

1 ROBERT M. SUSSMAN
2 Sussman & Associates
3 3101 Garfield Street, NW
4 Washington, DC 20008
5 (202) 716-0118
6 bobsussman1@comcast.net

7 MICHAEL CONNETT
8 Waters, Kraus and Paul
9 222 North Pacific Coast Highway
10 Suite 1900
11 El Segundo, California 90245
12 (310) 414-8146
13 mconnett@waterskraus.com

14 *Attorneys for Plaintiffs*

15 **UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17 **AT SAN FRANCISCO**

18 ASBESTOS DISEASE AWARENESS
19 ORGANIZATION, et al

20 Plaintiffs,

21 v

22 ANDREW WHEELER, as Acting
23 Administrator of the United States
24 Environmental Protection Agency, and
25 the UNITED STATES
26 ENVIRONMENTAL PROTECTION
27 AGENCY

28 Defendants.

Case No. 19-cv-00871-EMC

MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' SECOND
CLAIM FOR RELIEF FOR LACK OF
SUBJECT MATTER JURISDICTION

DATE: August 22, 2019
TIME: 1:30 p.m.
Courtroom: 5, 17th Floor

INTRODUCTION

1
2 Plaintiffs file this Memorandum in opposition to the motion of defendants
3 Environmental Protection Agency (“EPA”) and Administrator Andrew Wheeler to
4 dismiss plaintiffs’ second claim for relief for lack of subject matter jurisdiction.
5

6 Plaintiffs are the Asbestos Disease Awareness Organization (“ADAO”), the largest
7 independent asbestos victims’ organization in the U.S., and five other nonprofit public
8 health groups committed to combatting the dire threat of cancer and serious disease that
9 asbestos poses to the US population. Asbestos kills nearly 40,000 Americans annually and
10 its importation and use are largely uncontrolled under US law.
11

12
13 EPA is now evaluating the risks of asbestos under section 6 of the Toxic Substances
14 Control Act (“TSCA”) but plaintiffs are concerned that EPA lacks the information on the
15 importation and use of asbestos necessary to reach sound conclusions about its dangers to
16 public health. Plaintiffs filed this suit after EPA denied their September 2018 petition
17 under TSCA section 21 seeking the initiation of rulemaking under TSCA section 8(a) to
18 obtain the information necessary for a sound risk evaluation. The rule requested in the
19 petition would require importers, manufacturers and processors of asbestos and asbestos-
20 containing mixtures and articles to submit reports on the amounts of asbestos they import
21 and use, the sites where these activities occur, the nature of the use and the resulting
22 potential for exposure to asbestos by workers and members of the public.
23
24
25
26
27

1 In their Complaint, plaintiffs assert that (1) the preponderance of the evidence
2 demonstrates that asbestos presents an unreasonable risk of injury to human health,
3 thereby meeting the standard in TSCA section 21(b)(4)(ii) for requiring EPA to conduct
4 rulemaking under section 8, and (2) EPA's denial of the petition was arbitrary and
5 capricious and contrary to law, thereby violating the Administrative Procedure Act
6 ("APA"), 5 U.S.C Chapter 7, and requiring that the petition denial be set aside.
7

8 EPA argues that plaintiffs' claims under the APA are barred because Congress
9 provided a specific remedy for petition denials in section 21 itself. As demonstrated
10 below, EPA's position is without merit because:
11

- 12 • The Supreme Court has held in multiple cases that, even where a statute
13 provides a judicial remedy, the broad grant of judicial review in section 704
14 of the APA provides an additional remedy unless it is duplicative of the
15 statutory remedy in scope and effect.
- 16 • The savings clause in section 21(b)(5) is explicit evidence that Congress
17 intended to preserve all other remedies for unlawful petition denials,
18 including judicial review under the APA.
- 19 • Judicial review under the APA broadens the remedies for unlawful petition
20 denials because plaintiffs could successfully challenge such denials as
21 arbitrary and capricious under the APA even where they cannot prevail in a
22 de novo evidentiary proceeding under section 21(b)(4)(B) itself.
- 23 • The DC Circuit decision in *Env'tl. Def. Fund v. Reilly* holding that petition
24 denials cannot be simultaneously challenged under section 21 and the APA is
25 not controlling in this Circuit and was wrongly decided.

