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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FOOD & WATER WATCH, INC., et al.,
Plaintiffs,
v.
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,
Defendants.

Case No. [17-cv-02162-EMC](#)

**ORDER DENYING DEFENDANT’S
MOTION TO LIMIT REVIEW TO THE
ADMINISTRATIVE RECORD**

Docket No. 41

This is an action under Section 21 of the Toxic Substances Control Act (“TSCA”), codified at 15 U.S.C. § 2620, challenging Defendant Environmental Protection Agency (“EPA”)’s denial of Plaintiffs’ petition to regulate the fluoridation of drinking water supplies. The EPA moves for a protective order limiting the scope of review in this litigation to the administrative record,¹ a request that would effectively foreclose Plaintiffs from introducing any evidence in this litigation that was not attached to their administrative petition. The text of the TSCA, its structure, its purpose, and the legislative history make clear that Congress did not intend to impose such a limitation in judicial review of Section 21 citizen petitions. The Court therefore **DENIES** the EPA’s motion.

I. FACTUAL BACKGROUND

The Court assumes familiarity with the facts of this case, which are set forth in more detail in the Court’s recent order denying the EPA’s motion to dismiss. *See* Docket No. 42. In sum, Plaintiffs petitioned the Environmental Protection Agency to issue a rule under Section 6(a) of the Toxic Substances Control Act, codified at 15 U.S.C. § 2620 (“TSCA”), prohibiting the

¹ The EPA also moved to strike Plaintiffs’ demand for a jury trial on the basis that this is a case in equity not at law, but Plaintiffs have withdrawn their demand so the issue is moot.

1 fluoridation of drinking water supplies. Plaintiffs’ petition was supported by voluminous
2 scientific material which Plaintiffs claim demonstrates that the ingestion of fluoride causes
3 neurotoxic harm. Plaintiffs allege that this harm is unnecessary and therefore unreasonable
4 because fluoride’s positive effects on dental health can be achieved through topical application of
5 the chemical, thereby avoiding the harms associated with ingestion. The EPA denied the petition
6 and Plaintiffs subsequently filed suit.

7 Now, the parties dispute whether the Court’s review should be confined to the
8 administrative record (*i.e.*, Plaintiffs’ petition and the EPA’s official denial) according to
9 principles generally applicable to the review of agency action under the Administrative Procedure
10 Act (5 U.S.C. §§ 701, *et seq.*), or whether the TSCA authorizes Plaintiffs to introduce evidence
11 and take discovery beyond the administrative record.

12 II. STATUTORY BACKGROUND

13 The TSCA provides that when the EPA denies a citizen petition, “the petitioner may
14 commence a civil action in a district court of the United States to compel the Administrator to
15 initiate a rulemaking proceeding as requested in the petition.” 15 U.S.C. § 2620(b)(4)(A)
16 (commonly referred to as Section 21). It further provides:

17 In an action under subparagraph (A) respecting a petition to initiate
18 a proceeding to issue a rule under section 2603, 2605, or 2607 of
19 this title . . . *the petitioner shall be provided an opportunity to have*
20 *such petition considered by the court in a de novo proceeding. If*
21 *the petitioner demonstrates to the satisfaction of the court by a*
22 *preponderance of the evidence that—*

23 [. . .]

24 (ii) in the case of a petition to initiate a proceeding for the issuance
25 of a rule under section 2605(a) or 2607 of this title the chemical
26 substance or mixture to be subject to such rule or order presents an
27 unreasonable risk of injury to health or the environment, without
28 consideration of costs or other nonrisk factors, including an
unreasonable risk to a potentially exposed or susceptible
subpopulation, under the conditions of use.

the court shall order the Administrator to initiate the action
requested by the petitioner.

15 U.S.C. § 2620(b)(4)(B) (emphasis added).

No statutory provision specifically addresses the scope of review in a judicial action, *i.e.*,

1 whether the reviewing court is constrained to the materials presented to and considered by the
2 agency.

3 **III. DISCUSSION**

4 Statutory interpretation begins with the text of the statute. *See Los Angeles Lakers, Inc. v.*
5 *Fed. Ins. Co.*, 869 F.3d 795, 802 (9th Cir. 2017). “When an examination of the plain language of
6 the statute, its structure, and purpose clearly reveals congressional intent, our judicial inquiry is
7 complete. But if the plain meaning of the statutory text remains unclear after consulting internal
8 indicia of congressional intent, we may then turn to extrinsic indicators, such as legislative history,
9 to help resolve the ambiguity.” *Hernandez v. Williams, Zinman & Parham PC*, 829 F.3d 1068,
10 1073 (9th Cir. 2016) (quotations and citations omitted). Additionally, “when a statute is
11 ambiguous and we have the benefit of an administrative agency’s interpretation, we may defer to it
12 if it is based on a permissible construction of the statute.” *Eleri v. Sessions*, 852 F.3d 879, 882
13 (9th Cir. 2017).

