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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SIERRA CLUB, et al.,

Case No. 4:17-cv-6293-JSW

Plaintiffs,

v.

JOINT PROPOSED STIPULATION

SCOTT PRUITT, in his official capacity as
Administrator of the U.S. Environmental
Protection Agency,

Judge: Hon. Jeffrey S. White

Defendant.

WHEREAS, Congress in 2010 enacted the Formaldehyde Standards in Composite Wood Products Act (the “Formaldehyde Act” or “Act”), codified in Title VI of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2697;

WHEREAS, the U.S. Environmental Protection Agency (“EPA”) has stated that the “purpose of TSCA Title VI is to reduce formaldehyde emissions from composite wood products, which will reduce exposures to formaldehyde and result in benefits from avoided adverse health effects”, 81 Fed. Reg. 89,674, 89,674 (Dec. 12, 2016);

WHEREAS, the Act set the formaldehyde emission standards for composite wood products at levels identical to the emission limits previously promulgated by the California Air Resources Board (“CARB”), 15 U.S.C. §§ 2697(b), (d);

WHEREAS, Section 2697(d) of the Act provides: “Not later than January 1, 2013, the Administrator shall promulgate regulations to implement the standards required under subsection (b) in a manner that ensures compliance with the emission standards described in subsection (b)(2);”

WHEREAS, Section 2697(b)(1) of the Act provides: “Except as provided in an applicable sell-through regulation promulgated pursuant to subsection (d), effective beginning on the date that is 180 days after the date of promulgation of those regulations, the emission standards described in paragraph (2), shall apply to hardwood plywood, medium-density fiberboard, and particleboard sold, supplied, offered for sale, or manufactured in the United States”;

WHEREAS, EPA published a final rule in the *Federal Register* on December 12, 2016 implementing the Act, 81 Fed. Reg. 89,674 (the “Initial Formaldehyde Rule”) (codified, as amended, at 40 C.F.R. Part 770 (the “Formaldehyde Regulations”));

WHEREAS, EPA worked with CARB to help ensure that the Formaldehyde Regulations are consistent with California’s requirements for composite wood products, particularly Phase 2 of California’s Wood Products Regulation, 17 Cal. Code Regs. §§ 93120-93120.12;

WHEREAS, the formaldehyde emission standards for composite wood products under the Formaldehyde Regulations, and set by Congress, are identical to the California “Phase 2”

formaldehyde emission standards;

WHEREAS, the Initial Formaldehyde Rule required compliance with the emission standards and associated certification, recordkeeping and labeling requirements of the rule by December 12, 2017 (the “designated date of manufacture,” “manufactured-by date,” or “compliance date”);

WHEREAS, on May 24, 2017, EPA proposed to extend certain compliance deadlines for the Initial Formaldehyde Rule, 82 Fed. Reg. 23,735, which was finalized in modified form in a September 25, 2017 rule, 82 Fed. Reg. 44,533 (Sept. 25, 2017) (“Formaldehyde Compliance Date Extension Rule”);

WHEREAS, the Formaldehyde Compliance Date Extension Rule extended the compliance deadline and associated certification requirements from December 12, 2017 to December 12, 2018, 82 Fed. Reg. at 44,536-37, codified at 40 C.F.R. §§ 770.2(e) (introductory text), 770.2(e)(1), 770.2(e)(4), 770.10(a), 770.12(a), 770.15(a), 770.30(b), 770.30(c);

WHEREAS, on October 31, 2017, Plaintiffs, Sierra Club and A Community Voice-Louisiana, filed their complaint for declaratory and vacatur relief in this action against Defendant EPA. The complaint alleged that EPA had exceeded its statutory authority and acted contrary to the Formaldehyde Act in extending the compliance dates for the emission standards to December 12, 2018. The complaint asked the Court to declare unlawful, vacate, and set aside the Formaldehyde Compliance Date Extension Rule’s one-year extension from December 12, 2017 to December 12, 2018 of the deadline for complying with the emissions standards (the “Complaint”), Dkt 1, ¶¶ 2-4, 49-50, Request for Relief;

