**No. 16-72816**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re: A COMMUNITY VOICE, et al.,

A COMMUNITY VOICE, et al.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

# EPA'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division

ROCHELLE L. RUSSELL
U.S. Department of Justice
Environmental Defense Section
301 Howard Street, Suite 1050
(415) 744-6566
Rochelle.Russell@usdoj.gov

*Of Counsel*:
ALYSSA GSELL
Office of General Counsel
U.S. Environmental Protection Agency
Washington, D.C.

# TABLE OF CONTENTS

**PAGE**

# TABLE OF AUTHORITIES

**CASES** **PAGE**

**STATUTES:**

**REGULATIONS:**



**FEDERAL REGISTER:**

## INTRODUCTION

Respondents United States Environmental Protection Agency and Gina McCarthy, Administrator, (collectively "EPA") hereby oppose the Petition for Writ of Mandamus filed by A Community Voice, California Communities Against Toxics, Healthy Homes Collaborative, New Jersey Citizen Action, New York City Coalition to End Lead Poisoning, Sierra Club, United Parents Against Lead National, and We Act for Environmental Justice (collectively "Petitioners"). Petitioners argue that EPA has unreasonably delayed promulgating a rule to update the dust-lead hazard standards and the definition of lead-based paint under the Toxic Substances Control Act, and request that the Court order EPA to issue a proposed rule within 90 days and to finalize the rule within six months.

The mandamus petition should be denied. EPA has no duty, statutory or otherwise, to promulgate a rule revising the dust-lead hazard standards and the definition of lead-based paint. The only arguable duty in this case arises from EPA's response to the administrative petition, in which it committed to begin an appropriate proceeding to consider revising the dust-lead hazard standards – a duty which has been fulfilled. And there is no duty that has arisen from the administrative petition with respect to the definition of lead-based paint. Accordingly, there is no basis upon which this Court can issue a writ directing EPA to take any action in this case, let alone the rulemaking Petitioners seek. Furthermore, even if there were an outstanding duty, EPA has not unreasonably delayed its consideration of a revision to the dust-

lead hazard standards and the definition of lead-based paint. EPA has proceeded at a reasonable pace that is well within its discretion, and has reasonably prioritized and coordinated competing projects with firm deadlines that are at least equally important to human health and welfare. Judicial intervention is therefore unwarranted.

## BACKGROUND[1]

### I. Lead and Its Health Effects

Lead particles, when inhaled or swallowed, can cause significant adverse health effects, including learning disabilities, growth impairment, and other damage to the brain and nervous system. "Lead; Renovation, Repair, and Painting Program," 71 Fed. Reg. 1588, 1590 (Jan. 10, 2006). Lead exposure in young children is of particular concern because their nervous systems are still developing, they absorb lead more readily than adults, and they have a higher risk of exposure due to their frequent hand-to-mouth behavior. *Id.* Relevant here, children in the home can be exposed to lead through various pathways, including dust contaminated by lead-based paint and lead-based paint chips flaking from walls, windows, and doors. *Id.*

The amount of lead concentration in blood, or blood lead level, is used to predict the health effects and risks from lead exposure and is expressed in micrograms

[1] EPA concurs with Petitioners that, because the courts of appeals would have exclusive jurisdiction to review any final rule issued by EPA under subchapter IV of the Toxic Substances Control Act, 15 U.S.C. § 2618(a), this Court has jurisdiction over this case alleging EPA's unreasonable delay in promulgating a rule under that authority. *See Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 74-79 (D.C. Cir. 1984) ("*TRAC*"); *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1119-20 (9th Cir. 2001).

of lead per deciliter of blood (μg/dL). *See* Declaration of Jeffery Morris ("Morris Decl.") Attach. A, President's Task Force on Envtl. Health Risks & Safety Risks to Children, *Key Federal Programs to Reduce Childhood Lead Exposures & Eliminate Associated Health Impacts*, at 2-9 (Nov. 2016) ("*Key Federal Programs*"). In the past, the Centers for Disease Control and Prevention ("CDC") used a "level of concern" of 10 μg/dL for children under the age of six. *Id.* at 8. Due to the evolving body of research showing that no measurable level of blood is without harmful effects, the CDC in 2012 began to use a "reference level" of 5 μg/dL. *Id.* This reference level is used to identify children with blood lead levels that indicate an elevated source of exposure in the child's environment and to recommend initiation of public health actions. *Id.*

Due in large part to a number of federal regulations and programs aimed at reducing childhood lead exposures, *see id.* at 5 (Fig. 1), the median blood lead level of children ages one to five years dropped from 15 μg/dL in 1976-1980 to 0.7 μg/dL in 2013-2014, a decrease of 95 percent. *Id.* at 6. There is, however, no safe level of lead in blood, and lead exposure through paint, soil, water, and air remains a significant health concern for children. *Id.* at 7-8, 10-11.

## II. Statutory and Regulatory Background

To address the problem of lead exposure in the home, Congress in 1992 enacted the Residential Lead-Based Paint Hazard Reduction Act as Title X of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992) ("Title X"). Title X set forth a comprehensive federal program for

reducing the risks from lead-based paint and certain lead hazards. Among other things, Title X amended the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*, by adding subchapter IV, entitled "Lead Exposure Reduction." Title X § 1021, 106 Stat. 3912-24 (now codified at 15 U.S.C. §§ 2681-92). The statutory and regulatory provisions most relevant to this petition are summarized below.

