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Samuel Steelman

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DELAYING THE INEVITABLE: A COMPEL-ING TALE OF THE ENVIRONMENTAL PROTECTION AGENCY, ADMINISTRATIVE PROCEDURE ACT AND A PESTICIDE

In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc., 798 F.3d 809 (9th Cir. 2015)

I. INTRODUCTION

Section 706(1) of the Administrative Procedure Act authorizes a Court to compel agency action that has been unlawfully withheld or unreasonably delayed.[1] The standard with which agencies are deemed to have unlawfully withheld action has been directly addressed by the Supreme Court and it is a fairly bright line.[2] However, the standard to determine an agency's unreasonable delay is not nearly as clear.[3] Congress granted, and the Supreme Court held, that federal agencies such as the Environmental Protection Agency are to be provided broad discretionary authority when determining how and when they will implement rules or regulations.[4] This poses problems for petitioners challenging the EPA's

[1] 5 U.S.C. § 706(1) (2012).
[2] *See* Norton v. S. Utah Wilderness All., 542 U.S. 55, 62-65 (2004).
[3] E. Hammond & D. L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 338 (2013).
[4] Massachusetts v. E.P.A., 549 U.S. 497, 527 (2007).

stance on certain issues, particularly when there is no clear deadline the EPA must adhere to.[5] *In re Pesticide Action Network N. Am., Natural Res. Def. Council, Inc.* directly addresses the standard of unreasonable delay in this context.[6]

II. FACTS AND HOLDING

In September 2007, Pesticide Action Network North America and Natural Resources Defense Council, Inc. ("PANNA"), the petitioners, filed an administrative petition with the Environmental Protection Agency ("EPA"), the respondents, in order to get the EPA to remove chlorpyrifos from the list of registered safe pesticides.[7] PANNA's petition was in response to the EPA's evaluation of chorpyrifos following the required review of all "registered pesticides" according to the Food Quality Protection Act of 1996.[8] The EPA determined that although the pesticide was not safe for residential use, its use was still permissible in agricultural

[5] *See* Beyond Pesticides/Nat'l Coal. Against the Misuse of Pesticides v. Johnson, 407 F. Supp. 2d 38 (D.D.C. 2005).
[6] In re Pesticide Action Network N.A., Nat. Resources Def. Council, Inc., 798 F.3d 809, 813 (9th Cir. 2015) (hereinafter "*Pesticide Action Network*").
[7] *Id.* at 812.
[8] *Id.* at 811. ("The Act gave EPA ten years to complete an initial review of registered pesticides, 21 U.S.C. 346a(q)(1), and ordered the agency to repeat the process using updated scientific data every fifteen years, 7 U.S.C. § 136a(g)(1)(A)(iii).").

areas.[9] PANNA disagreed, and thus, it filed the administrative petition, to which the Court determined EPA's only response was to publish notice in the Federal Register.[10]

After not receiving any satisfactory ruling or response from the EPA, PANNA filed suit "demanding a final response to the administrative petition."[11] Although the lawsuit was never tried, an agreement was struck where the EPA was to "issue a human risk assessment by June 2011 and a final response by November 2011."[12] Ultimately, the human risk assessment was issued in July 2011, a month past the agreed upon deadline, and the "final response" was never issued.[13] This prior agreement and lack of response from the EPA again led PANNA to seek judicial relief, and it filed a petition for a writ of mandamus in April 2012.[14]

In its argument to the Ninth Circuit, the EPA, along with partially denying PANNA's petition, set forth what the Ninth Circuit considered a

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[9] *Id.*
[10] *Id.* at 812. ("EPA published a notice of that petition in the Federal Register, 72 Fed. Reg. 58,845 (Oct. 17, 2007), but otherwise did not issue any formal response to it.").
[11] *Id.* (Suit was filed in the Federal District of New York).
[12] *Id.* (Stipulation and Order, N.R.D.C. v. EPA, No. 10–CV–05590 (S.D.N.Y. Dec. 22, 2010), ECF No. 17).
[13] *Id.*
[14] *Id.*

"concrete timeline" as to when and how it would respond to the remaining undecided issues raised by the petition.[15] The Ninth Circuit denied relief to PANNA, specifically noting the EPA's timeline as a leading factor in its holding.[16]