WHEREAS, EPA argued that the Formaldehyde Act expressly provides for EPA to set the manufactured-by date and thereby authorized the challenged provisions of the Formaldehyde Compliance Date Extension Rule;

WHEREAS, trade associations representing the supply chain in the composite wood industry filed *amicus* briefs in support of Defendant EPA, including the American Home Furnishings Alliance, Inc. (“AHFA”), Composite Panel Association (“CPA”), the International Wood Products Association (“IWPA”), Kitchen Cabinet Manufacturers Association (“KCMA”),

and the National Association of Home Builders (“NAHB”), Dkt 37-1, Dkt 47-1, Dkt 52;

WHEREAS, the Court granted Plaintiffs’ motion for summary judgment and denied EPA’s cross-motion for summary judgment in a February 16, 2018 Order, Dkt 72 (the “Order”). The Court vacated and set aside the year-long extension of the compliance deadlines, but stayed the vacatur order to give the parties an opportunity to meet and confer to address timely, effective, and expeditious implementation of the Court’s order. *Id.* at 13. The Court gave the parties until March 9, 2018 at 4:00 pm to provide the Court with a “joint proposed submission” or simultaneous briefing, Order at 13;

WHEREAS, a complex, global supply chain brings composite wood products to market. Domestic producers and importers sell composite wood products (panels) to fabricators who depend on that supply to make products such as flooring, furniture, kitchen cabinets, windows and doors. The finished goods, as well as the panels, are sold downstream to distributors and retailers across the county, who in turn sell the composite wood products to home builders, commercial builders, contractors, and consumers;

WHEREAS, EPA estimated that the Formaldehyde Regulations apply to approximately one million regulated entities, including 922,000 small entities, 81 Fed. Reg. at 89,719-20;

WHEREAS, if lifting of the stay had the effect of reverting the manufactured-by date to December 12, 2017, it would have retroactive consequences for composite wood products sold, supplied, offered for sale, or manufactured (including imported) in the United States from December 12, 2017 to the date the stay is lifted;

WHEREAS, EPA did not issue its “Correlation Rule” until February 7, 2018, before which most third-party certifiers (“TPCs”) were not able to certify composite wood products as compliant with the Formaldehyde Regulations, 83 Fed. Reg. 5,340 (Feb. 7, 2018);

WHEREAS, several trade associations, including AHFA, IWPA, KCMA, NAHB, and the Window and Door Manufacturers Association (“Proposed Intervenor Associations”) moved to intervene on March 6 to participate in the remedy stage of this proceeding, Dkt 79;

WHEREAS, CPA intended to participate in the remedy briefing due on March 9 unless the Parties filed a joint proposed submission;

WHEREAS, Plaintiffs and EPA met and conferred in good faith, including with the Proposed Intervenor Associations and CPA (collectively “Trade Associations”), in an effort to come to an agreement on a joint proposed submission regarding the timely, effective, and expeditious implementation of the emission standards;

WHEREAS, Plaintiffs challenged the delay in compliance with the limits on formaldehyde emissions from composite wood products, but made it clear throughout the proceedings that they had no concern with CARB certification satisfying the requirements of the Formaldehyde Rule and Formaldehyde Act for a transition period that could extend for another year or longer;

WHEREAS, Paragraph 4 of the Request for Relief in Plaintiffs’ Complaint states that Plaintiffs did not seek vacatur of the Formaldehyde Compliance Date Extension Rule’s extension of the dates in the regulations related to reciprocity with CARB, 82 Fed. Reg. at 44,537 (codified at 40 C.F.R. §§ 770.2(d), 770.7(d)(1), 770.15(e));

WHEREAS, the Formaldehyde Regulations contain a provision that provides that: “If a product is certified by a CARB-approved TPC [third-party certifier] that is also recognized by EPA, the product will also be considered certified under TSCA Title VI until March 22, 2019 after which the TPC needs to comply with all the requirements of this part as an EPA TSCA Title VI TPC under Section 770.7(d) in order for the product to remain certified,” 40 C.F.R. § 770.15(e);

