No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE CATE JENKINS, PhD AND
PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY,
PETITIONERS

PETITION FOR WRIT OF MANDAMUS
(AGENCY ACTION UNREASONABLY DELAYED)

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INTRODUCTION

This petition seeks a writ of mandamus to compel the Environmental Protection Agency (EPA or Agency) to meet its mandatory statutory obligation under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C §§ 6901 *et seq.*, to respond to a Rulemaking Petition to amend the hazardous waste listing criteria for corrosivity, submitted more than three years ago by Petitioners, Dr. Cate Jenkins and Public Employees for Environmental Responsibility (PEER). As a result of negligent error or even outright fraud by the Agency, the alkaline corrosivity standard for regulation as a hazardous waste under RCRA was set at a pH level ten times that of the standard set by the United Nations' (UN) World Health Organization (WHO) upon which the EPA standard purportedly relied. The UN has reiterated and reinforced this same standard first in 1992 through the Basel Convention Treaty and then in 2002 through the UN.

Materials with a pH level now exempted from hazardous waste regulation can cause irreversible tissue damage (chemical burns), particularly to the respiratory tissues after inhalation. Alkaline corrosive materials at this pH level also defeat the natural respiratory protective mechanisms that prevent larger dust particles from reaching the lungs, by killing or immobilizing the ciliary cells that line the throat and upper respiratory tract. This results in the facilitated transport of

other toxic materials directly into the lungs. *See* Rulemaking Petition (Ex. A hereto) at 26 & nn. 71 and 72.

The result of the incorrect standard is that these dangerous materials are not regulated as hazardous waste under RCRA. Hazardous wastes under RCRA are subject to cradle-to-grave regulations requiring proper handling, transport and disposal to prevent exposures to the public. In addition, the faulty RCRA regulation results in unregulated exposures to releases from emergency response sites such as the collapse of the World Trade Center on Sept. 11, 2001, as well as exposures to materials transported on highways, railways and by air subject to Department of Transportation (DOT) regulations. This is because the RCRA regulations designating hazardous wastes were incorporated into the List of Hazardous Substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as "Superfund"), as well as DOT regulations which incorporate by reference the RCRA corrosivity characteristic regulation. Occupational Safety and Health Act (OSHA) regulations also reference the same CERCLA regulations in their guidance documents, and consider corrosive atmospheres to be immediately dangerous to life and health. Thus, if the corrosivity characteristic were set at the correct level, OSHA would be deeming corrosive environments which are not now subject to regulation to be

immediately dangerous to life and health, and appropriate precautions would apply, including the use of respirators.

The corrosivity characteristic regulation, found at 40 C.F.R. 261.22, was first promulgated in 1980, and since then the regulation has been re-published every year without change. Petitioners seek an amendment of the regulation to set the proper pH alkalinity level of 11.5, the international standard, instead of 12.5.[1] Petitioners also seek to amend the regulation so that it does not exclude non-aqueous corrosive materials. This is because on human contact, water-free alkaline materials quickly absorb water from body tissues, particularly the respiratory tract.

A highly publicized consequence of EPA's failure to set the proper pH level for corrosivity has been the severe, permanent and, in some cases, fatal health effects of exposure to corrosive dust on first responders at the World Trade Center, in the aftermath of the terrorist attack of September 11, 2001. Because the corrosivity standards were set too low, first responders and local authorities were not put on notice of the danger posed by the dust, and did not require or supply safety gear like respirators. First responders, as well as local residents, breathed in the corrosive dust permeating the site and consequently suffered chemical burns to their respiratory systems, creating long-term adverse health effects. *See* Rulemaking Petition at 29-32.

[1] Because the pH scale is logarithmic, one number higher is ten times as alkaline.