The last potential deadline date that the EPA said it would have issued a response was February 2014, after the EPA again failed to adhere to its own agreed-upon deadlines, PANNA renewed its writ of mandamus with the Ninth Circuit.[17] The court held that the when the EPA continued to delay and issue unsatisfactory, incomplete responses at the risk of the public health, mandamus relief was appropriate.[18]

II. LEGAL BACKGROUND

A. Chlorpyrifos and the Food Quality Act of 1996

Chlorpyrifos became a registered organophosphate pesticide in 1965.[19] Its primary purpose is to control foliage and soil-borne insect pests

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 813.
[19] US Environmental Protection Agency Office of Pesticide Programs (hereafter "OPP"), *Reregistration Eligibility Decision for Chlorpyrifos*, viii http://www3.epa.gov/pesticides/chem_search/reg_actions/reregistration/red_PC-059101_1-Jul-06.pdf (last visited Nov. 22, 2015).

on food and feed crops.[20] The EPA is tasked with the responsibility for registering and monitoring pesticides, including chlorpyrifos.[21] The EPA reports that the current primary application of chlorpyrifos is for the agricultural production of corn.[22] However, chlorpyrifos is also used with other agricultural products such as soybeans, fruit trees, cranberries and other citrus crops, along with nonagricultural uses such as golf course protection, turf applications, and wood treatment.[23] Chlorpyrifos is sold in numerous forms including liquids, granulars and flowable concentrates, and it can be applied using both ground and aerial equipment.[24] Approximately 10 million pounds of chlorpyrifos are used in the agricultural industry every year.[25] As of 2000, there were six "technical registrants" using chlorpyrifos including Dow AgroSciences, Cheminova, Inc., Gharda USA, Inc., Luxembourg-Pamol, Inc., Makhteshim-Agan of

[20] U.S. Envt'l Protection Agency (hereinafter "EPA"), *Chlorpyrfios*. http://www2.epa.gov/ingredients-used-pesticide-products/chlorpyrifos (last visited Nov. 22, 2015).
[21] *Pesticide Action Network*, 798 F.3d at 811 (9th Cir. 2015).
[22] EPA, *Basic Information*, http://www2.epa.gov/ingredients-used-pesticide-products/chlorpyrifos (last visited Nov. 22, 2015).
[23] *Id.*
[24] *Id.*
[25] EPA, *Chlorpyrifos Facts. Uses*, http://www3.epa.gov/pesticides/chem_search/reg_actions/reregistration/red_PC-059101_1-Jul-06.pdf (last visited Nov. 22, 2015).

North America, Inc. and Platte Chemical Company, Inc.[26] At one point chlorpyrifos was estimated to have been in over 400 registered products.[27]

On August 3, 1996, President Clinton signed the Food Quality Protection Act ("FQPA") into law.[28] The FQPA amended two acts directly affecting chlorpyrifos regulation, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and the Federal Food Drug and Cosmetic Act ("FFDCA").[29] A consequence resulting from the passage of the FQPA was that it "fundamentally changed [the] EPA's regulation of pesticides."[30] One purpose of the FQPA was to change the way in which pesticides chemical tolerances were evaluated to "better reflect real-world situations."[31] Not only did the FQPA effect the registration of new pesticides under FIFRA, it also required reassessment of currently registered pesticides under the both FIFRA and FFDCA.[32]

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[26] EPA, *Executive Summary*, http://www3.epa.gov/pesticides/chem_search/reg_actions/reregistration/red_PC-059101_1-Jul-06.pdf (last visited Nov. 22, 2015).
[27] EPA, *Regulatory History*, http://www3.epa.gov/pesticides/chem_search/reg_actions/reregistration/red_PC-059101_1-Jul-06.pdf (last visited Nov. 22, 2015).
[28] EPA, *Summary of the Food Quality Protection Act.*, http://www2.epa.gov/laws-regulations/summary-food-quality-protection-act (last visited Nov. 22, 2015).
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

The FFDCA amendment required the EPA to reassess currently registered pesticides tolerances, including chlorpyrifos.[33] In order for a currently registered pesticide to be eligible for reregistration at an unchanged tolerance, it must satisfy the new safety standard.[34] Section 346a(b)(2) states that the EPA can leave a tolerance of a currently registered pesticide unchanged only if it determines the pesticide's chemical residue tolerance to be "safe."[35] A pesticide's chemical residue tolerance is considered to be "safe" according to FQPA if the EPA administrator's reevaluation "determines that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue."[36]

