No. 19-71930

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A COMMUNITY VOICE; CALIFORNIA COMMUNITIES AGAINST TOXICS; HEALTHY HOMES COLLABORATIVE; NEW JERSEY CITIZEN ACTION; NEW YORK CITY COALITION TO END LEAD POISONING; SIERRA CLUB; UNITED PARENTS AGAINST LEAD NATIONAL; and WE ACT FOR ENVIRONMENTAL JUSTICE,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and ANDREW R. WHEELER, as Administrator of the United States Environmental Protection Agency,

Respondents.

On Petition for Review of a Final Rule
of the U.S. Environmental Protection Agency

PETITIONERS' MOTION TO SUPPLEMENT THE RECORD WITH EXPERT DECLARATIONS

Dated: January 15, 2020

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INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 10(e)(3) and 27 and Ninth Circuit Court Rule 27-1, Petitioners move to supplement the administrative record with three expert declarations: 1) the declaration of Patrick MacRoy, Sc.M., attached hereto at MA1; 2) the declaration of James W. Bono, Ph.D., attached hereto at MA13; and 3) the declaration of Howard Varner, M.B.A., attached hereto at MA39. In accordance with Circuit Rule 27-1, Petitioners conferred with Respondent Environmental Protection Agency ("EPA" or "Agency") regarding its position on this motion, and Respondent's counsel stated EPA would oppose the motion.

As discussed *infra*, the Toxic Substances Control Act ("TSCA") envisions the introduction of expert witness testimony in petition for review cases. 15 U.S.C. § 2618(d). The MacRoy, Bono, and Varner declarations set forth relevant factors about the lead-testing industry and market economics that EPA failed to consider when revising the dust-lead hazard standards ("DLHS"). In addition, the Bono declaration explains complex issues surrounding EPA's concerns about possible adverse economic effects of setting lower DLHS. As such, these declarations meet the standards for admission of extra-record evidence, and this motion should be granted.

BACKGROUND

Petitioners are challenging the final rule of EPA entitled "Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint" ("Final Rule"), ER1–17.[1] In the Final Rule, EPA lowers the DLHS, one of three lead-based paint ("LBP") hazard standards, from 40 µg/ft^2 and 250 µg/ft^2 to 10 µg/ft^2 and 100 µg/ft^2 for floors and windowsills, respectively (the "10/100 Standards"). *Id*. at 1. In addition to arguments addressing EPA's inaction regarding other LBP hazard standards, Petitioners assert that the DLHS were not lowered to levels necessary to protect against adverse health effects. Opening Br. at Argument.II. As such, Petitioners explain that the 10/100 Standards do not comport with the plain terms of TSCA, which require EPA to identify dangerous levels of lead and a corresponding clearance level, so that clean-up resources can be focused on those lead conditions that cause exposure that adversely impacts health. Opening Br. at Argument II.A. Petitioners argue this failure to meet TSCA's mandates stems partially from EPA's inappropriate consideration of the economic impact a lower standard might have on testing laboratories. Opening Br. at Argument IV.A.2. Petitioners further argue that even if EPA were allowed to

[1] Pursuant to Ninth Cir. R. 30-1, Petitioners have submitted excerpts of the administrative record along with their Opening Brief. All references to "ER" refer to these excerpts.

consider these economic factors, the haphazard economic analysis EPA conducted still failed to consider multiple, highly relevant factors about the dust-lead testing industry and market economics. *Id*. This resulted in EPA's flawed conclusion that the DLHS could not be lowered any further. Petitioners seek to supplement the record with the declarations of epidemiologist Patrick MacRoy, economist James W. Bono, and laboratory director Howard Varner to address these relevant factors EPA did not consider.

Patrick MacRoy, Sc.M., is an epidemiologist with 18 years of experience monitoring and addressing health hazards associated with exposures to hazardous chemicals, with a particular focus on lead. MA2. Mr. MacRoy previously served as the Epidemiologist and Program Director for the City of Chicago Department of Public Health's Lead Poisoning Prevention Program and the Rhode Island Department of Health's Office of Environmental Health Risk Assessment. MA2–3. Mr. MacRoy was also the Executive Director for the Alliance for Healthy Homes (formerly known as the Alliance to End Childhood Lead Poisoning), and is currently the Deputy Director for the Environmental Health Strategy Center, an organization focused on creating policies to protect people from toxic chemical exposures through drinking water, food, and products. MA3–4.

