No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC.

ENVIRONMENTAL DEFENSE CENTER & NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.

PETITION FOR A WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners Environmental Defense Center and Natural Resources Defense Council, Inc., submit that they have no parent corporations and no publicly issued stock shares or securities. No publicly held corporation holds stock in any of the petitioners.

December 18, 2014

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INTRODUCTION

In 2003, this Court vacated in part and remanded an Environmental Protection Agency (EPA) rule concerning stormwater pollution, finding that the rule's regulation of urban stormwater violated the Clean Water Act and that the agency had arbitrarily failed to decide whether to regulate stormwater from forest roads. *Envtl. Def. Ctr., Inc. v. U.S. EPA* (*EDC*), 344 F.3d 832, 858, 863 (9th Cir. 2003). Even then, a lawful stormwater regulation was past due, as Congress had required EPA to complete its stormwater rulemaking by 1993. Yet, more than eleven years after this Court found the rule unlawful and remanded it to the agency, EPA has yet to comply with the Court's remand order. Petitioners Environmental Defense Center (EDC) and Natural Resources Defense Council (NRDC), who brought and won that earlier litigation, now petition this Court to compel EPA to comply with the Court's 2003 remand order, and to do so by a date certain.

Polluted rainwater runoff, or "stormwater," is a major environmental and human health problem. Two types of stormwater are relevant in this case: urban stormwater and forest road stormwater. In urban areas, rain washes pollution from streets, roofs, parking lots, and other contaminated surfaces into rivers, streams, lakes, and coastal waters. This urban stormwater is one of the leading sources of water contamination in the country and causes

countless illnesses in swimmers each year. In our nation's forests, stormwater from the dirt and gravel roads used for logging and other forest activities washes sediment into water bodies, where it harms fish and contaminates sources of drinking water for millions of Americans.

In *EDC*, the Court agreed with Petitioners that the stormwater rule at issue, known as the "Phase II Rule," failed to adequately address these two types of stormwater. First, the Court held that the Phase II Rule created an impermissible self-regulatory system for small municipal stormwater systems and failed to provide for public participation in the permitting process for those stormwater systems, as required by the Clean Water Act. *Id.* at 854-58. Second, the Court held that EPA failed to explain why the Phase II Rule did not address stormwater from forest roads at all, despite evidence in the record that such roads are a major source of water pollution. *Id.* at 860-61, 863. The Court vacated and remanded the urban stormwater portions of the rule. *Id.* at 858. The Court also remanded the forest road issue, directing EPA to decide, in an appropriate administrative proceeding, whether to regulate forest roads under its Phase II authority. *Id.* at 863.

EPA has repeatedly acknowledged that it must comply with the Court's 2003 order. However, more than a decade later, the agency has yet to do so. The invalid regulations for small municipal stormwater systems remain

printed—unchanged—in the U.S. Code of Federal Regulations. Many state permitting agencies continue to rely on them. And EPA has yet to decide whether it will regulate forest road pollution under its Phase II authority. EPA's failure to address the Court's remand order is especially troubling because Congress required EPA to complete these rules by 1993.

Federal courts have authority to issue writs of mandamus directing agencies to comply with prior orders, and this Court should now exercise that authority. EPA's continued disregard of the 2003 order undermines the integrity of the courts and robs Petitioners of their victory. The Court should grant the Petition for a Writ of Mandamus and order EPA to comply with the 2003 order by a date certain.

JURISDICTION

Petitioners bring this case pursuant to Federal Rule of Appellate Procedure 21, which allows parties to petition the Courts of Appeals for a writ of mandamus. Under the All Writs Act, 28 U.S.C. § 1651(a), this Court has jurisdiction to issue a writ of mandamus to "effectuate and prevent the frustration of orders it has previously issued." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977) (discussing 28 U.S.C. § 1651(a)); *Ramon-Sepulveda v. INS*, 824 F.2d 749, 751 (9th Cir. 1987) ("We have the authority and the duty to

preserve the effectiveness of our earlier judgment."). The Court therefore has jurisdiction to enforce its 2003 *EDC* judgment.

