No. 14-72794

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

EPA'S RESPONSE TO PETITIONERS' MOTION FOR FURTHER MANDAMUS RELIEF

On March 29, 2017, Respondent United States Environmental Protection Agency ("EPA" or "Agency") denied the administrative petition filed by Pesticide Action Network North America and Natural Resources Defense Council, Inc., thereby complying in full with this Court's order "to take final action [on that petition] by March 31, 2017." For that reason alone, this case should be terminated.

Dissatisfied with EPA's decision, however, Petitioners have moved for "further mandamus relief." Contrary to its title, the motion essentially asks this Court for a ruling on the reasonableness of EPA's decision *on the merits*, namely

an order compelling the Agency to initiate cancellation proceedings for registrations of the pesticide chlorpyrifos and to take action different from what it took on March 29 with respect to chlorpyrifos tolerances. Petitioners are not entitled to the requested relief in this mandamus case.

To the contrary, if Petitioners disagree with EPA's decision to deny their petition, the Federal Food, Drug, and Cosmetic Act ("FFDCA") requires that they exhaust their administrative remedies through an objections process before seeking judicial review of the "final agency action," 5 U.S.C. § 704, resulting from that process. Petitioners have not identified any statutory or regulatory authority that would allow them to bypass the objections process by seeking what amounts to substantive judicial review under the guise of mandamus relief. It would be premature for this Court to consider the merits of EPA's March 29, 2017 decision before final agency action is taken at the conclusion of the objections process. Moreover, the relief Petitioners request exceeds this Court's mandamus authority. Thus, Petitioners' Motion for Further Mandamus Relief should be denied.

PROCEDURAL HISTORY

On August 10, 2015, this Court ordered EPA to "issue either a proposed or final revocation rule or a full and final response" to the administrative petition by October 31, 2015. Dkt. No. 23. In full compliance with that order, EPA issued a

proposed revocation rule on October 28, 2015.[1] *See* Status Report, Dkt. No. 25 (Oct. 30, 2015). At Petitioners' request, *see* Dkt. No. 26, this Court ordered EPA to make its "final response" to the administrative petition by December 30, 2016, and to file a status report by June 30, 2016, indicating if any "extraordinary circumstances" existed that would prevent EPA from complying with the deadline. Dkt. No. 29. On June 29, 2016, EPA filed a status report explaining its progress towards making such response but seeking an additional six months for the Agency to be able to evaluate the conclusions of the Scientific Advisory Panel, seek public comment on additional scientific data, and complete its analyses. *See* Dkt. No. 39. On August 12, 2016, the Court denied EPA's request for a six-month extension but did extend the deadline to March 31, 2017, stating that this was the "final extension, and the court will not grant any further extensions." Dkt. No. 51.

On March 29, 2017, following a change in Presidential administrations, EPA issued an order denying the administrative petition ("Denial Order") in full compliance with the Court's August 12, 2016 order.[2] *See* Status Report, Dkt. No. 54 (Mar. 30, 2017). EPA incorporated into the Denial Order updated versions of the Agency's 2012 and 2014 preliminary responses denying the administrative

[1] The proposed rule was published in the Federal Register on November 6, 2015. *See* 80 Fed. Reg. 69,080 (Nov. 6, 2015).

[2] The Denial Order was published in the Federal Register on April 5, 2017. *See* 82 Fed. Reg. 16,581 (Apr. 5, 2017).

petition with respect to six of the ten claims made by Petitioners in their administrative petition. 82 Fed. Reg. at 16,585-91. EPA had previously denied as final agency action a seventh claim, arising solely under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), in July 2012. *See id*. at 16,589.

The remaining three claims in the administrative petition raised similar issues, namely whether chlorpyrifos has the potential to cause neurodevelopmental effects in infants and children from exposures that are lower than those that result in 10% acetylcholinesterase inhibition (the long-standing point of departure for regulation of organophosphate pesticides). *Id*. at 16,590. In the Denial Order, EPA explained that these "are issues to be addressed as part of the registration review of chlorpyrifos—the next round of re-evaluation under section 3(g) of FIFRA," which must be completed by October 1, 2022. *Id*. Although "past EPA administrations had chosen to attempt to complete that review several years in advance of the statutory deadline . . . , it has turned out that it is not possible to fully address these issues early in the registration review period." *Id*. In order to comply with this Court's mandamus deadline and in light of the considerable remaining scientific uncertainty, EPA decided to deny the administrative petition with respect to these three issues. *Id*. As the Denial Order explained, "EPA has concluded that it should alter its priorities and adjust the schedule for chlorpyrifos so that it can complete its review of the science addressing neurodevelopmental

effects prior to making a final registration review decision whether to retain, limit or remove chlorpyrifos from the market." *Id*.

