IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Natural Resources Defense Council, Environmental Justice Health Alliance, Public Citizen, Catskill Mountainkeeper, Center for Coalfield Justice, Clean Water Action, Coming Clean, Flint Rising, Indigenous Environmental Network, Just Transition Alliance, Los Jardines Institute, Southeast Environmental Task Force, Texas Environmental Justice Advocacy Services, Water You Fighting For, West Harlem Environmental Action, Inc.,	)	Case No. 20-cv-3058 (CM) ECF Case
Plaintiffs,	)	
v.	)	
Assistant Administrator Susan Parker Bodine, Administrator Andrew Wheeler, and the United States Environmental Protection Agency,	)	
Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs petitioned EPA for an emergency rule to ensure the public is informed when companies violate environmental monitoring and reporting requirements during the COVID-19 pandemic. For more than two months, EPA has allowed companies that violate existing law to document their noncompliance "internally," without telling EPA unless asked. As a result, people lack current information about violations of environmental law in their communities. In the past, failures to disclose environmental monitoring violations have caused genuine, avoidable catastrophes.

Plaintiffs' petition should be easy for EPA to grant or deny, because it seeks public disclosure of basic information EPA already instructs companies to maintain internally and make available on request. The petition is also time-sensitive. But EPA still has not responded, and it offers no clue when it intends to. EPA's continuing delay is unreasonable.

Plaintiffs have standing to challenge EPA's unreasonable delay, which exposes Plaintiffs' members to an increased risk of harm from unreported pollution and chemical safety threats. Plaintiffs also have standing because EPA's delay denies them timely access to information they would be entitled to if EPA granted the petition. And the Court has jurisdiction to resolve Plaintiffs' claim, which arises under the Administrative Procedure Act, not under a statute that directs judicial review to a court of appeals.

EPA offers implausible excuses for its failure to respond to a petition it could answer in days. A few states have already done what the petition asks, requiring disclosure from companies and then posting information online about pandemic-related environmental monitoring and reporting failures in those states. That proves EPA could easily do the same, or it could promptly deny the petition, if it has a legitimate reason. Instead, EPA is dragging

its feet, indifferent to the risk of harm in vulnerable communities but responsive to industry demands for relaxed enforcement.

The Court should order EPA to cease its ongoing delay and respond to the petition.

ARGUMENT

I. This Court has jurisdiction

A. Plaintiffs have associational standing

EPA's non-enforcement policy announces to more than one million regulated facilities that EPA will generally waive penalties if a company stops monitoring and reporting for environmental compliance for reasons the company claims are based on the COVID-19 pandemic. Policy at 3, ECF No. 30-1; Starfield Decl. ¶ 5, ECF No. 45. EPA recommends—but does not mandate—that companies disclose when they stop monitoring. Policy at 3. Therefore, companies can stop monitoring and reporting pollution and, in reliance on EPA's policy, never divulge it. Likewise, companies may halt chemical safety inspections that help prevent disasters and not tell anyone.

Plaintiffs' petition seeks to mitigate the risk caused by EPA's policy, and the agency's delay in responding perpetuates that risk. As a result of the policy, Plaintiffs' members face an increased threat of harm from exposure to unmonitored pollution and chemical disasters. *See Baur v. Veneman*, 352 F.3d 625, 633-34 (2d Cir. 2003). In this case, "the injury contemplated . . . is not the future harm that the exposure risks causing, but the present exposure to risk." *NRDC v. U.S. FDA*, 710 F.3d 71, 81 (2d Cir. 2013), *as amended* (Mar. 21, 2013). An individual need not prove actual exposure to increased pollution. *Baur*, 352 F.3d at 641. Rather, for a person who "reside[s] in close proximity" to pollution sources, "'uncertainty' as to the health effects of such pollution constitutes cognizable injury-in-fact."

Id. at 634 (quoting *N.Y. Pub. Interest Research Grp. (NYPIRG) v. Whitman*, 321 F.3d 316, 325 (2d Cir. 2002)).

In its attempt to avoid this binding precedent, EPA distorts the harm at issue and ignores the foreseeable consequences of its non-enforcement policy and delay. Although the potential for industry to abuse the policy is obvious, *see* Petition at 1, ECF No. 1-1; Amicus Br. 12-13, ECF No. 36-1, Plaintiffs' members are exposed to a risk of increased pollution even when facilities rely on the policy in good faith to cease monitoring and reporting without disclosure. Policy at 3; Pls. Br. 17, ECF No. 16 (citing evidence that facilities pollute less, and less often, when complying with monitoring and reporting requirements).

Rather than acknowledge this clear risk, EPA insists it is speculative that its policy—issued in response to inquiries by trade associations representing virtually every regulated industry nationwide, Starfield Decl. ¶ 6—will affect facilities' behavior at all. *See* EPA Br. 17-18, ECF No. 42. The Court should reject that incredible assertion. The policy announces that EPA "does not expect to seek penalties for violations" of pollution monitoring and reporting requirements where noncompliance is related to COVID-19. Policy at 3. Violations of environmental monitoring and reporting obligations carry significant maximum penalties totaling many tens of thousands of dollars per violation per day. *See* 40 C.F.R. § 19.4 tbl.1. "The notion that financial incentives deter environmental misconduct is hardly novel." *NRDC v. NHTSA*, 894 F.3d 95, 104 (2d Cir. 2018) (citation and alterations omitted). Especially because the policy is a response to industry requests, "[c]ommon sense and basic economics" counsel that the policy will result in reduced compliance. *Id.* at 105 (citation omitted). "Compliance monitoring is one of the key components EPA uses to ensure that the regulated community obeys environmental laws and regulations." Knicley

Decl. Ex. 1, at 1 (EPA, *How We Monitor Compliance*).

