

No. 14-72794

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE PESTICIDE ACTION NETWORK NORTH AMERICA
AND
NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITIONERS' MOTION FOR FURTHER MANDAMUS RELIEF

PATTI A. GOLDMAN
KRISTEN L. BOYLES
Earthjustice
705 Second Avenue, Suite 203
Seattle, Washington 98104-1711
(206) 343-7340 | Phone
(206) 343-1526 | Fax
pgoldman@earthjustice.org
kboyles@earthjustice.org

*Attorneys for Petitioners Pesticide Action
Network North America and Natural
Resources Defense Council, Inc.*

INTRODUCTION

On August 10, 2015, this Court issued a writ of mandamus to put an end to respondent Environmental Protection Agency's "egregious" delay in responding to a 2007 petition to revoke all food tolerances and cancel all registrations of chlorpyrifos, a neuro-toxic pesticide. *In re Pesticide Action Network North America v. EPA*, 798 F.3d 809, 811 (9th Cir. 2015). Noting that EPA had "backtracked significantly" from its 2006 finding that chlorpyrifos was safe and had found that a nationwide ban might be justified to protect people from drinking water contamination, the Court held that EPA offered no acceptable justification for further delay and gave EPA until October 31, 2015 to either (1) issue a proposed or final revocation rule, or (2) deny the petition filed by Pesticide Action Network of North America and Natural Resources Defense Council ("PAN/NRDC"). *Id.* at 814-15. In response, EPA proposed to revoke all food tolerances due to drinking water contamination. 80 Fed. Reg. 69,080 (Nov. 6, 2015). In a subsequent order, the Court directed EPA to take final action by December 30, 2016. Order of Dec. 10, 2015 (Dkt. No. 29). When EPA sought an additional six months to conduct further scientific assessments, the Court called the request "another variation on a theme 'of partial reports, missed deadlines, and vague promises of future action' that has been repeated for the past nine years." Order of Aug. 12, 2016 (Dkt. No. 51) (quoting *In re Pesticide Action Network*, 798

F.3d at 811). The Court directed EPA to take final action by March 31, 2017, and made it clear it would not grant any further extensions. *Id.* The Court expressly retained jurisdiction over any further proceedings related to this petition.

Instead of finalizing the proposed revocation order by that deadline, EPA issued an order entitled “Chlorpyrifos: Order Denying PANNA and NRDC’s Petition to Revoke Tolerances” (“EPA Response”) (Attachment 1). EPA’s Response, however, did not make a final determination as to whether chlorpyrifos food tolerances must be revoked. Instead, EPA decided that it preferred to engage in further study of the neuro-developmental harm to children from chlorpyrifos before finalizing the October 2015 proposed revocation rule or taking an alternative regulatory path. *Id.* at 36-37. EPA acknowledged that it had “been unable to persuade the 9th Circuit Court of Appeals that further inquiry into this area of unsettled science should delay EPA’s response to the Petition,” *id.* at 35, but claimed: “the court’s order does not and cannot compel EPA to complete registration review of chlorpyrifos in advance of the October 1, 2022 deadline provided in section 3(g) of FIFRA [Federal Insecticide, Fungicide and Rodenticide Act], 7 U.S.C. § 136a(g),” for completing registration review of pesticides registered prior to 2007. EPA Response at 36.

PAN/NRDC seek further relief from this Court because EPA’s response to the petition is no response at all and certainly not what this Court ordered EPA to

do by March 31, 2017. To recap, EPA completed a risk assessment in December 2014, finding unsafe drinking water contamination from chlorpyrifos; it proposed revoking all food tolerances on October 30, 2015 because it could not find that chlorpyrifos is safe; and it reiterated its determination that all chlorpyrifos tolerances had to be revoked based on its updated risk assessment in November 2016 – a risk assessment that found the risks even greater than previously documented. In refusing to act, EPA made no new safety findings, nor could it find chlorpyrifos safe given the extensive scientific record documenting hazards from chlorpyrifos. Because EPA has sidestepped this Court’s orders and failed to act on the substance of the petition, PAN/NRDC respectfully ask the Court to grant further mandamus relief, giving EPA 30 days to act on its findings that chlorpyrifos exposures are unsafe and to establish deadlines for the next steps in the revocation and cancellation processes for chlorpyrifos.