Petitioners have standing to bring this action on two independently sufficient bases. First, Petitioners were prevailing parties in *EDC*, and thus have standing to enforce the Court's 2003 order. *See Salazar v. Buono*, 559 U.S. 700, 712 (2010) ("A party that obtains a judgment in its favor acquires a 'judicially cognizable' interest in ensuring compliance with that judgment."); *see also* Declaration of Lawrence Levine (Levine Decl.) ¶¶ 6-13; Declaration of Owen Bailey (Bailey Decl.) ¶¶ 5-15. Second, Petitioners' members have concrete interests harmed by stormwater pollution that would be addressed by EPA's compliance with this Court's 2003 order. *See* Declarations of E. Kush, B. Meade, A. Van Alyn Booraem, K. Shimata, B. Stevens, M. Schweitzer, B. Kimball, S. Cooper, S. Ferry, and T. Dudley.

BACKGROUND

I. Stormwater is a significant source of water pollution

Stormwater "is one of the most significant sources of water pollution in the nation, at times comparable to, if not greater than, contamination from industrial and sewage sources." *EDC*, 344 F.3d at 840 (internal quotation marks omitted). In urban areas, small municipal separate storm sewer systems (MS4s) collect stormwater from developed areas and discharge it to

nearby streams, rivers, lakes, and coastal waters. *Id.* at 840-41. As the stormwater flows across the pavement and soil and into the MS4, it picks up contaminants, including suspended metals, algae-promoting nutrients, used motor oil, raw sewage, pesticides, and trash. *Id.* at 840. EPA, upon issuing the Phase II Rule, explained that urban stormwater is a major cause of water pollution nationwide and is the single largest source of pollution in ocean waters. National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,726 (Dec. 8, 1999). EPA also noted that urban stormwater can cause illnesses in swimmers and leads to hundreds of beach advisories and closings each year. *Id.* at 68,727 (finding that the rate of illness in people who swim near storm drains is 57 percent higher than the rate in people who swim more than 400 yards away).

Stormwater is also a problem in our nation's forests, which are covered in a vast web of roads. These roads—many of them dirt or gravel—are used for logging, recreational, fire protection, or other purposes. Notice of Intent To Revise Stormwater Regulations To Specify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges, 77 Fed. Reg. 30,473, 30,475 (May 23, 2012). EPA has

concluded that these roads are the "major source of erosion from forested lands, contributing up to 90 percent of the total sediment production from forestry operations." *EDC*, 344 F.3d at 861 (internal quotation marks omitted). This sediment pollution can damage aquatic habitats by smothering benthic organisms, increasing turbidity, reducing light penetration, and reducing dissolved oxygen. 64 Fed. Reg. at 68,730. Forest road stormwater can also directly harm humans by contaminating drinking water supplies: 80 percent of the nation's freshwater sources originate in forest lands, and approximately 60 million people rely on National Forest lands as the primary source of their drinking water. 77 Fed. Reg. at 30,476.

II. EPA adopted the Phase II Rule six years after the deadline set by Congress

Congress amended the Clean Water Act in 1987 to better address the problem of stormwater pollution, directing EPA to regulate stormwater in phases. First, Congress required EPA to regulate stormwater discharges from industrial activities and "large" MS4s (those serving populations of more than 250,000) by 1989, and to regulate stormwater discharges from "medium" MS4s (those serving populations between 100,000 and 250,000) by 1991. 33 U.S.C. § 1342(p)(4). EPA promulgated the regulations addressing these sources, the "Phase I Rule," in 1990. *EDC*, 344 F.3d at 842.