The policy also definitively alters EPA's treatment of certain hazardous waste facilities, a key issue that EPA relegates to a footnote. EPA Br. 17 n.4. If companies that generate hazardous waste store that waste onsite during the pandemic, rather than transferring it to properly regulated hazardous waste storage and disposal facilities, EPA "will" continue to treat them only as generators, not as waste storage sites. Policy at 5. Those facilities are thus excused from the disaster prevention and response requirements that otherwise strictly govern storage and disposal of hazardous waste under the Resource Conservation and Recovery Act (RCRA). *See* Pls. Br. 7; 42 U.S.C. § 6924(a); 40 C.F.R. pt. 264. EPA similarly commits that it "will treat" small-quantity generators that, because of the pandemic, accumulate enough hazardous waste onsite to qualify as a large-quantity generator, only as small-quantity generators. Policy at 5-6. Those facilities are thus excused from stricter standards, too. *See, e.g.*, 40 C.F.R. pt. 262 subpt. M. The Court need not "speculate" to conclude that waste generators "will violate" those stricter requirements, *see* EPA Br. 16, because EPA has stated explicitly that it will not enforce the requirements. Plaintiffs' members living near hazardous waste generators—which can now store more hazardous waste for longer than they were allowed before, without additional protections—are less safe from disasters because of the policy. *See* Second Fedinick Decl. tbls. 1-2 & maps 2, 4 (documenting hundreds of hazardous waste generators near declarants' neighborhoods); Second Domin Decl. ¶ 4; Second Feld Decl. ¶ 4.

EPA's suggestion that Plaintiffs must show that a member has "actually been harmed" by a documented "increase in pollution," *see* EPA Br. 18 & n.5, is foreclosed by Circuit precedent. Setting aside how Plaintiffs would get pollution data for a facility that has

stopped monitoring or reporting that pollution, a member's "uncertainty" about exposure to excess pollution at nearby facilities is a cognizable injury. *NYPIRG*, 321 F.3d at 325; *see id.* at 326 (stating that the "distinction between an alleged exposure to excess . . . pollution and uncertainty about exposure is one largely without a difference" and affects at most "the extent, not the existence, of the injury"). Even if a "chain of contingencies may need to occur" before that member is exposed to additional pollution, "the relevant 'injury' for standing purposes" is the risk of harm. *Baur*, 352 F.3d at 641.

NYPIRG and *Baur* control here. Just as in *NYPIRG*, Plaintiffs' members are concerned that, because of the policy, they "will not know whether the nearby facility is in compliance with applicable requirements or is emitting pollutants in excess of legal levels." 321 F.3d at 325; *see* Domin Decl. ¶¶ 21-23, ECF No. 21; Feld Decl. ¶¶ 4-13, ECF No. 23. And as in *Baur*, "government studies and statements confirm" the "key" assertion underlying the members' concerns: lapses in compliance monitoring and reporting result in increased pollution. 352 F.3d at 637; Pls. Br. 17-18 (citing, *inter alia*, EPA and U.S. Government Accountability Office reports); *see also* Amicus Br. 12.

EPA criticizes Plaintiffs' so-called "generalized evidence," EPA Br. 17, but EPA data show that Houston and Baton Rouge, where Plaintiff NRDC's members Mr. Domin and Ms. Feld respectively reside, have dense concentrations of EPA-regulated facilities. *See* Fedinick Decl. ¶¶ 22-23, ECF No. 22; Second Fedinick Decl. tbls. 1-2 (documenting thousands of EPA-regulated facilities in those areas) & maps 1, 3 (showing EPA-regulated facilities near Mr. Domin and Ms. Feld's neighborhoods). Mr. Domin and Ms. Feld have "no choice but to breathe the air where [they] live[] and work[]"—air they reasonably fear will be more polluted because of the policy. *See LaFleur v. Whitman*, 300 F.3d 256, 270 (2d

Cir. 2002). Their concerns about health harms from increased pollution and a greater risk of chemical disasters are cognizable injuries under *NYPIRG* and *Baur*.

EPA's remaining arguments ignore the policy's foreseeable consequences. It is implausible that state or private individuals—or even EPA—could discover violations in time to prevent excess pollution, *see* EPA Br. 17, when facilities suspend monitoring and reporting without public notice. Enforcement after the fact will not help; at that point, the harm will be done. Pls. Br. 13-14; Amicus Br. 10. The policy does say that companies "should" disclose noncompliance that "may create an acute risk or an imminent threat," EPA Br. 20 (quoting Policy at 4), but EPA fails to explain how a facility that stops monitoring pollution will become aware of such a risk.

Finally, Plaintiffs' members' injuries are traceable to EPA's delay and redressable by this Court. Although those harms are caused, in the first instance, by the policy, *see* EPA Br. 19, they are perpetuated by EPA's delay in responding to the petition. The petition asks for public disclosure of information that the policy allows facilities to withhold: the fact that they have stopped monitoring and reporting. *See* Pls. Br. 7-9. Mandatory public disclosure will incentivize facilities to remain in compliance longer, or return to compliance sooner, than they would under the policy alone. *Id.* at 17; Amicus Br. 12 ("Research has proven that public disclosure motivates better compliance by regulated companies."). Even if not, if Plaintiffs' members knew which facilities had stopped monitoring and reporting, they could protect themselves from increased risks, including by taking precautions when nearby facilities suspend monitoring, and pursuing timely advocacy to redress violations. Pls. Br. 13. Although the action requested in the petition would not eliminate the risk caused by the policy, the "risk would be reduced to some extent if petitioners receive[] the relief they

seek." *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007). That is enough for Article III. *Id.*