### A. The Dust-Lead Hazard Standards

TSCA requires EPA to promulgate regulations that identify "lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil." 15 U.S.C. § 2683. Relevant here, TSCA defines "lead-contaminated dust" as "surface dust in residential dwellings that contains an area or mass concentration of lead in excess of levels determined by the [EPA] Administrator . . . to pose a threat of adverse health effects in pregnant women or young children." *Id.* § 2681(11).

In 2001, EPA promulgated regulations that established, among other things, numerical standards that indicate when a "dust-lead hazard" is present on floors and window sills in target housing[2] and child-occupied facilities.[3] "Lead; Identification of

[2] "Target housing" is defined as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing . . . ) or any 0-bedroom dwelling." 15 U.S.C. § 2681(17).

[3] A "child-occupied facility" means "a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, 6 years of age or under, on at least two different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visit lasts at least 6 hours, and the combined annual visits last at least 60 hours." 40 C.F.R. § 745.223. Examples include day-care centers, preschools, and kindergarten classrooms.

Dangerous Levels of Lead," 66 Fed. Reg. 1206 (Jan. 5, 2001) (codified at 40 C.F.R. §§ 745.61–65). The dust-lead hazard standard for floors is 40 micrograms of lead per square foot (40 μg/ft$^2$), and the standard for window sills is 250 μg/ft$^2$. 40 C.F.R. § 745.65(b). EPA also established "clearance levels" for the same areas that are used to evaluate the effectiveness of cleaning following an abatement[4] and which are currently identical to the dust-lead hazard standards. 66 Fed. Reg. at 1211; 40 C.F.R. § 745.227(e)(8)(viii). The dust-lead hazard standards inform other lead regulatory programs under Title X, and can affect, for example, the obligations for owners of target housing to disclose known lead hazards[5] and the situations in which certified workers must be used and work practice standards adhered to when a homeowner takes steps to eliminate a lead hazard through abatement.[6]

### B. The Definition of Lead-Based Paint

TSCA defines "lead-based paint" as paint or other surface coatings with lead levels in excess of 1.0 milligrams per square centimeter (mg/cm$^2$) or 0.5% by weight, and outlines how that definition may be revised:

> (A) in the case of paint or other surface coatings on target housing, such

---

[4] "Abatement" includes "[t]he removal of paint and dust, the permanent enclosure or encapsulation of lead-based paint, the replacement of painted surfaces or fixtures, or the removal or permanent covering of soil, when lead-based paint hazards are present in such paint, dust or soil." 40 C.F.R. § 745.223(1).

[5] *See* 42 U.S.C. § 4852d; "Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing," 61 Fed. Reg. 9064 (Mar. 6, 1996).

[6] *See* 15 U.S.C. § 2682; "Requirements for Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities," 61 Fed. Reg. 45,778 (Aug. 29, 1996).

> lower level as may be established by the Secretary of Housing and Urban Development, as defined in section 4822(c) of Title 42, or (B) in the case of any other paint or surface coatings, such other level as may be established by the [EPA] Administrator.

15 U.S.C. § 2681(9). EPA has not exercised its authority under this provision to set a different level. *See* 40 C.F.R. § 745.223 (mirroring statutory definition).

Like the dust-lead hazard standards, the lead-based paint definition is incorporated into certain regulatory programs under Title X. For example, lead-based paint must be disclosed by owners when selling target housing, and lead inspections and risk assessments may use the definition of lead-based paint in considering whether to conduct lead abatement.[7] *See supra* n.4 & n.5.

## III. EPA's Response to the Administrative Petition

On August 10, 2009, several of the Petitioners in this case submitted an administrative petition to EPA requesting that the Administrator begin rulemaking to lower the dust-lead hazard standards from 40 μg/ft² to 10 μg/ft² or less for floors and from 250 μg/ft² to 100 μg/ft² or less for window sills, and to modify the definition of lead-based paint to reduce the lead levels from 0.5% by weight to 0.06% by weight with a corresponding reduction in the 1.0 mg/cm² standard. Morris Decl. Attach. B.

[7] Contrary to Petitioners' characterization, Pets.' Br. at 9 and 18, the presence of lead-based paint or a dust-lead hazard does not itself trigger a requirement that any particular lead inspection, risk assessment, or abatement be performed. Rather, the regulatory requirements governing these activities apply only in the event the owner or occupant chooses to undertake such activities. 40 C.F.R. § 745.220(d).

After seeking public comment on the administrative petition, EPA issued a letter in response on October 22, 2009. Morris Decl. ¶¶ 7-8. In the response, EPA acknowledged that lead poisoning prevention is a priority and that the current dust-lead hazard standards "may not be sufficiently protective." Morris Decl. Attach. C at 1. EPA thus granted the petition,[8] but with qualification.

Regarding the dust-lead hazard standards, EPA stated that it "intends to begin an appropriate proceeding," and made clear that, in doing so, the Agency was "not committing to a specific rulemaking outcome . . . or to a certain date for promulgation of a final rule." *Id.* Concerning the definition of lead-based paint, EPA stated its "intention to initiate appropriate proceedings regarding the definition of lead-based paint in non-target housing." *Id.* at 2. But EPA also explained that, because it shares statutory authority with HUD to revise the definition, the Agency would "work with HUD on this aspect of [the] request" *Id.* Specifically, EPA stated that "[s]hould HUD make revisions to the definition of lead-based paint in target housing, EPA intends to coordinate accordingly." *Id.* at 2.

