

No. _____

IN THE
United States Court of Appeals
for the Ninth Circuit

IN RE NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, and
ANDREW WHEELER, in his capacity as Administrator of the
United States Environmental Protection Agency,
Respondents.

PETITION FOR A WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner Natural Resources Defense Council, Inc. (NRDC) states as follows:

NRDC is a non-profit corporation with no parent corporation and no outstanding stock shares or other securities in the hands of the public. NRDC does not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly held corporation owns any stock in NRDC.

Dated: May 29, 2019

/s/ Ian Fein _____
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INTRODUCTION

Ten years ago, Natural Resources Defense Council (NRDC) filed an administrative petition with the Environmental Protection Agency (EPA) to discontinue the use of a dangerous pesticide in household pet products, like flea collars and shampoos. NRDC demonstrated in its petition that these pet products threaten the neurodevelopment of young children, who are exposed to the toxic pesticide when they pet, play with, and even sleep with treated pets.

For more than two years, EPA's staff scientists have conceded these serious health risks. In a final risk assessment issued in December 2016, EPA acknowledged that epidemiology studies have consistently found neurodevelopmental effects associated with this class of pesticides, and that children's exposure from these pet products exceed the agency's level of concern. EPA recognized that "there is a need to protect children from exposures that may cause these effects."

Despite acknowledging this need, however, and despite having previously represented to this Court that it would act on NRDC's administrative petition within 90 days of issuing that final risk assessment, EPA—under the current administration—has done

nothing. Instead, the agency has opted to leave this dangerous pesticide on store shelves and in children's homes, where it continues to threaten their developing brains.

EPA's years-long delay is unreasonable and—given the acknowledged threat to children's health—unacceptable. It is also, unfortunately, of a piece with EPA's treatment of similar dangerous pesticides that have required this Court's repeated intervention. *See, e.g., In re Pesticide Action Network N. Am.*, 798 F.3d 809, 811 (9th Cir. 2015) (granting mandamus and ordering EPA to “issue a full and final response” to NRDC's administrative petition to ban a related pesticide); *League of United Latin Am. Citizens v. Wheeler*, 922 F.3d 443, 443 (9th Cir. 2019) (en banc) (mem.) (granting mandamus, again, and ordering EPA to issue a “full and final decision” that resolves administrative proceedings regarding that same petition).

This Court should not allow EPA to indefinitely drag out administrative proceedings that affect the health of millions of young children. The Court should order EPA to resolve NRDC's petition forthwith—as EPA itself told this Court it would do more than two years ago.

JURISDICTION

NRDC filed its administrative petition with EPA pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 500 *et seq.* This Court would have jurisdiction to review EPA's final decision resolving NRDC's petition, *see* 7 U.S.C. § 136n(b); *United Farm Workers of Am. v. EPA*, 592 F.3d 1080, 1082-83 (9th Cir. 2010), and venue would be proper here, *see* Decl. of Gina Trujillo ¶ 3 (APP003). This Court therefore also has jurisdiction to issue a writ of mandamus compelling EPA's unreasonably delayed decision. *See* 28 U.S.C. § 1651(a); *In re A Community Voice*, 878 F.3d 779, 783 (9th Cir. 2017).

NRDC has standing to bring this action. EPA's failure to resolve NRDC's administrative petition allows manufacturers to continue selling household pet products that contain a dangerous pesticide. This injures NRDC members whose young children risk being exposed to the pesticide that threatens their health. *See* Decl. of Kelley Kruze ¶¶ 6-8, 12 (APP007-009); *NRDC v. EPA*, 735 F.3d 873, 878-79 (9th Cir. 2013). It also injures NRDC members who risk exposure to the pesticide at work. *See* Decl. of Diana Owens ¶¶ 4-15 (APP012-014); *NRDC v. FDA*, 710

F.3d 71, 81-85 (2d Cir. 2013). A favorable decision ordering EPA to resolve NRDC’s petition could reduce—and potentially eliminate—these risks by prompting the agency to discontinue the pesticide’s use.

Protecting the public from harmful pesticides is also germane to NRDC’s organizational mission, Trujillo Decl. ¶¶ 5-6 (APP003), and the requested relief does not require members’ individual participation.

Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333, 343 (1977).

STATUTORY FRAMEWORK

FIFRA governs the sale, use, and distribution of pesticides in the United States. *See NRDC v. EPA*, 857 F.3d 1030, 1033 (9th Cir. 2017). The statute prohibits the sale or distribution of a pesticide unless it is “registered” by EPA. 7 U.S.C. § 136a(a); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 522 (9th Cir. 2015). EPA may not register a pesticide if it determines the pesticide would cause “unreasonable adverse effects” on human health or the environment. 7 U.S.C. §§ 136(bb), 136a(c)(5)(C); *Nw. Coal. for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1045 (9th Cir. 2008). EPA must periodically review a pesticide’s registration to evaluate whether new information warrants restricting the pesticide’s use or canceling its registration. 7 U.S.C.

