No. 17-72260
Consolidated with Nos. 17-72501, 17-72968, 17-73290, 17-73383, 17-73390

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAFER CHEMICALS HEALTHY FAMILIES, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

RESPONDENTS' MOTION FOR PARTIAL VOLUNTARY REMAND

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INTRODUCTION

Respondents United States Environmental Protection Agency and Andrew Wheeler, Acting Administrator[1], (collectively, "EPA" or "Agency") hereby move for voluntary remand of three provisions at issue in these consolidated petitions for review.

Petitioners challenge two EPA regulations promulgated as a result of amendments to the Toxic Substances Control Act ("TSCA"). The first rule establishes the process by which EPA will prioritize chemical substances for purposes of evaluating the substances' risks to human health or the environment. The second rule establishes the process by which EPA will conduct these risk evaluations. At issue in this motion are three provisions of the second rule (known as the "Risk Evaluation Rule") concerning submissions of information to EPA during risk evaluations, 40 C.F.R. §§ 702.31(d), 702.37(b)(4), and 702.37(b)(6).

In light of arguments raised by Petitioners in their opening brief and upon further consideration and review by EPA, EPA intends to reconsider these provisions and take appropriate agency action. Because EPA intends to revisit the challenged provisions, remand would best serve the interests of judicial economy. As explained

[1] Petitioners originally named Scott Pruitt, the former Administrator of EPA, as a respondent. Pursuant to Federal Rule of Appellate Procedure 42(c)(2), his successor, acting Administrator Andrew Wheeler, has automatically been substituted as a party.

below, EPA seeks remand with vacatur for section 702.31(d) and remand without vacatur for sections 702.37(b)(4) and 702.37(b)(6).

Counsel for Petitioners Safer Chemicals Healthy Families, et al., have represented: "The Petitioners oppose the request for remand without vacatur of 40 C.F.R. § 702.37(b)(4) and 40 C.F.R. § 702.37(b)(6). The Petitioners take no position on the remand with vacatur of 40 C.F.R. § 702.31(d) until we've seen the motion, and Petitioners reserve the right to file an opposition." Counsel for Intervenors American Chemistry Council, et al., have represented that Intervenors do not object to the requested relief.

BACKGROUND

In the 2016 amendments to TSCA, Congress created a three-step process for assessing and, if necessary, regulating chemical substances that might be harmful to human health or the environment. First, EPA must "prioritize" individual chemicals as either low- or high-priority. 15 U.S.C. §§ 2602(4), 2605(b)(1). High-priority chemicals move on to the second phase, "risk evaluation." Under this phase, EPA must assess whether a chemical poses an unreasonable risk to human health or the environment under its conditions of use. *Id.* § 2605(b)(4). If EPA finds that a chemical poses an unreasonable risk, it moves to the third phase—"risk management"—during which EPA must impose requirements on the chemical as necessary to remove the unreasonable risk. *See id.* § 2605(a)(1).

The TSCA amendments directed EPA to promulgate framework regulations for the first and second of these phases, i.e., regulations establishing a risk-based screening program to prioritize chemical substances, *id.* § 2605(b)(1)(A), and regulations establishing the procedures for conducting risk evaluations, *id.* § 2605(b)(4)(B). On July 20, 2017, EPA promulgated the two rules. Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act, 82 Fed. Reg. 33,753 (July 20, 2017) ("Prioritization Rule") (establishing the process and criteria that EPA will use to identify chemicals as either high or low priority for purposes of risk evaluation); Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act," 82 Fed. Reg. 33,726 (July 20, 2017) ("Risk Evaluation Rule") (establishing the process for EPA to conduct risk evaluations to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment).

Petitioners filed petitions for review of both rules in three Courts of Appeals, which were ultimately consolidated in this Court. In their April 2018 opening brief, Petitioners challenged several provisions in both Rules. *See generally* Pet'rs Br. (Dkt. 44-1). This motion concerns three challenged provisions of the Risk Evaluation Rule.

