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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
AT SAN FRANCISCO

BASEL ACTION NETWORK and SIERRA CLUB, Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; LISA P. JACKSON, Administrator, U.S. Environmental Protection Agency, in her official capacity, Defendants.	Civ. No. COMPLAINT

INTRODUCTION

1. Plaintiffs, Basel Action Network and Sierra Club (collectively "BAN"), bring this suit against Defendants, the U.S. Environmental Protection Agency and Lisa Jackson, in her official capacity as Administrator of that agency (collectively "EPA"), to compel the initiation of rulemaking pursuant to the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2629, for the marine disposal of PCBs (polychlorinated biphenyls) on decommissioned military vessels as part of the U.S. Navy SINKEX program as requested in BAN's July 12, 2011 petition to EPA.

JURISDICTION AND VENUE

2. On July 12, 2011, BAN petitioned EPA to initiate rulemaking under TSCA. 15 U.S.C. § 2620. BAN's petition is attached to this complaint as Attachment 1.

3. By letter dated July 21, 2011, EPA acknowledged receipt of BAN's petition. That letter is attached to this complaint as Attachment 2.

4. Under Section 21 of TSCA, 15 U.S.C. § 2620, the deadline for EPA to respond to BAN's petition was October 11, 2011. EPA failed to respond by that date and has not responded as of the date of this complaint.

5. BAN has a right to bring this action pursuant to TSCA, 15 U.S.C. § 2620(b)(4)(A), which authorizes petitioners to 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. Any such action must be filed within 60 days of the Administrator's denial of the petition or, if the Administrator fails to respond, within 60 days after the expiration of the Administrator's 90-day period to respond.

6. Based on EPA's failure to respond to BAN's petition on or before October 11, 2011, BAN may timely commence this action on or before December 12, 2011, which they have

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by filing this complaint.

7. This Court has jurisdiction pursuant to 15 U.S.C. § 2620(b)(4)(A) and 28 U.S.C. § 1331.

8. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) as plaintiff Sierra Club is incorporated in California and resides and maintains its headquarters in this District.

PARTIES

9. Plaintiff BASEL ACTION NETWORK is a 501(c)(3) charitable organization of the United States, based in Seattle, Washington. BAN works to confront the global environmental injustice and economic inefficiency of toxic trade (toxic wastes, products and technologies) and its devastating impacts. Working at the nexus of human rights and the environment, BAN confronts the issues of environmental justice at a macro level, working to prevent the disproportionate and unsustainable dumping of the world's toxic waste on the world's poorest communities. At the same time BAN actively promotes sustainable and just solutions to our waste crises — banning waste trade, while promoting green, toxic free and democratic design. BAN leads a campaign focused on the responsible management of end-of-life ships, promoting green recycling initiatives to better protect the global environment and human health from toxic waste found in end-of-life ships. BAN's staff and board members, supporters, and communities that BAN works to protect, have been injured or will be injured by EPA's failure to adequately regulate the marine disposal of PCBs through the SINKEX program.

10. Plaintiff SIERRA CLUB was founded in 1892 and is the nation's oldest grassroots environmental organization. The Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters nationwide dedicated to exploring, enjoying,

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and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. One of the Sierra Club's national initiatives is to build safe and healthy communities, free of toxic poisons that threaten public health and safety. The Sierra Club has a national Toxics Committee dedicated to protecting public health from the dangers of toxic exposure. The Sierra Club also has a Marine Action Team dedicated to marine mammal protection and marine and coastal ecosystems conservation, among other issues. The Sierra Club's main office is located in San Francisco, California. Sierra Club's members have been injured or will be injured by EPA's failure to adequately regulate the marine disposal of PCBs through the SINKEX program.

11. Plaintiffs' members, supporters, and staff use and enjoy marine species and marine and coastal ecosystems for recreational, scientific, aesthetic, cultural, and commercial purposes. Plaintiffs' members derive, or, but for the threat of PCB contamination, would derive, recreational, scientific, aesthetic, and commercial benefits from marine species and marine and coastal ecosystems through wildlife observation, study, photography, and recreational and commercial fishing. The past, present, and future enjoyment of marine species and marine and coastal ecosystems by members of the plaintiff organizations has been and will continue to be irreparably harmed by EPA's failure to comply with its obligations under TSCA.

