Episode Title: Why Are TSCA Citizen Petitions Filed? -- A Conversation with Michael Connett

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Lynn L. Bergeson (LLB): Hello, and welcome to *All Things Chemical*, a podcast produced by Bergeson & Campbell, P.C. (B&C®), a Washington, D.C., law firm focusing on chemical law, business, and litigation matters. I'm Lynn Bergeson.

This week, I had just the distinct pleasure of speaking with Michael Connett, a partner with Siri & Glimstad, LLP to discuss his epic litigation representing Food and Water Watch, a nonprofit consumer organization that sued the U.S. Environmental Protection Agency (EPA) over the fluoridation of drinking water. This issue has a long and complicated administrative and litigation history.

Michael and his firm are now actively engaged in a groundbreaking federal litigation based on a judicial appeal of a denied Toxic Substances Control Act (TSCA) Section 21 citizen petition. Michael concluded a bench trial earlier this year in federal district court in the Northern District of California. The case is really fascinating and much watched by the regulated community and others. We discuss the case and why TSCA citizen petitions in general are filed, Michael's thoughts on how to prepare petitions to maximize their success (as most are denied), and other means of citizen engagement under TSCA. Now, here is my conversation with Michael Connett.

Michael, thank you for being here today. I can't tell you how much I've been looking forward to chatting with you.

Michael Connett (MC): Thank you, Lynn. I really appreciate the opportunity.

LLB: You bet. Michael, in addition to being a brilliant lawyer, a fabulous litigator, and a TSCA Section 21 expert, maybe you can tell our listeners a little bit about who you are, give some information on your background, and tell us a little bit about your really distinguished legal career.

MC: You are very kind, Lynn. I appreciate that introduction. I am an attorney with an environmental research background. Prior to law school, I spent seven years working on

environmental health issues with a focus on fluoride chemicals in various types of products. During that time, I began working with an attorney, Perry Wallace, on a successful challenge to an EPA pesticide regulation, sulfuryl fluoride.

That sparked my interest in law, so I went to law school, clerked with a few federal judges, and then found myself working on chemical issues again, except this time as an attorney. My practice has been mostly focused on toxic tort and pharmaceutical litigation, including cases involving chemical-induced birth defects in the aerospace and semiconductor industries, which is a very interesting area of litigation from a scientific standpoint.

But the most interesting case I've worked on so far -- from a scientific and policy standpoint -- has been the citizen petition that I filed with EPA back in 2016 regarding fluoride chemicals and drinking water. I have to say, I didn't really expect the case to get very far; it was my first foray into this field. I knew very little about TSCA at that time, but I've now been litigating the case for eight years. We've had two bench trials, and we've had the help of some world-class experts in the fields of toxicology, epidemiology, and risk assessment. This year, we finished our second bench trial and are now awaiting the court's ruling. But as you may imagine, the case has been certainly an education for me about TSCA, which is the statute that, of course, we brought the case under.

LLB: Thank you for that, Michael. It's very helpful. I know you were able to optimize your extensive scientific background, deploying your knowledge and your litigation skills in various litigation contexts, but the one that is of great interest to us and the listeners of this podcast is of course TSCA Section 21.

You and I met this past June when you presented at the TSCA Reform Eight Years Later Conference. We both participated in a panel discussion on TSCA Section 21 petitions, and we tried to focus on the really important role the petitioning process has in influencing EPA priority setting and its identifying new topics that perhaps the Agency may not have considered when it set its regulatory agenda.

I'm going to digress a little bit here just to let our listeners know what TSCA Section 21 is, because it's not the provision that is getting all the love these days. That's TSCA Section 4, testing; Section 5, new chemicals; and of course, TSCA Section 6, existing chemicals. But TSCA Section 21 is really important. It authorizes any person to petition EPA to issue, amend, or repeal a rule under Section 4, 6, or 8 of TSCA -- 8 is, of course, the recordkeeping and reporting obligations section -- or an order under Section 4 or 5(e) or (f) of TSCA.

We intentionally selected this topic. Mostly it was Bob Sussman who did so, your good friend, Michael, for discussion at the conference because there has been, at least in our view, an uptick in Section 21 petitions, and they are submitted largely by citizen health organizations and non-governmental organizations (NGO), very seldom by the private sector. Let's begin by hearing your views on this concept of citizen activism, utility of citizen petitions, and the importance of citizen engagement more generally.