EPA promptly began the dust-lead hazard standards proceedings. The following summarizes the key administrative actions taken to date; the complete list is detailed in the Morris Declaration at ¶¶ 10-31 filed in support of this response.

[8] EPA construed the administrative petition as one submitted under section 553(e) of the APA, 5 U.S.C. § 553(e), which provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Morris Decl. Attach. C. at 1.

Approach Development. In early 2010 and pursuant to EPA's request, a Science Advisory Board Lead Review Panel ("SAB Panel") comprised of scientists and engineers from outside EPA was formed to provide advice to the Agency concerning possible revisions of the dust-lead hazard standards.[9] Morris Decl. ¶¶ 12-14. In June 2010, EPA submitted to the SAB Panel a 76-page proposed approach document that set forth the proposed methodology for determining how to derive appropriate dust-lead hazard standards for floors and window sills in target housing and child-occupied facilities. *Id.* ¶¶ 10-11, 15 & Attach. D. The SAB Panel found the approach to be well conceived and reasonable, but recommended, among other things, that EPA add epidemiologic studies to its analysis and compare those conclusions with the Agency's proposed modeling approach. Morris Decl. ¶ 17 & Pets.' Br. Neltner Decl. Exh. 5, at 1-2.

In November 2010, EPA submitted a revised 144-page proposal, which included modeling that predicted the relationship between a range of candidate standards for dust-lead loading[10] on floors and window sills and specified target blood lead levels in children. Morris Decl. ¶ 20 & Attach. E. On this, the SAB Panel recommended inclusion of an analysis to assess how incremental changes in dust-lead

[9] The SAB provides independent advice, consultation, and recommendations to EPA on scientific and technical matters. 42 U.S.C. § 4365.

[10] "Loading" refers to the quantity of a specific substance present per unit of surface area, such as the amount of lead in micrograms contained in the dust collected from a certain surface area divided by the surface area in square feet or square meters. 40 C.F.R. § 745.63.

loadings result in incremental changes in blood lead concentrations. Morris Decl. ¶ 25 & Pets.' Br. Neltner Decl. Exh. 6, at i-iii.

Literature Review. Between March and November of 2011, EPA conducted a literature review to determine (1) whether available laboratory and field technology used to detect lead-contaminated dust at lower levels would be effective, readily accessible, and broadly available, and (2) whether certain work practice requirements and current industry abatement practices consistently clean to a particular level below the current dust-lead hazard standards. Morris Decl. ¶ 23. The review concluded that current laboratory and field technology can detect lower dust-lead levels. *Id.* ¶ 27.

Clearance Survey. Between November 2011 and June 2012, EPA collaborated with HUD to develop the Lead Hazard Control Clearance Survey to obtain information about the practices used by HUD grantees to achieve clearance levels. *Id.* ¶ 28. The survey required public comment on and approval of an Information Collection Request ("ICR") by the Office of Management and Budget ("OMB"). *Id.* HUD solicited public comment on the ICR in June 2012 and submitted the ICR to OMB in October 2012. *Id.* ¶ 29. Over the course of eighteen months, EPA worked closely with HUD to address several rounds of questions and comments from OMB concerning the ICR. *Id.* OMB approved the ICR on May 20, 2014. *Id.* HUD completed the clearance survey and provided a final report to EPA in October 2015. *Id.* ¶ 30. The survey demonstrated that lower lead clearance levels are feasible. *Id.*

Next Steps. EPA will continue to update its approach for the dust-lead hazard standards to reflect the conclusions drawn from the literature review and clearance survey data, comments from the SAB Panel, and data collection concerning dust exposure IQ effects in children. *Id.* ¶¶ 31, 66. EPA intends to incorporate into its analysis data from its *Integrated Science Assessment for Lead*, which EPA released as part of its periodic review of the national ambient air quality standards for lead established under the Clean Air Act. *Id.* ¶ 65. This assessment provides a comprehensive review of the scientific literature, and includes an analysis of the health effects of lead at levels in blood lower than 10 μg/dL. *Id.*

With regard to the CDC's current reference level of 5 μg/dL, EPA cautions that, contrary to Petitioners' suggestion, Pets.' Br. at 12, this level is not dispositive of whether and to what level to revise the dust-lead hazard standards. EPA established the current dust-lead hazard standards, in part, based on a one to five percent probability of an individual child having a blood lead level exceeding 10 μg/dL, which comported with the CDC's then "level of concern" of 10 μg/dL. *See* 66 Fed. Reg. at 1214-16. Unlike the previous "level of concern," which was health-based, the CDC's new "reference level" of 5 μg/dL is statistically-derived. Morris Decl. ¶ 67. It is a level used to identify children with blood lead levels that indicate an elevated source of exposure and it is based on the 97.5th percentile of blood lead distribution in U.S. children ages one to five years. *Id.* The dust-lead hazard standards, on the other hand, must be health-based, and are determined by a level of lead in dust that poses a threat

of adverse health effects. 15 U.S.C. § 2681(11). Nevertheless, the CDC's reference level does inform discussion and analysis of health effects at lower blood lead levels, and EPA, in conducting its analysis, will consider the CDC reference level.

EPA will take a number of additional steps before making a decision about proceeding on a possible revision to the dust-lead hazard standards, including the technical, modeling, and other regulatory procedures described in the Morris Declaration at ¶¶ 68-72. EPA also will consider possible revisions to the clearance levels. To accommodate these steps and the competing priorities discussed below, EPA estimates it will take four years to develop a proposed rule revising the dust-lead hazard standards or to conclude that no such revision is appropriate. *Id.* ¶ 73.