On April 5, 2017, Petitioners filed their Motion for Further Mandamus Relief ("Motion"). *See* Dkt. No. 55. The overriding theme of the Motion is one of frustration with the *substance* of EPA's decision on three of nine issues addressed in the Denial Order, *i.e.*, the Agency's decision, following a change in administration, to deny the petition and decline to finalize the October 2015 proposed revocation rule. *See* Motion at 5-12. Petitioners' Motion asks the Court to order EPA to: (1) take "regulatory action" on a "finding that chlorpyrifos is unsafe" within 30 days; (2) complete the FFDCA objections process on EPA's March 29 denial of the administrative petition within 60 days (or 120 days if a hearing is held); (3) initiate proceedings to cancel the registrations of chlorpyrifos under FIFRA within 60 days; and (4) file status reports every six months.

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) (citations omitted). The issuance of writs directed to agency action is rare and the scope of relief granted, if any, should be narrow. *Pub. Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985). The circumstances that will justify interference with non-final agency

action must be truly extraordinary, because this Court's supervisory province as to agencies is not as direct as its supervisory authority over trial courts. *Id.* The party seeking a writ of mandamus bears the burden of proving that its right to issuance of the writ is "clear and indisputable." *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (citation omitted). The party must also show that it will be "damaged or prejudiced in a way not correctable on appeal if the writ is denied." *Pub. Utils. Comm'n of Cal. v. FERC*, 814 F.2d 560, 562 (9th Cir. 1987) (citation omitted).

ARGUMENT

Petitioners' Motion should be denied for three reasons. First, additional mandamus relief is not appropriate, because EPA has already complied with this Court's order to make a final response to the administrative petition. Second, the FFDCA provides for Petitioners' exclusive path to relief from the substance of that response, a path that includes a statutorily-mandated administrative objections process. Third, the specific relief Petitioners request is beyond the scope of this mandamus action and is otherwise unwarranted.

I. The Petition for Mandamus Has Been Resolved, and Petitioners Are Not Entitled to Further Mandamus Relief.

Petitioners' Renewed Petition for a Writ of Mandamus in this case asserted that EPA had "unreasonably delayed" acting on their administrative petition to revoke the tolerances for chlorpyrifos. On August 10, 2015, this Court granted the

Renewed Petition and ordered EPA to "issue either a proposed or final revocation rule or a full and final response" to the administrative petition by October 31, 2015. Dkt. No. 23. EPA issued a proposed revocation rule on October 28, 2015. *See* Status Report, Dkt. No. 25 (Oct. 30, 2015). This Court then ordered EPA to make a final response to the administrative petition by March 31, 2017. Dkt. No. 51. On March 29, 2017, EPA issued an order denying the administrative petition. *See* Status Report, Dkt. No. 54 (Mar. 30, 2017). By that order, EPA fully complied with this Court's orders and gave Petitioners the mandamus relief they requested—a final response that (after proper exhaustion of administrative remedies) can be judicially reviewed. Thus, the Motion for further relief should be denied and this action should be terminated.

EPA has fully complied with both of this Court's orders requiring the Agency to act on the administrative petition by the ordered deadlines. Under the FFDCA, EPA must take one of three actions in response to an administrative petition to establish, modify, or revoke a pesticide's tolerances (*i.e.*, a regulation that sets the permissible amount of pesticide residues on food): (i) issue a final regulation establishing, modifying, or revoking a tolerance; (ii) issue a proposed regulation under the separate provisions of 21 U.S.C. § 346a(e), and thereafter issue a final regulation after additional public notice and comment; or (iii) issue an

order denying the petition. 21 U.S.C. § 346a(d)(4)(A). Here, EPA issued "an order denying the petition" in satisfaction of the FFDCA and this Court's orders.[3]

EPA also gave Petitioners the relief they requested at the outset of this case: "a final denial order . . . if that is how EPA decides to resolve the 2007 Petition." Renewed Pet. for Writ of Mandamus at 36, Dkt. No. 1. The Renewed Petition has been resolved through a denial order. Petitioners cannot now seek—and this Court should not grant—new relief under new legal theories simply because Petitioners disagree with the Agency's decision.

