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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AT SAN FRANCISCO

ASBESTOS DISEASE AWARENESS ORGANIZATION, et al.,

Plaintiffs

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

Case No. 19-CV-00871-EMC

STATE OF CALIFORNIA, by and through Attorney General Xavier Becerra, et al.,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

STATE PLAINTIFFS' OPPOSITION TO EPA'S MOTION TO ALTER OR AMEND THE JUDGMENT UNDER RULE 59 OR FOR RELIEF UNDER RULE 60

Date: March 18, 2021
Time: 1:30 PM
Judge: Hon. Edward Chen
Courtroom: 5, 17th Floor

Case No. 19-CV-03807-EMC

I. INTRODUCTION

Plaintiffs have litigated this case and prevailed on summary judgment: This Court ruled that the Environmental Protection Agency (EPA) failed to act in accordance with law when it denied the plaintiffs' petitions under Section 21 of the Toxic Substances Control Act (TSCA) for EPA to initiate rulemaking to amend the Chemical Data Reporting rule (CDR), 40 C.F.R. Part 711, to require that certain asbestos data be reported to EPA. Order at 35, ADAO Case ECF No. 58; AGs' Case ECF No. 70. In its judgment and order, this Court "directed [EPA] to amend its CDR reporting rule pursuant to its authority under 15 U.S.C. § 2607(a)(1)(A) (i.e., under Section 8(a) of TSCA), to address the information-gathering deficiencies identified [in the Order]." *Id.*

EPA now asks the Court to reconsider its remedy, notwithstanding that plaintiffs are legally entitled to the relief granted under both Section 21 of TSCA and the Administrative Procedure Act (APA). EPA's motion asserts nothing the Court has not already considered, nor can EPA show that the Court committed a manifest error of law, as it must to prevail here. Therefore, State Plaintiffs respectfully request that the Court deny EPA's Motion.

II. STANDARD OF REVIEW

To prevail, EPA must, as it concedes, demonstrate that the Court has committed a "manifest error of law." EPA Mot. at 3, citing *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011); *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999) (requiring a showing of, among other things not relevant here, "clear error"). That is a high standard. Indeed, amending a judgment after its entry under either Rule 59(e) or 60(b)(6) is "an extraordinary remedy which should be used sparingly." *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (as to Rule 59(e), internal quotation omitted); *Twelve John Does v. District of Columbia,* 841 F.2d 1133, 1140 (D.C. Cir. 1988) (same as to Rule 60(b)(6)).

III. ARGUMENT

EPA acknowledges that "[a] party may not use a Rule 59(e) motion to litigate old matters" (EPA Mot. at 3), yet that is what EPA tries to do here: The parties already briefed these remedy issues. EPA offers nothing new to overcome the deferential standard of review necessary to obtain relief under Rules 59(e) and 60(b), and it cannot show manifest error of law. For reasons set forth in plaintiffs' earlier briefs on the issue, under both TSCA Section 21 and the APA, the Court has discretion to direct EPA to initiate the requested rulemaking. The Court was on firm ground in granting the relief it did.

A. Plaintiffs Are Entitled to the Remedy Provided by TSCA Section 21

Litigation of this action, including available remedies, was governed by Section 21. The ADAO Plaintiffs and State Plaintiffs each submitted petitions for rulemaking to EPA pursuant to Section 21. When EPA denied those petitions, the parties availed themselves of the procedures afforded them under Section 21 to compel the agency to initiate the requested rulemaking.

In its November 15, 2019 Order on EPA's motion to dismiss ADAO's complaint (ADAO Case ECF No. 43), the Court, analyzing Section 21 (15 U.S.C. § 2620), found that de novo review is available only to petitions for a new rulemaking, and that the standard of review for petitions seeking *amendment* of an existing rule was provided by the APA. On that basis, the Court found, "[p]laintiffs' Section 21 claim for *de novo* review cannot survive," and dismissed that claim. *Id.* at 12. It does not follow, however, that where a petitioner seeks amendment of a rule and not issuance of a new rule, Section 21 no longer applies at all. It plainly does.

Section 21(a) expressly authorizes petitions to "initiate a proceeding for the issuance, *amendment* or repeal of a rule" under Section 8 (emphasis added). Under Subsection 21(b)(4)(A), if such a petition is denied, "the petitioner may commence a civil action in a district court of the United States." Such actions may seek "to compel the Administrator to initiate a rulemaking

proceeding *as requested in the petition*" (emphasis added). All of these provisions, including the remedy, apply to *all* unlawful petition denials, whether the petition sought issuance of a new rule or amendment of an existing rule.

Plaintiffs did not dispute the Court's finding that their petitions were more aptly characterized as petitions to amend an existing rule, nor its subsequent ruling that Subsection 21(b)(4)(B) thus did not apply. But that does not mean that the preceding subsections no longer apply to their petitions; they do, including the very remedy ordered by the Court here, directing EPA to *initiate the rulemaking requested in the petitions*, to address the legal deficiencies.