26 EPA's motion to dismiss should therefore be denied.
27

BACKGROUND

A. Statutory Provisions

1
2
3 **1976 Law.** TSCA was enacted in 1976 to create a national program for assessing
4 and managing the risks of chemicals to human health and the environment. Section 6(a)
5 of the law gives EPA authority to regulate substances that present an “unreasonable risk
6 of injury.” Despite the high hopes of Congress for effective action under section 6,
7 progress in regulating unsafe chemicals under the 1976 law was disappointing. A major
8 setback involved EPA’s unsuccessful efforts to protect against the dangers of asbestos. In
9 1989, the Agency issued a rule under section 6(a) of TSCA prohibiting manufacture,
10 importation, processing or distribution in commerce of asbestos in almost all products. 51
11 Federal Register 29460 (July 12, 1989). However, the Fifth Circuit Court of Appeals
12 overturned the ban in 1991 because EPA had failed to clear several hurdles in the law.
13 *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).
14
15
16

17 **2016 TSCA Amendments.** Over time, *Corrosion Proof Fittings* became the poster
18 child for the inability of TSCA to support meaningful action on unsafe chemicals. After a
19 multi-year effort to overhaul and strengthen its key provisions, TSCA was amended by
20 the Frank R. Lautenberg Chemical Safety for the 21st Century Act (“LCSA”), which took
21 effect on June 11, 2016. In signing LCSA into law, President Obama singled out asbestos
22 as a prime example of why TSCA reform was necessary, stating that “...the system was
23
24
25
26
27

1 so complex, so burdensome that our country hasn't even been able to uphold a ban on
2 asbestos –a known carcinogen.”¹

3 The 2016 TSCA amendments enhance the chemical regulatory authorities in
4 section 6 by establishing a new integrated process for (1) prioritizing chemicals, (2)
5 conducting risk evaluations on substances designated high-priority and (3) promulgating
6 rules under section 6(a) to eliminate unreasonable risks identified in these risk
7 evaluations. Congress set strict deadlines for each of these steps and directed EPA to
8 address a minimum number of chemicals by these deadlines. It also removed the
9 impediments to effective regulation created by *Corrosion Proof Fittings* by eliminating
10 any consideration of costs and other non-risk factors in determining whether chemicals
11 present an unreasonable risk of injury and directing EPA to impose requirements
12 “necessary so that the chemical no longer presents such [unreasonable] risk.”
13
14
15
16

17 **Reporting under TSCA Section 8(a).** TSCA section 8(a)(1) is a critical
18 mechanism for obtaining the information EPA needs for sound and comprehensive risk
19 evaluations and chemical risk management decisions. It provides that EPA “shall
20 promulgate rules” that require each person who manufactures or processes a chemical
21 substance to submit such reports as the “Administrator may reasonably require.” 15
22 U.S.C. § 2607(a). The importance of reporting under section 8(a)(1) has been magnified
23
24
25

26 ¹ <https://obamawhitehouse.archives.gov/the-press-office/2016/06/22/remarks-president-bill-signing-frank-r-lautenberg-chemical-safety-2st>
27

1 by the increased need for information on chemical use and exposure to meet the expanded
2 responsibilities and stringent deadlines placed on the Agency by LCSA.

3 **Petitions for Rulemaking Under Section 21.** TSCA section 21 contains a
4 petition process by which citizens can seek to compel action by EPA under different
5 provisions of the law. 15 U.S.C. § 2620. Section 21(a) authorizes citizens to petition for,
6 *inter alia*, issuance of a rule under Section 8 requiring reporting by manufacturers and
7 processors of chemical substance. *Id.* § 2620(b)(4)(B). EPA is required to respond to the
8 petition within 90 days. If EPA denies the petition, it must publish a Federal Register
9 notice explaining the reasons for the denial. Following a petition denial, the petitioner
10 may file a civil action in federal district court to “compel the [EPA] Administrator to
11 initiate a rulemaking proceeding as requested in the petition.” 15 U.S.C. §2620(b)(4)(A).
12
13
14

