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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12
 13 WESTERN DIVISION
 14

15	_____)	
16	AMERICA UNITES FOR KIDS, et)	Case No. 2:15-CV-02124
17	al.,)	
18	Plaintiffs,)	DEFENDANTS'
19	vs.)	MEMORANDUM OF POINTS
20	SANDRA LYON, et al.,)	AND AUTHORITIES IN
21)	OPPOSITION TO PLAINTIFFS'
22	Defendants.)	MOTION FOR PRELIMINARY
23)	INJUNCTION
24	_____)	Dept. 15
		Judge: Anderson

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28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS.....	4
III. PLAINTIFFS CANNOT BE GRANTED RELIEF THAT IS OUTSIDE THE SCOPE OF PERMISSIBLE INJUNCTIVE RELIEF UNDER TSCA	7
IV. PLAINTIFFS CANNOT MEET THEIR BURDEN TO ESTABLISH THAT A PRELIMINARY INJUNCTION SHOULD BE GRANTED.....	8
A. Plaintiffs Cannot Establish a Likelihood of Success on the Merits	9
1. EPA has Primary Jurisdiction over PCB Removal.....	10
2. Plaintiffs’ Claims are Moot because the Remedies Sought are Already Mandated by EPA.....	13
3. The Court Lacks Jurisdiction to Hear Plaintiffs’ Claims because Plaintiffs Did Not Properly Notice Their Claims under 40 C.F.R. § 702.....	14
B. Plaintiffs Cannot Demonstrate They Will Suffer Irreparable Harm if the Court Does Not Grant the Preliminary Injunction	16
C. The Equities Weigh Against Issuing a Preliminary Injunction	20
D. The Public Interest Does Not Support Issuance of a Preliminary Injunction	22
V. CONCLUSION	23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
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23
24
25
26
27
28

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Page

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612 F.2d 1112 (9th Cir. 1979)..... 9, 16

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519 U.S. 452 (1997) 8, 22

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131 F. Supp. 2d 236 (D.D.C. 2001)10

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199 F.3d 1260 (11th Cir. 2000).....10

Caribbean Marine Service Co. v. Baldrige,
844 F.2d 668 (9th Cir. 1988).....19

Chalk v. United States Dist. Court Cent. Dist of Cal.,
840 F.2d 701 (9th Cir. 1988).....20

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935 F. Supp. 1206 (D. Utah 1996)19

Chesapeake Bay Foundation, Inc. v. Severstal Sparrows Point, LLC,
794 F. Supp. 2d 602 (D. Md. 2011)15

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709 F. Supp. 2d 888 (E.D. Cal. 2010)14

Davis Bros. Inc. v. Thornton Oil Co.,
12 F. Supp. 2d 1333 (M.D. Ga. 1998).....14

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778 F.2d 1365 (9th Cir. 1985).....10

Feldman v. Bomar,
518 F.3d 637 (9th Cir. 2008).....13

1 *Friends of Santa Fe County v. LAC Minerals, Inc.*,
 2 892 F. Supp. 1333 (D.N.M. 1995)12

3 *Haynes v. Navy Fed. Credit Union*,
 4 841 F. Supp. 2d 221 (D.D.C. 2012) 9, 10

5 *Mair v. City of Albany*,
 6 303 F. Supp. 2d 237 (N.D.N.Y. 2004)7

7 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*,
 8 571 F.3d 873 (9th Cir. 2009).....9

9 *Martinez v. Mathews*,
 10 544 F.2d 1233 (5th Cir. 1976)9

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 16 4 F.3d 887 (10th Cir. 1993).....13

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 18 2012 WL 7807955 (E.D.N.Y. Aug. 29, 2012)..... 15, 16

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 20 2013 WL 1232244 (E.D.N.Y. Mar. 26, 2013)..... 12

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 22 830 F.Supp. 2d 760 (N.D. Cal. 2011)14

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 26 775 F.3d 1118 (9th Cir. 2014)9

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 28 803 F. Supp. 2d 184 (E.D.N.Y. 2011).....20

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 167 F.3d 514 (9th Cir. 1999).....13

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 2 547 F.3d 1051 (9th Cir. 2008).....13
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 4 344 F.3d 914 (9th Cir. 2003).....20
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 6 13 F.3d 1313 (9th Cir. 1994).....9
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 8 2013 WL 5298469 (E.D. Pa. Sept. 19, 2013)22
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14 Code of Federal Regulations

14 Title 40, section 702.6114
 15 Title 40, section 702.61(a).....14
 16 Title 40, section 702.62 10, 14
 17 Title 40, section 745.22722
 18 Title 40, section 761.6112
 19 Title 40, section 761.61(c).....8
 20 Title 40, section 763.9322

21 United States Code

21 Title 15, section 2619(a).....7
 22 Title 15, section 2601(c).....10
 23 Title 15, section 260510
 24 Title 15, section 261711
 25 Title 15, section 268522

26 Rules and Regulations

27 Federal Rules of Civil Procedure

28 Rule 12(b)(1)14

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1 Defendants Sandra Lyon, Jan Maez, Laurie Lieberman, Dr. Jose
2 Escarce, Craig Foster, Maria Leon-Vazquez, Richard Tahvildaran-Jesswein,
3 Oscar de la Torre, and Ralph Mechur (hereinafter, “Defendants”) hereby
4 oppose the Motion for Preliminary Injunction of Plaintiffs America Unites for
5 Kids and Public Employees for Environmental Responsibility (hereinafter,
6 “Plaintiffs”).