WHEREAS, EPA interprets 40 C.F.R. § 770.15(e) to allow regulated composite wood panels and finished products containing such composite wood panels that are manufactured (in the United States) or imported (into the United States) prior to March 22, 2019 and certified as compliant with the CARB Phase 2 or TSCA Title VI emissions standards by a TPC approved by CARB and recognized by EPA to be considered certified as compliant with the emissions standards of the Formaldehyde Regulations and to be labeled as such;

WHEREAS, the Formaldehyde Regulations provide similar reciprocity for no-added formaldehyde-based resins under 40 CFR §770.17(d) and ultra low-emitting formaldehyde resins under 40 CFR § 770.18(e);

WHEREAS, Plaintiffs believe that the public will be protected from harmful

formaldehyde emissions when composite wood products with formaldehyde emissions in excess of the limits in the Formaldehyde Act, Formaldehyde Regulations, and CARB Phase 2 emission standards can no longer be manufactured, sold, supplied, offered for sale, or imported into the United States and that certification of composite wood products in accordance with either the CARB or the TSCA requirements for a transition period achieves this goal;

WHEREAS, Plaintiffs and Trade Associations agree with EPA's interpretation of 40 C.F.R. § 770.15(e);

WHEREAS, the Parties' stipulation herein does not in any way limit the Parties' right to appeal the Court's Order; and

WHEREAS, EPA intends to promptly transmit notice of the Court's order lifting its stay of the Order to the Office of the Federal Register for publication in the *Federal Register*;

NOW, THEREFORE, the parties hereby stipulate and request that the Court enter the following order:

1. The STAY of the Order dated February 16, 2018, Dkt 72, shall be lifted as of June 1, 2018.
2. In recognition of and to avoid the substantial disruption that would result from giving retroactive effect to the Order, this Order lifting the stay results in the designated date of manufacture (*i.e.*, the manufactured-by date) and corresponding compliance date being June 1, 2018, the date the stay is lifted, and not the December 12, 2017 manufactured-by date in the Initial Formaldehyde Rule, which has passed.
3. This accommodation ensures that the vacatur applies prospectively, provides fair notice to the affected industries, and avoids treating any composite wood products manufactured (in the United States) or imported (into the United States) between December 12, 2017 and June 1, 2018 as being noncompliant.
4. Consistent with the relief sought by Plaintiffs, the Court clarifies that the vacatur in the Order applies to the Formaldehyde Compliance Date Extension Rule's extension of the designated date of manufacturer (*i.e.*, the manufactured-by date) and corresponding compliance date to December 12, 2018, as codified in 40 C.F.R. § 770.2(e) (introductory

text), 40 C.F.R. § 770.2(e)(1), 40 C.F.R. § 770.2(e)(4), 40 C.F.R. § 770.10(a), 40 C.F.R. § 770.12(a), 40 C.F.R. § 770.15(a), 40 C.F.R. § 770.30(b) (introductory text), and 40 C.F.R. § 770.30(c), and does not affect any other revision to 40 C.F.R. § 770 set forth in the Formaldehyde Compliance Date Extension Rule, *i.e.*, 40 C.F.R. § 770.2(d), 40 C.F.R. § 770.2(e)(2)-(3), 40 C.F.R. § 770.3, 40 C.F.R. § 770.7(d)(1), 40 C.F.R. § 770.15(e) and 40 C.F.R. § 770.30(d). *See Final Rule*, 82 Fed. Reg. at 44,536-37 (listing relevant Code of Federal Regulations provisions).

5. Nothing in this Joint Proposed Stipulation shall be interpreted or construed to conflict with, undo or disturb EPA's interpretation of 40 C.F.R. § 770.15(e), as referenced above.
6. All parties to this Joint Proposed Stipulation reserve their right to seek an appeal of any final order issued by the Court in this matter.

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