Regarding the definition of lead-based paint, EPA has not yet initiated proceedings to consider revising the definition. *Id.* ¶ 74. EPA deferred these proceedings to accommodate work on other lead matters and because HUD has not initiated its own proceedings to revise the definition. *Id.* The Agency intends, however, to coordinate with HUD in 2017 to determine their respective authorities concerning the definition of lead-based paint, and to consider whether any revision to the definition is necessary. *Id.*

## IV. Related Proceedings

### A. The RRP Rule Settlement and P&CB Rulemaking

TSCA requires EPA to address renovation and remodeling activities that create lead hazards in target housing, public buildings constructed before 1978, and

commercial buildings. 15 U.S.C. § 2682(c)(3). In 2008, EPA issued regulations that establish accreditation, training, certification, and recordkeeping requirements as well as work practice standards for persons performing such activities in target housing and pre-1978 public buildings and commercial buildings that qualify as child-occupied facilities. "Lead; Renovation, Repair, and Painting Program," 73 Fed. Reg. 21,692 (Apr. 22, 2008) ("RRP Rule").

On August 24, 2009, EPA entered into a settlement agreement to resolve two petitions for review challenging the RRP Rule in the D.C. Circuit Court of Appeals.[11] Morris Decl. ¶ 33. Pursuant to the agreement, EPA committed to undertake a number of scientific reviews and rulemaking proposals by certain deadlines. *Id.* ¶ 34 (detailing commitments). Among other commitments, EPA agreed to sign an Advance Notice of Proposed Rulemaking regarding work practice standards applicable to renovations of pre-1978 public and commercial buildings, consult with the Science Advisory Board regarding the development of hazard standards for such buildings, and, absent a determination that such renovations do not create hazards, propose work practice requirements for such renovations (currently due by March 31, 2017). *Id.* ¶¶ 34, 48.

These public and commercial building ("P&CB") rulemaking commitments required numerous studies, complex modeling approaches, peer review, and input

[11] The petitions, filed by two of the Petitioners in this case, were held in abeyance pending completion of the terms of the settlement agreement. *See New York Coalition to End Lead Poisoning v. EPA*, No. 08-1235 (consolidated with *Sierra Club v. EPA*, No. 08-1258), Dkt. No. 1206107 (Sept. 14, 2009).

from the public and regulated community. *Id.* ¶¶ 36-49. And EPA's work under the settlement agreement, including the P&CB rulemaking (which remains ongoing), involved the same staff responsible for the dust-lead hazard standards and the definition of lead-based paint. *Id.* ¶ 35.

### B. The 2016 TSCA Amendments

In addition to addressing lead exposure, TSCA directs EPA, in subchapter I, "Control of Toxic Substances," to make affirmative determinations regarding the safety of all new chemical substances proposed to enter U.S. commerce, to conduct risk evaluations on numerous other chemical substances that are already in commerce, and to timely finalize risk management rules for chemical substances found to present unreasonable risks. 15 U.S.C. §§ 2604-06. EPA's responsibilities under this subchapter were significantly and immediately modified and enlarged in 2016 when Congress passed the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182 (June 22, 2016), 130 Stat. 448 ("2016 TSCA Amendments").

Primarily, the 2016 TSCA Amendments set forth a new risk-based safety standard to determine whether a chemical use presents an "unreasonable risk," eliminating the prior risk-benefit analysis under which costs and other non-risk factors were considered. 15 U.S.C. § 2604(a)(3). The amendments also require EPA to evaluate new chemicals, existing chemicals already in commerce, and significant new uses of existing chemicals against this new risk-based safety standard, and impose enforceable, near-term deadlines for the Agency to take such action. Morris Decl. ¶¶

51-63 & Attach. F (detailing actions required). This work is mandated to proceed at a pace and volume that is unprecedented in the history of TSCA.[12] Morris Decl. ¶ 54.

To carry out these new agency review and regulatory actions, EPA has had to shift resources, including staff from its lead program and other Agency staff that support the lead program. Morris Decl. ¶¶ 51, 57, 62-63.

## STANDARD OF REVIEW

"Mandamus is an extraordinary remedy and one that will be employed only in extreme situations." *Clorox Co. v. U.S. Dist. Court for N. Dist. of Cal.*, 779 F.2d 517, 519 (9th Cir. 1985). The issuance of writs directed to agency action, in particular, is rare and the scope of relief granted, if any, should be narrow. *Pub. Util. Comm'n of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985). The party seeking mandamus bears the burden of proving its right to issuance of the writ is "clear and indisputable." *In re Cal. Power Exch. Corp.*, 245 F.3d at 1120 (citation and internal quotation marks omitted). The issuance of a writ is a matter of discretion with the court, even when the elements for mandamus relief are otherwise satisfied. *Independence*

[12] For example, on December 19, 2016, EPA announced that it had commenced risk evaluations on ten chemical substances, meeting the six-month deadline set by the 2016 TSCA Amendments. 81 Fed. Reg. 91,927 (Dec. 19, 2016). EPA must complete these risk evaluations within three years (extendable for no more than an additional six months). 15 U.S.C. § 2605(b)(4)(G). If any of these chemical substances presents an unreasonable risk, the Agency must issue a final rule to regulate the substance, subject to further deadlines. *Id.* § 2605(c)(1). Meanwhile, EPA must continue to prioritize additional chemical substances and designate high-priority chemical substances for risk evaluation, eventually assessing all of the tens of thousands of chemical substances in commerce. *Id.* § 2605(b)(2)-(3).

*Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 505 (9th Cir. 1997). When the standard for mandamus relief is not met, the case should be dismissed. *See Sierra Club v. Thomas*, 828 F.2d 783, 799 (D.C. Cir. 1987).

## ARGUMENT

### I. Petitioners Have No Clear and Indisputable Right to Issuance of a Writ

The gravamen of this mandamus petition is the assertion that EPA has unreasonably delayed promulgating a rule revising the dust-lead hazard standards and the definition of lead-based paint. Pets.' Br. at 1, 25. But as explained below, EPA has no duty to issue a rule revising the dust-lead hazard standards or the definition of lead-based paint. Moreover, EPA has fulfilled the only duty it arguably incurred with regard to the dust-lead hazard standards, and no clear duty exists concerning the definition of lead-based paint. There is no other duty in this case that can be compelled through mandamus, and, thus, Petitioners cannot show a "clear and indisputable right" to the mandamus relief requested. *In re: Calif. Power Exch. Corp.*, 245 F.3d at 1120. The petition should therefore be denied.

#### A. A writ of mandamus based on a claim of unreasonable agency delay cannot issue absent a clear duty to act.

The APA directs a federal agency to conclude matters presented to it "within a reasonable time," 5 U.S.C. § 555(b), and thus an agency has a general duty to avoid "unreasonable delay." *Sierra Club v. Thomas*, 828 F.2d at 797; *see also* 5 U.S.C. § 706(1) (authorizing reviewing court to "compel agency action unlawfully withheld or

unreasonably delayed"). However, "a delay cannot be unreasonable with respect to action that is not required." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 n.1 (2004). Thus, a claim of unreasonable delay can proceed only where the agency has yet to take discrete agency action it is required to take, *id.* at 64, and a court can compel only agency action that is legally required. *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1221–22 (9th Cir. 2011). Likewise, the requisite agency action in a mandamus petition must be a "duty [that] is ministerial and so plainly prescribed as to be free from doubt." *In re: Calif. Power Exch. Corp.*, 245 F.3d at 1120. Accordingly, a writ of mandamus based on a claim of unreasonable agency delay cannot issue absent a clear duty to act and a finding of unreasonable delay in taking that action. *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000).

### B. The only arguable duty concerning the dust-lead hazard standards was to initiate an appropriate proceeding, which EPA has fulfilled.

TSCA directs EPA to identify by regulation "lead-contaminated dust," and EPA indisputably discharged that duty by promulgating the dust-lead hazard standards in 2001. *See* 15 U.S.C. § 2683; 40 C.F.R. § 745.65(b). But TSCA does not require EPA to review and revise (if necessary) the standards, so there is no statutory duty for the Agency to take such action. Therefore, to the extent any duty exists in this case with regard to such review and revision, it can only arise from EPA's response to the administrative petition.

In its response, EPA did *not* commit to propose or promulgate a rule revising the dust-lead hazard standards. EPA stated only its intent "to begin an appropriate proceeding" to consider revising them and made clear that it retained discretion as to the timing and outcome of that review.[13] Morris Decl. ¶ 8 & Attach C at 1. Thus, even if a rulemaking were the ultimate proceeding through which such revision, if appropriate, would be made, the only arguable duty was to initiate a proceeding – which the factual record demonstrates EPA has unquestionably done. Accordingly, EPA has fulfilled its duty concerning the dust-lead hazard standards, and there is no other duty owed to Petitioners that can be compelled through a writ of mandamus.[14]

### C. There is no clear duty for EPA to take any action with respect to the definition of lead-based paint.

In contrast to the dust-lead hazard standards, Congress itself established the definition of "lead-based paint." 15 U.S.C. § 2681(9). While Congress also provided that EPA, along with HUD, "may" revise certain aspects of this definition, *id.*, "may"

---

[13] *See also* Morris Decl., Attach. D at 1 (EPA explaining in the proposed approach document that it "agreed to commence the appropriate proceeding, but did not commit to a particular schedule or to a particular outcome.").

[14] Petitioners cite *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987), for the proposition that once an agency "elects" to initiate proceedings, "the APA impose[s] an obligation on the agency 'to proceed with reasonable dispatch.'" Pets.' Br. at 26. That case is factually distinguishable. Unlike here, the Food and Drug Administration there was under a statutory obligation to undertake the review requested by the petitioners, and the "elected" proceeding the court referred to in the quote cited by Petitioners was the agency's choice in how to meet that statutory directive. *Cutler*, 818 F.2d at 895. In any event, the factual record here makes clear that EPA has acted with reasonable dispatch.

is the quintessential term for discretion, not command. *See Lopes v. Davis*, 531 U.S. 230, 241 (2001) (construing the use of "may" in statute as permissive, in contrast to the mandatory "shall"). Hence, there is no statutory duty to revise the definition that can be directed through mandamus. As with the dust-lead hazard standards, any duty arises, if at all, from EPA's response to the administrative petition.

In the response, EPA did *not* commit to revise the definition of lead-based paint through rulemaking. Instead, the Agency explained its view that EPA and HUD share statutory authority to revise the definition. Attach. C at 1. Because of this shared authority, EPA stated that "[s]hould HUD make revisions to the definition of lead-based paint in target housing," EPA would "coordinate accordingly." *Id.* at 2. While EPA also stated that it "nonetheless" intended to "initiate appropriate proceedings," *id.*, the question of what proceedings would be "appropriate" must be read in light of the preceding statements, which clearly stressed EPA's intent to coordinate action with any that HUD may take. Morris Decl. ¶ 9.