7 **I. INTRODUCTION**

8 Plaintiffs’ motion for preliminary injunction is the latest salvo in a case
9 that, at its core, does nothing more than seek publicity by attacking a
10 compliant, regulated entity, the Santa Monica-Malibu Unified School District
11 (“SMMUSD”), for appropriately following the directives of the lead agency
12 with exclusive oversight authority and regulatory jurisdiction under the federal
13 Toxic Substances Control Act (“TSCA”). SMMUSD has spent significant
14 effort complying *to the letter* with the instructions of the United States
15 Environmental Protection Agency (“EPA”) concerning the investigation and
16 cleanup of polychlorinated biphenyl (“PCB”)-containing materials at Juan
17 Cabrillo Elementary School and Malibu Middle and High School (collectively,
18 the “Malibu Campus”). Throughout the process, SMMUSD has followed –
19 and will continue to follow – the instructions and guidance of EPA and its
20 scientists to ensure the health and welfare of staff and students. In turn, EPA
21 has consistently approved SMMUSD’s activities with respect to remediation
22 and management in place of PCB-containing materials at the Malibu Campus,
23 finding that SMMUSD’s actions are indeed ensuring that the Malibu Campus
24 is safe.

25 Plaintiffs’ motion for preliminary injunction falsely claims that EPA has
26 not gotten involved in any Malibu Campus cleanup at all, and that this Court is
27 somehow required to step into the breach. *See* Motion for Preliminary
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1 Injunction, fn. 1. This is, of course, not true. SMMUSD has been working
2 under EPA's direct oversight and jurisdiction for over a year in the
3 investigation and remediation of PCB-containing materials at the Malibu
4 Campus. EPA is the agency with Congressionally-authorized direct
5 jurisdiction over TSCA cleanups, and it is actively exercising its jurisdiction
6 and oversight here in the ongoing investigation and remediation at the Malibu
7 Campus.

8 Plaintiffs' motion papers hide the true story. In reality, Plaintiffs do not
9 take literal issue with TSCA's established regulatory PCB remedial
10 requirements, EPA's national policies with respect to PCB cleanup, or EPA's
11 practices and approvals at the Malibu Campus themselves. This lawsuit is
12 most likely a vehicle to attract publicity to Plaintiffs' policy arguments against
13 TSCA and EPA, which are more appropriately addressed to Congress and
14 EPA themselves. Importantly, because EPA's decisions taken in this area of
15 its significant expertise must be accorded significant deference by the Court,
16 in the instant action, Plaintiffs never directly challenge the agency's policies
17 and determinations at the Malibu Campus in this lawsuit, nor do they allege
18 that EPA action has violated TSCA or claim that the EPA-approved cleanup
19 has somehow been inconsistent with EPA's established national policies for
20 PCBs in schools. Defendants, who alone have been singled out in this action,
21 have only done as they must under the law: comply with the directives of
22 EPA exercised according to its jurisdiction and oversight authority pursuant to
23 TSCA.

24 Plaintiffs now demand that this Court supplant EPA as the oversight
25 agency with jurisdiction over the TSCA cleanup at the Malibu Campus. They
26 want this Court to force students and staff out of classrooms already deemed
27 safe by EPA, disrupt SMMUSD's considered balancing of the cleanup needs
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1 with the priorities of the ongoing educational mission at the Malibu Campus,
2 and disregard EPA's approved timetable for removal of building materials in
3 favor of their own timetable inconsistent with EPA's approved plan. If taken,
4 these actions would override EPA's jurisdiction, and completely ignore EPA's
5 established TSCA PCB policies and their Malibu Campus-specific
6 applications.

7 Plaintiffs seek a preliminary injunction to compel Defendants to direct
8 SMMUSD to immediately cease use, "for any educational purpose," of 15
9 classrooms at the Malibu Campus where PCBs have been identified in
10 building materials in excess of the TSCA regulatory threshold of 50 parts per
11 million ("ppm"), and to remove all known materials in those classrooms
12 containing PCBs in excess of 50 ppm prior to July 31, 2015. But Plaintiffs
13 have never shown, as would be required for such an action, that EPA's
14 interpretations of its regulations through implementation of the policies and
15 directives to which Defendants have adhered are in any way erroneous. And
16 critically, Plaintiffs cannot meet their burden with regard to any of the
17 elements required to obtain such injunctive relief.

18 Plaintiffs cannot demonstrate a likelihood of success on the merits of
19 their TSCA claim, which this Court lacks jurisdiction to hear due to the
20 doctrine of primary jurisdiction, because it is moot, and because it was
21 improperly noticed. Nor can Plaintiffs show that they will be irreparably
22 harmed in the absence of injunctive relief when, as discussed below, EPA, the
23 lead agency with statutory jurisdiction over these issues, has determined there
24 are no adverse health risks associated with PCB exposures at the Malibu
25 Campus, and the relief Plaintiffs request is already planned for implementation
26 over the Summer 2015 school break and subsequent school breaks pursuant to
27 an approval by EPA. Also, the balance of the equities does not favor Plaintiffs
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1 and there is no public interest in the proposed injunctive relief which, in fact,
2 would serve only to supplant EPA policy applied nationally with respect to
3 PCBs in schools, without any requisite showing that EPA's policies are an
4 erroneous interpretation of its own regulations. Finally, Plaintiffs' demanded
5 injunctive relief would only disrupt the Malibu Campus and make it more
6 difficult for SMMUSD to balance the cleanup needs with the priorities of
7 students and staff in carrying out the ongoing educational mission at the
8 Malibu Campus.

9 Accordingly, Plaintiffs' request for preliminary injunction should be
10 denied.

11 **II. STATEMENT OF FACTS**

12 Plaintiffs allege Defendants have violated TSCA because building
13 materials at the Malibu Campus contain PCBs in excess of the TSCA
14 regulatory threshold of 50 ppm. They base these allegations on samples of
15 bulk materials they claim were collected at various locations at the Malibu
16 Campus.

