No. 19-71324

IN THE
United States Court of Appeals for the Ninth Circuit

In re: NATURAL RESOURCES DEFENSE COUNCIL, INC.

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.

REPLY BRIEF FOR PETITIONER NATURAL RESOURCES DEFENSE COUNCIL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Procedure Act

Federal Insecticide, Fungicide, and Rodenticide Act

Federal Food, Drug, and Cosmetic Act

Regulations

Other Authorities

INTRODUCTION

Respondent Environmental Protection Agency (EPA) previously represented to this Court that it would act, within 90 days of issuing a final risk assessment, on Natural Resources Defense Council's (NRDC) decade-old petition to discontinue the use of a dangerous pesticide in household pet products. After that December 2016 final risk assessment confirmed that these products threaten children's neurodevelopment, EPA told the public that it would issue a proposed decision on the pesticide's continued use by September 2017. Then, EPA went silent.

Now, only after NRDC has (again) had to resort to mandamus, EPA brazenly tells this Court that it does not plan to act on NRDC's petition until September 2021. EPA's only justification for this latest years-long delay is that it has been waiting for the manufacturer to provide additional data. But that data would not eliminate the threats documented in the final risk assessment, and EPA could have forced the manufacturer to provide the data two years ago, simply by taking the actions EPA told this Court and the public it would take in 2017. It is unreasonable for EPA to continue postponing any action to address the ongoing threats these products pose to children's developing brains.

The Court should issue a writ of mandamus, order EPA to respond to NRDC's petition in 60 days, and—given the history of this matter—retain jurisdiction to ensure that EPA does not delay things yet again.

ARGUMENT

I. A writ of mandamus is warranted because EPA's delay in resolving NRDC's petition is unreasonable and egregious

EPA does not—and cannot—dispute that it has a "clear duty" to resolve NRDC's April 2009 administrative petition to discontinue the use of tetrachlorvinphos (TCVP) in household pet products. *See In re A Community Voice*, 878 F.3d 779, 784-86 (9th Cir. 2017); PET15-18.[1] Thus, a writ of mandamus is appropriate if the agency's delay in resolving NRDC's petition has been unreasonable. *Community Voice*, 878 F.3d at 786. A simple application of the *TRAC* factors—and a comparison to recent cases where this Court has ordered EPA to resolve petitions to protect children's health, *see id.* at 786-88; *League of United Latin Am. Citizens v. Wheeler ("LULAC")*, 922 F.3d 443 (9th Cir. 2019) (en banc) (mem.), neither of which the agency attempts to distinguish—demonstrates that a writ of mandamus is warranted here.

[1] This reply brief cites NRDC's mandamus petition as PET; the Appendix as APP; and EPA's opposition as OPP.

A. EPA's years-long delay defies any rule of reason

EPA now says that it does not plan to respond to NRDC's petition until September 2021, *twelve-and-a-half years* after NRDC filed it. Realizing that a dozen years is indefensible, EPA tries to focus solely on its delay since the Court's June 2016 remand. OPP4, 19. But EPA cannot simply wipe the slate clean and erase its initial five-year delay in responding to NRDC's petition, PET7-8, especially where EPA then deprived NRDC of its day in court by declining to defend the fleeting final action that it took. PET20. The lengthy delay that preceded that action—including NRDC's need to resort to mandamus once before in this matter, APP36-59—is certainly relevant in determining whether the pace of EPA's decision-making has been unreasonable. *See LULAC*, 922 F.3d at 445 (two-year delay in resolving objections warranted mandamus, "[c]onsidering the history and chronology of the matter").

Regardless, the delay here is unreasonable even by EPA's metric. It has been more than three years since this Court's remand, and September 2021 would be more than five years after it. "[B]ut a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d

413, 419 & n.12 (D.C. Cir. 2004) (citing cases that found three-, four-, and five-year delays unreasonable). That is presumably why EPA previously—and repeatedly—told this Court it intended to respond to NRDC's petition within 90 days of its final risk assessment. PET9.

EPA's only excuse for deviating so significantly from its prior representations to this Court is that it has been waiting for the pet collar manufacturer to provide additional data about the degree to which its product releases TCVP in liquid versus powder form. OPP15. Putting aside the peer-reviewed study that documented unsafe exposure irrespective of this question, *see* PET6; APP34, 367-68, EPA's suggestion that it now wants this data "to complete the necessary risk assessment," OPP2, contradicts its own, repeated public statements that it had already "finalized" the human health risk assessment in December 2016, APP379, 383, 386. Indeed, EPA made clear *after* issuing that risk assessment that it had sufficient data to act on TCVP, notwithstanding any uncertainty over the liquid-powder issue. PET11.[2] EPA nowhere explains the basis for its abrupt, unannounced reversal.