MC: Certainly. I would start, Lynn, by talking about how the courts have described Section 21. There are some, I think, good descriptions in the case law. Courts have explained that the purpose of Section 21 is to ensure that EPA does not overlook unreasonable risks to human health or the environment. The D.C. Court of Appeals has explained that Section 21 helps to ensure that, quote, "bureaucratic lethargy does not prevent the appropriate administration of this vital authority." The D.C. Court has also described Section 21 as a, quote, "unusually

powerful procedure for citizens to force EPA's hand." In my view, I think Section 21 is most useful -- not entirely, but *most* useful -- for chemicals that have become, for whatever reason, overly politicized within the agencies, chemicals that the Agency just does not think are politically feasible to regulate.

Think, for example, to the dioxin risk assessment that EPA began but never finished in the 1990s. Fluoride is another example, which is this chemical that we brought our citizen petition under. For decades, the politics of fluoride have effectively, I think you could say, sort of paralyzed EPA from taking action. In 2006, the National Research Council (NRC) had concluded that the safe drinking water level for fluoride is too high and should be lowered. But despite that conclusion, EPA has not yet taken action to lower the level, despite numerous requests from citizen groups to do so. So in that context, where citizen activity, more informal-type requests for Agency action do not bear fruit, Section 21 becomes very attractive, because it allows you to bypass the political gridlock at the Agency level and get the issue in front of an independent forum, of course, the federal court. In this sense, losing at the administrative level when you file your petition is basically a given, with the goal being to get the issue out of the Agency's hands.

Now, to be clear, if the science is not strong in your favor, it doesn't matter what forum you have, you're going to lose, whether it's before the Agency or before a court. But where you have a solid body of science, I think Section 21 can be a potent tool, particularly when you know -- if you know -- that there are scientists within EPA who do agree with you and whose voices could be amplified through the litigation process. For me, that's sort of where I see Section 21 is most useful, but certainly not the only way that it can be useful.

LLB: Sure. That's a very, very interesting insight, so win, lose, or draw, it gets the issue -- to your point -- before a judge. If you're denied -- and as we'll talk about in a minute, most of these Section 21 petitions historically, even before Lautenberg was amended in 2016 -- fail.

MC: Right.

LLB: We're going to talk a little bit about why is that, but it's an interesting perspective that enables you to take an issue that is perhaps contentious, or politicized, or for whatever reason, might give some discomfort within the Agency to elevate and to deal with administratively and take it out of that venue and stick it in another. Interesting.

Let's talk a little bit about what Section 21 petitions, what the track record is. We have added to our offerings for this podcast a paper that we did on Section 21 petitions simply because there's a long history, and EPA does a good job of summarizing them on its website. But looking at the history of success or failure, they have not done all that well historically. They have been denied about 78% of the time before TSCA was amended in 2016. And since 2016, by our calculation, they have been denied about 85% of the time. In our paper, we go into some greater detail, whether it's a Section 4, 8, or 5 petition. But given this track record and in light of the comments that you just offered, Michael, do you have any suggestions on how entities that wish to submit a Section 21 petition can frame the issue and prepare the petition in a way that increases the chance of success? And to some extent maybe elaborate on the differing burden -- legal burden -- under Sections 4 and 6 in particular, since they tend to get a lot of the -- Sections 4 and 6 tend to, I think, statistically represent the lion's share of the Section 21 petitions.

MC: Yes. So in terms of -- I do have some thoughts for how to maximize the chances of success for a citizen petition. In our case, we had had extensive briefing, and argument, and expert

testimony on the role of systematic review. As you may know, Lynn, EPA has defined sort of the weight of evidence requirement under TSCA to be to require a systematic review. So my advice and suggestion to any group filing a Section 21 petition would be to do a systematic review, or at the very least, go and look through the scientific literature to find if there are systematic reviews already out there on the hazards of the chemical, the exposures to the chemical. The more that you can rely on systematic review for your petition, you're going to be in, I think, a stronger position, both to win at the Agency level, because that's sort of the language that EPA works with, the framework that EPA works with, namely systematic review, as well as at the court level, if you have to appeal EPA's denial.