Remedying the erroneous corrosivity standard is important beyond its implications for disaster response, because corrosive dust is often released through common activities such as building demolition and cement manufacturing, or in accidents involving cement trucks. Petitioners presented evidence that routine building demolition results in cement dust with pH levels over 11.5, and that because no standard is in place which flags the danger, no precautions are taken to avoid public exposure, and in fact the public is invited to witness these events. *Id.* at 34-35. Petitioners also presented evidence that dust from cement manufacturing facilities can exceed the safe pH level of 11.5, endangering nearby residents, *id.* at 35-36, and that cement truck accidents can endanger first responders and the public. *Id.* at 12.

There is no valid reason for EPA to delay in adopting the correct standard. EPA officials have admitted that EPA set the corrosivity standard too high in error. *See id.* at 19-20. The correct standard, a corrosivity level of pH 11.5, is the international standard and has even been adopted by other components of EPA under other statues which it administers. *See id.* at 7-8.

JURISDICTION

Because this Court would have exclusive jurisdiction to review the EPA's final denial of Petitioners' Petition for Rulemaking, 42 U.S.C. § 6976(a)(1), this Court has jurisdiction to issue a writ of mandamus ordering EPA to rule on the

petition. *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*") (a statute affording review of final action in the Court of Appeals, read in conjunction with the All Writs Act, affords jurisdiction over claims of unreasonable delay); *see also* 5 U.S.C. § 706 (1) ("The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed").

RELIEF SOUGHT

PEER and Dr. Jenkins respectfully request a writ of mandamus directing the EPA to take action in accordance with 42 U.S.C. § 6974(a) concerning the relief sought in their September 8, 2011 Rulemaking Petition, within ninety days. Section 6974(a) requires that "[w]ithin a reasonable time following receipt of such petition, the Administrator shall take action with respect to such petition and shall publish notice of such action in the Federal Register, together with the reasons therefore."

ISSUE PRESENTED

Whether the Environmental Protection Agency's delay of three years in responding to a Rulemaking Petition to remedy an erroneously and fraudulently set safety standard for hazardous waste constitutes unreasonable delay of agency action, warranting a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a) and the Administrative Procedure Act, 5 U.S.C. § 706(1).

STATEMENT OF FACTS

In 1980, the EPA first promulgated the corrosivity characteristic, as required by RCRA, 42 U.S.C. § 6921(a) and (b).[2] Corrosivity is one of four "characteristics" of a material which make it subject to hazardous waste regulation.[3] The corrosivity characteristic regulation is republished every year in the Code of Federal Regulations at 40 C.F.R. § 261.22. It defines the ranges of corrosivity subject to hazardous waste regulation under RCRA. Materials within the regulatory ranges are given the EPA Hazardous Waste Number D002. The current regulation subjects substances to hazardous waste regulation which either have a pH equal to or less than 2 (highly acidic), or a pH equal to or greater than 12.5 (highly alkaline).[4] Petitioners seek amendment of the standard for alkaline corrosivity, which they contend should be set at a pH of 11.5. Petitioners also seek to amend the regulation so that it does not exclude non-aqueous corrosive materials. This is because on human contact, water-free alkaline materials quickly absorb water from body tissues, particularly the respiratory tract.

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[2] "Hazardous Waste Management System: Identification and Listing of Hazardous Waste," 45 Fed. Reg. 33084, 33122 (May 19, 1980).

[3] The other characteristics are ignitability, 40 C.F.R. § 261.21, reactivity, 40 C.F.R. § 261.23, and toxicity, 40 C.F.R. § 261.24.

[4] The pH of a material is determined by a simple laboratory test. Materials with a pH less than seven are considered acidic, while those with a pH greater than seven are considered basic (alkaline).

