No. 02-_____

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

In re Citizens for Reliable and Safe Highways;
Parents Against Tired Truckers; Teamsters for a
Democratic Union; and Public Citizen,

Petitioners.

Norman Y. Mineta, Secretary of the United States Department
of Transportation; the United States Department of Transportation;
and the Federal Motor Carrier Safety Administration,

Respondents.

**PETITION FOR A WRIT OF MANDAMUS AND FOR
RELIEF FROM UNLAWFULLY WITHHELD AGENCY ACTION**

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RULE 26. 1 DISCLOSURE STATEMENT

Petitioners Citizens for Reliable and Safe Highways, Parents Against Tired Truckers, Teamsters for a Democratic Union, and Public Citizen are non-profit advocacy organizations that engage in research, lobbying, educational, and litigation activities. None of them has a parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

I. INTRODUCTION

This petition seeks an order directing the Secretary of the United States Department of Transportation (DOT or agency) to fulfill his mandatory duty to promulgate regulations that enhance commercial motor vehicle safety. In a series of laws, Congress required DOT to promulgate regulations (1) requiring minimum background checks for new commercial drivers, (2) implementing staffing standards at international borders, (3) establishing hours-of-service rules for commercial drivers to reduce driver fatigue, (4) establishing minimum training requirements for drivers of longer combination vehicles, (5) requiring background checks for new drivers, and (6) setting rules for commercial vehicles that transport certain hazardous materials.[1]

With respect to each failure to issue regulations, Congress set a date certain by which DOT was required to issue final regulations. In each instance, DOT has missed the deadline, in some cases by many years. This petition seeks to enforce the mandatory deadlines set by Congress and thereby insure that public safety is served.

II. JURISDICTION AND APPLICABLE LAW

This Court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2341 *et seq.* The Hobbs Act provides this Court with jurisdiction to review orders, regulations, and rules issued under authority that previously rested with the Interstate Commerce Commission

[1]Five of the six relevant statutory provisions direct the Secretary of Transportation to issue the regulations. The other statute directs one of DOT's subagencies to issue the relevant regulation. For convenience, we refer simply to DOT.

(ICC) and was transferred to DOT under the Transportation Act. 49 U.S.C. § 351(a); *see, e.g., Center for Auto Safety v. Skinner*, 936 F.2d 1315 (D.C. Cir. 1991). That jurisdiction survives despite Congress's abolition of the ICC in 1995. *Aulenback, Inc. v. Federal Highway Admin.*, 103 F.3d 156, 164-65 (D.C. Cir. 1997). DOT's transferred authority includes its authority over commercial vehicle and driver safety matters. *Id.*; *see also MST Express v. Dept. of Transp.*, 108 F.3d 401, 404 (D.C. Cir. 1997) ("Absent Congressional direction to the contrary, the motor carrier safety regulations of the [Federal Highway Administration] are subject to the judicial review provisions of the Hobbs Act").[2] Because this Court would have jurisdiction over challenges to any of the regulations at issue here, had those regulations been promulgated, this Court also has jurisdiction to compel DOT to issue those regulations. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*).

The Administrative Procedure Act (APA) requires immediate promulgation of the regulations at issue in this petition. Specifically, as explained more fully below, DOT should be ordered to promulgate those regulations because its failure to do so as mandated by Congress is not in accordance with law, *see* 5 U.S.C. § 706(2)(A), and constitutes agency action unlawfully withheld. *Id.* § 706(1).

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[2]The regulatory authority involved in this appeal was lodged in the Federal Highway Administration until January 1, 2000, when it was transferred to a new DOT subagency, the Federal Motor Carrier Safety Administration. 49 U.S.C. § 113; *see* Pub. L. 106-159, § 106, 113 Stat. 1756 (Dec. 9, 1999).

III. THE PARTIES[3]

Petitioner Citizens for Reliable and Safe Highways (CRASH) is a nationwide, non-profit organization headquartered in Washington, D.C., with approximately 14,000 members. It was formed in 1990 to help mitigate the devastating problem of truck crashes. CRASH is dedicated to improving overall truck safety in the United States. Its members include truck drivers, other motorists, crash survivors, families of truck crash victims, emergency care workers, state highway officers, and crash reconstruction specialists. CRASH works at all levels of government, including before DOT and Congress, to initiate truck safety legislation and regulation involving issues of truck size and weight, truck driver fatigue, the dangers of longer combination vehicles, and vehicle maintenance, among other issues. CRASH and its members have been, and continue to be, injured by DOT's failure to promulgate the safety regulations at issue here.