15 Under Section 21, “the petitioner shall be provided an opportunity to have such
16 petition considered by the court in a *de novo* proceeding.” 15 U.S.C. §2620(b)(4)(B).
17 Where the petition seeks promulgation of a rule under section 8, section 21(b)(4)(B)(ii)
18 directs the district court to “order the Administrator to initiate the action requested by the
19 petitioner” if it “demonstrates to the satisfaction of the court by a preponderance of the
20 evidence” that the chemical substance in question “presents an unreasonable risk of injury
21 to health or the environment, without consideration of costs or other nonrisk factors.”
22
23
24

25 Section 21(b)(5) states that “[t]he remedies under this section shall be in addition
26 to, and not in lieu of, other remedies provided by law.”
27

B. Dangers of Asbestos to Public Health

1
2 Few if any chemicals are as dangerous as asbestos.² Numerous international
3 regulatory and public health bodies recognized asbestos as a human carcinogen decades
4 ago. Asbestos exposure is known to be causally related to lung cancer, malignant
5 mesothelioma, ovarian cancer, cancer of the larynx and asbestosis (fibrosis of the lungs).³
6 There is considerable evidence of causal associations with gastro-intestinal cancers and
7 kidney cancer. Painful and disabling non-malignant diseases are also caused by asbestos,
8 including asbestos-related pleural thickening.⁴ The death toll from asbestos exposure
9 remains high and is increasing. According to recently published research, asbestos-related
10 diseases cause 39,275 deaths in the United States annually.⁵ There is overwhelming
11 consensus in the scientific community that there is no safe level of exposure to asbestos.
12 Thus, as noted by the World Health Organization:
13
14
15
16

17 “Bearing in mind that there is no evidence for a threshold for the carcinogenic effect
18 of asbestos, including chrysotile, and that increased cancer risks have been observed
19 in populations exposed to very low levels, the most efficient way to eliminate
20 asbestos-related diseases is to stop using all types of asbestos.”⁶

21 ² See plaintiffs’ Amended Complaint at ¶¶ 24-29 for a description of the health hazards of asbestos.

22 ³ “Elimination of asbestos-related diseases,” World Health Organization Geneva 2014, Available:
23 <https://www.who.int/news-room/fact-sheets/detail/asbestos-elimination-of-asbestos-related-diseases>

24 ⁴ Dr. L. Christine Oliver, The Threat to Health Posed By Asbestos in the 21st Century In the United
25 States, March 29, 2018, EPA-HQ-OPPT-2016-0736-0124

26 ⁵ S. Furuya, O. Chimed-Ochir, K. Takahashi, A. David, and J. Takala, "Global Asbestos Disaster,"
27 International Journal of Environmental Research and Public Health, vol. 15, no. 5, p. 15, 2018.

28 ⁶ "Chrysotile Asbestos," ed: World Health Organization, 2015.

1 Since the TSCA ban was set aside in 1991, importation, mining and most forms of
2 asbestos use have been lawful in the US. The virtual absence of restrictions on asbestos in
3 the US is in marked contrast to the comprehensive asbestos bans that have been enacted in
4 nearly 70 other countries.
5

6 **C. Lack of Adequate Information for EPA's Asbestos Risk Evaluation**

7 On December 19, 2016, responding to long-standing concerns about the lack of
8 effective restrictions on asbestos, EPA selected it for one of its initial risk evaluations
9 under the new law.⁷ However, plaintiffs soon became concerned that EPA lacked
10 sufficient information on asbestos imports, uses and conditions of exposure to effectively
11 evaluate its risks. Of particular alarm was plaintiffs' discovery that substantial raw
12 asbestos imports for use by the chemical industry were not being reported under the 2011
13 Chemical Data Reporting ("CDR") rule promulgated under TSCA section 8(a)(1). 40
14 C.F.R. Part 711. When plaintiffs notified EPA of this lack of reporting, the Agency
15 advised in a letter dated July 28, 2017 that asbestos imports were not subject to CDR
16 requirements because, under 40 C.F.R. §711.6(a)(3), reporting is not required for
17 "naturally occurring chemical substances."⁸ Plaintiffs concerns further increased when
18 Scoping and Problem Formulation documents detailing EPA's approach to the asbestos
19
20
21
22
23

24 _____
25 ⁷ 81 Federal Register 91927

26 ⁸ Amended Complaint, at ¶¶ 34-35.

