

**BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

IN RE: STORMWATER/IMPAIRED) MDL - _____
WATERS PCB CONTAMINATION)
LITIGATION)

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER OF ACTION TO
THE NORTHERN DISTRICT OF CALIFORNIA PURSUANT TO 28 U.S.C. § 1407 FOR
COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS**

Pursuant to 28 U.S.C. § 1407 and Rule 6.2 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Movants respectfully submit this memorandum of law in support of their Motion for Transfer of Actions for Coordinated Pretrial Proceedings of all currently filed actions against Monsanto involving PCB contaminated stormwater and waterbodies identified in the included Schedule of Actions, as well as any actions against Monsanto subsequently filed involving similar facts or claims arising from PCB contaminated stormwater and waterbodies, to the United States District Court for the Northern District of California, San Jose Division, and to consolidate and coordinate all actions for pretrial proceedings before the Honorable Edward J. Davila, United States District Judge, Northern District of California, San Jose Division.

The City of San Jose, City of Oakland, City of Berkeley, City of San Diego/Port of San Diego, City of Spokane, and City of Seattle ("the Cities") have filed lawsuits against the same Monsanto defendants alleging the same PCB water contamination.

San Jose, Oakland, and Berkeley filed separately in the Northern District of California. The Honorable Edward J. Davila ordered¹ the San Jose, Oakland, and Berkeley cases are "related," and the Oakland and Berkeley cases were transferred to Judge Davila, who is currently presiding over all three cases in the Northern District of California, San Jose Division.

¹ Attached as Exhibit A is Judge Davila's Order relating the San Jose and Oakland cases. Exhibit B is Judge Davila's Order relating the Berkeley case.

Presently, there are at least six (6) federal actions filed in four (4) federal districts with four (4) different judges. All actions allege the same wrongful conduct on the part of the same named defendants, Monsanto Company, Solutia, Inc., and Pharmacia, Inc. (“Monsanto”). At least six (6) city attorney offices, one (1) port attorney, and three (3) private law firms are involved in representing seven (7) different governmental entities with the same claims. Defendants are represented by two (2) different private law firms in two (2) different states, California and Washington.

The Cities file this MDL Petition to promote judicial efficiency, economy, and consistency. The Cities aim to avoid duplicative judicial work in several courts with the potential for incongruent rulings. The Cities suggest the Northern District of California because (1) it has the most cases, (2) it has the largest water body and the most affected cities, (3) it is centrally located between Washington and southern California, (4) it is furthest along in its cases because the parties have already engaged in a 26(f) conference, filed a 26(f) report, and exchanged initial disclosures, and (5) Judge Davila has already consolidated three cases in his court.

All actions, including the Movants’ actions, actions by other plaintiffs, and actions by future plaintiffs, involve common questions of law and fact that arise from Monsanto’s manufacture, marketing, promoting, and selling of its PCB chemicals, which Monsanto knew were toxic, could not be contained to their original application, and lasted for decades if not longer.

I. BACKGROUND

A. Public Nuisance and Cities Paying to Clean Up Monsanto’s PCBs

Monsanto’s PCBs are one of the largest man-made water contaminants in the United States. Monsanto manufactured over a billion pounds of PCBs,² and due to their ubiquitous

² <http://www.fws.gov/contaminants/info/pcbs.html>.

nature, over six thousand water bodies across the United States are polluted with Monsanto's PCBs.³

Monsanto was the sole North American manufacturer of PCBs from the 1930s up to and until the late 1970s when Congress banned PCB production under the Toxic Substances Control Act. PCBs are probable human carcinogens and a cause of many other diseases and illnesses, according to the U.S. EPA.⁴ Throughout five decades, Monsanto manufactured over a billion pounds of PCB chemicals, despite knowing PCBs were toxic, could not be contained to their original application, and lasted for decades if not longer. PCBs became a toxic "global contaminant," in Monsanto's own words, and Monsanto continued to manufacture, promote, and sell the chemicals, despite its knowledge of global contamination.