[2] Specifically, EPA counsel reaffirmed to NRDC that the agency still intended to issue a final response to NRDC's petition within 90 days of the risk assessment, APP382, and EPA told the public that it "will

EPA previously saw no need to definitively resolve the issue because its final risk assessment concluded that *even if* TCVP pet collars released the pesticide in almost entirely liquid form, which EPA considers to be the least dangerous possibility, they *still would expose young toddlers* to dangerous amounts that could significantly harm their neurodevelopment. APP179 ("Children's … exposures to pets treated with TCVP collars are estimated to be of concern regardless of the ratio of liquid/dust assumed."); APP228 (similar). That conclusion more than suffices to initiate cancellation proceedings because—given the safer and more effective alternative products available, APP14—no countervailing benefit could justify keeping these dangerous products on the market under the relevant standard, *see* OPP13. In other words, the available information shows that, irrespective of the liquid-powder issue, the documented threat to toddlers' developing brains constitutes an "unreasonable adverse effect[]." 7 U.S.C. § 136d(b).

In any event, even if EPA did want additional data on the liquid-powder issue, that *still* does not justify its delay because, had the

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issue" a proposed decision on TCVP's registration in 2017, APP379. EPA's public schedule in February 2017 indicated the same. APP393.

agency simply issued a proposed interim decision on TCVP in 2017 (as it said it would), it could have forced the manufacturer to provide any required additional data at that time. 40 C.F.R. § 155.58(b)(3); *see* OPP 6-7. Instead, EPA now tells us, it waited two years for Hartz Mountain Corp., the only remaining manufacturer of TCVP pet collars, to provide the data voluntarily—and, unsurprisingly, to no avail. OPP15-16.

That unnecessary, "protracted" delay was clearly unreasonable, given EPA's prior representations to this Court and the ongoing "documented risks" to toddlers' brains. *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983). The useless result was also entirely predictable, given Hartz's repeated failures to provide relevant data throughout this process. Indeed, EPA staff told Hartz in August 2017 that the agency was "not willing to wait a long time for data in order to move forward with decision-making," because "TCVP has had multiple risk assessments, multiple public comment periods, and EPA first identified the problem with the liquid vs. dust composition question a couple years ago," when Hartz "did not address this uncertainty" in its response to EPA's inquiries. APP398. As staff acknowledged, "EPA also needed to respond to NRDC's petition." *Id.*

EPA does not explain why it was reasonable—despite what its staff said in 2017—to then wait two years for Hartz to produce this data, and, when Hartz failed (again) to provide it, to postpone EPA's response to NRDC's petition for another two years after that.

Given all this, EPA's belated, June 2019 request for additional data—which EPA conspicuously issued only *after* NRDC filed this lawsuit, PET31—in no way "represent[s] a reasonable amount of progress." OPP21. Indeed, Hartz has now (unsurprisingly) botched its response to this latest request as well, which EPA claims as yet another potential source of delay. OPP16-17. No matter how "desirable it may be for EPA" to compile this additional data, "that is no reason for acting against its own science findings in the meantime." *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290 (D.C. Cir. 2000). Young children who play with their pets should not be forced to "suffer while [EPA] awaits the Godot of scientific certainty." *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 156 (3d Cir. 2002) (quotation omitted).

Nor should the Court condone EPA's effort to delay responding to NRDC's petition pending its (revised) schedule for registration review. OPP22-26. Rather than providing a "concrete timeline" for resolving

NRDC's petition, that schedule is only a "roadmap for further delay." *In re Pesticide Action Network N. Am.*, 798 F.3d 809, 814 (9th Cir. 2015). EPA has now pushed back its registration review schedule repeatedly, *see* APP25, and it nowhere explains why it postponed the proposed interim decision previously slated for September 2017, *see* OPP15 n.6. Thus, EPA's present assertion that it only "anticipates" or "estimates" issuing a registration review decision in September 2021, OPP4, 15 n.6, 23, 30, raises serious "concerns as to the probable completion date." *Pesticide Action Network*, 798 F.3d at 814 (quotation omitted). In short, "EPA has stretched the 'rule of reason' beyond its limits." *Id.*

B. EPA's delay threatens children's neurodevelopment, and is not justified by competing agency priorities

Other *TRAC* factors underscore that mandamus is appropriate in this case. For example, EPA's years-long delay is "all the more" unreasonable here, given the "considerable human health interests prejudiced by it." *In re Pesticide Action Network N. Am.*, 840 F.3d 1014, 1015 (9th Cir. 2016) (quotation omitted). EPA tries to sweep these significant interests under the rug by quoting an earlier (unpublished) observation by this Court that the agency regulates "almost entirely in the realm of human health and welfare." OPP21 (quoting *In re Pesticide*

Action Network N. Am., 532 Fed. Appx. 649, 651 (9th Cir. 2013)). But EPA ignores that this Court subsequently relied, in the same matter, on "EPA's own assessment of the dangers to human health posed by [a] pesticide," in concluding that EPA had unreasonably delayed resolving NRDC's petition to ban it. *Pesticide Action Network*, 798 F.3d at 814.