Petitioner Parents Against Tired Truckers (PATT) is a nationwide, non-profit organization with approximately 5,000 members headquartered in Washington, D.C. Formed in Maine in May 1994, after a truck driver fell asleep at the wheel of an 80,000-pound rig, killing four teenagers, PATT's mission is to save lives by reducing truck crashes resulting from driver fatigue. PATT's membership consists of crash victims and their survivors, government officials, truck drivers, shippers, receivers, carriers, concerned citizens, and motorists working together to save lives. PATT advocates on

[3]Pursuant to *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002), declarations on behalf of each petitioner and of petitioners' members are attached to this petition as Exhibits 1 through 8.

truck driver fatigue issues before Congress, state legislatures, and federal and state regulatory agencies, and it promotes its mission through various public awareness campaigns. PATT and its members have been, and continue to be, injured by DOT's failure to promulgate the regulations at issue.

Petitioner Teamsters for a Democratic Union (TDU) was founded in 1976 as a movement of members of the Teamsters Union working together to improve their union and their working conditions. TDU has approximately 10,000 members, all of whom are members of the Teamsters and many of whom drive commercial trucks for a living. Over the years, TDU has been involved in promoting increased training of truck drivers and enhanced truck safety regulations through its lobbying and educational efforts. TDU members benefit from the kinds of truck safety regulations at issue in this petition because such regulations decrease the likelihood that they will be injured or killed in truck crashes. In addition, TDU members, as organized truckers, benefit economically from enhanced safety regulation because such regulation makes it more difficult for non-union truckers and trucking companies to drive down costs by skimping on safety. As a result, TDU and its members have been, and continue to be, injured by DOT's failure to promulgate the regulations at issue.

Petitioner Public Citizen is a national non-profit advocacy organization with approximately 125,000 members, many of whom are regularly on the Nation's highways as drivers and passengers. Since its founding in 1971, Public Citizen has worked before

Congress, regulatory agencies, and in the courts to advance the interests of its members on a wide-range of consumer protection issues. In particular, Public Citizen has advocated before Congress and DOT on motor vehicle safety matters, including protection of the driving public on the issues covered by the regulations the promulgation of which is sought in this petition. Public Citizen and its members have been, and continue to be, injured by DOT's failure to promulgate the regulations at issue.

Respondent Norman Y. Mineta is the Secretary of respondent DOT. He is ultimately responsible for carrying out DOT's legal responsibilities, including the issuance of the regulations at issue in this petition. Respondent Federal Motor Carrier Safety Administration is the DOT subagency charged with implementing DOT's commercial vehicle safety obligations. As set forth in more detail below, respondents have violated the law by failing to promulgate regulations as mandated by Congress.

IV. BACKGROUND

In a series of statutes enacted between 1990 and 1999, Congress commanded DOT to promulgate safety regulations for commercial vehicles and commercial drivers by specific dates. In each instance, as set forth below, the agency has failed to take the required actions and has, at most, taken only preliminary steps towards complying with its mandatory duties.

A. Minimum Training Requirements For Drivers Of Longer Combination Vehicles

Section 4007(b)(2) of the Intermodal Surface Transportation Efficiency Act of

1991 (ISTEA), Pub. L. 102-240, 105 Stat. 2152 (Dec. 18, 1991), 49 U.S.C. § 31307(b), required DOT to issue a final rule establishing minimum training requirements for drivers of longer combination vehicles (LCVs) by *December 18, 1993*.[4] An LCV is defined as a "vehicle consisting of a truck tractor and more than one trailer or semitrailer that operates on the [interstate highway system] with a gross vehicle weight of more than 80,000 pounds." 49 U.S.C. § 31307(a). DOT issued an advance notice of proposed rulemaking on January 15, 1993, that stated that drivers of single-trailer units cannot switch to driving LCVs without additional, advanced on-the-road and classroom training. 58 Fed. Reg. 4638 (Jan. 15, 1993). However, DOT did not issue a final rule by December 18, 1993, as required, and in the nearly nine years since it issued the advance notice, the agency has not taken any other steps toward issuing the final rule.