The FQPA also set forth a mandatory timeframe where all currently registered pesticides must be reassessed.[37] Section 346a(j)(3) required the EPA to reassess current "tolerances and exemptions" of pesticides on the following timeframe provided in §346a(q)(1): "(A) 33

[33] In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc., 798 F.3d 809, 811 (9th Cir. 2015).
[34] EPA, *Summary of the Food Quality Protection Act,* http://www2.epa.gov/laws-regulations/summary-food-quality-protection-act (last visited Nov. 22, 2015).
[35] 21 U.S.C. § 346a(b)(2)(A)(i) (2012).
[36] § 346a(b)(2)(A)(ii).
[37] § 346a(q).

percent of tolerances and exemptions within 3 years of August 3, 1996"; (B) 66 percent within 6 years; and (C) 100 percent within 10 years.[38] FIFRA requires reassessment of registered pesticides every fifteen years.[39]

During the mandatory review phase the EPA took several actions limiting the use of chlorpyrifos.[40] According to the EPA, excessive exposure to chlorpyrifos has been found to cause cholinesterase inhibition which can lead to nervous system malfunction and even death and "occupational exposure is of concern."[41] From 2000 to 2002, the EPA banned all household uses of chlorpyrifos (with a few exemptions) and limited its use on certain crops.[42] On September 25, 2009 the EPA published a final work plan relating to chlorpyrifos.[43] This work plan also addressed PANNA's petition (this is the petition in dispute under In re Pesticide) stating it intended to keep its planned reregistration review

[38] §§ 346a(j)(3), 346a(q)(1)(A)-(C).
[39] 7 U.S.C. §136a(g) (2012).
[40] EPA, *Chlorpyrifos*, http://www2.epa.gov/ingredients-used-pesticide-products/chlorpyrifos.
[41] *Id.*
[42] *Id.*
[43] *See generally* EPA, *Chlorpyrifos Final Work Plan*, http://www.chlorpyrifos.com/regulatory/chlorpyrifos-schedule.htm (follow "Final Work Plan" hyperlink).

under FIFRA in place.[44] In 2012 chlorpyrifos use was further limited with regulation by "lowering application rates" and "creating 'no-spray' zones" around certain public spaces.[45] Currently chlorpyrifos is being reassessed under the fifteen-year review process.[46]

In addition to the statutorily required review processes, the FFDCA authorizes any person to petition the EPA in order to establish, modify, or revoke a current tolerance or exemption regarding currently registered pesticide chemical residue tolerances.[47] Section 346a(d)(2) sets forth the requirements each petition must meet.[48] If the EPA receives a complete petition it must publish notice of the petition's proposal complete with a summary within 30 days.[49]

After notice has been published, the EPA administrator "*shall*, after giving due consideration to a petition" take one of three actions.[50] The EPA must: "(i) issue a final regulation;" "(ii) issue a proposed regulation" under its own initiative coupled with the issuance of a final

[44] *Id.* at 5.
[45] *Id.*
[46] *Id.*
[47] 21 U.S.C. §§ 346a(d)(1)(A) and (B) (2012).
[48] §§ 346a(d)(2)(A)((i)-(xiii).
[49] § 346a(d)(3).
[50] § 346a(d)(4)(A)(emphasis added).

regulation; or "(iii) issue an order denying the petition."[51] Some petitions will qualify for expedited review under §346a(d)(4)(C).[52] However, petitions that do not qualify for expedited review are sometimes forced to deal with the fact that the statutory language of §346a(d)(4) does not require administrative action within a set timeframe.[53]

One study revealed that on average, the EPA takes approximately 4.4 years to finalize its response to petitions, some taking as long as fourteen years to finalize.[54] The EPA is undoubtedly aware of this issue with regards to some petitions.[55] Additionally, the FFDCA does provide for "adversely affected" persons to obtain judicial review of petitions for "any regulation that is the subject of an order issued by the EPA."[56] Despite this, judicial review of petitions that do not require a statutory

