

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

CENTER FOR ENVIRONMENTAL HEALTH,
CAPE FEAR RIVER WATCH, CLEAN
CAPE FEAR, and TOXIC FREE NC,

Plaintiffs,

-vs-

Case No. 7:22-CV-73-M

MICHAEL REGAN, in his official
capacity as Administrator of the
U.S. Environmental Protection
Agency, and THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

MOTION HEARING held on FEBRUARY 14, 2023
THE HONORABLE CHIEF JUDGE RICHARD E. MYERS II
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

On Behalf of the Plaintiffs

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On Behalf of the Defendants

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Risa Kramer, RMR, CRR
Official Court Reporter
United States District Court
Wilmington, North Carolina

1 TRANSCRIPT OF PROCEEDINGS

2 (Proceedings commenced at 10:02 a.m.)

3 THE COURT: If the clerk would please call
4 the case.5 THE CLERK: Center for Environmental Health,
6 et al., versus the United States Environmental Protection
7 Agency.8 THE COURT: All right. Good morning,
9 everybody. We're here today essentially to determine
10 whether or not the Court has jurisdiction in this matter,
11 and to determine whether or not the EPA's claim that it
12 has granted the petition is sufficient under the
13 circumstances to divest this Court of jurisdiction over
14 any argument regarding the applicability of the Toxic
15 Substances Control Act to the 54 chemicals in question,
16 or whether or not, as the petitioners argue, the proposed
17 plan of action demonstrates that it is, in fact, a grant
18 in part and a denial in part, and if it is a denial in
19 part, that creates jurisdiction for this Court. That's
20 the question, as the Court sees it, as I sit here trying
21 to analyze all of the pleadings in this case.22 I'll tell everybody sitting in the audience,
23 we're not gonna come to a conclusion today. You'll get
24 to hear the argument. I know this is very important to
25 everyone who's here. But this is significant. I'm gonna

1 take my time. I'm gonna think about it, and I'll issue a
2 written order ultimately, but this is not going to be
3 decided today. It's going to be argued today.

4 We're really here on the EPA's motion, motion
5 to dismiss, so I'll permit the EPA to go first.

6 MR. LEE: Thank you, Your Honor. Can you
7 hear me at this...

8 THE COURT: I can. I want to make sure that
9 everybody -- I understand some of us are using devices.
10 Is the device working properly? Is everything okay?

11 MR. SUSSMAN: Yes. Yes, Your Honor. I just
12 want to make sure I can hear opposing counsel.

13 THE COURT: Okay.

14 MR. SUSSMAN: I can certainly hear you.

15 THE COURT: If you have any issue, flag it,
16 and we'll work to make sure --

17 MR. SUSSMAN: Okay. I appreciate that.

18 THE COURT: All right.

19 MR. LEE: Okay. Your Honor, we prepared a
20 short opening statement.

21 This Court lacks subject matter jurisdiction
22 to hear plaintiffs' suit. Plaintiffs have only brought
23 one single claim under TSCA's Section 21 citizen petition
24 review provision, and under that provision, this Court
25 only has jurisdiction to review a decision by EPA to

1 either deny a TSCA citizen petition or when EPA takes no
2 action on that petition.

3 Here, in December 2021, EPA provided written
4 correspondence to plaintiffs, granting their petition.
5 And in that response, EPA expressed that it shared
6 plaintiffs' concerns with respect to PFAS in this
7 community and wanted to act through the appropriate
8 channels provided for through TSCA. In EPA's response,
9 the Agency noted that plaintiffs presented the necessary
10 facts demonstrating that EPA should commence an
11 appropriate proceeding to issue a rule or order under
12 TSCA's Section 4, compelling health and environmental
13 effects testing regarding PFAS. And that's what EPA is
14 currently doing. It is embarking on that appropriate
15 proceeding in order to fill this identified information
16 gap with respect to PFAS.

17 EPA's response also acknowledged that
18 plaintiffs' petition and request for a reconsideration
19 played a key role in advancing the Agency's plan for
20 comprehensive PFAS testing strategy.

21 But now plaintiffs argue that while EPA says
22 that they, quote/unquote, granted the petition, EPA's
23 response is really a denial because the Agency's grant
24 did not also commit to all of plaintiffs' proposed
25 testing program.

1 Plaintiffs just can't take yes for an answer
2 here. In not committing to plaintiffs' proposed testing
3 program, they say EPA's response was tantamount to a
4 denial. Plaintiffs' position is incorrect and has no
5 basis in the statute. Critically, Section 21 only allows
6 petitioners to petition EPA to initiate an appropriate
7 proceeding under the relevant portion of TSCA. Here,
8 that relevant provision is Section 4.

9 But nothing in the statute allows petitioners
10 to demand the precise outcome of that proceeding. Here,
11 in granting plaintiffs' petition, EPA has already agreed
12 to commence an appropriate proceeding to issue a rule or
13 order under TSCA Section 4 in response to plaintiffs'
14 petition. And in issuing Section 4 testing orders, the
15 statute provides that EPA adhere to a series of
16 discretionary and nondiscretionary considerations,
17 including the statute's requirement for an iterative
18 tiering process and a preference for a category-based
19 approach.

20 To be sure, in addition to granting
21 plaintiffs' petition, EPA went beyond its statutory duty
22 by also providing plaintiffs with a road map regarding
23 how it anticipated its appropriate proceeding would look
24 like. The Agency explained that it expected to implement
25 its national PFAS testing strategy, and as it's an

1 iterative approach, is responsive to plaintiffs'
2 petition.

3 Under the statute, EPA was not required to
4 provide this explanation, and the Court certainly has no
5 jurisdiction to review EPA's explanation. While the
6 statute expressly requires EPA to publish an explanation
7 as to why it denies a petition, in granting a Section 21
8 petition, there's no statutory requirement mandating that
9 EPA also explain why it granted the petition or how it
10 expects to fulfill petitioners' request.

11 EPA could have easily issued a one-paragraph
12 response, saying, "We grant your petition and we will
13 commence an appropriate proceeding under Section 4." In
14 fact, EPA issued short summary grants like this in the
15 past, but in the interest of full transparency, the
16 Agency provided plaintiffs with a more fulsome
17 explanation here.

18 Plaintiffs here are effectively latching onto
19 this explanation as a way to get judicial review of
20 questions that are beyond this Court's jurisdiction. By
21 characterizing the Agency's response as not the same as
22 the proposal they set forth in their petition, plaintiffs
23 believe that they can say that EPA denied their petition
24 and that this Court has to consider the merits of their
25 own proposed testing program.

1 Because EPA granted plaintiffs' petition,
2 this Court lacks jurisdiction under TSCA Section 21; and
3 because EPA granted the relief available to plaintiffs,
4 the commencement of appropriate proceeding under Section
5 4, this proceeding is moot.

6 One other issue we'd like this Court to
7 consider: Even if the Court were to find that EPA denied
8 plaintiffs' petition and moves forward in this
9 proceeding, plaintiffs are not entitled to the proceeding
10 that they say they are entitled to. Plaintiffs want this
11 Court to believe that a de novo proceeding allows the
12 Court to examine each aspect of their proposed testing
13 strategy where the Court can then order EPA to issue a
14 specific administrative outcome. This is a highly
15 technical inquiry that has no basis in the statute and is
16 an unconstitutional reading that infringes on the powers
17 of executive. In fact, this precise reading was rejected
18 in Citizens for a Better Environment versus Thomas, where
19 the Court warned that while it could order EPA to
20 initiate a proceeding under Section 4, it could not
21 substitute its judgment for that of the Agency and demand
22 EPA to promulgate a precise final rule.