I. EPA’S FINDINGS THAT CHLORPYRIFOS IS NOT SAFE AND THIS COURT’S ORDERS COMPEL IT TO TAKE REGULATORY ACTION NOW, NOT ENGAGE IN FURTHER STUDY.

The Food Quality Protection Act (“FQPA”) establishes a precautionary approach to food safety that imposes affirmative obligations on the EPA Administrator to act to prevent unsafe exposures to pesticides. First, the EPA Administrator “may establish or leave in effect a tolerance for a pesticide chemical residue in or on food only if the Administrator determines that the tolerance is safe.

The Administrator shall modify or revoke a tolerance if the Administrator determines it is not safe.” 21 U.S.C. § 346a(b)(A)(i). The FQPA’s mandates are action-forcing once EPA has made a finding that a pesticide is not safe.¹

Second, safe “means the Administrator has determined there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.” *Id.* § 346a(b)(2)(A)(ii). Scientific uncertainty can preclude a finding that a pesticide is safe, but cannot be a basis for exposing people to potentially unsafe food.

Third, the FQPA directs EPA to act on the basis of available information on the special susceptibility of infants and children, including neurological differences between adults and infants and children, and EPA must apply an additional tenfold margin of safety to account for gaps in data or evidence of pre- or post-natal toxicity to children. *Id.* § 346a(b)(2)(C). Again, Congress directed EPA to act to

¹ In its Response at 28, EPA incorrectly asserts that PAN/NRDC bear the burden of proving that chlorpyrifos is unsafe, but the FQPA places the burden on EPA to find a pesticide is safe. EPA also argues that it need not apply a tenfold FQPA safety factor based on its 2006 risk assessment, even though it has since determined in its 2014 and 2016 risk assessment and proposed tolerance revocations that a tenfold FQPA safety factor is required to protect children from prenatal neuro-developmental harm from chlorpyrifos. EPA Response at 28-30. As this Court recognized, EPA “has backtracked significantly from” its 2006 pronouncement over the last several years. 798 F.3d at 814.

protect children where scientific information shows they are at risk of harm and it will take time to fill in gaps in the data.

For chlorpyrifos, the 2007 petition presented evidence of neuro-developmental harm to children from prenatal exposures, and EPA's 2014 risk assessment found that chlorpyrifos causes harm to children's brains from prenatal exposures and that this harm occurs at exposures far lower than EPA's acute poisoning regulatory endpoint. 2007 Petition (Dkt. No. 1-2); Chlorpyrifos Revised Human Health Risk Assessment for Registration Review (Dec. 29, 2014) ("2014 Risk Assessment") (Dkt. No. 8-2). EPA determined that it had to apply the FQPA tenfold margin of safety to protect children from this harm and that drinking water contamination from chlorpyrifos exposed children to unsafe levels of the pesticide. 2014 Risk Assessment at 48-49, 95-96.

In October 2015, EPA proposed to revoke all tolerances because it could not "determine that aggregate exposure to residues of chlorpyrifos, including all anticipated dietary exposures and all other non-occupational exposures for which there is reliable information, are safe." 80 Fed. Reg. 69,080, 69,081 (Nov. 6, 2015).

EPA explained:

Section 408(d) of the FFDCA, 21 U.S.C. 346a(d), authorizes EPA to revoke tolerances in response to administrative petitions submitted by any person. Because EPA is unable to determine at this time that aggregate exposures to chlorpyrifos are safe, EPA is proposing to revoke these tolerances in response to a Petition from PANNA and the Natural Resources Defense Council (NRDC) to revoke all chlorpyrifos tolerancesThis proposal

also implements the agency findings made during the registration review process required by section 3(g) of FIFRA (7 U.S.C. 136(a)(g)) which EPA is conducting in parallel with its petition response.

Id.; *see also id.* at 69,106 (“EPA cannot determine that current dietary exposures to chlorpyrifos are safe within the meaning of FFDCA section 408(b)(2)(A).”); *id.* (“EPA cannot find that any current tolerances are safe and is therefore proposing to revoke all chlorpyrifos tolerances.”); *accord* Declaration of Richard P. Keigwin, Jr. ¶ 5 (Oct. 29, 2015) (Dkt. No. 25-2) (proposed rule is “based on EPA’s conclusion that it could not make the ‘reasonable certainty of harm’ finding”). Drinking water contamination proved to be the driver for the proposed revocation. 80 Fed. Reg. at 69,083 (drinking water exposures alone “present a risk of concern”); *id.* at 69,097 (aggregate food, residential, and drinking water exposures “do present a significant risk concern and support revocation of all chlorpyrifos tolerances”); *id.* at 69,106 (children and infants are at risk from exposures to chlorpyrifos in drinking water and therefore, EPA “cannot make a safety finding based on drinking water exposure.”).