[51] § 346a(d)(4)(A)(i-iii).
[52] § 346a(d)(4)(C).
[53] § 346a(d)(4)(A).
[54] Hammond, *supra* note 3, at 337.
[55] *Id.*at 364 n. 150 ("As the Withdrawal Guidance notes, it is 'important to maintain communications with petitioners regarding the status of a complex petition ... so that a petitioner does not erroneously conclude that EPA has unreasonably delayed action on its petition.'").
[56] 21 U.S.C. § 346a(h)(1) (2012).

deadline seldom prevail.[57] Nonetheless, for petitioners seeking to compel agency action, an avenue for relief does exist.[58]

B. Writ of Mandamus and the Administrative Procedure Act

The All Writs Act ("AWA") grants Federal Courts the authority to issue writs "necessary or appropriate . . . and agreeable to the usages and principles of law."[59] 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."[60] However, the APA does not provide the opportunity for persons to challenge every type of agency action.[61]

One type of action (or more appropriately inaction) the Supreme Court interpreted falls within the APA is an agency's "failure to act."[62] Furthermore, §706(1) of the APA provides that "a reviewing court shall . .

[57] Hammond, *supra* note 3, at 338.
[58] 5 U.S.C. § 706(1) (2012).
[59] 28 U.S.C. § 165 (2012).
[60] 5 U.S.C. § 702 (2012).
[61] Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions,* 103 GEO. L.J. 157, 168-69 (2014).
[62] Norton v. S. Utah Wilderness All., 542 U.S. 55, 68 (2004).

. compel agency action unlawfully withheld or unreasonably delayed."[63] Regardless, an agency's failure to act must still fall within the purview of the APA in that it must be a "*discrete* agency action that it is *required to take*."[64]

In *Norton v. S. Utah Wilderness All.*, the Court defined the term "discrete" and "required" agency action.[65] The Court listed several actions under the APA, including "an agency statement of . . . taking of other action on the . . . petition of a person," that constitute as discrete agency action.[66] Although the Court did not find "failure to act" to fit the definition of a discrete action listed with the other actions, it did find "failure to act" to be "equivalent thereof" in that it specifically applies to "a failure to take one of the agency actions earlier defined."[67] Therefore, "a 'failure to act' is properly understood" to be a "*discrete* action."[68]

As to what action an agency is "required to take" the Court pointed out that §706(1) specifically requires actions be "*unlawfully* withheld."[69]

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[63] 5 U.S.C. § 706(1) (2012).
[64] *Norton*, 542 U.S. at 64.
[65] *Id.* at 62.
[66] *Id.*
[67] *Id.* at 62-63.
[68] *Id.* at 63.
[69] *Id.*

The Court did not address §706(1) other aspect of "unreasonable delay"; however, it did state that mandamus was typically limited to those actions "of a 'precise, definite act . . . about which an official had no discretion whatever."[70] Ultimately the Court found that although it cannot direct the manner in which an agency may act, "when an agency is compelled by law to act . . . a court can compel [that] agency to act."[71]

The *Norton* court failed to address "unreasonable delay" in §706(1).[72] As Hammond & Markell noted, "there is a judicial reluctance to interfere with how an agency prioritizes its work; the absence of a legal standard to apply makes review difficult; and there is lack of an agency decision to help focus the court's review."[73] Still, agency discretion with regard to timeliness in response to petitions does face constraints.[74] As the *Norton* court pointed out and to which Sunstein & Vermeule agree, if there is a clear statutory deadline, an agency must comply with that deadline.[75] Another constraint that is often observed is the fact that agencies cannot "abdicate" those responsibilities tasked to them by

[70] *Id.* (quoting U.S. *ex rel.* Dunlap v. Black, 128 U.S. 40, 46 (1888)).
[71] *Id.* at 65.
[72] *Id.* at 62-65.
[73] Hammond, *supra* note 3, at 338.
[74] Sunstein, *supra* note 61, at 195.
[75] *Id.*; *Norton*, 542 U.S. at 62-65.