§ 136a(g); *Ctr. for Biological Diversity v. EPA*, 847 F.3d 1075, 1086 n.11 (9th Cir. 2017).

Any interested person can petition EPA to cancel a registered pesticide under FIFRA. *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, 1031 (9th Cir. 2005); *see also Merrell v. Thomas*, 608 F. Supp. 644, 647 (D. Or. 1985), *aff'd*, 807 F.2d 776 (9th Cir. 1986). The APA requires that the agency resolve a petition presented to it “within a reasonable time.” 5 U.S.C. § 555(b); *Pesticide Action Network*, 798 F.3d at 813. If EPA determines that a registered pesticide causes unreasonable risks, it may initiate proceedings to cancel the registration. 7 U.S.C. § 136d(b).

FACTUAL BACKGROUND

NRDC petitions EPA to ban the use of a dangerous pesticide in household pet products

The pesticide at issue in this case, tetrachlorvinphos (TCVP), belongs to a class of pesticides called organophosphates, which were developed from nerve warfare agents and cause overstimulation of the nervous system. *See NRDC v. EPA*, 658 F.3d 200, 205 (2d Cir. 2011). Organophosphate exposure is particularly troubling for young children, whose neurological systems are still developing. It has been found to result in reduced cognitive capacity (i.e., lower IQ), delays in motor

development, and behavioral problems, including attention deficit/hyperactivity disorder. *See* Decl. of Miriam Rotkin-Ellman ¶¶ 7-8 (APP019-020) (discussing scientific studies).

EPA nonetheless has allowed TCVP to be used in the home—in the form of flea and tick shampoos, powders, and collars for dogs and cats—where children are exposed to it when they pet or play with treated pets. *See* EPA, Reregistration Eligibility Decision for Tetrachlorvinphos (TCVP), at 36 (July 31, 2006), *available at* https://archive.epa.gov/pesticides/reregistration/web/pdf/tcvp_red.pdf.

In 2008, a published, peer-reviewed study confirmed that TCVP was making its way into children’s bodies: the study documented measurable levels of the pesticide in the urine of children who had been exposed to pets wearing TCVP flea collars. *See* M. Keith Davis et al., *Assessing Intermittent Pesticide Exposure from Flea Control Collars Containing the Organophosphorus Insecticide Tetrachlorvinphos*, 18 J. Exposure Sci. & Env’tl. Epidemiology 564, 568-69 (2008). The study also documented that routine interactions with treated pets exposed people to the pesticide by transferring significant amounts of TCVP residue from the treated animal to the person’s hands and clothes. *Id.* The

study estimated that there are potentially “millions of children who could be in direct contact” with TCVP via their pets. *Id.* at 564.

In April 2009, NRDC filed an administrative petition with EPA to cancel the registration of TCVP pet products. *See* NRDC, Petition to Cancel All Pet Uses for the Pesticide Tetrachlorvinphos (Apr. 23, 2009) (APP029-034). The petition highlighted the pesticide’s significant health risks, as identified in recent studies. For example, the petition noted that TCVP residue levels measured in the peer-reviewed 2008 study indicated that children’s routine activities with treated pets put them at risk of unsafe exposure. *Id.* at 6 (APP034).

The petition observed that EPA had “improperly permitted the continued use of [TCVP] in pet collars, which has left toddlers . . . exposed to dangerous levels of a toxic pesticide.” *Id.* NRDC implored EPA to “exercise its statutory obligation to protect children by canceling all pet uses of [TCVP].” *Id.*

EPA tells this Court it will issue a final decision on NRDC’s petition within 90 days of finalizing a risk assessment

Five years after filing its administrative petition, NRDC had heard nothing in response. So NRDC sought a writ of mandamus in the D.C. Circuit directing EPA to respond to the petition. *See* Am. Pet. for

Writ of Mandamus, *In re NRDC*, No. 14-1017, ECF No. 1487402 (D.C. Cir. Apr. 8, 2014) (APP036-059). Only then did EPA act, denying NRDC's petition in November 2014. *See* EPA, Response to NRDC's April 23, 2009 Petition Requesting Cancellation of All Pet Uses of TCVP (Nov. 6, 2014) (APP061-072).