14 The EPA argues that the statute clearly limits the Court’s review to the administrative
15 record because it states that petitioner is only entitled “an opportunity to have *such petition*
16 considered by the court in a de novo proceeding.” 15 U.S.C. § 2620(b)(4)(A) (emphasis added).
17 It follows, according to the EPA, that “such petition” refers to the administrative record before the
18 EPA, and Plaintiffs therefore are limited in this litigation to relying on the evidence already
19 submitted to the agency in connection with the petition. Moreover, the EPA argues that because
20 the statute requires the administrative petition to present the “facts” necessary for a rule, it follows
21 that a plaintiff cannot then seek to introduce new “facts” in litigation without infringing upon
22 sovereign immunity.

23 Plaintiffs, in contrast, argue that Defendant’s reading of “such petition” is contradicted by
24 the text of the statute, which guarantees a “de novo *proceeding*” rather than “de novo *review*”; that
25 the statute only requires the citizen petition to present the agency with “facts” supporting its
26 position, rather than “evidence”; that the statute permits a prevailing plaintiff to recover costs for
27 expert witnesses, undermining the notion that Congress intended to preclude discovery; and that
28 the legislative history affirms that Congress envisioned discovery rather than a limited

1 administrative record (as typically would be the case in judicial review under, *e.g.*, the
2 Administrative Procedure Act (“APA”)) in litigation under this provision.

3 As explained below, Plaintiffs’ interpretation is more persuasive in light of the statutory
4 text, structure, and purpose.

5 A. Statutory Text

6 The statute does not explicitly provide for a scope of review. Rather, it states that the
7 plaintiff shall be entitled to “an opportunity to have such petition considered by the court in a de
8 novo proceeding.” 15 U.S.C. § 2620(b)(4)(B). Defendant seizes upon the term “such petition” to
9 support a limited scope of review, and Plaintiff seizes upon the term “de novo *proceeding*” to
10 support an unrestricted scope of review.

11 1. The Phrase “such petition” Does Not Imply a Limitation to the Administrative
12 Record

13 Defendant’s reliance on the term “such petition” to imply a limited *scope* of review is
14 unpersuasive. Defendant treats “such petition” as equivalent to “administrative record,” but does
15 not explain why that elision is justified or logical. If “such petition” is read literally, then it would
16 mean “such petition,” *i.e.*, only the materials submitted by the citizen petitioner. Under that literal
17 reading, the EPA’s denial of the petition and any scientific materials the EPA cites in support of
18 the denial would also be excluded from the Court’s scope of review because they would not be in
19 “such petition.” Rather, it would be in the EPA’s response to “such petition.” By expanding the
20 term “such petition” to “administrative record” so that it encompasses the EPA’s denial, the EPA
21 has implicitly conceded that the term cannot be construed literally to circumscribe the scope of
22 record review to “such petition.”

23 If the term should not be construed literally, then it is unclear why the EPA’s narrow
24 interpretation should be adopted. The EPA relies principally on language in *Trumpeter Swan Soc.*
25 *v. E.P.A.* stating that, “[i]n the normal TSCA section 21 case, we would review the administrative
26 record to determine whether the environmental groups had [demonstrated their burden].” 774
27 F.3d 1037, 1042 (D.C. Cir. 2014). That passing remark, however, did not involve reasoned
28 analysis of the question and was not part of the court’s holding, which concerned the “antecedent

1 issue” whether the regulation of “spent bullets” was categorically excluded from the scope of the
2 EPA’s regulatory authority (it was). *Id.* Moreover, the *Trumpeter* court did not specifically
3 address the significance of the term “such petition.” The dicta from *Trumpeter*, therefore, does not
4 carry persuasive weight here.

5 In addition, *Trumpeter* does not address the D.C. Circuit’s earlier holding in
6 *Environmental Defense Fund v. Reilly*, 909 F.2d 1497 (D.C. Cir. 1990). In that case, the plaintiffs
7 had sought review of their Section 21 citizen petition requesting regulation of dioxins and furans
8 concurrently under the TSCA’s judicial review provisions and the Administrative Procedure Act.
9 They settled their TSCA claim but sought to proceed on the APA claim. The district court
10 dismissed and plaintiffs appealed. The appellate court held that “Congress did not intend to
11 permit a litigant challenging an administrative denial of such a [Section 21 citizen] petition to
12 utilize simultaneously both Section 21 and the APA.” *Id.* at 1501. The basis for the D.C. Circuit’s
13 decision was the inherent “incompatibility” between de novo review under Section 21 and the
14 scope and standard of review under the APA. The D.C. Circuit explained:

15 The plaintiff in a Section 21 proceeding is entitled to de novo
16 consideration of his petition for issuance of a new rule, *but APA*
17 *review, save in rare instances, must be conducted on the*
18 *administrative record.* The Section 21 plaintiff must demonstrate,
19 by a preponderance of the evidence, a risk affecting health or the
20 environment; *on APA review, the agency’s action must be evaluated*
21 *on the record.* While the Section 21 court, proceeding de novo, is
22 free to disregard EPA’s reasoning and decision, *APA review is*
restricted and highly deferential. If the Section 21 plaintiff carries
his burden and the court makes any one of the statutorily-specified
determinations, the court itself directs the disposition to be made of
the petition. On the other hand should a district court on APA
review find agency action defective, either substantively or
procedurally, it ordinarily must remand to the agency for further
proceedings.

23 *Id.* at 1506 (emphasis added).

24 The D.C. Circuit’s contrast between Section 21 and the APA is significant. The D.C.
25 Circuit reasoned in *Reilly* not only that the *standard* of review (*i.e.*, the degree of deference owed
26 to the agency’s position) differed under the TSCA and APA, but also that the *scope* of review was
27 distinct, as the court reiterated several times the APA’s presumptive limitation to the
28 administrative record as a factor distinguishing TSCA from APA review. The clear implication of

1 *Reilly* is that Section 21 petitions are not limited to the administrative record.²

2 Accordingly, the EPA’s interpretation of the term “such petition” with respect to the scope
3 of review is not persuasive because it contradicts the EPA’s own position and is not supported by
4 case law.

5 2. The Phrase “de novo proceeding” Suggests a Broader Scope of Review

6 The EPA argues that the term “de novo” alone does not suggest an entitlement to discovery
7 beyond the administrative record. However, the EPA ignores the third word—“de novo
8 *proceeding*.” Thus, the only cases it cites in support of its argument are inapposite because they
9 do not involve statutes that use the term “de novo proceeding” but rather discuss the scope of “de
10 novo review.” See *Perry v. Simplicity Engineering*, 900 F.2d 963, 966 (6th Cir. 1990) (in ERISA
11 cases subject to de novo review, the district court “review[s] the administrator’s decision *de novo*,
12 that is without deference to the decision or any presumption of correctness, based on the record
13 before the administrator”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853-55
14 (1986) (stating that “[t]he legal rulings of the CFTC, like the legal determinations of the agency in
15 [another case], are subject to *de novo* review”).

16 As Plaintiffs point out, a “proceeding” is “[t]he regularly and orderly progression of a
17 lawsuit, including all acts and events between the time of commencement and the entry of
18 judgment.” Proceeding, Black’s Law Dictionary (10th ed. 2014). The term “is more
19 comprehensive than the word ‘action,’ but it may include in its general sense all the steps or
20 measures adopted in the prosecution or defense of an action, including the pleadings and
21 judgment.” *Id.*

22 Thus, federal courts have used the term “de novo proceeding” to encompass more than a
23 standard of review limited to an administrative record, permitting consideration of evidence
24 beyond such a record. See *Hyatt v. Kappos*, 625 F.3d 1320, 1338 (Fed. Cir. 2010), *aff’d and*
25 *remanded*, 566 U.S. 431 (2002) (“Since it is a de novo proceeding, the [agency] findings and fact-
26 based rulings are not reviewed on the deferential ‘substantial evidence’ standard, and the

27 _____
28 ² The EPA’s citation to *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001), is therefore inapposite,
because it involved the scope of review under the APA.

1 methodology of analysis of the evidence *does not depend on whether the [agency] had also*
2 *received the same evidence.*” (emphasis added)); *Callejo v. Resolution Tr. Corp.*, 17 F.3d 1497,
3 1501 n.3 (D.C. Cir. 1994) (characterizing “de novo proceedings” as “de novo trials” and
4 distinguishing them from de novo reviews limited to the administrative record); *Hackley v.*
5 *Roudebush*, 520 F.2d 108, 118 (D.C. Cir. 1975) (using the term “de novo proceeding”
6 interchangeably with “de novo trial”); *Bennett v. United States*, 371 F.2d 859, 861 (Ct. Cl. 1967)
7 (using term “de novo proceeding” to discuss proceeding where extra-record evidence was
8 introduced); *Democratic Leadership Council, Inc. v. United States*, 542 F.Supp.2d 63, 70 (D.D.C.
9 2008) (explaining that in “de novo proceedings” the reviewing court does not simply rely on “a
10 record previously developed at the administrative level”); *Ewing v. C.I.R.*, 122 T.C. 32, 58 (2004),
11 *vac’d on other grounds*, 439 F.3d 1009 (9th Cir. 2006) (“Of course, in situations where Congress
12 has provided for de novo proceedings in the reviewing court, the record rule by its terms does not
13 apply.”).³ *Cf. Doe v. U.S.*, 821 F.2d 694, 697-98 (D.C. Cir. 1987) (“De novo means here, as it
14 ordinarily does, a fresh, independent determination of ‘the matter’ at stake; the court’s inquiry is
15 not limited to or constricted by the administrative record, nor is any deference due the agency’s
16 conclusion.”);⁴ *Saunders v. U.S.*, 507 F.2d 33, 36 (6th Cir. 1974) (holding that “trial de novo”
17 “requires a reexamination of the entire matter rather than a mere determination of whether the
18 administrative findings are supported by substantial evidence.”); *id.* (“Since the procedures
19 followed at the administrative level do not provide for discovery or testing the evidence of the
20 Department of Agriculture by cross-examination, it is particularly important that an aggrieved
21 person who seeks judicial review in a trial de novo not be deprived of these traditional tools unless

