

1 PILLSBURY WINTHROP SHAW PITTMAN LLP
2 MARK E. ELLIOTT (SBN 157759)
3 mark.elliott@pillsburylaw.com
4 JULIA E. STEIN (SBN 269518)
5 julia.stein@pillsburylaw.com
6 725 South Figueroa Street, Suite 2800
7 Los Angeles, CA 90017-5406
8 Telephone: (213) 488-7100
9 Facsimile No.: (213) 629-1033

10 *Attorneys for Defendants Sandra Lyon, Jan Maez,*
11 *Laurie Lieberman, Dr. Jose Escarce, Craig Foster,*
12 *Maria Leon-Vazquez, Richard Tahvildaran-*
13 *Jesswein, Oscar De La Torre, and Ralph Mechur*

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

17 AMERICA 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' AMENDED
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF 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 In their complaint and attendant motion papers, Plaintiffs Public
3 Employees for Environmental Responsibility and America Unites for Kids
4 (collectively, “Plaintiffs”) have falsely claimed that Defendants and the Santa
5 Monica-Malibu Unified School District (“SMMUSD”) are knowingly exposing
6 students and staff at Juan Cabrillo Elementary School and Malibu Middle and
7 High School (collectively, the “Malibu Campus”) to dangerous toxins with no
8 concern for their health or wellbeing. This is patently untrue. In reality,
9 Defendants Sandra Lyon, Jan Maez, Laurie Lieberman, Dr. Jose Escarce, Craig
10 Foster, Maria Leon-Vazquez, Richard Tahvildaran-Jesswein, Oscar De La Torre,
11 and Ralph Mechur, serving in their official capacities, have directed the efforts of
12 SMMUSD as it has spent almost 2 years and over \$3 million addressing the
13 presence of polychlorinated biphenyls (“PCBs”) in building materials and other
14 contaminants at the Malibu Campus, efforts which have resulted in round after
15 round of air and wipe sampling showing *there are no harmful PCB exposures* at
16 the Malibu Campus, and the schools are safe.

17 Plaintiffs also falsely claim that this lawsuit is somehow necessary to force
18 the investigation and removal of PCBs from the Malibu Campus. But SMMUSD
19 has already undertaken a comprehensive PCB investigation under the statutory
20 oversight of the United States Environmental Protection Agency, Region IX
21 (“EPA”), the federal agency with primary jurisdiction over remediation of PCB
22 materials under the Toxic Substances Control Act (“TSCA”). Complying with
23 an EPA-approved remediation plan and strict health-based standards, SMMUSD
24 has proactively addressed verified locations of PCB-containing materials in
25 excess of TSCA thresholds at the Malibu Campus and otherwise ensured the
26 Malibu Campus’ safety. SMMUSD’s plans for PCB removal have been closely
27 scrutinized by EPA, which declared in August 2014 that “EPA concurs with [the
28

1 District’s] approach...EPA does not recommend additional testing of caulk
2 unless dust or air samples persistently fail to meet EPA’s health-based
3 guidelines.” Plaintiffs’ First Amended Complaint (“FAC”), ¶ 102; Request for
4 Judicial Notice (“RJN”), Exh. C. In October 2014, EPA approved that “PCB
5 remediation wastes remaining in place at the [Malibu Campus] will not pose an
6 unreasonable risk of injury to health or the environment.” All known locations
7 of PCB-containing caulk above TSCA’s regulatory threshold will be abated this
8 summer, pursuant to TSCA’s self-executing regulatory requirements.

9 Nonetheless, Plaintiffs invite this Court to ignore these EPA-approved and
10 overseen efforts at the Malibu Campus, as well as TSCA’s self-executing
11 cleanup program. They allege, incorrectly, that EPA’s concurrence with
12 SMMUSD’s plans, per the requirements of the regulations, to remove verified
13 PCB materials that exceed TSCA thresholds, and its approval to manage
14 remaining PCB remediation wastes in place, is of no import. On the contrary,
15 EPA’s approval is clear: when PCBs in concentrations over 50 ppm are
16 discovered in building materials at the Malibu Campus, SMMUSD is committed
17 to remove those materials within one year of verification pursuant to regulatory
18 cleanup requirements. SMMUSD is also obligated to follow, to the letter, the
19 best management practices EPA has endorsed to safely manage building
20 materials until school buildings are renovated or demolished. FAC, ¶ 113.

21 TSCA requires the removal of *known* materials with PCB concentrations
22 that exceed 50 parts per million (“ppm”), nothing more. 40 C.F.R. §§ 761.20,
23 761.60; RJN, Exh. C. *All* verified exceedances at the Malibu Campus will be
24 removed this summer, under the oversight of EPA and pursuant to regulation.
25 EPA has repeatedly confirmed comprehensive source testing is not necessary or
26 recommended at the Malibu Campus under TSCA.

1 The District is not required, under TSCA or by EPA, to undertake any
2 further sampling of building materials. Indeed, such sampling is not
3 recommended by EPA unless air and wipe tests show PCB exposures above EPA
4 health guidelines. Air and wipe tests have *never* shown such exposures at the
5 Malibu Campus. EPA officials themselves have told Plaintiffs the buildings are
6 safe for occupancy, going as far as to say they would send their own children to
7 school at the Malibu Campus. Plaintiffs have never explained why
8 comprehensive source testing is needed when round after round of testing
9 designed to evaluate actual exposures to toxins consistently confirm that
10 individuals at the schools simply are not being exposed to harmful levels of
11 PCBs.

12 Plaintiffs, a local advocacy group and a national lobbying organization that
13 appear to be pushing for TSCA reform on Capitol Hill, want this Court to set a
14 radical new precedent for PCB management by requiring exhaustive testing of
15 *all* building materials at the Malibu Campus. This is a remedy that is not legally
16 available under TSCA, and it runs contrary to EPA's policy that additional
17 testing should only occur when air or dust sampling shows PCB exposures above
18 EPA health levels. Plaintiffs want the Court to take the matter out of EPA's
19 capable hands and to go beyond what TSCA requires, overturning EPA policy
20 that is applied at schools nationwide, including the Malibu Campus. It appears
21 Plaintiffs want to use the courts to overturn TSCA provisions and policies
22 applied to thousands of other similarly situated schools across the United States.