B. Plaintiffs also have organizational standing based on informational harm

Plaintiffs also have standing based on informational harm caused by EPA's delay. The petition requests that EPA issue a rule to require disclosure of which facilities violate monitoring or reporting requirements for pandemic-related reasons. Petition at 6-7. Plaintiffs would use this information to further their educational and advocacy efforts, including by informing their members of increased risks, seeking enforcement by local and state officials, and taking action to help facilities return to compliance. Pls. Br. 24 (citing declarations). EPA's delay in responding to the petition denies Plaintiffs timely access to this information and constitutes a cognizable injury redressable by this Court.[1] *See Air All. Houston v. U.S. Chem. & Safety Hazard Investigation Bd.*, 365 F. Supp. 3d 118, 124 (D.D.C. 2019) (informational injury where "statute would require the agency to disclose information regarding accidental releases to the public, if the agency promulgated a mandatory reporting requirement"); *PETA v. USDA*, 797 F.3d 1087, 1095 (D.C. Cir. 2015) (informational injury where agency's delay in issuing standards meant that agency was not generating public enforcement reports that plaintiffs wanted for their advocacy).

To establish informational standing, Plaintiffs need only show that, if EPA took the action requested in the petition, Plaintiffs would then have a right to the information they seek. *See FEC v. Akins*, 524 U.S. 11, 21 (1998) (informational standing where FEC refused to treat organization as a "political committee," which would have triggered public reporting requirements); *Air All. Houston*, 365 F. Supp. 3d at 126 ("By not promulgating regulations

[1] Contrary to EPA's principal argument, EPA Br. 21-24, Plaintiffs do not base their informational injury on the reduction in monitoring and reporting data caused by the policy itself, let alone exclusively on reduced reporting under certain statutes.

that would enable the agency to receive 'reports' of accidental spills, the [agency] is denying the public, and these particular Plaintiffs, the very information that the act contemplates would be publicly available."); *see also NRDC v. EPA*, -- F.3d ---, 2020 WL 3022991, at *4 (2d Cir. June 5, 2020) (informational standing to challenge EPA rule that exempted entities from public reporting requirements); *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-42 (D.C. Cir. 2016) (informational standing where agency excused some entities from seeking certain permits, where permit applications were required to be public).

Plaintiffs meet this test. If EPA granted the petition, Plaintiffs would have a right through the resulting rule itself to the information they seek. Petition at 6. Plaintiffs' petition also identified several statutory provisions that authorize EPA to collect compliance information and mandate public access to the information collected. *See* Pls. Br. 24; EPA Br. 22 (admitting that the cited provisions "require EPA to make certain information that it receives available to the public"). If EPA opted to rely on those provisions to issue the rule, Plaintiffs would have a statutory right to the requested information, too. In these circumstances, Plaintiffs suffer an informational injury that is traceable to EPA's delay in responding to the petition and redressable by a Court order compelling a response.

C. The Clean Air Act's citizen-suit provision does not apply

Plaintiffs did not need to comply with the requirements for a Clean Air Act (CAA) citizen suit, including a pre-suit notice letter, *see* EPA Br. 27-29, because they are not seeking to enforce a "duty under" that Act. The CAA provides a limited waiver of sovereign immunity for a specific type of unreasonable delay claim. It vests district courts with jurisdiction to "compel . . . agency action unreasonably delayed" "consistent with paragraph (2)." 42 U.S.C. § 7604(a). Paragraph 2, in turn, only authorizes suits against the EPA

Administrator for "failure . . . to perform any act or duty *under this chapter*"—that is, under the CAA. *Id.* § 7604(a)(2) (emphasis added). EPA's duty to respond in this case is not a "duty under" the CAA. EPA's duty instead arises under the APA. 5 U.S.C. §§ 553(e) (providing right to petition), 555(b) (imposing duty to respond "within a reasonable time"); *see In re Am. Rivers*, 372 F.3d 413, 418 (D.C. Cir. 2004). Because the CAA's citizen-suit provision does not apply here, it is not an "adequate remedy" that bars APA review.

EPA ignores the limiting language in the CAA, instead claiming, without explanation, that its obligation to respond to the petition *under the APA* is somehow a duty "under the CAA." EPA Br. 27. The only case EPA cites on this point was wrongly decided, because it disregards the CAA's explicit limitation to suits enforcing a "duty under this chapter." *See Humane Soc'y of the U.S. v. McCarthy*, 209 F. Supp. 3d 280, 285 (D.D.C. 2016). Indeed, that opinion acknowledges that "unreasonable delay claims [regarding APA petitions] do not arise under the CAA." *Id*. EPA's reading improperly expands the citizen-suit provision's limited scope, disregarding the Supreme Court's instruction that waivers of sovereign immunity like the citizen-suit provision must be "unequivocally expressed" and narrowly construed. *FAA v. Cooper*, 566 U.S. 284, 290 (2012). Because Plaintiffs seek to enforce a duty under the APA, the CAA's citizen-suit provision does not apply.