Congress.[76] Lastly, there exists a general principle that agencies cannot try to circumvent their responsibility to respond with undue delay.[77] For those responsibilities tasked to an agency using the term "shall" as opposed to "may", the authorizing statute provides "a good indicator" the agency must respond in a timely manner.[78] "Unreasonable delay" in the context lacking a clear statutory deadline has most frequently been addressed using a six factor assessment set forth in *Telecommunications Research & Action Ctr. v. F.C.C.* ("*TRAC*").[79]

C. The *TRAC* Factors

TRAC was a 1984 case where a non-profit corporation along with public interest groups petitioned the D.C. Circuit Court of Appeals for a writ of mandamus requiring the Federal Communications Commission ("FCC") to decide pending agency issues.[80] Like other courts, the *TRAC* court found that §706(1) of the APA requires a court to compel agency action that is "unreasonably delayed."[81] Additionally, the court noted that

[76] Sunstein, *supra* note 61, at 195.
[77] *Id.*
[78] *Id.*
[79] Hammond, *supra* note 3, at 338. *See* Telecomms. Research & Action Ctr. v. F.C.C., 750 F.2d 70 (D.C. Cir. 1984).
[80] *Telecomms. Research & Action Ctr.*, 750 F.2d at 70.
[81] *Id.* at 79.

§55(b) of the APA also "mandate[s] agencies decide matters in a reasonable time.[82] Although the court ultimately found that because the FCC reinforced it was moving to resolve the issue in question, the court did not need to address the issue of unreasonable delay.[83] Before issuing its holding, the court outlined what is now recognized as the six TRAC factors:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (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 delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.' "[84]

[82] *Id.*
[83] *Id.* at 80.
[84] *See* Beyond Pesticides/Nat'l Coal. Against the Misuse of Pesticides v. Johnson, 407 F. Supp. 2d 38, 40 (D.D.C. 2005) (quoting *Telecomms. Research & Action Ctr.*, 750 F.2d at 79-80 (internal citations omitted)).

Beyond Pesticides/Nat'l Coal. Against the Misuse of Pesticides v. Johnson applied these factors.[85] This 2005 case involved both parties, Beyond Pesticides and the EPA, seeking motions for summary judgment as to whether the EPA "unreasonably delayed" its response to Beyond Pesticides' petitions to cancel or suspend three wood pesticides.[86] Before applying the TRAC factors, the *Beyond* court cited *Norton* as the standard to which it would determine at what point the EPA came under a a legal duty to act so as to be able to measure the amount of delay in question.[87] Although, Beyond Pesticides argued the court should consider its 1997 petition as the point in which the EPA was obligated to respond, the court determined that because Beyond Pesticides did not make a formal request to cancel or terminate the pesticides until 2001 the EPA was not obligated to act until December 2001.[88]

The *Beyond* court addressed the first two TRAC factors concurrently.[89] The court's reasoning for this was that "congressional expectations or mandates" play a pivotal role in determining how fast the

[85] *Id.*
[86] *Id.* at 38-39.
[87] *Id.* at 39.
[88] *Id.* at 39-40.
[89] *Id.* at 40.

EPA should reasonably be expected to address the petition.[90] These two factors weighed in favor of the EPA in this case because the court concluded that the EPA would issue a response to Beyond Pesticides petition and was already addressing the wood pesticides in a reregistration process required by statute.[91] Also, the court noted that the EPA was under no statutory duty to respond to the petition within a certain timeframe.[92]

All three of the next TRAC factors were found to relate to how the EPA prioritized the "action requested."[93] In the context of the EPA, the third factor was found to be minute because "virtually the entire EPA docket . . . involves issues" that deal with human health and welfare.[94] Thus, because the EPA is tasked with the responsibility of regulating issues that primarily deal with human health and welfare, and its docket reflects this, the court also found delay would be "irrelevant" because prioritizing one issue before another as Beyond Pesticides would have would usurp the EPA's discretion and "produces no net gain."[95]

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[90] *Id.* (citing In re Monroe Commc'n Corp., 840 F.2d 942, 945 (D.C. Cir. 1988)).
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* (citing Sierra Club v. Thomas, 828 F.2d 783, 798 (D.C. Cir. 1987)).
[95] *Id.* at 40-41 (quoting In re Barr Labs, Inc., 930 F.2d 72, 75 (D.C. Cir. 1991)).