NRDC promptly sued again, challenging EPA's denial in this Court as unlawful. *See* Pet. for Review, *NRDC v. EPA*, No. 15-70025, ECF No. 1-2 (9th Cir. Jan. 5, 2015) (APP074-075).¹ However, once briefing was underway, EPA announced that it wanted to reassess the risks posed by the pesticide instead of defending its denial of NRDC's petition, and so moved for a voluntary remand. *See* EPA Mot. for Voluntary Remand, ECF No. 22-1 (Sept. 25, 2015) (APP077-086).

Concerned about EPA's history of delay in these and similar proceedings, *see, e.g., Pesticide Action Network*, 798 F.3d at 812-15; Rotkin-Ellman Decl. ¶¶ 21-22 (APP025), NRDC opposed the motion for an open-ended remand. NRDC instead asked this Court to ensure timely resolution of the remanded proceedings—by, for example, retaining jurisdiction or imposing a deadline on the agency. *See* NRDC

¹ All ECF citations hereinafter are to the docket in this earlier case.

Resp. to Renewed Mot. for Voluntary Remand at 16-18, ECF No. 27 (Feb. 25, 2016) (APP143-145). EPA opposed those requests and assured the Court that it was “committed to completing remand proceedings in a reasonable time frame.” EPA Reply ISO Renewed Mot. at 11, ECF No. 28 (Mar. 10, 2016) (APP160).

Specifically, EPA asserted that it “intends to issue a revised response to NRDC’s petition within 90 days after finalizing the [TCVP] risk assessment.”² EPA Renewed Mot. for Voluntary Remand at 10, ECF No. 26 (Feb. 11, 2016) (APP124). The agency repeated this assertion several times. *See, e.g., id.* at 5 (APP119); EPA Reply ISO Renewed Mot. at 12-13 (APP161-162); Decl. of Richard P. Keigwin, Jr. ¶ 9, ECF No. 22-2 (Sept. 25, 2015) (APP091). EPA also argued that a deadline on the remanded proceedings was unnecessary because “[m]andamus is the appropriate remedy for any unreasonable delay.” EPA Renewed Mot. for Voluntary Remand at 9 n.8 (APP123); *see also* EPA Reply ISO Renewed Mot. at 15 (APP164).

² A risk assessment is the method by which EPA determines whether a pesticide poses unreasonable risks to human health or the environment. *Cf. NRDC*, 658 F.3d at 207-09 (discussing EPA’s risk assessment methodology in the context of another organophosphate pesticide).

In June 2016, the Court remanded the case to the agency without imposing a deadline. *See* Order, ECF No. 30 (June 9, 2016) (APP168).

EPA finalizes a risk assessment that acknowledges serious health risks to young children

On December 21, 2016, EPA issued a final risk assessment for TCVP that corroborated NRDC’s longstanding concerns and found health risks for young children that exceed acceptable levels. EPA, TCVP Revised Human Health Risk Assessment, at 9-10, 57-59 (Dec. 21, 2016) (APP178-179, 226-228). Among other things, the risk assessment recognized that epidemiology studies have “consistently identified” neurodevelopmental effects associated with organophosphate exposure, including “delays in mental development in infants (24-36 months), attention problems and autism spectrum disorder in early childhood, and intelligence decrements in school age children.” *Id.* at 30 (APP199). EPA acknowledged that “there is a need to protect children from exposures that may cause these effects,” *id.*, and that—based on the 2008 peer-reviewed study mentioned above, *see supra* at 6-7—“more stringent regulatory restrictions are necessary to protect public health,” EPA, EPA’s Reliance on Data from Human Research on TCVP Exposure from Pet Collars, at 1 (Dec. 21, 2016) (APP367).

One week later, EPA counsel reaffirmed to NRDC that “[i]t is EPA’s current intention and belief that the Agency will issue a final revised response to NRDC’s 2009 petition to cancel all pet uses of TCVP within 90 days.” Email from Benjamin Wakefield, EPA Office of General Counsel, to Ian Fein (Dec. 28, 2016, 3:39 pm) (APP382).

In January 2017, EPA issued a press release announcing that the TCVP risk assessment “identified potential risks to people, including children,” that “exceed the Agency’s level of concern.” Press Release, EPA, EPA Finalizes Human Health Risk Assessment for Pesticide Used on Pets (Jan. 4, 2017), <https://www.epa.gov/pesticides/epa-finalizes-human-health-risk-assessment-pesticide-used-pets> (APP379). The press release “advise[d] consumers to take certain precautions when handling TCVP products,” and asserted that the agency “will issue” a proposed decision on TCVP’s registration in 2017. *Id.*

EPA fails to issue a final decision on NRDC’s petition

In March 2017, ninety days after EPA finalized its TCVP risk assessment, the agency did not issue a final revised response to NRDC’s cancellation petition, as it had repeatedly represented that it would. Instead, EPA sent NRDC a perfunctory one-page letter, which stated, in

relevant part, that “EPA intends to address any risk-mitigation issues for the pet-care uses of TCVP when it addresses risk-mitigation issues for all TCVP products in the course of registration review for the chemical.” Letter from Yu-Ting Guilaran, EPA Dir. of Pesticide Re-evaluation Div., to Mae Wu, NRDC (Mar. 21, 2017) (APP386).