In the original standard for hazardous waste set in 1980, EPA knowingly falsified the alkaline pH level that is considered safe for human exposure. In setting the pH 12.5 standard it for alkaline corrosivity, EPA claimed falsely in its supporting documentation that the United Nations' World Health Organization's International Labor Organization (ILO) Encyclopedia supported a conclusion that pH levels above 11.5 are not tolerated by human eye tissue only.[5] EPA justified setting the standard at 12.5 by claiming that that level would not compromise human health because although eye tissue is damaged at levels above 11.5, skin tissue is not. *Id.* at 14-15. However, the standard set by WHO in its Encyclopedia is a pH of 11.5, which is ten times less corrosive than 12.5. The Encyclopedia states that both eye and skin damage will occur at pH values over 11.5, and nowhere even mentions a pH level of 12.5. *See* Rulemaking Petition at 9-10 (reprinting the Encyclopedia entry). EPA's selection of a pH of 12.5 as the standard appears to come out of nowhere, and has no claimed scientific support, but only a rationale that EPA agreed with commenters that "lime stabilized sludges and wastes should not be designated as hazardous." [6] In other words, EPA misrepresented the ILO Encyclopedia to justify a standard that in reality has no

[5] EPA, Office of Solid Waste, OSWER (May 2,1980) Background Document, Resource Conservation and Recovery Act Subtitle C -Hazardous Waste Management, Section 3001 - Identification and Listing of Hazardous Waste, 261.22 -Characteristic of Corrosivity, at 5. Attached as Ex. B hereto.

[6] Background Document at 11 (Ex. B).

health justification, in order to comply with the request of industry commenters to exempt certain wastes from hazardous treatment.

The WHO-set standard has remained the same, and in 1998, its pH 11.5 and above presumptive corrosivity level was adopted into the UN Basel Convention.[7] In 2002, the U.N. ratified the Organization for Economic Cooperation and Development Globally Harmonized System of Classification and Labeling of Chemicals, which states in many places that a pH level of 11.5 and higher is classified as corrosive to tissues.[8] Even other divisions have EPA have adopted a pH of 11.5 as level which is presumptively hazardous.[9] Nevertheless, EPA has reviewed and repromulgated this falsified pH level annually since 1980, continuing to issue a safety standard that is unsafe for human exposure.

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[7] United Nations Environment Programme (February 5, 1992) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Annex IX, List B, Waste B2120 (listing as non-hazardous solutions with a pH of greater than 2 and less than 11.5). Available at http://www.basel.int/text/17Jun2010-conv-e.pdf

[8] United Nations Economic Commission for Europe, Globally Harmonized System of Classification and Labeling of Chemicals, Part 3, Chapter 3.2, Skin Corrosion/Irritation, 2003 and 2013.
Revision 5, 2003 available at
http://www.unece.org/trans/danger/publi/ghs/ghs_rev00/00files_e.html
Revision 5 (2013) available at:
http://www.unece.org/trans/danger/publi/ghs/ghs_rev05/05files_e.html

[9] EPA's pesticide regulations exempt from testing requirements materials with a pH of less than 2 or greater than 11.5, because they are presumed corrosive to skin. 40 C.F.R. §§ 158.230; 158.2050 and 158.2230.

The incorrect corrosivity standard in RCRA has had ramifications far beyond RCRA regulation. Shortly after EPA adoption of the corrosivity (and other) characteristics in 1980, they were incorporated into the List of Hazardous Substances under the CERCLA amendments to the National Contingency Plan (NCP) statute. Hazardous substances for CERCLA purposes were defined as those having the characteristics identified in the RCRA regulations. 42 U.S.C. § 9601(14)(C) .

The CERCLA List of Hazardous Substances is used as the benchmarks for first responders and the public at all hazardous release sites, pursuant to the NCP.[10] In addition, the CERCLA List of Hazardous Substances is incorporated into the DOT List of Hazardous Substances. 49 C.F.R. § 172.101, Appendix A, No. 1. OSHA regulations also reference the same CERCLA regulations in their guidance documents, and consider corrosive atmospheres to be "immediately dangerous to life and health." Thus, if the corrosivity characteristic had been set at the correct level since 1980, OSHA would have been deeming corrosive environments which

[10] 40 C.F.R. §300.3:

> Scope.
> (a) The NCP applies to and is in effect for:
> ...
> (2) Releases into the environment of hazardous substances, and pollutants or contaminants which may present an imminent and substantial danger to public health or welfare of the United States.

are not now subject to regulation to be immediately dangerous to life and health, and appropriate precautions would have applied, including the use of respirators.[11]

In 1993, the falsified corrosivity characteristic was cited and used to evaluate risks to the public living around cement manufacturing plants (cement kilns) for possible regulation under RCRA. The corrosivity characteristic pH level of 12.5 was referenced and used as a basis for the supposed level of corrosivity that would make cement kiln dust hazardous to health, and to support the conclusion that there were "generally low" risks, thus militating against hazardous waste regulation.[12]

Since the World Trade Center disaster in 2001, Congress and the medical community have come to recognize that various respiratory ailments and damage to first responders and residents were caused by inhalation of the dust at the site, including specifically due to its corrosivity. *See* Rulemaking Petition at 30-32 (excerpting and citing medical research publications). The "James Zadroga 9/11 Health and Compensation Act of 2010," codified at 42 U.S.C. § 300mm *et seq.*,

[11] OSHA (May 1, 1995) Standard Interpretations – "Response to IDLH or Potential IDLH Atmospheres," available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21788

[12] EPA, Office of Solid Waste (December 31, 1993), "Report to Congress on Cement Kiln Dust," Chapter 6, Potential Danger to Human Health and the Environment, p. 6-4; Chapter 10, Study Findings and Regulatory Options, pp.10-2, § 10.1.3; 10-5, § 10.3.1. Available at http://www.epa.gov/osw/nonhaz/industrial/special/ckd/cement2.htm

established that the U.S. recognizes that both first responders and citizens living and working in lower Manhattan have suffered deadly and life threatening injuries from World Trade Center dust, and identifies various respiratory ailments as "WTC-related health conditions." 42 U.S.C. § 300mm-22(a)(3).

In 2006 and 2007, Dr. Jenkins disclosed the facts concerning the incorrect corrosivity standard and its consequences in reports to members of Congress and the FBI. In discovery in whistleblower litigation between Dr. Jenkins and EPA before the Merit Systems Protection Board and the Department of Labor Office of Administrative Law Judges, Dr. Jenkins obtained information showing that the then-current Director of the EPA Division responsible for the corrosivity characteristic regulation, Mr. Robert Dellinger, had reviewed one of her major disclosures.[13] His notes acknowledged that the international standard was in fact a pH of 11.5, and that a mistake was made in claiming that the 11.5 pH standard in the ILO encyclopedia referred only to eye damage and not skin damage.[14] Mr. Dellinger also testified in a deposition before the Merit Systems Protection Board

[13] A copy of Dr. Jenkins' May 6, 2007 complaint to members of Congress, marked up by Robert Dellinger, then the Director of EPA's Materials Recovery and Waste Management Division, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, is attached as Ex. C hereto.

[14] *See* Petition for Rulemaking at 19-20 and Ex. C hereto, pp. 5, 32-33.

in Dr. Jenkins' whistleblower litigation that the limitation of the corrosivity characteristic to aqueous materials was a mistake.[15]

On September 8, 2011, petitioners submitted a Rulemaking Petition to the EPA, seeking to change the corrosivity characteristic from the erroneously-set pH 12.5 to the international standard of pH 11.5 for alkaline hazardous waste, and to remove the limitation to aqueous wastes. As of September 9, 2014, EPA has not responded to or in any way acknowledged receipt of the rulemaking petition. It has been more than three years since the petition was submitted to EPA.

REASONS WHY THE WRIT SHOULD ISSUE

EPA Has Unreasonably Delayed in Performing its Mandatory Duty to Act on the Rulemaking Petition

The Administrative Procedure Act requires agencies to conclude matters before them within a reasonable time. "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). RCRA requires that within a "reasonable time" following receipt of a rulemaking petition, the EPA must take action and "publish notice of such action in the Federal Register, together with the reasons therefore." 42 U.S.C. § 6974(a). Thus, there

[15] *See* Rulemaking Petition at 37 (quoting deposition).

can be no question but that EPA has a clear and mandatory duty to take action on the Rulemaking Petition which can be compelled by this Court.