23 Rather, if this proceeding moves forward, the
24 only question before this Court is if EPA was wrong --
25 denied plaintiffs' petition, and if it should be ordered

1 to initiate a proceeding for the issuance of a rule or
2 order under Section 4. And this highlights the kind of
3 circularity where EPA has already agreed to initiate this
4 proceeding in granting plaintiffs' petition. There is no
5 further relief that can be granted by this Court.

6 THE COURT: Thank you, counsel. Opening
7 statement?

8 MR. SUSSMAN: Yes, Your Honor. Thank you.

9 I'm Bob Sussman, representing the petitioners
10 in this action. Before turning to the motion to dismiss,
11 I want to make a few bigger-picture points about the
12 importance of this case.

13 The Cape Fear Basin, the lower Cape Fear
14 Basin is ground zero for PFAS pollution in the United
15 States. There's no area in the country that has been hit
16 harder. Chemours has been polluting the Cape Fear River
17 for over four decades with hundreds of PFAS. The river
18 serves as a drinking water source for over 500,000 people
19 who've had long-term exposure to PFAS and are still
20 exposed. The PFAS have also contaminated ground water,
21 private wells, the air, and the food supply throughout
22 the basin.

23 When they talk about the contamination, many
24 residents ask the same question: How has my health been
25 impacted? Are the diseases our family members or

1 neighbors are experiencing the result of PFAS exposure?
2 What should doctors and health professionals be doing to
3 diagnose and treat these diseases?

4 There are no answers to these questions
5 because Chemours has done little or no testing on the
6 PFAS that they put into the environment. It's staggering
7 how many of the PFAS in the petition have no data at all.
8 Forty-one of the 54 PFAS are lacking in any test results.
9 We know that PFAS generally are toxic, but that's very
10 different from knowing the specific health effects of
11 specific PFAS under the specific conditions of exposure
12 in Cape Fear communities.

13 So my clients filed this petition under
14 Section 21 of TSCA to get EPA to use its broad authority
15 to require Chemours to fund the testing it should have
16 performed years ago. The petition was not vague about
17 the testing that the groups wanted. We were very
18 specific. We worked closely with scientific experts to
19 identify 54 Chemours PFAS to which communities were
20 likely exposed.

21 We chose these PFAS based on evidence that
22 several have been found in municipal drinking water,
23 private wells, and the blood of the population. Our
24 experts also advised us on the specific types of studies
25 that needed to be conducted to answer the questions of

1 communities. We worked on this petition for a year, and
2 the petition lays out a detailed, comprehensive testing
3 program in great detail. When we got EPA's response to
4 the petition at the end of 2021, our groups were,
5 frankly, dismayed and disheartened. EPA decided to only
6 require limited testing on seven PFAS, not to require
7 testing on the other 47. And the limited studies EPA
8 chose to require were just a small portion of the studies
9 we asked for.

10 This is not a minor disagreement over
11 technical details but a huge disparity between what we
12 requested and what we got. I did a calculation before
13 this hearing, Your Honor, and determined that the studies
14 that EPA chose to require on the seven PFAS represent
15 three percent, three percent of the testing program
16 proposed in the petition. Importantly, EPA rejected the
17 most significant studies: an epidemiology study of the
18 entire Cape Fear downstream population, studies on the
19 actual mixtures of PFAS found in blood and drinking
20 water, and long-term studies in animals on the 14 PFAS
21 with greatest exposure to determine their risk of cancer,
22 neurological damage, liver damage, and reproductive
23 effects.

24 What was and is most troubling to my clients
25 is that EPA actually presented its decision as a grant of

1 the petition. This gave the world the impression that
2 Chemours would be conducting the testing we asked for
3 when the exact opposite was the case. After we digested
4 the petition response, there was no doubt that the modest
5 testing EPA planned to require would provide no real
6 answers to communities and leave us where we are now,
7 without data to enable exposed residents to understand
8 how 40 years of PFAS exposure is affecting their health.

9 EPA says it need not agree to every
10 suggestion or aspect of a petition in order to grant it.
11 This is correct as far as it goes. But we would
12 emphasize, Your Honor, that there is a big difference
13 between rejecting a few minor suggestions in a petition
14 and denying the overwhelming portion of the petition's
15 request.

16 Our case involves the second scenario.
17 Indeed, we wouldn't be here today if we were just
18 quibbling over a few small points but the Agency had
19 satisfied the great bulk of our testing request. The
20 core of this case is that the Agency claimed to grant the
21 petition but effectively rejected what we asked for. If
22 EPA can do this here, it would have carte blanche in any
23 case to grant a tiny sliver of a petition and then dodge
24 judicial accountability for denying the rest.

25 I want to emphasize three critical principles

1 that we think should govern the disposition of this
2 motion. The first is to accept the allegations in the
3 complaint as true, it is clear under Fourth Circuit
4 precedent where the defendant challenges the Court's
5 jurisdiction, dismissal is not warranted unless it
6 appears to a certainty that the plaintiff would be
7 entitled to no relief under any state of facts which
8 could be proved in support of the claim.

9 The second core principle is that where the
10 Court's jurisdiction to review Agency action is
11 challenged, Courts examine the Agency's action de novo.
12 That is to say, they do not defer to the label that the
13 Agency has attached to the action but look at the
14 underlying reality of what the Agency has done.

15 As the Supreme Court recently held, agencies
16 have never been able to avoid notice and comment
17 rulemaking, which was the issue involved in the case,
18 simply by mislabeling their substantive pronouncements.
19 On the contrary, Courts have looked to the contents, the
20 contents of the Agency's action, not the Agency's
21 self-serving label, closed quote. And this is the
22 decision of the Supreme Court in Azar v. Allina Health
23 Studies, a 2019 case.

24 And then the third principle that I think is
25 operative here is the uniquely powerful and independent

1 role Congress assigned to district courts in assuring
2 that unsuccessful petitioners have a meaningful judicial
3 remedy under Section 21 of TSCA. This intent is embodied
4 in TSCA's legislative history and court decisions.
5 Section 21 is a unique and powerful tool for members of
6 the public to hold EPA accountable for acting or failing
7 to act on important issues. That's why Congress required
8 the Court to conduct a de novo proceeding in the case of
9 petition denials. And if plaintiffs support their
10 case -- and I'm quoting from the statute -- support their
11 case by the preponderance of the evidence, the Court
12 must, quote -- quote, order the Administrator to initiate
13 the action requested by the petitioner. That means if
14 the Court treats EPA's action here as a petition denial,
15 there will have to be a de novo proceeding. The burden
16 will be on the plaintiffs to demonstrate by a
17 preponderance of the evidence that the testing asked for
18 in our petition is justified under the criteria in
19 Section 21.

20 And if the Court agrees, it has an obligation
21 to order the Administrator to initiate the action
22 requested by the petitioner. This does not mean some
23 other program that EPA might prefer. It means the action
24 requested in the petitioner, Your Honor.

25 THE COURT: No. I'd like you to address the

1 question of whether or not the action requested by the
2 petitioner is a request to test a chemical or a category
3 of chemicals as opposed to a testing program. That's not
4 in the statute anywhere that says, "You shall follow our
5 proposed program of testing or environmental impact."
6 It's "You will initiate a proceeding to test the chemical
7 or the category of chemicals."

8 If your argument is that I have to decide if
9 they've granted you everything you've asked for,
10 including your precise detailed program of testing,
11 that's simply not in the statute anywhere, so please
12 address that.

13 MR. SUSSMAN: Well, I think the best way to
14 see whether the petition was granted or denied is simply
15 to compare what we requested and what they gave us. And
16 as I said, we wouldn't be here if EPA substantially
17 granted the testing program that we asked for but we had
18 a disagreement over a few details.

19 I think what happened here is the Agency
20 basically agreed to require a few tests that it had been
21 planning to require all along and denied everything else.