23 ³ Defendant attempts to distinguish the cases cited by plaintiff on the basis that the remarks were
24 made in passing, that they involved cases where review was not confined to the administrative
25 record, or they were specific to the statute involved. Reply at 5. Though these cases are not
26 binding, they are simply evidence that the term “de novo proceeding” is treated interchangeably
with “de novo trial.” In contrast, Defendant has not identified any examples where the term “de
novo proceeding” was used to refer simply to de novo review confined to an administrative record.

27 ⁴ It is true, as the EPA points out, that the court also mentioned that “de novo” did not necessarily
28 “entail any trial-type hearing” where no hearing was required at the agency level, but that caveat
does not affect the analysis here because the TSCA provides for a “de novo proceeding” whereas
in *Doe* it only provided for a “determin[ation]” de novo. *See Doe*, 821 F.2d at 698 nn. 9, 10.

1 it is clear that no issue of fact exists.”).

2 Accordingly, the statutory text more readily supports the view that Plaintiffs are not
3 confined by the administrative record in this *de novo* proceeding.

4 B. Statutory Structure

5 Plaintiffs’ reading is also supported by the structure of the statute. As Plaintiffs point out,
6 the TSCA provides for two different judicial review procedures of citizen petitions. Under
7 Section 21, citizen petitions that request the EPA to initiate a *new* rule are entitled to a “*de novo*
8 proceeding.” *See* 15 U.S.C. § 2620(b)(4)(B). In contrast, citizen petitions that merely request the
9 *amendment* or *repeal* of a prior rule are entitled to a more limited form of judicial review as
10 specified in Section 19 based on the Administrative Procedure Act, with some modifications. *See*
11 15 U.S.C. § 2618(c)(B) (stating that “Section 706 of Title 5 [*i.e.*, the APA] shall apply to review
12 of a rule or order under this section,” except as specifically provided).

13 That Congress specifically stated that citizen petitions requesting *new* rules are entitled to a
14 “*de novo* proceeding” while citizen petitions requesting the *amendment* or *repeal* of a rule are only
15 entitled to APA-like review strongly suggests that “*de novo* proceeding” means something broader
16 than record review. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) (“[I]t is a
17 general principle of statutory construction that when Congress includes particular language in one
18 section of a statute but omits it in another section of the same Act, it is generally presumed that
19 Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quotation and
20 citation omitted)).

21 The EPA does not provide a reasonable explanation for why the statute would use different
22 language to mean the same standard of review in both sections as EPA so argues. The EPA
23 contends that Section 19 provides for review in the courts of appeal, which would not consider
24 new evidence, but that begs the question and actually supports the opposite conclusion. Section
25 21 petitions are *not* sent to the courts of appeal but rather to the trial court in the first instance.
26 The different procedure and the different description of review available suggest that judicial
27 review for the denial of a Section 21 petition seeking a new rule is not limited to an administrative
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1 record.⁵

2 C. Statutory Purpose

3 The purpose of judicial review in the TSCA context also more readily supports Plaintiffs'
4 interpretation. According to the TSCA, plaintiffs must demonstrate to “the satisfaction of the
5 court by a preponderance of the evidence” whether a particular chemical substance presents an
6 unreasonable risk of harm. *See* 15 U.S.C. § 2620(b)(4)(B). Thus, the court is not being asked to
7 pass upon the sufficiency of the EPA’s reasons for denying the petition or the correctness of the
8 EPA’s analysis or conclusion. The statute does not state plaintiffs must demonstrate a risk “by a
9 preponderance of the evidence *presented in the petition.*” Rather, the purpose of judicial review is
10 to establish “to the satisfaction of the court by a preponderance of the evidence” that there is in
11 fact evidence of an unreasonable risk of harm. *See* 15 U.S.C. § 2620(b)(4)(B).