To be clear, in our case, we never -- we haven't got a decision from the court one way or the other as to whether a systematic review is necessary for the petition itself, or whether it's even necessary in the litigation stage. But based on everything I've seen from EPA, as well as their own guidance, EPA is -- the way that they do risk evaluations under TSCA -- I think it's a wise thing for citizen groups to do is to do that systematic review and put yourself in as strong a position as possible. Also, I would also -- certainly if you're looking for a Section 6 rule -- I would encourage groups to look through some of EPA's final risk evaluations under the amended TSCA and really try to understand the framework that EPA is using, and try to model that as much as you can.

I can tell you that that's what we have very much done in our litigation, where our experts have tried to mirror as closely as possible the analytical framework that EPA is using at the Agency level for other chemicals. That would be my main suggestion to maximize the chances of success, I think, at the administrative level.

But in terms of your second question about different burdens, I think that's important, because if you are filing a Section 21 petition to get a Section 4 rule, namely, to ask for EPA to require testing for a certain chemical, your burden is -- perhaps not surprisingly, your burden is much less than the burden will be if you're seeking a Section 6 rule. Under Section 4 for a new testing, you need to show that the current body of evidence or current body of data is not sufficient to understand the risks, and that the chemical *may* pose an unreasonable risk, whereas under Section 6, you need to prove that that chemical, or that particular *use* of a chemical, does pose an unreasonable risk.

I'm one of those foolhardy persons that sought a Section 6 rule, where we need to prove that the particular use of this fluoride chemical does pose an unreasonable risk. That's a higher burden. I think it makes for a more interesting and consequential litigation, so I think in that sense, it's more attractive. But in terms of, I think, the burden and your chances of success will be naturally greater if you go for a Section 4 rule for new testing.

But then ask yourself -- and I think -- "Is new testing -- more testing -- is it going to accomplish what you really want for that chemical?" I think that's a question that may not have easy answers.

LLB: You've teed up well my next question, because I was wanting to ask you a little bit about the Food & Water Watch case, where your client is seeking to prohibit the fluoridation of drinking water. You had mentioned in your first response that this has been going on now for some eight years. You've had two bench trials. For non-lawyers, you may not appreciate that two bench trials of probably some extended period of time, days or weeks, is a huge deal. Eight years is a long time.

But maybe, in just very broad strokes, in addition to the legal burden that you've borne here as you've just outlined, it just -- it's considerable. Just summarize that the history of the rulemaking is -- it is very interesting to lawyers, given the two trials that have gone on. You're probably really anxiously awaiting a determination on the second. Perhaps you can tell us when that might be and what you think it will be. But what is taking so long? Your client is very patient, and you've put an awful lot of effort into this, but what's at stake and why is it so steadfast in this mission?

MC: Just in terms of the background for the case, the litigation history, we filed the complaint in the Northern District of California in April 2017, and EPA filed a motion to dismiss, which the court denied in December 2017. Then EPA filed what I think is a very significant motion in the case, which is EPA moved to limit the scope of evidence in the case to only the administrative record, so our petition and EPA's denial.

LLB: Which is pretty limited, right, Michael? It's not the administrative record for anything beyond your citizen petition and EPA's somewhat abbreviated denial.

MC: Right, right. I mean, it would have been a very threadbare record to go on. Right. The court denied that motion and held that, under Section 21, which specifically affords citizen groups the right to a *de novo* proceeding, not just a *de novo* standard of review, a *de novo* proceeding. Court interpreted that phrase, and I think correctly, to include both standard of review, *i.e.*, non-deferential to the Agency's position, but also the scope of review to -- the scope of review is *de novo*, so we were not limited to the administrative record. We were able to depose EPA scientists. We were able to obtain internal communications within the Agency. We were able -- perhaps most consequentially -- we were able to rely upon new studies that were not available to us when we filed the petition in 2016. So we had a very extensive fact discovery process, as well as expert discovery. In total, there were over 30 depositions in the case. Most of them were full-day depositions. We had our first bench trial in June 2020, which had extensive expert testimony on both sides; it was seven days of testimony.

LLB: And this was all during COVID, right?

MC: This was during COVID, and the court had the trial proceed through Zoom, which --

LLB: Oh, my goodness!