22 Now, whether EPA can treat PFAS as a category
23 as the Agency requests is, I think, a scientific and a
24 policy question. We did not ask EPA to treat PFAS as a
25 category. We wanted EPA to test 54 specific PFAS to

1 which people in the Cape Fear Basin were exposed. And we
2 asked EPA to require the test that we believe would
3 provide the answers to the questions of the community
4 about the impact of contamination on their health.

5 Now, EPA's response was, "We have a PFAS
6 testing program that is for the entire PFAS category, and
7 that's what we're gonna be guided by. We're not gonna be
8 guided by what you asked for in the petition." And our
9 response is, "The petition asked for something very
10 different than what EPA provided."

11 Now, whether a category approach is
12 appropriate, I think, depends on whether it's
13 scientifically justified in the language of the statute,
14 whether it's scientifically appropriate. The PFAS
15 testing strategy is unique and unprecedented in its scope
16 and breadth. And our position, which we have laid out in
17 the amended complaint, is that the PFAS testing strategy
18 and the category approach is simply not a science-based
19 tool to get the answers about PFAS exposure in the Cape
20 Fear Basin and its impacts on specific populations.

21 So we would say that if EPA wants to come
22 into the de novo proceeding and demonstrate to Your Honor
23 that the category approach is reasonable and justified,
24 that would be -- that would be fine. But I want to
25 emphasize that it's a merits issue. It's not an issue to

1 be determined on the motion to dismiss. And our amended
2 complaint takes sharp issue with the validity of the
3 category-based approach. And I think, Your Honor, on a
4 motion to dismiss it, it is necessary to accept the
5 allegations in our complaint as true.

6 THE COURT: I agree that I have to accept the
7 factual allegations as being facts. That doesn't mean
8 that I have to accept the legal -- any legal position
9 regarding the application -- or the relevance of those
10 facts or the extent to which those facts are to be
11 applied to EPA's obligations under the statute.

12 I'm a little concerned that everybody's
13 talking past each other here --

14 MR. SUSSMAN: Yeah.

15 THE COURT: -- in this case, right? There
16 are lots of things that you've asked for that the
17 scientists would probably all say, "That's terrific."
18 And then there's the -- you're allowed to ask for testing
19 of categories of chemicals, and that's what you're
20 allowed to ask for. So to the extent it's "We want a
21 particular type of testing," that's not the question.
22 The question is has EPA agreed to test the 54 chemicals.
23 They say they have. They say they've decided to do it a
24 certain way. And if they have agreed to test those
25 chemicals, then there's a grant. If you -- if they --

1 however they decide to test it. They have to initiate a
2 proceeding that says, "This is what's scientifically
3 valid, and we will then go through it." And it's not
4 like there's ultimately no recourse. This can be taken
5 directly to the Court of Appeal after a rulemaking, and
6 the EPA can go in front of three judges instead of just
7 me and say -- you can say, "That wasn't good enough.
8 They initiated, they started something, but they never
9 got to where they're supposed to get."

10 If I tell them "Start," and they say, "We've
11 started, we're doing it" -- all I'm allowed to tell them
12 is to start. I can't tell them to order a particular
13 type of testing. That's not within the waiver on the
14 statute. So I'm trying to figure out today -- EPA's made
15 two arguments, really. One: I have no jurisdiction.
16 Two: Even if you find you have jurisdiction, it's moot
17 because we've done exactly what you can order us to do
18 under the statute. There's a limited grant -- or limited
19 waiver of sovereign immunity here, and that limited
20 waiver of sovereign immunity constitutes my authority to
21 decide whether or not the petition has been granted or
22 denied, and if it has been denied, to order the EPA to
23 initiate.

24 I agree -- so I think I agree with this
25 question of the people of the Cape Fear River Basin want

1 to know -- yes, they 100 percent do. Our scientists say
2 this would be a terrific program of testing that would
3 answer those questions. The EPA says, "We're at the
4 beginning of a process of determining the right way to
5 answer those questions," and that's, as they've called
6 it, an iterative process. "And our scientists need to
7 start, they need to say we need to look at PFAS, it's
8 been requested that we look at PFAS, these 54 things
9 constitute the 54 PFAS chemicals. We're obligated to
10 limit vertebrate testing, we're obligated to testing
11 categories where appropriate, we're obligated to consider
12 economic impact. We're obligated to do all those things,
13 so we're initiating our proceeding, and then we're going
14 to -- we may land where you've decided to land, but we're
15 not obligated to start where you've decided to land.
16 We're obligated to start." That's my reading of what the
17 statute requires.

18 So to the extent you've said, "And this is
19 how we wish you would do it," I think those things are in
20 the category of the wishes. The things of the "permitted
21 to ask fors" are the 54 chemicals.

22 So that's my reading of the statute as we sit
23 here today. I'm being transparent. I've read all the
24 pleadings. I've read everything. I've thought very hard
25 about it. I went back and read the Toxic Substances

1 Control Act from beginning to end. I'm trying to parse
2 this against the issues of sovereign immunity, the
3 ultimate future issues of the Administrative Procedure
4 Act, and whether to an extent any rulemaking ultimately
5 meets that.

6 There's a whole process that has to begin
7 after we say "Start," and I think they've agreed to
8 start. So the question is if they have agreed to start,
9 they don't have to agree to end where you want them to
10 end, they have to agree to start. So I want you to
11 address to me why what they've said does not agree to
12 start looking at those 54 chemicals but is instead a
13 refusal to look at those 54 chemicals such that they
14 haven't begun their iterative process.

15 Now, that's the problem when we're talking
16 past each other is -- you've come to a beautiful program
17 and one that it would be great if that's where we end,
18 but they're obligated to be at their beginning. And so I
19 want to know why I should not look at their decision to
20 begin as the beginning of a process which may end there.
21 And so the judicial review is of have they decided to
22 start, have they decided to start in good faith, and
23 could that ultimately proceed to all 54 -- or will that
24 ultimately proceed to what they believe to be an
25 appropriate analysis of one of two things, which is what

1 I forecast for you earlier, which is, is this the -- is
2 this a petition for PFAS and 54 representative chemicals?
3 Or is this a petition for 54 chemicals and -- and if it's
4 for 54 chemicals, because it does both -- if it's truly
5 for 54 discrete chemicals, am I supposed to treat this as
6 54 petitions and say, iteratively, a grant that says
7 we're gonna look at the category of PFAS, many of the
8 PFAS that are predicted will fall into appropriate
9 representative chemicals, then we'll go from there. And
10 then when we get to the end, we'll say, "These ones still
11 aren't addressed and we've agreed to address them, so now
12 we will begin the next step of figuring out categorically
13 do we address those or do we address those individually."
14 But they've agreed to do that in some scientifically
15 appropriate way that is premature to predict.

16 And that's what I'm trying to address in my
17 order, is -- is there anything new for me to order them
18 to do other than to begin, because that's all they're
19 obligated to do, is begin their process. Or is this a
20 denial -- how am I supposed to see it as a true denial
21 when they've said, "We'll begin"? Their forecast begins
22 to address them. But it's a forecast. They're not even
23 going to be held to that. They say, "We've agreed to
24 begin, we'll start our process, we'll have to make sure
25 it's scientifically valid, it will be tested and

1 subtested as we go. As we sit here, here's the first
2 step we're going to take." But it doesn't tell you the
3 ultimate steps they're gonna take such that I can decide
4 if it's a denial. And you're not left with no judicial
5 review. There's ultimate judicial review.

6 So that's as transparent as I can be for the
7 litigants. All right? Everybody now knows what I'm
8 trying to figure out, which is are we -- the argument the
9 EPA made was "Ultimately, Your Honor, you're in danger of
10 circularity here, which is you'll have to order us to
11 begin and we've agreed to begin, and you can't order us
12 to do a particular thing." The petition is for many
13 things, but the petition is permitted to be for
14 initiating a proceeding to test the environmental impact
15 of certain chemicals. It's not "And you must then do it
16 this way." Those things are in the petition, but they
17 are not the thing you are allowed to petition the
18 government to do. You're allowed to petition them to
19 begin testing.