The EPA was found to have satisfied the sixth factor as well.[96] According to the court, there need not be any "bad faith" in order to find unreasonable delay, nonetheless the EPA was shown to have been exercising its discretion satisfactorily, evidenced by the fact that of the 662 cases the 1988 amendments to FIFRA tasked the EPA to reregister, 229 reassessments were complete and 152 had been initiated.[97] Additionally, the court noted there is a "'well established presumption that public officials . . . act in good faith.'"[98]

In granting summary judgment in favor of the EPA,[99] the *Beyond* court did not contemplate the remedy of ordering the agency to set forth a schedule on how it plans to address the issue in question while retaining jurisdiction to ensure compliance.[100] In retaining jurisdiction and requiring an agency to issue a schedule as to how and when it will address a petition, courts have successfully been able to balance Congress' clear

[96] *Id.* at 41.
[97] *Id.* at 40 (citing In re Barr Labs, Inc., 930 F.2d 72, 75 (D.C. Cir. 1991)).
[98] *Id.* at 41 (quoting Bayshore Res. Co., Inc. v. U.S., 2 Cl. Ct. 625, 632 n. 4 (1983)).
[99] *Id.* at 41.
[100] Carol R. Miaskoff, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 635, 657 (1987).

intent that courts resolve issues of unreasonable delay under the APA[101] while still providing the agency with discretion as to how and when it will implement its mandated obligations.[102]

IV. INSTANT DECISION

The *In re Pesticide* Court began its analysis by finding that the standard with which the EPA is measured is set forth in the APA.[103] The Court determined that if the EPA was withholding action "unlawfully" or with "unreasonabl[e] delay"[104] it is within the authority of the Court to grant mandamus relief under 28 U.S.C. §1651.[105] In order to determine whether the EPA had violated its statutory work standard, the Court relied on precedent in declaring that mandamus relief is appropriate only in the

[101] 5 U.S.C. § 706(1) (1966); *see* Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1999); *see also* U.S. v. Monsanto, 491 U.S. 600, 607 (1989) (by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied").
[102] Miaskoff, *supra* note 100, at 657.
[103] *In re* Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc., 798 F.3d 809, 813 (9th Cir. 2015); *see* Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc. 435 U.S. 519, 521 (1978).
[104] *Pesticide Action Network*, 798 F.3d at 813 (quoting 5 U.S.C. §§ 555(b), 706(1) (1966)).
[105] 28 U.S.C. § 1651(a) (1948) ("[A]ll courts established by Act of Congress may issue all writs necessary.").

specific and unique circumstance when an "agency's delay is egregious."[106]

The Court applied the "TRAC factors" test in shaping its determination.[107] Although the Court found in favor of the EPA in its earlier assessment of the TRAC factors test, it was not influenced by the EPA's argument in light of the current circumstances.[108] The fourth factor pertaining to the EPA's priority interests as an agency and the fifth factor regarding the interest of PANNA were addressed in the prior ruling and at that time fell in favor of the EPA because the Court was sympathetic to the EPA's use of its resources and noted that in 2006 chlorpyrifos was certified as a safe pesticide.[109] However, even more important according to the Court, the EPA's establishment of a "concrete timeline" to which it was to adhere carried significant weight as it pertains to the "rule of reason" found in the first two factors.[110]

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[106] *Pesticide Action Network*, 798 F.3d at 813 (quoting In re Cal. Power Exch. Corp., 245 F.3d 1110, 1120 (9th Cir. 2001); *see also* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).
[107] *Pesticide Action Network*, 798 F.3d at 914.
[108] *Id.*
[109] *Id.*
[110] *Id.*

The Court rejected these arguments put forth by the EPA this time around.[111] In planning to issue a "proposed rulemaking" and not a final ruling, the EPA failed to provide the requisite certainty needed to successfully argue it did in fact have a "concrete timeline."[112] Also telling of the EPA's position was the fact that it acknowledged there may not be a ruling at all depending on the outcome of settlements.[113] Moreover, the EPA's recent history of failing to adhere to its own timetable[114] and the fact that the EPA has admitted chlorpyrifos may be harmful to farmers, yet has failed to initiate any proceedings to resolve the matter further, dissuaded the Court of the EPA's arguments.[115]

The Court's analysis of the fifth factor, which focused on the EPA's digression from its prior position that chlorpyrifos was safe, weighed heavily in determining that the interests prejudiced by further

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[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* ("The D.C. Circuit's comment in Public Citizen Health Research Group v. Brock seems particularly apt here: 'In light of the fact that [the agency's] timetable representations have suffered over the years from a persistent excess of optimism, we share petitioners' concerns as to the probable completion date.'" (quoting Public Citizen Health Research Group v. Brock, 823 F.2d 626, 629 (D.C. Cir. 1987) (per curiam)).
[115] *Id.*

delay outweighed the prejudice against the EPA.[116] By issuing a change in the labeling of the pesticide and a report about the dangers to the water supply, the EPA's own "assessment" of chlorypifiros provided the final piece the Court needed to evaluate whether agency action should be mandated.[117]