The Renewed Petition having been resolved, there is no further mandamus relief this Court can properly grant without in effect converting this case into an action for judicial review—an action that would necessarily have to be dismissed as premature. As explained in more detail in the next section, the FFDCA provides that Petitioners may file a petition for judicial review *after* exhausting their

[3] Petitioners suggest in a footnote that the Court "might choose" to hold EPA in contempt "for refusing to follow the Court's orders." Motion at 12 n.5. There is no basis to hold EPA in contempt. The Agency acted by the deadlines established by this Court, issuing a 45-page Denial Order on March 29, 2017. *See* Dkt. No. 55-2. And contrary to Petitioners' suggestion, Motion at 2-3, at no time did the Court order EPA to issue a final revocation rule; this Court simply ordered EPA to take final action on the administrative petition. EPA did so on March 29. The high bar for contempt has not been met under these circumstances. *See FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (citations omitted) (requiring "clear and convincing evidence" to hold party in contempt for violation of "specific and definite" court order).

administrative remedies. But Petitioners are entitled to no further relief at this time in this action for "unreasonably delayed" action.

II. The FFDCA Objections Process Provides the Exclusive Avenue for Petitioners to Obtain Further Relief.

Although their argument is not entirely clear, it is undisputable that Petitioners seek to have this Court order EPA to take an action different from what it took on March 29, 2017, namely to complete the revocation rulemaking. *See* Motion at 8. This is little more than an improper attempt to shoehorn premature judicial review of the Denial Order into this mandamus proceeding, which is limited to the timing, not the substance, of the Agency's decision.

If Petitioners disagree with the substance of the Denial Order, the FFDCA plainly outlines the steps they must take to obtain review: the administrative objections process, followed by judicial review of the order issued at the conclusion of that process. Not only is Petitioners' Motion at odds with this statutorily-mandated process, but (as elaborated below) the All Writs Act in fact *precludes* mandamus relief when another statute provides an avenue for relief, which is the case here. Thus, the Motion must be denied.

Where, as here, EPA denies a petition to revoke a tolerance, any person may file written objections with EPA within 60 days and may also request an evidentiary hearing on those objections. 21 U.S.C. § 346a(g)(2)(A). After considering objections and any hearing, EPA must issue a final order. *Id.* §

346a(g)(2)(C). This final order is subject to judicial review in the United States Courts of Appeals. *Id.* § 346a(h); 40 C.F.R. § 178.65. Petitioners acknowledge that this is the process they must follow to obtain judicial review of EPA's response to their administrative petition. *See* Motion at 17-18. But their Motion seeks to bypass that process by asking this Court to evaluate the reasonableness of EPA's Denial Order immediately, before the FFDCA objections process has even commenced.

Because the FFDCA provides Petitioners an alternative—indeed, the exclusive—remedy, mandamus relief is not available. The All Writs Act, 28 U.S.C. § 1651, the source of this Court's mandamus authority, *see* Fed. R. App. P. 21, 1967 Advisory Comm. Note, "is a residual source of authority to issue writs that are not otherwise covered by statute." *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). Where, as here, "a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Id*. Petitioners ask this Court to ignore this well-established law and sidestep the FFDCA's administrative exhaustion requirement in the interest of obtaining judicial review more quickly. But the All Writs Act does not authorize

courts to issue ad hoc writs whenever compliance with statutory procedures "appears inconvenient or less appropriate." *Id.*[4]

This requirement is not a mere legal technicality. Rather, it helps ensure that EPA has the first opportunity to consider and address Petitioners' (or any other party's) objections to the Denial Order, and, to the extent Petitioners are dissatisfied with the results of that process, it will provide a fuller administrative record for judicial review that is tailored to the specific legal and record-based concerns voiced by Petitioners.

Thus, Petitioners' exclusive remedy is to pursue the FFDCA objections process and seek review of the final order issued at the conclusion of the administrative proceedings.

III. The Requested Relief Is Beyond the Scope of This Mandamus Action and Is Otherwise Unwarranted.

Even if the FFDCA did not provide the exclusive remedy to Petitioners, the specific relief they request is beyond the scope of this mandamus case and is not warranted under the circumstances of this case. Petitioners have not met their burden of establishing that they are "clearly and indisputably" entitled to any of the

[4] Failure to comply with mandatory administrative exhaustion requirements can even deprive the Court of jurisdiction over further mandamus proceedings at this stage. *See, e.g., Howard v. Solis*, 570 F.3d 752, 757 (6th Cir. 2009) (holding that the court lacked jurisdiction over petition for writ of mandamus to compel agency action under Federal Mine Safety and Health Act of 1977 where petitioner had not first exhausted his administrative remedies under that statute).

relief, *In re Cal. Power Exch. Corp.*, 245 F.3d at 1120 (citation omitted), or that they will be "damaged or prejudiced" by following the FFDCA objections process and seeking review of the resulting decision, *Pub. Utils. Comm'n of Cal.*, 814 F.2d at 562 (citation omitted).[5] Thus, their Motion must be denied.