20 MR. SUSSMAN: Your Honor, I honestly don't
21 see where the statute says that. I think that the
22 petition as stated in the statute is very clear it's a
23 petition for EPA to adopt a specific set of requirements,
24 not a petition for EPA to take whatever steps they feel
25 are appropriate. And if you're saying that EPA has broad

1 discretion to look at a petition to say, "We're not gonna
2 give you what you wanted, we're not gonna give you the
3 requirements that you asked for, but we're gonna do
4 something else," then I think you have to view that as a
5 denial.

6 Now, to come back to the 54 PFAS, only seven
7 of them will be tested. The rest of them apparently fall
8 within various broad categories, and other chemicals in
9 those categories may perhaps be tested although, frankly,
10 as we sit here today, that's not happening.

11 That gives you 30 chemicals. Now, there are
12 another 14 chemicals that under no construction of the
13 petition response will be tested, either in themselves or
14 through representative chemicals in a category. Those
15 are substances that EPA says are not PFAS, which we
16 disagree with, and then substances which fall into other
17 subcategories for which EPA at this point in time has no
18 testing plan.

19 So I think the EPA is required to respond to
20 the petition that was submitted. This is not a petition
21 to test PFAS in the abstract. It is a petition to test
22 54 specific PFAS to which communities in the Cape Fear
23 Basin have been exposed, and to accomplish that testing
24 by looking at certain important health effects.

25 THE COURT: I understand. I've read the

1 petition.

2 MR. SUSSMAN: Okay. Where am I losing you?

3 THE COURT: You're losing me on "I'm allowed
4 to ask for those things." If I'm allowed to ask for
5 clean housing and EPA says, "We'll build you a clean
6 house," you don't also say, "And I want it to have a
7 swimming pool, and it would be best if it was at least
8 six bedrooms, and then I would also like it to have a
9 gourmet kitchen." And they said, "We've agreed to build
10 housing," which is what you're allowed to ask for, and
11 then they're allowed to use their best judgment on what
12 constitutes housing, right? So completely different.
13 But that's the analogy -- right? -- is you're allowed to
14 say, "Will you test these chemicals for their impact and
15 regulate them as appropriate," not "We want you to do
16 this kind of testing." That's the swimming pool, right?
17 That might be great, but is it required of them under the
18 statute when the statute permits them to make certain
19 requests -- to request testing on certain categories.

20 MR. SUSSMAN: Well, if the Agency believes
21 that the requests of the petition are unfounded, it can
22 simply deny the petition. Again, I don't think that our
23 petition is any different from the type of petition that
24 Congress expected and the type of petitions that have
25 been submitted to EPA in fairly large quantities over the

1 last 20 years. They all ask for specific types of
2 relief. Often they ask for specific types of relief on
3 specific chemicals. And EPA's response in the
4 overwhelming number of instances is "We're denying your
5 request."

6 I know of no petition response where EPA has
7 done what it did here, which is to deny the request but
8 say, "We're granting something different and, therefore,
9 we're granting the petition." And I think if you accept
10 that, you're essentially eviscerating the Citizens'
11 Petition provisions of TSCA, which are intended to give
12 petitioners a lot of leverage to compel EPA to do what
13 they think EPA is required to do. And if EPA can say,
14 "Well, you know, we read your petition, we're doing
15 something else, but we're granting your petition," then I
16 think that that makes the statute, essentially,
17 meaningless, and it makes the remedy that Congress
18 granted to petitioners, it makes it, essentially, empty
19 and lacking in any effect whatsoever.

20 THE COURT: All right. So I'm looking at
21 Section 2620. It's one sentence. "Any person may
22 petition the Administrator to initiate a proceeding for
23 the issuance, amendment, or repeal of a rule under
24 section 2603, 2605, or 2607 of this title or an order
25 under section 2603 or 2604(e) or (f) of this title."

1 None of those things are "Begin our preferred program of
2 testing." All of those things refer to a rulemaking.

3 Now, if they say, "We will begin the
4 proceeding to issue an appropriate rule," how they go
5 about doing that -- you're allowed to petition for that
6 thing, initiate a rulemaking or the issuance of an order.
7 If I agree that power I have is to order the
8 Administrator to initiate the action requested by the
9 petitioner, and the action requested by the petitioner is
10 initiate a proceeding for the issuance, amendment, or
11 repeal of a rule -- right? That's my authority.

12 MR. SUSSMAN: Well, you know, I think you
13 have to read into that, Your Honor, "issuance of a
14 specific rule or a specific order," because otherwise the
15 petition would simply be a general open-ended request to
16 use -- and EPA to use its authority in some open-ended
17 and nonspecific way. And I think if we go there, we lose
18 any accountability. We lose any accountability. If you
19 look at all the previous petitions that have been filed
20 with EPA, they ask for very specific rules and orders.
21 They didn't say, "We want you to issue a rule, we don't
22 really care what it is." All of the previous petitions
23 have said, "We want X, we want Y, we want Z. We want you
24 to regulate this specific chemical. Here's how we want
25 you to regulate it." And in the overwhelming number of

1 instances, EPA has said, "Petition denied."

2 So what's going on here that is different
3 from what EPA has done in the past? I think what's going
4 on, basically, Your Honor -- and if I overstate this a
5 bit, I apologize -- but I think what's going on here is
6 an effort to do an end run around the judicial remedy
7 that Congress provided and to leave citizen petitioners,
8 essentially, at the mercy of the Agency to respond to
9 petitions in any way that they may see fit.

10 THE COURT: And if they had simply said,
11 "Grant. We will do this"?

12 MR. SUSSMAN: Excuse me?

13 THE COURT: If they had simply said, "Grant.
14 We will initiate a proceeding," and said nothing more,
15 sufficient under the statute?

16 MR. SUSSMAN: I don't think so. I think
17 Congress -- Congress did not provide for judicial review
18 when EPA granted a petition. And so I think that
19 reflects an expectation by Congress that EPA has fully
20 responded to the petition and agreed to take the actions
21 required by the petitioner.

22 THE COURT: Is it not that if they grant, we
23 will then over a period of time have a set of facts
24 against which to judge whether or not the EPA has done
25 its job? If they say "Grant," we now develop all of the

1 factual record that's necessary for whatever Court
2 reviews it -- in this case it won't be a district court,
3 it will be a Court of Appeal and three-judge panel -- to
4 look at everything EPA has done and ultimately say,
5 "You've done what you agreed to do," or "You didn't," and
6 it --

7 MR. SUSSMAN: Your Honor, I --

8 THE COURT: -- will be tested then.

9 MR. SUSSMAN: -- respectfully, if Your Honor
10 dismisses this case, and there's no remedy under Section
11 21, there is no remedy, period. And I want to explain
12 why that's the case.

13 If EPA, for example, tests the seven PFAS
14 that they've agreed to require testing on but doesn't
15 test anything else, we can't go to the Court of Appeals.
16 We can't go to the district court. There is nothing for
17 a Court to review. EPA is simply exercised its
18 discretion not to take certain action. That is
19 unreviewable.

20 THE COURT: So if I say, "Do it," and they
21 don't do it, what makes it different?

22 MR. SUSSMAN: Well, it's a court order. I
23 mean, I think that if you order EPA to take the actions
24 requested in the petition, then EPA would have to start a
25 proceeding requiring testing on the 54 PFAS and requiring

1 the studies that the petitioner --

2 THE COURT: Under what authority do I have to
3 make that order? I can order them to initiate a
4 rulemaking. I can't order them to do the testing you
5 want.

