

October 31, 2018

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Acting Administrator Andrew Wheeler
U.S. Environmental Protection Agency
Mail Code 1101A
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: Notice of Intent to File Suit to Compel EPA to Perform Non-Discretionary Acts under Sections 6(a) and 7(a) of TSCA

Dear Acting Administrator Wheeler:

This is a notice of intent to sue under the citizens' suit provisions of section 20(a)(2) of the Toxic Substances Control Act (TSCA) to compel the Environmental Protection Agency (EPA) to address the serious and imminent threat to human health presented by methylene chloride (MC).

This notice is being submitted on behalf of the following parties:

- Lauren Atkins – a mother and resident of Pennsylvania whose son Joshua died from inhaling MC while using a paint removal product;
- Wendy Hartley – a mother and resident of Tennessee whose son Kevin died from inhaling MC while using a paint removal product;
- Labor Council for Latin American Advancement (LCLAA) – a national membership organization representing the interests of approximately 2 million Latino and Latina union members throughout the United States and Puerto Rico, including workers in the construction and building renovation trades;
- Safer Chemicals Healthy Families (SCHF) – a Washington, DC based non-profit organization that fights for strong chemical policy, works with retailers to phase out hazardous chemicals and transform the marketplace, and educates the public about ways to protect our families from toxic chemicals;
- Vermont Public Interest Research Group (VPIRG) – a nonprofit membership organization that promotes and protects the health and well-being of Vermont's environment, people, and locally based economies.

TSCA section 6(a) requires EPA to regulate chemicals that present an unreasonable risk to human health or the environment. EPA's failure to finalize a proposed ban on MC – a toxin that EPA has found to present an unreasonable risk of cancer, heart failure, and sudden death – violates that statutory obligation. A common ingredient in paint removers, MC is known to cause asphyxiation from acute

exposure and is responsible for more than 60 reported deaths, as well as incapacitation, loss of consciousness, and coma. According to EPA, 1.3 million Americans are at risk from exposure to MC paint removers in their homes and workplaces each year.

EPA acknowledged the unreasonable risks posed by MC in January 2017, proposing to ban the use of MC in paint and coating removal. 82 Fed. Reg. 7464 (Jan. 19, 2017). Since then, at least four more people have died from exposure to MC paint removers. After then-EPA Administrator Scott Pruitt met with the families of MC victims, on May 10, 2018 EPA reaffirmed its reliance on the risk assessment underlying its proposed ban and publicly announced that it would finalize that proposal and send a draft final rule to the Office of Management and Budget (OMB) “shortly.” *EPA Announces Action on Methylene Chloride*, May 10, 2018, <https://www.epa.gov/newsreleases/epa-announces-action-methylene-chloride>. Mr. Pruitt then repeated these commitments in testimony before Congress and even said (erroneously) that the final rule had begun OMB review.¹ However, more than 19 months after the publication of the proposed ban and five months after its May 10 announcement, no final rule has been published and no draft has been sent to OMB.

Since EPA has affirmed that MC paint removers present an unreasonable risk of injury and must be banned, EPA’s failure to finalize the proposed rule violates EPA’s non-discretionary duty under TSCA section 6(a) to take regulatory action on chemicals for which it has made an unreasonable risk determination. Further delay will unnecessarily leave users of paint removal products at serious risk and could result in additional deaths. You must therefore direct EPA staff to publish the final rule immediately and to abate the imminent hazards posed by MC.

As required by 40 C.F.R. § 702.62(b), the details of the Agency’s failure to perform non-discretionary acts and duties are described below:

(1) Specific TSCA Provisions Requiring Non-Discretionary Acts and Duties

Under TSCA section 6(a), “[i]f the [EPA] Administrator determines . . . that the . . . use . . . of a chemical substance . . . presents an unreasonable risk of injury to health or the environment, the Administrator *shall* by rule” take one of several specified actions, including banning the manufacture or distribution of the chemical for a particular use. 15 U.S.C. § 2605(a) (emphasis added). The rule must impose restrictions “to the extent necessary so that the chemical substance . . . no longer presents such risk.” *Id.*

¹ Senate Appropriations Committee, Interior, Environment, and Related Agencies Subcommittee, Hearing to review the Fiscal Year 2019 funding request and budget justification for the Environmental Protection Agency, May 16, 2018, <https://www.c-span.org/video/?445475-1/epa-administrator-pruitt-questioned-ethics-expenses>.

