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14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA  
16 WESTERN DIVISION

17 AMERICAN UNITES FOR KIDS, et  
18 al.,

19 Plaintiffs,

20 vs.

21 SANDRA LYON, et al.,

22 Defendants.

No. 2:15-CV-02124-PA-AJW

**DEFENDANTS' REPLY IN  
SUPPORT OF AMENDED  
MOTION TO DISMISS, OR, IN  
THE ALTERNATIVE, STAY**

Date: June 8, 2015

Time: 1:30 p.m.

Dept: 15

Judge: Anderson

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1 I. INTRODUCTION

2 Plaintiffs' opposition provides no legal or factual bases to conclude that  
3 its First Amended Complaint "contains sufficient factual matter, accepted as  
4 true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*,  
5 556 U.S. 662, 677 (2009) (internal citations omitted). The opposition  
6 misapprehends the requirements of TSCA, ignores the true nature of this  
7 dispute, and fundamentally misstates the legal bases on which TSCA  
8 mandates PCB remediation. TSCA's regulations mandate remediation of  
9 materials known to contain an excess of 50 ppm of PCBs, but on its face and  
10 as applied by EPA, TSCA does not require investigation for such materials.<sup>1</sup>  
11 Defendants concede that PCB exceedances have been located and verified at  
12 the Malibu Campus, but even Plaintiffs cannot dispute that Defendants  
13 *already* have a plan in place to remediate every single one of these  
14 exceedances before the start of the 2015-2016 school year.

15 Yet, Plaintiffs are not satisfied with this plan. They have ignored the  
16 ongoing TSCA-authorized remediation occurring under EPA oversight. They  
17 have engaged Defendants in litigation even though round after round of testing  
18 shows the Malibu Campus is safe irrespective of the potential presence of  
19 PCBs in caulk. Recognizing that TSCA does not require more than the  
20 removal of materials verified to contain PCBs in excess of 50 ppm, Plaintiffs  
21 want this Court to effectively amend TSCA's requirements and order  
22 Defendants to abate caulk that they contend may contain PCBs, on the sole  
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24 <sup>1</sup> Plaintiffs assert that Defendants claim "even if they violate EPA's regulatory  
25 threshold of 50 ppm...there is nothing to enforce under TSCA as long as they are  
26 meeting EPA's suggested guidelines for air concentrations." Plaintiffs' Opposition  
27 ("Oppn."), \*4. But Defendants have always acknowledged that verified  
28 exceedances of the 50 ppm threshold must be remediated, and have instituted a  
plan for that removal. Plaintiffs are asking this Court to read into TSCA a  
requirement to undertake an exhaustive hunt for and removal of PCBs. This is not  
what TSCA mandates.

1 basis that some of the untested caulk at the Malibu Campus was installed  
2 around the same time as caulk that has tested positive for PCBs.<sup>2</sup> Even  
3 assuming the most favorable interpretation of facts in Plaintiffs' favor, *this*  
4 *remedy is not required or even sanctioned by TSCA.*

5 TSCA, in fact, creates no obligation to test or remediate when there are  
6 only unconfirmed assumptions that PCBs may be present. TSCA and its  
7 implementing regulations contain no language, let alone affirmative mandates,  
8 to cover that scenario. For precisely that reason, EPA has built up a  
9 significant body of policy interpreting the TSCA regulations with respect to  
10 PCBs, and even more specifically, with respect to PCBs in schools. Because  
11 the 50 ppm threshold was adopted for economic, not health-based, reasons,<sup>3</sup>  
12 EPA's policy is that when there is a suspicion that PCBs may be present, a  
13 school should first test for air and dust exposures, instead of undertaking  
14 source testing and removal when there may be no health risk to school  
15 occupants. When exposures fall below EPA's health-based levels, EPA  
16 recommends that PCB-containing materials be managed in place—even if it is  
17 possible that some of those materials, if tested, would be found to exceed the  
18 TSCA threshold of 50 ppm. This policy is applied at schools across the

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19  
20 <sup>2</sup> Plaintiffs claim that they do not seek comprehensive source testing of building  
21 materials at the school as a remedy. However, because there are no verified TSCA  
22 exceedances that are not already scheduled for remediation, comprehensive source  
23 testing would be a necessary first step to implement Plaintiffs' requested remedy,  
24 the identification and removal of additional building materials at the school that  
25 may contain PCBs in excess of 50 ppm. As discussed in Defendants' opening  
26 brief and in further detail below, such testing is not required by TSCA or EPA, and  
27 EPA has specifically stated no such testing is needed at the Malibu Campus.

