

NO. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PESTICIDE ACTION NETWORK NORTH AMERICA; UNITED
FARM WORKERS; PIÑEROS Y CAMPESINOS UNIDOS
del NOROESTE; and PHYSICANS FOR SOCIAL RESPONSIBILITY,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS AND FOR RELIEF
FROM UNREASONABLY DELAYED AGENCY ACTION
BY THE ENVIRONMENTAL PROTECTION AGENCY

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CORPORATE DISCLOSURE STATEMENT
REQUIRED BY FRAP 26.1

Petitioners Pesticide Action Network North America, United Farm Workers, Piñeros y Campesinos Unidos del Noroeste, and Physicians for Social Responsibility have no parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Respectfully submitted this 24th day of July, 2013.

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INTRODUCTION

Pesticide Action Network North America, United Farm Workers, Piñeros y Campesinos Unidos del Noroeste, and Physicians for Social Responsibility (collectively the “Coalition”) petition this Court for a Writ of Mandamus requiring the U.S. Environmental Protection Agency (“EPA”) to respond to a long-pending petition to protect children from exposure to pesticide drift.

On October 13, 2009, a group of health, environmental, and farmworker advocates, including the members of the Coalition, jointly petitioned EPA to address the problem of pesticide spray drift, in particular to protect children from pesticide drift exposures. *Pesticides in the Air—Kids at Risk: Petition to EPA to Protect Children from Pesticide Drift* (Oct. 13, 2009) (the “Kids’ Petition”).¹ The Kids’ Petition called on EPA to correct its earlier failure to address exposure to pesticides through drift in its pesticide registration reviews and requested that as EPA undertakes that process to correct its mistake, it act quickly to protect children from the known risks of pesticide spray drift by imposing interim spray buffer zones around homes, schools, playgrounds and any other areas where children play or congregate. Almost four years have passed and EPA has still not responded to the Kids’ Petition, nor taken action to provide protections for children.

This Court has authority to issue a writ pursuant to Federal Rule of

¹ A copy of the Kids’ Petition is attached to the declaration of Pesticide Action Network North America Senior Scientist Margaret Reeves, Ph.D., as Exhibit A.

Appellate Procedure 21, Circuit Rule 21, the All Writs Act, 28 U.S.C. § 1651, and the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.* Mandamus relief is warranted because EPA has delayed for over three and a half years in fulfilling its statutory duty to respond to the Kids’ Petition. The Coalition seeks an order finding that EPA has unreasonably delayed responding to the Kids’ Petition, and ordering EPA to respond within 60 days.

STATEMENT OF JURISDICTION AND APPLICABLE LAW

The Administrative Procedure Act (“APA”) provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. The reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1). This Court has the authority to issue a writ of mandamus requiring EPA to respond to the Kids’ Petition under the All Writs Act. 28 U.S.C. § 1651(a).

Because this Court would have jurisdiction to review EPA final action in response to the Kids’ Petition, jurisdiction is proper in this Court to review a challenge to the agency’s failure to act. *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1124 (9th Cir. 2001) (finding jurisdiction over a petition for writ of mandamus on the basis of unreasonable delay) (citing *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (hereinafter “TRAC”)). *See*

also In re Tennant, 359 F.3d 523, 530 (D.C. Cir. 2004).

A final decision by EPA on the Kids' Petition would be reviewable by a United States Court of Appeals under either the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 346a or under FIFRA. Under the FDCA, any challenge to an EPA final order that relates to a pesticide tolerance must be filed in the Court of Appeals, 21 U.S.C. §§ 346a(h)(1) and 346a(h)(5). A possible outcome of the Kids' Petition would require EPA to review pesticide tolerances for children that it has previously set under the FDCA because EPA failed to consider drift when it set those tolerances. A challenge to EPA's resetting of those tolerances (or failure to review) must be filed in the Court of Appeals. *Id.*

The most immediate relief sought in the Kids' Petition is the imposition by EPA of interim no-spray buffer zones around places where children congregate such as homes, schools, and playgrounds. This relief arises under FIFRA in connection with EPA's authority to impose interim restrictions for health and safety reasons and to require changes in pesticide labeling to protect against unreasonable risks to people or the environment. 7 U.S.C. § 136w(a)(1); *see, e.g.*, 40 C.F.R. §§ 170.1-250. *See also, e.g.*, EPA, *Pesticide Registration (PR) Notice 83-2: Pesticide Label Improvement Program for Farmworker Safety* (Mar. 1983); and EPA, *Pesticide Registration (PR) Notice 95-5: Labeling Revisions Required by the Worker Protection Standard for Sale or Distribution of Certain Agricultural*

Pesticides After October 23, 1995 (Sept. 1995). Under FIFRA’s jurisdictional provision, 7 U.S.C. § 136n(b), judicial review of orders issued by EPA following a hearing is in the court of appeals for the circuit wherein a party resides or has a place of business. In *United Farm Workers v. Adm’r, Env’tl. Prot. Agency*, 592 F.3d 1080 (9th Cir. 2010), the Court held that a public comment period is a “hearing” for the purposes of FIFRA jurisdiction under § 136n(b). *Id.* at 1082. In this case, EPA afforded an opportunity for public comment on the Kids’ Petition. 74 Fed. Reg. 57168 (Nov. 4, 2009).² Because jurisdiction lies with this Court to review any final decision that EPA reaches relating to the Kids’ Petition, this Court also has jurisdiction to determine if EPA’s three-and-a-half year intransigence constitutes unreasonable delay. *See In re Cal. Power Exch. Corp.*, 245 F.3d at 1125.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether EPA’s failure to respond to the Kids’ Petition for over three years is such an unreasonable delay that this Court should order the agency to respond.