Moreover, where a chemical is “imminently hazardous,” or likely to present an unreasonable risk of serious injury before a proposed section 6(a) rule can be finalized, TSCA requires additional, immediate action. *See id.* § 2606. To protect the public from an imminent hazard, EPA must either: (1) make the proposed section 6(a) rule effective immediately upon its publication in the Federal Register or (2) “commence in a district court of the United States . . . a civil action” under section 7(a)(2) of TSCA for the seizure of the chemical or other relief. *Id.* §§ 2605(d)(3), 2606(a)(2).

(2) Actions by the Administrator Alleged to Constitute the Failure to Perform a Non-discretionary Act and Duty

The Administrator has failed to perform his non-discretionary duties under TSCA sections 6 and 7 by delaying final action to ban MC notwithstanding the Agency’s recognition that TSCA requirements for this ban have been satisfied.

EPA’s History of Inaction on MC: EPA has known of the threat posed by MC for decades, warning in 1994 that exposure to MC causes worker deaths; brain, heart, and liver damage; and increased risk of cancer. *Chemical Summary for Methylene Chloride*, EPA-749-F-94-018a at 5-9 (August 1994). However, EPA did not comprehensively evaluate MC for regulation under TSCA until 2014, when it published an extensive, peer-reviewed risk assessment of MC’s paint removal uses. *TSCA Work Plan Chemical Risk Assessment – Methylene Chloride: Paint Stripping Use*, EPA 740-R1-4003 (August 2014).² This Risk Assessment concluded that acute (short-term) exposure to MC paint strippers presents an increased risk of “death; neurological impacts such as coma, incapacitation, loss of consciousness, and dizziness; and liver effects,” and that chronic (long-term) exposure to those products presents an increased risk “brain, liver, lung, and hematopoietic cancers and liver damage.” 82 Fed. Reg. 7471. In many circumstances analyzed in the Risk Assessment, worker, consumer, or bystander exposures to MC from paint strippers were hundreds of times greater than the margins of exposure that EPA deems safe. *See id.* at 7478, 7480.

² Congress recognized the work that had gone into this risk assessment when it amended TSCA in 2016. Therefore, instead of requiring MC and other previously assessed chemicals to undergo new risk evaluations under the amended TSCA law, Congress expressly authorized EPA to issue proposed and final rules regulating such chemicals “under [TSCA] section 6(a) that are consistent with the scope of the completed risk assessment for the chemical substance and consistent with other applicable requirements of section 6.” 15 U.S.C. § 2625(l)(4). This provision was intended to “avoid any delay in the imposition of important public health protections that are known to be needed” based on EPA’s already completed risk assessments. *See* Cong. Record S3519 (June 7, 2016) (Joint Statement of Sens. Boxer, Markey, Udall, and Merkley).

January 19, 2017 Proposed Rule. Based on that 2014 Risk Assessment, EPA proposed a ban on MC paint strippers on January 19, 2017.³ EPA’s proposed ban explicitly found that MC presents unreasonable risks and that a ban is “necessary” to address those risks under TSCA section 6. 82 Fed. Reg. at 7488.

More specifically, EPA found that “[MC] is a likely human carcinogen, a neurotoxicant, and acutely lethal.” *Id.* at 7468. EPA’s proposed rule attributes 49 deaths to MC since 1976, a figure which it acknowledges is an underestimate because some deaths have been unreported or mistakenly attributed to other causes. *Id.* at 7482. MC evaporates quickly upon application, giving off strong fumes that accumulate in confined spaces. *Id.* at 7475. Inhaling these fumes causes carbon monoxide to build up rapidly in the blood, leading to heart failure, loss of consciousness, coma, and death. *Id.* at 7468, 7482. As described in a report cited by EPA:

The danger posed by methylene chloride is its one-two punch when fumes accumulate. Because it turns into carbon monoxide in the body, it can starve the heart of oxygen and prompt an attack. The chemical also acts as an anesthetic at high doses: Its victims slump over, no longer breathing, because the respiratory centers of their brains switch off.