B. Training Standards For Entry-Level Drivers Of Commercial Motor Vehicles

Section 4007(a) of ISTEA, Pub. L. 102-240, 105 Stat. 2151 (Dec. 18, 1991), required DOT to report to Congress on the effectiveness of private sector training of entry-level commercial drivers by *December 18, 1992*, and to issue a final rule addressing the training of entry-level drivers by *December 18, 1993*. The required report

[4] Section 4007(b)(2) was originally set forth at 49 U.S.C. App. 2302 note. In 1994, when most of the laws governing DOT activities were recodified in Title 49 of the U.S. Code, section 4007(b)(2) was codified at 49 U.S.C. § 31307. *See* Pub. L. 103-272, § 1(e), 108 Stat. 1020 (July 5, 1994). In this codification, the due date for the final regulation was listed as December 18, *1994*, rather than December 18, *1993*. *Id.*; *see* 49 U.S.C. § 31307(b). This change was apparently inadvertent, because the Title 49 recodification was not intended to enact any substantive changes. *See* Pub. L. 103-272, 108 Stat. 745 (preamble) (July 5, 1994) (indicating that recodification took place "without substantive change").

was submitted to Congress on February 2, 1996, more than three years late. *See* 61 Fed. Reg. 18355 (April 25, 1996). In that report, DOT determined that the current level of training provided to new commercial drivers is inadequate. The report concluded that DOT should develop detailed performance standards to ensure that all new commercial drivers receive adequate training. *Id.* Nevertheless, DOT did not issue a final rule by December 18, 1993, and since it submitted its report more than six years ago, it has not taken any further steps toward issuing final rules.

C. Rules Regulating Drivers' Hours Of Service And Other Fatigue-Related Issues

Section 408 of the Interstate Commerce Commission Termination Act of 1995, Pub. L. 104-88, 109 Stat. 958 (Dec. 29, 1995), 49 U.S.C. § 31136 note ("Federal Highway Administration Rulemaking"), directs DOT to promulgate rules to address specific fatigue-related issues affecting commercial vehicle safety. These issues include the need for "8 hours of continuous sleep after 10 hours of driving, loading, and unloading operations, automated and tamper-proof recording devices, rest and recovery cycles, fatigue and stress in longer combination vehicles, fitness for duty, and other appropriate regulatory and enforcement countermeasures for reducing fatigue-related incidents and increasing driver alertness." *Id.*

Section 408 required DOT to issue an advance notice of proposed rulemaking by March 1, 1996, a notice of proposed rulemaking by March 1, 1997, and a final rule by *March 1, 1999*. The agency issued an advance notice of proposed rulemaking on

November 6, 1996, 61 Fed. Reg. 57252, six months late, and a notice of proposed rulemaking on May 2, 2000, 65 Fed. Reg. 25540, more than three years late. DOT's notice of proposed rulemaking estimated that "755 fatalities and 19,705 injuries occur each year on the Nation's roads because of drowsy, tired, or fatigued drivers." *Id.* The agency also noted that fatigue contributes directly to 15 percent of both fatal and nonfatal injury crashes involving large trucks. *Id.* at 25546. *See also* National Transportation Safety Board, *Factors That Affect Fatigue in Heavy Truck Accidents — Vol. I: Analysis*, Safety Study NTSB/SS-95/01 (Jan. 1995) ("Research has suggested that truck driver fatigue may be a contributing factor in as many as 30 to 40 percent of all heavy truck accidents."). DOT did not issue the final rule by the statutory deadline, nor has it done so in the three-and-a-half years since expiration of that deadline.