² EPA also asked for public comment on a registration notice providing general label guidance regarding protecting “bystanders” from drift at the same time it made the Kids’ Petition available for comment. 74 Fed. Reg. 57,168 (Nov. 4, 2009). Most of the comments EPA received at the time concerned the proposed label change. *See* www.regulations.gov/#!docketDetail;D=EPA-HQ-OPP-2009-0628 (registration notice); www.regulations.gov/#!docketDetail;D=EPA-HQ-OPP-2009-0825 (Kids’ Petition).

STATUTORY FRAMEWORK

EPA regulates pesticides under two statutes: FIFRA, 7 U.S.C. § 136 *et seq.* and the FDCA, 21 U.S.C. § 346a. FIFRA establishes a registration system for pesticides. Under FIFRA, a pesticide may not be sold or used in the United States unless it has an EPA registration for a specified use. 7 U.S.C. § 136a(a). To register or re-register a pesticide, EPA must determine that its use “will not generally cause unreasonable adverse effects on the environment,” *id.* § 136a(c)(5)(D), defined as “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide” *Id.* § 136(bb). In applying this standard, EPA must undertake a comprehensive assessment of all risks from a pesticide encompassing “every relevant factor that the Administrator can conceive into account,” including pesticide drift. *See* S. Rep. No. 838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 3993, 4032-33; *see also* EPA, *General Principles for Performing Aggregate Exposure and Risk Assessments* 9 (Nov. 28, 2001).

EPA can register a pesticide only if there is reasonable certainty of no harm from aggregate exposure to the pesticide under the Food Quality Protection Act, part of the FDCA. The Food Quality Protection Act amended FIFRA’s “unreasonable adverse effects” definition to include “a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the

[FQPA] standard.” 7 U.S.C. § 136(bb)(2). When registering a pesticide under FIFRA, EPA must ensure that a “tolerance” (maximum allowable levels for pesticide residues in food) for that pesticide has been set under the FDCA statutory requirements. 21 U.S.C. §§ 346a(b) & (c). EPA may “establish or leave in effect a tolerance for a pesticide chemical residue in or on a food only if the Administrator determines that the tolerance is safe.” *Id.* § 346a(b)(2)(A)(i). The FDCA requires that EPA assess the risk a pesticide poses to infants and children when establishing a tolerance, *id.* § 346a(b)(2)(C), and EPA’s assessment of tolerances must take into consideration all forms of exposures to children, including pesticide drift. *Id.* EPA can impose use restrictions as necessary to meet this standard, included on the legally enforceable pesticide label. *See* requirements and functions of pesticide labeling, 7 U.S.C. §§ 136(p), (q) and 136a(c)(9), (d)(1).

EPA is authorized to cancel pesticide registration whenever the “pesticide or its labeling or other material required to be submitted does not comply with the provisions of [FIFRA] or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment.” *Id.* § 136d(b). EPA can use notices (“pesticide registration notices”) to inform registrants of label amendments that are necessary to comply with FIFRA and to avoid cancellation or misbranding proceedings. EPA also has broad authority under FIFRA to “prescribe regulations to carry out the provisions

of’ the statute. 7 U.S.C. § 136w(a)(1).

Finally, two Executive Orders (“EOs”) from the 1990s instruct EPA on its obligations to children and environmental justice. The 1997 EO on Children’s Health requires EPA to protect children from environmental health and safety risks. *Exec. Order No. 13,045*, 62 Fed. Reg. 19,885 (Apr. 23, 1997). The 1994 Environmental Justice EO requires EPA to ensure that its actions do not have disproportionate impacts on low-income and/or minority populations. *Exec. Order No. 12,898*, 59 Fed. Reg. 7,629 (Feb. 11, 1994). Specifically, EPA must, to the maximum extent practicable, “identify[] and address[] . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” *Id.* at § 1-101.

FACTUAL BACKGROUND

In 1993, the National Academy of Sciences (“NAS”) published a pivotal study documenting the many ways pesticides pose especially severe risks to infants and children. NAS found that pesticides pose heightened risks to children because “[i]nfants and children are growing and developing,” “[t]heir metabolic rates are more rapid than adults,” and “[t]here are differences in their ability to activate, detoxify, and excrete xenobiotic compounds.” *See Kids’ Petition* (citing NAS, *Pesticides in the Diets of Infants and Children 3-7* (1993) (hereinafter “NAS Report”)). Children are also at heightened vulnerability because they “eat and

drink more than adults” in relation to their body weight, they consume large quantities of certain fruits and vegetables, and engage in risky behaviors “such as playing on floors or lawns or putting objects in their mouths.” *Id.* at 5 (citing EPA, *Pesticides and Food: Why Children May be Especially Sensitive to Pesticides* (Mar. 2008)). The NAS Report found EPA failed to assess children’s unique exposures to pesticides and their special susceptibilities to the adverse health effects of such exposures at various stages of development. *Id.* (citing NAS Report 3-7). Recent EPA-funded research confirmed and strengthened the NAS findings. *Id.* (citing Centers for Children’s Environmental Health & Disease Prevention Research, *Exposures & Health of Farm Worker Children in California*; EPA, *Children’s Exposure to Pesticides and Related Health Outcomes*).

One of the many routes by which children are exposed to pesticides is through pesticide drift. The NAS observed that “[e]xposure to pesticide residues from ambient air sources is generally higher in areas close to agricultural lands and in communities surrounding pesticide manufacturing factories” and also “movement of the more volatile chemicals present potentially significant human exposure.” *Id.* To guard against harms associated with pesticide exposures, NAS recommended “exposure from all sources—not just ingestion—must be considered when estimating total [pesticide] exposure and risk to children.” *Id.* at 5-6.