12. The above-described aesthetic, conservation, recreational, commercial, and scientific interests of plaintiffs and their members, supporters, and staff have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by EPA's failure to comply with TSCA, as described below. Plaintiffs have

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no adequate remedy at law.

13. Defendant LISA JACKSON is the Administrator of the EPA and, in that role, is responsible for responding to citizen petitions submitted pursuant to Section 21 of TSCA, 15 U.S.C. § 2620, and for adopting regulations pursuant to Section 6 of TSCA, 15 U.S.C. § 2605. Defendant Jackson is named solely in her official capacity.

14. Defendant U.S. ENVIRONMENTAL PROTECTION AGENCY is the agency of the United States responsible for administering and adopting regulations to implement TSCA under the direction of the Administrator.

BACKGROUND

I. STATUTORY FRAMEWORK

A. The Toxic Substances Control Act ("TSCA")

15. Congress enacted the Toxic Substances Control Act in 1976 to provide a comprehensive framework for the regulation of toxic chemicals. Congress found that existing federal laws were fragmented, inadequate, and left conspicuous gaps in protecting the environment and the public from the hazards of toxic chemicals. Accordingly, in TSCA Congress created a regulatory approach that would allow EPA to prevent damage to health and the environment from toxic chemicals, rather than simply responding to such harm after it had already occurred.

16. TSCA authorizes EPA to control toxic substances in many different ways: EPA may entirely ban or regulate the manufacture, processing, distribution, use, and/or disposal of any chemical substance or mixture for which there is a "reasonable basis to conclude" that such activity "presents or will present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(a). EPA may require testing of any substances or mixtures which may pose such risks if "there are insufficient data and experience" to assess such risks, id. § 2603, and EPA may

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also impose record keeping and reporting requirements on manufacturers and processors of such chemicals or mixtures, id. § 2607.

17. In general TSCA authorizes EPA to regulate toxic chemicals and mixtures, but requires EPA first to determine that a chemical or mixture poses an unreasonable risk before regulating it. In addition to this general authority, TSCA includes a specific provision concerned solely with PCBs. Section 6(e) of TSCA requires a rapid phase-out of all manufacture, processing, distribution in commerce, or use of all PCBs between 1977 and 1979, subject only to limited and temporary exemptions granted by the Administrator. Id. § 2605(e). Section 6(e) also directs that EPA shall enact regulations prescribing methods for the disposal of PCBs within six months after January 1, 1977. Id. While there was opposition to the singling out of one specific substance in the Act itself, the extremely hazardous nature of PCBs and the severity of the threat they posed to human health and the environment led Congress to regulate PCBs specifically and more stringently than other chemicals under TSCA.

18. Congress provided for citizen participation in the administration and enforcement of TSCA. Section 21 of TSCA authorizes any person to petition EPA to initiate rulemaking under any of the above sections. Id. § 2620. Under the citizens' petition provision, EPA must respond to all petitions for rulemaking within 90 days. Id. If EPA grants the petition, EPA must promptly initiate rulemaking proceedings; if EPA denies the petition, it must publish its reasons for denial in the Federal Register. Id. If EPA denies (or fails to answer) a petition, the petitioner may seek *de novo* review in federal district court. Id. This remedy is "in addition to, and not in lieu of, other remedies provided by law." Id.

19. Finally, TSCA explicitly addresses the relationship between its provisions and other federal laws. If a risk to health or the environment "could be eliminated or reduced to a

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sufficient extent" by actions taken under another federal law administered by EPA, EPA may waive TSCA's applicability unless the Administrator determines that it would be in the public interest to regulate under TSCA in addition to such other authority. 15 U.S.C. § 2608(b).

20. Pursuant to TSCA's mandate, the manufacture, processing, distribution in commerce, or use of PCBs has been banned since 1979, subject to only limited exceptions. Additionally, to prevent harm to human health and the environment from the substantial volume of PCBs manufactured and distributed prior to their ban, EPA has enacted extensive rules governing domestic disposal of PCBs. 40 C.F.R. §§ 761.50 – 761.80. These rules prescribe detailed requirements for the disposal of PCBs in an EPA-approved incinerator, chemical waste landfill, or other methods depending on whether the PCBs are in liquid or other form. See id.

21. EPA has also enacted rules governing the import and export of PCBs; these rules include a ban on the export for disposal of PCBs in concentrations greater than 50 parts per million without an exemption from the Administrator. Id. § 761.97.

