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July 9, 2021

Hon. Molly C. Dwyer
Clerk of Court
United States Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, CA 94103

Re: Response to Motion for Voluntary Remand in *Environmental Defense Fund v. EPA*, No. 21-70162(L); *State of New York v. EPA*, No. 21-70684(CON)

Dear Ms. Dwyer:

The State and Municipal Petitioners in *State of New York v. EPA* (No. 21-70684) submit this letter in response to EPA's June 8, 2021, motion for voluntary remand filed in these consolidated cases, which challenge EPA's determination that eleven common uses of the toxic chemical 1,4-dioxane pose no unreasonable risk to human health.¹ The State and Municipal Petitioners take no position on EPA's requested remand. If remand is granted, however, the Court should impose the conditions proposed by petitioners in *Environmental Defense Fund v. EPA*, No. 21-70162 (ECF No. 20-1 at 17-21), and vacate the no-unreasonable-risk determinations at issue here.

¹ The State and Municipal Petitioners are New York, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, and the City of New York.

This Court has substantial “inherent equitable powers” to craft a remand order that minimizes prejudice to petitioners. *See Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989); *see also, e.g., National Wildlife Fed’n v. National Marine Fisheries Serv.*, 524 F.3d 917, 937 (9th Cir. 2008) (court had inherent authority to require “regular status reports” and “impose a deadline for the remand proceedings”). If the Court grants remand, it should impose conditions—including regular status reports and enforceable time limits—that ensure that EPA’s reconsideration of its final risk evaluation for 1,4-dioxane does not result in unjustifiable and potentially interminable delays in EPA’s adoption of the regulatory measures the Toxic Substances Control Act (TSCA) mandates to manage the significant risks posed by 1,4-dioxane.

The chemical 1,4-dioxane is widely used by the State and Municipal Petitioners’ residents and is highly toxic. Acute exposure to 1,4-dioxane can cause central nervous system depression, paralysis, and potentially death. Long-term exposure can also cause serious health effects, as 1,4-dioxane is likely a carcinogen and may be harmful to fetal development.² Given its pervasive use and unique chemical properties, EPA has identified 1,4-dioxane as a potential contaminant that poses significant concern for public water systems.³ Research suggests that at least twelve million New Yorkers drink water with some level of 1,4-dioxane contamination. In Long Island, 1,4-dioxane has been detected in groundwater—the sole source of drinking water for nearly three million residents—and in some water districts, the highest levels of the chemical

² *See* Letter from the Attorneys General of New York, Hawai‘i, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia, and the Corporation Counsel of the City of New York, to Andrew Wheeler, Adm’r, EPA, at 7 (Dec. 10, 2020), <https://tinyurl.com/d7cb9hxx> (hereafter, “State & Municipal Comment Letter”); *see also, e.g.,* EPA, *Technical Fact Sheet—1,4-Dioxane* 3 (Nov. 2017), <https://tinyurl.com/3etr2jhr> (hereafter, “EPA Factsheet”).

³ *See* State & Municipal Comment Letter at 5-6; EPA Factsheet at 1-2.

detected are ninety-seven times higher than the standards set forth in EPA's health guidance.⁴

Several of the State and Municipal Petitioners have enacted measures to address the risks posed by 1,4-dioxane. New York, for example, has established limits on the amount of 1,4-dioxane that may appear in household cleaning and personal care products. *See* N.Y. Env't Conserv. Law §§ 35-0105, 37-0117. Federal action is an important complement to these state and local efforts. The longer EPA takes to rectify the errors in the risk evaluation for 1,4-dioxane, the longer it will take for the agency to promulgate the risk-management measures necessary to ameliorate the substantial, ongoing harms caused by the chemical, which the State and Municipal Petitioners cannot address as effectively on their own.