The first provision, 40 C.F.R. § 702.31(d) or the "Penalty Provision," states:

> Submission to EPA of inaccurate, incomplete, or misleading information pursuant to a risk evaluation conducted pursuant to 15 U.S.C. 2605(b)(4)(B) is a prohibited act under 15 U.S.C. 2614, subject to penalties under 15 U.S.C. 2615 and Title 18 of the U.S. Code.

Petitioners argue that this provision is unconstitutionally vague and could chill public comments on risk evaluations out of fear of criminal prosecution for submitting "incomplete" information. Pet'rs Br. at 52-55.

The second provision, 40 C.F.R. § 702.37(b)(4) or the "Relevancy Provision," states in part that, when manufacturers submit a request to EPA to conduct a risk evaluation, "[t]he request must also include a list of all the existing information that is relevant to whether the chemical substance, under the circumstances identified by the manufacturer(s), presents an unreasonable risk of injury to health or the environment." Petitioners argue that this provision unlawfully allows manufacturers, not EPA, to determine which information is relevant to the Agency's evaluation and could result in manufacturers withholding pertinent information. Pet'rs Br. at 58-59.

The third provision, 40 C.F.R. § 702.37(b)(6) or the "Consistency Provision," states that, when manufacturers submit a request to EPA to conduct a risk evaluation, "[s]cientific information submitted must be consistent with the scientific standards in 15 U.S.C. 2625(h)."[2] Petitioners argue that this provision unlawfully allows manufacturers, not EPA, to determine which information is scientifically sound under

[2] Section 26(h) of TSCA provides that, when EPA is making decisions based on science, the Agency "shall use scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner consistent with the best available science, and shall consider as applicable" five factors, such as whether the information "is relevant for [EPA's] use" or has been peer reviewed. 15 U.S.C. § 2625(h).

15 U.S.C. § 2625(h), and could result in manufacturers withholding pertinent information. Pet'rs Br. at 55-57.

ARGUMENT

I. Remand Would Serve the Interests of Judicial Economy.

"A reviewing court has inherent power to remand a matter to the administrative agency." *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1127 (9th Cir. 1983) (citation omitted). "[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002) (citation omitted); *see also Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (noting that "the power to decide in the first instance carries with it the power to reconsider") (citation omitted).

An agency's motion to remand for reconsideration of its own decision is usually granted. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) ("We commonly grant [remand] motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete."). While the reviewing court has discretion on whether to remand, voluntary remand is appropriate where the request is reasonable and timely. *Macktal*, 286 F.3d at 826. "[A]dministrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts." *B.J. Alan Co. v. ICC*, 897 F.2d

561, 562 n.1 (D.C. Cir. 1990) (citation omitted). "Generally, courts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (citation omitted).

Here, EPA's request to remand the Penalty, Relevancy, and Consistency Provisions is reasonable, timely, and will serve the interests of judicial economy. EPA only learned of the potential concerns over the implications of these provisions upon receiving Petitioners' opening brief in April 2018. After reviewing those arguments and taking a closer look at the provisions, the Agency has decided to revisit the provisions and take further administrative action. Given EPA's competing demands, including responding to the rest of Petitioners' issues in an answering brief, the Agency has not yet decided on a specific course of action. Rather than consuming the parties' and this Court's time litigating issues that may be mooted or significantly narrowed by further administrative proceedings, it is reasonable to seek remand.

Granting this motion additionally promotes efficiency because remand is part of the ultimate outcome that Petitioners seek in this litigation. *See* Pet'rs Br. at 69-70. Thus, even if Petitioners prevailed in their challenge to the provisions—provisions that are being reconsidered by EPA—there may still need to be further administrative proceedings to address any deficiencies the Court may find. EPA is simply proposing to move forward with remand now, rather than waste judicial and governmental resources litigating over provisions that EPA is reconsidering and may change.

Denying EPA's motion for voluntary remand would just compel the Court and EPA to devote limited resources to this litigation.

In short, remand would promote judicial and governmental economy.