Poisoning incidents and air monitoring reports show pesticide drift is a risk

to people, particularly children. Epidemiological studies link pesticide drift to adverse health effects in humans, including autism spectrum disorders, Parkinson’s disease, and childhood acute lymphoblastic leukemia. *Id.* at 8 & nn.24-26 (citations omitted.) The California Department of Pesticide Regulation (“CDPR”) documented 3,997 reported pesticide drift incidents in California between 1992 and 2007. *Id.* at 8 (citing Cal. Dep’t of Pesticide Regulation, *California Pesticide Illness Query*). In 2006, the Washington State Pesticide Incident Reporting and Tracking Review Panel found that “[e]xposure to pesticide drift is an important cause of documented pesticide-related illness in Washington.” *Id.* at 7-8 (citing Washington State Pesticide Incident Reporting and Tracking Review Panel, *Annual Report: 2005*, at 81 (May 2007); Barbara Morrissey, Washington State Dep’t of Health, *Spray Drift and Human Health Incidents*).³

Monitoring and modeling studies confirm pesticide drift may pose significant health risks to children who live near fields. *Id.* at 8. For example:

- In 2007, air monitoring conducted near Southwoods Elementary School in Hastings, Florida, detected four pesticides—endosulfan (now cancelled), diazinon, trifluralin, and chlorothalonil. At least one pesticide was found in each of the 39 samples, with three or four of the pesticides detected in 74% of samples, sometimes at levels exceeding levels of concern based on end points selected by the EPA. *Id.* at 9.

³ Pesticide incidents are notoriously underreported. Kids’ Petition 8 & n.23.

- In 2006 and 2007, air monitoring at homes and an elementary school in rural Minnesota detected chlorothalonil—a fungicide EPA has classified as a “probable” carcinogen—in 123 of the 186 samples analyzed. *Id.*
- In Spring 2006, air monitoring in the Yakima Valley of Washington State, detected chlorpyrifos—an acutely toxic organophosphate insecticide associated with developmental harm to children—in amounts exceeding levels of concern derived from EPA selected endpoints and including EPA’s FQPA safety factor. *Id.* (citing Farm Worker Pesticide Project & Pesticide Action Network North America, *Poisons on the Wind: Community Air Monitoring for Chlorpyrifos in the Yakima Valley* (Dec. 2006)).
- Monitoring in Lindsay, California, found chlorpyrifos in the air at levels exceeding the level of concern for children by up to 7.9 times in 2004, and up to 6.6 times in 2005. *Id.* (citing Pesticide Action Network North America, *Air Monitoring in Lindsay, California* (July, 2006)).

Because EPA has failed to take action, families living, working and going to school near agricultural areas continue to be exposed to pesticide drift:

- Manuel Silveira and his family continue to suffer from pesticide drift events in their California community even after the filing of the Kids Petition. *See* Decl. of Manuel Silveira, served and filed with this Petition.
- In the summer of 2012, again, years after the filing of the Kids Petition, Bonnie Wirtz suffered a pesticide drift event at her rural home in Minnesota. Bonnie’s infant son was also likely exposed. *See* Decl. of Bonnie Wirtz, served and filed with this Petition.
- Howard Hurst works at a school in Hawai’i where he and children at the school have been repeatedly exposed to drifting pesticides from nearby agricultural test fields. *See* Decl. of Howard Hurst, served and filed with this Petition.

While EPA was required to consider all potential exposures to children when registering pesticides under FIFRA and the FQPA, EPA failed to consider

pesticide drift in its FQPA tolerance review that was to be *completed by 2006*.

EPA has not corrected this oversight.⁴

PROCEDURAL HISTORY

On October 13, 2009, the Kids' Petition presented evidence to EPA that EPA had failed to assess children's exposures to drift and therefore had failed to assess whether registered pesticides posed unreasonable risks to children. The Coalition asked EPA to immediately address this oversight and while doing so through registration reviews, to implement no-spray buffer zones around homes, schools, daycares, playgrounds and other places where children were present or congregated. *See id.* at 1; Reeves Decl. Ex. A.

⁴ Sporadic, limited action on individual pesticides cannot count as a response to this petition. For example, EPA is currently engaged in a drawn-out registration review for chlorpyrifos, the subject of another petition to which it has not responded. *See In re Pesticide Action Network of N. Am. v. Env'tl. Prot. Agency*, Case No. 12-71125. In 2012, EPA finally started to consider pesticide drift in the chlorpyrifos context, six years after it was supposed to complete such review under the FDCA, and three years after the filing of the Kids' Petition. As found in studies published in 2012 and submitted by PANNA to EPA in further support of the Kids' Petition, organophosphate pesticide drift continues to turn up in the urine of children living near agricultural areas. Bradman, Asa, R. Castorina, D. Boyd Barr, J. Chevrier, M.E. Harnly, E. A. Eisen, T. E. McKone, K. Harley, N. Holland, and B. Eskenazi, *Determinants of Organophosphorus Pesticide Urinary Metabolite Levels in Young Children Living in an Agricultural Community*, 8 *Int. J. Environ. Res Public Health*, No. 4 (April 2011) and Coronado, Gloria D., S. Holte, E. Vigoren, W.C. Griffith, D. Boyd Barr, E. Faustman, and B. Thompson, *Organophosphate Pesticide Exposure and Residential Proximity to Nearby Fields—Evidence for the Drift Pathway*, 52 *J. Occup. Environ. Med.* No. 8 (August 2011). While EPA hunts and pecks its way through registration reviews, generations of kids are exposed to pesticide drift for potentially decades after the FDCA required EPA to act.