In his declaration, Mr. MacRoy introduces to the Court two factors EPA failed to consider when it determined that further lowering the DLHS could

detrimentally impact the feasibility and availability of dust-lead testing: 1) the share of the dust-lead testing market each laboratory comprises; and 2) the capacity some larger laboratories possess to conduct additional dust-lead tests. MA5. Mr. MacRoy explains how market share is determined in the dust-wipe testing industry, and posits that analyzing market share is required for a factfinder to conclude that any one laboratory's inability to continue dust-lead testing would have a detrimental effect on the industry overall. MA5–6.

Mr. MacRoy also introduces the concept of laboratory capacity, and explains that the number of dust-lead tests a laboratory currently conducts is not necessarily an indication of a laboratory's capacity to conduct additional tests. MA8. Rather, some larger laboratories have the capacity to absorb an increase in demand if, as EPA predicts, smaller laboratories stopped conducting dust-lead wipe tests if the DLHS were lowered. *Id*.

James W. Bono, Ph.D., is the Senior Vice President of the consulting firm Economists Incorporated, where he routinely conducts economic analyses and research. MA14. In his declaration, Dr. Bono pinpoints multiple economic considerations related to demand and market prices that EPA did not consider when determining that further reducing DLHS would require laboratories to invest in new testing equipment or discontinue testing services. MA15–28. Dr. Bono explains each economic factor in turn, and explains how these factors are integral

to any prediction of how a market subject to a government mandate such as the DLHS will react when that mandate is revised. *Id.* Dr. Bono also explains the fundamental principles of economics that undergird economic models like the one that EPA prepared for the Final Rule, and how EPA's predictions of negative market effects are unlikely. MA15–18, 22–24, 26–28.

Howard Varner, M.B.A., has over 40 years of experience in the laboratory services field, and is currently the laboratory director at one of the largest dust-lead testing laboratories in the United States, Environmental Hazard Services ("EHS"). MA40–41. In his declaration, Mr. Varner explains to the Court that his laboratory's share of the dust-lead testing market, and capacity to conduct additional dust-lead tests, was not considered when determining that the DLHS could not be further lowered. MA41. Mr. Varner then identifies the instrumentation EHS currently owns that can be used to conduct dust-lead tests and paint-chip tests, expresses his laboratory's capacity to conduct more dust-wipe tests if such a demand existed, and explains the DLHS levels his laboratory could meet. MA41–42.

ARGUMENT

While judicial review of agency action is generally limited to a review of the administrative record, there are two reasons that it is appropriate for this Court to consider Petitioners' expert declarations.

I. TSCA permits the consideration of expert declarations on a petition for review.

The MacRoy, Bono, and Varner declarations are admissible under TSCA. Petitioners' claims center on EPA's failure to comply with the requirements of Title IV of TSCA, which sets forth a directive to establish LBP hazard standards. 15 U.S.C. § 2683. The United States courts of appeals have original jurisdiction to review final agency rules promulgated under Title IV of TSCA. 15 U.S.C. § 2618(a)(1)(A) ("[N]ot later than 60 days after the date on which a rule is promulgated under. . . subchapter IV, . . . any person may file a petition for judicial review of such rule or order with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal place of business is located.").

Yet 15 U.S.C. § 2618(d) contemplates that expert witnesses will play a role in such proceedings, stating that "[t]he decision of the court in an action commenced under subsection (a) . . . may include an award of costs of suit and reasonable fees for attorneys *and expert witnesses* if the court determines that such

an award is appropriate." 15 U.S.C. § 2618(d) (emphasis added). This statutory backdrop opens the door for expert witness testimony in this matter.

II. The Ninth Circuit recognizes four exceptions to the record review rule.

Even apart from the specific language in TSCA, the Ninth Circuit recognizes four well-established exceptions to the general record review rule, and permits the admission of extra-record evidence if it is necessary to determine:

> (1) . . . 'whether the agency has considered all relevant factors and has explained its decision,' (2) if 'the agency has relied on documents not in the record,' (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter,' or (4) 'when plaintiffs make a showing of agency bad faith.'

Lands Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (citation omitted). These exceptions "operate to identify and plug holes in the administrative record." *Id*. Indeed, "in the often difficult task of reviewing administrative regulations, the courts are not straightjacketed to the original record in trying to make sense of complex technical testimony, which is often presented in administrative proceedings without ultimate review by nonexpert judges in mind." *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977). As explained below, Petitioners' declarations fall within two of these exceptions: "relevant factors" and "expla[nation of] technical or complex subject matter." 395 F.3d at 1030.

A. The declarations describe "relevant factors" not considered by EPA.

"A reviewing court may look beyond the administrative record 'for the limited purposes of ascertaining whether the agency considered all relevant factors or fully explicated its course of conduct or grounds of decisions.'" *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1123 n.14 (9th Cir. 2012) (citation omitted). Indeed, "[t]he court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters." *Nat. Res. Def. Council v. Blank*, 2013 WL 2450110, at *1 (N.D. Cal. 2013) (quoting *Arasco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)).