At the time, EPA’s publicly available registration review schedule reported that the agency intended to issue a proposed interim decision on TCVP’s registration between July and September 2017. *See* EPA, Registration Review Schedules, 2017 Registration Review Schedule for Conventional Cases (as of 02/09/2017) (APP388, 393). EPA staff told the manufacturer of TCVP pet products that “EPA’s timeline is spurred by its obligation to respond to NRDC’s petition [to cancel] the pet uses.” EPA, Notes and Action Items for 7/11/17 Teleconference with Hartz (APP395). The agency explained that “TCVP has had multiple risk assessments” as well as “multiple public comment periods,” and that the agency “needed to respond to NRDC’s petition.” EPA, Notes and Action Items for 8/7/17 Teleconference with Hartz (APP398).

In September 2017, however, EPA did not issue a proposed decision on TCVP, as it previously said it would. Instead, EPA released

a new registration review schedule, which—unlike the prior version—omitted any reference to TCVP. *See* EPA, Registration Review Schedules, 2018 Registration Review Schedule for Conventional Cases (as of 09/18/2017) (APP400-403). Subsequent schedules have likewise included no reference to TCVP—indicating that EPA no longer plans to issue a proposed decision on its registration any time soon. *See, e.g.*, EPA, Registration Review Schedules, 2019-2020 Registration Review Schedule for Conventional Cases (as of 03/26/2019) (APP411-415).

In the meantime, TCVP continues to be sold in household pet products, where it threatens the neurodevelopment of young children who are exposed to the pesticide through residues on treated pets.

ARGUMENT

EPA's failure to resolve NRDC's petition to cancel the registration of TCVP pet products is unreasonable. NRDC filed its petition a decade ago, and more than two years have passed since EPA scientists conceded that the products threaten children's neurodevelopment. Yet EPA has taken no further public action to address the issue, despite having previously represented publicly—and to this Court—that it would act on the pesticide's registration in 2017. Meanwhile, young

children continue to be exposed to the toxic pesticide when they pet and play with treated pets.

More than once in recent years, this Court has concluded that EPA unreasonably delayed resolving administrative petitions which sought to protect the public health. *See Community Voice*, 878 F.3d at 786-87 (granting mandamus and ordering EPA to finalize a rulemaking regarding lead paint standards); *Pesticide Action Network*, 798 F.3d at 814 (granting mandamus and ordering EPA to issue a full and final response to NRDC's petition to ban the use of a dangerous pesticide); *League of United Latin American Citizens*, 922 F.3d at 443 (granting mandamus, again, and ordering EPA to resolve administrative proceedings regarding that same petition and pesticide).

Two questions are at issue in such cases: (1) whether the agency has a duty to act and, if so, (2) whether its delay in taking that action is unreasonable. *Community Voice*, 878 F.3d at 784. Here, as in the other recent cases, EPA has a duty to resolve NRDC's petition within a reasonable time, 5 U.S.C. § 555(b), and this case is similar in its length of delay, absence of a concrete timeline, and harm to children's health, *Community Voice*, 878 F.3d at 786. EPA has also repeatedly broken its

commitments to the Court, to NRDC, and to the public that it would timely resolve NRDC's petition and take action on TCVP. *See Pesticide Action Network*, 798 F.3d at 814. Thus, like in the other recent cases, the Court should order EPA to resolve NRDC's petition forthwith.

I. EPA has a legal duty to resolve NRDC's petition and decide whether to ban TCVP pet products

"EPA has a clear duty to act under the APA." *Community Voice*, 878 F.3d at 784. The APA requires that agencies "shall" "conclude a matter presented to it" "within a reasonable time." 5 U.S.C. § 555(b). This "general but nondiscretionary duty," *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099 (D.C. Cir. 2003), extends to administrative petitions that are "requests for discretionary action," *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). That is, an agency is "obligated *under the APA*" to resolve petitions presented to it, even if the agency may have some discretion regarding the final action it ultimately takes. *Id.* at 419. "An agency 'cannot simply refuse to exercise [its] discretion' to conclude a matter." *Community Voice*, 878 F.3d at 785 (alteration in original) (quoting *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 507 n.6 (9th Cir. 1997)). Thus,