Intended applications included paint, caulking, plasticizers, coolants, lubricants, transformers, capacitors, light ballasts, building materials, hydraulic fluid, and many other industrial and commercial applications.⁵

Today, Monsanto's PCBs are one of the largest man-made chemical contaminants in the world, affecting thousands of water bodies, sediment, and wildlife. As predicted by Monsanto while it produced PCBs, PCBs migrate from their intended source, travel into water bodies or sediment, leach from sediment into water bodies, and end up in fish and wildlife tissue. PCBs do not degrade in the environment.

According to the U.S. Environmental Protection Agency ("EPA"), over 6,000 water bodies in the United States are contaminated with Monsanto's PCBs.⁶ PCBs are found in the blood serum of humans.⁷

³ http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T#tmdl_by_pollutant, listing 6,180 water bodies impaired due to PCBs. *See also*

http://iaspub.epa.gov/tmdl_waters10/attains_nation_cy.cause_detail_303d?p_cause_group_id=918.

⁴ <http://www3.epa.gov/epawaste/hazard/tsd/pcbs/pubs/effects.htm>.

⁵ <http://www3.epa.gov/epawaste/hazard/tsd/pcbs/about.htm>.

⁶ http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T#tmdl_by_pollutant, listing 6,180 water bodies impaired due to PCBs. *See also*

http://iaspub.epa.gov/tmdl_waters10/attains_nation_cy.cause_detail_303d?p_cause_group_id=918.

⁷ <http://www.epa.gov/ace/biomonitoring-polychlorinated-biphenyls-pcbs>.

Due to the large number of PCB-contaminated water bodies, Movants' counsel expect numerous additional filings by municipal plaintiffs that have spent money and/or will continue to spend money for decades in order to clean up PCBs from municipal stormwater and urban run-off.

Monsanto's PCBs leach from their intended application, such as highway paint or street caulking, or from other industrial or commercial applications. Through ordinary urban run-off, PCBs are transported into municipal stormwater systems, which discharge stormwater into bodies of water such as bays and rivers. Then, PCBs become part of the marine ecosystem and travel up the food chain.

PCBs both bioaccumulate and biomagnify.⁸ Bioaccumulation means Monsanto's PCBs enter into animal tissue at a higher rate than they exit. Biomagnification means Monsanto's PCBs increase in relative concentration as they travel up the food chain, because animals at the top of the food chain eat other animals in large quantities relative to those lower on the food chain. Therefore, animals high on the food chain, including humans, internalize high concentrations of PCBs through fish and shellfish consumption.

Municipal stormwater discharge into water bodies is managed federally through the Clean Water Act and the National Pollutant Discharge Elimination System ("NPDES"). Municipal stormwater dischargers must receive an NPDES Permit from the state or EPA in order to legally discharge stormwater into a water body.

The Clean Water Act and the NPDES permitting programs require municipal dischargers to report pollutants in water bodies. Pursuant to the Clean Water Act, when a water body is "impaired" due to a certain pollutant, a Total Maximum Daily Load ("TMDL") is required for that pollutant. A TMDL limits the amount of a particular pollutant that can be discharged into an impaired water body through stormwater discharge and urban runoff. TMDLs can be expressed

⁸ <http://www.fws.gov/contaminants/info/pcbs.html>.

in water column concentrations, sediment concentrations, wasteload allocations, or fish tissue concentrations.⁹

For example, a sample of consumable fish tissue will be analyzed for Monsanto's PCB chemicals. A TMDL may set an objective or limit to the amount of PCB that can be found in fish tissue.