28 <sup>3</sup> Plaintiffs dispute this in their papers, but the Federal Register announcing the  
original final TSCA PCB rules indicates otherwise. 44 Fed. Reg. 31514 (May 31,  
1979). EPA again acknowledged in a 2010 Federal Register notice on TSCA  
regulations: "The level of 50 ppm has been used in PCB use regulations since  
1979. Based on regulatory history, this number is based almost entirely on  
economic considerations. There are no traditional exposure and risk assessment  
calculations." 75 Fed. Reg. 17645-01, 17658 (Apr. 7, 2010). EPA reiterated this  
point in its January 27, 2014 letter to SMMUSD.

1 nation, including the Malibu Campus. Similar “manage in place” programs  
2 exist under TSCA for lead paint and asbestos. *See* 40 C.F.R. § 745.226; 40  
3 C.F.R. § 763.93.

4         Simply put, Defendants have already committed to remediating all the  
5 TSCA violations they have verified, including those raised in Plaintiffs’ notice  
6 of intent to sue under TSCA. The remediation will be entirely complete by  
7 August 2015. That remediation is what TSCA requires. Yet Plaintiffs are  
8 asking for more relief than TSCA legally provides: a complete investigation of  
9 the school to try to seek out and abate more possible violations. This relief is  
10 not available under TSCA, and represents a course of action EPA has never  
11 recommended at the Malibu Campus. There is no path for Plaintiffs to legally  
12 obtain the relief they seek under TSCA, even if *all* facts alleged in their First  
13 Amended Complaint are taken as true. Granting Plaintiffs’ requested relief  
14 would go far beyond TSCA and upset EPA policy that is applied nationally  
15 and at the Malibu Campus.

## 16 II. ARGUMENT

### 17 A. The Doctrine of Primary Jurisdiction Applies at the Malibu 18 Campus

19         Contrary to Plaintiffs’ suggestion that the doctrine of primary  
20 jurisdiction cannot apply in the instant suit because TSCA contains a citizen  
21 suit provision, the existence of a citizen suit provision does not automatically  
22 bar the application of the doctrine. *See, e.g., Friends of Santa Fe County v.*  
23 *LAC Minerals, Inc.*, 892 F. Supp. 1333, 1350 (D.N.M. 1995); *Montgomery*  
24 *Env’t Coalition Citizens Coord. Comm. v. Washington Suburban Sanitary*  
25 *Comm’n*, 607 F.2d 378 (D.C. Cir. 1979) (where an issue regarding discharge  
26 of sewage flows under the Clean Water Act was already the subject of an EPA  
27 proceeding, primary jurisdiction barred a citizen suit); *see also Maine People’s*  
28

1 *Alliance v. Holtrachem Mfg. Co., LLC*, 211 F. Supp. 2d 237, 255 (D. Me.  
2 2002) (while the court could require a study of contamination under the Clean  
3 Water Act to weigh remediation alternatives, “primary jurisdiction concerns  
4 could arise in the future” if the relevant government agencies made a “formal  
5 conclusion” that cleanup options were “impractical or risky”).

6 The doctrine can and does apply here. Where the subject matter at bar  
7 “requires resolution of issues that are ‘within the special competence of an  
8 administrative body,’” a court may dismiss or stay the action. *See Farley*  
9 *Transp. Co., Inc. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir.  
10 1985) (internal citations omitted). “The advisability of invoking primary  
11 jurisdiction is greatest when the issue is already before the agency.”