17 Contrary to Plaintiffs' assertions, SMMUSD itself has tested myriad
18 bulk samples from the Malibu Campus, many taken from the same rooms
19 allegedly tested by Plaintiffs. April 10, 2015 Supplemental Daugherty
20 Declaration (hereinafter, "Supp. Daugherty Decl."), ¶36. Defendants do not
21 dispute that, while PCB exposures at the Malibu Campus pose no adverse
22 health risk to either students or staff, some exceedances of TSCA's PCB
23 regulatory threshold have been found. However, these exceedances are
24 *already being addressed* by Defendants pursuant to proper federal EPA
25 oversight and approval under TSCA. Defendants have been working
26 diligently under the supervision of EPA, the lead regulatory agency with
27 authority under TSCA to plan for and execute removal activities. On August
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1 14, 2014, EPA approved SMMUSD’s plans for removal of known and verified
2 building materials with PCB concentrations above 50 ppm. April 2, 2015
3 Daugherty Declaration (hereinafter, “First Daugherty Decl.”), Exhibit F. This
4 removal is slated to begin over Summer 2015 so as not to disrupt the school
5 schedule, and to be completed by no later than March 2016 for all currently
6 known and verified locations. In fact, of the 15 rooms Plaintiffs reference in
7 their motion papers, five will, by direction of EPA, be remediated by June 30,
8 2015—a full month *before* the July 31, 2015 date Plaintiffs propose.

9 On October 31, 2014, EPA approved management in place of PCB
10 materials at the Malibu Campus pursuant to EPA-mandated and established
11 best management practices. EPA found unequivocally, as required by TSCA,
12 that PCB materials remaining in place at the Malibu Campus do not pose an
13 unreasonable risk of injury, either to human health or to the environment.
14 Supp. Daugherty Decl., ¶8. EPA has also validated SMMUSD’s decision to
15 continue to safely hold classes at the Malibu Campus, finding that “air and
16 dust sampling results serve as the basis for appropriate decisions by the
17 District...including allowing staff and students access to those classrooms that
18 have been shown to meet EPA’s health-based guidelines.” First Daugherty
19 Decl., Exhibit F. Representatives from EPA have even gone so far as to tell
20 the Malibu public they would be comfortable sending their own children to
21 school at the Malibu Campus. Supp. Daugherty Decl., ¶7. As part of its
22 approvals, EPA expressly approved SMMUSD’s plan to address any PCB
23 exceedances that are discovered at the Malibu Campus in the future. *Id.* at ¶3.

24 SMMUSD is bound by the August and October 2014 EPA approvals.
25 Any changes or departures from those approvals may not be made without the
26 express written consent of EPA. Per the October 2014 approval, “[d]eparture
27 from this approval without prior written permission from EPA may result in
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1 revocation of this approval.” First Daugherty Decl., Exhibit C. If SMMUSD
2 were forced to obtain approval from EPA for changes to the scope and
3 timeframes of the current EPA-approved remediation at the Malibu Campus,
4 remediation likely would be delayed past the time it is scheduled to occur over
5 the school break. Supp. Daugherty Decl., ¶11.

6 Despite this ongoing implementation of the EPA-approved TSCA
7 cleanup plan for PCBs at the Malibu Campus, on March 23, 2015, Plaintiffs
8 filed their Complaint, alleging TSCA violations based on claimed exceedances
9 of the 50 ppm TSCA regulatory threshold at several locations on the Malibu
10 Campus. First Amended Complaint, ¶¶ 2, 126. On April 1, 2015, Plaintiffs
11 filed their Motion for Preliminary Injunction, demanding that Defendants be
12 compelled to cordon off and remediate 15 classrooms with allegedly known
13 and verified locations of PCBs in excess of 50 ppm on the school campuses.
14 Plaintiffs' Motion for Preliminary Injunction, 2. Plaintiff's motion ignores the
15 fact that PCB exposures at the Malibu Campus pose no adverse human health
16 risk, and that Defendants *are already preparing to execute an EPA-approved*
17 *and -supervised plan to remove known and verified PCBs exceeding the 50*
18 *ppm TSCA regulatory threshold*. As stated above, the EPA-approved
19 removal from many of the classrooms will take place *before* the date requested
20 by Plaintiffs.

21 Plaintiffs' unnecessary, duplicative and burdensome request for
22 preliminary injunctive relief is not needed to keep students and staff at the
23 Malibu Campus safe and will not make them any safer. Ample testing,
24 required and approved by EPA, has already documented that PCB exposures
25 are safely below EPA health levels. Plaintiffs' request is nothing more than an
26 attempt to get this Court to overturn the directives and policy of EPA, the lead
27 agency already exercising its authority over PCB remediation under TSCA at
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1 both the Malibu Campus and schools across the country. Plaintiffs have not
2 alleged that EPA is failing to discharge its legal duty under TSCA. As such,
3 this Court should defer to EPA's legal execution of its directives and policy
4 under TSCA. Plaintiffs' request should be denied.

5 **III. PLAINTIFFS CANNOT BE GRANTED RELIEF THAT IS**
6 **OUTSIDE THE SCOPE OF PERMISSIBLE INJUNCTIVE**
7 **RELIEF UNDER TSCA**

8 As a preliminary matter, Plaintiffs are not eligible for the injunctive
9 relief they seek. First and foremost, under TSCA, Plaintiffs can only request
10 that exceedances be remediated, not that classrooms be vacated. TSCA only
11 allows for injunctive relief to halt ongoing or future TSCA violations. *See* 15
12 U.S.C. § 2619(a); *Mair v. City of Albany*, 303 F. Supp. 2d 237, 243 (N.D.N.Y.
13 2004); *Oil Re-Refining Co., Inc. v. Pacific Recycling, Inc.*, 75 ERC 1315, 2 (D.
14 Ore. 2012). It does not allow for the injunctive relief Plaintiffs request:
15 immediate evacuation of classrooms at the school which, in any case, are safe
16 for students and teachers to occupy. Indeed, Plaintiffs do not even request this
17 relief as a remedy in their First Amended Complaint. *See* First Amended
18 Complaint at 32. And here, even the TSCA relief Plaintiffs do request—
19 abatement of exceedances of the TSCA threshold—is unnecessary because
20 exceedances are *already* being addressed pursuant to an EPA-approved plan
21 according to which school buildings can be safely used in the interim.