NRDC is entitled to a “final ruling” on its petition—i.e., a “formal action to grant or deny it.” *Pesticide Action Network*, 798 F.3d at 813.³

Nor does EPA’s short, noncommittal letter in March 2017 satisfy its duty to “conclude [the] matter presented to it.” 5 U.S.C. § 555(b) (emphasis added); see Letter from Yu-Ting Guilaran (APP386). “To ‘conclude [the] matter,’ EPA must enter a final decision subject to judicial review.” *Community Voice*, 878 F.3d at 785 (alteration in original); see also *Pub. Citizen Health Research Grp. v. Comm’r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) (the APA requires that agencies “resolve the questions in issue within a reasonable time” (emphasis added)). Yet EPA’s March 2017 letter provides neither a “full [nor] final response to the administrative petition.” *Pesticide Action Network*, 798 F.3d at 815 (emphases added). Instead, the letter merely kicks the can down the road, with no concrete timetable or commitment for further

³ Indeed, EPA effectively conceded that it has a duty to resolve NRDC’s administrative petition when it acknowledged to this Court that mandamus would be an “appropriate remedy” for any unreasonable delay following the earlier remand. EPA Renewed Mot. for Voluntary Remand at 9 n.8 (APP123); see also EPA Reply ISO Renewed Mot. at 15 (APP164) (“mandamus, not a schedule on remand, is the appropriate relief if there were such a delay”).

action. Indeed, EPA acknowledged—after the March 2017 letter—that it still had an “obligation to respond to NRDC’s petition.” EPA Notes and Action Items 7/11/17 (APP395); *see also* EPA Notes from Teleconference 8/7/17 (APP398) (acknowledging that EPA “needed to respond to NRDC’s petition”). Thus, as EPA itself has conceded, the agency still must “fully respond” to NRDC’s administrative petition and “reach some final decision.” *Community Voice*, 878 F.3d at 785-86.

Above and beyond EPA’s “clear duty to act under the APA,” this Court also found in *Community Voice* that EPA had a separate, “ongoing duty” to revisit its prior determinations under a “statutory framework” where Congress had directed the agency to protect children from lead poisoning and authorized it to amend its lead paint standards based on new information. 878 F.3d at 784. Here, like in that case, Congress has authorized EPA to cancel the registration of a pesticide that causes unreasonable risk to human health. 7 U.S.C. § 136d(b).

Moreover, like in *Community Voice*, “EPA does not dispute that now available information shows” that further action is warranted to protect children. 878 F.3d at 784. To the contrary, EPA now concedes that TCVP pet products pose health risks that exceed the agency’s level

of concern, “creating an ‘obvious need, apparent to [the EPA],” to protect children’s health. *Id.* at 785 (alteration in original) (quoting *Pub. Citizen Health Research Grp. v. Aughter*, 702 F.2d 1150, 1154 (D.C. Cir. 1983)); see Risk Assessment at 30 (APP199) (acknowledging “there is a need to protect children” from exposure to TCVP); EPA’s Reliance on Data from Human Research on TCVP at 1 (APP367) (acknowledging, based on TCVP study, that “more stringent regulatory restrictions are necessary to protect public health”). “Under these circumstances, EPA is under a clear duty to act.” *Community Voice*, 878 F.3d at 785.

In short, EPA has a “clear duty” to take final action on NRDC’s 2009 petition. *Id.* at 784. A writ of mandamus is therefore appropriate if EPA’s delay in taking such action has been unreasonable. *Id.* at 786. As explained below, EPA’s failure to resolve NRDC’s decade-old petition—despite its prior representations to this Court, and the acknowledged health risks to children—is demonstrably unreasonable.

II. EPA’s delay in resolving NRDC’s petition is unreasonable

This Court considers six factors—first articulated in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (“*TRAC*”), and commonly referred to as the “*TRAC*

factors”—in determining whether an agency’s delay is unreasonable. They are (1) whether the time the agency takes to make a decision complies with a “rule of reason”; (2) whether Congress has provided a timetable for the agency’s action; (3) whether human health is at stake; (4) the effect of expediting agency action on competing priorities; (5) the nature and extent of the interests prejudiced by the delay; and (6) any impropriety by the agency. *Community Voice*, 878 F.3d at 786.

In both *Community Voice*, 878 F.3d at 786-87, and *Pesticide Action Network*, 798 F.3d at 814, this Court concluded that it was unreasonable for EPA to take more than eight years to resolve administrative petitions that sought to protect public health, where the agency itself acknowledged the health dangers and yet still did not provide a “concrete timetable” for final action. “This case is similar in the length of delay, absence of a reasonable timetable, and harm to health.” *Community Voice*, 878 F.3d at 786.