23 Plaintiffs appear more concerned with attracting publicity for their policy
24 agenda than with actually protecting kids or ensuring the Malibu Campus meets
25 TSCA's safe standards. SMMUSD is committed to providing the best
26 educational environment for its students and a safe work environment for its
27 staff, and has worked throughout to ensure it is meeting that commitment.

28

1 Plaintiffs have dragged SMMUSD into unnecessary and costly litigation when an
2 overwhelming abundance of data at the Malibu Campus shows the schools are
3 already safe, forcing SMMUSD to expend resources that would be better devoted
4 to its educational mission. Further still, Plaintiffs appear to have no interest in
5 actually achieving a rapid and effective cleanup under TSCA. Plaintiffs have
6 ignored numerous requests from SMMUSD to provide more specific information
7 with respect to the alleged TSCA violations in their FAC. This has made it
8 impossible for SMMUSD to quickly locate and address locations at the Malibu
9 Campus where Plaintiffs claim, based on illegally-taken samples, that PCBs
10 exceed TSCA thresholds.

11 This Court should defer to EPA's clear primary statutory jurisdiction in
12 this matter, and allow EPA to continue overseeing the ongoing cleanup it has
13 already approved under TSCA and which will be performed pursuant to TSCA's
14 self-executing regulations. Any remedy this Court could provide has been
15 rendered moot by SMMUSD's removal work and EPA's ongoing and active
16 oversight. Moreover, involving this Court now could potentially result in an
17 order inconsistent with EPA's directives and countermand EPA policy on PCBs
18 in schools that is applied nationally. Granting the relief Plaintiffs request would
19 do nothing more than unnecessarily drain this Court's time and resources.

20 Thus, in accordance with the doctrine of primary jurisdiction and because
21 it is moot, Defendants respectfully request that this Court dismiss Plaintiffs'
22 lawsuit. In addition, Defendants respectfully request that this Court dismiss this
23 lawsuit for failure to provide sufficient notice pursuant to TSCA's notice
24 requirements in 40 C.F.R. § 702.62. In the alternative, Defendants respectfully
25 request that this Court stay the matter until such time as the ongoing remediation
26 of PCB materials at the Malibu Campus has been completed and EPA oversight
27 has been terminated.

28

1 II. STATEMENT OF FACTS

2 SMMUSD has been diligently investigating and addressing PCBs at the
3 Malibu Campus for nearly two years. For over a year, these activities have
4 proceeded under the careful oversight of EPA. This work began when, after
5 initiating mold testing at the Malibu Campus in September and October of 2013,
6 SMMUSD retained an environmental consulting firm, The Phylmar Group, Inc.,
7 to undertake further environmental investigation of indoor air quality at the
8 Malibu Campus at the teachers' behest.¹ FAC, ¶¶ 58-59.

9 EPA policy recommends that, if the presence of PCBs is suspected but not
10 confirmed, initial sampling should focus on collection of air and wipe samples,
11 as these samples represent the most common exposure pathway for PCBs. EPA
12 explained its policy in a January 27, 2014 letter to SMMUSD:

13 “EPA has not derived a health based threshold concentration for
14 PCB impacted caulk. EPA research indicates that the potential
15 health risks associated with contaminated caulk come *primarily*
16 *from inhalation of PCBs that have migrated from the caulk into*
17 *the air. For this reason, EPA recommends that schools*
18 *concerned with potential PCB contamination evaluate the*
19 *indoor air quality.* If PCB concentrations in air exceed the health

18 ¹ Plaintiffs erroneously allege throughout their complaint that indoor air sampling has
19 no bearing on a determination that buildings at the Malibu Campus are fit for
20 occupation, and that there are no regulatory standards for PCB concentrations in indoor
21 air. See FAC, ¶¶ 26, 27, 28, 29, 70, 87. This is, of course, not true. First, the federal
22 Occupational Safety and Health Administration has set permissible exposure limits—
23 the concentration to which workers can be exposed without adverse effect—for PCBs
24 in indoor air at 1 mg/m³ or 0.5 mg/m³ (depending on the chlorine content of the PCBs).
25 29 C.F.R. § 1910.1000 Table Z-1. These limits have been adopted by California's state
26 Occupational Safety and Health Administration. 8 Cal. Code Regs. § 5155 Table AC-
27 1. Concentrations of PCBs detected in the air at the Malibu Campus are well below
28 both of these limits, and, indeed, Plaintiffs have not alleged any violation of the
Occupational Safety and Health Act. Furthermore, EPA has, based on extensive
research and taking into account the particular sensitivities of exposure on children, set
public health levels for PCBs in indoor air in schools. RJN, Exh. F. These levels
maintain PCB exposures below the reference dose of PCBs—“the amount of PCB
exposure that EPA does not believe will cause harm.” These levels have been
employed by EPA in PCB remediation efforts across the country, and levels are set for
children as young as one year old. Again, air concentrations of PCBs at the Malibu
Campus fall well below these levels.

1 based threshold for schools, the potential sources of PCBs should
2 be investigated and mitigated to reduce air concentrations below a
health based threshold.” RJN, Exh. B (emphasis added).

3 TSCA *does not* require the sampling of building materials to determine their
4 PCB concentrations, and EPA policy does not require or even recommend
5 analysis of bulk samples, such as caulk, when air and wipe sampling do not
6 reveal PCB exposures. Plaintiffs skirt this issue, because there is no explanation
7 as to why source testing would be needed at the Malibu Campus when it is not
8 required or available to be compelled under TSCA, when EPA has said it is not
9 necessary at the Malibu Campus, and when every round of air and wipe tests
10 show the schools are safe and no harmful PCB exposures are occurring.