12 *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 420  
13 (5th Cir. 1976). The issue is, indeed, already before EPA. EPA has provided  
14 constant oversight and approvals where they are statutorily required, and has  
15 acted in conformity with the regulations it devised for management and  
16 remediation of PCB-containing materials. 40 C.F.R. §§ 761.61, 761.62.

17 *Friends of Santa Fe County v. LAC Minerals* is not inapposite.  
18 Plaintiffs have engaged EPA on the issues raised in the FAC in public and  
19 through copious correspondence. EPA has concurred with SMMUSD’s plans  
20 to implement a self-executing cleanup of caulk as required by TSCA, and has  
21 issued a formal approval for management of PCB remediation wastes,  
22 containing myriad requirements SMMUSD must implement. EPA continues  
23 to exercise regulatory oversight, overseeing this summer’s planned removal  
24 activities and mandating continued best management practices at the Malibu  
25 Campus. Just like in *Friends of Santa Fe County*, court involvement here  
26 “would represent a serious drain of judicial resources and would largely  
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1 duplicate the past and present efforts” of the agency. *Friends of Santa Fe*  
2 *County*, 892 F. Supp. at 1350.

3 EPA has not relinquished its authority over PCB cleanups simply  
4 because it anticipated the need for PCB remediation projects and provided a  
5 self-executing regulatory program for remediation under its oversight that the  
6 regulated public can follow with lessened scrutiny of interim activities.

7 Further, as discussed below, TSCA itself does not provide for the removal of  
8 PCBs, and EPA’s TSCA-implementing regulations do not require an  
9 exhaustive search of school buildings to identify and remove PCBs. *See, e.g.*,  
10 15 U.S.C. § 2605(e). Instead, EPA exercised its discretion to promulgate its  
11 PCBs in schools policy: if air and wipe exposures remain below health-based  
12 triggers, no testing or removal of building materials need occur. EPA has  
13 specifically applied this policy at the Malibu Campus. RJN, Exh. A-D.

14 Plaintiffs also incorrectly claim that this Court “has rejected this  
15 argument [of primary jurisdiction] before.” Oppn., \*6. In its May 8, 2015  
16 order denying Plaintiffs’ preliminary injunction motion, this Court expressed  
17 concern that EPA had not issued an order or formal approval with respect to  
18 PCB-containing caulk, formally approving only SMMUSD’s plans to deal  
19 with PCB remediation waste. Docket No. 47, \*4. As explained in  
20 Defendants’ opening brief, and ignored by Plaintiffs’ opposition, EPA did not  
21 need to issue a formal approval because removal of verified PCB-containing  
22 caulk, classified as “bulk product waste,” is required and self-executing under  
23 TSCA’s regulations. 40 C.F.R. §§ 761.3, 761.62. In fact, EPA has recognized  
24 that classifying materials as bulk product waste can help to streamline removal  
25 and disposal due to the lack of formal approval process, a boon “in schools or  
26 other locations where such PCB-contaminated building materials are currently  
27 in place.” 77 Fed. Reg. 12293-01, 12294 (Feb. 29, 2012). The self-executing  
28

1 nature of the bulk product waste regulations does not make them any less  
2 mandatory than a formal EPA order, but does allow for comparatively faster  
3 removal when caulk containing more than 50 ppm PCBs is verified. As  
4 discussed in the opening brief, the removal of verified PCB exceedances and  
5 the management of PCB remediation waste are not two divorced actions; they  
6 are inextricably tied together, and part and parcel of the single remediation  
7 action Defendants have undertaken and EPA has approved and is overseeing.