D. Transportation Of Hazardous Materials

Under Section 8 of the Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. 101-615, 104 Stat. 3257-58 (Nov. 16, 1990), 49 U.S.C. § 5109, DOT was required to promulgate a final rule governing the issuance of permits for the transportation of Class A and Class B explosives and other extremely hazardous materials by *November 16, 1991*. *Id.* § 5109(h). In enacting section 8, Congress determined that a federal regulatory program was necessary because of the serious harm that may result from accidents involving hazardous materials and the inadequacies of current state and federal regulations. Pub. L. 101-615, § 2, 104 Stat. 3244-45. DOT did

not issue the final rule by November 16, 1991, nor has it taken any steps towards doing so in the eleven years that have since passed.

E. Safety Performance History For Commercial Vehicle Drivers

Section 114 of the Hazardous Materials Transportation Authorization Act of 1994, Pub. L. 103-311, 108 Stat. 1677 (Aug. 26, 1994), directed DOT to issue a rule specifying the background information on commercial drivers that employers must seek from those drivers' prior employers. The rule was also to specify how prior employers were to cooperate with such information requests. Currently, there are no rules governing what information a prospective employer of a commercial driver must seek from the driver's former employers, nor are there rules requiring prior employers to provide such information to potential future employers or even to maintain such information about their former drivers.

DOT was originally required to issue the rules within 18 months of the enactment of section 114 (January 26, 1996). The agency issued a notice of proposed rulemaking on March 14, 1996. *See* 61 Fed. Reg. 10548. Congress later extended the deadline for promulgation of a final rule to *January 31, 1999*. *See* Pub. L. 105-178, § 4014, 112 Stat. 411 (June 9, 1998). Despite the extension, DOT did not issue the final rule by January 31, 1999, nor has it taken any steps toward issuing a rule in the eight years since Congress directed it to act.

F. Staffing Standards For Inspectors At International Borders

Section 218 of the Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, 113 Stat. 1767 (Dec. 9, 1999), 49 U.S.C. § 31133 note, directed DOT to issue a final rule setting forth staffing standards for federal and state motor carrier safety inspectors at international borders by *December 9, 2000*. The purpose of the rule is to ensure that commercial trucks that cross U.S. borders meet federal safety standards. In 1998, DOT's inspector general determined that, because there are too few vehicle inspectors at international borders, too few inspections are conducted at the United States-Mexico border and, therefore, too many unsafe, non-compliant trucks enter the U.S. and travel on the Nation's highways. DOT, Office of Inspector General, *Motor Carrier Safety Program for Commercial Trucks at U.S. Borders* iii (Dec. 28, 1998). DOT did not issue a final rule by the statutory deadline, nor has it taken any steps to initiate rulemaking before or after that deadline expired.

V. ARGUMENT

As explained below, DOT's failure to issue the regulations described above is contrary to the plain language of the controlling statutes and therefore constitutes agency action "not in accordance with law" and "unlawfully withheld" under the APA. 5 U.S.C. §§ 706(2)(A), (1). As a result, this Court should order DOT to issue the relevant rules promptly. With regard to the hours-of-service and safety performance history regulations, for which the agency has published notices of proposed rulemaking and

taken public comment, DOT should be ordered to finalize the rules within 30 days of the issuance of this Court's order compelling such action. With respect to the other four required regulations, for which no formal regulatory action has been taken, DOT should be ordered to issue final rules within 120 days of this Court's order, which should be sufficient time to issue proposed rules, consider public comment, and promulgate final rules.

A. DOT's Failure To Issue Final Rules Is Unlawful Under The Plain Language Of The Controlling Statutes.

DOT's refusal to promulgate regulations by the statutory deadlines is unlawful because it violates the plain language of those statutes. *See United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("Where the language [of a statute] is clear, that is the end of the judicial inquiry 'in all but the most extraordinary circumstances.'") (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474 (1992) (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991))); *see also Chevron USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). This Court has applied the plain-language rule to cases of agency inaction, *e.g., Natural Resources Defense Council, Inc. ("NRDC") v. Reilly*, 983 F.2d 259, 261, 266 (D.C. Cir. 1993), and refused to allow agencies to ignore statutory deadlines that are unambiguous. *E.g., Northern States Power Co. v. Dep't of Energy*, 128 F.3d 754, 756-57 (D.C. Cir. 1997).