27 Continued on the next page

1 risk evaluation revealed that EPA had a poor understanding of the types and quantities of
2 asbestos-containing products exported to the US and how and where these products were
3 used.⁹

4 **D. Plaintiffs' Petition For Rulemaking Under TSCA Section 21**

5
6 To compel EPA to use its mandatory reporting authority to obtain the information
7 on asbestos necessary for an effective risk evaluation, plaintiffs' September 25, 2018
8 section 21 petition requested that the Agency initiate rulemaking under TSCA section
9 8(a)(1) to:¹⁰

11 (1) eliminate the asbestos exemption in the CDR current rule and designate
12 asbestos as a reportable substance, thereby triggering requiring reporting on
13 importation and use of raw asbestos in the US,

14 (2) lower the reporting threshold, eliminate exemptions for impurities and articles,
15 and require reporting by processors in order to assure that EPA has the information
16 on asbestos use and exposure necessary for its TSCA risk evaluation,

17 (3) require immediate submission of reports on asbestos for the 2016 reporting
18 cycle, thereby maximizing EPA's ability to use the information reported to conduct
19 the ongoing asbestos risk evaluation and subsequent rulemaking under TSCA
20 section 6(a), and

21 (4) determine that reports submitted on asbestos are not subject to protection as
22 confidential business information (CBI), enabling the public to submit informed
23 comments on the asbestos risk evaluation and assuring full public awareness of
24 asbestos uses and exposure that present a significant risk to health.

25 To justify section 8(a) rulemaking, the petition emphasized that the absence of reporting

26 ⁹ *Id.* at ¶¶ 32, 38-39.

27 ¹⁰ The Amended Complaint provides a detailed description of the petition at ¶¶ 36-41.

1 “has resulted in a troubling – and wholly avoidable – lack of reliable information about
2 who is importing asbestos and in what quantities, where and how asbestos is being used in
3 the US, and who is being exposed and how that exposure is occurring.” Because of the
4 lack of reporting, the petition maintained, “the public is not adequately informed about the
5 risks that asbestos presents to health in the US, and EPA itself lacks the basic information
6 required for a complete and informed risk evaluation that assures that unsafe asbestos uses
7 are removed from commerce.”
8
9

10 EPA notified ADAO’s counsel of its denial of the petition in a letter dated
11 December 21, 2018 and published a Federal Register notice explaining the basis for the
12 denial on February 12, 2019. 84 Federal Register 3396.
13

14 **E. Claims for Relief in Plaintiffs’ Complaint**

15 Plaintiffs’ Complaint makes two alternate claims for relief.

16
17 The first claim, in ¶¶ 46-52 of the Complaint, is based on TSCA section
18 21(b)(4)(B) and its requirement that, following the denial of a petition seeking the
19 initiation of rulemaking under TSCA section 21, “the petitioner shall be provided an
20 opportunity to have such petition considered by the court in a de novo proceeding.”
21 Plaintiffs assert that, as required by section 21(b)(4)(B)(ii), the “preponderance of the
22 evidence” demonstrates that asbestos “presents an unreasonable risk of injury to health or
23 the environment, without consideration of costs or other nonrisk factors,” and on this basis
24 the Court “should order EPA to initiate rulemaking under section 8 of TSCA to require the
25
26
27

1 asbestos reporting requirements requested in plaintiffs’ petition.”

2 The second claim for relief, in ¶¶ 53-56 of the Complaint, is based on section 706
3 of the APA, 5 U.S.C. § 706, under which a reviewing court shall “hold unlawful and set
4 aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an
5 abuse of discretion, or otherwise not in accordance with law.” Plaintiffs assert that EPA’s
6 December 24, 2018 denial of plaintiffs’ petition “contains errors of law and fact,
7 misrepresents the basis for the petition and ignores information in the docket and EPA’s
8 own past statements.” On this basis, plaintiffs request that “the petition denial should be
9 declared unlawful and be set aside under the APA.”
10
11

12 ARGUMENT

13 14 **I. Even Where a Statute Provides a Judicial Remedy, the Broad Grant of 15 Judicial Review in Section 704 of the APA Provides an Alternate Remedy 16 Unless It Is Equivalent in Scope and Operation to the Statutory Remedy**

