



## Q&A for Vermont Schools

### The State of Vermont's PCB Lawsuit Against Monsanto

#### What is the State's recent motion to stay and why is it being filed?

The State filed an amicus brief requesting that the federal court issue a stay, or temporary pause, in *Addison Central School District et al. v. Monsanto et al.* This will not dismiss the *Addison* case, but allow the State's case, which was filed first on behalf of all public and independent schools in the statewide testing program, to proceed first in state court.

This should provide several benefits for schools:

- Staying *Addison* would avoid duplicating discovery and avoid conflicting court decisions; it will allow issues to be resolved efficiently.
- The resolution of the State's lawsuit could remove the need for any additional action by schools. The Legislature allocated money to schools to recover the costs of remediation for any PCBs that test above the action thresholds set by the Agency of Natural Resources. The Legislature explicitly authorized the State to recover those amounts in the State's lawsuit. After the State's lawsuit has recovered damages for remediation to comply with ANR's action levels, schools may decide that further action is unnecessary. Regardless, it is the State's intention that schools will still be able to continue their lawsuit if they wish to seek relief related to remediation below the action levels.
- It could save money for schools. The State has an agreement with two outside law firms for a total contingency fee of 12 to 20 percent of any recovery. The plaintiffs' attorneys in the *Addison* suit, in contrast, are due to receive 33 percent of any recovery, according to a recent media report (*Brattleboro Reformer*). While 33 percent may not be unusual in some contingency fee arrangements, it is significantly more than the State has contracted for. Further, under Act 78, if schools recover sufficient funds in their own lawsuit, they will need to reimburse the State for grants they received to comply with the regulatory standard anyway.

#### Can schools still get remediation costs in litigation against Monsanto?

While the State cannot guarantee the outcome of any litigation – a goal of the State's lawsuit is to recover from Monsanto costs associated with remediation of PCBs where there has been an exceedance of a state school action level ("SAL") in any public or independent school within the State's PCB testing program. At present, school remediation costs to comply with the SAL are covered by funds issued by the Legislature, so schools should not have out-of-pocket expenses to

comply with the SAL. However, should the legislative appropriation prove to be insufficient to cover remediation costs across all schools to come into compliance with the SAL, the State seeks to recover the difference in its case. The State, working with the Legislature, expects to reimburse out of its tort recovery (likely after reimbursement of the State's appropriations and net of fees and costs) any expenditures made by a school district to come into compliance with SALs for PCBs, to the extent the contamination at issue was a basis for the damages and subject to any legislative approvals that might be needed.

**If a school tests below the action level, can the school still remediate and sue Monsanto for that later?**

That is the State's intention – that schools can choose to remediate PCBs that do not exceed the state action level. Per statute, that remediation will not be reimbursed in the current testing and remediation program administered by the Agency of Natural Resources, and those costs generally would not be recovered through the State's suit against Monsanto.

Following the State's suit against Monsanto, the State's intention is that schools that wish to pursue further recovery from Monsanto will be free to pursue their independent lawsuit. However, at present, for strategic and financial reasons, the State wishes to have only one suit proceeding against Monsanto – the State's suit against Monsanto will centralize discovery and resolve many contested issues and ultimately should simplify any subsequent lawsuit that schools choose to continue against Monsanto to seek any potential further recovery.

**Does the State have outside counsel representing it in this matter and how are they paid?**

Yes. The State has hired attorneys with experience in representing states and cities in PCBs lawsuits against Monsanto. These attorneys work in coordination with lawyers in the Attorney General's Environmental Protection Unit. The Attorney General's Office negotiated a graduated contingency fee contract with these outside lawyers of 12 to 20 percent depending on the amount of the recovery.

**Will this stay request affect the school testing and remediation program administered by the Agency of Natural Resources?**

No. The request for a stay will not impact the State's PCB testing program or remediation efforts; sampling and remedial work will continue as scheduled. The Agency of Natural Resources will continue to work alongside schools in sampling, investigation, and remediation of PCB contamination. Schools with questions about this program should contact the [Agency of Natural Resources](#).

**What is the State's lawsuit against Monsanto?**

On June 16, 2023, the Attorney General's Office filed a lawsuit on behalf of the State of Vermont in Chittenden County Superior Court against Monsanto, the company that manufactured, marketed, and distributed a class of toxic chemicals known as polychlorinated biphenyls (PCBs). The State alleges that Monsanto was aware of the harmful effects of PCBs, hid their negative effects from the

public, and continued to produce, market, and sell them, including for use in building materials, causing damage to Vermont's natural resources and schools.

In its lawsuit, the State seeks compensation for damage caused by PCBs to Vermont's natural resources and schools, including the costs of testing for and remediating PCBs in schools.

A copy of the State's lawsuit, with a full listing of its claims against Monsanto, can be found [here](#).

A copy of the State's press release announcing the lawsuit can be found [here](#).

### **What are PCBs?**

These chemicals, which are common in materials used in buildings constructed from the 1930s-1970s, have been shown to cause liver, thyroid, dermal, and ocular changes; immunological alterations; neuro-developmental and neurobehavioral changes; reduced birth weight; reproductive toxicity; and cancer. Children are particularly vulnerable to PCBs as the chemicals can disrupt normal neurological development, leading to lifelong impairments.

### **Why is this lawsuit being filed now?**

Due to the historic presence of PCBs in schools, in 2021, the Vermont Legislature passed Act 74 requiring all schools built or renovated before 1980 to test their indoor air for PCBs. Testing in schools began in spring 2022 and it is expected that testing of schools will be completed by July 2025.