EPA based its 2014 risk assessment and its proposal to revoke chlorpyrifos tolerances on acute poisoning risks. In keeping with its policy to protect against the most sensitive health effects and its finding that harm to children’s brains occurs at lower doses than EPA’s acute poisoning endpoint, EPA conducted another risk assessment using a lower endpoint drawn from studies correlating

chlorpyrifos exposures with such brain impacts as lower IQ, delayed development, and attention deficit disorders. This risk assessment, released in November 2016, revealed even higher and more pervasive risks from chlorpyrifos:

The revised analysis indicates that expected residues of chlorpyrifos on most individual food crops exceed the “reasonable certainty of no harm” safety standard under the Federal Food, Drug, and Cosmetic Act (FFDCA). In addition, the majority of estimated drinking water exposures from currently registered uses, including water exposures from non-food uses, continue to exceed safe levels even taking into account more refined drinking water exposures. Accordingly, based on current labeled uses, the agency’s analysis provided in this notice continues to indicate that the risk from the potential aggregate exposure does not meet the FFDCA safety standard. EPA can only retain chlorpyrifos tolerances if it is able to conclude that such tolerances are safe. EPA has not identified a set of currently registered uses that meets the FFDCA safety standardFurther, EPA has not received any proposals for mitigation that registrants may be willing to undertake that would allow the EPA to retain any of the tolerances subject to this rulemaking.

81 Fed. Reg. 81,049, 81,050 (Nov. 17, 2016) (citing Chlorpyrifos Revised Human Health Risk Assessment for Registration Review (Nov. 3, 2016) (“2016 Risk Assessment”) (Attachment 2)).

After years of study and several rounds of review by its Scientific Advisory Panel, EPA made an unbroken series of findings that chlorpyrifos harms children’s brains at lower exposures than those used by EPA in its previous risk assessments and regulatory decision. As EPA has tried to guard against lower-level exposures associated with the brain damage, its findings of harm from chlorpyrifos have grown in severity. According to its more recent risk assessment, released less than six months ago, people would be harmed from virtually every use and every way

that people are exposed to the pesticide, with children and particularly 1-2 year olds most at risk. 2016 Risk Assessment at 23.

EPA's March 29, 2017 Response is remarkable in its utter silence as to EPA's previous findings. Nowhere does EPA suggest that it has reconsidered its finding that chlorpyrifos is unsafe. Nor does EPA address how it can legally maintain chlorpyrifos tolerances in the face of its findings that chlorpyrifos exposures are unsafe. EPA's only justification for failing to take action in the face of its prior findings that chlorpyrifos exposures are unsafe is its preference to engage in further study and its belief (addressed below) that this Court has not and cannot order it to act before October 2022. EPA has not withdrawn the proposed rule, but has merely decided not to finalize it or take other regulatory action until some unspecified time prior to October 1, 2022. EPA Response at 37. This approach runs counter to EPA's representations to the Court that it would revoke all chlorpyrifos tolerances unless the registrants agreed to mitigation that would ensure the exposures would be safe, *see* EPA Response at 14, or its further assessments showed exposures are at safe levels. Decl. of Jack Housenger in Support of Opposition to Petition for a Writ of Mandamus ¶ 22 n.15 (July 23, 2012) (Dkt. No. 1-2).

This Court has already rejected EPA's pleas for more time to study chlorpyrifos before taking regulatory action. The Court opened its August 2015

Order granting a writ of mandamus, stating: “Although filibustering may be a venerable tradition in the United States Senate, it is frowned upon in administrative agencies tasked with protecting human health.” 798 F.3d at 811. EPA had emphasized that the scientific issues are “on the cutting edge of science,” involving “novel scientific questions . . . on the frontiers of science.” Decl. of Dana Vogel in Support of EPA’s Response to Renewed Petition for a Writ of Mandamus ¶ 5 (Dec. 18, 2014) (Dkt. No. 7-2); *see also* Housenger Decl. ¶¶ 11, 15, 24 (“novel questions,” “on the edge of evolving science,” complex and important scientific issues). In July 2013, this Court denied PAN/NRDC’s earlier petition for a writ of mandamus, in part because of the complicated scientific issues. After EPA delayed further, this Court ruled in 2015 that spending nearly a decade reviewing the scientific issues without taking regulatory action was too little, too late. *Compare In re Pesticide Action Network N. Am.*, 532 Fed. Appx. 649, 651 (9th Cir. 2013) *with* 798 F.3d at 811. And in August 2016, this Court refused to allow EPA to delay taking final regulatory action, calling the nine-year delay “objectively extreme” and making it clear that the time for further study had come and gone. Order of August 12, 2016 (Dkt. No. 51).

