

US EPA, TSCA, LITIGATION, LEGAL

## California District Court Rules That EPA Wrongly Dismissed TSCA Section 21 Petition

By ROGER PEARSON, January 17, 2018

In a decision of first impression under the new TSCA law, the District Court for the Northern District of California has ruled that U.S. EPA wrongly dismissed a Section 21 petition filed by coalition of anti-fluoridation groups. District Court Judge Edward Chen, who authored the opinion, rejects EPA's argument that a Section 21 petitioner must provide evidence on all the "conditions of use" for the particular chemical for which EPA action is requested. Instead, says Judge Chen, the petitioner only needs to show that a single particular use of the chemical poses an unreasonable risk. *Food & Water Watch v. US EPA*, Order denying defendant's **motion to dismiss, 17-cv-02162-EMC<sup>1</sup>** (N.D. Cal., filed Dec. 21, 2017).

The petitioners include Food & Water Watch, Inc., the American Academy of Environmental Medicine, Fluoride Action Network, and several other organizations and individuals active in the anti-fluoridation movement. Their petition requests that EPA find that adding specified fluoride chemicals to drinking water poses an "unreasonable risk" to the health of individuals exposed to it pursuant to section 6(a) of TSCA and that based on that finding that EPA ban the use of these chemicals in water treatment in the U.S.

EPA denied the petition in February of last year concluding that the petition failed to set forth a scientifically defensible basis showing that drinking water fluoridation causes neurotoxic harm. Separately EPA dismissed the petition based on the petitioners' failure to comprehensively address all of the conditions of use for the fluoride chemicals, their failure to adequately identify those chemicals, and their failure to specify the remedy they are seeking. Judge Chen rules that EPA was in error in dismissing the case on these latter three grounds.

TSCA Section 6(a) requires EPA to take remedial action if it finds that a chemical poses "an unreasonable risk" to human health or the environment. TSCA Section 21 authorizes anyone to file a petition asking EPA to take action under a number of TSCA sections, including section 6(a). Should EPA deny the petition then the petitioner can apply for judicial review of that action. To succeed in such a review the petitioner must demonstrate that it presented sufficient evidence demonstrating the unreasonable risk to an exposed population "under the conditions of use."

EPA argued that this latter term requires a Section 21 petition to lay out all of the potential conditions of use for the chemical. Judge Chen disagrees pointing out that Section 6(a) refers to "an unacceptable risk" implying that a petitioner can ask EPA to take action on the condition of use that interests the petitioner.

As further support for his decision Judge Chen cites EPA's own framework rules for implementing risk assessments under section 6(b) of TSCA. That section governs assessments where EPA has designated a chemical as "high priority" and separately where a manufacturer has requested an evaluation of a particular chemical. In both cases Judge Chen notes that EPA originally proposed to base the assessment on all potential uses of the chemical. However, in both cases the final rule allows EPA to make an adverse risk finding limited to a particular use.

After ruling on the "conditions of use" argument, which occupies most of his opinion, Judge Chen summarily rejects EPA's arguments regarding the adequate description of the chemicals and the specification of the remedy. EPA will now be required to consider the merits of the science presented by the petitioners in support of their unacceptable risk claim.

The law firm of Bergeson & Campbell, in its write-up of the case, notes that citizen groups are currently challenging EPA's decision in the above framework rules allowing it to consider a risk based on less than all of the conditions of use. The law firm notes that Judge Chen's decision appears to be inconsistent with the citizen groups' challenge; an interesting situation given that the framework rule challenge is currently pending before the Ninth Circuit.

## **Resources for this article**

### **1. motion to dismiss, 17-cv-02162-EMC**

<https://ceitoday.com/documents/25280>

### **2. Bergeson & Campbell**

<http://www.tscablog.com/in-case-of-first-impression-court-rules-epa-wrongly-dismissed-citizen-group>