6 MR. SUSSMAN: No, we're not -- we're simply
7 asking that you issue an order requiring them to initiate
8 the providing of the relief called for by the petition.
9 Whether they ultimately do that in the end, I think, is
10 another question. But I think that the obligation is an
11 obligation to take steps moving towards granting the
12 relief called for by the petition, and I guess I don't --
13 I don't understand why we can't have a de novo proceeding
14 in which we can present the science to you and EPA can
15 present their science, and you can decide whether we have
16 carried our burden of proof and supported the findings
17 required to justify testing under the statute. That's
18 what Congress wanted.

19 THE COURT: All right. I understand. I also
20 understand that this Court is obligated to construe its
21 jurisdiction seriously, and I'm -- ultimately, at the end
22 of the day, there's two questions. The de novo
23 proceeding doesn't necessarily constitute a hearing. The
24 de novo proceeding -- I'm trying to figure out what facts
25 are at issue that aren't already in the petition and

1 aren't already in the EPA's response that are necessary
2 for a hearing, a factual hearing as opposed to a legal
3 hearing that is significantly different than what we're
4 doing today.

5 So there's a question of whether or not a
6 extended -- so the de novo proceeding to determine the
7 facts. The question then becomes what facts are
8 necessary for me to be able to know whether or not they
9 have agreed to initiate or not initiate and whether or
10 not those are new facts.

11 They've told you exactly what they intend to
12 do. I have exactly what you asked for. The question is
13 now the application of the law to those facts: Is what
14 they've said they're going to do a grant or not?

15 So we have -- I think they overlap so
16 substantially here today that the proceeding is, for all
17 intents and purposes, the same proceeding. They've
18 agreed to initiate. They say, "You don't have
19 jurisdiction unless we deny." You're saying, "What
20 they've agreed to do does not constitute initiating. We
21 asked for this and they've agreed to that. That's not
22 initiating."

23 I don't see how a de novo proceeding creates
24 legally operative facts that are sufficiently different
25 between those two positions that it's gonna change the

1 analysis I have to do. They either grant it or deny. I
2 have a sufficiently developed record to look at what they
3 say they're gonna do and what you've asked for.

4 So, you know, I understand you'd like to
5 bring your scientists to court and have all that happen
6 in front of me, but that's not the question. The
7 question is, is what they've agreed to do a grant of the
8 thing you asked for.

9 MR. SUSSMAN: Your Honor, if I can speak to
10 the de novo proceeding.

11 If you go to Section 21(b)(4)(B), you'll see
12 that Roman numeral I is "in the case of a petition to
13 initiate a proceeding for the issuance of a rule or an
14 order" -- this is a testing rule or order -- "If the
15 petitioner demonstrates to the satisfaction of the court
16 by the preponderance of the evidence," two things. The
17 first is "information available to the Administrator is
18 insufficient to permit" --

19 THE COURT: I've read this. I understand.
20 The EPA's agreed. They agree with you.

21 MR. SUSSMAN: No, they're not. They're
22 agreeing that in the abstract, there is a need for
23 information. They're not agreeing that there's a need
24 for information on the 54 PFAS which should be developed
25 by testing those PFAS and conducting certain requested

1 studies.

2 THE COURT: All right. I understand your
3 position.

4 MR. SUSSMAN: Okay. Well, that's -- that's
5 all I can hope for. Can I help you with anything else?

6 THE COURT: Thank you, Mr. Sussman. I
7 understand your position. And you have been 100 percent
8 consistent in your argument in your pleadings. There is
9 no issue here where I feel like any ball hiding. I feel
10 like you've written it beautifully. I understand exactly
11 where you're coming from. I was telling you where I'm
12 confused. I'm gonna ask the EPA to address the same set
13 of considerations that I've placed before them.

14 I do think there's some merit to the
15 circularity argument. That is, at the end of the day, I
16 order you to initiate a proceeding, and you say we have
17 agreed to initiate that proceeding, we're there.

18 So I'll ask you to address specifically
19 Mr. Sussman's arguments that the testing program that
20 they've requested, which places the impact on the Cape
21 Fear River Basin in greater context, why is that not
22 constitute the petition. You've heard me talk about "Is
23 a petition to initiate a rulemaking under your
24 authority," and that doesn't talk about any of these
25 things. That's where -- I think we're fairly joined on

1 that issue because that's ultimately what's gonna decide
2 this case.

3 MR. LEE: Thank you, Your Honor. We have a
4 couple points in rebuttal.

5 I just want to say generally that EPA is
6 fully on board with the concerns that plaintiffs have
7 regarding the impacts -- the potential impacts on PFAS,
8 and we recognize, absolutely, there is an information gap
9 with respect to PFAS, and we are trying to fill that, you
10 know, with these test orders and with the testing
11 strategy, and that's how the Agency believes is the most
12 appropriate way to, sort of, respond to these potential
13 threats.

14 And the other thing I want to emphasize too
15 is this petition is one of the key reasons for EPA's
16 testing strategy, and this is why we developed it and
17 that's why we implemented it, was in direct response to
18 the petition. The petition predates the PFAS testing
19 strategies. So I think that it's just important to
20 establish that, you know, this is EPA's position and this
21 is -- we fully recognize plaintiffs' concerns, and this
22 is a significant driver to some of our strategy and
23 policies moving forward, so.

24 But I think where the disconnect is is that,
25 you know, plaintiffs, they want to fill that information

1 gap in a very specific way. They want 54 test orders for
2 very specific substances that they believe are PFAS. And
3 EPA has -- they have a different idea in terms of what is
4 the best, most appropriate way to fill that information
5 gap, the testing strategy, for example. And we believe
6 that this is a nationalized strategy that can fill, sort
7 of, the information gaps that are more local. And I
8 understand that, you know, that Cape Fear is a hotbed.
9 There's a lot of interest in terms of PFAS contamination.
10 And this national testing strategy is a way to encompass
11 all localized, sort of, concerns, and that's part of the
12 reason that why we -- we moved forward with a national
13 PFAS testing strategy as a response to their petition.

14 But I think the question is whether this was
15 a full grant or a partial grant and, you know, whether
16 this is really in reality 50-some-odd petitions -- is
17 this really 50-some-odd petitions or is this a single
18 petition? And I think the Centers for Biological
19 Diversity versus Jackson case is actually quite important
20 and illuminates a lot on this question. And we cited
21 that in our supplemental briefing, and I think we cited
22 that in our motion as well.

23 So in that case, EPA has deference with
24 respect to how it decides what constitutes a petition
25 under Section 21. So if, for example, there's one single

1 document but it contains multiple requests, Jackson is
2 instructive in that EPA has significant discretion with
3 respect to how it chooses to respond to those requests.
4 And, you know, Section 21 petitions routinely have
5 numerous requests. I mean, I think plaintiffs
6 acknowledge that in their briefing, acknowledge it in the
7 hearing, and we acknowledge that as well. There are
8 oftentimes, you know, one single document but they
9 contain multiple requests.

10 THE COURT: This is the lead shot and sinkers
11 case, right?

12 MR. LEE: For example. That's right. That's
13 right.

14 THE COURT: So in that case, EPA says, "We
15 don't have jurisdiction over lead shot, it's actually
16 stripped from us because it constitutes ammunition, and
17 the lead sinkers we'll deny because we don't think it's
18 been shown."

19 MR. LEE: That's right.

20 THE COURT: And the question was timing,
21 right?

22 MR. LEE: Right.

23 THE COURT: And so EPA was fairly able to
24 say, "We've issued two responses to your request." And
25 this is the obverse, right? This is one response to what

1 might be multiple requests. So it's not directly on
2 point. Do you have anything that's directly on point on
3 that other than you have broad discretion?