Imposing meaningful restrictions on EPA's requested remand is especially important given the ambiguities in the scope of reconsideration. EPA has not confessed error with respect to any aspect of its risk evaluation. And while the agency has committed to reconsider many of the issues with the risk evaluation that the State and Municipal Petitioners have identified, it is not clear that EPA will address all of the deficiencies. For example, the State and Municipal Petitioners have explained that EPA's risk evaluation does not comply with TSCA because the agency failed to analyze exposure risks to the general population due to releases of 1,4-dioxane into the air, water, and land.⁵ In its remand motion, EPA committed to consider "*whether* to conduct additional analyses for certain excluded environmental exposure pathways." Decl. in Supp. of Mot. For Voluntary Remand ¶ 19 (emphasis added). In a June 30, 2021, press release, EPA reiterated its intent to "re-open" the 1,4-dioxane risk evaluation "to consider *whether* to include additional

⁴ *See* State & Municipal Comment Letter at 6-7; N.Y. Pub. Interest Rsch. Grp., *Emerging Contaminants in New York's Drinking Water Systems: What's In My Water?* 1, 5, 7 (May 2019), <https://tinyurl.com/f5n8vcyw>.

⁵ *See* State & Municipal Comment Letter at 10-12.

exposure pathways.”⁶ But it is not certain that EPA ultimately will analyze, much less act to remedy, the risks posed by 1,4-dioxane contamination from all environmental exposure pathways. Given this uncertainty, it is essential that EPA be held to conditions that will enable the State and Municipal Petitioners to return to court expeditiously if EPA’s reconsideration does not fully address our concerns and comply with TSCA.

Finally, if the Court grants remand, it should also vacate the eleven no-unreasonable-risk determinations at issue here. EPA already has acknowledged that the no-unreasonable-risk findings should be withdrawn; following the filing of EPA’s remand motion, the agency announced that it “intends to withdraw the previously issued orders for those conditions of use for which no unreasonable risk was found” for 1,4-dioxane, among other chemicals.⁷ While this is a positive development, EPA has not committed to withdrawing the no-unreasonable-risk findings in the short-term.

There is no justification for delay. In the final risk evaluation, EPA erroneously concluded that eleven conditions of use do not present an unreasonable risk to human health, and the State and Municipal Petitioners are concerned that those findings might fuel efforts to challenge state and local restrictions on 1,4-dioxane based on TSCA’s preemption provisions. *See* 15 U.S.C. §§ 2605(i)(1), 2617(a)-(e). Indeed, certain manufacturers and trade associations already have threatened litigation concerning the preemptive effects of EPA’s final risk evaluation.⁸ The State and Municipal Petitioners are confident that our

⁶ *See* Press Release, EPA, EPA Announces Path Forward for TSCA Chemical Risk Evaluations (June 30, 2021), <https://tinyurl.com/n6b4h2t5> (emphasis added).

⁷ *See id.*

⁸ *See, e.g.,* Matthew G. Lawson, *Analysis of Recent and Forthcoming State Legislation on Toxic Chemicals in Cosmetics and Personal Care Products and Preemptive Effects of Existing Federal Legislation*, Lexology Corp. Env’t Lawyer Blog (June 3, 2021), <https://tinyurl.com/ykka6d8> (noting that “manufacturers and/or trade

laws and regulations governing 1,4-dioxane are not preempted, and that any potential claims of preemption would lack merit. But vacating the no-unreasonable-risk determinations now will reduce the litigation risks the State and Municipal Petitioners face while EPA reconsiders the final risk evaluation, and ensure that the critical restrictions we have enacted for 1,4-dioxane remain in effect while EPA reconsiders the final risk evaluation.

Respectfully submitted,

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organizations will likely bring preemption challenges to these state regulations”); *Industry Seen Awaiting EPA 1,4-Dioxane Process to Claim TSCA Preemption*, Inside TSCA (June 25, 2021), <https://tinyurl.com/nh22pn2f> (quoting an industry attorney saying that “I would expect to see litigation filed in the near future”).

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CERTIFICATE OF COMPLIANCE

This response complies with Federal Rule of Appellate Procedure 27(d)(2) and Circuit Rule 27-1(1)(d) because it contains 1,204 words and does not exceed 20 pages. This response also complies with the type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it was prepared in 14-point Century Schoolbook font, a proportionally spaced typeface, using Microsoft Word.

/s/ Caroline A. Olsen
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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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