II. Vacatur Is Appropriate Only for the Penalty Provision.

A. The Penalty Provision.

The Penalty Provision should be remanded with vacatur. In the proposed risk evaluation rule, section 702.31(d) stated:

> Submission to EPA of inaccurate, incomplete, or misleading information *by a manufacturer* pursuant to a risk evaluation conducted pursuant to 15 U.S.C. 2605(b)(4)(B) is a prohibited act under 15 U.S.C. 2614, subject to penalties under 15 U.S.C. 2615 and Title 18 of the U.S. Code.

Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, Proposed Rule, 82 Fed. Reg. 7562, 7575 (Jan. 19, 2017) (emphasis added). EPA did not receive any public comments seeking to expand the scope of this provision beyond manufacturers. Yet, in the final rule, EPA removed the language "by a manufacturer," such that the Penalty Provision could apply to persons besides manufacturers. *See* 40 C.F.R. § 702.31(d). EPA did not provide notice in the proposal or elsewhere in the rulemaking record that the provision could apply to persons other than manufacturers.

Although an agency may promulgate a rule that differs from a proposed rule, the changes must be a "logical outgrowth" of the proposal. *Nat. Resources Def. Council, Inc. v. EPA,* 863 F.2d 1420, 1429 (9th Cir. 1988). Because nothing in the proposed

rule or rulemaking record gave any indication that EPA was contemplating extending the Penalty Provision beyond manufacturers, and EPA did not purport to make that change in response to public comments, the Penalty Provision is not a logical outgrowth of the proposed rule. *See Nat. Resources Def. Council v. EPA*, 279 F.3d 1180, 1188 (9th Cir. 2002) (change from proposed rule is not a logical outgrowth where it was not "foreshadowed in proposals and comments advanced during the rulemaking") (citation omitted). Thus, vacatur is appropriate. Petitioners raise other arguments about the Penalty Provision, Pet'rs Br. at 52-55, but the Court need not reach those arguments.

B. The Relevancy and Consistency Provisions Should Not Be Vacated.

The remaining two provisions should not be vacated. *See Cal. Cmtys. Against Toxics,* 688 F.3d at 992 (citation omitted) ("Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'"); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (agencies can seek voluntary remand of a challenged agency decision without confessing error). First, EPA believes that the concerns about these provisions can be addressed through modifications to the language of the regulations. Second, the unintended consequences of the Relevancy and Consistency Provisions that Petitioners allege are not serious. Even if a manufacturer were to rely on those provisions to withhold information, EPA has independent authority to

collect that information or require development of new information as needed to conduct its risk evaluations. *See, e.g.*, 40 C.F.R. § 702.41(b)(2), (b)(5). Third, the disruptive effects to EPA could be considerable if these regulations were vacated while EPA completes its remand process. If the provisions are vacated, manufacturers could (intentionally or unintentionally) submit junk science or irrelevant material, requiring EPA to consume limited resources and take time out of the statutorily-mandated schedule to review the information. Vacatur of the Relevancy Provision would be particularly disruptive because it would eliminate altogether the affirmative requirement for manufacturers to submit lists of information when requesting risk evaluations.[3] It could delay EPA's information-gathering if the Agency had to request or order such information from the outset.

CONCLUSION

The Court should vacate 40 C.F.R. § 702.31(d) and remand it to EPA for further administrative proceedings. The Court should remand 40 C.F.R. §§ 702.37(b)(4) and 702.37(b)(6) to EPA for further administrative proceedings without vacatur.

[3] Moreover, the Relevancy Provision that Petitioners challenge is only the first sentence of a much longer regulation, 40 C.F.R. § 702.37(b)(4). Petitioners raise no argument as to the remainder of section 702.37(b)(4), so vacatur of the entire section is unwarranted. But vacating the first sentence (which requires manufacturers to submit a list of information) would render the rest of the section (which describes in detail the contents of the list of information) ambiguous.

Respectfully submitted,

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AUGUST 6, 2018

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A) & CIRCUIT RULE 27-1

I hereby certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this motion complies with the length limitation of Circuit Rule 27-1 because it contains less than 20 pages.

s/ *Erica Zilioli*
ERICA M. ZILIOLI

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2018, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ *Erica Zilioli*
ERICA M. ZILIOLI