4 MR. LEE: Yeah. I mean, Your Honor, I think
5 it is on point in the sense that the plaintiffs in that
6 case were complaining that this is actually a single
7 petition and it deserved a single response because it's
8 one petition. And the Court ultimately said, you know,
9 EPA has a lot of experience with TSCA petitions and how
10 to respond to them, how to treat them, you know, whether
11 they're related, if they're different, if there are
12 requests that can be sort of cabined as a single request,
13 you know, if you can just take multiple requests and
14 bunch them in as a single request.

15 So I think in that sense, the Court
16 recognized that EPA should be afforded deference in terms
17 of how they respond to those petitions when petitions
18 have multiple requests, whether they treat them as
19 single, separate requests or, you know, one single,
20 unified request.

21 THE COURT: So is that Skidmore deference,
22 it's persuasive to -- or it's deference to the extent
23 it's persuasive to the Court?

24 MR. LEE: In that case, they called it
25 Skidmore. They said, you know, at the very least, EPA

1 has Skidmore deference with respect to how they
2 ultimately decide whether this is a single petition or
3 this is, you know, all these multiple requests --

4 THE COURT: It's one document with 54 --

5 MR. LEE: Yeah, that's right. And in this
6 case, EPA says these 54-plus requests is one single
7 petition, and it's a request to fill an information gap
8 with respect to PFAS. It's one petition.

9 THE COURT: So if the EPA were -- I think --
10 there's a program that categorically covers 30 of the 54.
11 There's 24 that are unaccounted for in some form or
12 another under Mr. Sussman's argument, right? He's
13 arguing that 30 are covered, but there's 24 that aren't
14 covered, separate and apart from what kind of testing
15 he's requesting. He's saying, "Twenty-four of my
16 chemicals are just not covered." Is that true?

17 MR. LEE: Your Honor, again, like you
18 mentioned, this is an iterative test, and the definition
19 of "PFAS" is actually expanding. I think EPA just
20 released a rule recently that actually expanded the
21 definition of "PFAS." So it may be that, you know, once
22 we get more test orders out, we get the results of those
23 test orders, that this definition of "PFAS" may expand to
24 include, you know, additional of the 54 substances
25 identified in the petition. So that is true that, you

1 know, it's a working definition, it's iterative, it's
2 evolving. And so right now we can't say for sure whether
3 or not, you know, categorically, that some of those
4 remaining 24 substances won't be part of the testing
5 strategy and as part of the "PFAS" definition.

6 THE COURT: All right. So as you sit here
7 today, the agreement is to test PFAS as a category. To
8 the extent some of those 54 chemicals don't meet the
9 EPA's definition of "PFAS," they won't be tested?

10 MR. LEE: It's not that they won't be tested.
11 It's just too hard to say right now, frankly. You know,
12 we're sort of at the early stages. We have two test
13 orders out.

14 THE COURT: And there are 24 total
15 contemplated right now? Is that my recollection?

16 MR. LEE: That's right.

17 THE COURT: And so figuring out what those 24
18 test orders ultimately look like, part of the issue is
19 it -- "We've agreed to initiate a rulemaking. We've
20 agreed to it in response to your request. Your request
21 covers PFAS as a category plus some additional chemicals.
22 We've told you as we stand here right now, this is what
23 we think we're gonna do, but we actually don't know and
24 can't tell what we're ultimately going to do, but we have
25 initiated our proceeding."

1 MR. LEE: I think that's the best
2 characterization of where EPA stands right now in terms
3 of their initiation of the commencement of the
4 appropriate proceeding and where we're at.

5 THE COURT: All right.

6 MR. LEE: And, Your Honor, I do want to -- I
7 have a couple more points here.

8 So you mentioned that under the statute, EPA
9 could have very easily just issued a one-sentence
10 response saying they grant the petition and we're
11 initiating an appropriate proceeding under Section 4, and
12 that's absolutely correct. There's no statutory
13 requirement that EPA further explain, you know, what they
14 plan to do. And, curiously, the EPA is actually required
15 to explain why they denied a petition expressly in the
16 statute, but there's no requirement on the flip side
17 where they have to explain why they granted a petition.
18 So I think that sort of illuminates the contrast between
19 the two scenarios.

20 THE COURT: Will you address the Court's
21 question about -- and I think it actually comes from this
22 Jackson case. A denial ends the record. There's no more
23 future factual development necessary for the Courts to be
24 able to figure out what happened. When there's a grant,
25 there's gonna be a lot of things that happen, which

1 ultimately are reviewable.

2 Now, that's my understanding of how it works.
3 Mr. Sussman's argument is that that essentially ends up
4 with zero opportunity for judicial review. But you've
5 agreed to initiate the proceeding. That ends up going
6 through -- we don't know for certain. We've been told
7 that you either have to make a choice under TSCA -- we
8 have to elect. Once you've chosen to elect TSCA, you're
9 stuck with TSCA. We don't have the obverse case where
10 you choose APA and not TSCA for your judicial review.
11 That hasn't been upheld by -- the D.C. circuit considered
12 it. I think it was Spottswood Robinson wrote the opinion
13 that said once you've chosen TSCA, you're stuck with
14 TSCA. But you can't simultaneously proceed under both
15 because that ends up with all the risks of inconsistent
16 opinions and different things happening.

17 Is APA available as an alternative under the
18 current practice of the EPA? Do you end up with a TSCA
19 test or an APA test? Can you take your ultimate
20 rulemaking, ultimately, straight to judicial review?
21 What's the response to Mr. Sussman's argument that if I
22 were to find this to be a grant, I'm effectively
23 stripping this of ultimate judicial review?

24 MR. LEE: Yeah. Your Honor, as we mentioned
25 in some of our briefing, there are alternative options

1 for judicial review. For example, under Section 19 of
2 TSCA, final testing orders, Section 4 test orders can be
3 challenged in the Court of Appeals. In fact, the first
4 test order that we issued under the PFAS strategy is
5 being challenged in the D.C. circuit right now.

6 That's one option to directly test --
7 challenge the test orders.

8 Under Section 20, there is mandatory duty
9 suits. If EPA is required to do something under TSCA and
10 they don't do it, plaintiffs can pursue those challenges.
11 There are mandamus actions. If EPA has agreed to do
12 something and they're not doing it, they can drag EPA to
13 court through a mandamus action. So there are other
14 actions available.

15 You know, right now, in terms of whether this
16 action here and now is challengeable under the APA is a
17 little bit more difficult in that, you know, we view this
18 as an interlocutory step, so there's no -- not
19 necessarily a final action. You know, this is an
20 agreement to do more -- a promise to do more --

21 THE COURT: Right. This is the beginning.
22 I'm saying once we get to the end, is it ultimately
23 challengeable and we say this is -- "You asked us for a
24 rulemaking, we did our rulemaking, they can come back
25 under the APA and say that rulemaking is insufficient for

1 the following reasons."

2 MR. LEE: Again, not directly, just
3 indirectly in the sense that Section 19 orders are
4 available, mandamus actions are potentially available.
5 So I wouldn't say directly but sort of indirectly.

6 THE COURT: Okay. All right. I interrupted
7 you. You had further points?

8 MR. LEE: No, I think that's it, Your Honor.
9 Thanks.

10 THE COURT: All right. Thank you.
11 Mr. Sussman, I'll allow you to respond.

12 MR. SUSSMAN: Couple of things, Your Honor.
13 I think that if EPA were to issue a test rule
14 or a test order saying test seven PFAS, seven of the
15 petition PFAS, we couldn't challenge that test order or
16 rule on the basis that "Hey, you know, there are 47 other
17 PFAS that should have been tested." I think a Court
18 would say, "That's not ripe, that's not the issue that's
19 presented to us, that's not something we can decide."