Id. at 7482 (quoting J.S. Hopkins, Ctr. for Public Integrity, *Common Solvent Keeps Killing Workers, Consumers*, September 21, 2015.)

MC has killed not only those overcome while using it, but also others who have rushed in to try to help. *Id.* It also threatens bystanders, especially children, who happen to be in the same building where MC paint strippers are being or have been used. *Id.* at 7476. Excluding bystanders from the room where MC has been applied is not enough, as MC can cause acute and lasting harm to people elsewhere in the same house, and likely even in adjacent apartments and hotel rooms. *Id.* at 7476-77. The neurotoxic and cardiovascular harms from MC exposure are magnified in fetuses and in infants. *Id.* at 7468. In short, “the health effects associated with exposure to methylene chloride are serious and can have impacts throughout a lifetime.” *Id.* at 7482.

According to the proposal, about 32,600 workers are exposed to MC from paint and coating removal activities each year. *Id.* at 7475. Latino and foreign-born workers, who are overrepresented in the construction industry, are more likely to be harmed.

³ In addition to the proposed MC ban, EPA also proposed to ban the use of N-methylpyrrolidone (“NMP”) in paint and coating removal and announced that it intends to restrict the use of MC in commercial furniture refinishing. EPA’s delay in pursuing these steps is of great concern to the parties submitting this notice. While this Notice of Intent is focused on MP, the undersigned parties do not waive, and expressly reserve, any and all rights with respect to the proposed NMP ban and the restriction of MC in commercial furniture refinishing.

Id. at 7476. The same MC products used commercially are also available for purchase off the shelf at hardware and home improvement stores. *Id.* at 7475-76. As a result, EPA estimates that 1.3 million do-it-yourself consumers are exposed to MC each year. *Id.*

EPA Commitment to Finalize the Proposed Ban. In the time that the proposed ban has been pending before EPA, at least four more people have died from MC exposure. The decedents include Kevin Hartley, a 21-year-old who died of MC exposure in April 2017 while refinishing a bathtub; Drew Wynne, a 31-year-old who died in October 2017 while stripping the floor of a commercial refrigerator in his small business; and Joshua Atkins, a 31-year-old who died in February 2018 while refinishing his bike.⁴ As EPA has acknowledged, risks of incapacitation or death are present “even when respiratory protection is used.” *Id.* at 7471. That was the case for Mr. Wynne, who was using a respirator in a ventilated room when he died.⁵

After then-Administrator Pruitt met with family members of Drew Wynne and Kevin Hartley, EPA announced on May 10 that “EPA intends to finalize the methylene chloride rulemaking,” “is not re-evaluating the paint stripping uses of methylene chloride and is relying on its previous risk assessments,” and is “working to send the finalized rulemaking to OMB shortly.”⁶ Appearing at a Senate subcommittee hearing the following week, Admin. Pruitt testified that “I recently met with individuals impacted by methylene chloride and made the decision to proceed with that [ban] by forwarding it to OMB.”⁷ Indeed, Admin. Pruitt said that “[w]e have forwarded to OMB recently a proposed rule prohibiting consumer and commercial paint stripping uses for methylene chloride, following through on EPA’s January 2017 proposal that methylene chloride be banned from [those] products.”⁸

⁴ Sarah McCarthy, *Nashville mom calls for ban of dangerous chemical in paint thinners*, News Channel Five (Mar. 28, 2018), <https://tinyurl.com/ya36br55>; Laren Sausser, *Charleston family calls on EPA to ban common chemical paint stripper after son dies*, Charleston Post & Courier (Mar. 29, 2018), <https://tinyurl.com/ya54mhlk>; Don Hopey, *Inhaling a paint stripper killed a Fayette County man. His mother is calling to have them banned*, Pittsburgh Post-Gazette (May 22, 2018), <http://www.post-gazette.com/news/health/2018/05/22/Deadly-paint-stripper-ban-sought/stories/201805220142>. See also OSHA Inspection No. 1242614.015, Wilson Maintenance & Services, Inc., June 23, 2017, https://www.osha.gov/pls/imis/establishment.inspection_detail?id=1242614.015 (investigating worker death attributed to fumes from MC paint stripper).