12 This purpose distinguishes TSCA cases from the ERISA cases relied upon by Defendant,
13 where courts are presumptively limited to the administrative record unless the plaintiff clearly
14 establishes a need for extra-record evidence. *See, e.g., Opeta v. Nw. Airlines Pension Plan for*
15 *Contract Employees*, 484 F.3d 1211, 1217 (9th Cir. 2007); *Mongeluzo v. Baxter Travenol Long*
16 *Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995); *Orndorf v. Paul Revere Life Ins.*
17 *Co.*, 404 F.3d 510, 519-20 (1st Cir. 2005). The ERISA case-law is inapplicable here because it
18 emerges from a context that differs in important respects.

19 First, the ERISA statute does not provide for either a standard or scope of review; both
20 standards have been judicially-crafted. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101,
21 109-115 (1989). In contrast, the TSCA explicitly guarantees a “de novo proceeding,” which, as
22 explained above, strongly suggests no limitation to the administrative record.

23 Second, the rationale for limiting de novo review in ERISA cases to the record is tied

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25 ⁵ Plaintiffs also argue that the TSCA envisions discovery because it permits the prevailing
26 plaintiff to seek reimbursement for expert witness fees. *See* 15 U.S.C. § 2620(b)(4)(C). However,
27 this factor is neutral because, as the EPA points out, APA-level record review also permits for
28 expert witness testimony to aid the Court’s understanding of the administrative record. *See San*
Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 992-93 (9th Cir. 2014) (explaining
four common exceptions to record review under the APA, including “when supplementing the
record is necessary to explain technical terms or complex subject matter”). Thus, the mere
provision of expert costs is not necessarily inconsistent with the EPA’s interpretation.

1 specifically to effectuating ERISA’s purpose. As explained in *Quisinberry v. Life Ins. Co. of N.*
2 *Am.*, 987 F.2d 1017 (4th Cir. 1993), one of the foundational cases explaining the scope of review
3 in ERISA cases, “ERISA was designed to promote internal resolution of claims, and to permit
4 broad managerial discretion on the part of pension plan trustees in formulating claims procedures,
5 and to encourage informal non-adversarial proceedings.” *Id.* at 1022 (quotation and citation
6 omitted). Moreover, “a primary goal of ERISA was to provide a method for workers and
7 beneficiaries to resolve disputes over benefits inexpensively and expeditiously.” *Id.* (quotation
8 and citation omitted). It was the “importance of promoting internal resolution of claims and
9 encouraging informal and non-adversarial proceedings” that “guide[d] [the court] in determining
10 the appropriate scope of review under a *de novo* standard.” *Id.* (emphasis in original). Confining
11 review, at least in most instances, to the administrative record furthers the specific goals of
12 ERISA.

13 The TSCA context is decidedly different. As previously noted by the Court, the
14 overarching purpose of the TSCA is to protect the public from chemicals that pose an
15 unreasonable risk to health and the environment, and citizen petitions are considered a powerful
16 tool in forcing the EPA’s hand in that regard. *See* Docket No. 42 at 18-20. Indeed, “[t]he
17 responsiveness of government is a critical concern and the citizens’ petition provision will help to
18 protect against lax administration of the [TSCA].” S. Rep. 94-698, reproduced at 1976
19 U.S.C.C.A.N. 4491, 4503.⁶ Thus, in contrast to ERISA, the role of citizen oversight, including
20 access to federal courts, weighs considerably against any possible interest in promoting internal
21 resolution of claims. A *de novo* proceeding in district court modeled after traditional trial-like
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23 ⁶ Plaintiffs claim that another reason for rejecting the record review standard is that the EPA has
24 “absolute discretion in what investigative procedures it will use to vet the facts” as well as “the
25 option of conducting no investigation at all.” The Court need not reach the question whether the
26 EPA actually has “absolute discretion,” particularly in light of language in *Reilly* which expressly
27 left open the question whether a citizen petitioner could pursue APA remedies on a Section 21
28 petition in lieu of Section 21 judicial review. *Reilly*, 909 F.2d at 1502 (“We need not and do not
decide whether APA review would have been available to appellants had they chosen that route
exclusively.”). The Court notes, however, that if Plaintiffs were correct, that would bolster their
interpretation in two respects. First, it would be another distinction from the ERISA context,
where administrators are bound by their fiduciary obligations and the benefit plan terms. Second,
it would provide another reason for comprehensive judicial review to effectuate TSCA’s purpose.

1 proceedings would not conflict with the purpose of the TSCA, but would instead effectuate it.