EPA’s March 2017 Response does not determine what regulatory action is required by the FQPA given the brain damage to children from prenatal exposures

to chlorpyrifos.² Instead, it presents reasons why EPA will not take final action now, but instead will continue to study the evidence of neuro-developmental harm to children from chlorpyrifos. EPA's Response reads like the earlier declarations and briefs EPA submitted to this Court in opposition to mandamus relief. It recycles EPA's contentions, rejected by this Court, that further study is warranted before EPA could take final action because the scientific issues are novel, highly complex, at the cutting edge of science, and uncertain. EPA Response at 8, 13, 35.³ EPA admits that it has "been unable to persuade the 9th Circuit Court of Appeals that further inquiry into this area of unsettled science should delay EPA's response to the Petition." *Id.* at 35; *see also id.* at 36 ("As the 9th Circuit has made clear in its August 12, 2016 order in *PANNA v. EPA*, EPA must provide a final response to the Petition by March 31, 2017, regardless of whether the science remains unsettled and irrespective of whatever options may exist for more complete resolution of these issues during the registration review process.").

² EPA previously issued partial denials (and one partial grant) of the petition, and the EPA Response finalizes the denials. EPA Response at 15-33. The issues that had not previously been resolved and still remain unresolved are the petition's requests for action to protect children from adverse brain impacts at low doses. On these issues, EPA's Response defers final action pending further study.

³ EPA asserts that the comments received on the October 2015 proposed rule and its November 2016 renewed findings that chlorpyrifos is not safe suggest continued uncertainty and deep disagreements, without any elaboration. EPA Response at 35. In contrast, earlier in this case, EPA acted with greater specificity on a far more accelerated timetable by informing the Court within 60 days of a comment deadline that it would propose to revoke all chlorpyrifos tolerances. Status Report (June 30, 2015) (Dkt. No. 20).

Recognizing that this Court would not give it an extension to conduct further scientific review, EPA purported to give itself an open-ended extension up to October 1, 2022. It decided to follow its “preference” to explore other scientific approaches to its chlorpyrifos risk assessments and possibly seek peer review before finalizing any regulatory action. *Id.* at 36. EPA’s Response states that it is denying the petition, but in reality it is postponing a decision on whether to revoke tolerances to prevent harm to children’s brains from prenatal exposures, as the 2007 petition requested. EPA will continue to review the evidence of neuro-developmental harm before “either finalizing the proposed rule of October 30, 2015, or taking an alternative regulatory path.” *Id.* at 37.⁴

In its December 10, 2015 Order setting a deadline for final action on the petition, this Court required EPA to demonstrate that extraordinary circumstances made it impracticable to meet the deadline, if it sought an extension. (Dkt. No. 29). When EPA claimed extraordinary circumstances based on its desire to complete additional studies, this Court rebuffed EPA and concluded that “nothing has changed that would justify EPA’s continued failure to respond to the pressing

⁴ Even though FQPA compels action on tolerances based solely on health risks, EPA’s Response at 36 cites the widespread use of chlorpyrifos as undergirding its preference for further study before taking regulatory action, and EPA’s press release applauds the decision as welcome news for the farms that use chlorpyrifos. <https://www.epa.gov/newsreleases/epa-administrator-pruitt-denies-petition-ban-widely-used-pesticide-0>. The fact that chlorpyrifos is widely used or that the agricultural industry may prefer to keep using it is irrelevant to the safety question EPA is required to answer.

human health concerns presented by chlorpyrifos.” Order of August 12, 2016 (Dkt. No. 51). The Court acknowledged that the evidence may be imperfect, but concluded that “a claim of premature rulemaking has come and gone,” and that further delay is unjustified in light of EPA’s history and this Court’s rulings. *Id.* By purporting to deny the petition without addressing the merits, EPA is not acting in compliance with this Court’s orders or the FQPA’s prohibition on the maintenance of tolerances if EPA has found exposures to a pesticide to be unsafe.⁵

II. THIS COURT POSSESSES AND HAS EXERCISED AUTHORITY TO ORDER EPA TO TAKE REGULATORY ACTION ON CHLORPYRIFOS BEFORE THE OCTOBER 2022 DEADLINE FOR REGISTRATION REVIEW OF OLDER PESTICIDES.