11 In November 2013, The Phylmar Group performed a preliminary
12 evaluation of indoor air quality in the classrooms at the Malibu Campus,
13 including air, wipe, and bulk sampling for analyses of PCBs. Every single
14 indoor air sample taken during this evaluation fell below the EPA health-based
15 threshold for PCBs in schools. FAC, ¶ 65. The overwhelming majority of bulk
16 samples—roughly 80 percent—fell below TSCA’s regulatory threshold for PCB
17 concentrations. In fact, sampling showed only four detections of PCB levels
18 exceeding TSCA’s threshold concentration of 50 ppm. FAC, ¶ 64. To follow up
19 on this sampling, additional air testing was conducted on December 21-22, 2013.
20 The action level of 100 ng/m³ was set to adhere to EPA’s strictest public health
21 level for school age children, not, as Plaintiffs suggest, because some of the test
22 results were higher than the Task Force-set action level. As before, not a single
23 air sample exceeded the EPA health-based threshold for PCBs in schools. FAC,
24 ¶ 72.

25 SMMUSD voluntarily and expediently provided the sampling results to
26 EPA, which reviewed them. On November 21, 2013, EPA declared that, based
27 on the preliminary test results, which were “well below the health-based
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1 thresholds established by EPA for elementary & high school age children, and
2 adult staff,” it had “no reason to believe that there [was] an immediate or acute
3 threat to the health of the children or the staff at the school from the levels of
4 PCB contamination found.” RJN, Exh. A. Nonetheless, because TSCA requires
5 that the few bulk samples verified to exceed 50 ppm be removed, EPA required
6 SMMUSD to submit a PCB Cleanup Plan for EPA approval. *Id.*; FAC, ¶ 68. In
7 addition, EPA recommended that SMMUSD consider implementing appropriate
8 best management practices (*i.e.*, regular classroom dusting to reduce the potential
9 for dust exposures) for PCBs. RJN, Exh. A. SMMUSD quickly did so with
10 EPA’s endorsement.

11 In January 2014, EPA instructed SMMUSD to prepare a comprehensive
12 work plan to investigate and assess PCBs at the Malibu Campus. RJN, Exh. B.
13 EPA **mandated** SMMUSD submit a plan that included “removal of all caulk with
14 known concentrations above 50 ppm PCBs” discovered to date, as well as
15 “mitigation or removal of any caulk that is deteriorating in pre-1979 structures”
16 at the Malibu Campus. *Id.* SMMUSD, as required, presented EPA with its
17 comprehensive plan, the Draft Comprehensive PCB-Related Building Materials
18 Inspection, Management, and Removal Plan (“Draft Comprehensive Plan”), on
19 April 25, 2014. EPA’s comments to the draft plan were incorporated over the
20 summer 2014 school break; meanwhile, SMMUSD moved forward with its best
21 management practices cleaning program throughout the summer of 2014,
22 completing a cleanup that met EPA’s rigorous requirements before re-opening
23 school buildings in the fall. FAC, ¶ 85. EPA itself found that “[t]he air and dust
24 sampling results serve as the basis for appropriate decisions by the District at the
25 school opens for the Fall semester next week, including allowing staff and
26 students access to those classrooms that have been shown to meet EPA’s health-
27 based guidelines.” RJN, Exh. C.

28

1 At every step of the process, SMMUSD complied with the strict standards
2 set by EPA and TSCA. At all times, SMMUSD sought to meet or exceed
3 cleanup requirements informed by agency expertise, and engage in a proper and
4 thorough remediation process. EPA imposed upon SMMUSD the most stringent
5 health-based standards for PCB air sampling in schools found anywhere in the
6 country, standards which SMMUSD has consistently met.² Indeed, EPA
7 formally validated SMMUSD’s environmental testing program in its August
8 2014 letter. FAC, ¶ 102; RJN, Exh. C.

9 Despite EPA’s and SMMUSD’s diligent joint efforts to address the
10 presence of PCBs in compliance with EPA’s requirements, on August 19, 2014,
11 Plaintiffs sent SMMUSD and EPA a 60-day notice of intent to sue under TSCA,
12 alleging PCBs in excess of 50 ppm in three window caulking samples and three
13 dirt samples. However, the sampling on which Plaintiffs relied was taken
14 illegally and suffers from numerous vagueness and reliability deficiencies,
15 including a failure to identify specific sampling locations, the dates or times of
16 sampling collections, and a complete chain of custody for the samples. Plaintiffs
17 themselves never address these issues, despite the fact that multiple of the
18 declarations they cite in support of their complaint and moving papers discuss
19 this so-called “independent” sampling extensively. *See, e.g.*, Rosenfeld Decl.,
20 ¶¶22-28; DeNicola Decl., ¶¶18-22.

22 ² Plaintiffs attack the use of a 70 ng/m³ detection limit for air sampling conducted in the
23 schools, but this level is set by EPA’s own policy for school indoor air exposures,
24 which establishes 70 ng/m³ as the limit below which there will be no adverse health
25 effects for a child as young as 1 year old. Thus, levels below that detection limit at the
26 schools do not pose a health risk to students and staff and constitute “non-detects” for
27 the purposes of evaluating risk of adverse health effects. In fact, the majority of rooms
28 recently sampled returned non-detects, and all rooms sampled contained air
concentrations of PCBs below EPA thresholds. Plaintiffs also say recent air testing
should have tested for congeners. FAC, ¶ 86. But neither TSCA, nor its implementing
regulations, nor EPA policy require or even rely in any way upon an analysis of
specific congeners to determine whether PCB exposures present a risk to human health.

1 Without knowing the window locations from which Plaintiffs claimed to
2 take samples (there are numerous large windows in most of the rooms sampled),
3 SMMUSD could not conduct independent testing to verify the allegations and
4 begin remediation. Seeking to obtain the information it needed to begin this
5 verification process and any necessary PCB cleanup, SMMUSD sent two
6 separate letters – on September 22 and September 24, 2014 – to Plaintiffs’
7 counsel, requesting that supplemental information to the 60-day notice be
8 provided. Plaintiffs refused these requests and did not identify their sampling
9 locations. This prevented SMMUSD from conducting further investigation and
10 PCB cleanup of the specific violations alleged by the Plaintiffs.