2 This background—as well as the lack of any express statutory language to the contrary—
3 also explains why Defendant’s general argument that standard administrative law principles
4 should apply is not persuasive. Plaintiffs cite to *Kappos v. Hyatt*, 566 U.S. 431 (2012) to support
5 their view. There, the Supreme Court considered whether a person whose patent application had
6 been denied by the Patent and Trademark Office (PTO) and then filed a civil action in district
7 court pursuant to 35 U.S.C. § 145 could submit additional evidence beyond the administrative
8 record. That statute provides that individuals have a “remedy by civil action” in which “[t]he
9 court may adjudge that such applicant is entitled to receive a patent . . . as the facts in the case may
10 appear[.]” 35 U.S.C. § 145. As the Supreme Court observed, “[b]y its terms, § 145 neither
11 imposes unique evidentiary limits in district court proceedings nor establishes a heightened
12 standard of review for factual findings by the PTO.” *Kappos*, 566 U.S. at 437. Accordingly, the
13 Supreme Court held that no limitations to consideration of extra-record evidence applied other
14 than those generally imposed by the Federal Rules of Civil Procedure and Federal Rules of
15 Evidence. *Id.*

16 In reaching its holding, the Supreme Court rejected the PTO’s argument that,
17 notwithstanding the absence of an express limitation, the statute “should be read in light of
18 traditional principles of administrative law, which Congress codified in the APA.” *Id.* at 438. The
19 Supreme Court instead reasoned that the purpose of administrative exhaustion—“the avoidance of
20 premature interruption of the administrative process,” *id.* at 439 (quotation and citation omitted)—
21 was already served because the suit could not be brought until that process was complete.
22 Moreover, the Court noted that Section 145 “does not provide for remand to the PTO to consider
23 new evidence, and there is no pressing need for such a procedure because a district court . . . has
24 the ability and the competence to receive new evidence and to act as a factfinder.” *Id.*

25 Similarly, here, Section 21 does not provide for remand to the agency, and there is no
26 reason why a court would be unable to adjudicate whether an unreasonable risk has been shown on
27 the basis of new evidence, even if the EPA had not seen the evidence in connection with the
28

1 administrative petition.⁷

2 The legislative history also supports Plaintiffs’ interpretation regarding the purpose of a de
3 novo proceeding under Section 21. The Senate Committee Report regarding this provision states
4 that, “[i]n a judicial review of the Administrator’s denial of a citizen’s petition or failure to act,
5 there would be no record upon which the review could be based, and therefore a de novo
6 procedure is essential to provide the opportunity to *develop* such a record.” S. Rep. 94-698
7 (1976), reproduced at 1976 U.S.C.C.A.N. 4491, 4503 (emphasis added). Moreover, the Report
8 states that “[a]fter *gathering evidence* in a de novo procedure, the courts would be authorized to
9 require the initiation of the action requested if the petitioner has shown that the action requested is
10 justified.” *Id.* at 4499 (emphasis added). The House Conference Report similarly explains that
11 the statute “affords greater rights to a person petitioning for the issuance of a rule or order [than to
12 a petitioner seeking the amendment or repeal of a rule] because in such a situation the
13 Administrator will not previously have addressed the issue by rule or order.” H. R. Conf. Rep. 94-
14 1679 (1976), reproduced at 1976 U.S.C.C.A.N. 4539, 4583. The clear implication is that
15 Congress intended the Section 21 judicial review petition to go beyond the record; there is no way
16 to square the language concerning “gathering evidence” and “develop[ing] a record” with
17 Defendant’s interpretation.

18 Defendant argues that the legislative history is ambiguous because it applies “at most” to
19 circumstances where the EPA fails to respond to a petition. This appears to be based on the
20 premise that when the EPA denies a petition and publishes its reasons, there is a record for the
21 Court to review. This premise is mistaken because even when the EPA fails to publish its reasons
22 for a denial, a record exists in the form of the petition itself. Moreover, it is equally possible—as
23 Plaintiffs assert—that the legislative history suggests that Congress did not view the petition and
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25 ⁷ Defendant attempts to distinguish *Kappos* on the basis that prior case law had already accepted
26 the proposition that the district court could accept new evidence. This distinction is immaterial
27 however. The issue in *Kappos* was whether the ability to submit new evidence should be limited
28 pursuant to general APA principles, the exact argument the EPA makes here (having conceded
that the same exceptions to APA record review would also apply here, including the receipt of
expert testimony to aid the court in understanding the record). Thus, *Kappos* is highly relevant to
this case insofar as statutory construction is concerned.

1 denial to constitute an adequate record, particularly when compared with the more comprehensive
2 record that would be generated under a formal rulemaking process subject to notice-and-
3 comment.⁸ Finally, and perhaps most importantly, the legislative history is clearly referring *both*
4 to situations where the EPA denies a petition by publishing its reasons and when it does so
5 constructively by failing to act within 90 days. Defendant’s interpretation of the legislative history
6 is not persuasive.