D. Plaintiffs' APA claim belongs in this Court

EPA is wrong that the D.C. Circuit has exclusive jurisdiction over some parts of the case. *See* EPA Br. 25-27. There is a single claim here, under the APA. Unlike in the cases cited by EPA, Plaintiffs do not seek to compel EPA to act under any specific environmental statute; thus, those statutes' judicial review provisions do not apply. *See Telecomms. Research & Action Ctr. (TRAC) v. FCC*, 750 F.2d 70, 73-74 (D.C. Cir. 1984) (mandamus petition to

compel FCC to complete matters pursuant to the Communications Act); *Beyond Pesticides v. Whitman*, 360 F. Supp. 2d 69, 71 (D.D.C. 2004) (suit to compel EPA to take action under RCRA); *NRDC v. Thomas*, 689 F. Supp. 246, 248, 261 (S.D.N.Y. 1988) (citizen suit to compel EPA to list air pollutants as hazardous under CAA). Plaintiffs instead submitted a petition under the APA, Petition at 1 (citing 5 U.S.C. § 553(e)), and sued for unreasonable delay under the APA, to compel EPA to respond, ECF No. 1 ¶¶ 74, 76 (citing 5 U.S.C. §§ 555(b), 706(1)). As a default rule, "in cases brought under APA § 706(1) seeking to 'compel agency action unlawfully withheld or unreasonably delayed,' 5 U.S.C. § 706(1), when the agency has failed to act within a 'reasonable time,' *id.* § 555(b), jurisdiction lies in the district court." *In re NRDC* (*NRDC I*), 645 F.3d 400, 406 (D.C. Cir. 2011).

EPA admits that its "response to the Petition itself is distinct from any rulemaking it may actually elect to undertake." EPA Br. 12. Yet EPA has not identified any statute that requires an APA delay claim regarding an APA petition to be heard in the D.C. Circuit. Absent such a requirement, "the only federal court with jurisdiction . . . is the district court." *See Clark v. CFTC*, 170 F.3d 110, 113 n.1 (2d Cir. 1999) (citing 28 U.S.C. § 1331).

That the petition identifies the CAA and RCRA as statutes under which EPA *could* issue the requested rule, if it chose to do so after granting the petition, *see* EPA Br. 25, does not divest this Court of jurisdiction.[2] Even assuming *TRAC*'s jurisdictional framework applies, it creates only a "narrow exception" to the general rule that agency delay is reviewable in district courts. *NRDC I*, 645 F.3d at 405. That exception applies if "the final agency action *will be exclusively reviewable* in the courts of appeals and the [appeals] court is

[2] EPA also invokes the Safe Drinking Water Act, EPA Br. 25, but the agency elsewhere declares that the policy does not apply to public drinking water systems, *id.* at 24. Taking the agency at its word, that statute is no longer relevant here.

acting to protect its future jurisdiction." *Id.* (emphasis added). It does not apply based on "hypothetical scenarios" or a "speculative chain of events." *Id.* (quoting *Moms Against Mercury v. FDA*, 483 F.3d 824, 827 (D.C. Cir. 2007)).

Here, EPA can only speculate whether the final action it takes in response to the petition "will be exclusively reviewable in the courts of appeals." *Id.*; *see also Moms Against Mercury*, 483 F.3d at 827. Jurisdiction over EPA's ultimate decision depends on the authority the agency invokes. *See Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 720 (D.C. Cir. 2016) (looking to authority underpinning rule to determine whether appellate jurisdiction existed). As EPA notes, EPA Br. 25, it may choose to grant the petition and issue separate rules under the Clean Water Act, CAA, and other statutes, with some rules reviewable in district court and others in the D.C. Circuit. But that is not the only possibility. EPA hints that it may deny the petition based on its asserted enforcement discretion—the authority cited in its non-enforcement policy, *see* EPA Br. 33—in which case jurisdiction to challenge that decision will lie in the district court. *See* Compl. ¶ 6, *New York v. EPA*, 20-cv-3714 (CM) (S.D.N.Y. May 13, 2020) (challenging the policy). Or EPA may grant the petition but, rather than issue a regulation, amend the policy to include disclosure and public notice requirements, with jurisdiction over any challenge again in district court. Or as EPA also hints, *see* EPA Br. 12, it might refuse to issue an immediately applicable rule based on a determination that there is no "good cause" to waive the APA's pre-publication notice and comment requirements. That too would be reviewable in district court. *Cf. Sierra Club v. Jackson*, 813 F. Supp. 2d 149, 158 (D.D.C. 2011) (holding that district court had jurisdiction to review action under the APA staying the effective date of a CAA rule, even when the rule itself would be reviewable solely in D.C. Circuit).

The possibility that EPA *might* issue a rule in response to the petition that would be exclusively reviewable in the D.C. Circuit is not enough to upend the default presumption of district court jurisdiction; *TRAC* requires certainty. *NRDC I*, 645 F.3d at 406. Because judicial review of EPA's petition response "might be in the district court, the *TRAC* exception does not apply," *id.*, and this Court has jurisdiction over Plaintiffs' APA claim.

II. EPA's continued delay is unreasonable

All relevant factors weigh in favor of finding that EPA has delayed unreasonably. EPA's policy creates a serious risk that companies will not disclose environmental monitoring and reporting violations during the pandemic, thereby undermining the environmental statutes that govern water pollution, air pollution, hazardous waste cleanup, chemical safety, and more. The petition seeks disclosure—to EPA and the public—of information EPA has already instructed companies to maintain internally. Policy at 3. The purported obstacles in EPA's way, like the Paperwork Reduction Act, are contrived excuses for not responding to the petition. The fact that some states now collect and publish the information Plaintiffs seek, for facilities in those states, is clear proof that EPA could do it too, nationwide. EPA's continued delay is unreasonable.

A. EPA's continued failure to respond violates the "rule of reason"

1. EPA's delay is unreasonable

Agency delay must be evaluated in context. "[T]here is no per se rule as to whether a given delay is reasonable," and "courts must determine the reasonableness of delay based on the totality of the circumstances." *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 541 (S.D.N.Y. 2009). The circumstances here demand a prompt agency response.