11 On October 31, 2014, EPA formally approved “that PCB remediation
12 wastes remaining in place at the two schools will not pose an unreasonable risk
13 of injury to health or the environment.” RJN, Exh. D. The approval states that
14 SMMUSD’s planned removal of caulk is “not required to be part of the enclosed
15 approval,” but that does not, as Plaintiffs suggest, signify that EPA did not
16 require a plan for or concur with the District’s caulk removal activities. Under
17 TSCA, caulk with concentrations of PCBs equal to or exceeding 50 ppm
18 constitutes bulk product waste. 40 C.F.R. § 761.3. Because removal of such
19 material is mandatory under TSCA, EPA *required*, in its January 2014 letter, that
20 SMMUSD prepare a plan for removal and disposal of the caulk with verified
21 PCB concentrations in excess of 50 ppm. RJN, Exh. B. Under TSCA
22 regulations, EPA’s formal written approval of such a plan is not necessary; a
23 party must simply comply with TSCA’s express regulatory requirements for bulk
24 product waste. 40 C.F.R. § 761.62. Nonetheless, EPA issued a letter concurring
25 with the removal plan in August 2014. RJN, Exh. C. Accordingly, all verified
26 TSCA exceedances at the Malibu Campus will be remediated by August 2015.
27 Once the verified caulk containing more than 50 ppm PCBs is removed, the
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1 building materials remaining in place at the Malibu Campus onto which PCBs
2 may have leached are considered remediation wastes. For those materials
3 remaining in place, EPA was required, under TSCA regulations, to adopt a
4 separate written approval finding that no unreasonable risk is posed; it did so in
5 its October 2014 approval. 40 C.F.R. § 761.61(c); RJN, Exh. D. EPA's
6 approval required the continued implementation of a number of health-protective
7 best management practices, and indicated that SMMUSD's EPA-approved
8 remediation plan would apply to any future verified TSCA exceedances. *Id.*;
9 FAC, ¶ 113. EPA has made clear that any deviation from the terms of its
10 approval without EPA's express written permission can lead to revocation of the
11 approval. RJN, Exh. D.

12 Air and wipe sampling at the Malibu Campus over the 2014-2015 winter
13 holiday confirmed that concentrations of PCBs remained below EPA's health
14 levels. FAC, ¶ 116. Plaintiffs would have the Court believe that cleaning was
15 orchestrated prior to this sampling event to ensure sampling below EPA
16 guidelines. FAC, ¶ 117-118. In reality, pursuant to the best management
17 practices prescribed by EPA, rooms received a scheduled monthly cleaning
18 several days prior to the sampling event. Any and all cleaning of the buildings at
19 the Malibu Campus has been done in accordance with EPA's best management
20 practices since their implementation in summer 2014.

21 Despite these sampling results, in January 2015, SMMUSD (but not EPA)
22 received a second 60-day notice of intent to sue from Plaintiffs. This notice
23 restated the TSCA violations alleged by Plaintiffs' August 2014 notice, and
24 alleged 11 additional TSCA violations based upon illegally obtained sampling
25 data. These allegations form the basis of this lawsuit. Despite SMMUSD's
26 requests for additional information regarding the windows or doors from which
27 these samples were taken—information necessary for SMMUSD to be able to
28

1 identify, verify, and remediate the alleged TSCA violations in caulk—Plaintiffs
2 failed to provide more specific information.

3 Nonetheless, in a good-faith effort to respond to the 60-day notice and
4 avoid legal action, SMMUSD requested that its environmental consultant
5 visually inspect all windows and doors in classrooms from which Plaintiffs’
6 alleged caulk samples were taken. FAC, ¶ 124. That visual inspection found
7 multiple places where Plaintiffs could have obtained caulk, making it impossible
8 to pinpoint the exact areas where the alleged violations were located.
9 SMMUSD’s consultant proceeded with verification sampling for a number of the
10 potential sampling locations, and SMMUSD has planned remediation of the
11 locations identified containing PCBs in excess of the TSCA threshold, pursuant
12 to the terms of EPA’s approval. FAC, ¶ 125. The remediation of *all* known PCB
13 exceedances on the Malibu Campus will be completed by August of 2015.

14 In addition to activities overseen by EPA at the Malibu Campus,
15 SMMUSD has also voluntarily removed PCB-containing fluorescent lights at its
16 school facilities, known to be a significant potential source of airborne PCBs.
17 SMMUSD is also ensuring that all ballast backings associated with the light
18 ballasts are removed. All told, SMMUSD has invested over \$3 million in the
19 thorough investigation and remediation of the Malibu Campus and has satisfied
20 EPA that the building materials remaining in place at the Malibu Campus do not
21 pose any threat to the health of students and teachers. RJN, Exh. C; RJN, Exh.
22 D; FAC, ¶ 102. Still, Plaintiffs unreasonably demand that this Court issue an
23 injunction concerning the investigation and remediation of the Malibu Campus.

24 **III. ARGUMENT**

25 **A. Legal Standard for Review**

26 “To survive a motion to dismiss [under Federal Rule of Civil Procedure
27 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to
28

1 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
2 662, 677 (2009) (internal citations omitted). When a complaint is challenged by
3 a motion to dismiss under Rule 12(b)(6), “a plaintiff’s obligation to provide the
4 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and
5 conclusions...[f]actual allegations must be enough to raise a right to relief above
6 the speculative level on the assumption that all of the complaint’s allegations are
7 true.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Where a
8 complaint raises “issues of fact not within the conventional experience of
9 judges,” a court may dismiss the complaint for failure to state a claim because
10 deference to the administrative agency with primary jurisdiction over the matter
11 is necessary, and therefore the claimant cannot prove any set of facts that will
12 support a claim for relief. *See Far East Conference v. United States*, 342 U.S.
13 570, 574 (1952); *Kent v. DaimlerChrysler Corp.*, 200 F.Supp. 2d 1208, 1212
14 (N.D. Cal. 2002).

15 A complaint may also be challenged for the federal court’s lack of subject-
16 matter jurisdiction under Article III of the United States Constitution. Fed. R.
17 Civ. P. 12(b)(1). The burden of proof under Rule 12(b)(1) falls on the party
18 asserting jurisdiction—here, the Plaintiffs. *See Sopcak v. Northern Mountain*
19 *Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995). Mootness is a jurisdictional
20 issue; “federal courts have no jurisdiction to hear a case that is moot, that is,
21 where no actual or live controversy exists.” *Cook Inlet Treaty Tribes v. Shalala*,
22 166 F.3d 986, 989 (9th Cir. 1999). Federal courts also lack jurisdiction to hear a
23 case when notice requirements of the law under which violations are alleged
24 have not been met. *See Northern California River Watch v. Honeywell*
25 *Aerospace*, 830 F.Supp. 2d 760, 765 (N.D. Cal. 2011); *Man Against Extinction v.*
26 *Hall*, 2008 WL 3549197, at *1 (N.D. Cal. Aug. 13, 2008). Plaintiffs bear the
27 burden of demonstrating the instant case is not moot and that they have met
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1 standing requirements by providing adequate notice. They have failed to meet
2 their burden on either issue here.