Second, Congress required EPA to identify and regulate all other sources of problematic stormwater pollution by October 1, 1993. *See* 33 U.S.C. § 1342(p)(5)-(6). EPA eventually responded to this command by promulgating the "Phase II Rule" in 1999, six years after the statutory deadline. 64 Fed. Reg. at 68,722. The Phase II Rule required operators of "small" MS4s (those serving fewer than 100,000 people) in urbanized areas to obtain National Pollutant Discharge Elimination System (NPDES) permits. 40 C.F.R. §§ 122.26(a)(9)(ii), 122.26(b)(16), 122.32(a), 122.34(a); *EDC*, 344 F.3d at 840. The Phase II Rule did not regulate—or even mention—discharges from forest roads. *EDC*, 344 F.3d at 861-62.

III. The Ninth Circuit vacated and remanded portions of the Phase II Rule in 2003

Shortly after EPA adopted the Phase II Rule, Petitioners challenged the regulations in this Court. Industry and municipal groups also challenged the regulations on a variety of grounds. *EDC*, 344 F.3d at 843. The Ninth Circuit consolidated the actions, and found that it had original jurisdiction over the final Phase II Rule under 33 U.S.C. § 1369(b)(1). *Id.* In 2003, the Court rejected the industry and municipal groups' challenges, but ruled for Petitioners on issues relating to small MS4s and forest roads. *Id.* at 840, 879.

On the small MS4 issue, this Court held that the Phase II Rule created an "impermissible self-regulatory system" because it allowed permittees to decide, without any oversight from the permitting agency, which pollution control measures to include in their permits. *Id.* at 854-56. The Clean Water Act requires EPA to reduce municipal stormwater pollution to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B)(iii). As one way of meeting that mandate, the Phase II Rule authorizes EPA or a state permitting agency[1] to regulate a large number of small MS4s under one "general permit." *EDC*, 344 F.3d at 853 (citing 40 C.F.R. § 122.33(b)). Typically, a general permit explains what a class of dischargers (e.g., small MS4s, construction sites, etc.) must do to control water pollution. To obtain coverage under the general permit, a discharger must file a simple "notice of intent" (NOI) to comply with the general permit's terms before discharging. Because the NOI is merely the formal acceptance of the general permit's terms, permitting authorities need not review the NOI before the permittee can start discharging. *Id.*

Unlike this traditional general permitting approach, the Phase II Rule allows each polluter to develop its own individualized pollution control

[1] The Clean Water Act allows the states to administer NPDES permitting programs. EPA serves as the permitting authority in states that choose not to administer the Act. *EDC*, 344 F.3d at 841 (citing 33 U.S.C. § 1342(a)-(b)).

system in its NOI. *Id.* at 853-54. But nothing in the rule requires permitting authorities to review the individualized NOIs to "ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable." *Id.* at 855. Accordingly, this Court ruled that the Phase II Rule violates the Clean Water Act. *Id.* at 856.

This Court also found that the Phase II Rule's NOI procedures failed to meet the Clean Water Act's public availability and participation requirements. *Id.* at 856-58. The Act requires permitting authorities to provide public notice and an opportunity for a hearing on permits. *Id.* at 856 (citing 33 U.S.C. § 1342(j), (a)(1)). The Court reasoned that because Phase II NOIs include substantive, individualized pollution control plans, they are "functionally equivalent" to individual permit applications. *Id.* at 857. Accordingly, the Court held that the Phase II Rule violates the Act by failing to require notice and a hearing on each NOI. *Id.* Because of these deficiencies, the Court vacated these portions of the Phase II Rule and remanded the rule to EPA. *Id.* at 858.

The Court also ruled for Petitioners on the forest roads issue. EPA had argued that Petitioners were barred from challenging that aspect of the rule on procedural grounds, but made no substantive defense of its failure to regulate forest roads. *Id.* at 862 (stating that EPA responded to comments "without disputing that the [forest road sedimentation] problem is serious").

The Court rejected EPA's procedural defenses and held that Petitioners' contention that the Clean Water Act requires EPA to regulate forest roads "necessitates a response from EPA on the merits." *Id.* The Court remanded the issue to EPA "so that it may consider in an appropriate proceeding Petitioners' contention that [the Act] requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review." *Id.* at 863.