EPA claims that this Court lacks authority to order it to take regulatory action on chlorpyrifos prior to October 1, 2022, the date Congress set for EPA’s completion of a comprehensive registration review of all pesticides registered or reregistered prior to October 2007. EPA Response at 36 (Court’s order “cannot

⁵ Given EPA’s disregard of this Court’s orders, this is a situation where the Court might choose to issue an order for EPA to show cause why it should not be held in contempt for refusing to follow the Court’s orders. *See, e.g., Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 900-04 (N.D. Cal. 1984) (EPA held in contempt when court rejected argument that EPA was only required to “take final action” and could permissibly withdraw proposed regulations without also finding that a listed hazardous pollutant does not pose a health risk). “A court has the inherent power to punish for civil or criminal contempt any obstruction of justice relating to any judicial proceeding.” *Lambert v. Montana*, 545 F.2d 87, 88 (9th Cir. 1976). Civil contempt “consists of a party’s disobedience to a specific and definite court order by failure to take all reasonable steps within the party’s power to comply.” *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006) (internal quotation and citation omitted).

compel EPA to complete the registration review of chlorpyrifos in advance of the October 1, 2022 deadline” for registration review of older pesticides). It claims to have complete discretion to change the priorities and schedules set by the previous administration in the absence of a specific statutory deadline to respond to the petition or complete registration review for chlorpyrifos. *Id.* at 37. In its view, the fact that Congress set a 2022 deadline for completing review of older pesticides deprives this Court of the power to order EPA to act any sooner in response to a petition, even in the face of “objectively extreme” unreasonable delay.

This claim of unbridled discretion ignores the right of citizens to petition their government, including to revoke tolerances, *see* 21 U.S.C. § 346a(d), EPA’s statutory obligation to act “within a reasonable time,” 5 U.S.C. § 555(b), and this Court’s power to issue a writ of mandamus compelling an agency to take action unreasonably delayed. As far back as *Marbury v. Madison*, 5 U.S. 137, 177 (1803), the Supreme Court declared: “It is emphatically the province and duty of the judicial department to say what the law is,” and this includes determining when an agency has unreasonably delayed or unlawfully withheld agency action in violation of the Administrative Procedure Act, 5 U.S.C. § 706(1). Not only does this Court have the power to compel an agency to act under the APA and the All Writs Act, 28 U.S.C. § 1651, but it has already exercised that authority in issuing a string of court orders directing EPA to take action to resolve the 2007 petition.

Under those orders, EPA had to make it a priority to address the neuro-developmental harm to children and to meet the court-imposed deadlines.⁶

Not only has this Court exercised its power to compel EPA to take regulatory action by a date certain, but EPA represented to the Court under oath that it was prioritizing chlorpyrifos and working diligently to determine whether the tolerances had to be revoked. The agency relied on its prioritization of chlorpyrifos in registration review to try to convince this Court in 2013 and again in 2015 that it was acting expeditiously to address the mounting evidence of adverse brain impacts to children from prenatal exposures. *See* Housenger Decl.

¶ 13 (EPA moved up chlorpyrifos in registration review because of the scientific issues with it and the other organophosphates and to respond to the petition). EPA

⁶ EPA cites *Federal Communications Commission v. Fox Television Stations*, 556 U.S. 502 (2009), for the proposition that it has no obligation to provide a justification for reversing course more substantial than what is needed to adopt a policy in the first instance. *Fox Television*, however, requires agencies to provide a reasoned explanation that comports with *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 43 (1983), and to address prior factual findings and circumstances that underlay the earlier agency decision. 556 U.S. at 515-16. Here, EPA prioritized registration review of chlorpyrifos, originally setting it for completion in 2015, because of the evidence of neurological harm to children and the PAN/NRDC petition. EPA Response at 8, 13. Chlorpyrifos was leading the way by addressing scientific issues that would also be drivers in EPA's review of many other pesticides, including the evidence of neuro-developmental harm, the use of epidemiology studies in pesticide regulation, and protecting children from spray drift and volatilization exposures. Vogel Decl. ¶ 5. Moreover, this Court had little difficulty concluding that EPA should act quickly to resolve the petition in light of the considerable health risks prejudiced by further delay. 798 F.3d at 814; Order of August 12, 2016. EPA must, but has failed to, provide a reasoned justification for disregarding these findings and circumstances.