Each of the six statutes uses the mandatory language "shall" to direct DOT to issue

final rules by a particular calendar date.[5] Thus, the plain language of the six respective statutes imposes a mandatory duty on DOT to promulgate the final rules by date-certain deadlines. *See Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1274-77 (D.C. Cir. 1996) (statute that provided "the Secretary, beginning not later than January 31, 1998, will dispose of the [nuclear waste] as provided in this subchapter" imposed mandatory duty on agency to accept waste by deadline); *NRDC v. Reilly*, 983 F.2d at 261, 266 (statute providing "'the Administrator *shall* . . . promulgate standards,'" contained "plain and unmistakable language" that imposed mandatory duty on agency to promulgate regulations) (quoting Section 202(a)(6) of the Clean Air Act) (emphasis in original); *Sierra Club v. Thomas*, 828 F.2d 783, 787-88 (D.C. Cir. 1987) (statutory provision that required agency to complete particular action by a certain calendar date imposed a "clear-cut nondiscretionary duty" on agency to comply by deadline); *see also Sierra Club v. Environmental Protection Agency*, 719 F.2d 436, 463 (D.C. Cir 1983)

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[5]*See* 49 U.S.C. § 31307(a) ("Not later than December 18, 1994, the Secretary of Transportation shall prescribe regulations establishing minimum training requirements for operators of longer combination vehicles."); Pub. L. 102-240, § 4007(a)(2), 105 Stat. 2151 ("Not later than 12 months after the date of the enactment of this Act, the Secretary shall commence a rulemaking on the need to require training of all entry level drivers of commercial motor vehicles. Such rulemaking shall be completed not later than 24 months after the date of such enactment."); 49 U.S.C. § 31136 note ("The Federal Highway Administration shall issue a final rule dealing with [hours-of-service and fatigue-related] issues" by March 1, 1999); 49 U.S.C. § 5109(h) ("The Secretary shall prescribe regulations necessary to carry out this section [concerning transportation of hazardous materials] not later than November 16, 1991."); Pub. L. 105-178, 112 Stat. 411 (June 9, 1998) ("The rulemaking and amendments referred to in paragraph (1) [concerning safety performance history of new drivers] shall be completed by January 1, 1999."); 49 U.S.C. § 31133 note ("Not later than 1 year after the date of the enactment of this Act [Dec. 9, 1999], the Secretary shall develop and implement appropriate staffing standards for Federal and State motor carrier safety inspectors in international border areas.").

(agency "may avoid implementing a statute only by showing that attainment of the statutory objective is impossible").

B. Petitioners Are Entitled To An Order From This Court Compelling DOT To Promulgate The Truck Safety Regulations As Required By Congress.

Because the DOT has violated clear statutory mandates, this Court should order the agency to promulgate the required rules, as required by the Administrative Procedure Act. *See* 5 U.S.C. § 706(1) ("the reviewing court shall ... compel agency action unlawfully withheld"). This Court has issued such orders in cases involving agency violations of mandatory duties imposed by clear statutory language. *See Northern States Power*, 128 F.3d at 756-59 (issuing writ of mandamus in light of agency's refusal to accept nuclear waste by statutory deadline because duty to act by deadline was mandatory under plain language of statute); *NRDC, Inc. v. Reilly*, 983 F.2d 259 (ordering EPA to issue rules that it found were mandated by plain language of statute); *see also Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807, 814-15 (D.C. Cir. 2001) (compelling agency to recalculate petitioners' Medicare reimbursement payments because agency was required to perform recalculations under controlling statute); *Chapman v. Santa Fe Pac. R. Co.*, 198 F.2d 498, 502 (D.C. Cir. 1951) (directing Secretary to proceed to determine petitioner's rights because Secretary's failure to act was "plainly wrong" under controlling statutes and case law); *Hazen v. Hardee*, 78 F.2d 230, 232 (D.C. Cir. 1935) (enforcing agency's statutory duty to file tax return).

In considering petitions to compel agency action under the circumstances present here — agency failure to perform a clear and nondiscretionary statutory duty — this court has typically applied a traditional mandamus analysis and granted relief. *See Monmouth Med. Ctr.,* 257 F.3d at 814-15 (holding mandamus warranted after finding agency had clear duty and had refused to perform that duty); *Northern States Power*, 128 F.3d at 758-59 (analyzing agency's refusal to adhere to statutory deadline under traditional mandamus criteria); *Chapman*, 198 F.2d at 502 (mandamus warranted because Secretary's failure to act was "plainly wrong" and deprived petitioner of vested rights).