EPA sought en banc and Supreme Court review of this Court's decision. Both were denied. *Id.* at 839-40; *Texas Cities Coal. on Stormwater v. EPA*, 541 U.S. 1085 (2004); Levine Decl. ¶ 4, Ex. A at 1.

IV. EPA has not complied with the Court's 2003 order

More than eleven years after this Court's ruling in *EDC*, EPA has yet to comply with the 2003 order. Meanwhile, state permitting agencies have continued to rely on the invalidated small MS4 regulations. Although EPA, in 2004, issued a non-binding guidance memorandum that advises small MS4 permitting agencies to comply with *EDC* until EPA takes "affirmative action" to address the Court's remand order, Levine Decl. ¶ 4, Ex. A at 2-3, many permitting agencies have not followed that guidance.

For example, New York's 2010 general permit for small MS4s allows precisely the self-regulatory system that EPA's vacated rule allowed and that this Court's 2003 order held to violate the Clean Water Act. *Id.* ¶ 7, Ex. C at 29, 33, 35, 43, 46, 50 (allowing permittees to "[s]elect and implement appropriate" pollution controls), and 8 (stating that permit coverage may be obtained simply by submitting a "complete and accurate" NOI). It also fails to provide for adequate public participation on NOIs. *Id.* ¶ 7, Ex. C at 8. Because of these deficiencies and others, in 2010, Petitioner NRDC and other organizations challenged the New York small MS4 general permit in state court. That litigation is currently pending before New York's highest court.[2] Notably, in that litigation, the State of New York has argued that *EDC* is not controlling because "EPA has not issued revised regulations . . . . Therefore, EPA's current regulations remain binding, and remain the framework for which stormwater permitting occurs throughout the nation . . . ." *Id.* ¶ 8, Ex. D

[2] NRDC and the other petitioners prevailed in the trial court in 2012, but the intermediate appellate court reversed. *NRDC v. N.Y. State Dep't of Envtl. Conservation*, 940 N.Y.S.2d 437, 443, 449, 453-54 (N.Y. Sup. Ct. 2012), *aff'd in part and rev'd in part*, 994 N.Y.S.2d 125, 136 (N.Y. App. Div. 2014). The state supreme court recently granted NRDC's request for review, *NRDC v. N.Y. State Dep't of Envtl. Conservation*, 10 N.E.3d 189 (N.Y. 2014) (unpublished disposition), and the parties are currently briefing the appeal. Levine Decl. ¶ 8.

at 15-17; *see also id.* ¶ 8, Ex. D at 17 (arguing that EPA's 2004 guidance memorandum is not binding on the states).

Other state permitting agencies have similarly followed, or proposed to follow, the invalidated regulations. *See, e.g.*, Levine Decl. ¶¶ 10-11, Ex. E at section III(e) (California), Ex. F at 18, 30-31 (New Jersey). In fact, EPA found it necessary in its recent "MS4 Permit Improvement Guide" to remind permit writers to refer to the 2004 guidance memorandum regarding the *EDC* remand. *Id.* ¶ 5, Ex. B at 10. However, until EPA amends its regulations, states will likely continue to issue permits that contain the fatal flaws identified in the Court's 2003 order.

In late 2009, EPA began a process to update its entire urban stormwater program, including the Phase II Rule. *See, e.g.*, Stakeholder Input; Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68,617 (Dec. 28, 2009). At that time, EPA planned to issue a proposed rule by September 2011, but it has pushed back that date repeatedly, and now states only that a proposed rule may be issued on a date "To Be Determined." Levine Decl. ¶ 14, Ex. G. EPA has stated that it is "deferring action on [the] rulemaking" to instead pursue non-regulatory actions that "provide incentives" to "encourage" communities to implement stronger stormwater programs. *Id.* ¶ 16, Ex. I.