The petition seeks public disclosure of violations of monitoring and reporting

requirements. Environmental law and regulation depend on these requirements being faithfully observed. Pls. Br. 12; Amicus Br. 4-7. Industries will not learn of pollution violations if they suspend monitoring and reporting, and EPA and the public will have no ability to enforce compliance with underlying pollution limits. *See NRDC v. EPA*, 808 F.3d 556, 580 (2d Cir. 2015); Pls. Br. 12-13. EPA offers no response to this point. Instead, reprising its standing argument, EPA wrongly discounts the health and safety risks created by its policy and the value of the information the petition would make public. EPA Br. 36. As described above, the policy increases the risk of undisclosed violations. EPA's delay in responding to the petition undermines environmental protection and EPA's ability to regulate effectively. *See Cutler v. Hayes*, 818 F.2d 879, 897-98 (D.C. Cir. 1987); Pls. Br. 11-13; *cf. United States v. Mun. Auth. of Union Twp.*, 929 F. Supp. 800, 809 (M.D. Pa. 1996) (explaining that when setting a penalty for violating pollution limits, "the court must bear in mind that if the regulated community perceives that violations of the law are treated lightly, the government's regulatory program is subverted" (internal quotations omitted)).

Moreover, *timely* disclosure of monitoring violations is vital. When the public is informed of environmental monitoring failures, people can adjust their behavior to account for increased risk by warning others, taking extra precautions, engaging with companies to understand more, conducting their own monitoring to fill in missing information, or pursuing private enforcement. *See* Pls. Br. 13 (citing declarations). Late disclosure is potentially worthless. EPA's arguments and inaction ignore that time is of the essence.

EPA is also wrong that agency delay is tolerable until it stretches into years. Courts have repeatedly explained that a reasonable time frame for an agency to act is months, or "occasionally" a year or two. *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir.

1987) (quoting *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)); *see also Am. Rivers*, 372 F.3d at 419. In one case, the D.C. Circuit held that a seven-month delay in responding to a petition was so unreasonable as to amount to a constructive denial, and the court ordered the agency to justify that denial within 30 days. *EDF v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970); *EDF v. Ruckelshaus*, 439 F.2d 584, 589 (D.C. Cir. 1971) (noting petition filed October 31, 1969). Another court held an agency's nine-month delay in responding to a petition to be unreasonable. *Pub. Citizen v. Heckler*, 602 F. Supp. 611, 612-14 (D.D.C. 1985).

The handful of cases EPA cites in which longer delays were held to be reasonable are readily distinguishable. Two involved economic interests only. *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001); *Orion Reserves Ltd. P'ship v. Kempthorne*, 516 F. Supp. 2d 8, 15 (D.D.C. 2007). Others required an agency to resolve highly complicated scientific and technical questions. *Sierra Club v. Thomas*, 828 F.2d 783, 798-99 (D.C. Cir. 1987); *United Steelworkers of Am. v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1119-20 (D.C Cir. 1986); *Ctr. for Sci. in the Pub. Interest v. FDA*, 74 F. Supp. 3d 295, 300, 301 (D.D.C. 2014). In the last case, "Congress *mandated*" the agency to treat other matters as a higher priority. *Beyond Pesticides v. Johnson*, 407 F. Supp. 2d 38, 41 (D.D.C. 2005). None of those circumstances exist here.

EPA also cites cases in which longer delays were held *un*reasonable, EPA Br. 30-31, as though such decisions set a minimum time period for unreasonable delay. They do not. A court's holding that an eighteen-month delay is unreasonable, for example, *see Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1154 (D.C. Cir. 1983), does not suggest that a shorter delay is reasonable.

EPA's repeated statement that it has only had "*fifteen days*" to consider the petition is

disingenuous. EPA Br. 29, 30. Plaintiffs filed the petition on April 1. By the time the merits are briefed, the petition will have been pending for two and a half months. That is enough time for EPA to answer, given what is at stake and the petition's modest request.

Tellingly, EPA provides no schedule whatsoever for its intended response. The Court should be especially skeptical of continued delay when the agency refuses to say when it will get around to resolving the matter. *See In re Pesticide Action Network N. Am.*, 798 F.3d 809, 814 (9th Cir. 2015) (holding EPA's refusal to offer a timetable for concluding proceedings is "a roadmap for further delay"); *In re A Cmty. Voice*, 878 F.3d 779, 787 (9th Cir. 2017). EPA's evasiveness confirms the need for judicial intervention.

2. The petition seeks a simple rule and is easy for EPA to answer

EPA declares (seven times) that the petition seeks a "novel" rule. EPA Br. 3, 9, 20, 32, 33, 35, 36. EPA ignores that the petition asks for disclosure of the same information EPA already instructs industry to compile—and make available to the agency upon request—under the policy. *Compare* Petition at 6-7, *with* Policy at 3. The only requirement the petition adds is that the information be submitted to EPA and made public. It is not "novel" to ask for disclosure of information EPA already tells companies to keep on hand.

Indeed, numerous states have conditioned enforcement flexibility during the pandemic on submission of this same information through a short online form or email to the agency. Knicley Decl. Exs. 2-5. EPA could do the same. At least three states, Michigan, Minnesota, and Pennsylvania, have published the industry submissions and the state's responses online. *Id*. Exs. 3-4, 6. If this is an "information collection burden[]"at all, EPA Br. 35, it is surely a trivial one. And the information posted by these states is both easily accessible and incredibly valuable. Minnesota's website, for example, includes a database of

enforcement discretion requests, and automatically creates maps as the data are sorted and filtered, so the public can see where relevant facilities are located and what environmental rules they sought enforcement discretion for. *See* https://bit.ly/3dzhUEv. If Minnesota can do it, so can EPA.