17 Section 704 of the APA provides for judicial review of “[e]very agency action
18 made reviewable by statute and every final agency” except where there is an “other
19 adequate remedy in any court.” 5 U.S.C. § 704. As the Supreme Court explained in its
20 seminal decision in *Bowen v Massachusetts*, 487 U.S. 879, 903 (1988), Congress created
21 this exception because it did not want APA review to “*duplicate* the previously
22 established special statutory procedures relating to specific agencies” (emphasis added).
23 The Court emphasized that the exception “should not be construed to defeat the central
24 purpose of providing a broad spectrum of judicial review of agency action.” *Id.* The Court
25
26
27

1 also noted (487 U.S. at 904) its previous recognition that the legislative history of the
2 APA “manifests a congressional intention that it cover a broad spectrum of administrative
3 actions” and that “the Administrative Procedure Act’s ‘generous review provisions’ must
4 be given a ‘hospitable’ interpretation.” *Abbot Laboratories v. Gardner*, 387 U.S. 136,
5 140-141 (1967) (footnote omitted). And it emphasized that “[a] restrictive interpretation
6 of 704 would unquestionably, in the words of Justice Black, ‘run counter to 10 and 12 of
7 the Administrative Procedure Act. Their purpose was to remove obstacles to judicial
8 review of agency action under subsequently enacted statutes’ *Shaughnessy v.*
9 *Pedreiro*, 349 U.S. 48, 51 (1955).” 487 U.S. at 904. Applying these principles, *Bowen*
10 held that the Government’s efforts to invoke Claims Court jurisdiction under the Tucker
11 Act to defeat APA review should be rejected as a “restrictive – and unprecedented –
12 interpretation of 704” that should “not oust a district court of its normal jurisdiction under
13 the APA.” *Id.*

14 In *Sackett v EPA*, 566 U.S. 120, 132 S. Ct. 1367 (2012), the Court held that review
15 of an EPA compliance order under the Clean Water Act (“CWA”) was available under
16 section 704 of the APA notwithstanding the existence of judicial remedies under CWA
17 enforcement and permitting provisions. It emphasized that the APA “creates a
18 ‘presumption favoring judicial review of administrative action’” (citing *Block v.*
19 *Community Nutrition Institute*, 467 U.S. 340, 345 (1984)) and that while this presumption
20 “may be overcome by inferences drawn from the statutory scheme as a whole” (*id.* at
21
22
23
24
25
26
27

1 349) , the mere fact that the statute expressly provides a mechanism for judicial review is
2 not evidence of an intent to preclude APA jurisdiction: “But if the express provision of
3 judicial review in one section of a long and complicated statute were alone enough to
4 overcome the presumption of reviewability for all agency action, it would not be much of
5 a presumption at all.” 132 S. Ct. at 1373,
6

7 The Court relied on *Sackett in Army Corps. of Engineers v. Hawkes Co.*, 578 U.S.
8 _____, 136 S. Ct. 1807 (2016) to uphold APA review of a “Jurisdictional Determination”
9 by the Army Corps that a particular water body was subject to regulation under the CWA.
10 Again, it disagreed that the opportunity for judicial review of jurisdictional issues under
11 the CWA’s enforcement and permitting provisions provided an “adequate” remedy that
12 could overcome the “APA’s presumption of reviewability for all final agency action.”
13 136 S. Ct. at 1816. *See also Cohen v United States*, 650 F.3d 717, 733 (D.C. Cir. 2011)
14 (rejecting argument against APA jurisdiction because it “conflates the existence of an
15 alternative remedy with an ‘adequate remedy’”); *Natural Resources Defense Council, v.*
16 *S.E.C.*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) (Section 10 of APA “creates a strong
17 presumption of reviewability that can be rebutted only by a clear showing that judicial
18 review would be inappropriate”).
19
20
21
22

23 ///

24 ///

25 ///

II. The Savings Clause in Section 21(b)(5) Explicitly Preserves All Other Remedies, Including Judicial Review Under the APA

In this case, defendant EPA argues that, because Congress provided a judicial remedy for petition denials under section 21, that remedy should foreclose review under section 704 of the APA. But the text of section 21 is explicit that Congress intended the opposite result. Section 21(b)(5) states that “[t]he remedies under this section *shall be in addition to, and not lieu of, other remedies provided by law*” (emphasis added). Thus, in contrast to *Bowen, Sackett and Hawkes*, where the Court inferred legislative intent from the structure of the statute as a whole, TSCA expressly preserves a judicial remedy under section 704 of the APA for petition denials under section 21.¹¹ The TSCA savings clause (which EPA does not mention in its motion) is conclusive evidence that APA review is available to plaintiffs.