A. The First and Third Requests Improperly Ask This Court for Rulings on the Merits.

Petitioners' first request asks the Court to order EPA to "take regulatory action" within 30 days on a finding that chlorpyrifos is unsafe. Motion at 16-17. Their third request is to require EPA to initiate proceedings to cancel all FIFRA registrations of chlorpyrifos within 60 days. *Id*. at 18-19. According to Petitioners, "the only legally and scientifically defensible action is revocation of all food tolerances and cancellation of all uses." *Id*. at 16. In order for this Court to reach the same conclusion as Petitioners and issue the requested relief, however, the Court must conduct scientific and legal analyses in the absence of an administrative record. Any merits-based review is entirely outside the scope of

[5] As explained in EPA's Response to the Renewed Petition for a Writ of Mandamus, Petitioners previously turned down opportunities for expedited administrative and judicial review of many of the matters set forth in the Denial Order. EPA issued responses to seven of the ten issues raised by the administrative petition in the Agency's 2012 and 2014 partial responses. EPA's Resp. to Renewed Pet. for Writ of Mandamus at 29-30, Dkt. No. 7. One of those seven issues was subject to immediate judicial review under FIFRA, but Petitioners did not file a petition for review. *Id*. EPA also offered to publish formal denial orders on the other six issues, which would have made them immediately eligible for the FFDCA objections process and then judicial review. *Id*. Petitioners declined. *Id*.

this mandamus action and premature at this time. *See, e.g., In re Int'l Union, United Mine Workers of Am.*, 231 F.3d 51, 54 (D.C. Cir. 2000) (declining to issue writ of mandamus compelling agency to issue temporary protective standard to protect mine workers because "[t]his is a matter that is committed to the agency's expertise in the first instance, and this court is in no position to pretermit the prescribed statutory process").

The bulk of Petitioners' Motion asks this Court to make scientific, legal, and policy findings regarding the nature of EPA's response to three of the nine issues addressed in the Denial Order in order to justify the requested relief. *See* Motion at 3-15. For example, Petitioners' requests are premised on a finding that EPA's scientific discussion in the Denial Order is deficient. *Id*. at 3-7. Petitioners also ask this Court to find as a matter of law that EPA "waived the argument that this Court lacks authority to compel it to act to protect children from chlorpyrifos prior to the 2022 registration review deadline." *Id*. at 14-15 & n.7. These are precisely the kinds of findings and legal conclusions that a court would be making in an Administrative Procedure Act action for judicial review of final agency action. This demonstrates why the requests for a new decision on the administrative petition and for FIFRA cancellation proceedings amount to requests for judicial review.

Furthermore, it bears noting that many of Petitioners' arguments—especially their waiver argument—are thinly-veiled attempts to bind the present administration to the policy choices of the prior administration in this matter. If the Court were to reach the merits and accept such arguments, it would effectively preclude the new administration from taking positions different from past administrations, contrary to the Supreme Court's guidance in cases such as *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), and *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). The Agency should be allowed an opportunity to explain and defend its decision to reprioritize its pesticide registration review in a proper action for judicial review, where the Court can review the "whole record" (and not just Petitioners' one-sided excerpts), as the APA contemplates. *See* 5 U.S.C. § 706.

The FFDCA objections process, including a hearing if one is held, is the proper forum for EPA to consider these factual, legal, and policy arguments (as well as additional arguments that may be raised on any of the nine issues addressed in the Denial Order). As Congress intended, EPA will continue to develop its reasoning and administrative record in response to any objections raised in that process. The final order resulting from that process may differ from the March 29, 2017 Denial Order after the Agency has an opportunity to consider the arguments

presented. It would be premature for this Court to evaluate the merits of an order that may change. Moreover, this Court does not have before it a "whole record," as it must to engage in the requested review. The administrative record on the issues regarding food uses of chlorpyrifos will not be complete unless and until the FFDCA objections process is completed and EPA issues a final, reviewable order.

In *Public Utilities Commission of California*, this Court declined to grant a writ of mandamus compelling the Bonneville Power Administration to cease implementing interim energy rate changes until the Federal Energy Regulatory Commission approved the final rate schedule. 814 F.2d at 562. The Court held that it lacked jurisdiction to review the interim rates, noting that "[r]efusing intervention in current agency proceedings ensures against premature, possibly unnecessary, and piecemeal judicial review." *Id*. at 561 (internal quotation marks and citation omitted). The Court further held that mandamus was not warranted, noting that the issues on review could change if FERC's final decision differed from the interim rate schedule. *Id*. at 562.