22. Finally, EPA has enacted extensive rules governing the decontamination of items containing PCBs. Id. § 761.79. These rules contain standards and procedures for the removal of PCBs from "water, organic liquids, non-porous surfaces (including scrap metal from disassembled electrical equipment), concrete, and non-porous surfaces covered with a porous surface, such as paint or coating on metal." Id. Materials which have been fully decontaminated in accordance with the EPA rules are no longer governed by the disposal rules or the prohibitions on use or distribution in commerce. Id.

B. The Marine Protection, Research and Sanctuaries Act ("MPRSA")

23. The Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401-1445, also known as the Ocean Dumping Act, sought to create comprehensive federal regulation

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preventing the dumping of materials into ocean waters near the U.S. coastline. The Act forbids any dumping into ocean waters without a permit from the Administrator of EPA by an American vessel or by any vessel transporting material from the United States. 33 U.S.C. § 1411. The EPA Administrator may only issue a permit for dumping if she first determines that such dumping "will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." Id. § 1412(a). The Administrator can choose to issue general permits in lieu of specific permits for dumping that the Administrator determines "will have a minimal adverse environmental impact." Id. § 1414(c).

24. The MPRSA directs the Administrator to establish criteria for reviewing and evaluating permit applications for ocean dumping, and directs that the Administrator "shall" include in such criteria factors including "the need for the proposed dumping," "the effect of such dumping on human health and welfare," "the effect of such dumping on fisheries resources, plankton, fish, shellfish, wildlife, shore lines and beaches," "the effect of such dumping on marine ecosystems, particularly with respect to the transfer, concentration, and dispersion of such material and its byproducts through biological, physical, and chemical processes," and "the persistence and permanence of the effects of the dumping," among other factors. Id. § 1412; see also 40 C.F.R. pt. 227 (criteria for evaluating environmental effect of dumping).

25. The MPRSA directs the Administrator to review permits periodically and provides that the Administrator may revoke permits if she finds that the dumping is no longer consistent with the criteria she must consider in approving permits initially. 33 U.S.C. § 1414(d); see also 40 C.F.R. § 223.2 to 223.5.

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II. THE MARINE DISPOSAL OF PCBS VIA SINKEX POSES AN UNREASONABLE RISK TO HEALTH AND THE ENVIRONMENT

A. PCBs Pose Substantial Risks to Human Health and the Environment

26. PCBs (polychlorinated biphenyls) are mixtures of synthetic organic chemicals that are highly toxic and dangerous to human health and the environment: in a 1996 report, prepared at the direction of Congress, EPA found that PCBs cause cancer in animals and are probable carcinogens for humans. Other known significant ecological and human health effects of PCBs include neurotoxicity, reproductive and developmental toxicity, immune system suppression, liver damage, skin irritation, and endocrine disruption.

27. There are 209 different PCB congeners or chemical forms, which vary based on the number and location of hydrogen and chlorine substitutions within a common molecular structure. The more chlorinated PCB congeners are the more potentially carcinogenic.

28. PCBs are non-flammable and chemically stable, so after they are released into the environment they persist for many years. EPA has noted that once in the environment, PCBs do not readily break down and therefore may remain for long periods of time cycling between air, water, and soil. PCBs can be carried long distances and have been found in snow and sea water in areas far away from where they were released. More chlorinated PCB congeners persist to a much greater extent in the environment than less toxic congeners.

29. PCBs are highly soluble in lipids and are readily absorbed by fish and other organisms. EPA has found that PCBs accumulate selectively in living organisms, such that the more chlorinated and most dangerous forms of PCBs are retained in the highest concentrations. More chlorinated PCBs are more likely to bioaccumulate in fish and bind to sediments. Moreover, bioaccumulation through the food chain concentrates the PCB forms with higher chlorine content, which are the slowest to biodegrade. Accordingly, EPA has concluded that

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bioaccumulated PCBs appear to be even more toxic than commercially produced PCBs.

30. EPA has found that PCBs are widespread in the environment, and humans are exposed through multiple pathways, including through air, soil, sediment, water, and food. Because PCBs bioaccumulate in fish and other animals and biomagnify in the food chain, exposure through ingesting contaminated fish and other contaminated food may lead to dangerous levels of exposure.