III. Judicial Review Under the APA Provides a Different Path to Relief than Section 21 and Affords a Remedy to Petitioners that Is Not Available under Section 21 Itself

EPA’s motion argues that the relief available under section 21 and under the APA is equivalent and section 21 provides an “adequate” remedy to unsuccessful petitioners that obviates the need for APA review. However, the remedies section 21 affords are

¹¹ Notably, two other TSCA provisions authorizing judicial review do not contain any language preserving alternate judicial remedies. These include section 20 (authorizing citizens’ civil actions in district courts to enforce TSCA requirements against regulated parties and to compel EPA to perform non-discretionary acts and duties) and section 18(f)(8)(authorizing judicial review in the DC Circuit Court of Appeals of EPA denials of requests for waivers of state preemption). Thus, Congress understood that other judicial remedies would be available under the section 21 petition provisions but not under other TSCA judicial review provisions.

1 different in scope and application from those provided by the APA and, accordingly,
2 section 21 cannot substitute for APA review.

3 Section 21(a) authorizes any person to “petition the Administrator for the issuance,
4 amendment or repeal of a rule” under TSCA section 8. If such a petition is denied or not
5 acted on in 90 days, section 21(b)(4)(A) authorizes the petitioner to “commence a civil
6 action . . . to compel the Administrator to initiate a rulemaking proceeding, as requested
7 in the petition.” The process the court must follow and the standards it must apply to
8 adjudicate this action are set forth in section 21(b)(4)(B) as follows:
9

10
11 In an action under subparagraph (A) respecting a petition to initiate a proceeding to
12 issue a rule under section 8 . . . of this title . . . , the petitioner shall be provided an
13 opportunity to have such petition considered by the court in a *de novo* proceeding.
14 If the petitioner demonstrates to the satisfaction of the court by a preponderance of
the evidence that—

15 . . .

16 (ii) in the case of a petition to initiate a proceeding for the issuance of a rule
17 under section . . . 8 of this title . . . , the chemical substance or mixture to be
18 subject to such rule . . . presents an unreasonable risk of injury to health or
19 the environment, without consideration of costs or other nonrisk factors,
including an unreasonable risk to a potentially exposed or susceptible
subpopulation, under the conditions of use;

20 the court shall order the Administrator to initiate the action requested by the
petitioner.

21 15 U.S.C. §2620(b)(4)(B). In short, where the petition seeks rulemaking to impose
22 reporting obligations under TSCA section 8, the court is required to conduct a *de novo*
23 *proceeding* and then must order EPA to initiate this rulemaking *if the petitioner*
24

1 *demonstrates to the satisfaction of court by a preponderance of evidence* that the chemical
2 involved presents *an unreasonable risk of injury*.

3 The framework for judicial review of a petition denial under section 704 of the
4 APA would differ significantly from this process. The court would not conduct a de novo
5 evidentiary hearing; review would be based on the administrative record of the petition
6 denial. The court would not make an independent determination of the preponderance of
7 evidence but would examine whether, under section 706 of the APA, the petition denial.
8 was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
9 law.” If the denial met these standards, the court would be obligated to “hold [it]
10 unlawful and set [it] aside.” Whether or not the chemical subject to the petition presents
11 “an unreasonable risk of injury” (a prerequisite for relief under section 21) would not be a
12 relevant factor under the APA.
13

14 Because of these different standards, a petitioner that is unable to demonstrate an
15 unreasonable risk of injury could prevail under the APA but not under section 21.
16 Conversely, a petitioner might prevail under section 21 based on a de novo determination
17 of the preponderance of the evidence but not under the more deferential “arbitrary and
18 capricious” test of the APA. In short, the two paths to obtaining a favorable judicial ruling
19 are not equivalent and neither is a substitute for the other. In this case, even if plaintiffs
20 could not demonstrate in a de novo proceeding that asbestos presents a unreasonable risk
21 of injury, they could prevail by demonstrating that the petition denial was “arbitrary and
22
23
24
25
26
27

1 capricious” under the APA.¹² Thus, the remedies provided by section 21 would be
2 “inadequate” under section 704 of the APA and could not defeat APA review.