22 Plaintiffs also are ineligible for injunctive relief that, in essence, asks
23 this Court to override EPA's policy interpretations of its own TSCA
24 regulations, as manifested both in EPA's national "PCBs in Schools" policy
25 and EPA's actions at the Malibu Campus specifically. EPA's policies and
26 interpretations established in the area of its particular expertise are accorded
27 significant judicial deference, and Plaintiffs have not even directly challenged
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1 them, let alone made the required showing that EPA’s interpretation of its
2 regulations is erroneous. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (an
3 agency’s interpretation of its own regulations through policy is accorded
4 deference unless its interpretation is “plainly erroneous”).

5 EPA has stated in no uncertain terms that “[a]n approval under TSCA
6 regulations in 40 C.F.R. 761.61(c) requires EPA to make a finding that PCB
7 remediation wastes remaining in place at the two schools will not pose an
8 unreasonable risk of injury to health or the environment. EPA is hereby
9 making a finding that the District meets this TSCA standard for Malibu High
10 School and Juan Cabrillo Elementary School.” Supp. Daugherty Decl., ¶8.
11 Requiring SMMUSD to vacate classrooms that have been deemed safe by
12 EPA while school is still in session is not only incredibly burdensome to
13 Defendants and disruptive to students and school staff, but would also directly
14 contradict EPA’s TSCA finding that the classrooms may be occupied and
15 PCB-containing materials may be safely managed in place until their
16 mandated removal. *Id.* at ¶¶8, 17, 30, 31, 44, 53.

17 Appropriate deference should be accorded to EPA’s policies, approvals,
18 and instructions issued within its expertise and exclusive jurisdiction to direct
19 and oversee TSCA cleanups. In fact, Plaintiffs do not challenge EPA’s actions
20 or policies in this action *at all*. This Court cannot take an action that would
21 have the effect of overturning national EPA policy with respect to PCBs in
22 schools when no challenge to that policy has even been mounted.

23 **IV. PLAINTIFFS CANNOT MEET THEIR BURDEN TO**
24 **ESTABLISH THAT A PRELIMINARY INJUNCTION SHOULD**
25 **BE GRANTED**

26 Furthermore, Plaintiffs cannot establish, as required by law, that (1)
27 they are likely to succeed on the merits; (2) they are likely to suffer irreparable
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1 harm in the absence of preliminary relief; (3) the balance of equities tips in
2 their favor; and (4) an injunction would be in the public interest. *Winter v.*
3 *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Pom*
4 *Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014). “[A]
5 preliminary injunction is an extraordinary and drastic remedy that should not
6 be granted unless the movant, **by a clear showing**, carries the burden of
7 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citing 11A C.
8 Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp.
9 129–130 (2d ed. 1995)) (emphasis in original).

10 Plaintiffs request a mandatory injunction to remove PCB-containing
11 materials at the Malibu Campus, a request that ““goes well beyond simply
12 maintaining the status quo *pendente lite* [and] is particularly disfavored.””
13 *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (citing
14 *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)). “In general,
15 mandatory injunctions ‘are not granted unless extreme or very serious damage
16 will result and are not issued in doubtful cases.’” *Marlyn Nutraceuticals v.*
17 *Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (quoting
18 *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)).

19 This Court should deny Plaintiffs’ request for mandatory injunction
20 because the facts and law **do not** ““clearly favor the moving party.”” *Stanley*,
21 13 F.3d at 1320 (quoting *Martinez*, 544 F.2d at 1243).

22 A. **Plaintiffs Cannot Establish a Likelihood of Success on the**
23 **Merits.**

24 ““It is particularly important for the [movant] to demonstrate a
25 substantial likelihood of success on the merits.’ If the movant fails to do so,
26 inquiry into the remaining factors is unnecessary, for the injunctive relief must
27 be denied on that ground alone.” *Haynes v. Navy Fed. Credit Union*, 841 F.
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1 Supp. 2d 221, 223 (D.D.C. 2012) (quoting *Barton v. District of Columbia*, 131
2 F. Supp. 2d 236, 242 (D.D.C. 2001)). Plaintiffs cannot establish a likelihood
3 of success on the merits for three reasons. First, EPA has primary jurisdiction
4 over PCB removal actions at the Malibu Campus and this Court should decline
5 to substitute its judgment for that of EPA in the area of its special competence.
6 Second, the controversy is moot because SMMUSD has already taken action,
7 under EPA direction and oversight, to cure all TSCA violations at the Malibu
8 Campus and EPA's approval mandates that such violations will not occur in
9 the future. Third, this Court lacks jurisdiction to hear Plaintiffs' claims
10 because Plaintiffs failed to provide sufficient notice pursuant to TSCA's notice
11 requirements under 40 C.F.R. § 702.62.

12 1. EPA has Primary Jurisdiction over PCB Removal.

13 This Court should defer to EPA's existing and ongoing exercise of
14 primary jurisdiction under TSCA to oversee and direct the Malibu Campus
15 PCB remediation. The purpose of the primary jurisdiction doctrine is
16 "protecting the administrative process from judicial interference," and courts
17 defer to the lead regulatory agency when, as here, "the enforcement of a claim
18 subject to a specific regulatory scheme requires resolution of issues that are
19 'within the special competence of an administrative body.'" *Boyes v. Shell Oil*
20 *Products Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000) (internal citations
21 omitted); *see also Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d
22 1365, 1370 (9th Cir. 1985). EPA has primary jurisdiction here because
23 TSCA—a regulatory scheme requiring uniform administration—places *sole*
24 authority to compel remediation of PCB wastes in EPA's hands. *See* 15
25 U.S.C. § 2601(c) (giving EPA sole regulatory authority under TSCA); 15
26 U.S.C. § 2605 (defining EPA's sole authority to promulgate regulations
27 governing the "manufacturing, processing, distribution in commerce or use" of
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1 chemical substances, including PCBs); 15 U.S.C. § 2617 (preemption
2 provision establishing primacy of EPA regulations designed “to protect
3 against a risk of injury to health or the environment” from regulated chemicals
4 like PCBs); *see also United States v. General Dynamics Corp.*, 828 F.2d 1356,
5 1362 (9th Cir. 1987) (an agency has primary jurisdiction if authority over the
6 issue in question has been given pursuant to a regulation that “subjects an
7 industry or activity to a comprehensive regulatory scheme that requires
8 expertise or uniformity in administration”).