7 As the statute itself makes clear, the purposes of the TSCA, at least with respect to Section
8 21 citizen petitions seeking institution of a new rule, are not served by general administrative law
9 principles. That conclusion is bolstered by the legislative history, which indicates that Congress
10 intentionally provided for a “de novo proceeding” under Section 21 broader than the APA-like
11 review under Section 19.

12 D. Policy

13 Defendant ultimately falls back on policy arguments, some of which have significant force.
14 For example, Defendant argues that Plaintiffs already had an “opportunity” to make a case to the
15 EPA with all the evidence they need because they did not have any time limits or restrictions on
16 when they could submit their petition or what evidence they could include to support it. If
17 petitioners are permitted to simply file suit, then they will be able to file barebones administrative
18 petitions and then sandbag the EPA with new evidence in litigation, effectively depriving the
19 agency of an opportunity to avoid litigation by reviewing an adequate petition on the merits first.
20 Moreover, the EPA contends that an open record would render meaningless the requirement that
21 the administrative petition “set forth the facts” making a rule necessary. *See* 15 U.S.C. §
22 2620(b)(1).

23 The EPA’s concerns are forceful but ultimately do not bear the weight of the statutory text,
24 structure, purpose, and legislative history to the contrary. Defendant’s argument also overlooks
25 policy reasons why an open record would be permitted. For example, as Plaintiffs pointed out at

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27 ⁸ The stark contrast between the record developed after notice-and-comment and the “record”
28 consisting of a petition and official denial also explains why Section 19 judicial review (governing
the first situation) is limited to APA-like deference while Section 21 review (governing the latter
situation) is broader.

1 the hearing, new studies relevant to the merits have been issued after their petition was denied, and
2 therefore they were unable to present such evidence in their petition. Defendant also overlooks the
3 fact that even though a petitioner has unlimited time to prepare their initial petition, they do not
4 have a chance to respond to the EPA’s denial or evidence prior to this civil proceeding.⁹ Finally,
5 EPA’s concern might carry greater force if the purpose of judicial review were to review the
6 soundness of the EPA’s findings, but here it is to determine whether an unreasonable harm is
7 proved “to the satisfaction of the court,” 15 U.S.C. § 2620(b)(4)(B)(ii), not, *e.g.*, whether the
8 EPA’s actions appear supported by substantial evidence.

9 The EPA’s concern about the risk of being sandbagged and surprised with new evidence in
10 litigation not presented in the EPA petition, although fair, is likely exaggerated. Citizen
11 petitioners do not gain much by withholding evidence supporting their position from the EPA.
12 They have every incentive to make their best case and present their best evidence directly to the
13 EPA in an administrative petition. The administrative process is quick and efficient, as the EPA
14 must act within 90 days of receiving a petition. Litigation, in contrast, will certainly take much
15 longer and undoubtedly involve greater expense. Indeed, the Supreme Court rejected a similar
16 concern in *Kappos*. It found unpersuasive the PTO’s argument that permitting new evidence to be
17 submitted to a district court would “encourage patent applicants to withhold evidence from the
18 PTO intentionally with the goal of presenting that evidence for the first time to a nonexpert
19 judge,” because “[a]n applicant who pursues such a strategy would be intentionally undermining
20 his claims before the PTO on the speculative chance that he will gain some advantage in the § 145
21 proceeding by presenting new evidence to a district court judge.” 566 U.S. at 445.

22 Further, contrary to the EPA’s suggestion, the Court’s interpretation would not render the
23 requirement to present an administrative petition setting forth the “facts” requiring a rule
24 meaningless. *See* 15 U.S.C. § 2620(b)(1). The EPA mistakenly assumes that the only way to give
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26 ⁹ As Plaintiffs state, despite being offered an opportunity for an oral meeting, the EPA allegedly
27 “refused to answer any questions at the meeting, and never held any hearings where Plaintiffs
28 could respond to EPA’s scientific contentions, thereby denying Plaintiffs any opportunity to
understand and respond to EPA’s positions prior to publication of EPA’s denial in the Federal
Register.” *Opp.* at 16.

1 that requirement meaning is to require an evidentiary record in litigation to be confined to the
2 administrative record, but that is not necessarily the case. In recognition of the TSCA’s reference
3 to “such petition,” the Court, while not strictly bound by the administrative record, might impose
4 limits on new evidence, requiring, for instance, that any evidence not submitted or referenced in
5 the petition be subject to exclusion if the petition failed to give reasonable notice of such evidence
6 or if there is not good cause to submit such new evidence (such as where a new study has
7 emerged). This would assign the petition a role similar to a complaint framing the case and setting
8 the boundaries of evidence for trial.¹⁰ Although the Court is not prepared to articulate a precise
9 standard by which to judge the scope of new evidence to be permitted in this “de novo
10 proceeding,” affording some weight to the scope of the petition would give meaning to the
11 requirement that “such petition . . . set forth the facts which . . . establish that it is necessary to
12 issue . . . a rule,” 15 U.S.C. § 2620(b)(1), and would also afford significance to the exhaustion
13 requirement under Section 21 of the TSCA, while at the same time not confining judicial review to
14 that which would obtain traditionally under the APA.