Shortly after receiving the Kids' Petition, EPA published a notice of availability of the Kids' Petition for public comment on November 4, 2009. 74 Fed. Reg. 57,168 (Nov. 4, 2009). EPA has not responded to those comments, has not responded to the Kids' Petition, and has not imposed the requested interim measures to protect children from pesticide drift, such as buffer requirements around areas where children congregate. Reeves Decl. ¶ 17.⁵

SUMMARY OF ARGUMENT

EPA has a clear statutory duty under the APA to respond to the Kids' Petition within a reasonable time. Coalition members' children, who live, play, or attend school near areas where pesticides are used, are suffering ongoing harm. A writ of mandamus under the six factors identified by the Court in *TRAC v. FCC* is the only remedy that will adequately cure the injury the Coalition has suffered as a result of EPA's delay.

STANDING

The Coalition's standing to seek a writ of mandamus in this case is based on the procedural injury each organization has suffered while trying to protect the underlying health interests of its members and their children.

To satisfy Article III's standing requirements, a petitioner must show (1) it

⁵ Again, while EPA recently set some minimal buffers limited to chlorpyrifos as part of a separate action, *see supra* n.4, that action was not in response to the Kids' Petition and does not constitute a response.

has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the respondent; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000); *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003).

To establish the “injury in fact” prong of standing in a case alleging procedural harm, a petitioner must show: (1) the respondent agency violated certain procedural rules; (2) these rules protect petitioner’s concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests. *See Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171-72 (9th Cir. 2011) (citing *Citizens for Better Forestry*, 341 F.3d at 969-70). A party that “has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992).

EPA’s failure to respond to the Kids’ Petition has caused ongoing injury that only a writ from this Court can remedy. PANNA is a human health and environmental protection organization with over 90,000 members nationwide. Reeves Decl. ¶ 3. It is dedicated to preventing harm to the public from pesticides

and challenging the proliferation of pesticides. Reeves Decl. ¶¶ 2-3. Petitioners United Farm Workers (“UFW”) and Piñeros y Campesinos Unidos del Noroeste (“PCUN”) are organizations of farmworkers with multiple offices and members throughout the United States, dedicated to serving the needs of farmworkers including protecting their health and the health of their families from pesticide exposures. Declaration of Erik Nicholson, UFW ¶¶ 2-3; Declaration of Ramon Ramirez, PCUN ¶ 4. PANNA’s, UFW’s and PCUN’s members include individuals who live and/or work near agricultural areas where pesticides are used, some of whom have been directly exposed to the pesticide through spray drift. Reeves Decl. ¶¶ 8 and 13; Nicholson Decl. ¶¶ 4 and 6; Ramirez Decl. ¶¶ 5-11. *See also*, Declaration of Bonnie Wirtz ¶¶ 3-5; Declaration of Howard Hurst ¶¶ 3-6; Declaration of Manuel Silveira ¶¶ 3, 6, and 11. Their members’ past and continuing exposure is detailed in the accompanying declarations. *Id.* Parents who are aware of pesticide risks are nevertheless unable to protect their children from exposure to spray drift because there are no consistent buffer requirements, no assessment of the risks of drift to children living or going to school or daycare near application sites, and because places children frequent are near agricultural sites where pesticides are used. Reeves Decl. ¶¶ 12-13; Silveira Decl. ¶¶ 9 and 11; Hurst Decl. ¶¶ 12 and 14. A writ of mandamus compelling the EPA to take action would redress the harm suffered by the Coalition groups’ members exposed to

pesticide drift along with their children who are unable to fully protect themselves and their families from that exposure. Reeves Decl. ¶ 18; Nicholson Decl. ¶ 7; Ramirez Decl. ¶ 14; Silveira Decl. ¶¶ 12-13; Hurst Decl. ¶¶ 14-15.

Physicians for Social Responsibility (“PSR”) is a national nonprofit organization of physicians, nurses, other health practitioners, public health professionals, and other concerned citizens working to protect human life, with approximately 50,000 members nationwide. Declaration of Barbara Gottlieb ¶ 2. PSR members live and work in communities affected by pesticide drift, caring for children with a wide array of health issues. PSR’s Environment and Health program educates health professionals and the public and advances policies to reduce the toxic contamination of the environment and to reduce and prevent exposure to toxic chemicals. *Id.* PSR has published articles that focus specifically on pesticide drift, the health effects of airborne pesticides on rural residents, and the health effects of pesticides on children. Those articles note that pesticide drift is one of the pathways for child exposure to pesticides, potentially resulting in dermal exposure, inhalation, and oral ingestion. *Id.* ¶ 4. PSR members also educate doctors, nurses, and other health practitioners about the dangers to children of pesticide exposure by preparing and disseminating resource materials such as PSR’s Pediatric Environmental Health Toolkit, a clinical tool designed to provide guidance to healthcare providers and to patients (or to patients’ parents) on

preventing exposures to pesticides and other substances that may affect child health. Gottlieb Decl. ¶ 7. PSR chapters in heavily agricultural states engage in addressing issues related to children's exposure to pesticide drift, especially in communities disproportionately impacted by environmental toxicants. Gottlieb Decl. ¶ 8. As a particular example, Florida PSR has conducted special outreach trainings to raise awareness of pesticide exposures among the personnel of the Head Start program serving the children of migrant agricultural workers in that state. *Id.* EPA's failure to assess and address pesticide drift interferes with PSR's ability to effectively protect members' patients and to provide useful protective information to PSR members working in communities heavily impacted by pesticide drift. Gottlieb Decl. ¶¶ 10, 11, and 13.