9 EPA, the lead agency with authority to require remediation of PCBs
10 under TSCA, has already approved a remediation plan for the Malibu Campus
11 that not only addresses identified PCB contamination but provides for
12 mandatory best management practices that will eliminate the potential for
13 future TSCA violations. Supp. Daugherty Decl., ¶3. EPA’s expertise in this
14 area is clear. EPA oversees PCB remediation in schools across the nation and
15 has adopted a “PCBs in Schools” policy that sets uniform health levels for
16 PCB exposures to children and others in school buildings. *Id.* at ¶16. These
17 policies and practices have not only been utilized by EPA in schools
18 nationally, but are emulated in the policy documents of other governmental
19 agencies as well. For example, the State of Washington’s Department of
20 Ecology (subject to deference to EPA in areas of exclusive jurisdiction, such
21 as removal/abatement of TSCA violations) recently released a plan for PCB
22 management in schools consistent with EPA’s management in place policies.
23 *Id.* at ¶32. SMMUSD has consistently acted at EPA’s direction and has
24 secured EPA’s approval in two letters issued in August 2014 and October
25 2014 for plans to remove specific known and verified locations of PCBs above
26 50 ppm within a set timeframe, and for plans to manage in place PCB
27 materials at the school, which do not pose any adverse health risk. *Id.* at ¶3.
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1 Courts decline involvement where, as here, agencies are already
2 engaged in remediation because in such cases, court involvement “would
3 represent a serious drain of judicial resources and would largely duplicate the
4 past and present efforts” of the agency. *Friends of Santa Fe County v. LAC*
5 *Minerals, Inc.*, 892 F. Supp. 1333, 1350 (D.N.M. 1995). It is only when
6 agencies shirk involvement that courts step in. *See, e.g., New York*
7 *Communities for Change v. New York City Dept. of Educ.*, 2013 WL 1232244,
8 *7 (E.D.N.Y. Mar. 26, 2013); *Mississippi Power & Light Co. v. United Gas*
9 *Pipe Line Co.*, 532 F.2d 412, 420 (5th Cir. 1976). Far from abdicating its
10 authority at the Malibu Campus, EPA has been involved in oversight of
11 SMMUSD’s response to the presence of PCB materials at the Malibu Campus
12 for over a year and has “acted with deliberate care and diligence,” formally
13 approving a remediation plan that includes stringent and mandatory
14 benchmarks SMMUSD must meet. *See Friends of Santa Fe County*, 892
15 F.Supp. at 1350; Supp. Daugherty Decl., ¶3. EPA has worked actively and
16 consistently to enforce TSCA at the Malibu Campus. Again, it is notable that
17 Plaintiffs have *never* challenged any of the numerous oversight actions EPA
18 has taken at the Malibu Campus, including EPA’s approval of a remediation
19 plan for known and verified exceedances of the 50 ppm TSCA threshold for
20 PCBs. SMMUSD is acting precisely according to EPA’s directives, exercised
21 under EPA’s exclusive PCB remediation authority, and Plaintiffs overlook the
22 fact that even if the relief they request were granted, EPA would need to
23 approve that removal process under TSCA, duplicating the preexisting efforts
24 of the agency. Supp. Daugherty Decl., ¶11; 40 C.F.R. § 761.61.

25 Plaintiffs’ lawsuit puts the Court in the unwanted position of potentially
26 issuing an order that conflicts with EPA’s decisions in directing and
27 overseeing the remediation of the Malibu Campus. This is a particular
28

1 problem because Plaintiffs seek not only to require removal of certain PCB-
2 containing materials, but also to compel the immediate cordoning off of
3 classrooms that EPA has already determined, pursuant to TSCA, are safe.
4 This would disregard EPA's role as the statutory oversight agency for the
5 TSCA remediation at the Campus, acting in the area of its special competence,
6 and instead substitute the Court as the supervising entity, a role in which the
7 Court would be asked to require *the same types of cleanup activities EPA is*
8 *already requiring and overseeing.*

9 2. Plaintiffs' Claims are Moot because the Remedies Sought
10 are Already Mandated by EPA.

11 Federal courts lack jurisdiction to consider a moot claim. "If there is no
12 longer a possibility that [a party] can obtain relief for his claim, that claim is
13 moot and must be dismissed for lack of jurisdiction." *Ruvalcaba v. City of Los*
14 *Angeles*, 167 F.3d 514, 521 (9th Cir. 1999). Here, there is no "present
15 controversy as to which effective relief can be granted." *Serena v. Mock*, 547
16 F.3d 1051, 1053 (9th Cir. 2008) (*quoting Feldman v. Bomar*, 518 F.3d 637,
17 642 (9th Cir. 2008)). Because the injunctive relief sought by the Plaintiffs—
18 *i.e.*, evacuation of 15 classrooms and immediate removal and disposal of
19 materials in those classrooms known and verified to contain PCBs in excess of
20 regulatory threshold of 50 ppm—is not necessary in light of the ongoing EPA-
21 supervised TSCA remediation, "the relief sought can no longer be given or is
22 no longer needed" and the case is moot. *N.M. Env't Dep't v. Foulston (In re*
23 *L.F. Jennings Oil Co.)*, 4 F.3d 887, 889 (10th Cir. 1993).