20 And in terms of a suit to compel EPA to take
21 action under Section 20 because they have a mandatory
22 duty, EPA is arguing here that their appropriate
23 proceeding that they've initiated is not subject to
24 judicial review. They're saying that we cannot go to
25 court and say, "We think this appropriate proceeding that

1 you've initiated is inadequate, and we want the Court to
2 mandate something more." That's really what we're trying
3 to do in Section 21. I don't think we can do it under
4 Section 20. And I don't think we can do it in the
5 context of a petition to review a rule or order that is
6 specific to certain chemicals and does not include the
7 chemicals covered in the petition.

8 I want to make another point here that I hope
9 I can -- I hope I can capture, which is, as government
10 counsel said, we have very different visions of what the
11 testing initiative should be, and I think that's a very
12 important and revealing comment. Our vision of what the
13 testing should be is a program which responds to the Cape
14 Fear situation. We're not interested in other categories
15 of PFAS. We're not interested in a macro scientific
16 design in which we look at this category and that
17 category, we try to make judgments.

18 The purpose of this petition is to answer
19 questions that the community has about the specific PFAS
20 that they have been exposed to on a day-to-day basis.
21 And so I think when you compare our purpose to EPA's
22 purpose, it's entirely correct to say that EPA may have
23 initiated a proceeding, but it was a proceeding for a
24 different purpose, a completely different purpose than
25 the purpose that motivated and animated the petition and

1 that the petition was trying to achieve.

2 So I think if you accept EPA's argument, you
3 know, they're basically saying, "We think some testing is
4 appropriate on PFAS, we agree. There's not a lot of data
5 on these different PFAS, but we're not really interested
6 in the Cape Fear Basin. That's not our objective here.
7 We're not trying to answer the questions that the
8 community has. We're trying to answer some very abstract
9 macro questions about a category of chemicals that
10 includes over 6500 PFAS." And what we're saying is that
11 may be fine, but that's not why we filed the petition and
12 that's not what the petition was intended to accomplish.

13 And so I don't think that it's appropriate
14 for EPA to say, "We're granting the petition, but we're
15 granting it for a completely different purpose which is
16 unrelated to the reason why the petition was filed."
17 That's a denial to me. That's a denial.

18 THE COURT: So your position is that the
19 motive must be considered by EPA, and if the EPA has a
20 different motive for ordering testing, that would be a
21 denial?

22 MR. SUSSMAN: I would because I -- you call
23 it a motive. I think the petition had a purpose.

24 THE COURT: I understand, but the 2603
25 doesn't say anything about purpose. Now, that may be a

1 perfectly legitimate basis for a lawsuit against Chemours
2 and DuPont and say, "We're gonna sue you for the harms
3 that have happened, and those are now gonna be developed
4 in discovery and by scientists who are going to argue
5 about that and we're going to establish liability."
6 Those things may -- this is not the only area, time that
7 this is gonna happen. The question is, is the
8 manufacturer going to be required to engage in certain
9 kinds of testing if it wishes to continue to engage in
10 the use of these chemicals in manufacture, distribution
11 in commerce, processing, use, or disposal in such a way
12 -- or any combination of those activities that may
13 present an unreasonable risk of injury to health or the
14 environment.

15 So EPA is actually limited in what they're
16 authorized to do under their own statute.

17 MR. SUSSMAN: I would -- I wouldn't say that
18 at all. EPA is, as you quoted from the statute,
19 authorized to require testing to determine whether the
20 specific chemicals present an unreasonable risk to health
21 of the environment. That's what we're talking about.

22 THE COURT: I understand that. I understand
23 that. And there's more than one way to determine that.
24 And so that's why I'm saying to the extent EPA says,
25 "We care about these nationwide," and you say, "That

1 constitutes a denial if you're not motivated by looking
2 at it solely as it exists in the Cape Fear Basin," that
3 can't be right.

4 MR. SUSSMAN: I think it can be right because
5 every petition has a specific purpose.

6 THE COURT: Okay.

7 MR. SUSSMAN: And the requests in the
8 petition are a reflection of the purpose of the
9 petitioners, and the petitioner will have a set of
10 environmental goals and objectives relating to specific
11 chemicals and specific actions that they want EPA to
12 take. And I believe that the legislative history of the
13 structure of the statute creates an obligation on EPA's
14 part to respond to the petition as presented, not some
15 other petition, not some recharacterization of the
16 petition by the Agency, but the petition which has been
17 presented, which I think is inextricably linked to the
18 reason why the petition was filed and the purposes that
19 the petitioner wants to achieve through the testing.

20 THE COURT: Okay. I understand your
21 position.

22 MR. LEE: Your Honor, I just want to make one
23 quick rebuttal to that point.

24 Sorry, Your Honor. I just want to make one
25 quick rebuttal to that point.

1 So on page 7 of our response to their
2 petition, we do say that the Agency understands and
3 shares petitioners' concerns about the historic and
4 ongoing exposures of PFAS in the Cape Fear River
5 watershed of North Carolina. The Agency's actions on
6 PFAS, while generally national in scope, will accelerate
7 efforts to understand PFAS exposures at a local level.
8 And I -- it's sort of a response to this -- while the
9 concerns might be localized, we do recognize that, and we
10 do feel like a national approach does address local
11 concerns.

12 THE COURT: Okay.

13 MR. SUSSMAN: Your Honor, I --

14 MR. LEE: Secondly, Your Honor, we also did
15 -- the petition noted that there are numerous PFAS
16 associated in the Chemours facility beyond the 54
17 identified in the petition, and the expansive scope of
18 EPA's testing strategy aims to advance data-gathering for
19 these additional PFAS as well.

20 THE COURT: All right. Mr. Sussman.

21 MR. SUSSMAN: Yeah. I think it's one thing
22 to say that the Agency feels our pain and has concerns
23 about the impact of PFAS on the Cape Fear Basin, but that
24 doesn't mean that, as constructed, the Agency's testing
25 strategy is likely to or even may possibly lead to

1 answers to the questions that the petition poses. And so
2 again I come back to the question and the critical point:
3 Don't look at what they said they did, look at what they
4 actually did. And I -- perhaps we're at cross-purposes
5 here, but I'm honestly struggling -- even though I'm
6 counsel, I'm honestly struggling to understand how a
7 petition response that rejects 97 percent of the requests
8 in the petition can be treated as a grant; maybe a
9 partial grant and a partial denial, which is something
10 that EPA has done before. In the one -- one of the very
11 few instances where EPA granted a petition, they said,
12 "We're granting this part of the petition and we're
13 denying that part of the petition," and that would be
14 fine, and I think it would be an accurate
15 characterization of what they did. But to say that
16 "We're granting the petition," when 97 percent of the
17 requests in the petition are not being granted, I think
18 is just not -- it's not tenable.

19 The other thing I wanted to say, Your Honor,
20 is this testing program that EPA is conducting under its
21 PFAS testing strategy is a very slow, open-ended,
22 long-term process. And EPA said there would be 24
23 testing orders at the end of 2021. We now have only two
24 testing orders. There are another 24 testing orders that
25 EPA agreed it would issue, but we don't know when they're

1 gonna be issued and there's no time table for issuing
2 them.

3 And even if we have 24 testing orders, that's
4 24 PFAS out of a category of 6500. And so this is an
5 effort that will continue for years, may continue for
6 decades. Meanwhile, we have an immediate concern here in
7 the Cape Fear Basin. We have people who want to know
8 what impact these chemicals have had on their health. I
9 don't think it's an answer to say that this is a testing
10 program that may go for two or three decades and maybe,
11 just maybe it will provide some answers. I think...

12 THE COURT: I agree with all of that. My
13 question is where in the statute is the EPA obligated to
14 be the source of those answers?