The Court held that these factors necessitated granting Pesticide Action Network's prayer for mandamus relief, and the Court ordered the EPA to issue a final ruling no later than October 31, 2015.[118]

V. COMMENT

The United States regulatory system is vast and complex. Federal agencies are a key component that our system of government relies on when it comes to enforcing Congress' laws. As time passes, this legal framework increases demands on these agencies in that more laws and regulations are passed and more laws and regulations must be enforced. What is more, these laws and regulations are seldom consistent over the course of several years. Legislators on both sides of the aisle prioritizing different issues will rely on the same federal agency for enforcement.

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[116] *Id.*
[117] *Id.*
[118] *Id.* at 815.

In a system of finite resources, agency inaction can ensue and the need for a court to compel agency action in the face of clear violation of the law is tantamount. Still, writs of mandamus in the context of agency decisions are extremely rare, and rightfully so.[119] Congress authorizes and expects agencies to act, and when they do not, Congress has authorized and expects courts to uphold its intent.[120] However, Congress also recognizes that agencies must have discretion on certain issues to best fulfill its intent, and the courts should uphold this intent as well.[121]

For an agency such as the EPA, who not only regulates pesticides, but also such things as water quality, air quality, cosmetic safety, food safety, and a whole host of other effects on human health and welfare, the undertaking of implementing its own mandates and Congress' mandates become enormous.[122] *In re Pesticides* exploits the very issues that arise because of this type of vast legal framework.

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[119] *See* In re Cal. Power Exch. Corp., 245 F.3d 1110, 1120 (9th Cir. 2001) (quoting Pub. Util. Comm'r v. Bonneville Power Admin., 767 F.2d 622, 630 (9th Cir.1985)).
[120] *See* 5 U.S.C. § 706(1) (2012); *see also* Massachusetts v. E.P.A., 549 U.S. 497, 527 (2007).
[121] Massachusetts v. E.P.A., 549 U.S. 497, 527 (2007).
[122] EPA, *Summary of the Food Quality Protection Act*, http://www2.epa.gov/laws-regulations/summary-food-quality-protection-act (last visited Nov. 28, 2016).

One key aspect the *In re Pesticides* court failed to address was that in the case of chlorpyrifos, the EPA's statutory deadlines for reregistration did provide a clear legal standard with which the court could have observed.[123] In one regard, the EPA already completed a massive undertaking by reevaluating over 9,000 pesticides—including reregistering chlorpyrifos—according to the mandatory ten-year review required under the FQPA. What is more is that this review applied the new standard for chemical residue pesticides. The EPA discovered that it was not as beneficial and safe as previously thought, so it used its discretion accordingly; limiting those pesticides it found to be unsafe. Consequently, in meeting its statutory deadline to reassess chlorpyrifos by 2006, it fulfilled one of Congress' statutory mandates. The next statutory deadline the EPA was required to meet did not come until 2011 under FIFRA's fifteen-year review. Although the court pointed this out when it first addressed PANNA's writ of mandamus request, it did not analyze the expectations of Congress when looking at the EPA's deadlines.

[123] *See* Beyond Pesticides/Nat'l Coal. Against the Misuse of Pesticides v. Johnson, 407 F. Supp. 2d 38, 41 (D.D.C. 2005).

The fact that this particular proceeding had gone on for so many years is worthy of consideration, and the Court rightly does so.[124] In pointing out that the EPA failed to adhere to its previously planned timeline, the court also addresses a concern that directly spurs from the EPA's discretionary authority; federal agencies need to be predictable and accountable in exercising their discretion. But, was the EPA abusing its discretion with regards to failing to adhere to its own timelines? The court believed so, but its reasoning was based on the EPA's actions, not Congress' intent or expectations.