B. Remedies Under the APA Are Not Limited to Vacatur and Remand

As the plaintiffs explained in their summary judgment briefs (*see, e.g.*, States' Reply, AGs' Case ECF No. 64, at 16–17), even if the remedy at issue here were governed by the APA, and not directly by TSCA Section 21, the Court would still be within its authority to order EPA to initiate the requested rulemaking. Where an agency action is deemed arbitrary and capricious and/or otherwise contrary to law, it may be that a "proper" or "ordinary" remedy is "vacatur and remand" to the agency for further consideration consistent with the Court's ruling. *See* EPA Mot. at 6, citing cases. But EPA has pointed to no authority that provides the court can do no more.[1]

EPA asserts that "failure to act" is not at issue here. Respectfully, EPA is mistaken. The Court ruled that, in denying the petitions, EPA had acted contrary to law, specifically, in

[1] EPA cites *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1221 (9th Cir. 2011) for the proposition that the Court does "not have the power to compel [a] specific result on remand." EPA Mot. at 5. This takes the *Gardner* court's ruling out of context. There, the court analyzed whether, in the *absence of a congressional directive for the agency to take the requested action*, the court could nonetheless direct the agency to take that action. It found that it could not: "Even if a court believes that the agency is withholding or delaying an action the court believes it should take, the 'ability to compel agency action is carefully circumscribed to situations *where an agency has ignored a specific legislative command.*'" 638 F.3d at 1221–22 (emphasis added). There can be no doubt that where, as here, the Court has found that EPA *has ignored a specific legislative demand*, the result is different.

contravention of TSCA's mandate to obtain all reasonably available information. To rectify that violation, EPA must perform that duty and obtain all reasonably available information; the Court is authorized to direct EPA to initiate a rulemaking to do so. Put otherwise, the APA does not prohibit the Court from being clear about what action the agency must take to remedy that violation on remand. *See, e.g., Cmty. Voice v. United States EPA,* 878 F.3d 779, 786 (9th Cir. 2017) (directing the agency to complete a rulemaking to update lead standards where "EPA is under a duty stemming from the TSCA and the Paint Hazard Act" to take such action "in light of the obvious need"); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1154, 1158 (D.C. Cir. 1983) (per curiam) (directing OSHA to issue an emergency workplace standard for a dangerous carcinogen where the statutory "criteria" for such a standard—including that the carcinogen presented a "grave danger" and there was an "obvious need"—were met); *Public Citizen Health Research Group v. Commissioner, Food & Drug Administration,* 740 F.2d 21, 32 (D.C. Cir. 1984) (court has the power to order an agency to carry out its substantive statutory mandates).

C. The Court's Order Does Not Authorize or Direct EPA To Evade APA Rulemaking Requirements

The Court specifically "directed [EPA] to amend its CDR reporting rule pursuant to its authority under 15 U.S.C. § 2607(a)(1)(A) (i.e., under Section 8(a) of TSCA), to address the information-gathering deficiencies identified [in the Order]." EPA mistakenly construes the Order to direct EPA to amend the CDR without following proper rulemaking procedures, and on that basis, EPA argues that the Court's remedy is unlawful.

As noted above, Section 21 authorizes a court "to compel the Administrator to initiate a rulemaking proceeding as requested in the petition." Implicit in this language is this: "*in accordance with APA rulemaking procedures*." The legislature apparently found it unnecessary to include that language in the statute, and so, too, did the Court in its Order. Indeed, in complying

with the Court's Order directing it to amend the CDR to address the deficiencies identified by the Court, it is plaintiffs' expectation that EPA will issue a proposed rulemaking; take comment on that proposal; potentially modify the proposed rule on the basis of those comments, and then issue a final rule amending the CDR.

D. The Court Is Authorized to Enforce Its Order

Time is of the essence for EPA to take action to initiate the requested rulemakings, but to date, it has not done so, and EPA has resisted plaintiffs' request that it commit to a date certain by which it will do so. State Plaintiffs request the Court's assistance to enforce its Order.

On December 30, a week after the Order was entered, EPA issued its "Part 1: Chrysotile Asbestos Final Risk Evaluation (FRE)."[2] Therein, and despite the fact that the Final Risk Evaluation did not benefit from the additional information requested here, EPA found that some asbestos conditions of use presented an unreasonable risk of injury (and that others did not). This finding triggers a requirement that EPA take further regulatory action *within one year* to manage those risks. EPA is simultaneously conducting a "Part 2" evaluation to fill gaps in the Final Risk Evaluation, to address the court's order in *Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397, 425 (9th Cir. 2019), that it consider legacy uses. The amended CDR rule required by this Court's December 22 Order will yield critical information that will inform both the ongoing Part 2 risk evaluation and the risk management rulemaking.

The Court has retained jurisdiction over this matter "for purposes of ensuring compliance." Order at 26. State Plaintiffs request that the Court exercise its authority to direct EPA to propose amendments to the CDR rule within a timeframe that will allow EPA to timely comply with its mandate to issue protective regulations that reflect the actual risk of exposure to asbestos.

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[2] 86 Fed. Reg. 89 (January 4, 2021).

IV. CONCLUSION

The Court should deny EPA's motion and set a schedule for proposed and final rulemaking to comply with its December 22 Order. State Plaintiffs join in the proposed order submitted by the ADAO Plaintiffs.

Dated: February 26, 2021

Respectfully submitted,

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