⁵ Letter from Senators Lindsey O. Graham and Tim Scott and Representative Mark Sanford to EPA Administrator Scott Pruitt (Mar. 22, 2018), <https://tinyurl.com/y93xv53g>.

⁶ *EPA Announces Action on Methylene Chloride* (May 10, 2018), <https://www.epa.gov/newsreleases/epa-announces-action-methylene-chloride>.

⁷ <https://www.c-span.org/video/?445475-1/epa-administrator-pruitt-questioned-ethics-expenses> (video at 33:02).

⁸ <https://www.c-span.org/video/?445475-1/epa-administrator-pruitt-questioned-ethics-expenses> (video at 29:05). OMB’s regulatory review database, however, contains no reference to its receipt of EPA’s proposed rule. <https://www.reginfo.gov/public/do/eoReviewSearch> (last accessed October 30, 2018).

EPA's Unlawful Failure to Finalize the Proposed Ban. Since Administrator Pruitt's testimony, EPA has repeatedly reaffirmed its finding that MC paint strippers present "unreasonable risks."⁹ While EPA is currently conducting a TSCA risk evaluation for *other* uses of MC, in June 2018 it specifically excluded paint removal from the scope of that ongoing evaluation because EPA has already "determined that those risks were unreasonable" and "inten[ds] to finalize" its proposed ban on such uses. EPA, *Problem Formulation of the Risk Evaluation for Methylene Chloride*, EPA 740-R1-7016 at 21 (June 2018). However, EPA's commitment, as well as its statutory obligation to regulate MC's unreasonable risks, remains unfulfilled.

In recognition of MC's serious hazards, a number of major retailers – including Lowes, Walmart, Home Depot, and Sherwin Williams – have announced that they are stopping sales of MC-containing paint removal products. But other retailers are continuing to sell MC paint removers, and expeditious action is needed to assure that they are removed immediately from the stream of commerce.

In sum, EPA's commitment to rely on the earlier risk assessment and to finalize its MC ban reflects a final determination that MC use in paint removers presents an unreasonable risk of injury. EPA expressly reiterated that determination in its June MC problem formulation document. Section 6(a) provides that EPA "shall" take regulatory action upon making a determination that a chemical presents an unreasonable risk of injury and this action must assure that the "substance no longer presents such risks." EPA has failed to perform this non-discretionary duty and must immediately finalize its proposed rule banning MC use in paint and coating removal. More than four years after the publication of its MC Risk Assessment, 20 months after its proposed ban, and 5 months after its public commitment to finalize that ban, there is no legal or scientific basis for further delay.

Failure to Act Against Imminent Hazard. In addition to presenting an unreasonable risk, MC is imminently hazardous. EPA recognized as much as in its Risk Assessment, which described "acute risks for neurological effects for most workers using [methylene chloride]-based paint strippers," Risk Assessment at 25, and in its proposed ban, which acknowledges at least 49 sudden deaths attributed to MC exposure. 82 Fed. Reg. at 7482; *see also id.* at 7489 ("[A]dverse effects associated with methylene chloride exposure can be immediately experienced and can result in sudden death."). The imminence of this hazard has been tragically confirmed by several, preventable deaths since the publication of EPA's proposed ban. Had EPA exercised its authority to make its proposal immediately effective under TSCA section 6(d)(3), those lives may have been saved. Having failed to do so, EPA has an

⁹ Even before the May 10 announcement, EPA reiterated that it had made a determination that the paint stripper uses of MC present an unreasonable risk. *See, e.g.*, EPA Regulatory Agenda, Spring 2018, *N-Methylpyrrolidone (NMP) and Methylene Chloride; Rulemaking Under TSCA Section 6(a)*; EPA Regulatory Agenda, Fall 2017, *N-Methylpyrrolidone (NMP) and Methylene Chloride; Rulemaking Under TSCA Section 6(a)*; EPA, *Scope of the Risk Evaluation for Methylene Chloride*, EPA 740-R1-7006 at 9 (June 2017).

immediate and non-discretionary duty under section 7 to commence a civil action “to protect public health . . . from the unreasonable risk . . . associated with” MC. 15 U.S.C. § 2606(a)(2).

(3) Parties and counsel giving notice

The parties giving notice are:

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