Here too, EPA's own final risk assessment strongly supports mandamus by highlighting the health threats that organophosphate pesticides—and TCVP pet products, in particular—pose to children's neurodevelopment. *See* PET10. EPA acknowledged a "need to protect children" from these threats, APP199, and agreed that "more stringent regulatory restrictions are necessary to protect public health," APP367. EPA made these assertions notwithstanding the liquid-powder issue, *supra* 4-5, and it does not disclaim them now. Thus, "nothing has changed that would justify EPA's continued failure to respond to the pressing health concerns." *Pesticide Action Network*, 840 F.3d at 1015.

The documented risk to children's brain development also defeats EPA's attempt to justify its delay based on any "higher or competing priority." OPP21-22. EPA points generally to other registration reviews required under the Federal Insecticide, Fungicide, and Rodenticide Act

(FIFRA), but it identifies no pesticide that poses a greater risk, nor alleges that resolving NRDC's petition will prevent it from fulfilling any other obligations. In any event, EPA's reference to competing priorities has a hollow ring, given its recent emphasis on deregulation. *See, e.g.*, EPA, Office of Inspector General, *EPA Exceeded the Deregulatory Goals of Executive Order 13771* (Aug. 9, 2019), https://tinyurl.com/yyu9cys8 (reporting that EPA, in fiscal years 2017 and 2018, took 26 deregulatory actions compared to only four regulatory ones).

Finally, in addition to "severely prejudic[ing]" children's health by continuing to expose them to a dangerous pesticide, *Community Voice*, 878 F.3d at 787, EPA's delay also prejudices NRDC, *see* PET27, and, to a certain extent, the integrity of this Court's proceedings. In opposing NRDC's earlier request that the Court retain jurisdiction or impose a deadline on remand proceedings, EPA repeatedly told this Court that it intended to respond to NRDC's petition within 90 days, *see* PET8-9, and assured the Court it was "committed to completing remand proceedings in a reasonable time frame," APP160. EPA has since "failed to honor the terms of its representations to this Court." *Sierra Club v. McCarthy*, 61 F. Supp. 3d 35, 40 (D.D.C. 2014). "Despite its filings suggesting to the

[C]ourt that something would happen," EPA on remand has, "once again," "afford[ed] no relief to petitioners and no assurance that final action is imminent, much less to be expeditiously accomplished." *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 271-72 (D.C. Cir. 2000) (granting mandamus where agency failed to act following court's earlier remand); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 853, 855-61 (D.C. Cir. 2008) (similar). This Court should not allow a government agency—or any litigant, for that matter—to avoid judicial supervision by making representations that it then cavalierly disregards.

In short, EPA's continued "delay is egregious and warrants mandamus relief." *Pesticide Action Network*, 798 F.3d at 811.

II. The Court should order EPA to respond within 60 days, and should retain jurisdiction to prevent further delays

Given the documented threat to children's neurodevelopment, EPA "should be compelled to act quickly to resolve the administrative petition." *Pesticide Action Network*, 798 F.3d at 814. The Court should order EPA to respond to NRDC's petition within 60 days, by either denying the petition or initiating the statutory cancellation process.[3]

[3] To the extent NRDC's earlier reference to a proposed cancellation decision was imprecise, NRDC clarifies that a proper response to its

Additionally, because EPA "has a significant history of missing the deadlines it has set in these proceedings," *id.*, the Court should retain jurisdiction until EPA issues a judicially reviewable decision. This relief is consistent with FIFRA, *contra* OPP28-29, as well as with remedies ordered in similar cases, *see Community Voice*, 878 F.3d at 788; *LULAC*, 922 F.3d at 445; *In re Pesticide Action Network N. Am.*, 808 F.3d 402, 403 (9th Cir. 2015); *Pesticide Action Network*, 798 F.3d at 815.