EPA has similarly failed to comply with this Court's 2003 order to decide whether to regulate forest roads under its Phase II authority, even though the agency has acknowledged a duty to do so. In 2012, EPA cited the 2003 order during a rulemaking to revise the Phase I regulations to exempt logging roads[3] from the NPDES permit requirement.[4] EPA stated that, in response to *EDC*, it "continues to review available information on the water-quality impacts of stormwater discharges from forest roads," and that it "believes that stormwater discharges from forest roads, including logging roads, should be evaluated under [its Phase II authority]," which "may be well-suited to address the complexity of forest road ownership, management, and use." 77 Fed. Reg. at 72,972, 72,973.

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[3] Logging roads are a subset of forest roads. *See* Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads, 77 Fed. Reg. 72,970, 72,973 (Dec. 7, 2012).

[4] EPA made these revisions in response to litigation over the Phase I program. *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011), *rev'd and remanded on other grounds sub nom., Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013). After the Ninth Circuit held that stormwater discharges from logging roads required NPDES permits, *id.* at 1066-67, EPA revised its regulations—in just over six months—to specifically exclude logging roads from the Phase I Rule's permit requirement. 77 Fed. Reg. at 72,970, 72,972 (showing that EPA issued the notice of intent, proposed rule, and final rule on May 23, September 4, and December 7, 2012, respectively). The Supreme Court reversed, holding that EPA had properly construed the earlier version of the regulation to exempt logging roads from regulation under the Phase I Rule. *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013).

Around that time, EPA began a process to propose "flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads." Levine Decl. ¶ 15, Ex. H. But as with the nascent urban stormwater rulemaking, EPA's estimate for the release of an advanced notice of proposed rulemaking on forest roads slipped from 2013 to 2014, and then to a date "To Be Determined." *Id.* ¶ 15, Ex. H. EPA has yet to decide, in an appropriate proceeding that allows for judicial review, whether to regulate forest roads, as this Court required in 2003.

ARGUMENT

The Court should issue a writ of mandamus because EPA's eleven-year delay in complying with the 2003 order is unreasonable

Under the All Writs Act, a federal court may issue a writ of mandamus to "effectuate and prevent the frustration of orders it has previously issued." *N.Y. Tel. Co.*, 434 U.S. at 172; *see also Ramon-Sepulveda*, 824 F.2d at 751 ("We have the authority and the duty to preserve the effectiveness of our earlier judgment."). The Court should use its authority under the All Writs Act to compel EPA to comply with the 2003 order.

Courts evaluate an agency's failure to comply with a prior court order as a claim for unreasonable delay under the Administrative Procedure Act (APA), 5 U.S.C. § 706(1), which requires a court to compel agency action unlawfully

withheld or unreasonably delayed. *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008); *cf. Cal. Power Exch. Corp. v. FERC*, 245 F.3d 1110, 1124-25 (9th Cir. 2001). To determine whether agency action has been unreasonably delayed, courts apply the factors announced in *Telecommunications Research & Action Center v. FCC* (*TRAC*):

> (1) the time agencies take to make decisions must be governed by a 'rule of reason';] (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interests prejudiced by the delay[;] and (6) the court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.'

Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (quoting *TRAC*, 750 F.2d 70, 80 (D.C. Cir. 1984)); *see also Cal. Power Exch. Corp.*, 245 F.3d at 1124-25 (applying the TRAC factors, rather than the traditional three-part mandamus test, to an unreasonable delay case).

When applying the *TRAC* factors in similar circumstances, courts have held that an agency's failure to comply with a prior court order is dispositive. For example, in *In re People's Mojahedin Organization of Iran*, the D.C. Circuit remanded the U.S. Secretary of State's decision to reject an organization's

petition to be removed from a terrorist watch list. *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 833 (D.C. Cir. 2012). The Secretary failed to take final action on the organization's petition, and two years later, the court granted a writ directing the Secretary to comply with the first order within four months. *Id.* The court considered the *TRAC* factors, but it ultimately found the agency's disregard of the remand order to be dispositive: "Decisive to us, however, is the fact that the Secretary has failed to heed our remand." *Id.* at 837.