15 MR. SUSSMAN: Well, I think that that's what
16 the petition process is all about.

17 THE COURT: Where in the statute?

18 MR. SUSSMAN: I think it's in the legislative
19 history --

20 THE COURT: In the statute.

21 MR. SUSSMAN: Okay. We'll go to the statute.
22 I think the statute says a person may petition the
23 Administrator to initiate a proceeding for the issuance,
24 amendment, or repeal of a rule or an order.

25 THE COURT: Right.

1 MR. SUSSMAN: So, I mean, that -- it's common
2 sense to interpret that to mean a request to issue a
3 certain type of order that accomplishes certain types of
4 things. I think it would be contrary to the plain
5 meaning of the statute and legislative intent to say that
6 all a petition can do is ask for an order, and if the
7 Agency decides to issue an order, end of story, end of
8 judicial review, no remedy, even though the order that
9 the Agency has issued is not responsive to the petition.

10 THE COURT: All right. I understand your
11 position.

12 MR. SUSSMAN: Your Honor, if there are any --
13 any other --

14 THE COURT: I don't have any further
15 questions for the parties. I also want to be sure that
16 nobody walks out -- I've been in your seats. I don't
17 want anybody to walk out and say, "Oh, if I only thought
18 to say this to the judge." So I will give both sides an
19 opportunity for closing to tell me anything you want me
20 to know or -- I understand the positions. They're
21 well-raised in the arguments. I asked for supplemental
22 briefing. The supplemental briefing directly addressed
23 the questions the Court has.

24 And I just want to be clear that I am not
25 unsympathetic to all of the concerns of all of the

1 citizens of Wilmington, North Carolina, where this Court
2 sits. I am not unconcerned. I thought long and hard
3 when I accepted this case that I need to be very careful
4 to be sure that I am separating my personal concerns from
5 the legal concerns. So this is a legal argument, and I'm
6 being very careful about that.

7 I just want to say that I am not -- that
8 there's nothing that you've said, Mr. Sussman, about the
9 concerns of people or the things they are worried about
10 that is wrong. It's all correct. The question is how
11 that bears on the EPA's determination to initiate -- to
12 grant your request for the initiation of a rulemaking or
13 particular orders regarding the regulation of the
14 chemicals. That is not the same -- that's their
15 authority. It's not the same thing as saying, "And we
16 also want you to initiate full epidemiological survey
17 that demonstrates the individual impact on individual
18 citizens of North Carolina." If they were to say, "That
19 is our purpose," wouldn't Chemours be in here saying,
20 "You can't do that, that's beyond their authority under
21 the statute"?

22 MR. SUSSMAN: But it's not.

23 THE COURT: So your position is that any
24 order would be permissible.

25 MR. SUSSMAN: Well, I think an order that

1 asks for testing which is within EPA's authority under
2 the statute to issue is a legitimate petition, and it
3 frames the question for the Agency to answer.

4 What if we had simply submitted a petition
5 that said we want an epidemiology study for the Cape Fear
6 population? The statute specifically mentions
7 epidemiology studies as the type of study that EPA can
8 require. So it's within their authority, no doubt about
9 it.

10 So could they come back in response to that
11 and say, "Well, we don't think an epidemiology study is
12 needed, but guess what? We have another testing program
13 out here which we think is worth pursuing"? When we
14 said, as we did, "We want you to do an epidemiology
15 study. Require this company to do an epidemiology study
16 on the Cape Fear population." And if that's all we ask
17 for, could EPA say, "We're granting the petition but
18 that's not what we're doing"? I think it's -- it's
19 illogical.

20 THE COURT: That's part of the Court's
21 question at the outset, which is how many petitions do we
22 have, and are they fairly presented in such a way that
23 the EPA is looking at what they say is one petition to
24 study a category in any appropriate manner and you've
25 suggested some ways that are appropriate. And you're

1 saying, "No, we've actually made 60, 70 petitions,"
2 because there are a bunch of different particular tests
3 you're also asking for.

4 MR. SUSSMAN: Yeah, yeah.

5 THE COURT: So your position is this is 70
6 petitions.

7 MR. SUSSMAN: But, you know, Your Honor, if
8 you look back at the petitions that have been filed over
9 the years, they're all single petitions. They're not
10 multiple petitions.

11 THE COURT: I understand.

12 MR. SUSSMAN: They're also petitions that
13 contain multiple requests. And in the one example I
14 mentioned, EPA said, "Okay, we have this request, we have
15 that request, we're granting this, we're not granting
16 that," which I think is the appropriate procedure.

17 This was not a petition in the abstract to do
18 testing on PFAS. We were not asking in the abstract for
19 a test order or a rule on PFAS, any PFAS that EPA might
20 want to test. The specific requests in the petition are
21 focused at a defined number of PFAS, and we identified
22 those very carefully based on the evidence of exposure by
23 people in the environment here in the Cape Fear Basin.
24 We said, "These are the PFAS that people have in their
25 blood. These are the PFAS that people have in their

1 drinking water. These should be the priorities for
2 testing."

3 And then we said there are certain studies
4 that we think are absolutely essential, one of which, by
5 the way, was the epidemiology study. And EPA actually --
6 in its petition response it has a couple of pages
7 addressing the epidemiology study. And they have a whole
8 bunch of reasons for saying that we don't need to do an
9 epidemiology study, none of which relate to the general
10 PFAS testing strategy. They're just reasons EPA gives
11 for saying, "It's too hard, it's too complicated, it will
12 take us a long time to do that." That, to me, is a
13 denial. They're saying, "We don't think it's needed, and
14 here's why." And it's not based on the testing strategy.
15 It's based on their reasons for believing in their
16 judgment that an epidemiology study is not a good idea.
17 And that's the sort of issue that we would present at a
18 de novo hearing. We would bring expert epidemiologists
19 before the Court and they would say, "We don't agree with
20 EPA's reasons for not doing an epidemiology study. We
21 think an epidemiology study is absolutely critical to
22 understand health impacts on this population, and here's
23 why we think it's absolutely critical."

24 And so I think in that instance, the
25 predominance of the evidence would indicate that Your

1 Honor should accept the portion of the petition that asks
2 for an epidemiology study and order EPA to initiate it.

3 Now, that doesn't mean that EPA is locked in,
4 which is what the government suggests. It means that
5 they simply need to take action in the direction of
6 granting the relief requested by the petition. If they
7 decide down the road that they really don't think it's
8 doable, if they make that decision in good faith, I think
9 maybe that's okay. But they can't just blow it off.

10 THE COURT: All right. Thank you,
11 Mr. Sussman. Any response?

12 MR. LEE: Your Honor, just one final thought.
13 Just with respect to the question of whether this is, you
14 know, 60, 70 petitions or a single petition, again, like
15 we were saying, EPA views this as one single petition.
16 All these multiple, very closely related requests are all
17 related to PFAS. And under Jackson, EPA has a deference
18 to view those multiple requests and treat it as a single
19 petition, and that's how we treated it. And, you know,
20 we -- both parties agree that there's an information gap
21 with respect to PFAS, and they've simply expressed their
22 preferred way of how EPA should fill that information
23 gap, and that's under the -- under the statute, not a
24 reason for jurisdiction here.

25 THE COURT: All right. As I said earlier,

1 I'm not making any decisions today. This is complicated.
2 It's got multiple moving parts under the statute, and
3 there's not a whole lot of case law to help this Court
4 with the question of partial grants and denials. So I
5 will take my time, I will think about it, and I will
6 issue an opinion in due course.

7 MR. SUSSMAN: Thank you, Your Honor.

8 THE COURT: All right. We'll be in recess.

9 (Proceedings concluded at 11:24 a.m.)
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18 **C E R T I F I C A T E**
19

20 I certify that the foregoing is a correct
21 transcript from the record of proceedings in the
22 above-entitled matter.
23

24 /s/Risa A. Kramer

3/24/2023

25 Risa A. Kramer, RMR, CRR

Date