As in *Public Utilities Commission of California*, Petitioners' requested "mandamus" relief is not warranted here because any arguments Petitioners raise in their Motion can be addressed when they seek review of the final order issued at the conclusion of the objections process. And should that final decision differ from the March 29, 2017 Denial Order, this Court would not have needlessly

expended time and resources on what would amount to an advisory opinion on the merits of a portion of the Denial Order.

In addition to being beyond the scope of the All Writs Act (as well as presuming that the tolerances for chlorpyrifos must be revoked), Petitioners' third request that EPA be ordered to publish a notice of intent to initiate FIFRA cancellation proceedings for chlorpyrifos registrations within 60 days does not leave room for the Agency to follow statutorily-mandated processes. EPA cannot publish a notice of intent to cancel unless it first provides a draft of the notice to the U.S. Department of Agriculture and to the EPA Scientific Advisory Panel and allows those entities 60 days to review and provide comments. *See* 7 U.S.C. §§ 136d(b), 136w(d)(1).[6] And EPA must assemble a Panel whose members' professional qualifications would enable them to assess the specific subject matter of the notice. *Id*. § 136w(d)(1). Even if a Panel could be assembled immediately, this would leave no time for EPA to actually draft the notice of cancellation and have it published in the Federal Register under Petitioners' proposed schedule. In

[6] To the extent Petitioners' third request also asks the Court to require EPA to initiate FIFRA cancellation proceedings within 60 days for *non-food* uses of chlorpyrifos because such uses may result in chlorpyrifos residues in drinking water, *see* Motion at 18-19, it must be denied. Petitioners never raised this argument in their administrative petition, and EPA has not made the required risk/benefit findings that would need to be made before any cancellation proceedings of non-food uses could go forward. Nor have Petitioners explained in their Motion why they believe the risks from these non-food uses outweigh the benefits of continued use.

short, 60 days would be woefully insufficient for EPA to issue a notice of intent to initiate FIFRA cancellation proceedings.

B. The Objections Process Is Beyond the Scope of This Action.

As to Petitioners' second and fourth requests, the objections process is beyond the scope of this litigation, and this Court should not set any deadlines or impose any other requirements. Those proceedings *follow* EPA's response to the administrative petition; they are not *part of* that response. Thus, they are outside the scope of a mandamus action seeking to compel Agency response to an administrative petition for revocation.

Petitioners ask this Court to impose an arbitrary 60-day deadline for EPA to resolve objections (of an unknown nature) that may (or may not) be filed in response to the Denial Order or some future, additional regulatory action. Motion at 17-18. Who will object and when the objections may be filed are entirely speculative at this time, because the FFDCA allows 60 days for parties to file objections, a time period that does not end until June 5, 2017. *See* 21 U.S.C. § 346a(g)(2)(A). If multiple parties file objections on different dates, it would be impractical and potentially prejudicial to one or more parties if EPA is ordered to rule on each objection within 60 days "of [its] receipt" as Petitioners request. Petitioners also ask this Court to impose a 120-day deadline if a party asks for an evidentiary hearing and to prohibit EPA from granting any stays of the revocation

rule Petitioners seek during the proceedings absent "extraordinary circumstances." Motion at 18 n.9.

Petitioners are attempting to create a new standard for establishing future effective dates for tolerance revocation rules. Nothing in the FFDCA or EPA's implementing regulations, 40 C.F.R. Parts 178-179, imposes any deadlines on the Agency's conduct of the objections process, let alone such arbitrary deadlines. And without knowing the nature and scope of any objections Petitioners and others might make, it is impossible for EPA—or this Court—to determine whether those proceedings could be completed on such an expedited time frame. The objections process, including a hearing if one is held, provides a forum for the Agency to consider factual, legal, and policy arguments. Imposing an arbitrary deadline could truncate that process and prevent EPA from considering arguments raised by one or more parties. It could also force the Agency to consider arguments concerning the same issues on a piecemeal basis rather than evaluating them collectively. Petitioners apparently desire an expedited objections process in order to skip ahead to judicial review, but they should not be permitted to dictate a schedule that might prejudice other interested parties or might compromise the administrative record available to the ultimate reviewing court.

As to Petitioners' fourth request, EPA believes that status reports are unnecessary because this Court's jurisdiction ended upon the resolution of the Renewed Petition for a Writ of Mandamus.

CONCLUSION

In conclusion, this Court need not—and should not—take any further action in this case and should reject Petitioners' request for further "mandamus" relief.

Dated: April 28, 2017

Respectfully submitted,

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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 April 28, 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/ *Erica M. Zilioli*