24 When remedial efforts are ongoing, a controversy related to that
25 remediation is moot. *See, e.g., City of Fresno v. United States*, 709 F. Supp.
26 2d 888 (E.D. Cal. 2010); *Davis Bros. Inc. v. Thornton Oil Co.*, 12 F. Supp. 2d
27 1333, 1338 (M.D. Ga. 1998). SMMUSD is already acting in accordance with
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1 an approved and mandatory EPA plan to remove and dispose of known and
2 verified building materials containing PCBs in excess of 50 ppm. Supp.
3 Daugherty Decl., ¶4. Four such locations were identified during 2014
4 sampling events, and those classrooms will be remediated, pursuant to EPA’s
5 approval, no later than June 30, 2015—***a full month before the date requested***
6 ***by Plaintiffs***. *Id.* In addition, consistent with EPA’s binding approval,
7 SMMUSD has committed to removing all other currently known and verified
8 exceedances of the TSCA threshold for PCBs in building materials by March
9 2016. *Id.* Any removal at those locations that cannot be accomplished during
10 the summer 2015 school break will occur during subsequent school breaks,
11 when students and staff are not in classrooms. EPA’s October 2014 TSCA
12 approval guarantees that the Malibu Campus remains safe for students and
13 staff until that removal occurs. *Id.* at ¶8. Accordingly, the injunctive relief
14 sought by Plaintiffs is unnecessary.

15 3. The Court Lacks Jurisdiction to Hear Plaintiffs’ Claims
16 because Plaintiffs Did Not Properly Notice Their Claims
17 under 40 C.F.R. § 702.62.

18 Additionally, Plaintiffs did not properly notice their claims under 40
19 C.F.R. §§ 702.61 and 702.62. Thus, the court lacks jurisdiction to hear them.
20 *See Northern California River Watch v. Honeywell Aerospace*, 830 F. Supp.
21 2d 760, 765 (N.D. Cal. 2011); Fed. R. Civ. P. 12(b)(1).

22 TSCA provides that, prior to filing suit, an alleged violator must be
23 given 60 days prior notice to remedy alleged violations of the Act. 40 C.F.R.
24 § 702.61(a). In relevant part, this notice “shall include sufficient information
25 to permit the recipient to identify . . . the location of the alleged violation.” 40
26 C.F.R. § 702.62. The purpose of this notice requirement is “to afford
27 government regulators an opportunity to act with respect to the violation and
28

1 to give the violators an opportunity to comply with the law.” *New York*
2 *Communities for Change v. New York Dept. of Educ.*, 2012 WL 7807955, *11
3 (E.D.N.Y. Aug. 29, 2012). Notice that does not provide a defendant enough
4 information to identify the problem and correct it is insufficient under TSCA.
5 *Id.* Simply naming a general area where a violation is located is not enough;
6 reasonable specificity must be provided. *Chesapeake Bay Foundation, Inc. v.*
7 *Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 622 (D. Md. 2011).

8 Plaintiffs have only described the rooms at the Malibu Campus
9 allegedly containing TSCA violations, but not the actual locations within each
10 room alleged to contain actionable PCB levels. These general, unspecified
11 allegations—based on Plaintiffs’ “independent” sampling illegally taken
12 during a trespass of school property and not overseen or authorized by EPA or
13 SMMUSD—make it impossible for SMMUSD to know exactly which areas in
14 each room might require remediation. Moreover, SMMUSD’s extensive
15 sampling and testing data showed no PCB exposures documented by air or
16 wipe samples in many of the same rooms Plaintiffs alleged violations. Even
17 where SMMUSD could verify, as approved by EPA, that PCBs were present
18 in some building materials in the classrooms, SMMUSD’s testing results did
19 not match Plaintiffs’ results. Further, SMMUSD’s environmental consultants
20 observed so many potential sampling locations—in the form of missing caulk
21 and other building materials—that it is impossible to tell where Plaintiffs had
22 sampled. Supp. Daugherty Decl., ¶35. Plaintiffs’ supporting declarations,
23 which extensively discuss the “independent” sampling Plaintiffs conducted,
24 never once explain how samples were collected, detail the precise locations
25 from which samples were taken, or establish any chain of custody for the
26 samples. *Id.* at ¶34; *see, e.g.*, Rosenfeld Decl., ¶¶22-28; DeNicola Decl.,
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1 ¶¶18-22. Notably, the declarants also fail to mention that the samples were
2 collected illegally.

3 Defendants requested additional information from Plaintiffs on three
4 separate occasions to attempt to locate alleged TSCA violations and remediate
5 them. In every case, Plaintiffs have refused to reveal the locations from which
6 they or their unidentified agent allegedly took their unauthorized samples at
7 the Malibu Campus. Instead of aiding SMMUSD by providing specific
8 information that could have led to additional cleanup at the Malibu Campus
9 while avoiding disruption to students and staff, Plaintiffs decided to file this
10 lawsuit.

11 Despite good faith efforts, SMMUSD cannot remediate every alleged
12 violation if Plaintiffs ignore TSCA’s notice requirements, undermining the
13 very purpose of TSCA’s notice provisions. *See New York Communities for*
14 *Change*, 2012 WL 7807955. The Court lacks jurisdiction to consider these
15 improperly noticed claims.

16 **B. Plaintiffs Cannot Demonstrate They Will Suffer Irreparable**
17 **Harm if the Court Does Not Grant the Preliminary**
18 **Injunction.**

19 Plaintiffs cannot show that they will suffer irreparable harm if the
20 preliminary injunction they request is not granted. Mandatory injunctions
21 such as the one Plaintiffs seek are “particularly disfavored” and are not
22 granted “unless extreme or very serious damage will result.” *Anderson*, 612
23 F.2d at 1115. Where there is any doubt as to whether irreparable harm will
24 occur, a mandatory injunction must be denied. *Id.* Here, not only have
25 Plaintiffs failed to prove that any irreparable harm will occur in the absence of
26 a preliminary injunction, the available evidence clearly shows that irreparable
27 harm *will not* occur.

28

1 Plaintiffs claim that students and staff at the Malibu Campus will suffer
 2 irreparable harm if their motion is not granted, but this is not true. EPA has
 3 determined on multiple occasions, based upon a very large data set, that the
 4 buildings at the Malibu Campus meet EPA’s health-protective standards with
 5 respect to PCB exposures, and are safe for occupation.¹ Supp. Daugherty
 6 Decl., ¶¶3, 5, 7, 8. EPA’s October 2014 TSCA approval indicates the PCB
 7 materials remaining at the school are safe to remain in place with continued
 8 implementation of health-protective best management practices. *Id.* at ¶8.
 9 EPA has mandated such best management practices for school safety and
 10 SMMUSD is implementing them. *Id.* at ¶¶4, 9, 10. SMMUSD will continue
 11 implementing these health-protective best management practices until the
 12 buildings at issue are renovated or demolished. *Id.* at ¶¶4, 10.