8       Because removal of verified PCB-containing material over 50 ppm is  
9 mandatory, when EPA was made aware, in December 2013, of the few  
10 verified TSCA exceedances in caulk at the Malibu Campus, it did require, in  
11 its January 2014 letter, that SMMUSD prepare a plan for removal and disposal  
12 of the caulk. RJN, Exh. B. SMMUSD did prepare a removal plan. Because  
13 there is no mechanism for formal approval of such a plan under the self-  
14 executing TSCA regulations, which EPA acknowledged in its October 2014  
15 approval, EPA instead offered its concurrence with the plan in its August 2014  
16 letter to SMMUSD. RJN, Exh. C. In accordance with, and in fact, ahead of  
17 the schedule proposed by that plan, all verified TSCA exceedances at the  
18 Malibu Campus will be remediated by August 2015. SMMUSD has already  
19 informed EPA of its removal schedule; EPA will oversee the removal process  
20 and will be presented with data regarding the removal before the start of the  
21 next school year.

22       Once the verified caulk containing more than 50 ppm PCBs is removed,  
23 building materials remaining in place onto which PCBs may have leached are  
24 considered remediation wastes. 40 C.F.R. §§ 761.3, 761.61. As required by  
25 TSCA regulations, EPA has issued a formal approval requiring the continued  
26 implementation of health-protective best management practices, and a finding  
27 that no unreasonable risk is posed by leaving these materials in place—even if  
28

1 it is possible some of them may contain PCBs in excess of 50 ppm—until such  
2 time as the buildings at the Malibu Campus are renovated or demolished. 40  
3 C.F.R. § 761.61(c); RJN, Exh. D.

4 In sum, EPA has concurred with SMMUSD’s plan to remove all caulk  
5 exceeding the TSCA threshold this summer, and EPA’s formal approval  
6 covers the building materials remaining in place after this summer’s removal  
7 activities are complete. EPA’s TSCA approval affirms EPA’s national policy  
8 that materials potentially containing PCBs over the 50 ppm threshold can be  
9 safely managed in place when their PCB content has not been verified,  
10 exposure data shows there is no unreasonable health risk, and best  
11 management practices have been implemented to ensure exposures do not  
12 occur in the future. SMMUSD has committed to strictly follow EPA’s  
13 mandates and TSCA’s self-executing regulations. Defendants are already  
14 providing *exactly* the scope and type of remedy TSCA allows, pursuant to  
15 *exactly* the approvals EPA is empowered to give. This Court’s involvement is  
16 unnecessary given the high level of EPA oversight in its area of expertise, and  
17 runs the risk of producing an order inconsistent with the management in place  
18 policies mandated by EPA’s formal approval to SMMUSD.

19 **B. Plaintiffs’ Case is Moot**

20 Regardless of whether EPA’s primary jurisdiction extends beyond  
21 management of remediation wastes to potential PCB-containing caulk at the  
22 Malibu Campus, the controversy at hand is moot and should be dismissed on  
23 that basis. The only remedy legally available to Plaintiffs is injunctive relief  
24 to cease ongoing violations of TSCA—in other words, relief to require  
25 removal of known and verified exceedances of the 50 ppm threshold. *See* 15  
26 U.S.C. § 2619(a); *Mair v. City of Albany*, 303 F.Supp. 2d 237, 243 (N.D.N.Y.

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1 2004); *Oil Re-Refining Co., Inc. v. Pacific Recycling, Inc.*, 75 ERC 1315, at\*2  
2 (D. Or. 2012). This removal is already scheduled.

3 Plaintiffs alleged a number of TSCA violations in their notice of intent  
4 to sue based on illegal sampling taken at the Malibu Campus. Defendants  
5 undertook verification sampling to confirm those allegations. Where  
6 exceedances were confirmed, TSCA removal activities have been scheduled,  
7 along with removal of the PCB exceedances that were previously identified by  
8 SMMUSD's own sampling activities. SMMUSD has confirmed, both to this  
9 Court and to EPA, that removal of *all* verified caulk containing PCBs in  
10 excess of 50 ppm will occur by August 2015. The relief defendants seek "is  
11 no longer needed." *Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983).