MC: -- which I think really worked very well. Because this is an issue -- the addition of fluoride chemicals to drinking water -- that obviously impacts or interests many people in the public. And by having it via Zoom, it was really, I think, nice, because anyone from the public could just get onto Zoom and watch the proceeding, and hear the testimony, hear the evidence, and see the documents very clearly on the screen as they were being discussed, to see the study as it was being discussed.

LLB: Oh, a new form of citizen engagement.

MC: Very much so. It really, truly was. At the end of the trial -- and I have to say at the end of the trial, I felt very good. I think our evidence came in very well. We felt -- you know, I'm biased. I'm the attorney for the plaintiffs, so I'm probably going to have a more favorable view of our side of the evidence. But I felt very confident in our case and how the evidence came in. But the judge said, right at the end of the trial, he acknowledged that we had

presented serious evidence and raised serious questions about this policy. And I'm thinking, "Great! That's what I think we did, right?

LLB: Right. But?

MC: But, and that's the but. The but was -- there was at that time a pending review from the National Toxicology Program (NTP), which is a body within the NIH [National Institutes of Health] at the federal level. NTP was conducting a systematic review on the precise issue in this case, which is fluoride's potential neurodevelopmental effects, effects on the developing brain, and that's what the whole case had been focused on. And the court said, "With this review outstanding, I think it's really important that I consider what their findings are." He had some other concerns as well that he wanted us to address, but I think that was really -- my sense is that was the focus of his reasoning to stay the case, which is what he did.

He stayed the case so that he could consider NTP's findings when they came out. Now at that time, the thinking was, is NTP's report would come out in a matter of months, but that didn't turn out to be the case. And I think going back to this notion of fluoride being a chemical that has caused problems for federal agencies to regulate because of its very contentious nature, that dynamic carried over to NTP, and it just took forever for NTP to release the report. And in fact, it still has not technically released the final report.

But what happened in 2022, two years after the stay was issued, I received word from somebody with knowledge of the NTP proceedings that NTP *had* completed its review and it was ready to publish it in May 2022, but that they had been blocked from releasing it due to concerns at higher levels of the HHS, Health and Human Services. Naturally, that was a significant concern to me, because our whole case was waiting on that report to come out. So when I learned that, I went to the court and moved to lift the stay, on the grounds that we can't keep waiting for a report that may never come out. The judge agreed with that and ultimately set the case for a second bench trial, which took place in the early part of this year. At that second trial, we really focused the experts on both sides, really focused on the draft NTP report, which we were able to obtain through discovery, which again, speaks to the power of that *de novo* proceeding.

LLB: Yes.

MC: Right, so we got that draft NTP report, and the experts on both sides really spent a lot of time testifying to the content and the implications of NTP's findings. So we had the second trial and then submitted post-trial briefing, and we have now been waiting for the court to issue its decision.

LLB: Wow! I mean, for us lawyers, the narrative you just provided, Michael, is kind of gripping. Going back to the *de novo* review and a *de novo* proceeding. You're so humble. I mean, the standard has always been the subject of some discussion. But is your case not the first to go forward with a *de novo* proceeding, where you had depositions, and extensive discovery, and interrogatories, and all kinds of discovery? I mean, that's kind of unprecedented, right?

MC: Yes. And you know, that -- to my surprise, I did not realize this when I filed --

LLB: -- how many glass ceilings you were breaking there!

MC: Right. Well, I certainly didn't realize when we filed the case that there had never been a trial for a Section 21 case under TSCA. I did not appreciate that at that time. But then, as I got

into the case and was reviewing the case law, it became apparent that there was a real scarcity -- in fact, really none, no case law to sort of guide these questions on discovery matters --

LLB: Right.

MC: -- because there really had never been discovery in a prior case. In that sense, the case was fascinating from a law standpoint, because so much of what was being decided throughout this case was just novel. It was -- as you noted, it was a very -- especially for me, as someone who has worked on fluoride issues for a long time -- the combination of seeing the fluoride issue litigated and then in a context of a very novel set of laws was very satisfying.

LLB: Let's talk a little bit about the judge who has presided over presumably both bench trials, correct? Senior Judge Edward Chen in the Northern District of California. I recall in 2022 listening to some of the case online on Zoom. I was struck by the technical nature of the -- it's just hugely technical, right? You had all kinds of epidemiologists, and toxicologists, and technical documents that were under review. Judge Chen seemed to manage his court in a way that was orderly, logical, thorough, and not overwhelming for anyone. Michael, you are particularly gifted in taking very technical concepts and making them accessible and understandable by non-scientists.