Unlike in other delay cases, the petition does not ask the agency to develop a complicated chemical safety standard or analyze technical data. *See, e.g.*, *In re Int'l Chem. Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992); *In re NRDC* (*NRDC II*), 956 F.3d 1134 (9th Cir. 2020). The petition simply asks EPA to solicit and then make public basic information about noncompliance with environmental laws that could harm vulnerable communities if not disclosed. EPA does not need months or even weeks to respond.

3. EPA's claimed barriers do not justify more delay

EPA strains to identify obstacles to a timely response, but none stand in its way. The Paperwork Reduction Act, for instance, permits faster processing in emergencies. 5 C.F.R. § 1320.13. That procedure exists for situations like this, where the information collection is temporary and "[p]ublic harm is reasonably likely to result" from delay. *Id*. § 1320.13(a). EPA sought and obtained paperwork reduction clearance within days for a recent rule analogous to what the petition seeks. 85 Fed. Reg. 22,362, 22,371 (Apr. 22, 2020) (*CEMS Interim Rule*); Knicley Decl. Ex. 7 (EPA, *Emergency ICR Justification Memo*).

Likewise, the Regulatory Flexibility Act does not block a prompt response. That statute applies to proposed rules subject to notice-and-comment requirements. *See* 5 U.S.C. § 601(2). The petition asks EPA to publish an interim final rule without notice and comment, for good cause. Petition at 20. Again, EPA followed that approach to forego a regulatory flexibility analysis for the *CEMS Interim Rule*. 85 Fed. Reg. at 22,371.

The executive orders cited by EPA do not excuse its inaction either. Executive Order 12,866, as supplemented by Executive Order 13,563, does not bind an agency when responding to an emergency rulemaking petition or a court-imposed deadline. *See* Exec. Order No. 12,866 § 6(a)(3)(D). For that reason, in failure-to-act cases, courts have described White House review under the Executive Order as "completely discretionary." *Cmty. In-Power & Dev. Ass'n v. Pruitt*, 304 F. Supp. 3d 212, 223 (D.D.C. 2018).

There is also no credible need to delay while EPA ponders confidential business information. EPA Br. 32-33. The petition asks EPA to compel public disclosure of: (a) the monitoring or reporting requirement a facility is violating, (b) the source of authority for that requirement, (c) the extent to which the facility is continuing to operate, (d) the COVID-19 related justification for noncompliance, and (e) notice of the facility's return to compliance. Petition at 6-7. None of these disclosures remotely implicate confidential business information. *See* 40 C.F.R. § 2.201(e) (defining reasons of business confidentiality). If there is any doubt, EPA could simply direct facilities not to include confidential business information in their submissions, just as it did in the *CEMS Interim Rule*. *See* 85 Fed. Reg. at 22,368 ("Notifications may not contain Confidential Business Information."); *id.* at 22,734 ("No claim of confidentiality may be asserted with respect to any information included in a notification submitted under . . . this section.").

EPA has shown it can act quickly, as it did in issuing the non-enforcement policy to begin with. EPA lists fourteen industry groups that asked for enforcement relief, starting on March 16. Starfield Decl. ¶ 6. The policy followed ten days later. The petition has now been pending at EPA for sixty-five days and counting. EPA high-stepped to accommodate industry requests but has dragged its feet in answering a call for public disclosure.

4. EPA's defense of its policy is irrelevant

EPA argues at length that the policy itself is reasonable. EPA Br. 3-7. Plaintiffs disagree. The policy is reckless, overbroad, and unprecedented. Petition at 1, 7-8, 11, 21; *see also* Amicus Br. 3, 9, 13. But the merits of the policy are not before the Court in this case.

EPA also disparages the rule Plaintiffs seek, claiming it would impose "reporting burdens" on "struggling" entities "impacted by COVID-19." EPA Br. 1, 29, 32-33. EPA ignores that the petition seeks to protect vulnerable communities that are also impacted by COVID-19. Pls. Br. 19-20. And EPA fails to explain how it has balanced the perceived burdens on industry from *disclosing* violations of the law against the benefit to the public from *learning* of those violations. In any event, the merits of the petition are not before the Court either. If EPA thinks the requested rule is too onerous, it can deny the petition.

EPA also claims that some states have adopted similar non-enforcement policies, EPA Br. 1, 6-7, which even if true would not excuse EPA's continuing delay. In any event, none of the states EPA references has announced an intent to waive civil penalties for monitoring and reporting violations during the pandemic. Instead, those states reiterated their policies on enforcement flexibility and said they will consider current circumstances when making enforcement decisions. *See* Knicley Decl. Ex. 8 (Oregon); *id*. Ex. 9-10 (Washington); *id*. Ex. 11 (Illinois). And EPA omits that other states have required facilities to submit the same information Plaintiffs seek in the petition and are posting that information online, *id*. Exs. 3-4, 6, which shows EPA could do the same if it wanted to.

B. The statutory framework does not justify EPA's ongoing delay

Under *TRAC*, where Congress provides a timetable in the enabling statute, that timetable informs the rule of reason. 750 F.2d at 80. There is no statutory deadline for EPA

to respond to the petition here. In assessing the reasonableness of the delay, this factor is thus neutral. *Families for Freedom*, 628 F. Supp. 2d at 541.

EPA claims that the lack of a deadline "strongly supports deference to EPA's determination of the appropriate pace of action," EPA Br. 33-34 (citing *Beyond Pesticides*, 407 F. Supp. 2d at 40), but never says what "pace of action" it is following, let alone why it is "appropriate." There is therefore nothing for the Court to defer to. In *Beyond Pesticides*, in contrast, EPA committed to resolve the pending petitions by a date certain, and Congress had directed EPA to prioritize other matters. 407 F. Supp. 2d at 40-41.