> Mandamus is an extraordinary remedy reserved for extraordinary circumstances. … An administrative agency's unreasonable delay presents such a circumstance because it signals the breakdown of regulatory processes. . . . Accordingly, we will interfere with the normal progression of agency proceedings to correct transparent violations of a clear duty to act . . . because it is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action.

In re Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir.2004) (internal quotation marks and citations omitted). The only question here is whether the agency's delay in taking action is unreasonable.

In making this determination, this Court has articulated six factors to consider:

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

TRAC, 750 F.2d at 79 (citations omitted). While "[t]here is no *per se* rule as to how long is too long to wait for agency action . . . a reasonable time for agency

action is typically counted in weeks or months, not years." *Am. Rivers*, 72 F.3d at 419 (internal quotation marks and citations omitted). The third factor, involving the consequences of delay for human health and welfare, is most critical. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir.1987). "When the public health may be at stake, the agency must move expeditiously to consider and resolve the issues before it." *Public Citizen Health Research Group v. Comn'r., Food & Drug Admin*., 740 F.2d 21, 34 (D.C. Cir.1984).[16]

While there is no statutory deadline for EPA to respond to RCRA rulemaking petitions (*TRAC* factor 2), three years is more than sufficient time to evaluate this particular petition, considering its extremely limited scope and the very obvious support for amending the corrosivity standard as requested. There is no need for complex scientific investigations in order to correct a misrepresentation and conform the regulation to international standards. There is no reason that ruling on this petition could not have taken weeks or months instead of years.

There are critical human health concerns at stake in preventing chemical burns for exposed populations. EPA's delay of more than three years is especially

[16] The fifth *TRAC* factor, the nature and extent of the interests prejudiced by delay, also addresses the potential harm to human health and welfare occasioned by the delay in question.

egregious, considering the public health consequences and the ease with which EPA could remedy this problem. In cases like this involving agency inaction on hazardous substances, this court has found unreasonable delay where inaction had or would extend three years or more. In *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1154 (D.C. Cir.1983), the court found "a more than three year span from Public Citizen's petition to projected final regulation is not tolerable." *See also, In re Intn'l Chemical Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir.1992) (six years to complete a rulemaking "is an extraordinarily long time, in light of the admittedly serious health risks"); *Public Citizen*,740 F.2d at 34 (failure to issue rule two years after filing of citizen petition suggests agency action was "unreasonably dilatory"); *cf. Oil, Chemical & Atomic Workers Intn'l Union v. Zegeer*, 768 F.2d 1480, 1486-88 (D.C. Cir.1985) (court holds agency to two year schedule for complex rulemaking on worker exposure to radioactive material).

While Petitioners cannot directly address the fourth *TRAC* factor concerning competing priorities of the Agency unless and until the Agency actually advances such competing priorities, the ease with which the requested relief could be granted makes it unlikely that acting on the Rulemaking Petition could significantly delay action on any other EPA priority. The only action required would be to repromulgate the regulation with a pH of 11.5 instead of 12.5, and to delete the requirement that the substance be "aqueous." As explained above, the requested

standard is consistent with the international standard and even the standard used in other EPA programs. The current standard rests upon a misrepresentation of the international standard and the rationale supporting it, by incorrectly claiming that the UN standard stating that tissue damage occurs at a pH of 11.5 and above applies only to eyes and not skin, when it fact it applies to both. This error has been perpetuated far more than long enough and can be easily corrected.

CONCLUSION

For the reasons set forth above, the Court should issue a writ of mandamus directing the EPA to take action on Petitioners' Rulemaking Petition and publish notice of such action in the Federal Register, together with the reasons therefore, within ninety days of the Court's order.

Respectfully submitted,

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