31. EPA has found that nursing infants are likely exposed to approximately three times the adult level of exposure via food intake; adjusted for body weight, this equates to a 50-fold higher level of exposure.

32. PCBs pose substantial risks to human health: EPA has characterized PCBs as "mutation-causing, cancer-causing, and teratogenic [meaning they can interfere with normal embryonic development]."

33. PCBs also have significant adverse effects on wildlife. For example, EPA has noted that effects on avian species include "morbidity, tremors, upward pointing beaks, muscular incoordination, and hemorrhagic areas in the liver." EPA has found that effects on aquatic species include complete reproductive failure, reduced growth, cancer causing effects, and biochemical perturbation.

B. SINKEX Leads to the Marine Disposal of Dangerous Levels of PCBs

34. Military vessels whose keels were laid before 1985 often contain substantial volumes of PCBs. Potential PCB sources on military vessels built prior to 1985 include thermal insulation materials (fiberglass, felt, foam, and cork), oil-based paint, cable insulation, motor and hydraulic system oils, transformers and capacitors, other miscellaneous electrical equipment, florescent light ballasts, caulking materials, adhesives and tapes, and some plastics. The PCBs

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used in these products were generally mixtures made up of a variety of different PCB congeners, including more heavily chlorinated congeners. The total amount of materials containing PCBs in such military vessels can be as high as multiple hundreds of thousands of pounds.

35. Once military vessels reach the end of their useful life, one method the Navy employs for their disposal is to use them as targets in weapons development testing and fleet training exercises. The U.S. Navy's SINKEX program allows the Navy to conduct live fire training exercises on decommissioned Naval warships. Sink exercises result in the permanent sinking and disposal of such decommissioned ships at sea. The Navy conducts sink exercises at least 50 nautical miles from shore and in water at least 6,000 feet deep. Navy sink exercises are most frequently conducted off the shores of Hawaii, Southern California, the east coast of the United States, and Puerto Rico. Since 2000, the Navy has sunk 109 vessels through the SINKEX program.

36. EPA has issued a general permit under the MPRSA authorizing ocean dumping of ships sunk by the Navy as part of the SINKEX program. 40 C.F.R. § 229.2. Under the general permit and related agreements between the Navy and EPA, the Navy must conduct some environmental remediation, including limited PCB decontamination, on a vessel prior to conducting a sink exercise. Under the SINKEX general permit and related agreements, the Navy must remove prior to a sink exercise all PCB transformers and large capacitors, small capacitors to the greatest extent practical, and solid PCB items only if they are readily detachable. Under the general permit and related agreements, the Navy is <u>not</u> required to remove any solid PCB items that are not readily detachable. Ships remediated to this standard may still contain many hundreds of pounds of PCBs in solid form and in concentrations of 50 parts per million or greater. Such ships would not meet the standards otherwise applicable to the export for disposal

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of these vessels.

37. When decommissioned Naval warships containing PCBs are disposed of at sea via the SINKEX program, solid PCBs remaining on them may leach into the marine environment. These PCBs may then be transported to shallow water ecosystems by a variety of methods including by biographic transport, upwelling, and meridional circulation overturning, where they may bind to sediments or be absorbed by fish or other marine organisms.

38. The marine disposal of PCBs in sunken Naval vessels poses significant risks to health and the environment. The only way to limit or prevent these risks is to limit or prevent the marine disposal of PCBs.

III. BAN'S PETITION AND EPA'S FAILURE TO RESPOND

39. Under the general EPA regulations governing the disposal and export of PCBs under TSCA, the marine disposal of PCBs via the SINKEX program would be prohibited.

40. In 1999, EPA determined under Section 9 of TSCA that the marine disposal of PCBs via the SINKEX program should be regulated solely under the Marine Protection, Research and Sanctuaries Act on the grounds that the MPRSA general permit for the SINKEX program, 40 C.F.R. § 229.2, adequately protects against the risks posed by the marine disposal of PCBs via the SINKEX program and that regulation under TSCA would not be in the public interest.

41. The MPRSA general permit for the SINKEX program requires the removal of PCBs prior to sinking to "the maximum extent practicable," as described above. 40 C.F.R. § 229.2. Under this standard, hundreds of pounds of solid PCBs may remain on board SINKEX vessels if their removal is not deemed "practicable." The removal of all solid PCBs is not required under the general permit and related agreements based, in part, on the finding that solid

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PCBs do not readily leach into the marine environment and that sunken vessels would contain, at worst, 100 pounds of solid PCBs.