PANNA, UFW, PCUN, and PSR also each satisfy the requirements for organizational standing. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 862 n.16 (9th Cir. 2011). Members of PANNA, UFW, and PCUN would have standing to sue in their own right, because of the injuries described above. *See generally* Hurst, Wirtz, Silveira, Nicholson, and Ramirez Decls. Further, the interests the Coalition seeks to protect are germane to each organization's purposes, *see generally*, Reeves, Nicholson, Ramirez, and Gottlieb Decls. and the litigation will not require the participation of individual members. *Hunt*, 432 U.S. at 343.

ARGUMENT

I. A WRIT OF MANDAMUS IS THE ONLY REMEDY THAT WILL ADEQUATELY ENFORCE EPA'S DUTY TO RESPOND TO THE KIDS' PETITION.

This Court employs a three-part test to determine whether to grant mandamus relief: (1) the petitioner's claim is clear and certain; (2) the duty is so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. *In re Cal. Power Exch. Corp.*, 245 F.3d at 1120 (citing *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995); *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986)). This Court has also noted that in the case of a petitioner seeking a writ of mandamus for unreasonable delay, "the standards for mandamus ... are, at least in form, somewhat different than the traditional three-part mandamus test." *Id.* at 1125 (applying the six-factor *TRAC* test). The Coalition prevails under either test.

EPA has a clear statutory duty to act in response to the Kids' Petition. Under FIFRA, EPA has an obligation to assess and protect against unreasonable risks to human health such as the many risks posed by pesticide drift and must register a pesticide before it can be sold or used in the United States. 7 U.S.C. § 136a. To register or reregister a pesticide for use, EPA must ensure that the chemical will perform its intended function without causing any "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). FIFRA defines

this standard as “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide” 7 U.S.C. § 136(bb)(1). In applying this standard, EPA must undertake a comprehensive assessment of all risks from a pesticide encompassing “every relevant factor that the Administrator can conceive into account,” including pesticide drift. *See* S. Rep. No. 92-838, *reprinted in* 1972 U.S.C.C.A.N. 3993, 4032-33. The Food Quality Protection Act amended FIFRA’s “unreasonable adverse effects” definition to include “a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the [FQPA] standard.” 7 U.S.C. § 136(bb)(2). *See also* EPA, *General Principles for Performing Aggregate Exposure and Risk Assessments*, at 9 (Nov. 28, 2001) (“The FQPA-amended FIFRA also speaks to the requirement that [EPA] evaluate risks on an aggregate basis.”). EPA can impose use restrictions as necessary to meet the ‘no unreasonable adverse effects’ standard, which are included on the legally enforceable pesticide label.⁶ The August 2006 deadline for bringing food-use pesticides into compliance with the Food Quality Protection Act extended to both tolerances under the FDCA and registrations under FIFRA. *See* 21 U.S.C.

⁶ Use restrictions are set out on the EPA-approved label affixed to the product. If EPA determines that a pesticide registration does not comply with FIFRA, it may cancel the pesticide’s registration or amend the registration to require additional safeguards. 7 U.S.C. § 136d(b).

§ 346a(q)(1)(C) (deadline); 7 U.S.C. § 136d(b).⁷

EPA has not denied that it failed to include pesticide drift exposures in assessing the risk of pesticides by the 2006 deadline now seven years past. While EPA has a menu of options available for responding to the Kids' Petition, simply refusing or failing to respond is not permissible. The Coalition has no remedy other than mandamus. With no regulation or order to which the Coalition can object, *see supra*, the only option is to seek judicial review under the APA. *See* 5 U.S.C. § 706.

II. A WRIT OF MANDAMUS IS JUSTIFIED UNDER THE EQUITABLE FACTORS ESTABLISHED BY *TRAC V. FCC*.

The Ninth Circuit has adopted a flexible, six-factor test for judging whether to compel agency action on the basis of unreasonable delay based on the D.C. Circuit's *TRAC* decision. *In re Cal. Power Exch. Corp.*, 245 F.3d at 1124-25 (noting that the Ninth Circuit has "adopted the *TRAC* guidelines"); *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (applying the *TRAC* factors to assess whether APA relief for unreasonable delay was appropriate). The six *TRAC* factors are:

(1) the time agencies take to make decisions must be governed by a "rule of reason"[;]

⁷ EPA's duty to protect children and to ensure environmental justice is heightened by the requirements of the Executive Orders. Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 23, 1997); Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;]

(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;]

(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;]

(5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and

(6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.”

Independence Mining Co., 105 F.3d at 507 n.7 (quoting *TRAC*, 750 F.2d at 80)

(internal citations omitted). When these factors are applied here, it is clear that the Court should order EPA to respond to the Kids’ Petition.

A. EPA’s Three-and-a-Half-Year Delay in Responding to the Kids’ Petition is Excessive.

The first, “and most important” *TRAC* factor, is the guiding principle: “the time agencies take to make decisions must be governed by a ‘rule of reason.’” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (citing *TRAC*, 750 F.2d at 80). Although “[t]here is no per se rule as to how long is too long to wait for agency action,” *id.* at 855, a number of Circuits have stated that “a reasonable time for an agency decision should encompass ‘months, occasionally a year or two, but not several years or a decade.’” *In re American Rivers*, 372 F.3d 413, 419

(D.C. Cir. 2004) (“FERC’s six-year-plus delay is nothing less than egregious.”) (citing *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)); *Pub. Citizen Health Research Group v. Chao*, 314 F.3d 143, 153 (3d Cir. 2002) (same)). This Court has noted “[t]he cases in which courts have afforded relief have involved delays of years, not months.” *In re Cal. Power Exch. Corp.*, 245 F.3d at 1125. Further, at least one Circuit Court of Appeals has found that an agency delay of three years was unacceptable where human health was at risk. *See Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1154, 1157 (D.C. Cir. 1983) (requiring federal agency to issue a workplace standard governing exposure to a potential mutagen/carcinogen on an expedited schedule).