3 EPA has pointed to nothing in the text, structure or legislative history of TSCA to
4 indicate that Congress wanted to deny plaintiffs access to the alternate remedies available
5 under the APA and section 21. Indeed, the procedures Congress mandated for EPA
6 consideration of petitions under section 21(b)(1)-(3) reflect an expectation that petition
7 denials would receive judicial scrutiny under the APA as well as affording petitioners the
8 opportunity to prevail through a de novo proceeding under section 21(b)(4)(B).
9

10
11 Section 21 petitions must “set forth the facts which it is claimed establish that it is
12 necessary to issue, amend or repeal a rule.” EPA may then hold a public meeting or
13 conduct an investigation or proceeding to “determine whether or not such petition should
14 be granted.” If EPA “denies such petition, the Administrator shall publish in the Federal
15 Register the Administrator’s reasons for such denial.” This administrative process –
16 which envisions that EPA would examine the basis for a petition, conduct further fact-
17 finding if necessary and issue a formal explanation in the Federal Register of its rationale
18 for denying the petition – would serve no purpose if the only role of the court is make a de
19 novo determination of the merits of the petition based on newly presented evidence. Thus,
20 the process Congress created under section 21 is evidence that it envisioned that the court
21
22
23
24

25 ¹² In addition to the potential to prevail under the APA but not under section 21, plaintiffs might wish to
26 avoid the time and expense of an evidentiary trial-type proceeding and opt (at least initially) for the more
27 streamlined, less burdensome APA approach of review based on the administrative record. In this case,
28 plaintiffs have not yet evaluated which strategy is preferable.

1 could also examine the basis for the petition denial using traditional principles of judicial
2 review under the APA.

3
4 **IV. The DC Circuit Decision in *Envtl. Def. Fund v. Reilly* Is Not Controlling in
5 this Circuit and Was Wrongly Decided**

6 EPA relies on *Envtl. Def. Fund v. Reilly*, 909 F.2d 1497 (D.C. Cir. 1990) to
7 demonstrate that TSCA does not allow plaintiffs to challenge petition denials under both
8 the de novo process in section 21 and the judicial review provisions of the APA. This case
9 is not controlling in the Ninth Circuit and, plaintiffs believe, was wrongly decided. The
10 decision does not refer to the Supreme Court's 1988 *Bowen v Massachusetts* opinion
11 applying section 704 of the APA and mentions section 704 only in a short footnote. 909
12 F.2d 505, n.100. It was issued before the Supreme Court's decisions in *Sackett* and
13 *Hawkes*, holding that the presence of explicit judicial review provisions in a statute does
14 not insulate an agency action from review under the APA. The DC Circuit opinion also
15 unjustifiably disregards the unambiguous language preserving other judicial remedies in
16 TSCA section 21(b)(5).¹³
17
18
19
20

21 ¹³ The court acknowledged that [t]aken literally, this provision might superficially appear to preserve the
22 right to APA review" but then reasoned that it would be "naïve" to accept the savings clause at face value
23 and asserted (without explanation) that the "clause in Section 21 is susceptible to more than one reading."
24 909 F.2d at 1508. To justify its approach, the court cited *Middlesex County Sewerage Auth. v. National
25 Sea Clammers Ass'n*, 453 U.S. 1 (1981). This case did not involve the availability of judicial review
26 under the APA. Rather, the issue was whether the Federal Water Pollution Control Act ("FWPCA") and
27 Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA") provided an implied private right
of action for injunctive and monetary relief against unlawful discharges of pollutants into ocean waters.
The Court rejected the lower court's reliance on the savings clause in the FWPCA, explaining that its
wording "is quite ambiguous concerning the intent of Congress to 'preserve' remedies under the FWPCA
itself." 453 U.S. at 15-16. Here, by contrast, plaintiffs do not seek to imply an additional remedy from