The driving motivation and policy behind TMDLs for Monsanto's PCBs are human health factors due to contaminated fish, water, and sediment. For example, San Francisco Bay has a fish consumption advisory, instructing recreational fishers not to consume the fish; there is no commercial fishing in San Francisco Bay. The same is true of San Diego Bay. And, in Washington, a lawsuit was filed against municipal and governmental entities in order to remove PCBs from the Spokane River because the Spokane Indian Tribe consumes fish from the Spokane River for subsistence. In the Lower Duwamish, Seattle is already in the process of spending tens of millions of dollars to build water treatment facilities to remove PCBs.

The U.S. EPA authorizes states, such as California and Washington, to administer NPDES programs and issue TMDLs. In addition, municipalities or other governmental entities incur costs to remediate Monsanto's PCBs from stormwater, water bodies, and sediment. Each water basin, river, bay, lake, etc. has its own specific hydrogeological characteristics, and the scientific solution for preventing or removing PCBs is customized to that waterbody.

Each and every water body involved in this lawsuit-- San Francisco Bay, San Diego Bay, Spokane River, and the Lower Duwamish—has the same fate and transport story: PCBs travel from their intended use, flow through stormwater and urban run-off, discharge into sediment and water, and leach from sediment into water. Then, each municipal plaintiff is required to pay for it, simply for being a city.

Monsanto predicted all of this, including these lawsuits.

⁹ http://iaspub.epa.gov/tmdl_waters10/attains_nation_cy.cause_detail_303d?p_cause_group_id=918.

B. Monsanto Knew PCBs Were a Toxic “Global Contaminant” and Predicted These Lawsuits

Monsanto’s own internal documents reveal the corporate knowledge of widespread environmental contamination of water, sediment, and wildlife. Monsanto predicted the exact problem cities are having today.

In corporate documents, Monsanto explained and predicted that PCBs would migrate from their intended source, travel into sediment, leach from sediment into water bodies, and end up in fish and wildlife tissue. Monsanto’s corporate documents identify its PCBs as “global contaminants” and precisely follow the fate and transport of the chemicals. Fate and transport means: where will it end up, and how will it get there?

In a series of Monsanto corporate documents, Monsanto predicts exactly where PCBs will end up and how they will get there, as if to predict these lawsuits:

December 15, 1966- “PCB is much harder to break down than DDT and there is every reason to suppose that it is much more difficult to get it out of the system.”

“It can therefore be presumed to be widespread throughout the world.”

September 5, 1969- “PCB has been found in:

- a. Fish, oysters, shrimp, birds.
- b. Along coastlines of industrialized areas such... Western wild life (eagles). It may be a global contaminant.”

“Although use of Aroclor was halted immediately, we can expect the water contamination to continue for a lengthy period by leaching from contaminated mud.”

“In one application alone (highway paints), one million lbs/year are used. Through abrasion and leaching we can assume that nearly all of this Aroclor winds up in the environment.”

October 2, 1969- “[A]n “ad hoc” committee was appointed to prepare a resume of the situation concerning the environmental contamination through the manufacture and use of polychlorinated biphenyls (Aroclors).”

“The objective of the committee was to recommend action that will:

1. Protect continued sales and profits of Aroclors;
2. Permit continued development of new uses and sales, and
3. Protect the image of the Organic Division and the Corporation as members of the business community recognizing their responsibilities to prevent and/or control contamination of the global ecosystem.”

“The committee believe there is little probability that any action that can be taken will prevent the growing incrimination of specific polychlorinated biphenyls (the higher chlorinated—e.g. Aroclors 1254 and 1260) as nearly global environmental contaminants leading to contamination of human food (particularly fish), the killing of some marine species (shrimp), and the possible extinction of several species of fish eating birds.

Secondly, the committee believes that there is no practical course of action that can so effectively police the uses of these products as to prevent environmental contamination.

There are however, a number of actions which must be undertaken to prolong the manufacture, sale and use of these particular Aroclors as well as to protect the continued use of other members of the Aroclor series.”

