MEMORANDUM

TO:	Rick Eichstaedt, Director, Environmental Law and Land Use Clinic
FROM:	John Cummings, Intern
DATE:	October 2, 2019
RE:	PCB Petition Process under TSCA

This memo discusses the Environmental Protection Agency's ("EPA") process for bringing petitions to ban or restrict a chemical under the Toxic Substance Control Act ("TSCA"), and what a petition would need to include in order to be successful. 15 U.S.C. §§ 2601-2697.

a. Petitioning the EPA

The controlling language for petitioning the EPA states that petitions must be filed with the principle office of the Administrator of the EPA. 15 U.S.C. § 2620(b)(1). The petition must detail the facts that necessitate the action requested. *Id*. The Administrator may then hold a public hearing or conduct an investigation to consider the merits of the petition before either granting or denying the petition within ninety days of it being filed. *Id.* § 2620(b)(2)-(b)(3). These petitions must concern any of the following: the testing of chemical substances and mixtures; the prioritization, risk evaluation, and regulation of chemical substances and mixtures; the reporting and retention of information; regulation pending development of information; or protection against unreasonable risks. *Id.* § 2620(b)(1).

If the petition is denied, "the petitioner may commence a civil action in a district court of the United States to compel the Administrator to initiate a rulemaking proceeding as requested in the petition." *Id.* § 2620(b)(4)(A). This shall be commenced within sixty days of the Administrator's denial of a petition or failure to respond within ninety days. *Id*. The court will then consider the merits of the petition in a de novo proceeding to the standard of the

preponderance of the evidence, and if successful, the court will order the Administrator to take the requested action within the petition. *Id.* § 2620(b)(4)(B).

b. Discussion of Previous Petitions

Previous successful petitions include a petition for the EPA to create a regulation that would decrease formaldehyde emissions from hardwood plywood, particle board, and medium density fiberboard. Formaldehyde Emissions from Composite Wood Products; Disposition of TSCA Section 21 Petition, 73 Fed. Reg. 36,504 (June 27, 2008). This was in response to the effects that formaldehyde was having on persons staying in FEMA trailers after Hurricane Katrina. *Id*. The petitioners were able to show that the formaldehyde levels in these trailers were higher than typical levels, that it was directly due to the use of formaldehyde in the wood products used in construction of the trailers, and that existing federal standards and regulations were not adequate to protect human health. *Id*. However, the EPA did not implement the specific regulations that the petitioners asked for because the petitioners failed to show that they would be the least burdensome. *Id*.

Another successful petition asked for the EPA to lower the dust lead hazard standards, claiming that the then current standards were insufficient to protect the health of children. Dust-Lead Hazard Standards; Definition of Lead-Based Paint, 84 Fed. Reg. 32,632 (July 9, 2019). The petitioners were able to show that the standards in place were not adequate to meet the EPA's own set criteria for protecting children from elevated blood lead levels and from lead poisoning, and that the requested changes were reasonably achievable. *Id*. It was also successful in having the EPA review the definition of "lead-based" in reference to paint, although the EPA did not ultimately change its definition. *Id*. This petition also led to a successful civil action

against the EPA to compel them to follow through with their initial response granting the petition to lower standards and review the definition. *Id*.

The EPA has denied petitions when the evidence presented did not adequately support the need for the implementation or altering of rules and regulations in order to prevent unreasonable risks to the environment or human health. For example, the EPA denied a petition for a ban on hydrofluorosilicic acid as a water fluoridation agent. Toxic Substances Control Act Petitions; Hydrofluorosilicic Acid in Drinking Water, 78 Fed. Reg. 48,845 (August 12, 2013). The EPA also denied a petition for the implementation of regulations concerning the treatment, storage, and disposal of polyvinyl chloride and vinyl chloride. Petitions for Rulemaking: Discarded Polyvinyl Chloride; Agency Response, 79 Fed. Reg. 64,722 (October 31, 2014).