Since HUD has not, to date, made any revisions to the definition of lead-based paint, no duty to initiate proceedings on EPA's part can possibly be deemed to have arisen – certainly not one that can be deemed sufficiently clear to support a writ of mandamus. *See In re Bluewater Network*, 234 F.3d at 1307 (denying mandamus relief because the statute did "not create a sufficiently clear duty" for the agency to undertake the rulemaking requested). As a result, there is no duty for EPA to take any action concerning the definition of lead-based paint that this Court can compel.

## II. Mandamus Relief Is Unwarranted under the *TRAC* Factors

For the reasons given above, there is no outstanding action that EPA is legally required to take in this case. To the extent this Court holds otherwise, a writ is still unwarranted. Where a writ of mandamus is based upon a claim of unreasonable agency delay, this Court analyzes the six factors set forth by the D.C. Circuit in *TRAC* to determine whether an agency's delay is "so 'egregious' as to warrant mandamus." *In re Cal. Power Exch. Corp.*, 245 F.3d at 1124-25. These factors are:

> (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 agency 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.

*TRAC*, 750 F.2d at 79-80 (citations and internal quotation marks omitted).

In applying these factors, courts have recognized that they are generally "ill-suited to review the order in which an agency conducts its business" and are "hesitant to upset an agency's priorities by ordering it to expedite one specific action, and thus to give it precedence over others." *Sierra Club v. Thomas*, 828 F.2d at 797. With this guiding principle in mind, examination of the *TRAC* factors below shows that EPA's timing in this case has not been unreasonable, much less egregious, to warrant the extraordinary remedy of a writ of mandamus.

### A. EPA's Actions to Date Are Within the Rule of Reason.

The "rule of reason" factor considers whether the agency is proceeding at a reasonable pace. This factor "cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). Instead, the analysis is case-specific, a "complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Id.* at 1100. Whether the agency's pace satisfies the "rule of reason" depends "upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Id.* at 1102. In this case, the "rule of reason" factor mitigates against issuance of a writ.

#### 1. EPA has proceeded at a reasonable pace in considering whether to revise the dust-lead hazard standards.

EPA staff have worked diligently on the scientific and technical review of the dust-lead hazard standards. Morris Decl. ¶¶ 10-31 (detailing proceedings). EPA initiated this review by developing proposed approaches for determining how to potentially revise the standards in consultation with the SAB Panel. *Id.* ¶¶ 10-20, 25. This crucial step, which involved public meetings, took over a year to conclude. Because setting a regulatory standard that could not be reliably measured or achieved would create significant programmatic difficulties, EPA reasonably determined that it

was necessary to attempt to verify that lower standards were detectable through current laboratory testing and achievable through abatement activities. *Id.* ¶ 26.

The answers to those questions took time. EPA engaged in a six-month literature review, which showed that lower levels of lead in dust could be measured. *Id.* ¶¶ 23, 27. EPA also collaborated with HUD to develop the Lead Hazard Control Clearance Survey to obtain information about the specific practices used to achieve clearance at lower levels. *Id.* ¶ 28. The survey, which required approval from OMB, was complex and entailed a substantial number of participants. *Id.* ¶ 28-30. The results of the survey, completed in October 2015, showed that lower dust-lead hazard standards are achievable. *Id.* ¶ 30. EPA will continue to update its approach to reflect the literature review and survey data, comments from the SAB Panel, and data concerning dust exposure IQ effects in children. *Id.* ¶ 31.

Meanwhile, the same office within EPA undertook a number of rulemaking actions required under the RRP Rule settlement agreement that was negotiated by two of the Petitioners in this case: two rulemaking proceedings that culminated in the issuance of final rules amending the RRP Rule; the development of two separate approaches for estimating certain health effects from lead exposure; and an Advance Notice of Proposed Rulemaking for the P&CB rulemaking, followed by a number of scientific and technical modeling, analyses, and peer and public reviews. *Id.* ¶¶ 32-49. This work involved a significant commitment from the Agency in terms of staff and budget. *Id.* ¶ 35. Because work on the RRP Rule settlement and the dust-lead hazard

standards involved shared resources, EPA coordinated the two as efficiently as possible to proceed with both, while managing the RRP Rule settlement obligations. *Id.* This balancing of resources was entirely appropriate and within EPA's discretion. *See In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) ("The agency is in a unique – and authoritative – position to view its project as a whole, estimate the prospects for each, and allocate its resources in the optimal way.").

As demonstrated, EPA has not been idle and the actions taken in consideration of the dust-lead hazard standards do not support a finding of unreasonable delay. The Agency will continue its work, with plans to issue a proposed rule revising the dust-lead hazard standards – as well as the clearance levels based on those standards – or to conclude that no such revision is necessary. Morris Decl. ¶ 73. EPA estimates that it will require four years to complete the multiple analyses and regulatory proceedings underway to support any decision, as well as intra-agency coordination with other lead rulemaking proceedings. *Id.* ¶¶ 64-73 (detailing next steps). This timing, however, depends on a number of variables, including the competing priorities discussed below. *Id.* ¶ 73. EPA should therefore be allowed to complete its review within a timeframe informed by sound science, proper rulemaking procedures, and competing priorities.

