechanism to identify lower volume imports. Moreover, EPA glosses over the fact that asbestos is contained in imported articles (now exempt from the CDR rule but a major focus of the EPA risk evaluation) and, if the reporting threshold were applied to these articles, EPA might never be informed of imported articles with lower amounts of asbestos that result in exposure and risk.

B. Eliminating the Article Exemption

At 40 CFR. § 711.10(b), the CDR rule exempts from reporting persons who import a reportable substance as part of an article. Because all the imported asbestos-containing products identified in the EPA problem formulation are "articles" under TSCA, [50] plaintiffs' petition asked EPA to amend the CDR rule so the article exemption is inapplicable to asbestos.[51] The petition denial rejected this request on the ground that the "Agency does not believe amending the CDR rule would be helpful in collecting additional import information on articles" and that "EPA has sufficient information on imported articles containing asbestos to conduct the risk evaluation and inform subsequent risk management decisions based the risk determination." 84 Fed. Reg. at 3401. As demonstrated in Section I.C. above, these conclusions are contradicted by the record and EPA's own statements. Both the problem formulation and DRE repeatedly admit that EPA lacks fundamental information about asbestos-containing articles – such as the quantities imported, the number of use sites and size of the exposed population – essential for an informed

[49] 84 Fed. Reg. at 3402.
[50] Under 40 CFR §720.3(c), "article" is defined as a "manufactured item . . .formed to a specific shape or design during manufacture" and having "end use function(s) dependent in whole or in part upon its shape or design during end use."
[51] Petition at 11.

understanding of exposure and risk. For EPA to ignore its own admissions of the inadequacy of available information on imported articles is arbitrary and capricious.[52]

C. Applying Reporting Requirements to Processors

The CDR rule only applies to manufacturers and importers. The petition asked EPA to expand the scope of reporting to "processors" of asbestos-containing articles because "[i]n many cases, importers will be unable to provide the detailed information about use and exposure" in the possession of the firms who directly use these products.[53] The Agency denied this request because it "does not believe that requiring processors of asbestos [to report] under the CDR rule will provide useful information not already in the Agency's possession." 84 Fed. Reg. 3402. Although EPA claims otherwise in its petition denial,[54] most of the asbestos-containing articles identified in the problem formulation are "processed" as defined in section 3(13) of TSCA. For example, following importation, asbestos-containing sheet gaskets, brake pads and linings, fabric and cement are all "prepare[d] . . . for distribution in commerce . . . as part of an article" and thus fall within the statutory definition of "process." That EPA lacks adequate information about these processing activities is indisputable given the admissions in its draft risk evaluation that, for example, "it is not known how many sites cut or stamp imported asbestos-containing sheet gaskets" and "EPA was not able to identify the volume of imported asbestos-containing brake blocks, the number of brake blocks used nationwide, nor the number of workers exposed as a result of installation, removal, and disposal activities." *See* pages 14-16 *supra.* Thus, EPA's refusal to require reporting by processors was arbitrary and capricious.

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[52] EPA also claims that that importers would not necessarily know that imported articles contain asbestos "because information reported under the CDR rule is limited to that which is 'known to or reasonably ascertainable' by the reporter." 84 Fed. Reg. at 3401. It is inconceivable that an importer of say, brake pads and linings, would not know that they contain asbestos or could not "reasonably ascertain" this information.

[53] Petition at 11.

[54] 84 Fed. Reg. at 3402

D. Eliminating the CDR Exemption for Impurities

40 CFR § 711.10(c) exempts from CDR reporting activities described in 40 C.F.R § 720.30(g) and (h). Among these activities are manufacture or import of a substance as an impurity which is not used for commercial purposes ((h)(2)). In their petition, plaintiffs asked EPA to amend the CDR rule so these exemptions are inapplicable to asbestos.[55] The petition cited several studies demonstrating the presence of asbestos contamination in makeup, crayons and other children's toys made from talc, a mineral often found in deposits also containing asbestos, raising the possibility that thousands of asbestos-contaminated talc-based consumer products may be entering the US.[56] As plaintiffs showed in their January 31, 2019 petition denial rebuttal,[57] the gravity of this concern has now been underscored by studies showing the widespread presence of asbestos in talc-derived baby powder products and the recent decision of their manufacturer, Johnson & Johnson, to withdraw these products from sale in the US.[58]

As an unintended component of domestically produced or imported talc products, asbestos is an "impurity" as defined in TSCA (i.e. "a chemical substance which is unintentionally present with another chemical substance").[59] Thus, eliminating the CDR impurity exemption along with the article exemption would mean that importers of asbestos-contaminated talc products would be required to file reports. EPA did not mention talc-based consumer products in its problem formulation or draft risk evaluation and obviously lacks the information required to determine their risks to human health under TSCA.