12 Plaintiffs argue that because this removal is "voluntary," it cannot  
13 render the controversy moot. But beyond the fact that this removal is in fact  
14 required by TSCA's self-executing cleanup regulations and EPA's approval,  
15 even voluntary actions can moot litigation when the effects of the alleged  
16 violation have been eradicated, and government agencies like SMMUSD are  
17 accorded extra deference when they undertake "self-correction." *County of*  
18 *Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Mosley v. Hairston*, 920 F.2d  
19 409, 415 (6th Cir. 1990). SMMUSD has already engaged in implementation  
20 of best management practices, testing and monitoring of school facilities, and  
21 removal of PCB-containing fluorescent lights. EPA has found "the District's  
22 undertaking of the BMPs [best management practices], as verified by pre- and  
23 post-BMP sampling data, demonstrates that the TSCA standard for no  
24 unreasonable risk is currently being met." RJN, Exh. D. SMMUSD has  
25 demonstrated its commitment to removing all caulk containing more than 50  
26 ppm PCBs and to ensuring that no health risk from PCBs arises at the Malibu  
27 Campus in the future.

28

1 Plaintiffs also claim that their case is not moot because there may yet be  
2 other undiscovered caulk at the Malibu Campus containing more than 50 ppm  
3 PCBs. But again, TSCA and its implementing regulations create *no*  
4 *obligation* to exhaustively hunt for undiscovered PCBs. Indeed, undertaking  
5 such a search is inconsistent with the policy EPA has promulgated to cover  
6 this very scenario. Thus, the relief Plaintiffs request in terms of locating  
7 undiscovered TSCA violations is simply not legally available under TSCA.

8 Unlike many environmental regulations, the 50 ppm threshold for PCB  
9 use under TSCA was promulgated without regard to traditional exposure and  
10 risk assessment calculations, and was primarily based on economic  
11 considerations, with the main objective being to cease manufacture of  
12 materials using PCBs. 44 Fed. Reg. at 31514; 75 Fed. Reg. at 17658.  
13 Because the 50 ppm threshold is divorced from the calculus of potential health  
14 risk from PCB exposure, EPA, the agency charged with implementing TSCA,  
15 created a significant body of policy to address situations where—just as at the  
16 Malibu Campus—the presence of PCBs may be suspected, but has not been  
17 verified. RJN, Exh. E-H. Recognizing that initiating testing of building  
18 materials, such as caulk, could put schools in the difficult and costly position  
19 of removing materials that pose no health risk to school occupants, EPA  
20 promulgated health-based levels for air and dust exposure, representing the  
21 primary exposure pathways for PCBs. RJN, Exh. F. These health levels,  
22 created specifically for school environments, are based on extensive research  
23 and take into account the particular sensitivities of children to exposures.

24 When the presence of PCBs is suspected, whether in caulk or in other  
25 building materials, EPA policy is that “schools concerned with potential PCB  
26 contamination evaluate the indoor air quality. If PCB concentrations in air  
27 exceed the health based threshold for schools, the potential sources of PCBs  
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1 should be investigated and mitigated to reduce air concentrations below a  
2 health based threshold.” RJN, Exh. B. If air and wipe sampling fall within  
3 EPA’s health-based thresholds, *testing of caulk and other building materials*  
4 *is neither required nor recommended*—even if it is possible that some of  
5 those materials may contain more than 50 ppm PCBs. RJN, Exh. C. This  
6 policy has been applied by EPA nationally, and specifically to the Malibu  
7 Campus. On multiple occasions, EPA has confirmed that the school is safe to  
8 be occupied and that further testing of caulk is not needed. RJN, Exh. A-D.  
9 Plaintiffs have articulated no legitimate reason why this Court should ignore  
10 established EPA policy and TSCA to grant relief not even provided under  
11 TSCA itself.

12 Moreover, EPA, in its formal approval for the Malibu Campus,  
13 mandated best management practices that are designed to ensure that  
14 exposures to PCBs remain below EPA’s health levels for schools until the  
15 buildings can be renovated or demolished. Despite the fact that the best  
16 management practices are required as part of the remediation waste approval,  
17 air and wipe sampling to confirm the effectiveness of those practices does not  
18 differentiate between the sources of PCB exposures. As a result, the best  
19 management practices mandated by EPA to ensure PCB exposures remain at a  
20 safe level apply to all sources of PCBs at the Malibu Campus, whether  
21 remediation waste or caulk. In other words, EPA’s best management practices  
22 require that exposures stay below health levels throughout the Malibu  
23 Campus, regardless of where those exposures may potentially emanate from.