**2. EPA has reasonably deferred proceedings to consider revising the definition of lead-based paint.**

TSCA authorizes, but does not compel, EPA to modify the statutory definition of lead-based paint. 15 U.S.C. § 2681(9). EPA shares this discretionary authority with

HUD. *Id.* Accordingly, and in exercising its discretion to set its own regulatory agenda and priorities, EPA has reasonably deferred proceedings to consider revising the definition until HUD takes similar action and in order to accommodate work on the dust-lead hazard standards and the rulemaking actions required under the RRP Rule settlement agreement. Morris Decl. ¶ 74.

Nonetheless, EPA intends to coordinate with HUD in 2017 to determine their respective authorities and responsibilities under the statute and to consider whether revision of the definition is appropriate. *Id.* In light of the competing priorities discussed below, as well as the fact that EPA has no statutory obligation to establish a different definition of lead-based paint, a writ of mandamus directing the Agency to take any action is unwarranted.

**3. The cases cited by Petitioners are not persuasive.**

Because measuring agency delay by years alone cannot establish unreasonable delay, *see Mashpee*, 336 F.3d at 1102, the cases cited by Petitioners in support of their assertion that the time that has elapsed since EPA agreed to initiate appropriate proceedings is "patently" unreasonable, Pets.' Br. at 27-28, are not dispositive. They also are factually distinguishable.

For example, in *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 418-20 (D.C. Cir. 2004), the court granted mandamus relief after the agency made no attempt "to demonstrate the reasonableness of its more than six-year delay." Not so here. In *Brower v. Evans*, 257 F.3d 1058, 1070 (9th Cir. 2001), the agency delayed completing

stress studies that were a statutory prerequisite to the challenged decision in that case. There is no statutory requirement or comparable deadline for EPA to act in this matter. The petition in *In re Core Communications,* 531 F.3d 849, 858 (D.C. Cir. 2008), involved an agency's failure to respond to a judicial mandate directing the agency to state the legal basis for a rule – an action that did not implicate the type of technical and scientific analysis required by EPA here. And in *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1154, 1158 (D.C. Cir. 1983), the court was persuaded to issue a writ expediting a rulemaking the agency had already initiated largely because the agency conceded that the rulemaking was more urgent than any other that its acceleration might impede. EPA makes no such concession in this case.

### B. EPA Must Get Considerable Deference in Setting the Pace at Which It Proceeds Because There Is No Governing Statutory Timetable.

The second *TRAC* factor states that "where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed . . . , that statutory scheme may supply content for [the] rule of reason." *TRAC*, 750 F.2d at 80. "[A]bsent a precise statutory timetable or other factors counseling expeditious action, an agency's control over the timetable of a . . . proceeding is entitled to considerable deference." *Sierra Club v. Thomas*, 828 F.2d at 797 (citation omitted).

No statutory timetable – precise or otherwise – governs EPA's proceedings here. TSCA does not require EPA to review or revise the dust-lead hazard standards or the definition of lead-based paint, and there is no corresponding statutory

timeframe within which EPA must take such action. *Cf.* 42 U.S.C. § 7411(b)(1)(B) (requiring EPA at least every eight years to review and, if appropriate, revise certain standards under the Clean Air Act).

Petitioners argue that the overarching goals expressed by Congress in enacting Title X provide the relevant timetable. Pets.' Br. at 29-31. Congress, however, did not use compulsory language when outlining its goals of eliminating lead hazards in housing "as expeditiously as possible" and of implementing the lead programs "on a priority basis." Pub. L. 102-550 § 1003. These goals were thus aspirational, not mandatory. *See Action on Smoking & Health v. Dep't of Labor*, 100 F.3d 991, 993-95 (D.C. Cir. 1996) (denying mandamus petition where timeframes established in agency policy document for taking regulatory action deemed high priority were aspirational).

Moreover, such aspirational goals do not cabin EPA's inherent discretion to order in a reasonable manner its own priorities, especially with regard to actions not mandated by statute. *See id.; see also Wildearth Guardians v. EPA,* 751 F.3d 649, 651 (D.C. Cir. 2014) (explaining that EPA has broad discretion to determine the timing and priorities of its regulatory agenda). This discretion is particularly germane here, where Congress's stated goals apply equally to all of EPA's lead initiatives under TSCA and where Congress has not designated the rulemaking Petitioners seek as a "super-priority" over all others. *See In re Barr Labs., Inc.*, 930 F.2d at 76 (determining there was not enough "clarity to guide judicial intervention" where Congress "did not address the trade-off between strict compliance with [its] deadline and the FDA's

disposition of other projects."); *Sierra Club v. Thomas*, 828 F.2d at 798 (denying writ of mandamus where there was "no statutory command that EPA assign [the] rulemaking a higher priority than any of its other activities.").

In short, the absence of a precise statutory timetable affords EPA substantial discretion as to the timing of the proceedings in this case. And EPA's actions to date fall well within that discretion. This *TRAC* factor strongly counsels against a finding of unreasonable delay and in favor of denying mandamus relief.

### C. EPA Has Reasonably Prioritized and Coordinated Competing Regulatory Actions That Benefit Human Health and Welfare.

EPA's proceedings in this case are also consistent with the third and fourth *TRAC* factors. The third *TRAC* factor states that "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake," while the fourth factor provides that "the court should consider the effect of expediting agency action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80.