The EPA also denies petitions that could not be granted because they were not within the proper scope of TSCA. One such petition was for stricter rules concerning PCB-contamination levels in the materials on U.S. Navy vessels sunk as part of the Navy's SINKEX program which the EPA denied because SINKEX vessels are regulated under the Marine Protection, Research, and Sanctuaries Act. Disposition of Requests Submitted Under TSCA Section 21; Polychlorinated Biphenyls, 77 Fed. Reg. 42,181 (July 18, 2012).

The EPA will also deny petitions when the petition does not show that the current regulations and requirements are inadequate, or when the petition fails to show that the requested changes are appropriate. This includes a petition for stricter regulations on the recordkeeping and reporting of mercury, mercury compounds, and mercury-added products. Mercury; TSCA Section 21 Petition; Reasons for Agency Response, 80 Fed. Reg. 60,584 (October 7, 2015).

c. A Petition on Inadvertent PCBs

It has been established that PCBs pose a risk to life and the environment. The EPA has banned the manufacture of PCBs, but still allows for the inadvertent production of PCBs. The current maximum allowable level of inadvertent PCBs is 50 ppm. 40 C.F.R. § 761.3. This has not changed since 1979, raising the question that the regulation is outdated. The EPA initially considered setting the limit as high as 500 ppm and as low as 1 ppm. Polychlorinated Biphenyls Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions. 44 Fed. Reg. 3154 (May 31, 1979). The EPA thought that a limit of 10 ppm would pose too great of an economic burden on industry to alter their manufacturing process to be in compliance, and that the environmental benefits would be negated due to improperly disposed of PCB contaminated materials. *Id*, at 31516. A limit of 1 ppm was considered even more unreasonable because of the drastic impact it would have on fish and dairy products, and because the human body commonly held concentrations of PCBs at that level. *Id*. However, the EPA admits that Congress "intended that [the] EPA address the problem of contamination of the environment by PCBs *to the greatest extent possible*," and that the 50 ppm limit is "*adequate* protection for human health and the environment." *Id* (emphasis added in both). The TSCA also stipulates that regulations made under it "may be amended from time to time as necessary." 15 U.S.C. § 2687.

In 2010, the EPA gave an Advance Notice of Proposed Rulemaking that considered, among other changes, a reevaluation of the 50 ppm limit and the definition of "excluded manufacturing process." Polychlorinated Biphenyls (PCBs): Reassessment of Use Authorizations, 75 Fed. Reg. 17,645 (April 7, 2010). The EPA was seeking comments on the feasibility of lowering the limit to 1 ppm. *Id*, at 17,658. In 2014, the EPA announced that any proposed rule would focus on "existing liquid-filled PCB use authorizations, PCBs in fluorescent

light ballasts, PCBs in natural gas pipelines, and clarifying regulatory language," but have yet to give notice of a proposed rule. EPA, *SBAR Panel: PCB Use Authorizations Update Rule,* https://www.epa.gov/reg-flex/sbar-panel-pcb-use-authorizations-update-rule (last updated November 26, 2018). Dr. John Smith, who represented the EPA in administrative and judicial proceedings as a PCB technical expert and who had worked in the PCB program at the EPA for over 25 years, admitted during a presentation on the advance rulemaking proposal that "the PCB program is not one of the best or largest funded programs in the EPA," and that the EPA is "several years late" on making changes to the overall PCB use authorizations and regulations. EPA, *Transcript of May 11, 2010 Northwest Public Power Administration Webinar on PCB Advance Notice of Public Rulemaking*, at 3-4, 16, and 10 (published October 6, 2010), https://www.regulations.gov/document?D=EPA-HQ-OPPT-2009-0757-0233.

A successful petition should include evidence backed through scientific studies that the allowable level of 50 ppm is insufficient to protect the environment and human health and what level would be sufficient. If the desire is a ban, then the petition must show that any level of inadvertent PCBs poses an unreasonable risk to the environment and human health, and that a ban on inadvertent PCBs would be reasonably achievable. The petition should at the least ask for the EPA to re-evaluate the 50 ppm level based on information made available since 1979, and stress the purpose of the EPA to protect human and environmental health to the greatest extent possible. It should also ask for a requirement that producers of inadvertent PCBs investigate and implement reasonable alternative manufacturing methods should an allowable limit remain in place.