We've been talking a lot since the Loper Bright decision by the Supreme Court earlier this year, discarding Chevron deference. It raises a whole line of very interesting questions to me about how judges who may or may not be technically inclined or have an affinity for the scientific nature of TSCA issues and whether Judge Chen is an exception. Is he just an exceptional jurist who has embraced the challenges invited by these types of inquiries? Or is he typical of a judge who knows what he or she is doing and really doing a master class on this is how it's done?

But what are some of the issues that you considered in preparing for both trials? And have you been happy, or delighted, or disappointed with how a judge -- who may or may not have a technical background and may or may not have the resources to support consideration of these many technical issues -- how is that working for you?

MC: Well, I think we've been very fortunate. Both sides, frankly, have been very fortunate to have a judge like Judge Chen. I think anyone who has observed some of the trials so far can see that he has a knack for asking very intelligent questions to the experts that really help distill the material issues at play. I was always struck at his -- the timely questions that he would ask during an exam of a witness, where you could see that he was really -- he really understood how each piece of the evidence fit together. To me, as an attorney, that's very rewarding, because you know that, win or lose, you're being heard, and the judge is really listening to the evidence, so what you say matters; what you do matters, because the judge is listening.

I certainly have nothing but favorable things to say about how the judge handled these, as you say, technical matters, but to be fair, I think it's also worth reminding ourselves that federal judges handle very complex issues every day in the federal courts. Toxic tort litigation involves very complex matters of epidemiology and toxicology. Scientists -- sorry, judges are not -- complex scientific matters are not foreign to federal judges. However, --

LLB: True.

MC: However, I don't think one can look at our experience in this case with Judge Chen and necessarily expect that the next judge who will hear a Section 21 case seeking a Section 6 rule is going to have the type of patience and curiosity that Judge Chen has shown. I do suspect -- and obviously I can only guess at this point because we really haven't had another such trial, but I could imagine that some judges would be intimidated or want to find a way out of having to make a decision that's typically reserved for a federal agency that has expertise in the area.

I think Judge Chen looked at the statute and understood that Congress specifically commanded that judges *not* defer to the position of the Agency. I think the judge -- doing his job -- followed that command of Congress. But I'm not necessarily convinced that all judges would do that. I think judges -- not to say that -- I just think that judges might be challenged in that regard and not want to take on that level of responsibility, I guess. But we don't know that. I should say that's just guesswork on my part.

I know that, and then I know that there are people who question whether a judge should ever be in a position to be making these types of determinations on risk assessment matters that affect federal policy. I can understand some of the principles underlying that. But at the same time, certainly that's what Congress wanted here, because they wanted to have that check on EPA lethargy, right? They wanted that check to make sure that EPA was fully utilizing the vital authority that TSCA provides. Also, I think looking at what has happened in this case, I think you can see that it was a very -- it was a thorough, thorough discussion, a thorough vetting of the science from all sides. I would be happy to know that the ordinary risk assessment at EPA underwent the same level of vetting. I think what we have seen in this litigation is very likely a greater degree of vetting, a greater amount of scrutiny being applied to the science than the ordinary course of business. I think this litigation will bring about -- or could well bring about -- a more informed rather than less informed decision than would otherwise be the case without that opportunity to have a federal judge overseeing this controversy.

LLB: You probably had no earthly idea back in 2017 that you would be having this conversation in 2024.

MC: No. I didn't know; that's fair.

LLB: I wanted to circle back to the ruling in 2017 when Judge Chen denied EPA's motion to dismiss. I think EPA took the position that because only one condition of use -- that would be the addition of fluoride to drinking water -- was the subject of the petition that it must necessarily fail because it didn't consider *all* conditions of use of fluoride. Did you appreciate at the time the significance of that determination? Because it certainly was a very instrumental reading of the law of Section 21, and I think is now beginning -- people in this space are beginning to appreciate its implications. Did you know it at the time?