never contested this Court’s power to compel it to take regulatory action on chlorpyrifos. Instead, it defended its slow pace under the well-established factors developed by the courts for deciding whether to exercise that power. *See* EPA’s Response to Renewed Petition for Writ of Mandamus at 13, 16-30 (Dkt. No. 7-1) (applying factors established in *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)).⁷

EPA is wrong in asserting that this Court lacks the power to compel it to take final regulatory action on chlorpyrifos prior to 2022. This Court unquestionably has the power to issue orders to put an end to EPA’s unreasonable delay in taking final regulatory action.

⁷ As such, EPA waived the argument that this Court lacks authority to compel it to act to protect children from chlorpyrifos prior to the 2022 registration review deadline. *See Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007) (arguments that are not raised in a party’s opening brief are generally deemed waived by federal courts); Fed. R. App. P. 28(a)(8)(A). EPA did not present this argument in its initial briefing, or at any other time during the course of this litigation, and has thus deprived PAN/NRDC “of a fair opportunity to respond comprehensively to [the] claim,” and has deprived this Court “of the benefit of a robust debate informed by zealous advocacy.” *City of Beaumont*, 506 F.3d at 900. EPA noted that it was “not required by law to complete another review until 2022,” EPA Response to Renewed Petition for Writ of Mandamus at 8, but this statement does not contest the Court’s authority to order it to address the chlorpyrifos petition sooner. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1079 n.26 (9th Cir. 2008) (“It is well-established that a bare assertion in an appellate brief, with no supporting argument, is insufficient to preserve a claim on appeal.”); *Simpson v. Union Oil Co. of Cal.*, 411 F.2d 897, 900 n.2 (9th Cir. 1969), *rev’d on other grounds*, 396 U.S. 13 (1969) (concluding that issues not discussed in briefs are waived despite mention in statement of case or specifications of error).

III. THE COURT SHOULD ORDER FURTHER RELIEF FOR EACH STEP OF THE REVOCATION AND CANCELLATION PROCESSES.

PAN/NRDC ask the Court to order further relief made necessary by EPA's misinterpretation and disregard of this Court's prior orders. In 2015, this Court determined that EPA's delay was prejudicing considerable human health interests. That prejudice has only worsened with EPA's further delay despite its findings that chlorpyrifos is even more harmful than its 2014 risk assessment demonstrated. Accordingly, PAN/NRDC ask the Court to order the following relief:

1. An order directing EPA to take regulatory action within 30 days on its finding that chlorpyrifos is unsafe.

Given that this Court rejected EPA's plea for a six-month extension of a court-ordered December 30, 2016 deadline for final action and EPA's failure to take the required action by its March 31, 2017 deadline, a further order is warranted giving EPA a short period of time to do what it was required to do by March 31, 2017. Because of EPA's assertion of unbridled authority to re-order priorities and postpone all regulatory action on chlorpyrifos, this Court should make it abundantly clear that what is required within 30 days is final regulatory action based on the neuro-developmental and other risks posed by chlorpyrifos exposures. PAN/NRDC believe the only legally and scientifically defensible action is revocation of all food tolerances and cancellation of all uses as the 2007 petition sought. The only way to avoid revoking the food tolerances and

cancelling the uses would be for EPA to find that chlorpyrifos exposures are safe, but EPA cannot make such a finding in the face of the overwhelming body of scientific evidence, EPA's risk assessments, its representations to this Court, and its findings that chlorpyrifos is not safe.⁸

2. An order requiring EPA to resolve objections to its final regulatory action within 60 days

As EPA's Response explains at 5-6, EPA resolves petitions regarding tolerances through a two-stage process. The first stage consists of the EPA's decision on the petition and ends with publication of that decision in the Federal Register. In the second stage, parties who disagree with EPA's decision, whether a denial or grant of a petition or revocation of tolerances, may file administrative objections with EPA within 60 days of the Federal Register publication. 21 U.S.C. § 346a(g)(2)(A). The objections allow parties to contest the conclusions EPA reached.