3 **B. The Suit Should Be Dismissed, or, in the Alternative, Stayed, Because**
4 **EPA Has Primary Jurisdiction Over PCB Removal Actions at the**
5 **Malibu Campus**

6 EPA, an agency with the authority to require remediation of PCBs under
7 TSCA, which has promulgated extensive mandatory regulations to control and
8 simplify the process, and which has considerable expertise in this area, has
9 approved a remediation plan for the Malibu Campus that not only addresses
10 identified PCB contamination but provides for mandatory best management
11 practices that will eliminate the potential for future TSCA violations. FAC, ¶¶
12 102, 113. SMMUSD has committed to strictly follow EPA’s mandates as
13 directives of the lead agency with jurisdiction over TSCA and expertise in the
14 area of PCB management and remediation, as well as to follow TSCA’s self-
15 executing regulations. Not only does this effectively address Plaintiffs’ TSCA
16 allegations, but any Court action could delay or confuse the process in place.

17 The primary jurisdiction doctrine allows a court to dismiss or stay an
18 action when, as here, “the enforcement of a claim subject to a specific regulatory
19 scheme requires resolution of issues that are ‘within the special competence of an
20 administrative body.’” *See Farley Transp. Co. v. Santa Fe Trail Transp. Co.*,
21 778 F.2d 1365, 1370 (9th Cir. 1985) (internal citations omitted). In such a case,
22 a court may determine that “the initial decisionmaking responsibility should be
23 performed by the relevant agency rather than the courts.” *Syntek Semiconductor*
24 *Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). The
25 doctrine’s purpose is “protecting the administrative process from judicial
26 interference.” *Boyes v. Shell Oil Products Co.*, 199 F.3d 1260, 1265 (11th Cir.
27 2000) (citing *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63 (1956)).
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1 An agency has primary jurisdiction over a particular issue when the
2 resolution of that issue falls within the jurisdiction of an agency that has been
3 given regulatory authority pursuant to a statute that “subjects an industry or
4 activity to a comprehensive regulatory scheme that requires expertise or
5 uniformity in administration.” *United States v. General Dynamics Corp.*, 828
6 F.2d 1356, 1362 (9th Cir. 1987). The remediation of PCB-contaminated
7 materials is governed by TSCA. *See* 15 U.S.C. §§ 2601 *et seq.* TSCA gives
8 EPA comprehensive authority to require reporting, record-keeping, and testing,
9 and to restrict certain chemical substances, including PCBs. 15 U.S.C. § 2601(c)
10 (giving EPA regulatory authority under TSCA); 15 U.S.C. § 2605 (EPA
11 authority to promulgate regulations governing the “manufacture, processing,
12 distribution in commerce, [or] use” of chemical substances, including PCBs).
13 EPA-promulgated TSCA regulations specifically and comprehensively delineate
14 the circumstances of manufacture, use, and disposal of PCBs, grant EPA
15 enforcement authority when regulatory requirements are not met, and mandate
16 the method of PCB removal. *See* 40 C.F.R. §§ 761.1-.398, 761.60. EPA must be
17 notified of and consent to plans to dispose of PCB-containing materials in excess
18 of the TSCA threshold. 40 C.F.R. §§ 761.60, 761.61, 761.70. EPA’s closely-
19 followed Fact Sheet and its other policies on indoor air exposures and best
20 management practices for schools work in conjunction with these regulations.
21 RJN, Exh. E-H. These matters are within the special and exclusive competence
22 of EPA.

23 A court must weigh four factors when evaluating the dismissal or stay of a
24 lawsuit due to an agency’s primary jurisdiction: (1) whether the issue is a
25 question within an agency’s particular field of expertise, (2) whether the issue is
26 particularly within the agency’s discretion, (3) whether there is a substantial risk
27 of inconsistent rulings, and (4) whether a prior application to the appropriate
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1 agency has been made. *See Nat'l Commc'ns Ass'n. v. AT&T Corp.*, 46 F.3d 220,
2 222 (2d Cir. 1995). EPA's existing and ongoing oversight of the PCB
3 investigation and cleanup at the Malibu Campus presents good cause to dismiss
4 the instant suit. Not only does EPA have the expertise and discretion to require
5 remediation of PCBs at SMMUSD facilities, which must be accorded deference
6 by this Court, but EPA has already approved a plan of action that, if disrupted by
7 a court proceeding now, could result in an inconsistent and delayed response to
8 the PCB remediation.

9 1. The Issue in Plaintiff's Lawsuit is Within EPA's Expertise

10 First, the issue primarily raised by Plaintiffs' lawsuit – whether SMMUSD
11 should be forced to remediate PCBs at the Malibu Campus – is squarely within
12 EPA's unique expertise. EPA has developed extensive self-executing
13 regulations and policies with respect to PCBs, and oversees PCB remediation at
14 sites across the country, pursuant to its regulations. TSCA regulations require
15 EPA be notified of and consent to, as it has here, removal and disposal of certain
16 PCB-containing material. 40 C.F.R. §§ 761.60, 761.61, 761.70. Consistent with
17 the regulations and EPA's management of lead paint and asbestos under TSCA,
18 EPA has adopted a policy for PCBs in schools that sets uniform health levels for
19 PCB exposures to children and others in school buildings, and has set best
20 management practices to ensure school buildings are safe while long-term plans
21 are made for renovation or demolition of those buildings. RJN, Exh. E-H.³ In
22 two letters issued in August 2014 and October 2014 respectively, EPA has
23 specifically concurred with plans to remove known and verified PCB
24 exceedances before March 2016, and approved plans to manage in place PCB

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26 ³ These documents are also available online at, respectively,
27 <http://yosemite.epa.gov/R10/ecocomm.nsf/childrenshealth/sensible-steps-webinars>;
28 <http://www.epa.gov/pcbsincaulk/maxconcentrations.htm>;
<http://www.epa.gov/pcbsincaulk/pdf/caulk-fs.pdf>;
http://www.epa.gov/pcbsincaulk/pdf/caulk_faq.pdf

1 materials at the school, which EPA has certified do not pose any adverse health
2 risk. FAC, ¶¶ 102, 113.