Sixty (or, at most, 90) days is an adequate length of time for EPA to either initiate cancellation proceedings or deny NRDC's petition. EPA previously told this Court that it could respond to the petition within 90 days of its final risk assessment. PET9. EPA finished that assessment more than 1,000 days ago. PET10. And because the agency documented dangerous risks to toddlers irrespective of the liquid-powder issue, EPA has sufficient information to decide whether to initiate cancellation proceedings under the relevant risk-benefit standard, given the many safer and more effective alternative products available. *Supra* 5.

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petition would be for EPA to initiate cancellation proceedings by sending, to the relevant entities, a proposed notice of intent to cancel the registration of TCVP pet uses. *See* 7 U.S.C. §§ 136d(b), 136w(d).

Moreover, because NRDC's petition requests cancellation of TCVP pet products only, other "factors identified in the statute," OPP28—such as impacts "on production and prices of agricultural commodities," 7 U.S.C. § 136d(b)—are irrelevant and thus do not justify further delay.

Despite its prior representations to this Court, EPA now says that it would prefer to put off responding to NRDC's petition for another two years while it compiles more data and prepares an interim registration review decision. Having delayed resolving NRDC's petition for a decade, and after failing to gather this purportedly relevant data two years ago, *supra* 5-6, EPA's present emphasis on avoiding "inefficiencies," OPP22-23, cannot justify further delay—especially given the ongoing risks to children's neurodevelopment. EPA has previously conceded that, under FIFRA, 7 U.S.C. § 136a(g)(1)(C), it "must continue to respond to emerging risk concerns and not defer action until a pesticide's regularly scheduled registration review." 70 Fed. Reg. 40,251, 40,270 (July 13, 2005); *accord* 71 Fed. Reg. 45,720, 45,722 (Aug. 9, 2006). Yet, deferring action on documented risks is precisely what EPA proposes here.

Nor does any forthcoming aggregate risk analysis on TCVP justify delaying EPA's response to NRDC's petition. OPP25-26. An aggregate

risk analysis is required under a separate statute, not FIFRA, to evaluate the safety of TCVP's food uses, not pet products. *See* 21 U.S.C. § 346a(b)(2)(A)(ii), (b)(2)(D)(vi). EPA also fails to mention that it previously decided not to conduct a complete aggregate risk analysis for TCVP because the risks from food uses and pet products are *each unsafe* for children when considered alone. APP230 (noting "risks of concern" from both TCVP pet and food uses); APP177-80 (similar). Any aggregate analysis would therefore only identify *more* risks beyond those found in the December 2016 final risk assessment. That prospect provides no basis to avoid protecting children from dangerous pet products now.[4]

Regardless, the Court should retain jurisdiction over this matter until EPA issues a judicially reviewable decision either cancelling registration of TCVP's pet uses or refusing to do so. *Community Voice*, 878 F.3d at 785-86, 788. The Administrative Procedure Act requires EPA to "conclude a matter presented to it" within a reasonable time. 5 U.S.C. § 555(b). EPA will not "'conclude [this] matter'" until it "enter[s] a final decision subject to judicial review." *Community Voice*,

[4] To the extent any new data or information informs EPA's thinking on the pet uses, it can amend or enlarge its notice of intent "at any time" before commencing a cancellation hearing. 40 C.F.R. § 164.21(b).

878 F.3d at 785 (rejecting EPA's argument that initiating a rulemaking resolved a petition to protect children's health). Merely "'begin[ning] an appropriate proceeding'" does not suffice. *Id.*; *contra* OPP29-30.

As in other recent cases, then, if EPA responds to the petition by initiating cancellation, the Court should retain jurisdiction and order EPA to conclude those proceedings within one year. *Community Voice*, 878 F.3d at 788; *Pesticide Action Network*, 808 F.3d at 403. If that deadline proves impracticable, OPP29, EPA can advise the Court of its efforts to comply with the deadline and ask for a modification. *See Community Voice*, 878 F.3d at 788. But given the history of this matter, PET6-13, the burden should not (again) fall on NRDC to "seek further relief from this Court." OPP30. As in *Pesticide Action Network*, "EPA's unreasonable delay in responding to the administrative petition has already been the subject of three non-frivolous lawsuits." 798 F.3d at 814-15. "There should not be a fourth." *Id.*

CONCLUSION

The Court should grant a writ of mandamus, order EPA to respond to NRDC's petition in 60 days, and retain jurisdiction until EPA issues a final decision subject to judicial review.

Dated: October 2, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This reply brief in support of NRDC's petition for a writ of mandamus complies with the type-volume limitation of Ninth Circuit Rules 21-2(c) and 32-1(b). It does not exceed 15 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

The brief 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: October 2, 2019

/s/ *Ian Fein*
Ian Fein

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 2, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Ian Fein*
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