Filing objections and awaiting their resolution by the EPA Administrator is a prerequisite to obtaining judicial review. 21 U.S.C. § 346a(h)(1) (within 60 days of EPA's resolution of objections, adversely affected parties may seek review in

⁸ The FQPA specifies that a tolerance revocation shall take effect upon publication unless specified otherwise. 21 U.S.C. § 346a(g)(1). As proposed, the tolerance revocation would become effective 180 days after publication of the final rule. 80 Fed. Reg. at 69,106. Given the length of time since the rule was proposed, the Court should direct EPA to make the final revocation rule effective no later than six months after publication, unless EPA demonstrates extraordinary circumstances for a longer compliance timetable.

the court of appeals). The Administrator is to issue a final order resolving the objections “[a]s soon as practicable after receiving the arguments of the parties,” but there is no specific statutory deadline for EPA to issue a decision on objections. Given the delay in EPA’s resolution of PAN/NRDC’s 2007 petition, and EPA’s revelation in its March 29, 2017 Response that it prefers to put off regulatory action on chlorpyrifos for more than five additional years, this Court should order EPA to resolve any objections within 60 days of their receipt.⁹

3. An order requiring EPA to issue a notice of intent to cancel all chlorpyrifos uses within 60 days

PAN/NRDC’s 2007 petition sought revocation of all chlorpyrifos tolerances and cancellation of all chlorpyrifos registrations under FIFRA. An order revoking tolerances would prohibit residues of chlorpyrifos on food and require cancellation of food uses of the pesticide. 7 U.S.C. § 136(bb)(2) (EPA can maintain a pesticide registration only if there are no unreasonable adverse effects, and that term is defined to include “a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under section 346a of

⁹ A party filing objections can seek an evidentiary hearing, but not on issues it could have presented in the first stage of review of a petition. EPA Response at 6; *Nat’l Corn Growers Ass’n v. EPA*, 613 F.3d 266, 272 (2010) (objection stage allows an interested party to challenge a fact, law, or policy that appeared for the first time in the final rule). If EPA grants such a hearing, the Court should require resolution of the hearing and final EPA action on the objections within 120 days. A party could also ask EPA to stay a revocation rule or delay its effective date during the objection process. This Court should prohibit EPA from doing so unless it demonstrates extraordinary circumstances warrant such a delay.

Title 21”). EPA has found drinking water contamination from all chlorpyrifos uses, including nonfood uses, and will need to take regulatory action to end such uses in addition to stopping food uses. PAN/NRDC asks the Court to require EPA to initiate cancellation proceedings within 60 days by issuing a notice of intent to cancel chlorpyrifos uses consistent with its risk assessments and findings that chlorpyrifos is unsafe.

4. An order requiring EPA to file six-month status reports

PAN/NRDC ask the Court to direct EPA to file status reports every six months until it finalizes the tolerance revocation process, including by fully resolving any objections, and completes cancellation proceedings. Such relief is warranted in light of the pattern of missed deadlines and what this Court called “egregious” delay when it issued the writ of mandamus and “objectively extreme” when it later denied EPA a six-month extension for taking final action. 798 F.3d at 811; Order of August 12, 2016 at 4; *see Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (ordering agency to adhere to specific schedule and to report to the Court every six months on the progress made).

CONCLUSION

PAN/NRDC ask the Court to order the further requested relief to ensure EPA takes regulatory action to protect children from a hazardous pesticide in a timely manner.

Dated: April 5, 2017

Respectfully submitted,

s/ Patti A. Goldman

PATTI A. GOLDMAN

KRISTEN L. BOYLES

Earthjustice

705 Second Avenue, Suite 203

Seattle, WA 98104-1711

(206) 343-7340 | Phone

(206) 343-1526 | Fax

pgoldman@earthjustice.org

kboyles@earthjustice.org

*Attorneys for Petitioners Pesticide Action
Network North America and Natural
Resources Defense Council, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document(s) on the following party via CM/ECF Service:

1. Petitioners' Motion For Further Mandamus Relief

Erica Monique Zilioli
Jon Michael Lipshultz
DOJ - U.S. DEPARTMENT OF JUSTICE
Environmental Enforcement Section
PO Box 7611, Ben Franklin Station
Washington, DC 20044-7611
Erica.zilioli@usdoj.gov
jon.lipshultz@usdoj.gov

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via hand delivery
- via e-mail
- via electronic filing

Attorneys for Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of April, 2017, at Seattle, Washington.

s/ Patti A. Goldman

PATTI A. GOLDMAN