3 Plaintiffs demand that this Court override EPA’s interpretation and
4 implementation of TSCA regulations—through the actions it has taken at the
5 Malibu Campus and through its nationwide “PCBs in Schools” policy—without
6 first finding that EPA’s interpretation of those regulations is erroneous. *See Auer*
7 *v. Robbins*, 519 U.S. 452, 461 (1997) (an agency’s interpretation of its own
8 regulations through policy is accorded deference unless its interpretation is
9 “plainly erroneous”). EPA has stated in no uncertain terms that “[a]n approval
10 under TSCA regulations in 40 C.F.R. § 761.61(c) requires EPA to make a
11 finding that PCB remediation wastes remaining in place at the two schools will
12 not pose an unreasonable risk of injury to health or the environment. EPA is
13 hereby making a finding that the District meets this TSCA standard for Malibu
14 High School and Juan Cabrillo Elementary School.” RJN, Exh. D. Not only
15 does this area clearly fall within EPA’s expertise, but appropriate deference is
16 due to EPA’s approval and instructions at the Malibu Campus.

17 2. The Issue in Plaintiff’s Lawsuit is Within EPA’s Discretion

18 Second, the issue raised by Plaintiffs’ lawsuit is also well within EPA’s
19 discretion. TSCA specifically provides EPA with the exclusive authority and
20 discretion to require remediation of PCB wastes. *See* 40 C.F.R. § 761.135.
21 Indeed, EPA drafted the regulations and has overseen the remediation process for
22 PCBs in school facilities across the nation, and courts have only weighed in on
23 the remediation process where EPA has been unwilling to actively enforce
24 standards for cleanup. *See New York Communities for Change v. New York City*
25 *Dep’t of Educ.*, 2012 WL 7807955 (E.D.N.Y. Aug. 29, 2012); *report and*
26 *recommendation adopted*, 2013 WL 1232244 (E.D.N.Y. Mar. 26, 2013). That is
27 not our situation.

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1 Where agencies are already engaged in remediation, court involvement,
2 “would represent a serious drain of judicial resources and would largely
3 duplicate the past and present efforts” of the agency. *Friends of Santa Fe County*
4 *v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1350 (D.N.M. 1995) (where injunctive
5 relief was “exactly the type of relief the [agency], in its expertise, considered,
6 and, in the manner it deemed most appropriate, provided,” citizen suit was
7 dismissed because New Mexico Environment Department held primary
8 jurisdiction and was already addressing the contamination through investigation
9 and approval of a discharge plan for a waste pile). Here, EPA is “far better
10 suited to resolve” the issues at hand “by reason of ‘specialization, by insight
11 gained through experience, and by more flexible procedure.’” *Id.* (citing *Far*
12 *East Conference v. United States*, 342 U.S. 570, 575 (1952)).

13 3. Court Involvement in the Ongoing EPA-Approved Remediation of the
14 Malibu Campus Creates a Substantial Risk of Inconsistent Rulings; It
15 Would Also Ignore SMMUSD’s Prior Application for EPA Involvement

16 Finally, Plaintiffs’ request puts the Court in the unwanted position of
17 possibly having to fashion an order at odds with EPA’s decisions in directing and
18 overseeing the remediation of the Malibu Campus. As discussed above, the
19 deference accorded to EPA’s actions requires that the Court make a finding that
20 EPA’s activities were “plainly erroneous” before overriding them—something
21 Plaintiffs have not asked this Court to do. *See Auer*, 519 U.S. at 461. In fact,
22 Plaintiffs have not even challenged EPA’s actions in this lawsuit, although it is
23 EPA’s approval and policies with which they take issue. While EPA was named
24 in Plaintiffs’ first 60-day notice, Plaintiffs elected not to name the agency in its
25 January 2015 notice. This decision effectively places the Court in potential
26 conflict with the actions of the unnamed government agency.

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1 In the TSCA context, courts have inserted themselves only when EPA
2 refuses to exercise its authority to be involved in a remediation. In *New York*
3 *Communities for Change*, EPA entered into a consent agreement with the City of
4 New York and the New York City School Construction Authority to resolve
5 TSCA violations concerning the use of PCBs in New York City school facilities,
6 particularly in caulk. *New York Communities for Change v. New York City Dep't*
7 *of Educ.*, 2013 WL 1232244 at *1. It was subsequently discovered that a
8 significant amount of PCB contamination was due to leaking fluorescent light
9 ballasts, which were not covered by the consent agreement. *Id.* The City made
10 no application to EPA to oversee remediation of the ballasts, and EPA offered no
11 approval or disapproval of the City's voluntary proposal to address the ballasts
12 over a ten-year period. *Id.* at *2. Unhappy with the City's plan, plaintiffs filed a
13 citizen suit to compel expedited remediation of the ballasts. *Id.* at *3. Because
14 "there is no risk of inconsistent rulings and there is no application pending before
15 the agency," the court elected to hear the suit. *Id.* at *7.

16 As in *Friends of Santa Fe County*, and in sharp contrast to *New York*
17 *Communities for Change*, there is a high risk of inconsistency here. Unlike in
18 *New York Communities for Change*, SMMUSD has already made a prior
19 application to EPA to oversee this TSCA remediation as the appropriate agency
20 with jurisdiction. "The advisability of invoking primary jurisdiction is greatest
21 when the issue is already before the agency." *Mississippi Power & Light Co. v.*
22 *United Gas Pipeline Co.*, 532 F.2d 412, 420 (5th Cir. 1976). Here, SMMUSD
23 has submitted hundreds of pages of remediation planning documents to EPA. In
24 response to these plans, EPA has "acted with deliberate care and diligence,"
25 greenlighting SMMUSD's remediation plan and formally endorsing stringent
26 and mandatory best management practices, such as monitoring, meeting strict
27 airborne and wipe sample concentration thresholds, proper maintenance of
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1 ventilation, and increased cleaning with dust-minimizing equipment, that
2 SMMUSD must employ. *Friends of Santa Fe County*, 892 F.Supp. at 1350. In
3 addition, SMMUSD has already removed and replaced fluorescent lights.