EPA cites other purported statutory indicators of reasonableness, but none helps the agency. The CAA's citizen-suit notice requirement does not apply, as explained above. And EPA's greenhouse gas reporting example, EPA Br. 34, supports Plaintiffs. There, Congress set a deadline of nine months for EPA to propose a rule "to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy." *Id.* That rule was an enormous, groundbreaking undertaking, comprising 260 pages in the Federal Register and dozens of subparts in the Code of Federal Regulations. 74 Fed. Reg. 56,260 (Oct. 30, 2009); 40 C.F.R. pt. 98. In EPA's words, the rule involved "an unprecedented level of outreach." 74 Fed. Reg. at 56,269. If EPA could develop that rule in nine months, then engage in unprecedented outreach to revise and finalize it nine months later, it can require disclosure of information *it has already instructed companies to document and retain* within a few months, if not weeks or days. Finally, EPA's "fuel blending" example, EPA Br. 34, does not support the agency either. Congress's fifteen-month timetable reflects that gathering records related to fuel blending has no particular urgency.

EPA fails to mention other reporting rules that Congress directed it to implement on

a much shorter timeframe. In 7 U.S.C. § 136i-1(g), for example, Congress required EPA and the Department of Agriculture to publish rules within 180 days to implement recordkeeping requirements for application of restricted use pesticides. In 15 U.S.C. § 2607(a)(1), Congress directed EPA to publish a rule, again within 180 days of a specified date (and less than nine months from the statute's enactment), to compel chemical manufacturers to submit information about chemical substances made and processed in the United States. And in 42 U.S.C. § 11023(g), Congress gave EPA less than eight months to publish a "toxic chemical release form" for facilities to submit information that EPA then must make public. Congress thus routinely gives EPA months—not years—to develop and implement recordkeeping and reporting programs more complicated and less consequential than what the petition seeks.

C. EPA's failure to respond may result in serious health harms

Agency delay is less tolerable "[w]hen the public health may be at stake." *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984). That is unquestionably true here. People can use information about monitoring violations and chemical safety lapses to protect themselves against the threat of harm. EPA's refrain that the policy does not apply when there is an acute risk or imminent threat, EPA Br. 35, ignores that a facility will not be aware of such a risk if it suspends monitoring.

EPA also ignores that the purpose of many monitoring and reporting requirements is to identify and redress problems *before* they cause harm, or at least to limit the damage. Indeed, some monitoring requirements directly trigger substantive protections. *See, e.g.*, 40 C.F.R. § 112.8(c)(6), (10) (requiring operators of bulk oil storage containers to inspect for discharges frequently and "[p]romptly correct visible discharges which result in a loss of oil from the container"); *id.* § 265.195-.196 (requiring hazardous waste storage tanks to be

"removed from service immediately" upon discovery of leaks or spills, and imposing measures to prevent further release of hazardous waste); *id.* § 63.6640(c)(7) (directing that reciprocating internal combustion engines be "shut down as soon as safely possible" when emissions of hazardous air pollutants exceed safe limits). When a facility suspends compliance monitoring, it avoids the protective measures triggered by monitoring results.

EPA claims that health risks are uncertain here, EPA Br. 36, citing *Center for Science in the Public Interest*, 74 F. Supp. 3d at 304. In that case, however, the agency was wrestling with complicated science and policy questions: whether exposure to mercury in fish outweighed the health benefits from eating fish, and how best to inform the public of the risks without deterring healthy fish consumption. *Id*. at 301, 303-05. No such uncertainty exists here: disclosing pollution and chemical safety risks from monitoring failures under existing laws benefits the public more than hiding those risks.

EPA also argues that this factor should carry less weight because everything EPA does relates to health. EPA generally works on health-related matters, true, but the non-enforcement policy applies to nearly every single facility regulated by EPA—more than 1.1 million of them. Starfield Decl. ¶ 5. That was not true in *Sierra Club v. Thomas*, 828 F.2d at 798, where the court noted the limited scope of the matter before it relative to other issues confronting the agency. The monitoring and reporting requirements at stake here include testing for air pollution, water pollution, chemical releases, oil spills, hazardous waste storage safety, pipeline leaks, and more. Policy at 3 nn.2-7; Pls. Br. 4-7. EPA identifies no pending matter that has the same implications for environmental protection.

The unpublished decision in *In re Pesticide Action Network North America*, 532 F. App'x 649 (9th Cir. 2013), does not help EPA. In that case, the court initially declined to compel

EPA to respond to a petition because EPA committed to a "concrete timeline" for doing so, pledging to act in a matter of months. *Id.* at 651. EPA then broke its word, and two years later, in a subsequent case (which EPA does *not* cite), the court issued a writ of mandamus compelling the agency to act. *Pesticide Action Network*, 798 F.3d at 815. Indeed, the Ninth Circuit recently rejected the same argument EPA makes here, explaining that EPA does not "get[] a free pass on several of the *TRAC* factors simply because all of its activities to some extent touch on human health, such that prioritization of one goal will necessarily detract from competing priorities." *NRDC II*, 956 F.3d at 1141 (noting that "to support that tenuous position, the EPA quotes to a 2013 unpublished decision in *Pesticide Action Network*—the very case in which two years later we *granted* mandamus").

Finally, the policy exacerbates existing racial and social inequities. Pls. Br. 19-20. EPA does not dispute that low-income communities and communities of color suffer a higher pollution burden; that the same communities suffer disproportionate harms from the COVID-19 pandemic; or that monitoring and reporting failures make pollution increases more likely. *Id.*; Petition at 11. The health harms at stake strongly support the conclusion that EPA's delay is unreasonable.