13 If it were not enough that EPA has deemed the Malibu Campus safe for
 14 students and staff, ***SMMUSD itself already plans to undertake the very***
 15 ***removal Plaintiffs seek to require through preliminary injunction***—on a
 16 timetable approved by EPA and arranged to cause as little disruption to the
 17 school year and the learning and working environments of students and staff
 18 as possible. Several of the known and verified locations of PCBs in excess of
 19 50 ppm will be removed prior to June 30, 2015, and any that remain will be
 20 safely removed over school breaks in 2015 and early 2016. ***Every*** existing
 21 verified location of PCBs in excess of 50 ppm discovered to date will be
 22 removed no later than March 2016. Supp. Daugherty Decl., ¶4. SMMUSD is

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 24 ¹ Nevertheless, Plaintiffs include several declarations from teachers and parents
 25 citing suspicions and unsubstantiated concerns about health risks at the Malibu
 26 Campus, including a few claiming or suggesting that cancer occurrences,
 27 headaches and other unspecified health problems were somehow “caused” by
 28 PCBs in building materials. Notably, none of the declarations provides a ***single*** bit
 of evidentiary or scientific support for these completely unfounded allegations, and
 indeed, EPA’s conclusion has been that actual PCB exposure levels at the Malibu
 Campus are well within safe limits. Supp. Daugherty Decl., ¶¶8, 25-29, 30.

1 already required, during that time frame and beyond, to adhere to best
2 management practices mandated by EPA that will ensure PCB exposures at
3 the Malibu Campus do not pose any adverse health risk.

4 Even Plaintiffs' own expert cannot establish that there is any threat of
5 harm that would require an acceleration of the remedial timeframe past what
6 EPA has already approved. Supp. Daugherty Decl., ¶¶12, 13. Dr.
7 Rosenfeld's declaration only states that PCBs accumulate in the body over
8 time, and therefore longer exposure times could potentially lead to adverse
9 health effects. Rosenfeld Decl., ¶46. However, Dr. Rosenfeld provides no
10 data or calculations demonstrating any accumulation of PCBs in students or
11 staff at the Malibu Campus. Supp. Daugherty Decl., ¶13. Neither Dr.
12 Rosenfeld's declaration, nor any other of Plaintiffs' supporting declarations or
13 Plaintiffs' moving papers, explain why the planned remediation that is
14 occurring on an EPA-approved timeframe would lead to irreparable harm, or
15 how an earlier remediation would reduce or eliminate such harm. *Id.* at ¶¶13-
16 15. Finally, Dr. Rosenfeld's declaration fails to even explain the route of
17 exposure by which the population would be exposed to PCBs in window
18 caulk. *Id.* at ¶13.

19 And indeed, assuming any exposure were to occur, there is no harm
20 from remediating on EPA's approved timeframe. "Because PCBs accumulate
21 over such long averaging times, short term exceedances of the levels will
22 likely cause only small changes to human blood concentrations, and these can
23 be offset by other periods of exposure to lower air levels." Supp. Daugherty
24 Decl., Exhibit 2. In other words, EPA has found that even when air
25 concentrations of PCBs exceed health risk levels—which they do not at the
26 Malibu Campus—adverse health effects from such short term exceedances are
27 highly unlikely. At the Malibu Campus, *air concentrations of PCBs are*
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1 ***below health risk levels***, meaning that the already miniscule potential for harm
2 from PCB exposures is reduced to insignificance. *Id.* at ¶16. This is a reality
3 EPA recognized when it issued its TSCA approval and confirmed that
4 classrooms on the Malibu Campus are safe and should be accessible to
5 students and staff. There is no reason why remediation needs to occur any
6 sooner than on the timeframe approved by EPA, which already slates removal
7 to begin over the 2015 summer break. Plaintiffs have not shown that any
8 harm will result from performing remediation on EPA’s existing approved
9 timetable, and indeed, forcing earlier work will only cause disruption to
10 SMMUSD students, teachers, and staff. *Id.* at ¶¶13-15. This may not matter
11 to Plaintiffs, but it is of critical importance to SMMUSD and the families it
12 serves.

13 Even if there were somehow a hypothetical risk of PCB exposures at the
14 school, this would not be enough to constitute irreparable harm to support a
15 preliminary injunction. Plaintiffs “must demonstrate ***immediate*** threatened
16 injury as a prerequisite to preliminary injunctive relief.” *Caribbean Marine*
17 *Service Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis added).
18 “Mere threatened, speculative harm, without more, does not amount to
19 irreparable injury for purposes of justifying preliminary injunctive relief such
20 as that sought by plaintiffs.” *Chemical Weapons Working Group Inc. v. U.S.*
21 *Dept. of Army*, 935 F. Supp. 1206, 1215 (D. Utah 1996) (irreparable injury
22 could not be shown when plaintiffs could not demonstrate that “any plaintiff,
23 or any person at all, would ***in fact*** be placed at risk by the projected dioxin
24 emissions” associated with incineration of a chemical weapons agent)
25 (emphasis added). Plaintiffs have not made any showing that any individual at
26 the Malibu Campus would be exposed to PCBs in excess of EPA’s health-
27 protective thresholds. Indeed, safe levels have already been demonstrated
28

1 through extensive air and wipe sampling conducted by SMMUSD. Imagining
2 that harmful conditions might exist, with no basis in fact for that assertion,
3 does not meet Plaintiffs' burden to show irreparable harm.

4 Simply put, Plaintiffs will experience no irreparable harm if the
5 preliminary injunction is not granted. To the contrary, students and staff will
6 remain safe per EPA's directives and removal activities will be undertaken as
7 EPA has already mandated.