Through this testing program conducted by the Department of Environmental Conservation, PCB contamination has already been discovered in a number of Vermont schools. The State is suing to recover the costs of testing and remediation from Monsanto, the party responsible for the creation of PCB contamination in Vermont schools.

### **How does the school testing program work? Will my school be tested? Who is on the list?**

A total of 324 schools will be tested through the State of Vermont's testing program. A full list of schools and a schedule of testing can be found on the Department of Environmental Conservation's [website](#).

The State has established three different action levels for schools based on the PCB levels detected, depending on the age of the students. School action levels ("SALs") are based on the amount of PCBs found in the indoor air at a school. Younger children tend to have more exposure to PCBs from their diet, so the levels for younger children are more stringent than those for older children and staff.

The three school action levels are:

- (a) 30 nanograms per cubic meter (ng/m<sup>3</sup>) for Pre-K;
- (b) 60 ng/m<sup>3</sup> for kindergarten to 6th grade; and
- (c) 100 ng/m<sup>3</sup> for 7th grade to adult.

There is also an Immediate Action Level (IAL) that is triple the above amounts. For schools that exceed one of these thresholds (either the SAL or IAL), the Department of Environmental Conservation will notify the school about the results and discuss further options with the school, including a plan for interim operations.

### **How can the State bring a lawsuit to help schools?**

The State has a type of authority referred to as “*parens patriae*.” This includes authority for the State to bring lawsuits to protect the health and wellbeing of its residents when a substantial segment of the population is threatened, such as by toxic conditions in Vermont schools. Schools do not need to formally “sign on” in order to be included in the State’s lawsuit.

Attorneys General traditionally use *parens patriae* authority to bring cases in areas such as antitrust, consumer protection, anti-discrimination, and environmental law – these are areas where there is a strong public interest in the outcome of the suit, and where it is in the States’ interest to ensure “that the interests of the suit’s beneficiaries are truly the motivating force behind the litigation ... rather than leaving it entirely to the private bar.”<sup>1</sup>

### **Is my school included in the State’s lawsuit?**

The State’s claims cover all 324 schools included in the State PCB testing program (except for the Burlington School District), a list of which can be found on the Department of Environmental Conservation’s [website](#). The covered schools are all “public schools,” “approved independent schools,” and “recognized independent schools” as those terms are defined in 16 V.S.A. § 11. The State seeks to recover all costs associated with testing and remediation of PCBs at these schools.

### **Does my school need to hire a lawyer to represent our interests in the State’s lawsuit? How will we receive our share of any award?**

No, schools do not need to hire their own lawyers to be part of the State’s case. The Attorney General’s Office will coordinate with the Agency of Education and with schools directly where necessary. Any award received through the lawsuit will likely be allocated by the Legislature to cover the expenses of testing and remediation of PCBs at schools across Vermont, with fund disbursements likely being administered by a state agency.

### **Will the State’s lawsuit result in recovery for my school?**

The State’s lawsuit is not a guarantee of any outcome. Litigation is uncertain and takes time. A case like this can take years and involve many twists and turns. The State is committed to pursuing its case to protect Vermont and Vermonters, whether that leads to a negotiated settlement or a litigated outcome.

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<sup>1</sup> Ryan and Sampen, *Suing on Behalf of the State: A Parens Patriae Primer*, 86 Ill. B.J. 684, 690 (1998).

### **What if my school has already filed a lawsuit? Should my school file its own lawsuit?**

The State's lawsuit does not include the Burlington School District, which has filed a separate lawsuit against Monsanto. Other schools do not need to hire their own lawyers to be a part of the State's case, nor do they need to formally "sign on" in order to be included in the State's lawsuit. The State cannot guarantee how Vermont courts would treat private lawsuits concerning the same subject matter filed independently by individual schools after the filing of the State's lawsuit.<sup>2</sup>

### **What if my school has already retained a private attorney?**

You should consult with your attorney and ask them to explain the impact of the State's lawsuit and your options going forward.

### **Does the State's lawsuit cover injuries to school personnel and students caused by PCBs?**

No, the State's lawsuit seeks to cover all the costs of testing and remediation of PCBs for school buildings, but it does not seek damages relating to personal or medical injuries to school personnel or students.

### **How can I contact the State for more information about the State's lawsuit?**

Schools may contact the Attorney General's Office with any questions about the State's case by calling 802-828-3171 or emailing [AGO.info@vermont.gov](mailto:AGO.info@vermont.gov). Schools that have already retained a private attorney should consult with their attorney before contacting the Attorney General's Office directly.

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<sup>2</sup> See, e.g., *In re Certified Question from the U.S. District Court for the Eastern District of Michigan*, 465 Mich. 537 (2002) (finding claim preclusion where county tried to bring claim on same subject matter against same parties as a previously settled state claim); *Nash Cty. Bd. of Educ. v. Biltmore Co. et al.*, 640 F.2d 484 (4th Cir. 1981) (affirming a finding of claim preclusion where schools brought an antitrust suit following the resolution of a state claim on the same subject matter); *State v. City of Dover*, 153 N.H. 181 (2006) (affirming declaratory judgment sought by the state and holding that private claims by municipalities must be dismissed due to pending, previously filed state *parens patriae* suit brought on behalf of municipalities on the same subject matter); *State of Florida v. Sarasota County et al.*, No. 2022-CA-000541 (Second Jud. Cir., Florida May 26, 2023) (granting declaratory judgment sought by state and holding that suits by municipal entities and health systems were barred by the settlement of a state *parens patriae* action brought on behalf of the same parties on the same subject matter).