A. EPA’s lengthy delay, and the absence of any timetable to resolve the petition, violates the rule of reason

The first, and “most important,” *TRAC* factor weighs sharply in favor of mandamus here, as EPA’s lengthy delay and the absence of any

concrete timeline to resolve NRDC's administrative petition defies any "rule of reason." *Community Voice*, 878 F.3d at 786.

NRDC filed its administrative petition to ban TCVP pet products in April 2009, more than ten years ago. *See* NRDC, Petition to Cancel All Pet Uses (APP029-034). EPA's decade-long delay in resolving that petition exceeds the eight years that were found to be unreasonable in *Community Voice*, 878 F.3d at 786-87, and *Pesticide Action Network*, 798 F.3d at 814. To be sure, EPA did take a fleeting final action when it previously denied NRDC's petition in November 2014, but the agency quickly negated that action by moving for a voluntary remand to reconsider the denial rather than defend it on the merits. *See supra* at 8. Allowing that ephemeral, earlier action to evade mandamus here would invite agencies to use voluntary remands to insulate themselves from judicial review. And it would defeat the "primary purpose of the writ in circumstances like these," which is "to ensure that an agency does not thwart [the court's] jurisdiction by withholding a reviewable decision." *American Rivers*, 372 F.3d at 419.

In any event, the "pace of [EPA's] decisional process" here defies the rule of reason no matter how one measures it. *Comm'r*, 740 F.2d at

34. “[A] reasonable time for agency action is typically counted in weeks or months, not years.” *American Rivers*, 372 F.3d at 419. This Court—sitting en banc—recently found EPA’s nearly two-year delay in resolving objections to its initial decision denying NRDC’s petition regarding another organophosphate pesticide to be unreasonable. *League of United Latin American Citizens*, 922 F.3d at 443. The same is true here, given the “history and chronology of this matter.” *Id.*

It has now been more than three and half years since EPA asked this Court to remand its prior decision denying NRDC’s TCVP administrative petition, *see* EPA Mot. for Voluntary Remand (APP077-086), and nearly two and a half years since EPA finalized its risk assessment acknowledging risks of concern to young children, *see* Risk Assessment 9-10 (APP178-179). Yet EPA has taken no further action to resolve those risks or provide a full and final response to NRDC’s petition. And EPA’s own publicly available schedule now reveals that it no longer plans to issue even a *proposed* decision on TCVP’s registration any time soon, despite having previously announced to the public that it would do so in 2017. *See supra* at 11-13. Indeed, EPA has inexplicably removed TCVP from its registration review schedule altogether. *Id.*

EPA’s continued, lengthy inaction violates its representations to this Court that it was “committed to completing remand proceedings in a reasonable time frame.” EPA Reply ISO Renewed Mot. at 11 (APP160). EPA urged this Court not to impose a schedule on the remand by asserting—repeatedly—that it intended to issue a revised response to NRDC’s petition within 90 days of finalizing the TCVP risk assessment. *See supra* at 9. But, on remand, EPA “failed to issue a final response to the administrative petition,” as it had repeatedly told this Court that it would. *Pesticide Action Network*, 798 F.3d at 812. And instead of offering a “concrete timeline’ for resolving the petition,” EPA has provided only “a roadmap for further delay.” *Id.* at 814.

Here, as with its decade-long deliberation regarding a related organophosphate pesticide, “EPA has stretched the ‘rule of reason’ beyond its limits.” *Id.* at 814. “Issuing a writ of mandamus is necessary to end this cycle of incomplete responses, missed deadlines, and unreasonable delay.” *Id.* at 813; *see also League of United Latin American Citizens*, 922 F.3d at 443.

B. EPA acknowledges that its delay threatens children's health

EPA's lengthy delay in resolving NRDC's administrative petition is particularly unreasonable because the agency has confirmed that TCVP pet products endanger children's neurodevelopment. "When the public health may be at stake, the agency must move expeditiously to consider and resolve the issues before it." *Comm'r*, 740 F.2d at 34. The third *TRAC* factor thus favors issuance of the writ because "EPA itself has acknowledged" that its inaction poses "a clear threat to human welfare." *Community Voice*, 878 F.3d at 787.