24 Again, Plaintiffs have consistently ignored this issue in their papers  
25 because they cannot explain why the Court should grant relief that is  
26 inconsistent with the letter of TSCA and with the EPA policy implementing it,  
27 particularly when EPA has specifically stated such investigation is not  
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1 necessary at the Malibu Campus and has approved best management practices  
2 to ensure that air and wipe tests continue to show, as they always have, that  
3 the Malibu Campus is safe.

4       When it comes to PCBs in caulk, SMMUSD is doing exactly what  
5 TSCA requires: removing all the known and verified exceedances of the 50  
6 ppm threshold. SMMUSD is also comporting with longstanding EPA policy  
7 directly applicable to the Malibu Campus by ensuring exposures from  
8 unverified materials stay below EPA health levels applicable to schools.  
9 Ordering SMMUSD to go looking for new potential violations to remediate is  
10 not a remedy compelled by or available under TSCA. It is also in direct  
11 conflict with EPA policy that has been applied for years across the country.  
12 Accordingly, the requested relief sought by Plaintiffs either cannot be given or  
13 is no longer needed, and the case is moot.

14 **C. Plaintiffs Failed to Meet TSCA’s Notice Requirements**

15       Finally, Plaintiffs continue to provide no justification for their legally  
16 insufficient notice of their intent to file suit under TSCA. Courts have “never  
17 abandoned the requirement that there be a true notice that tells a target  
18 precisely what it allegedly did wrong, and when.” *Ctr. for Biological*  
19 *Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 801 (9th Cir. 2008). While  
20 Defendants may have been able to identify certain of the Plaintiffs’ alleged  
21 sampling locations through undertaking a detailed visual inspection and  
22 confirmatory verification sampling, without these extensive efforts,  
23 Defendants would not have been able to ascertain the locations of the  
24 violations alleged in Defendants’ notice. That is a far cry from the precise  
25 notice required under TSCA.

26       Furthermore, there were multiple inconsistencies between the  
27 allegations in the notice and the observations of Defendants’ contractor (e.g.,  
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1 references in the notice to material taken from door frames or windows where  
2 no such sampling locations were visually observed), and the illegal nature of  
3 the sampling—something Plaintiffs repeatedly gloss over in their papers—  
4 calls into question the reliability of the information provided in Plaintiffs’  
5 notice. Finally, Plaintiffs’ notice with respect to assumed potential violations  
6 is woefully inadequate—the bulk sampling taken in 2013 indicated that only  
7 20 percent of samples exceeded the 50 ppm TSCA threshold, meaning that  
8 even where buildings were constructed during a similar time period and using  
9 similar materials, it cannot simply be assumed that violations are present.  
10 Specific violations must be alleged under TSCA. 40 C.F.R. § 702.62.

11 **III. CONCLUSION**

12 At its core, Plaintiffs’ First Amended Complaint continues to pursue a  
13 legal remedy that is *already* being performed to the extent legally required  
14 under TSCA. Any further relief demanded by Plaintiffs simply exceeds the  
15 scope of legally available relief under TSCA. All verified TSCA exceedances  
16 will be remediated over this summer. Defendants therefore respectfully  
17 request that the Court dismiss Plaintiffs’ case, or, at the very least, stay the  
18 case until removal activities at the Malibu Campus have been completed and  
19 EPA’s oversight has terminated.

20 Dated: May 22, 2015

Respectfully Submitted,

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23 Mark E. Elliott  
24 Julia E. Stein

25 */s/Mark E. Elliott*

26 Mark E. Elliott  
27 Attorneys for Defendants  
28 SANDRA LYON, et al.