In a similar case, the D.C. Circuit remanded a Federal Communications Commission rule in 2002, holding that the agency had failed to explain its authority for issuing the rule. *In re Core Commc'ns, Inc.*, 531 F.3d at 850. After six years of agency inaction, the petitioner sued again, and the court issued a writ of mandamus directing the agency to comply with the remand order within six months. *Id.* at 850, 861-62. The court discussed some of the *TRAC* factors, but it emphasized that the case was "different" from a typical unreasonable delay case because the agency had failed to comply with a court order. *Id.* at 856 ("In this case, we are faced with the agency's failure—for six years—to respond to our own remand.").

The Court's authority to issue a writ of mandamus in these circumstances is clear. EPA has failed to heed this Court's 2003 order for more

than a decade, despite knowing that it must do so. On this basis alone, the Court should grant the petition.

Each of the six *TRAC* factors also favors Petitioners. First, EPA has disregarded the Court's 2003 order for more than eleven years; that length of delay is unreasonable on its face. "[A] reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (internal quotation marks omitted). Courts have found much shorter delays for similarly complex or important agency actions to be unreasonable. *In re People's Mojahedin Org. of Iran*, 680 F.3d at 833 (finding a two-year delay unreasonable); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157-58 (D.C. Cir. 1983) (finding a three-year delay unreasonable); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 324-25, 341-42 (D.C. Cir. 1980) (finding a four-year delay unreasonable); *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (finding a five-year delay unreasonable); *In re Core Commc'ns, Inc.*, 531 F.3d at 857 (finding a six-year delay unreasonable); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (calling six years an "extraordinarily long time"); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 414, 419 (finding a six-year delay "nothing less than egregious"). At some point, the courts "must lean forward from the

bench to let an agency know, in no uncertain terms, that enough is enough." *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

Second, Congress provided a deadline for the underlying rulemaking, and that deadline has long since passed. Indeed, it had long since passed even at the time that EPA promulgated the rule that, in 2003, this Court struck down. *See* 33 U.S.C. § 1342(p)(6) (setting a 1993 deadline for the Phase II Rule). EPA's continuing failure to comply with the 2003 order means that, more than twenty years after the statutory deadline, the agency still has not promulgated a lawful Phase II Rule.

Third, this delay is unreasonable because human health is at stake. As EPA itself acknowledges, municipal stormwater is one of the leading sources of water pollution nationally and contributes to illnesses in swimmers and hundreds of beach swimming advisories every year. 64 Fed. Reg. at 68,727. Forest road stormwater pollutes important sources of drinking water supplies for millions of Americans. 77 Fed. Reg. at 30,476.

Fourth, this rule is a high priority because it is subject to a statutory deadline. Congress undoubtedly knew about the other demands on EPA when it established the 1993 deadline. *See, e.g.*, *In re People's Mojahedin Org. of Iran*, 680 F.3d at 837. EPA may claim that it has other priorities, but "[h]owever many priorities the agency may have, and however modest its personnel and

budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction in the face of the congressional command to act." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 554 (D.C. Cir. 1999). And, here, this Court has already ordered EPA to take action.

Fifth, Petitioners have been prejudiced by EPA's failure to comply with the 2003 order. EPA's delay in responding to the Court's mandate, and failure to revise the rule to comply with the law, has insulated this issue from further judicial review. *See In re People's Mojahedin Org. of Iran*, 680 F.3d at 837 (stating that the petitioner was unfairly "stuck in administrative limbo"). Petitioners cannot challenge the final rule until EPA issues that rule—that alone is sufficient prejudice to warrant issuance of the writ. *See id.* Petitioners have also expended significant organizational resources to combat stormwater pollution that would be addressed by a legally adequate rule. *See* Levine Decl. ¶¶ 6-13 (describing NRDC's efforts to address these issues); Bailey Decl. ¶¶ 10-15 (describing EDC's efforts to address these issues). For example, NRDC has spent years litigating over New York's small MS4 general permit, which improperly relies on the invalidated portions of the Phase II Rule. Levine Decl. ¶¶ 8-9. Furthermore, EPA's continued delay in adopting a legally adequate stormwater rule has caused harm to Petitioners' members. *See* Kush, Meade, Van Alyn Booraem, Shimata, Schweitzer, Stevens, Kimball,

Cooper, Ferry, and Dudley Decls. While EPA dithers, stormwater from small MS4s and forest roads continues to pollute our nation's waters.