MC: I could appreciate the implications if EPA prevailed in that argument. I think the implications would have been pretty stark for the role of citizen petitions moving forward, because when EPA was asking not just for us, but for all citizen petitions, is that the citizen petitioner cannot just pick and analyze and evaluate the particular condition of use that concerns them. In order to get the Agency and the court to consider that condition of use, you have to identify, systematically identify and evaluate, every single condition of use for that chemical in this country. Now, for a chemical as widespread as fluoride, you can imagine that would have been a very onerous burden.

LLB: Nearly impossible.

MC: Right? You'd have to look at fluoride in toothpaste, and mouthwash, and varnishes, and pesticides, and occupational uses, and pharmaceutical uses, and you're looking easily at hundreds of different conditions of use. For a citizen group, that would have been effectively impossible, so I could appreciate at that time that a bad ruling would effectively make Section 21 a dead letter. I think the court appreciated that as well, but fortunately, the plain language of the statute, I think, really worked against EPA in that argument, in that motion. The court wisely held that no, a citizen group does not need to evaluate every condition of use. They can simply evaluate the particular condition of use for which they seek relief.

LLB: Your case, as you know well, was cited recently when EPA granted an unusual grant of a Section 21 petition seeking a TSCA Section 6(a) rule prohibiting the manufacturing, processing, use, and distribution of 6PPD [*N*-(1,3-dimethylbutyl)-*N*′-phenyl-*p*-phenylenediamine] in tires. I think our listeners are probably aware of that. Your case was cited explicitly for the proposition that a petitioner need only, to your point, Michael, quote, "present facts demonstrating that a chemical substance poses *an* unreasonable risk due to one or more conditions of use," not all conditions of use, end quote. In addition to being very, very satisfying, recognizing that that seems to be a faithful interpretation of what Congress intended, I know it has been the subject of some consternation by members of the stakeholder community worrying about seriatim Section 21 petitions that could, at the very least, undermine or perhaps destabilize EPA's institutional agenda, and goal setting.

As you know -- or at least those of us that live, breathe, and think about TSCA all the time, as I confess I do -- our Assistant Administrator, Michal Freedhoff. Dr. Freedhoff is always reminding Congress and anyone else who will listen that EPA is understaffed, under-resourced, and has a huge congressional mandate, with TSCA reauthorization in Lautenberg and dealing with the mandate that it has legislatively through the law and dealing with Section 21 petitions if they were to be filed seriatim. It really can't do both well. What are your thoughts on that potential concern about seriatim Section 21 petitions and EPA's ability to manage its burden?

MC: I can certainly appreciate the dilemma that EPA finds itself in. On one hand, the amended TSCA statute has, I think it's fair to say, some pretty demanding requirements for the Agency to fulfill in terms of a certain number of chemicals that it needs to identify for prioritization, and then a certain number of chemicals that it needs to conduct and complete risk evaluations on, and those are not small tasks. I can appreciate that that takes a lot of Agency resources. But I think it's a mistake to cite that as -- to put the focus on Section 21 as potentially destabilizing EPA's agenda or diverting resources, because I think the key issue here is the fact that EPA is severely under-resourced and understaffed. I think that's really the problem that needs the solution. I think if we had an agency that had sufficient resources and staff to carry out its obligations and duties, we wouldn't -- this question of Section 21 and whether it is diverting too much of the Agency's resources would largely become a moot point.

LLB: I agree.

MC: I think that's where I sort of -- that's ow I look at it, but I certainly understand. I can see an EPA official or EPA scientist being frustrated at having to be at two places at the same time and just have too much on their plate to carry out. I can appreciate that sort of human dilemma.

LLB: Sure.

MC: But I would also add that -- I think it was Barry Commoner who said that there's a moral wisdom that resides in the citizenry. You look at -- if you go back to some of the environmental health controversies that we've had over the decades, you'll often find that citizens were ahead of EPA on certain important matters, like incineration of garbage in the 1980s, when EPA was largely approving these facilities and making pronouncements that they were safe. That was being very much criticized by citizen groups, which were largely dismissed, but I think time has shown that the concerns being raised at that time proved to be very valid and that those facilities *were* a risk to the public. So I think that Congress was wise in allowing and enabling this robust citizen petition provision and that we should certainly be retaining that in TSCA. But there's no question that the Agency needs more resources if they are to fulfill the purpose of the statute and what I think everyone wants them to accomplish.