The three traditional requirements for mandamus are whether (1) the respondent has a clear duty to act; (2) the petitioner has a clear right to relief; and (3) there is no other adequate remedy. *Northern States Power*, 128 F.3d at 758. The first criterion is met here because the six statutes establish a mandatory duty on the part of the agency to issue final rules, as shown above. *See id.* at 756-58. Second, petitioners are "entitled to relief" for the same reason — because DOT has, through inaction, failed to comply with a statutory command that it act by a specified date, and because the APA provides that the courts "shall" order agency action that is unlawfully withheld. 5 U.S.C. § 706(1); *see Northern States Power*, 128 F.3d at 758 (defendant's refusal to act by statutory deadline entitled petitioners to relief); *see also Ass'n of Nat'l Advertisers, Inc. v. Fed. Trade Comm'n*, 627 F.2d 1151, 1178 (D.C. Cir. 1979) (Leventhal, J., concurring) (approving of mandamus jurisdiction over nonfinal agency action when the agency "clearly violated an

express statutory prohibition"). Finally, petitioners have no other judicial or administrative remedy. *Northern States Power*, 128 F.3d at 758. Inaction allows DOT to avoid judicial review through the usual review process, *see Oil, Chemical & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1485 (D.C. Cir. 1985) ("'the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes'") (quoting *TRAC*, 750 F.2d at 76)), and although petitioners have attempted to persuade DOT to issue truck safety regulations, there are no formal administrative means of challenging DOT's inaction in the face of these attempts. *See Ganem v. Heckler*, 746 F.2d 844, 853 (D.C. Cir. 1984) (writ issues where no alternatives exist "other than awaiting the Secretary's [action] — precisely the thing which [petitioner] claims that she should not have to do in light of the statute's commands").

In cases involving whether agency action has been "unreasonably delayed," *see* 5 U.S.C. § 706(1), this Court ordinarily reviews the reasonableness of delay and the availability of relief by considering the six factors set forth in *TRAC*, 750 F.2d at 80.[6]

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[6]The six factors are:

> (1) the time agencies take 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, the statutory scheme may supply the 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; (6) the court need not find any impropriety lurking behind the agency lassitude in order to hold that agency action is unreasonably delayed.

(continued...)

However, where Congress has specified particular dates by which an agency is required to issue rules, it makes more sense to view an aggrieved party's petition as presenting the question not of "delay" but of agency action "not in accordance with law," 5 U.S.C. § 706(2)(A), or "unlawfully withheld." *Id.* § 706(1). *See Northern States Power*, 128 F.3d at 758 n.1 (after issuing writ to enforce clear statutory deadline, declining to reach argument "wholly apart" from statutory violation that mandamus was warranted under *TRAC* for unreasonable delay); *Sierra Club v. Thomas*, 828 F.2d at 787-88 (distinguishing between statutory deadline held to be mandatory, which gives rise to claim for agency violation of statute, and statutory deadline held to leave agency some discretion, which gives rise to claim for unreasonable delay); *see also Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1225-56 nn.5&6 (10th Cir. 2002). Indeed, in such circumstances, the only *TRAC* factors that might weigh in favor of the agency — the "rule of reason" governing the agency's timetable and consideration of competing agency priorities — have been preempted by Congressional directive. In other words, by setting dates by which DOT was required to act, Congress itself established the "rule of reason," *cf. TRAC*, 750 F.2d at 80 ("where Congress has provided a timetable . . . , the statutory scheme may supply the content for this rule of reason"), and set the agency's priorities vis-a-vis other agency activities for which Congress did not set comparable mandatory deadlines. *See id.* (factor 4). Thus, not surprisingly, in cases involving an

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[6](...continued)
Id. (quotations and citations omitted).

