

Clay R. Smith  
Chief Editor, AILD  
CWAG & AG Alliance  
208.350.6426 (Direct Dial)  
208.724.9780 (Cell)  
[Clay.Smith@cwagweb.org](mailto:Clay.Smith@cwagweb.org)

**Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency**—Mandamus relief granted against EPA for 11-year delay in resolving administrative petition to cancel pesticide certification

NRDC filed an administrative petition in 2009 requesting EPA to cancel the registration of a pesticide (tetrachlorvinphos (TCVP)) used in the manufacture of products for household pets. TCVP is a subset of a class of pesticides that “pose recognized dangers to the neurodevelopment of children, causing reduced cognitive capacity, delays in motor development, and behavioral problems.” In 2014, NRDC sought mandamus in the D.C. Court of Appeals to compel a response to its cancellation petition. During the course of that proceeding, EPA denied the administrative petition, prompting the parties to stipulate to its dismissal and NRDC to seek judicial review of the administrative petition’s denial in the Ninth Circuit six weeks later. The latter circuit remanded the case to EPA in 2016, over NRDC’s objection, without a deadline for administrative action after “EPA filed a motion for voluntary remand, asserting that it was completing a new risk assessment which might change its response to NRDC’s petition.” In late 2016, “EPA issued a revised final risk assessment, which now recognized that children could be exposed to TCVP through contact with pets using TCVP products and that such exposure posed considerable risks to their health. ... Upon release of the risk assessment, the EPA repeated its intention to ‘issue a final revised response to NRDC’s 2009 petition . . . within 90 days,’ and issued a press release announcing that it had had ‘identified potential risks to people, including children, . . . which exceed the Agency’s level of concern.’” EPA did not act within the 90-day period but did “sen[d] NRDC a cursory letter in March 2017, stating that it intended to review pet-care uses of TCVP and issue a proposed decision in several months, between July and September 2017, alongside its scheduled review of all other TCVP uses.” The agency, however, failed to do so after an unsuccessful attempt to secure additional data from a manufacturer. NRDC filed the present mandamus proceeding in 2019 to compel a decision on its 2009 petition. Five days later, EPA sued the manufacturer to secure the data denied in 2017.

“Guided by our case law and the history of these proceedings,” the panel held “that the EPA has unreasonably and egregiously delayed the performance of its statutory duties on this critical matter of public health and that the circumstances warrant the extraordinary remedy of issuing a writ of mandamus.” *Natural Res. Def. Council, Inc. v. U.S.E.P.A.*, No. 19-71324, 2020 WL 1933135 (9th Cir. Apr. 22, 2020). In so holding, it applied the six-factor test set out in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984):

“(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.”

The panel found the first, and most important, factor present, reasoning that “‘the more developed law of the District of Columbia Circuit,’ ... has held that a ‘six-year-plus delay is nothing less than egregious’” and that “[o]ur own law is no different.” Here,

[w]hether we measure from April 2009—the time of NRDC’s initial Administrative Petition—or from March 2017—the date that a final response should have been made according to the EPA’s own representations to this court—the “EPA has stretched the ‘rule of reason’ beyond its limits.” ... Its delay has not been one of weeks or months, but of years, ... and is all the more glaring because of its history of inaccurate representations and mooted lawsuits. ... The rule of reason “tip[s] sharply in favor” of mandamus relief.

The panel further found that, while the second and sixth factors had little relevance to the dispute, the third and fourth factors “strongly support[ed] NRDC’s petition for mandamus relief.” It rejected EPA’s argument that, “[e]ssentially, ... because the third factor (human health) will always be at stake in EPA cases, it merits less weight; and at the same time, the nature of the EPA’s work means that expediting this action will necessarily delay ‘agency activities of a higher or competing priority’—the fourth factor.” The panel closed the factor analysis by finding that “‘[t]he children exposed [to TCVP] due to the failure of EPA to act are severely prejudiced by EPA’s delay, and the fifth factor thus favors issuance of the writ.’ ... The stakes to human health and the interests prejudiced by delay are indisputable.”

The panel, finally, issued a detailed remedy addressing the range of administrative decision-making and imposing specific time constraints:

We order the EPA to issue a full and final response to the Administrative Petition within 90 days of the date that this decision becomes final, either by denying the Petition or by initiating cancellation proceedings. If the EPA initiates cancellation proceedings, we order the EPA to file status reports with this court every two months, until registration of TCVP has been cancelled. We note, however, if the EPA begins cancellation proceedings, then we expect cancellation proceedings to conclude within one year of the date of this decision, and any extension beyond that must be supported by a showing of good cause. By contrast, if the Agency denies NRDC’s Petition on the merits, then NRDC may appeal that final agency action under the standards of the APA and any other applicable law. This court shall retain jurisdiction until the EPA has taken a final action subject to judicial review.

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/04/22/19-71324.pdf>