Sixth, although the Court need not find any impropriety behind the delay to find it unreasonable, here, EPA is plainly and consciously disregarding this Court's order. EPA has repeatedly acknowledged that it must comply with the order, yet it has withheld that action for more than eleven years. Levine Decl. ¶ 4, Ex. A at 1-2; 77 Fed. Reg. at 72,973.

All six *TRAC* factors favor Petitioners. In addition, EPA's failure to heed a court order for more than a decade is, by itself, dispositive. *In re People's Mojahedin Org. of Iran*, 680 F.3d at 837. Accordingly, the Court should grant the Petition for a Writ of Mandamus and compel EPA to comply with the 2003 order by a date certain.

REQUEST FOR RELIEF

Petitioners respectfully request that the Court grant the Petition for a Writ of Mandamus and order EPA to comply with the 2003 order by the dates outlined below. Given EPA's delay up to this date, a deadline for compliance with the Court's mandamus is critical; without such a deadline, EPA will be able to continue to disregard the 2003 order, as it has for eleven years. Courts that have granted similar writs have directed the agency to comply with an

order by a specific time. *See In re People's Mojahedin Org. of Iran*, 680 F.3d at 833; *In re Core Commc'ns, Inc.*, 531 F.3d at 861.

Petitioners first request that the Court order EPA to immediately revise the Phase II small MS4 regulations to include a statement that directs permitting authorities to comply with the 2003 *EDC* order pending further rulemaking. This action is needed to ensure that state permitting agencies do not continue to mistakenly rely on the vacated rules. EPA has made similar notations in other sections of the Code of Federal Regulations. *See, e.g.*, 40 C.F.R. § 63.99, Delegation Status for Part 63 Standards—State of Oklahoma, n.3 (stating that the standard was vacated and remanded to EPA by the D.C. Circuit in *Mossville Environmental Action Network v. EPA*, 370 F. 3d 1232 (D.C. Cir. 2004)); 40 C.F.R. § 52.21, note to paragraph (b)(2)(iii)(a) (stating that the second sentence of the paragraph was stayed indefinitely by court order).

Petitioners further request that the Court order EPA to propose a rule, within six months, revising the small MS4 regulations to address the problems outlined in this Court's 2003 order. EPA has already had more than a decade to consider that order, and revising the rule to address the procedural deficiencies the order identified should be straightforward. Petitioners also request that the Court order EPA to take final action on the proposed rule

within six months of proposing it. EPA has shown that it can move quickly when it chooses. In 2012, EPA, in just over six months, revised the Phase I Rule to specifically state that logging roads do not require NPDES permits. *See* 77 Fed. Reg. at 72,970, 72,972 (showing that EPA issued the notice of intent, proposed rule, and final rule on May 23, September 4, and December 7, 2012, respectively). Petitioners' proposed schedule gives EPA twice as much time to revise this rule.

Petitioners also request that the Court order EPA to decide, within six months, in an appropriate proceeding allowing it to set forth judicially reviewable findings, whether to regulate forest roads. EPA has already stated that its Phase II authority "may be well-suited" to regulate forest roads and that it has been considering options for doing so for years. *Id.* at 72,973. If EPA ultimately decides to regulate forest roads, as it has repeatedly implied it would, Petitioners request that the Court order EPA to propose a rule within a year of that decision and finalize that rule no later than a year after issuing the proposed rule.

Finally, Petitioners request their reasonable attorneys' fees and costs for bringing this action, pursuant to 33 U.S.C. § 1369, 28 U.S.C. § 2412, or any other applicable provision of law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the Petition for a Writ of Mandamus.

December 18, 2014

Respectfully submitted,

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