4 This suit’s remedy is limited to injunctive relief under TSCA, and that is
5 exactly the type of relief that EPA “in its expertise, considered, and, in the
6 manner it deemed most appropriate, provided.” *Id.* For the court to step in now
7 would create a significant risk of inconsistency, would unnecessarily drain the
8 resources of the Court, and would duplicate EPA’s ongoing efforts.

9 Accordingly, SMMUSD asks this Court to dismiss Plaintiffs’ suit in accordance
10 with the doctrine of primary jurisdiction or, at the very least, to stay Plaintiffs’
11 suit until such time as EPA oversight of the remediation activities at the Malibu
12 Campus has terminated.

13 **C. The Court Should Dismiss, or, in the Alternative, Stay Plaintiffs’**
14 **Claims Because SMMUSD Is Already Taking Action to Cure All**
15 **Verified TSCA Violations at the Malibu Campus and EPA’s Approval**
16 **Mandates Such Violations Will Not Occur in the Future**

17 A federal court lacks jurisdiction to consider a moot claim. “If there is no
18 longer a possibility that [a party] can obtain relief for his claim, that claim is
19 moot and must be dismissed for lack of jurisdiction.” *Ruvalcaba v. City of Los*
20 *Angeles*, 167 F.3d 514, 521 (9th Cir. 1999). “The hallmark of a moot case or
21 controversy is that the relief sought can no longer be given or is no longer
22 needed.” *Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983).

23 In the context of a TSCA citizen suit such as this one, a court may only
24 grant the remedy of injunctive relief to halt ongoing or future TSCA violations.
25 See 15 U.S.C. § 2619(a); *Mair v. City of Albany*, 303 F.Supp. 2d 237, 243
26 (N.D.N.Y. 2004); *Oil Re-Refining Co., Inc. v. Pacific Recycling, Inc.*, 75 ERC
27 1315, at*2 (D. Or. 2012). But here, the injunctive relief sought by Plaintiffs—
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1 comprehensive testing of the Malibu Campus and removal and disposal of
2 materials containing PCBs in excess of 50 ppm—is not necessary, or, in the case
3 of testing, even available under TSCA. The Malibu Campus is already subject to
4 the oversight of EPA, which has approved SMMUSD’s plan to address the
5 presence of PCB-containing materials, both now and in the future. FAC, ¶¶ 102,
6 113. SMMUSD is already implementing that plan, and has scheduled removal of
7 all verified PCB exceedances during the summer 2015 school break pursuant to
8 TSCA’s § 761.61 and 761.62 regulations. As a result, the controversy is moot.

9 Where an agency is already engaged in remedial efforts, courts have
10 consistently found controversies related to the remediation of such contamination
11 to be moot. *See, e.g., City of Fresno v. United States*, 709 F.Supp. 2d 888 (E.D.
12 Cal. 2010); *West Coast Home Builders, Inc. v. Aventis Cropscience USA Inc.*,
13 2009 WL 2612380 (N.D. Cal. Aug. 21, 2009); *Davis Bros. Inc. v. Thornton Oil*
14 *Co.*, 12 F.Supp. 2d 1333, 1338 (M.D. Ga. 1998). In *Davis Bros. Inc. v. Thornton*
15 *Oil Co.*, the defendants brought a claim for injunctive relief for remediation of
16 contamination from leaking storage tanks. Cleanup of the contamination by the
17 property owner, Conoco, was already underway, subject to oversight by
18 Georgia’s Environmental Protection Division. *Davis Bros. Inc.*, 12 F.Supp. 2d at
19 1335. The court held that “the proposed remedy of injunctive relief is moot
20 because Conoco has already agreed to remediate the site...and the state is
21 overseeing the cleanup more effectively than the court ever could.” *Id.* at 1338.

22 Plaintiffs say *Davis Bros. Inc.* and cases like it are inapposite because
23 remediation was already underway in those cases. But just like in *Davis Bros.*
24 *Inc.*, SMMUSD, as the regulated entity, has already submitted a remediation plan
25 with which the lead agency has concurred; that plan will be completely executed
26 by the end of the summer 2015 school break. EPA’s formal approval obligates
27 SMMUSD to take additional action, from monitoring to implementation of best
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1 management practices, to ensure that future TSCA violations do not occur. FAC,
2 ¶ 113; RJN, Exh. D. There is no need for the requested injunctive relief.

3 Plaintiffs also say injunctive relief is necessary because some of
4 SMMUSD's actions to date have been voluntary. But while agency action
5 compelling an entity to resolve a controversy can certainly render a lawsuit moot,
6 even voluntary actions can moot litigation when the effects of the alleged
7 violation have been eradicated. *County of Los Angeles v. Davis*, 440 U.S. 625,
8 631 (1979). In fact, government entities like SMMUSD that undertake voluntary
9 action to cease alleged violations receive a higher level of deference in
10 application of the mootness doctrine: "such self-correction provides a secure
11 foundation for a dismissal based on mootness so long as it appears genuine."
12 *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990). Moreover, compliance
13 with TSCA's mandatory and self-executing regulations is a far cry from an
14 uncontrolled voluntary action.

15 To add to the numerous health-protective requirements contained in EPA's
16 approval, SMMUSD has already engaged in voluntary implementation of best
17 management practices, testing and monitoring of school facilities, and removal of
18 PCB-containing fluorescent lights. According to EPA, "the District's
19 undertaking of the BMPs [best management practices], as verified by pre- and
20 post-BMP sampling data, demonstrates that the TSCA standard for no
21 unreasonable risk is currently being met." RJN, Exh. D. In short, this genuine
22 self-correction by SMMUSD evidences its commitment to ensuring a safe school
23 environment, the remediation of all verified TSCA violations, and the prevention
24 of any future TSCA violations, and should be given the deference due
25 government entities that take such proactive steps.