November 17, 1969- “We are here today to acquaint you with the PCB (Aroclor) pollution problem.... This is a serious matter, not only from a pollution viewpoint, but also because of the \$22 M worldwide customer business involved with resultant gross profits of \$10 M and a net investment of approximately \$9 M. In addition, there could be possible adverse legal and public relations problems leveled against Monsanto.”

Today, Monsanto’s website appears to take responsibility for its PCB contamination:

“[T]he current Monsanto Company manages several legacy liabilities, which in most cases have nothing to do with the company’s current business. Regardless, we take our commitments seriously and strive to resolve these liabilities responsibly.”¹⁰

¹⁰ <http://www.monsanto.com/newsviews/pages/pcbs.aspx>

Monsanto manufactured several brands of its PCB products, the most notable being the Aroclor series.¹¹ Of the Aroclor series, Aroclor 1254 and 1260 became the most notorious because they are highly chlorinated and do not degrade in nature.

Aroclor 1254 and 1260 are found in nature, such as water, sediment, and wildlife. As cities are required to test, identify, monitor, and remediate PCBs from its stormwater and urban run-off, Aroclors are found throughout the west coast.

In each of the water bodies involved, Aroclors are found in either wildlife tissue, sediment, and/or water. These PCBs are found in fish, shellfish, sea otters, harbor seal pups, and other wildlife up and down the west coast.¹²

The common thread among all plaintiffs and other cities is the public nuisance created by Monsanto's PCBs in water bodies. San Jose, Oakland, Berkeley, San Diego, Spokane, and Seattle are all incurring special damages to mitigate, remediate, monitor, investigate and/or remove Monsanto's PCBs from public waters. Each is a discharger under an NDPEs permit pursuant to the Clean Water Act, and each has incurred and will continue to incur special injury at the hands of Monsanto's knowing contamination.

II. ARGUMENT

A. Transfer and Consolidation or Coordination of All Actions Is Appropriate Under 28 U.S.C § 1407

The purpose of multidistrict litigation is to “eliminate the potential for contemporaneous pretrial rulings by coordinating district and appellate courts in multidistrict related civil actions.” *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 491-92 (J.P.M.L. 1968). Transfer of related actions to a single district for pretrial proceedings avoids conflicting pretrial discovery and

¹¹ U.S. EPA devotes an entire section of its website to Monsanto's Aroclors, <http://www3.epa.gov/epawaste/hazard/tsd/pcbs/pubs/aroclor.htm>, including materials and tools to help identify Monsanto's Aroclors through different congener compositions.

¹² <http://www.fws.gov/contaminants/info/pcbs.html>.

ensures uniform and expeditious treatment in pretrial procedures. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F. 3d 1217, 1230 (9th Cir. 2006).

Accordingly, pursuant to 28 U.S.C. § 1407, transfer of actions to one district for coordinated or consolidated pretrial proceedings is appropriate where (1) actions pending in different districts involve one or more common questions of fact, and (2) the transfer of such actions will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions. 28 U.S.C. 1407(a). Consolidation is especially important in multidistrict litigations where “the potential for conflicting, disorderly, chaotic” action is greatest, including disparate rulings from multiple judges. *In re Plumbing Fixture Cases*, 298 F. Supp. At 493.

The JPML determines the extent of the common factual issues and the likelihood that centralized pretrial proceedings will create important efficiencies, avoid inconsistent rulings, and result in the overall fairer adjudication of the litigation for the benefit of all involved parties. *See In re: Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 588 F.Supp.2d 1376 1377 (U.S. Jud. Pan. Mult. Lit. 2008). Centralization under section 1407 is thus necessary in order to prevent duplication of discovery and eliminate the possibility of conflicting pretrial rulings concerning the common factual questions. *See In re: Oil Spill by “Amoco Cadiz” Off Coast of France on Mar. 16, 1978*, 471 F.Supp.473, 478 (J.P.M.L. 1979).