TCVP belongs to the same class of organophosphate pesticides as chlorpyrifos, the chemical at issue in *Pesticide Action Network* and *League of United Latin American Citizens*. The agency's 2016 risk assessment for TCVP acknowledged that epidemiology studies have "consistently identified" neurodevelopmental effects associated with children's exposure to this class of pesticides, including delays in mental development, attention deficit disorders, and lower IQs. *See supra* at 5-6. And just as EPA scientists in *Pesticide Action Network* had "backtracked significantly" from any prior suggestions that chlorpyrifos was safe, 798 F.3d at 814, here too EPA's risk assessment for TCVP

found potential health effects from pet products that exceed the agency's level of concern. *See supra* at 10. EPA expressly acknowledged that "there is a need to protect children from exposures that may cause these effects." *Id.* (quoting Risk Assessment at 30 (APP199)).

EPA has offered "no acceptable justification" for refusing to resolve that compelling need. *Pesticide Action Network*, 798 F.3d at 814. In fact, "despite the documented risks" to children's neurodevelopment, EPA has provided "no reasoned explanation" at all "why it has protracted" resolution of NRDC's petition to ban TCVP pet products. *Auchter*, 702 F.2d at 1158. "In view of EPA's own assessment of the dangers to human health posed by this pesticide," the agency "should be compelled to act quickly to resolve the administrative petition." *Pesticide Action Network*, 798 F.3d at 814.

C. No competing interests or priorities justify EPA's unreasonable delay

As in *Pesticide Action Network*, the first and third *TRAC* factors are strong enough on their own here to establish the unreasonableness of EPA's lengthy delay in resolving NRDC's administrative petition. 798 F.3d at 814. Also like in that case, the remaining factors are either neutral or support the same conclusion.

To begin with, it does not matter under the second *TRAC* factor that FIFRA requires EPA to complete its registration review of all previously-registered pesticides by 2022. 7 U.S.C. § 136a(g)(1)(A)(iii)(I). Irrespective of that schedule, EPA “is obligated *under the APA* to respond to [NRDC’s 2009] petition” within a reasonable time. *American Rivers*, 372 F.3d at 419; *see* 5 U.S.C. § 555(b). That is why this Court ordered EPA to issue a full and final response to NRDC’s similar administrative petition in *Pesticide Action Network*, notwithstanding any separate FIFRA schedule. 798 F.3d at 814-15. And that is why EPA told a TCVP pet product manufacturer that its plan to issue a proposed decision in September 2017 was “spurred by its obligation to respond to NRDC’s petition.” EPA Notes and Action Items 7/11/17 (APP395).

Moreover, the registration review provision states expressly that “[n]othing in this subsection shall prohibit the Administrator from undertaking any other review of a pesticide,” 7 U.S.C. § 136a(g)(1)(C), which precludes EPA from invoking that process to forestall other scientifically compelled regulatory action. *See, e.g., id.* §136d(b) (providing for cancellation of registrations of pesticides that pose unreasonable adverse effects). That is especially so here, where EPA

told this Court three and a half years ago that TCVP was “*currently* undergoing registration review,” Keigwin Decl. ¶ 4 (APP089) (emphasis added), and where EPA has—without explanation—since *removed* TCVP from its registration review schedule altogether, *see supra* at 13.

Nor does the fourth *TRAC* factor cut against mandamus here, where EPA has “in no way indicated that any practical impediments have prevented a response or that any agency activities of a higher or competing priority have required its attention.” *American Rivers*, 372 F.3d at 420 (quotation omitted). This Court in *Pesticide Action Network* expressly “recognize[d] the scientific complexity inherent in evaluating the safety of pesticides and the competing interests that the agency must juggle.” 798 F.3d at 811. The Court nonetheless concluded that mandamus was warranted where EPA had already “spent nearly a decade reviewing [NRDC’s] data and arguments.” *Id.* at 813. So too here. When the agency’s review has spanned many years and progressed to the extent it has in this case, “scientific uncertainties and technical complexities . . . can no longer justify delay.” *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 156 (3d Cir. 2002).

The fifth *TRAC* factor strongly “favors issuance of the writ” because “children exposed to [TCVP] due to the failure of EPA to act are severely prejudiced by EPA’s delay.” *Community Voice*, 878 F.3d at 787. There are potentially millions of children who could be in direct contact with TCVP via treated pets. *See supra* at 7. “Yet EPA offers no acceptable justification for the considerable human health interests prejudiced by [its] delay.” *Pesticide Action Network*, 798 F.3d at 814.

NRDC, too, has been prejudiced by EPA’s failure to resolve its administrative petition. EPA previously told this Court that NRDC would not be prejudiced by the earlier remand because the agency “will issue a new response to NRDC’s petition for cancellation” after finalizing the TCVP risk assessment. EPA Reply ISO Renewed Mot. at 8 (APP157). However, because of EPA’s subsequent “inaction,” NRDC is now “stuck in administrative limbo; it enjoys neither a favorable ruling on its petition nor the opportunity to challenge an unfavorable one.” *In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012). The Court should not permit EPA to evade judicial scrutiny of its decisions by withholding final action following its voluntary remand.