15 Furthermore, the Court’s holding does not foreclose the possibility of limiting discovery
16 depending on the equities when a petitioner’s conduct so requires, such as when a barebones
17 petition is presented, but the EPA is purposefully ambushed with a mountain of new evidence or
18 specific allegations in litigation. For example, in *Kappos*, Justice Sotomayor, joined by Justice
19 Breyer, explained in a concurring opinion that “[c]onsistent with ordinary equity practice and
20 procedure, there may be situations in which a litigant’s conduct before the PTO calls into question

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22 ¹⁰ In this regard, a useful analogy may be found in the context of employment discrimination
23 under Title VII of the Civil Rights Act. Under Title VII, a plaintiff must file an administrative
24 charge with the Equal Employment and Opportunity Commission or an analogous state agency
25 before filing suit. *See, e.g., Leong v. Potter*, 347 F.3d 1117, 1121 (9th Cir. 2003). A common
26 theme in such cases arises when a plaintiff makes an allegation in litigation that a defendant
27 believes was not fairly presented in the administrative charge. When that occurs, courts do not
28 automatically reject the new allegations. Rather, “[e]ven when an employee seeks judicial relief
for claims not listed in the original EEOC charge, the complaint nevertheless may encompass any
discrimination like or reasonably related to the allegations of the EEOC charge.” *Freeman v.*
Oakland Unified School Dist., 291 F.3d 632, 636 (9th Cir. 2002) (quotation and citation omitted).
Further, a court may consider “all allegations of discrimination that either fell within the scope of
the EEOC’s *actual* investigation or an EEOC investigation which *can reasonably be expected* to
grow out of the charge of discrimination.” *Id.* (quotation and citation omitted, emphasis in
original). The overarching notion is fair notice.

1 the propriety of admitting evidence presented for the first time in a § 145 proceeding before a
2 district court.” *Kappos*, 566 U.S. at 447 (Sotomayor, J., concurring). One example is when a
3 petitioner refuses to provide the agency with information upon request and in connection with a
4 petition, but later seeks to introduce the same evidence in litigation. *Id.* As explained by Justice
5 Sotomayor, the exercise of such equitable authority is “limited, and must be exercised with
6 caution,” so as to protect persons who “fail[] to present evidence . . . due to ordinary negligence, a
7 lack of foresight, or simple attorney error.” *Id.* But it may nevertheless provide a means to
8 address the EPA’s concern that, in the absence of a strict limitation to the administrative record,
9 the sky would be the limit.

10 Indeed, the absence of a presumptive limitation to the administrative record under Section
11 21 does not mean that discovery will be unbridled. Discovery is still limited to matters “relevant”
12 to the “claim[s] or defense[s] and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1).
13 Given the elements of the claim (likely defined by the petition herein), discovery should be
14 focused on scientific evidence and expert discovery regarding the risk of injury to health or the
15 environment posed by the chemical substances at issue in Plaintiffs’ petition. At the hearing,
16 Plaintiffs stated that their discovery requests could include document discovery related to internal
17 studies the EPA has performed or other data it possesses, including that received from third
18 parties, which relates to whether fluoride chemicals present a risk of neurotoxic harm. On its face,
19 that does not appear burdensome or unreasonable, particularly in light of the fact that such
20 evidence would not have been previously available to Plaintiffs but is within the scope of the
21 petition.¹¹ However, because the nature of any discovery is still hypothetical, the Court’s
22 comments are without prejudice to the parties’ ability to raise discovery disputes, should they
23 arise, through this Court’s Standing Order regarding civil discovery disputes.

24 In sum, Defendant has not shown that the TSCA creates a presumptive rule against
25 discovery nor a limitation of review to the administrative record.

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27 ¹¹ The EPA’s claim that Plaintiffs could have obtained such evidence through the Freedom of
28 Information Act is unavailing as litigants in civil discovery are often entitled to more than the
FOIA statute provides. Moreover, FOIA waiting times are often very long and may unduly delay
the ability to present a complete petition to the EPA prior to litigation.

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IV. CONCLUSION

For the reasons stated, the Court **DENIES** Defendant’s motion for a protective order limiting review to the administrative record. The statutory text, structure, purpose, and legislative history all support the conclusion that TSCA Section 21 judicial review is not subject to APA-like limitations or principles. The parties shall meet and confer and agree upon a discovery plan consistent with this Order.

This order disposes of Docket No. 41.

IT IS SO ORDERED.

Dated: February 7, 2018



EDWARD M. CHEN
United States District Judge