D. Responding to the petition would not interfere with competing priorities

Acting on the petition would not interfere with EPA's other priorities. *TRAC*, 750 F.2d at 80. For this factor, courts consider "*the effect* of expediting delayed action on agency activities of *a higher or competing* priority." *Id.* (emphasis added). In other words, EPA must show that responding to the petition would hinder its work on more important things.

EPA asks that the Court defer to the agency's priorities, EPA Br. 37-38, but never says what those priorities are, let alone why responding to the petition would impede them.

The Starfield Declaration cites some agency matters that are not mentioned in EPA's brief, Starfield Decl. ¶¶ 18-22, but nowhere claims that answering the petition would compete with them. That would be implausible anyway, since the petition asks for public disclosure of information EPA already instructs companies to compile and make available on request.

EPA argues that "significant deference" is owed to its "assessment of the appropriate timeframes," EPA Br. 38, but again does not say what those "timeframes" are, nor explain why they are "appropriate." EPA also provides no support for its claim that deference "should be particularly pronounced" because the petition "implicates EPA's enforcement discretion." *Id.* Regardless, the petition does not implicate EPA's enforcement discretion. EPA has already exercised that discretion by announcing to every regulated facility in the country that it does not intend to seek civil penalties for monitoring and reporting violations when the company claims a pandemic-related reason. Policy at 3. The petition asks for a rule disclosing which companies are taking advantage of that amnesty. Petition at 6-7. That would not hamper EPA's enforcement discretion, unless EPA also claims the right to *shield* violations of law from public disclosure.

Finally, EPA's invocation of competing priorities rings hollow, because even during the pandemic it has continued to issue new rules that relax health and environmental protections. Pls. Br. 22 (citing examples); *see also* 85 Fed. Reg. 24,094, 24,117-18 (Apr. 30, 2020) (proposing not to strengthen annual air standards for fine particulate matter, despite risk assessment showing thousands of lives saved per year from a lower standard). If EPA can pursue rollbacks during the pandemic, it can act on the petition.

E. EPA's delay prejudices Plaintiffs and the public interest

EPA gives short shrift to the interests prejudiced by its delay, and casually declares

that Plaintiffs are in the same situation as anyone else awaiting agency action. EPA Br. 38. That is untrue. In some circumstances, an agency's slow response is ultimately harmless. *E.g.*, *Towns of Wellesley, Concord & Norwood v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (no prejudice from risk of paying a higher rate pending agency delay, because petitioners will be refunded any overpayment). But that is not the case here. It is prejudicial for EPA to drag its feet until harm caused by undisclosed violations has already occurred. *See Am. Broadcasting Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951) ("[O]n occasion the courts must act to make certain that what can be done is done. Agency inaction can be as harmful as wrong action. The [agency] cannot, by its delay, substantially nullify rights which the [statute] confers, though it preserves them in form.").

Plaintiffs have a right under the APA and the Constitution to petition EPA and receive a timely response. 5 U.S.C. §§ 553(e), 555(b); U.S. Const. amend. I. EPA's continuing delay may nullify Plaintiffs' rights entirely. If EPA's goal is to run out the clock and avoid responding to the petition until the urgent need has passed, it is well on its way.

F. Plaintiffs do not need to prove EPA's bad faith

Under *TRAC*, a finding of bad faith is not required to demonstrate unreasonable delay. 750 F.2d at 80. If there is no proof of agency bad faith, "this factor is neutral." *Families for Freedom*, 628 F. Supp. 2d at 541.

EPA cites *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 120 (D.D.C. 2005), to argue that a lack of bad faith weighs in its favor, EPA Br. 39, but that case is inapt. In *Liberty Fund*, the agency was taking "comprehensive steps" to resolve a challenged backlog of visa applications, including by creating two "backlog centers" staffed by 200 employees. 394 F. Supp. 2d at 107-08, 110, 120. It was in that context that the court held the agency's good-

faith efforts weighed against mandamus. *Id*. at 120; *see also In re Am. Fed'n of Gov't Emps.,* 837 F.2d 503, 504, 507 (D.C. Cir. 1988) (good-faith response weighed against mandamus where agency had resolved all delayed matters identified in the lawsuit). EPA points to no analogous effort here. Instead, it has done the bare minimum: it "received, "reviewed," and "circulated" the petition, and "designated" an office to "coordinate and lead the review." EPA Br. 39. That does not earn EPA extra credit for good faith.

IV. The Court should order EPA to respond promptly

The Court should order EPA to grant or deny the petition promptly, and no later than five days from entry of the Court's order. EPA wrongly suggests that Plaintiffs need to meet some additional burden to justify a Court-ordered deadline. EPA Br. 30. "[W]hen there has been an unreasonable delay in rulemaking, courts have power and discretion to enforce compliance within some form of timeline." *Cmty. Voice*, 878 F.3d at 788. Courts routinely compel agency action by a fixed deadline after finding unreasonable delay. *E.g.*, *Auchter*, 702 F.2d at 1154 (30-day deadline); *Am. Rivers*, 372 F.3d at 420 (45-day deadline).

EPA's request for supplemental briefing on remedy, EPA Br. 39 n.12, would only cause further delay. Plaintiffs identified the remedy they were seeking both in the complaint and in their summary judgment papers. ECF No. 1, at 4, 19; Pls. Br. 2, 25. EPA had room in its 40-page opposition brief to muster a response. Another round of briefing on an issue clearly presented by Plaintiffs' motion would be excessive. *See California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1179 (N.D. Cal. 2019).

CONCLUSION

EPA's ongoing delay is unreasonable. The Court should order EPA to respond within five days.

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Respectfully submitted,

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