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[55] Petition at 11.
[56] Id. at 8.
[57] Petition Denial Rebuttal at 8. Well before the filing of the petition, EPA had been informed about testing demonstrating asbestos-contamination of talc-based consumer products and the large volume of talc imported into the United States (on average 656,259,377 pounds per year). See, e.g. Safer Chemicals comments, supra, note 20, at 7; Castleman Report, supra note 22, at 7-8. EPA has never addressed the talc issue, even in the recent DRE.
[58] https://www.npr.org/2020/05/19/859182015/johnson-johnson-stops-selling-talc-based-baby-powder-in-u-s-and-canada
[59] 40 CFR § 720.3(m)

EPA's petition denial dismissed the value of this information on the remarkable ground that "the CDR rule does not require submitters to perform chemical analyses of products containing the chemicals they manufacture. . . [and] it is unlikely that EPA would receive new information that would change its understanding of the conditions of use for asbestos that can be addressed under TSCA." 84 Fed. Reg. at 3402. This is pure speculation that assumes that companies will stick their heads in the sand in the face of the widespread and well-known contamination of talc with asbestos. Moreover, even if the CDR rule does not explicitly require product testing, TSCA section 8(a)(2) directs reporting companies to provide information that is "known or reasonably ascertainable" (i.e. "information that a reasonable person similarly situated might be expected to possess, control, or know"[60]) . This would undoubtedly include whether a talc-based product contains asbestos. EPA's refusal to eliminate the impurity exemption on the specious ground that companies would not know whether their products contain asbestos was thus arbitrary and capricious.

IV. EPA's Refusal to Consider Making Public CDR Report Information on Asbestos Was Contrary to Law and Arbitrary and Capricious

Plaintiffs' petition requested that, in amending the CDR rule, EPA should include provisions making all reports submitted on asbestos publicly available notwithstanding any claims that these reports contain Confidential Business Information (CBI). As the petition explained,[61] "[k]nowledge of which entities are importing and using asbestos, where and how these activities occur and the quantities of asbestos involved is critical to identifying exposed populations and pathways of exposure and taking steps to reduce risks."

The petition identified two provisions of TSCA section 14 which authorize overriding CBI claims in the interest of transparency and public disclosure. First, section 14(d)(3) provides that CBI protections

[60] 40 CFR 720.3(p).
[61] Petition at 11.

will not apply if the Agency "determines that disclosure is necessary to protect health or the environment against an unreasonable risk of injury." As the petition emphasized, knowledge of where and how asbestos is being used and who is exposed is plainly necessary to protect human health. Second, section 14(d)(7) authorizes disclosure of CBI where EPA "determines that disclosure is relevant in a proceeding under this Act." The ongoing asbestos risk evaluation is such a "proceeding" and information on asbestos importation and use is clearly "relevant" because it has a direct bearing on EPA's determinations of exposure and risk and the ability of the public to comment on these elements of the risk evaluation.

EPA rejected this aspect of the petition on the ground that "[p]etitioners' request is not appropriate for a TSCA section 21 petition" because section 21 is not a vehicle to "petition EPA to initiate an action under TSCA section 14." 84 Fed. Reg. at 3403. However, EPA rules under section 8 routinely address the application of TSCA CBI requirements to reports submitted to the Agency. The CDR rule is a case in point: 40 C.F.R. §711.30 outlines in detail what information can be claimed CBI and how CBI claims must be asserted and supported. It is this CDR provision that petitioners asked EPA to modify so that information reported on asbestos is no longer subject to CBI protection. Plainly, therefore, petitioners sought "amendment of a rule under TSCA section . . . 8" and requested action by the Agency that is within the express scope of section 21. The Court should hold that the petition properly requested a remedy available under section 21 and that EPA's refusal to consider it was contrary to TSCA.

As for EPA's further assertion that "disclosure of CBI would have no practical relevance to the risk evaluation or risk determination" (84 Fed. Reg. at 3403), the Agency has no basis for reaching this sweeping conclusion in a vacuum; it should address the issue in a section 8(a) rulemaking (should the Court order one) in which EPA can examine the benefits of public disclosure in the context of the specific information to be reported under an amended CDR rule and its value in commenting on the risk evaluation and follow-up section 6(a) rulemaking.

V. If it Grants Summary Judgment, the Court Should Direct EPA to Forthwith Initiate a Rulemaking Under TSCA Section 8(a) to Amend the CDR Rule as Requested in Plaintiffs' Petition

As described above, the Court should grant summary judgment in favor of plaintiffs based on a determination that EPA's denial of their section 21 petition was contrary to law and arbitrary and capricious in violation of the APA. Under section 21(b)(4)(A), suits challenging petition denials may seek to "compel the Administrator to initiate a rulemaking proceeding as requested in the petition." This remedy is essential in this case, where EPA easily could have amended the CDR rule in 2017 to require asbestos reporting and the clock is running on the TSCA risk evaluation and will soon begin to run on asbestos risk management rulemaking under TSCA section 6(a). Without expeditious rulemaking, the important information obtainable under the CDR rule will once again not be available in time to inform EPA decisionmaking.

Respectfully submitted on July 14, 2020:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by Notice of Electronic Filing this 14th day of July, 2020 upon all ECF registered counsel of record using the Court's CM/ECF system.

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