In using the EPA's own analysis that chlorpyrifos might not be as safe as it once thought, the court relies directly on the EPA's discretionary authority, yet at the same time uses that exercise of discretion against them.[125] The court's reasoning here is questionable in that it does not distinguish the difference between the EPA's discretion to classify chlorpyrifos as an unsafe pesticide, and the next step: EPA's discretion as to how it will implement the necessary regulations to ensure the safety of human health and welfare. If the EPA's discretionary authority is good

[124] In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc., 798 F.3d 809, 813 (9th Cir. 2015).
[125] *Id.* at 814.

enough to classify a pesticide as unsafe, why is it not good enough with regards to its response to PANNA's petition? One way the court could have addressed this would be to compare the EPA's timetable to Congress'.[126]

Courts have frequently acknowledged that statutory timelines are manifestations of Congress' intent. In setting clear timelines for pesticide chemical residues, Congress provided one clear standard with which it intended chlorpyrifos to be evaluated. The court placed little to no emphasis on the fact that in exercising its discretion, the EPA's intent to fulfill its obligations according to its 2009 work plan, a discretionary response to PANNA's petition, directly aligned with Congress' expectations for reevaluating chlorpyrifos starting in 2011. In setting timelines of ten and fifteen years, surely Congress was addressing the fact that these types of evaluations take enormous amounts of time, planning, and resources. Regardless, the court never addresses the EPA's timeline in this manner.

In granting third parties the right to petition the EPA, Congress created one avenue with which people could assert disproval of the EPA's

[126] *See* Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004).

actions. With any EPA decision, no matter the merits, there is always bound to be someone who opposes it. Consequently, there is a risk that petitions can be frivolous. That does not authorize the EPA to ignore these types of petitions, but in granting the EPA powerful discretionary authority, Congress was aware that this type of situation could occur and the EPA must take action accordingly.[127] This is not to say that petitions are useless. Petitions are a valuable resource the EPA can and should utilize. Such benefits include spotting issues that the EPA might not otherwise address for clear lack of knowledge, as well as questions arising to decisions, regulation, or orders the EPA may have inappropriately addressed, *i.e.*, when the EPA oversteps its bounds. Conversely, as PANNA argued, the EPA had not done enough with respect to chlorpyrifos.

Although PANNA was dissatisfied with the EPA's lack of action with respect to its petition, there were still actions taken. The EPA's continued action during the course of the proceedings for *In re Pesticides*, including the 2012 limitation placed on chlorpyrifos, clearly illustrates not only that the EPA was exercising its discretion in devoting resources to

[127] *See* Massachusetts v. E.P.A., 549 U.S. 497, 527 (2007).

chlorpyrifos regulation, but also using its discretion to address PANNA's petition, albeit in a roundabout way. However, the court seems to place little emphasis on these actions.[128]

The EPA's inability to keep its own discretionary timetable appears to be the deciding factor against its case.[129] In using this factor, the court attempts to account for Congress' intent to grant the EPA discretionary authority, without overstepping its bounds. The court justifies this by using the EPA's analysis of chlorpyrifos as unsafe to conclude it was an imminent threat to human health and welfare worthy of more direct action. This is certainly reasonable, and the court's decision may be right, but it might also fundamentally alter the way the EPA deals with petitions. Although we want predictability and accountability from our federal agencies, the concern is that an agency such as the EPA will always respond in a way that ensures they can comply with their timeline. This incentive could potentially lead to longer delays in responses to actions, the exact result the court is trying to avoid.

[128] *Pesticide Action Network*, 798 F.3d at 809.
[129] *Id.*

VI. CONCLUSION

Human health and welfare is undoubtedly of utmost importance. Political candidates from all backgrounds and parties certainly can agree to this. But oftentimes that seems to be the only thing they agree upon. The EPA, as part of the executive branch of government, is often tasked with implementing these parties' ideologies; the influence of politicians and special interest groups is clearly relevant. Even the EPA acknowledged it was in settlement talks with industry groups during the *In re Pesticides* litigation. Consequently, governmental changes lead to changes in priority as often as as the weather changes in Missouri, and often just as extreme. This type of priority shifting can and does significantly affect how the EPA decides to prioritize its obligations, potentially altering its approach as to how and when it takes action to certain petitions. If the EPA decides to respond to these petitions by overstating the timeline it actually needs for fear of court intervention, this will only exacerbate the problem. Yet, courts must be authorized to take action to compel agency inaction in clear violation of the law, but courts should be sure to thoroughly vet all the potential harms that result as a consequence.

SAMUEL STEELMAN