agency's failure to meet specific deadlines, the Court has sometimes issued the writ — or simply ordered agency action — with little or no reference to the *TRAC* factors. *See In re Bluewater Network*, 234 F.3d 1305, 1315-16 (D.C. Cir. 2000); *see also Northern States Power*, 128 F.3d at 758; *Natural Resources Defense Council v. Train*, 510 F.2d 692, 704 (D.C. Cir. 1975) (upholding district court order compelling agency to publish rules according to timetable after finding statutory deadline agency missed was mandatory); *NRDC, Inc. v. EPA*, 797 F. Supp. 194 (E.D.N.Y. 1992) (ordering agency to issue rules by new date after finding agency violated clear statutory duty to issue rules by date certain); *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986) (same). In our view, therefore, this Court need not engage in a multi-factor analysis but should simply order the agency to issue the regulations without further delay.

In this Court's most recent encounter with an agency's failure to issue regulations by a Congressionally-mandated deadline, *In re Bluewater Network*, 234 F.3d 1305, the Court cited *TRAC*, but eschewed a factor-by-factor review in favor of a categorical analysis based on the agency's violation of the deadline. *Id.* at 1315-16. In *Bluewater Network*, the Coast Guard had failed to issue regulations regarding tank level and pressure monitoring devices for oil tankers that Congress required be issued within one year of enactment of the Oil Pollution Act of 1990. *Id.* at 1307. The Court noted that, because it was feasible for the Coast Guard to issue "*some sort of*" standard, *id.* at 1315 (emphasis in original), in light of Congress's "clear one-year time line" and the

"important environmental concerns" at issue, it need "not pause to analyze" the *TRAC* factors. *Id.* at 1316. Rather, the Court simply directed the Coast Guard to undertake prompt rulemaking. *Id*.

This Court has declined to order agency action in the face of a mandatory statutory deadline in only two cases, and both serve to underscore the propriety of an order compelling relief here. In *In re United Mine Workers*, 190 F.3d 545 (D.C. Cir. 1999), the Court considered the Mine Safety and Health Act of 1977, which provides a general timetable for the issuance of rules once the agency has undertaken to address a particular issue by formulating a regulation. *Id.* at 550. However, in that case, Congress had not required the agency to promulgate the particular rules the petitioners sought, much less dictated a deadline for those particular rules. *See id.* at 553. Put otherwise, the statute did not advance any particular rulemaking priority, but rather set the *same timetable* for all appropriate rules. Thus, although the agency failed to adhere to the generally-applicable statutory deadline, the court determined that the agency was working on other rules that the agency *and petitioners* agreed were of higher priority for protecting worker health and safety. *Id.* at 552-53. If the Court had granted relief it would have allowed certain lower-priority regulations to leapfrog over more important initiatives, arguably contravening Congressional intent. Just the opposite is true here, where an order granting relief would, as in *Bluewater*, simply enforce the priorities mandated by Congress.

In re Barr Laboratories, Inc., 930 F.2d 72 (D.C. Cir. 1991), illustrates the same

point. There, the agency failed to process petitioner Barr's application for generic drug approval within the statutory 180-day deadline. Nevertheless, this Court declined to order the agency to expedite action on Barr's application because doing so would simply increase the delay for other applicants. 930 F.2d at 75. Once again, issuance of the writ would not have advanced the overall Congressional design. It would have *reordered* Congressional priorities, by allowing one person to jump to the front of the line, rather than implementing those priorities, as would the order petitioners seek here.

CONCLUSION

For the reasons stated above, petitioners are entitled to an order from this Court requiring DOT to issue the truck safety regulations at issue here. With regard to the hours-of-service and safety performance history regulations, because DOT has already issued notices of a proposed rulemaking and taken public comment, DOT should be required to issue final rules within 30 days after this Court compels such action. With respect to the other four required regulations, for which no formal regulatory action has been taken, DOT should be required to issue final rules within 120 days of this Court's order. In addition, petitioners should be awarded their reasonable costs and attorney's fees under 28 U.S.C. § 2412.

Respectfully submitted,

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November 26, 2002

CERTIFICATE OF SERVICE

I, Brian Wolfman, hereby certify that, on November 26, 2002, I caused to be served a copy of the foregoing petition on the following by certified mail, return receipt requested:

United States Department of Transportation
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Brian Wolfman