Finally, under the sixth *TRAC* factor, this Court “need not find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’” *Comm’r*, 740 F.2d at 34. But as in *Pesticide Action Network*, EPA now has a “significant history of missing the deadlines” it has set for resolving NRDC’s petition and reaching a final determination on TCVP’s registration. 798 F.3d at 814.

Thus, with or without any “allegation of impropriety underlying EPA’s delay,” the agency’s failure to adhere to its previous timelines helps demonstrate the need for relief from this Court. *Id.* Indeed, EPA’s recalcitrance to resolve the issue has now “been the subject of three non-frivolous lawsuits,” *id.* at 814-15, including an earlier mandamus petition, *supra* at 7-8. The Court should put “an end to [EPA’s] marathon round of administrative keep-away,” *American Rivers*, 372 F.3d at 420, and grant mandamus to “let [the] agency know, in no uncertain terms, that enough is enough,” *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

III. The Court should grant a writ of mandamus and retain jurisdiction to ensure that EPA timely resolves the petition

NRDC respectfully requests that the Court grant a writ of mandamus and, like in *Pesticide Action Network*, “order EPA to issue a

full and final response to [NRDC's administrative] petition” by either denying the petition or issuing a proposed decision to cancel all pet uses of TCVP forthwith. 798 F.3d at 811.

This Court's authority to “compel agency action . . . unreasonably delayed,” 5 U.S.C. § 706(1), gives it “discretion in determining how soon the agency must act,” *Mashpee Wampanoag Tribal Council*, 336 F.3d at 1102. Although the Court gave EPA a little under 90 days to publish a proposed rule in *Pesticide Action Network*, a shorter deadline is warranted here. EPA previously represented to this Court that it needed only 90 days to issue a final response to NRDC's petition after finalizing its TCVP risk assessment—an event that occurred almost two and a half years ago. Given how much time has already passed, a shorter deadline of 60 (or fewer) days is therefore more appropriate at this juncture. *See, e.g., American Rivers*, 372 F.3d at 420 (ordering agency to “issue a judicially reviewable response to [an administrative] petition within 45 days”); *Auchter*, 702 F.2d at 1159 (ordering agency to “issue a notice of proposed rulemaking within 30 days”).

Moreover, if EPA issues a proposed decision to cancel TCVP's registration, NRDC respectfully requests that the Court order the

agency to finalize that decision within a year. *See Community Voice*, 878 F.3d at 788; *In re Pesticide Action Network N. Am.*, 808 F.3d 402, 402-03 (9th Cir. 2015) (ordering EPA to “take final action” on its proposed decision within roughly a year).

Finally, to ensure compliance with these deadlines, and given the lengthy history of delay in these (and similar) proceedings, NRDC respectfully requests that the Court “retain[] jurisdiction” in this case, at least “until EPA issues a final order subject to judicial review.” *Community Voice*, 878 F.3d at 788; *see also, e.g., League of United Latin American Citizens*, 922 F.3d at 443 (granting mandamus and “retain[ing] jurisdiction over this and any related cases”).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of mandamus and order EPA to issue a full and final response to NRDC’s administrative petition within 60 (or fewer) days, by either denying the petition or issuing a proposed decision to cancel all pet uses of TCVP. If EPA issues a proposed decision to cancel the registration, a final decision should follow within one year. The Court should also retain jurisdiction to ensure EPA’s compliance with these deadlines.

Dated: May 29, 2019

Respectfully submitted,

/s/ Ian Fein

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STATEMENT OF RELATED CASES

This case is related, within the meaning of Ninth Circuit Rule 28-2.6(c), to another case pending in this Court, *League of United Latin Am. Citizens v. Wheeler*, No. 17-71636 (9th Cir.), because they raise “closely related issues” about EPA’s decade-long failure to resolve administrative proceedings regarding petitions to ban the use of organophosphate pesticides.

Dated: May 29, 2019

/s/ Ian Fein

Ian Fein

CERTIFICATE OF COMPLIANCE

This petition for a writ of mandamus complies with the type-volume limitation of Ninth Circuit Rule 21-2(c) because it does not exceed 30 pages, excluding the parts exempted by Federal Rules of Appellate Procedure 21(a)(2)(C) and 32(f).

The petition also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

Dated: May 29, 2019

/s/ Ian Fein
Ian Fein

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing
Petition for a Writ of Mandamus upon all parties by U.S. mail at the
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