This case does, of course, involve important questions of human health and welfare. EPA does not dispute that lead exposure remains a significant health threat to children, or that lead exposure disparities exist by race, ethnicity, and income. *See* Morris Decl. Attach. A, *Key Federal Programs,* at 6-7. That is why EPA has worked diligently on a number of fronts to address issues surrounding childhood lead exposure from multiple sources including soil, water, air, and paint. *See id.* at 24-34.

This includes work to prevent childhood exposure from lead-contaminated Superfund sites, reducing lead in drinking water, review and implementation of national ambient air-quality standards for lead, and addressing lead hazards in homes and child-occupied facilities through the RRP Rule and other programs. *Id.*

But as courts have recognized, virtually everything EPA does (or fails to do) may implicate health or welfare. *See Sierra Club v. Thomas*, 828 F.2d at 798 (health and welfare concerns "can hardly be considered dispositive when . . . virtually the entire docket of [EPA] involves issues of this type."). Thus, "whether the public health or welfare will benefit or suffer from accelerating [a] particular rulemaking depends crucially upon the competing priorities that consume EPA's time, since any acceleration here may come at the expense of delay of EPA action elsewhere." *Id.*

EPA does not have infinite resources to do everything at once and must prioritize its work based on available resources. Accelerating the proceedings for the dust-lead hazard standards and the definition of lead-based paint would divert Agency resources from the P&CB rulemaking required under the RRP Rule settlement – a significant undertaking that is subject to specific deadlines. Morris Decl. ¶ 35. In addition, EPA has had to shift resources to meet the new regulatory work required by the recent 2016 TSCA Amendments. *Id.* ¶¶ 51-63. These amendments authorize the Agency for the first time to require safety reviews of all chemicals in the marketplace, and provide EPA the authorities needed to protect families from the health effects of dangerous chemicals. *Id.* The amendments, however, created an immediate and

substantial increase in work that the Agency is required to complete under comparatively short deadlines.[15] *Id.* Staff from EPA's lead program and other Agency staff who support the lead program are now responsible for much of this work. *Id.*

Accordingly, court-imposed deadlines in this matter would constrain the Agency's ability and its inherent discretion to allocate resources to complete pending rulemakings and regulatory actions that involve at least equally weighty public health considerations. Analysis of the third and fourth *TRAC* factors, therefore, does not support issuance of a writ in this case.

### D. Petitioners' Interests Do Not Outweigh the Greater Public Interest in Well-Reasoned and Well-Supported Decision Making.

The fifth *TRAC* factor considers "the nature and extent of the interests prejudiced by delay." *TRAC*, 750 F.2d at 80. Petitioners argue that the health risks from lead exposure to children in disadvantaged communities outweighs any competing priorities or reasons behind the pace of EPA's proceedings. Pets.' Br. at 35-36. That childhood health and welfare concerns are implicated in this case, however, does not mean that EPA should not be afforded the time necessary to get it right – *i.e.*, to reach a well-reasoned and well-supported determination concerning possible revisions of the dust-lead hazard standards and lead-based paint definition.

[15] A list of many of the actions required and their corresponding deadlines can be found in "The Frank R. Lautenberg Chemical Safety for the 21st Century Act: First Year Implementation Plan," Attachment F to the Morris Declaration.

Expediting action as requested by Petitioners (requiring EPA to issue a proposed rule within 90 days and a final rule within six months) would not only fall outside the scope of any legally-required action in this case, but would force the Agency to take action without due deliberation. Petitioners' truncated timetable would leave insufficient time for the completion of the ongoing technical analyses, as well as other regulatory proceedings. This, in turn, could impair substantially the quality and defensibility of the ultimate decisions made, and result in further administrative proceedings to correct any issues. *See Sierra Club v. Thomas*, 828 F.2d at 798 ("EPA must be afforded the time necessary . . . so that it can reach considered results in a final rulemaking that will not be arbitrary and capricious or an abuse of discretion."). Such results cannot reasonably be said to be in the interests of Petitioners, EPA, or the public. *See United Steel Workers of Am. v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (denying writ seeking accelerated rulemaking, explaining that "judicial imposition of an overly hasty timetable . . . would ill serve the public interest").

Likewise, rushing a final decision so that Petitioners can "provid[e] comment and input on a proposed rule and ultimately litigate[] a final rule that may be insufficiently protective," Pets.' Br. at 36, presumes without foundation a particular rulemaking outcome and, in any event, should not outweigh the greater public interest in producing a well-considered and well-supported agency decision. Moreover, Petitioners cannot claim a statutory right that might be irreparably harmed by EPA's timing in this case because TSCA does not even require EPA to reconsider the

current dust-lead hazard standards or to establish a different definition for lead-based paint. *See Sierra Club v. Thomas*, 828 F.2d at 798.

### E. There Is No Allegation of Impropriety Here.

The sixth and final *TRAC* factor states that "the court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" *TRAC*, 750 F.2d at 80. Petitioners do not suggest that any impropriety has occurred in this case, and the actions described above and in the Morris Declaration certainly do no manifest any bad faith on EPA's part.

## CONCLUSION

For all the foregoing reasons, EPA respectfully requests that this Court deny the Petition for Writ of Mandamus.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division

Dated: January 17, 2017

*/s/ Rochelle L. Russell*
Trial Attorney
Environmental Defense Section
Environment & Natural Resources Division
301 Howard Street, Suite 1050
San Francisco, CA 94105
(415) 744-6566
Rochelle.Russell@usdoj.gov

*Of Counsel*:
ALYSSA GSELL
EPA, Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 17, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Rochelle L. Russell*
Trial Attorney
U.S. Department of Justice