Continued on the next page

1 *Envtl. Def. Fund* involved the highly unusual situation where plaintiffs in a section
2 21 case entered into a settlement agreement committing EPA to take limited actions in
3 satisfaction of its section 21 claims but then sought to pursue a broader remedy through
4 APA review of the petition denial. 909 F.2d at 1500-01. The court acknowledged that
5 plaintiffs “might have qualified for APA review of EPA’s denial of their rulemaking
6 petition by invoking the presumption of reviewability” under the APA (*id.* at 1505) but
7 then held that “Congress did not intend to permit a litigant challenging an administrative
8 denial of such a petition to utilize simultaneously both Section 21 and the APA” (*id.* at
9 1501).¹⁴ As grounds for this conclusion, the court said that “Section 21’s mission is
10 antagonistic to use of the two remedies concomitantly,” “the Section 21 and the APA
11 remedies are incompatible in major respects” and “could rather easily produce wholly
12 inconsistent rulings” and a “terrible waste of time, energy, money and tranquility [is]
13 inherent in any mixture of Section 21 and APA remedies.” *See* 909 F.2d 1505-07.
14
15
16
17
18
19

20 TSCA but invoke the express remedy provided by the APA.

21 ¹⁴ The court limited this holding to cases where the section 21 petition sought the promulgation of a new
22 rule as opposed to amendment or repeal of an existing rule. Based on the legislative history of TSCA, it
23 reasoned that a *de novo* proceeding in the district court was available under section 21 only for petitions
24 for new rules and that “[r]efusals to amend or repeal existing rules can be reviewed . . . in modified APA
25 proceedings.” 909 F.2d at 1503-04. Oddly, however, the court believed that APA review would occur in
26 the court of appeals under the judicial review provisions of section 19 of TSCA. This is plainly incorrect
27 since section 19 authorizes court of appeals review only of final rules or orders, not petition denials. (The
28 court itself recognized that section 19 applies “only when EPA has actually established a rule, and not
where, as here, it has refused to formulate a new rule”). In the absence of statutory language providing
otherwise, APA review is available only in the district courts under 28 U.S.C. § 1331. In the current case,
plaintiffs believe that their petition sought issuance of new rule as opposed to revision or repeal of an
existing rule, giving rise to a *de novo* district court proceeding. Thus, this portion of the *Envtl. Def. Fund*
opinion is not directly applicable.

1 These considerations are not relevant to whether section 21 provides an “adequate”
2 remedy that defeats APA review under section 704 and in any event are unpersuasive.
3 There is no inherent “incompatibility” between the section 21 and APA remedies. As
4 noted above, they simply involve differing evidentiary standards and modes of decision –
5 a common occurrence in cases where plaintiffs present alternate legal theories and
6 evidence to the court to justify the relief they seek. Moreover, the availability of alternate
7 remedies would not undermine – but in fact would further -- the purposes of section 21.
8
9 As this Court has recognized, section 21 is an “unusually powerful procedure[] for
10 citizens to force EPA’s hand.” *Trumpeter Swan Soc. v. E.P.A.*, 774 F.3d 1037, 1039 (D.C.
11 Cir. 2014). The Congressional goal of holding EPA accountable for failing to use its
12 TSCA rulemaking authority to maximize public health protection would be enhanced by
13 enabling plaintiffs to prevail where the court either makes a de novo determination of
14 unreasonable risk under section 21(b)(4)(B) *or* it concludes that EPA’s grounds for
15 denying a petition are arbitrary and capricious under section 706 of the APA. Indeed,
16 section 21 anticipates this very result by expressly providing that its remedies shall be “in
17 addition to, and not in lieu of, other remedies provided by law.” As for the DC Circuit’s
18 concern about delay and expense, judicial review under section 706 of the APA is not
19 resource-intensive or time-consuming. It is normally limited to the administrative record
20 and based on written motions and briefs and thus involves far less time and burden on the
21 litigants than a full de novo evidentiary proceeding under section 21(b)(4)(B).
22
23
24
25
26
27

CONCLUSION

The Court should hold that section 21 of TSCA does not preclude judicial review of petition denials under section 704 of the APA and should deny EPA’s motion to dismiss.

Respectfully submitted on July 19, 2019.

/s/ Michael Connett
MICHAEL CONNETT
Waters, Kraus and Paul
222 North Pacific Coast Highway
Suite 1900
El Segundo, California 90245
(310) 414-8146
mconnett@waterskraus.com

ROBERT M. SUSSMAN
Sussman & Associates
3101 Garfield Street, NW
Washington, DC 20008
(202) 716-0118
bobsussman1@comcast.net

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by Notice of Electronic Filing this 19th day of July, 2019, upon all ECF registered counsel of record using the Court's CM/ECF system.

/s/ Michael Connett
MICHAEL CONNETT
Attorney for Plaintiffs