8 **C. The Equities Weigh Against Issuing a Preliminary Injunction.**

9 "The less certain...the likelihood of success on the merits, the more
10 plaintiffs must convince the district court that the public interest and balance
11 of hardships tip in their favor." *Southwest Voter Registration Educ. Project v.*
12 *Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). Plaintiffs' burden is
13 greater still because "[t]he basic function of a preliminary injunction is to
14 preserve the status quo pending a determination of the action on the merits,"
15 but the mandatory injunction Plaintiffs seek does not aim to preserve the status
16 quo. *Chalk v. United States Dist. Court Cent. Dist of Cal.*, 840 F.2d 701, 704
17 (9th Cir. 1988). Thus, the balance of hardships tips strongly against Plaintiffs.

18 The injunctive relief Plaintiffs seek imposes great burden on SMMUSD,
19 and for no reason. Buildings at the Malibu Campus are already safe for
20 students and staff, as confirmed by EPA and as categorically proven through
21 air and wipe sampling. Supp. Daugherty Decl., ¶¶5, 8, 9. EPA has already
22 approved the planned remediation under TSCA, and removal activities have
23 already been scheduled. Where, as here, an application for injunctive relief
24 seeks remediation but plans for remediation are already underway, injunctive
25 relief is inappropriate. *See Rococo Assocs., Inc. v. Award Packaging Corp.*,
26 803 F. Supp. 2d 184, 191-92 (E.D.N.Y. 2011) (where the state environmental
27 agency was already overseeing cleanup of a hazardous waste spill, injunctive
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1 relief requiring immediate remediation of the spill “would do nothing to
2 improve” the situation and was not granted).

3 EPA has already required removal of specific verified locations where
4 PCB concentrations in building materials exceed 50 ppm by June 30, 2015.
5 The remaining verified locations will be remediated no later than March 2016,
6 pursuant to EPA’s mandate. Supp. Daugherty Decl., ¶4. Plaintiffs, however,
7 ask not only to accelerate removal activities, but to remove students from the
8 classrooms immediately. To do so during the final few weeks of the school
9 year would not only run contrary to EPA’s directives and TSCA approval, but
10 would result in great expense to SMMUSD and significant disruption to
11 students and staff for no reason. To avoid this unnecessary expense and
12 inconvenience, EPA mandated that removal of known and verified locations
13 where PCB concentrations exceed 50 ppm could begin over the 2015 summer
14 break, when students and staff are away from school.

15 There is no benefit in requiring removal activities prior to the already-
16 scheduled removal. Supp. Daugherty Decl., ¶¶13-15. Air sampling is the
17 recommended method to evaluate potential health risks in classrooms after the
18 removal of PCB materials Plaintiffs seek by their motion. *Id.* at ¶ 30.
19 Numerous air and wipe samples have **already** shown the buildings are safe for
20 occupancy. *Id.* at ¶¶39-42, 44. Indeed, air sampling—the benchmark to
21 measure PCB exposures given that inhalation is a primary exposure
22 pathway—shows exposures in many classrooms are below detection
23 levels. *Id.* at ¶¶40, 42. This is already as good as or better than the result
24 Plaintiffs would be seeking in compelling the removal of PCB materials (i.e.,
25 air sampling levels safely below EPA’s health thresholds for schools).

26 Safe air levels **already exist** at the Malibu Campus and EPA has already
27 approved the buildings for occupancy under TSCA. Requiring immediate
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1 removal of students from the classroom and accelerated removal of PCB
2 materials at great expense to obtain the same exposure data that sampling has
3 already shown and EPA has already approved is not equitable and benefits no
4 one. As such, the equities weigh strongly against issuance of a preliminary
5 injunction.

6 **D. The Public Interest Does Not Support Issuance of a**
7 **Preliminary Injunction.**

8 The public interest is not served by seeking unnecessary court
9 involvement in a remediation that is already managed by EPA, the lead agency
10 with jurisdiction over TSCA. “There is a public interest in deferring to state
11 or regulatory agencies...in matters for and as to which they have actual
12 knowledge or particular expertise.” *Tri-Realty Co. v. Ursinus Coll.*, 2013 WL
13 5298469, *12 (E.D. Pa. Sept. 19, 2013) (citing *Del. River Port Auth. v.*
14 *Transam. Trailer Transp.*, 501 F.2d 917, 923–24 (3d Cir. 1974)). Here, EPA
15 not only has knowledge and particular expertise with respect to PCBs in
16 schools, but has been granted sole authority under TSCA to enact regulations
17 with respect to PCB use.² Taking this matter out of EPA’s capable hands
18 when it has been actively involved not only in the oversight of SMMUSD but
19 at other schools nationwide, and has in place specific policies and procedures
20 to deal with these very issues, is contrary to the public interest. Beyond that, it
21 would demonstrate an inappropriate lack of deference to the agency’s policies
22 and interpretations of its regulations. *See Auer*, 519 U.S. at 461.

23
24 _____
25 ² EPA’s policy with respect to PCBs in schools is entirely consistent with the
26 management of other building material contaminants, both in schools and other
27 buildings, regulated under TSCA. For example, both asbestos and lead paint, though
28 toxic, can be safely managed in place pursuant to federal regulations with periodic
inspections to determine that unsafe exposures do not occur. 15 U.S.C. § 2685; 40
C.F.R. § 745.227; 40 C.F.R. § 763.93.

1 Finally, granting this preliminary injunction would subject the District
2 to unnecessary financial burden when EPA has already determined PCB
3 exposures do not present an adverse health risk at the Malibu Campus and
4 removal activities are already scheduled in the coming months, and subverts
5 judicial economy by unnecessarily wasting the Court's time and resources.
6 There is no public interest in issuing the requested preliminary injunction.

7 **V. CONCLUSION**

8 For the reasons stated above, Defendants respectfully request that this
9 Court deny Plaintiffs' motion for preliminary injunction.

10
11 Dated: April 13, 2015

Respectfully Submitted,

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