LLB: Yes, I completely agree. EPA shouldn't have to choose among its children, for lack of a better expression. If it has limited resources for Section 6 rulemakings for existing chemicals and a tsunami of Section 21 petitions seeking Section 6 rules for different chemicals, that's just not the way I think Congress intended Section 21 or 6 to work.

MC: What I would say, Lynn, just quickly, is I think, certainly EPA has expressed the concern of opening the floodgates to Section 21. EPA sort of made that point in our case if the judge held that there was a *de novo* scope of review. But in reality, since the judge made that ruling, there has been no noticeable increase in the number of Section 21 petitions that have been filed. I think citizens and citizen groups have been responsible in how they have approached this part of the statute. I don't think we have a problem historically of people frivolously filing citizen petitions. I just don't see that as a real problem in the 40-plus years of this Act. If anything, there has been an underutilization of this provision.

LLB: I was just going to ask you that as my concluding question, because I think you and I chatted a little bit about this in June, which is -- Section 21 is this enormous tool, which has largely been used by the citizen activist NGO and not-for-profit community. It *has* been used by the private sector, but that seems to be the exception that makes the rule. But it does really offer enormous opportunity for citizens and other stakeholders who wish to draw attention to a matter involving an unreasonable risk to health and the environment. Why do you think it *is* underutilized? What might people do differently to optimize its utility?

MC: I wondered about that question when I found out that there had never been a trial under Section 21. I remember just really trying to wrap my mind around that. Why would that be the case when you have such a powerful provision for a *de novo* proceeding, right?

LLB: Right.

MC: Why would that *not* have been used *more* by the environmental community? I think part of the answer likely lies in one of the realities that we have faced in our case, which is that a Section 21 petition, certainly that seeks a Section 6 rule, can be a very resource-intensive and time-intensive litigation. In our case, we've been going about seven and a half years. It involves a lot of experts, and expert reports, and expert testimony. I suspect that's part of the answer, that an environmental group may look at that from a budgetary standpoint and may conclude it's too much of a lift and too much of a risk we lose, right? Whereas --

LLB: Yes, the precedent is always a consideration.

MC: Right. And then there's -- I think, taking the approach of filing cases which are more matters of pure law, where you just don't have that amount of discovery and litigation. There's probably something there that leads a lot of groups to focus on those types of cases, but I would say, as the oddball who actually went down this road, okay --

LLB: Yes, the brave soul that you are.

MC: Right. I would say that just something so valuable about -- if you look at this not just from the vantage point of winning and losing, but also from the vantage point of discovery and education. Through this case that we've had, we've been able to learn so much by deposing the [Section] 30(b)(6) representatives for EPA not once, but twice, and then a 30(b)(6) representative for the Centers for Disease Control [and Prevention] and many different staff scientists at EPA. It really just helped bring some clarity to the science, right now, as it exists, and the way the federal agencies are viewing that science, and it really kind of cut through some of the sound bites, and really press the Agency to prove -- prove up or shut up, actually show us what you've got. We're not deferential here. We're going to challenge you on the science. I think it's a -- it provides a lot of really valuable opportunities to advance the scientific debate on a particular issue, as well as to increase, perhaps, the public profile of an issue that might not be getting the attention it warrants. So I like this. I really like that aspect of Section 6. Also, of course, the rule that you can get, which is a ban on a particular use of a chemical is obviously a very consequential one, an important one. I really like this avenue for relief, but it's obviously one that is not to be taken lightly.

LLB: No, it brings new meaning to that metaphor: it's a marathon, not a sprint.

MC: Right.

LLB: You've been at this a long time, but the precedent that your case has provided and the clarity around the Section 21 standard of review are having a lot of implications in other matters for this area of TSCA. I want to thank you for being so generous with your time.

I'm going to add a link for our listeners to our TSCA Reform Eight Years Later, because you can see Michael in a panel discussion providing further insights to this fascinating topic of TSCA. Section 21 is huge; it's powerful. Your cases are proving to be very, very consequential. You've presented this, I think, in a way that our listeners can understand just how significant Section 21 is, so thank you, Michael, for being here. I really enjoyed it.

MC: Well, thank you, Lynn. It's been a pleasure. I really appreciate it.

LLB: I hope you have enjoyed my conversation with Michael Connett on TSCA Section 21 petitions, the epic lawsuit he brought against EPA on the fluoridation of drinking water, and other forms of citizen engagement under TSCA.

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