In this case, EPA’s three-and-a-half-year delay in responding to the Kids’ Petition—with no end to the delay in sight—violates the rule of reason. *See Biodiversity Legal Found. v. Norton*, 285 F. Supp. 2d 1, 16-17 (D.D.C. 2003). (“[An] ambiguous, indefinite time frame for review of [a] petition [can] constitute[] unreasonable delay within the meaning of APA § 706(1)”) (citations omitted). There is no dispute that EPA has not responded to the Kids’ Petition, Reeves Decl. ¶ 17.⁸

⁸ This Court recently denied mandamus where EPA had “set forth a concrete timeline for final agency action” and had “pointed to concrete steps” taken on that petition. *See In re Pesticide Action Network N. Am.*, No. 12-71125, slip op. at 4 (9th Cir. July 10, 2013). EPA has taken no such steps in this case. Here, unlike with the chlorpyrifos cancellation petition, there is a clear statutory requirement to

B. EPA's Delay Is Unreasonable in Light of the FIFRA and FDCA Requirements That EPA Protect Children and Infants From Pesticides No Later Than 2006.

TRAC provides that “where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason.”

Independence Mining Co., 105 F.3d at 507 n.7 (quoting *TRAC*, 750 F.2d at 80).

Under the FQPA amendments to the FDCA, EPA can establish a pesticide tolerance only if the agency has determined that “there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.” 21 U.S.C. § 346a(b)(2)(A)(ii). To ensure that then-existing pesticides would comply with the new safety standard, Congress instructed EPA to reassess the tolerances and review the registrations for all pesticides by 2006. *Id.*

§ 346a(q)(1); 7 U.S.C. § 136a(g)(1).

Although FIFRA does not provide a fixed deadline for EPA to respond to a petition like the Kids' Petition (to address an admitted failure to comply with the

consider pesticide drift as part of EPA's obligations under the FDCA, required to be completed by 2006 and which EPA admits it failed to do. *See supra* Argument section I. The Court in the chlorpyrifos cancellation case also decided that where EPA had found chlorpyrifos safe at current levels, there was no health or human safety rationale for granting that petition. *See In re Pesticide Action Network N. Am.*, No. 12-71125, slip op. at 5. Also here, unlike the chlorpyrifos cancellation, EPA has made no such determination, and, indeed, it is EPA's complete lack of consideration of spray drift that the Kids' Petition challenges and which is a current and ongoing health risk, especially for rural and farmworker children.

statutory requirements), the FDCA 2006 deadline for EPA to complete assessment of children's exposures and to curtail unsafe exposures as part of the FIFRA process is relevant. Over six years have elapsed since EPA should have first addressed drift as part of its FDCA obligations. Further, the broad protective goal of FIFRA generally requires a focus on protection for children and other sensitive populations. This statutory focus supplies the context for gauging the unreasonableness of EPA's delay in this case. *See Auchter*, 702 F.2d at 1158 n.30 (D.C. Cir. 1983) ("The reasonableness of the delay must be judged 'in the context of the statute' which authorizes the agency's action.") (citing *Nat'l Congress of Hispanic Am. Citizens v. Marshall*, 626 F.2d 882, 888 (D.C. Cir. 1979)).

EPA's three-and-a-half-year delay in responding to the Kids' Petition (and six-and-a-half year delay in complying with its statutory obligations) is unreasonable in light of the broad, protective purposes of FIFRA and FDCA's focus on the health of children. The Kids' Petition cites studies indicating that pesticide drift exposures are a significant and ongoing problem. Kids' Petition at 1-10. It highlights that EPA has failed to consider drift exposures in setting pesticide tolerances, which likely leads to unacceptable risks to children from some pesticides and because EPA has not developed protections for children from pesticide drift exposures.⁹ *Id.* at 1-10. Each year agricultural communities report

⁹ EPA's worker protection label language is plainly ineffective given the frequency

harm resulting from pesticide drift incidents. *See, e.g.*, Kids' Petition at 7-10. *See also* Silveira, Hurst, and Wirtz Decls. Since well before the Kids' Petition and the 2006 statutory deadline for EPA to assess and take action to protect children from spray drift, evidence has demonstrated a link between exposure to various pesticides and adverse health effects. Kids' Petition at 8; Reeves Decl. ¶ 16.

When gauged in the statutory context of FIFRA, the FDCA, and the Executive Orders' broad, child-health protection focus, EPA's delay is even more egregious. *See Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987) (“[T]he court must also estimate the extent to which delay may be undermining the statutory scheme. . .”); *Auchter*, 702 F.2d at 1154 (finding three-year delay unreasonable); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 414 (finding six-year delay unreasonable). A writ of mandamus will force EPA to address the well-documented dangers posed by pesticide drift that is a regular event in agricultural areas across the country.