Here, EPA stated that the 10/100 Standards were informed in part by "the achievability of these standards in relation to . . . whether lower dust lead loadings can be reliably detected by laboratories." ER3. EPA based its conclusion regarding achievability largely on two bodies of information: 1) interviews it conducted with fourteen laboratories and two laboratory accreditation bodies after publishing its proposal to lower the DLHS to the 10/100 Standards (the "Proposed Rule"), and 2) cost-benefit estimates summarized in the Agency's Economic Analysis of the Final Rule ("Economic Analysis"). ER976–1290, 1291–1317. Both of these categories of information highlight the need for Petitioners' proffered declarations.

First, the lack of opportunity for Petitioners to comment on these interviews during the rulemaking process is salient. When admitting an extra-record declaration in *Oceana, Inc. v. Pritzker*, the court emphasized that plaintiff Oceana had no prior opportunity to introduce the declarant's information, since the agency action Oceana was challenging had been drafted on remand to the agency. *See* 126 F. Supp. 3d 110, 113 (D.D.C. 2015). The court explained that "challengers such as Oceana typically have the opportunity to submit such evidence in conjunction with comments on proposed agency action. That process did not occur here . . . ." *Id*. Conversely, in *Lands Council*, the court expressed concern that appellant Lands Council did not attempt to obtain and submit its deposition testimony prior to suing the Forest Service, stating, "it is not entirely clear that Lands Council could not have moved the agency to supplement its record with this evidence." 395 F.3d at 1030. This case mirrors *Oceana*. Since the interviews that formed the basis for the revised DLHS were conducted *after* the drafting of the Proposed Rule, Petitioners had no opportunity to raise these relevant factors and clarifications to EPA before this juncture, making this motion the sole means of identifying these factors and providing helpful clarifications.

Second, each declaration identifies factors that are missing from EPA's analysis, and explains why the absence of each factor is relevant. *See Oceana*, 126 F. Supp. 3d at 114. Mr. MacRoy explains how market share and the capacity of

laboratories to conduct more dust-lead wipes were factors not addressed in the Economic Analysis, and explains why these factors are integral to determining if a laboratory's inability to continue dust-lead testing will have a tangible effect on the overall availability of dust-lead wipe testing services. MA6. Dr. Bono highlights that consideration of demand and market prices, the existence of price ceilings and other market constraints, and the inelasticity of demand for services subject to government mandates, are factors that are imperative when predicting the impact a regulatory requirement such as lower DLHS will have on an industry. MA20–28. Finally, Mr. Varner explains that his laboratory's capacity to conduct more dust-lead wipe tests and to meet a lower DLHS was not considered by EPA. *See* MA41–42. Mr. Varner outlines the relevancy of this lack of consideration due to his laboratory's sizeable market share. *Id.*

B. The Bono declaration clarifies economic concepts that are "technical and complex."

The Bono declaration also fits within the technical and complex subject matter exception because it "condense[s] and explain[s] existing material in the record" and is "helpful and necessary to explain a complex [] subject." *Western Watersheds Project v. U.S. Forest Serv.*, 753 Fed. Appx. 465, 467 (9th Cir. 2019) (upholding the consideration of declarations clarifying grazing procedures in a national forest); *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 n.22 (9th Cir. 1992) (upholding the consideration of an extra-record affidavit

explaining a computer program used by the Forest Service in a case "sufficiently complex with the affidavit, let alone without it"). The record in this case is extensive and requires an understanding of complex issues, such as how changes in supply and demand curves may react to changes to government mandates, thereby impacting market equilibrium prices and quantities. MA26–28. Dr. Bono distills these topics and their applicability to EPA's Economic Analysis for the Final Rule. *Id*. By introducing the Bono declaration, Petitioners seek to assist the Court in understanding the complex background topics at issue in this matter, so the Court can properly evaluate the integrity of EPA's analysis.

CONCLUSION

The MacRoy, Bono, and Varner declarations alert the Court to relevant factors regarding the lead-testing industry and the rules of economics that EPA did not consider when determining it could not further lower the DLHS, and the Bono declaration further explains complex technical subject matter. Since Congress envisioned that expert witnesses could play a role in proceedings challenging rules adopted under Title IV of TSCA, such as this one, it is appropriate for the Court to grant this motion. In addition, each declaration fits within well-established exceptions to the record review rule. Accordingly, Petitioners respectfully request the record be supplemented with the MacRoy, Bono, and Varner declarations.

Dated: January 15, 2020

Respectfully submitted,

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