26 In light of the stringent requirements imposed on SMMUSD by EPA's
27 formal approval document, and the extensive self-imposed corrective action that
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1 SMMUSD has already taken to address PCBs in school facilities and
2 Defendants' suit is moot.

3 **D. Plaintiffs Failed to Provide Sufficient Notice as Required by TSCA,**
4 **and the Court Should Accordingly Dismiss Plaintiffs' Claims**

5 A federal court does not have jurisdiction over a plaintiff's claims if the
6 plaintiff has not conformed to pertinent statutory notice requirements. *See*
7 *Northern California River Watch*, 830 F. Supp. 2d at 765; Fed. R. Civ. P.
8 12(b)(1). Plaintiffs have failed to provide SMMUSD with adequate notice of
9 alleged TSCA violations as required by law.

10 TSCA provides that, prior to filing suit, an alleged violator be given 60
11 days of notice to remedy alleged violations of the Act. 40 C.F.R. § 702.62.
12 Under TSCA, the purpose of a 60-day notice is "to afford government regulators
13 an opportunity to act with respect to the violation and to give the violators an
14 opportunity to comply with the law." *New York Communities for Change v. New*
15 *York Dept. of Educ.*, 2012 WL 7807955, at *11 (E.D.N.Y. Aug. 29, 2012). In
16 the TSCA context, notice must "be sufficient to provide defendants with
17 information so that they can identify the problem." *Id.*

18 TSCA's notice provisions mirror that of the Clean Water Act's, and courts
19 interpreting TSCA notice have relied upon Clean Water Act case law stating that
20 notice must "provide the alleged violator with enough information to attempt to
21 correct the violation and avert the citizen suit." *Chesapeake Bay Foundation,*
22 *Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 622 (D. Md. 2011)
23 (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d
24 387, 400 (4th Cir. 2011)) (where notice alleged discharge violations but failed to
25 specify from which of 22 potential outfalls violations occurred, plaintiffs "failed
26 to identify the locations of the alleged violations with anything approaching
27 reasonable specificity"). Much as in *Chesapeake Bay Foundation*, Plaintiffs
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1 have described only general, unspecified locations of alleged violations by
2 stating samples were taken from an “interior window” or “exterior window” in
3 particular classrooms, or from a trash bag purporting to be air duct cleaning. The
4 Malibu Campus contains hundreds of classroom windows and thousands of feet
5 of air ducting. SMMUSD cannot divine which window frame in these
6 classrooms or which part of the air ducting contains the alleged violating
7 material. Specific information is critical not only to allow SMMUSD to correct
8 potential violations in order to avoid a lawsuit in the first place, but also because
9 SMMUSD’s own extensive sampling and testing data shows that PCB exposures
10 were not detected at reportable levels in many of the rooms listed on Plaintiffs’
11 notice. Thus, simply naming the classroom does not give SMMUSD sufficient
12 notice and opportunity to comply with the law by understanding “what corrective
13 actions will avert a lawsuit” and taking them. *See Natural Resources Defense*
14 *Council v. Southwest Marine, Inc.*, 236 F.3d 985, 996 (9th Cir. 2000).

15 Despite repeated requests, Plaintiffs have refused to reveal the specific
16 locations from which they or their unidentified agent took samples at the Malibu
17 Campus. Nonetheless, SMMUSD made a good faith effort to ascertain the
18 sampling locations itself, instructing its environmental contractor to conduct a
19 thorough inspection of the Malibu Campus to verify sampling locations. FAC, ¶
20 124. In all but two of the 15 rooms where Plaintiffs alleged TSCA violations,
21 there were so many potential sampling locations visible that it was not possible
22 to verify whether and from where Plaintiffs’ alleged samples had been taken. In
23 at least two of the rooms, there was no evidence of any caulk removal *at all* in
24 the locations referenced by the 60-day notice, but multiple potential sampling
25 locations where caulk was degraded and gaps appeared were visible elsewhere in
26 the classrooms. In every other room where Plaintiffs alleged a TSCA violation
27 as a result of PCB concentrations in interior window caulking, caulk was missing
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1 in multiple locations on three or more interior windows, again rendering
2 verification of Plaintiffs' actual sampling locations impossible.

3 To be as proactive as possible, SMMUSD proceeded with verification
4 sampling for a majority of the potential sampling locations its consultant
5 discovered. FAC, ¶ 124. Where that sampling found PCBs in excess of 50 ppm,
6 removal will occur over the summer 2015 school break. However, in several of
7 the locations sampled, while SMMUSD's own data did show PCBs in excess of
8 TSCA thresholds, SMMUSD's data did not match Plaintiffs', making it
9 impossible for SMMUSD to know with certainty that it will remedy all alleged
10 violations, and highlighting the importance of specifying the *actual* locations
11 from which Plaintiffs removed samples. If Plaintiffs ignore TSCA's notice
12 requirements, SMMUSD, despite its best efforts, cannot effectively remediate
13 every alleged violation. This is exactly the scenario TSCA's notice provisions
14 were enacted to prevent. *See New York Communities for Change*, 2012 WL
15 7807955. Because Plaintiffs' claims of TSCA violations were not properly
16 noticed, this Court lacks jurisdiction to consider them, and SMMUSD
17 accordingly asks that these claims be dismissed.

18 IV. CONCLUSION

19 EPA is already engaged in oversight of the Malibu Campus. SMMUSD
20 will already remove all known and verified PCB-containing material this
21 summer, and will continue to manage all building materials whose PCB content
22 has not been tested or verified in place pursuant to the binding standards imposed
23 by EPA's approval letter. For all the reasons discussed above, SMMUSD
24 respectfully requests that this Court dismiss Plaintiffs' action, or, in the
25 alternative, that the Court stay the action pending conclusion of SMMUSD's
26 remedial actions and EPA oversight of the Malibu Campus.

1 Dated: May 11, 2015

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Respectfully Submitted,
PILLSBURY WINTHROP SHAW PITTMAN
LLP
Mark E. Elliott
Julia E. Stein

/s/
Mark E. Elliott
Attorneys for Defendants
SANDRA LYON, et al.