C. The Kids' Petition Bears on Human Health and Welfare.

EPA's delay is even less tolerable because the Kids' Petition directly relates to human health and welfare, as opposed to economic injury. *See Independence Mining Co.*, 105 F.3d at 507 (citing *TRAC*, 750 F.2d at 80). *See also Auchter*, 702 F.2d at 1157-58 (noting that delay is particularly unreasonable where purpose

of drift events even with that language in place. Kids' Petition at 5-7.

of governing statute is to protect public health). A growing number of epidemiological studies link pesticide drift to specific adverse health effects in humans, including autism spectrum disorders, Parkinson's disease, and childhood acute lymphoblastic leukemia. Kids' Petition at 8, n.24-26; Reeves Decl. ¶¶ 6 and 8; Gottlieb Decl. ¶ 6. The consequences of acute exposure to pesticides can include dizziness, seizures, abdominal cramps, vomiting, diarrhea, cessation of breathing, paralysis, and even death. *Id.* See also Hurst and Silveira Decls. The chronic effects of longer term or repeated exposures can include cancers, developmental difficulties and neurological problems. Kids' Petition at 5 and 8.

Under the FQPA, before EPA can allow a pesticide residue on a food, the agency must “ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure” to the pesticide. 21 U.S.C. §§ 346a(b)(2)(C)(ii)(I), (II). The FQPA defines “aggregate exposure” to include “all anticipated dietary exposures and *all other exposures* for which there is reliable information.” 21 U.S.C. § 346a(b)(2)(A)(ii) (emphasis added). To implement the statutory mandate, EPA has developed a “risk cup” approach that first quantifies the exposure level for a pesticide that would exceed the safety standard for specific population groups, including fetuses, infants, and children in different age ranges. Kids' Petition at 11. EPA then adds up exposures from various sources and if aggregate exposures to the pesticide from non-occupational

sources “overflow” the risk cup for a particular subpopulation, the pesticide does not meet the FQPA safety standard. *Id.* EPA will then look for ways to reduce exposure by, for example, eliminating some uses to reduce total exposure to levels that meet the safety standard. *Id.* Full risk cups have been the driving force behind pesticide cancellations and use limitations. *Id.* at 11-12 & nn.42-44. For example, in May 2009, EPA revoked all tolerances for carbofuran after determining that “estimated exposures significantly exceeded EPA’s level of concern for children.” 74 Fed. Reg. 23,046, 23,052 (May 15, 2009). However, because EPA has failed to include drift exposures in its risk cup analysis for pesticides in the same situation as carbofuran, EPA has left children unprotected who are exposed to many of these same chemicals that drift from agricultural sites.¹⁰

This evidence demonstrates that EPA’s delay of over three years is unreasonable, ignoring the risks to children from pesticide drift, in clear violation

¹⁰ Chlorpyrifos was determined to have an over-full risk cup, as far back as 2000. At that time, EPA cancelled residential and home and garden uses of chlorpyrifos, but, failing to properly include pesticide drift exposures, left rural children less protected. *See* 65 Fed. Reg. 56,886 (Sept. 20, 2000) and 66 Fed. Reg. 57,073 (Nov. 14, 2001) (where EPA determines that only with the cancellations will chlorpyrifos not overflow the risk cup). In 2012, twelve years after the initial determination that children were exposed to dangerous risks from chlorpyrifos, six years after it should have completed its FQPA assessment, and three years after the filing of the Kids’ Petition, EPA imposed interim minimal spray buffers for chlorpyrifos. EPA, Spray Drift Mitigation Decision for Chlorpyrifos (July 16, 2012), *available at* <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2008-0850-0103>.

of EPA's statutory obligations to ensure children are protected and there is no unreasonable risk to human health from registered pesticides. "When lives are at stake," the agency "must press forward with energy and perseverance in adopting regulatory protections." *Pub. Citizen Health Research Group. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987). An agency delay of more than three-and-a-half years (six-and-a-half years from the statutory obligation of 2006) where human health is at risk is unacceptable. *See Auchter*, 702 F.2d at 1154, 1157. It is unreasonable, in the face of EPA's knowledge and understanding of pesticides and drift, for EPA to continue to delay protection for children.

D. No Competing Priorities Justify EPA's Delay.

Federal agencies invariably face the challenge of limited resources with which to address competing priorities. Courts must bear this in mind while weighing the reasonableness of agency delay in responding to requests for action. *See TRAC*, 750 F.2d at 80. Here, however, EPA has never stated that competing priorities or limited resources would interfere with reaching a decision on the Kids' Petition. Rather, EPA has long identified pesticide drift as a problem, inadequately addressed by existing labels, Kids' Petition at 7-8, and has identified pesticides such as those in the organophosphate and carbamate families as posing the greatest risks to public health, even without having assessed exposures from drift. *See Kids' Petition* at 23-25. *See also*, 62 Fed. Reg. 42,020, 42,021 (Aug. 4, 1997)

(placing organophosphate pesticides in the first category for tolerance reassessments “which based on the best available information to date appear to pose the greatest risk to the public health”). Despite EPA itself recognizing the priority nature of the drift exposure threat, EPA has, after years, made only minimally-protective changes for one pesticide—chlorpyrifos—related to drift.

Courts have recognized that claims of competing agency priorities cannot be used to delay action indefinitely. The D.C. Circuit held in *In re United Mine Workers* that “[h]owever many priorities the agency may have, and however modest its personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction in the face of the congressional command to act” 190 F.3d 545, 554 (D.C. Cir. 1999). It is appropriate here for this Court to “let [the] agency know, in no uncertain terms, that enough is enough.” *Brock*, 823 F.2d at 627 (imposing a one-year deadline on OSHA, following a five-year delay). In *In re Int’l Chem. Workers Union*, the D.C. Circuit retained jurisdiction to enforce deadlines for agency action where the agency had delayed regulating cadmium exposure. 958 F.2d 1144, 1150 (D.C. Cir. 1992).