In another water contamination case, *In re: Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litigation* (“In re MTBE, MDL No. 1358”), the Defendants successfully moved for an MDL, where the plaintiffs each had individualized damages, throughout different states, applying different state law. The manufacturers were the same, and the same fate and transport of the MTBE chemicals was the same. The Judicial Panel on Multi-District Litigation (“JPML”) formed the MTBE MDL and transferred additional tag-along cases because “transfer was warranted to ‘streamline remaining discovery and pretrial motions.’” *See MDL No. 1358, Doc.*

No. 309, Transfer Order at 1-2 (J.P.M.L. Oct. 7, 2010).”¹³ In the MTBE cases, one judge oversaw “the MTBE litigation in MDL No. 1358 through voluminous discovery and addressed many complex and novel legal issues.”¹⁴

On October 10, 2000, the JPML issued a Transfer Order for the MTBE MDL, Docket No. 1358, in which only three cases were consolidated, two of which were in the same district. “This litigation consists of three actions pending in the following federal districts: two actions in the Southern District of Illinois and one action in the Southern District of New York.” In that case, the defendants successfully moved for an MDL. In the years following that order, hundreds of MTBE cases were resolved through the MDL.¹⁵

1. Common Issues Require Transfer, Coordination, and/or Consolidation.

Here, transfer, coordination, and/or consolidation are appropriate because many common questions of fact exist, including but not limited to the following:

- Whether Monsanto manufactured, sold, and distributed PCB chemicals;
- Whether Monsanto knew PCBs were a global contaminant;
- Whether Monsanto knew PCBs were harmful to marine wildlife;
- Whether Monsanto knew PCBs posed were a human health hazard;
- Whether Monsanto concealed from its customers, the public, and governmental agencies information about PCBs and global contamination;
- Whether Monsanto engaged in a campaign to promote PCBs despite knowledge of global contamination, harm to wildlife, and hazards to human health;
- The fate and transport and general characteristics of Monsanto’s PCB chemicals;
- Whether Monsanto protected profits over human and environmental health and safety;

¹³ United States Judicial Panel on Multidistrict Litigation, *In re: Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litigation*, MDL No. 1358, Transfer Order, dated October 9, 2013.

¹⁴ *Id.*

¹⁵ In the years following the JPML order in the MTBE cases, hundreds of municipal plaintiffs filed and resolved their cases with the oil and gas company defendants through the MDL. Scott Summy of Baron & Budd was appointed co-lead in the MTBE MDL.

- Whether Monsanto predicted the fate and transport of PCB chemicals from their intended application to water bodies, sediment, marine wildlife, and human bodies.

Determination of these and other common issues in a single district will benefit the parties and witnesses and serve to promote the efficient prosecution and resolution of these Actions.

Notably, all plaintiffs in this action are similarly situated, because all plaintiffs are municipal dischargers which have incurred special injury and which are subject to the Clean Water Act, NPDES permitting, regulatory orders, and/or TMDLs.

The Clean Water Act, NPDES permitting, regulatory order, and/or TMDLs apply to all municipal stormwater dischargers, which incur special damages to clean up Monsanto's PCBs. If multiple judges in multiple districts are required to rule on similar issues for similarly situated plaintiffs, disparate and conflicting federal rulings could occur. This is the judicial "chaos" that multidistrict litigation seeks to avoid.

B. The Northern District of California is the Most Appropriate Forum for Transfer and Consolidation for Coordination.

The Northern District of California, San Jose Division is the most appropriate forum for consolidation and coordination of the instant litigation.