42. On July 12, 2011, BAN submitted to EPA a Petition demonstrating that PCBs on board sunken SINKEX vessels pose an unreasonable risk to health and the environment. The Petition demonstrates that solid PCBs are readily leachable to the marine environment and are then readily absorbed by living organisms, contrary to the assumptions relied on by the Navy and EPA at the time EPA granted the TSCA waiver for SINKEX.

43. The Petition demonstrates that the MPRSA general permit for SINKEX is an inadequate basis for an exemption from TSCA because it does not protect against an unreasonable risk to human health and the environment.

44. The evidence discussed in the Petition includes a recent study conducted on a decommissioned military vessel, the ex-Oriskany, that was sunk off the coast of Florida. The Oriskany contained substantial volumes of PCBs; while most PCB materials were removed prior to sinking, some electrical cable insulation, fiberglass bulkhead insulation, and paint and rubber products were left on board the ship at the time the vessel was sunk. Based on the pre-sink modeling prediction data provided by the Navy, EPA concluded prior to the sink that the sinking of the Oriskany would not pose any unreasonable risk to human health or the environment.

45. Following the sinking of the ex-Oriskany, the Florida Fish and Wildlife Conservation Commission sampled and tested fish caught in the vicinity of the vessel eight times at intervals over the course of four years. Average PCB concentrations in fish caught in the vicinity of the ex-Oriskany exceeded both EPA and Florida Department of Health maximum levels in each of the first four separate sampling events, conducted at intervals during the first two years following the sinking of the vessel. In contrast, average PCB concentrations in fish

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caught in the vicinity of a nearby underwater structure made of concrete rubble that did not contain PCBs did not exceed EPA or Florida Department of Health levels in either of two separate sampling events conducted at the same time as two of the sampling events conducted in the vicinity of the ex-Oriskany. Additionally, the average PCB concentrations in fish caught in the vicinity of the nearby underwater structure were similar to the PCB levels recorded during the pre-sink analysis at the ex-Oriskany site. The ex-Oriskany was remediated to standards similar to the remediation required prior to a Navy sink exercise, including removal of all liquid PCBs. Accordingly, the PCB levels that exceeded federal and state health standards for fish are attributable to the leaching of solid PCBs from the ex-Oriskany and their subsequent absorption by fish and/or their prey.

46. Based on this and other evidence that PCBs on SINKEX vessels pose substantial risks to human health and the environment, BAN's Petition requests that EPA initiate rulemaking under TSCA to regulate the marine disposal of PCBs via SINKEX. Specifically, the Petition asks EPA to enact rules requiring greater remediation prior to sinking, such that only trace amounts of PCBs would be allowed to remain on board vessels designated for sink exercises.

47. The Petition requests, in the alternative, that EPA initiate rulemaking under the MPRSA to amend the SINKEX general permit under the MPRSA to include these same increased remediation requirements.

48. EPA acknowledged receipt of the Petition but has not otherwise responded either on or before October 11, 2011, or as of the date of this complaint.

CAUSE OF ACTION

49. Plaintiffs restate and reallege all preceding paragraphs.

50. There is a reasonable basis to conclude that the initiation of rulemaking

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proceedings under TSCA to regulate the marine disposal of PCBs through the SINKEX program is necessary to protect human health or the environment against an unreasonable risk of injury.

51. Under these circumstances, EPA's failure to respond to BAN's petition entitles BAN to relief pursuant to 15 U.S.C. § 2620.

PRAYER FOR RELIEF

WHEREFORE, BAN respectfully requests that the Court grant it the following relief;

A. Declare that BAN has demonstrated a reasonable basis to conclude that the initiation of rulemaking proceedings consistent with its petition is necessary to protect health or the environment against an unreasonable risk of injury pursuant to 15 U.S.C. § 2620(b)(4)(B).

B. Order EPA to initiate rulemaking as requested by BAN in its petition pursuant to 15 U.S.C. § 2620(b)(4)(B).

C. Award BAN its costs of suit and reasonable fees for attorneys and expert witnesses in this action pursuant to 15 U.S.C. § 2620(b)(4)(C).

D. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this _____ day of December, 2011.

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