In light of the amount of time that has passed since the agency was required to assess risks to children and protect them against that risk (nearly seven years), any argument of competing agency priorities rings hollow. *See In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (stating that the agency’s

“asserted justifications for the delay become less persuasive the longer the delay continues”). Moreover, justifications for delay “must always be balanced against the potential for harm.” *Cutler*, 818 F.2d at 898. In this case, the consequences of inaction on public health are serious. EPA should move expeditiously to respond to the Kids’ Petition and impose protective no-spray buffers around homes, schools, daycares and play areas.

E. The Harm Caused by EPA’s Delay Is Serious and Wide-Ranging.

The fifth *TRAC* factor, the nature and extent of the harm caused by delay, weighs strongly in favor of issuing a writ of mandamus in this case. EPA’s failure to respond to the Kids’ Petition perpetuates the underlying harm suffered by the Coalition’s members and the general public, namely, exposure to pesticide drift magnifying the already elevated risks to them from multiple exposures to pesticides. *See* Reeves Decl. ¶¶ 13 and 18; Nicholson Decl. ¶¶ 5-6; Gottlieb Decl. ¶¶ 10-11 and 13. From Hawai’i to California to Washington to Oregon to Minnesota, the Coalition’s members are justifiably concerned about the health effects of drift exposure to themselves and their children. *See* Reeves Decl. ¶¶ 13-18; Hurst Decl. ¶¶ 6, 8-9, 12-13; Wirtz Decl. ¶¶ 6-8; Silveira Decl., ¶¶ 7, 11, and 13; Gottlieb Decl. ¶ 11; Ramirez Decl. ¶¶ 5-12. Numerous scientific studies establish that various pesticides pose risks of a range of serious human health effects. Kids’ Petition at 8; Reeves Decl. ¶¶ 6 and 8; Gottlieb Decl. ¶ 6. Infants

and young children are particularly susceptible to pesticide exposures. Kids' Petition at 4-5; Reeves Decl. ¶¶ 6 and 8. Each day that EPA delays action on the Kids' Petition, the Coalition's members are unwittingly and involuntarily coming into contact with pesticides that drift from their application sites.

F. The Court Need Not Find Any Impropriety Behind EPA's Delay to Grant Mandamus.

EPA need not be acting in bad faith for the Court to grant the Coalition's petition for writ of mandamus. *In re Cal. Power Exch. Corp.*, 245 F.3d at 1124 (citing *TRAC*, 750 F.2d at 80). While EPA's delay in the face of these facts is inexplicable, it does not matter for the purposes of this Court's judgment. Regardless of whether EPA's inaction is in bad faith or simply a failure of diligence, the delay here is unreasonable in light of the urgent human health threats to children exposed to pesticide drift.

CONCLUSION

The Coalition and its members are entitled to a response to the Kids' Petition in a timely fashion. EPA has failed in its statutory obligations to assess all children's exposures to pesticides, including drift, and it has unreasonably delayed in providing a response to the Kids' Petition. The Coalition respectfully asks this Court to order EPA to fully and quickly respond to the Kids' Petition within 60 days of the Court's order.

Respectfully submitted this 24th day of July, 2013.

s/ Janette K. Brimmer

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for Petitioners Pesticide Action Network North America, United Farm Workers, Piñeros y Campesinos Unidos del Noroeste, and Physicians for Social Responsibility, are aware of no cases related to this petition pending before this Court.

Respectfully submitted this 24th day of July, 2013.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington.

I am over 18 years of age and not a party to this action. My business address is
705 Second Avenue, Suite 203, Seattle, Washington 98104.

On July 24, 2013, I served a true and correct copy of:

1. Petition for a Writ of Mandamus and for Relief From Unreasonably Delayed Agency Action by the Environmental Protection Agency;
2. Declaration of Barbara Gottlieb in Support of Petition for a Writ of Mandamus and for Relief From Unreasonably Delayed Agency Action by the Environmental Protection Agency;
3. Declaration of Howard Hurst in Support of Petition for a Writ of Mandamus and for Relief From Unreasonably Delayed Agency Action by the Environmental Protection Agency;
4. Declaration of Erik Nicholson in Support of Petition for a Writ of Mandamus and for Relief From Unreasonably Delayed Agency Action by the Environmental Protection Agency;
5. Declaration of Ramon Ramirez in Support of Petition for a Writ of Mandamus and for Relief From Unreasonably Delayed Agency Action by the Environmental Protection Agency;
6. Declaration of Margaret Reeves in Support of Petition for a Writ of Mandamus and for Relief From Unreasonably Delayed Agency Action by the Environmental Protection Agency;
7. Declaration of Manuel Silveira in Support of Petition for a Writ of Mandamus and for Relief From Unreasonably Delayed Agency Action by the Environmental Protection Agency;
8. Declaration of Bonnie Wirtz in Support of Petition for a Writ of Mandamus and for Relief From Unreasonably Delayed Agency Action by the Environmental Protection Agency; and
9. Motion for Leave to File Exhibits Via Compact Disc.

on the following parties:

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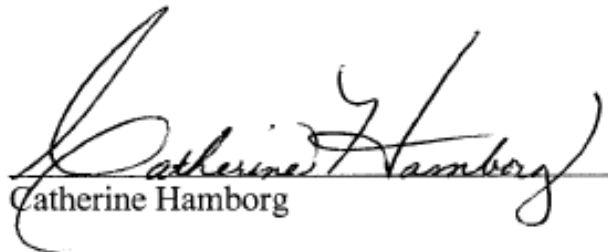
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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 24th day of July, 2013, at Seattle, Washington.


Catherine Hamborg