First, the Northern District of California has the most actions filed, with San Jose, Oakland, and Berkeley. The Northern District is also most likely to receive the most tag-along cases because of the size of the affected area. San Francisco Bay is the largest affected water body among the currently affected water bodies, including San Diego Bay, the Spokane River, and the Lower Duwamish. Moreover, the number of potential tag-along cases far exceeds that of any other location at issue. In the Northern District alone, surrounding the San Francisco Bay, are dozens and dozens of affected municipal dischargers who are similarly situated to plaintiffs. Due to the size of San Francisco Bay, and due to the many municipal dischargers in counties

such as San Mateo, Santa Clara, Alameda, Contra Costa, San Francisco and others, the Northern District of California will most likely have the most municipal plaintiffs in this litigation. And, while the Clean Water Act applies to all municipal dischargers, among the affected subject areas, the California Regional Water Quality Control Board, San Francisco Bay Region is the most advanced region to enforce a PCB TMDL by including it in the NPDES permit itself, affecting dozens and dozens of municipal discharges, more than any other region at issue in these cases.

Second, Judge Davila has consolidated three cases in the Northern District of California: San Jose, Oakland, and Berkeley.¹⁶

Third, San Jose is ahead of the other cases in discovery. In San Jose, the parties have engaged in multiple 26(f) conferences, filed a 26(f) report, exchanged initial disclosures, and held an ADR conference with the district's ADR clerk. None of that has occurred in any of the other cases. Moreover, no legal rulings, except for Judge Davila's consolidation order, have been made in any other district. No motions to dismiss or other substantive legal motions have been heard in any of the other districts. And, in each case, the Cities are filing Motions to Temporarily Stay All Proceedings pending this JPML hearing. Defendants have filed motions to dismiss in Spokane, San Diego, San Jose, and Oakland, all of which are fully briefed.

Fourth, the Northern District, San Jose Division, is the most convenient location for all of the parties because it is centrally located between Washington and southern California. City attorneys from Seattle, Spokane, San Diego, Berkeley, San Jose, and Oakland are all intimately involved in this case as counsel of record on behalf of their municipal clients. The city attorneys will be required to travel to regularly scheduled hearings. Holding the hearings in the Northern District of California will reduce city attorney travel costs and time for the greatest number of city attorneys. Moreover, if additional plaintiffs in Washington, Oregon, or southern California file lawsuits, the Northern District of California will be centrally located to them as well. And,

¹⁶ Attached as Exhibit A is Judge Davila's Order relating the San Jose and Oakland cases. Exhibit B is Judge Davila's Order relating the Berkeley case.

as more and more plaintiffs from the San Francisco Bay region file suits, the Northern District of California will be convenient for them.

Fifth, the San Jose Division of the Northern District of California is conveniently located to a major airport with easy transportation access to the courthouse and with plenty of affordable hotel options.

Lastly, Judge Edward J. Davila is amply qualified to manage this multidistrict litigation. A Northern District native, Judge Davila was born in Palo Alto, California in 1952. Judge Davila received his bachelor's degree from California State University, San Diego in 1976 and his law degree from University of California, Hastings College of Law in 1979. From 1981 to 1988, Judge Davila was a deputy public defender at the Santa Clara County Office of the Public Defender, before entering into private practice from 1988 to 2001.

Then, Judge Davila served on the Superior Court of California, County of Santa Clara from 2001 to 2011. By March 2011, Judge Davila was nominated by the President, confirmed by the Senate, and received his commission as an Article III district court judge for the Northern District of California, San Jose Division.

It appears Judge Davila understands the importance of coordination and consolidation in order to avoid disparate rulings, as shown by his management of the San Jose, Oakland, and Berkeley cases. Judge Davila ordered the cases consolidated and set a consolidated hearing for defendants' motions to dismiss so that they can be heard at the same time.

III. CONCLUSION

The City of San Jose, City of Oakland, City of Berkeley, City of San Diego, City of Spokane, and City of Seattle respectfully request the Judicial Panel on Multidistrict Litigation transfer all Actions pursuant to 28. U.S.C. §1407 to the Honorable Edward J. Davila in the Northern District of California, San Jose Division.

DATED: January 26, 2016

Respectfully Submitted,

/s/ John P. Fiske

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