

ARGUED DECEMBER 12, 2016
DECIDED APRIL 11, 2017

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

WATERKEEPER ALLIANCE, ET AL.,

Petitioners,

V.

U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Nos. 09-1017 &
09-1104 (Consolidated)

EPA'S MOTION FOR FURTHER STAY OF ISSUANCE OF MANDATE

Respondent U.S. Environmental Protection Agency respectfully moves this Court for an additional stay of the issuance of the mandate in this case for three months from the date of a stay order, or until April 23, 2018, whichever is later. As explained in EPA’s prior motions to stay the issuance of the mandate, EPA has been developing guidance to help farms come into compliance with requirements to report certain releases of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and Emergency Planning and Community Right-to-Know Act (“EPCRA”). On October 25, 2017, EPA released its preliminary guidance and solicited public input. Based on comments EPA has received, there is still confusion among farmers as to how they will meet their

reporting obligations. The additional three months will give EPA time to revise its guidance to be more effective at assisting farms in coming into compliance and to conduct outreach to farms without internet access that may not be aware of the reporting requirements and guidance. The additional three months will also give EPA time to finalize the streamlined continuous release reporting form that the Agency has developed and is currently undergoing review by the Office of Management and Budget. Finally, the additional time will enable EPA to continue its coordination with the National Response Center on how to manage the influx of reports while still providing viable reporting methods for all farms.

Petitioner National Pork Producers Council and Intervenor United States Poultry and Egg Association consent to this motion. Petitioners Waterkeeper Alliance, et al., (“Waterkeeper Petitioners”) take the following position: “Waterkeeper Petitioners have advised EPA they are concerned that first responders, government agencies, and communities across the country have waited nearly a decade for this reporting information. Nevertheless, Waterkeeper Petitioners take no position on this further stay of the mandate. Waterkeeper Petitioners have advised EPA that it should utilize this additional time to fully and finally resolve any remaining matters so that the mandate can issue with no further request for a stay.”

BACKGROUND

On April 11, 2017, this Court granted the petition for review filed by Waterkeeper Petitioners and ordered the vacatur of EPA's 2008 rule exempting farms. No. 09-1017, Mem. Op. (Apr. 11, 2017).

On July 17, 2017, EPA moved for a six-month stay of the issuance of the mandate that would trigger vacatur of the rule while EPA developed guidance for farms on how to measure emissions of hazardous substances from animal waste into the air in order to report releases of the substances exceeding threshold levels in compliance with CERCLA and EPCRA. No. 09-1017, EPA Mot. to Stay Issuance of Mandate (July 17, 2017). On August 16, 2017, this Court granted EPA's motion in part, staying the issuance of the mandate through November 14, 2017. No. 09-1017, Order (Aug. 16, 2017). In its Order, this Court stated that, "[i]f necessary, EPA may request an extension of the stay" and that any such request "should include a status update on EPA's efforts to develop guidance." *Id.*

On October 25, 2017, EPA released its preliminary guidance. The preliminary guidance consisted of two parts: (1) a webpage containing questions and answers, links to resources, and other information to assist farms in complying with the CERCLA reporting requirements (*see* <https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms>); and (2) EPA's interpretation of EPCRA to exclude farms that use substances in routine agricultural operations from reporting under EPCRA section 304, along with notice

that EPA intends to conduct a rulemaking on the interpretation of “used in routine agricultural operations” as it pertains to EPCRA reporting requirements (*see* <https://www.epa.gov/epcra/question-and-answer-epcra-reporting-requirements-air-releases-hazardous-substances-animal>). EPA solicited public comment for 30 days.

On October 30, 2017, EPA moved for an additional two-month stay of the issuance of the mandate in order to allow time for EPA to incorporate public comments, develop a more streamlined continuous release reporting form, and coordinate with the National Response Center on how best to manage the expected volume of reports without overloading the phone lines and preventing true emergencies from being reported. No. 09-1017, EPA Mot. for Further Stay of Issuance of Mandate (Oct. 30, 2017). On November 22, 2017, the Court granted EPA’s motion. No. 09-1017, Order (Nov. 22, 2017).

ARGUMENT

A. This Court Has Discretion to Stay Issuance of the Mandate.

Pursuant to D.C. Circuit Rule 41(a)(2), a party may move for a stay of the issuance of the mandate for “good cause.” *See also* D.C. Circuit Handbook of Practice & Internal Procedures 55 (2017). Where, as here, the Court vacates an agency rule as contrary to law, staying the mandate is appropriate to allow the agency to take additional administrative action, such as to avoid disruption to the regulatory program or regulated community. *See, e.g., Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006) (withholding mandate for 90 days to allow agency to address matter and

avoid substantial disruption of mutual fund industry); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 872 (D.C. Cir. 2001) (stating that parties could move to delay issuance of mandate to allow vacated standards to remain in place or to allow EPA time to develop interim standards); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923-24 (D.C. Cir. 1998) (“If EPA wishes to promulgate an interim treatment standard, the Agency may file a motion in this court to delay issuance of this mandate in order to allow it a reasonable time to develop such a standard.”); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854-55 (D.C. Cir. 1987) (withholding mandate for six months to allow agency to undertake further proceedings and avoid further disruption of domestic shipping market); *Simmons v. Interstate Commerce Comm’n*, 757 F.2d 296, 300 (D.C. Cir. 1985) (withholding mandate for 90 days to allow commission to take further action).

B. There Is Good Cause to Stay the Issuance of the Mandate for an Additional Three Months.

Although EPA has made substantial progress since releasing the preliminary guidance on October 25, 2017, three key aspects of the development of the CERCLA guidance remain. First, based on input from stakeholders, EPA plans to revise its guidance in order to better assist farms in coming into compliance. Comments the Agency received indicate that farmers remain confused as to how to meet their reporting obligations. Declaration of Reginald Cheatham ¶ 7, attached as Exhibit A. For example, as explained in a December 21, 2017 letter from a bipartisan group of

U.S. Senators, many farmers were still unable to determine how to comply even after reviewing EPA's guidance. *Id.* ¶ 7 & Attach. A. The December 21, 2017, letter also notes that some farmers are unaware the guidance existed at all. *Id.* ¶ 7 & Attach. A. The Agency intends to further revise its guidance and conduct additional outreach to ensure that farms with limited access to the internet are made aware of the reporting requirements as well as EPA's guidance and reporting forms. *Id.* ¶¶ 7-8.

Second, EPA needs additional time to finalize the new, streamlined form to report continuous releases that is better suited for farms than the existing form. *Id.* ¶ 8. The Agency has developed such a form, but it is still undergoing review by the Office of Management and Budget and was not finalized before the current expiration of the stay, January 22, 2018, as originally anticipated. *Id.* Once available, this form should make reporting easier for farms that elect the continuous release reporting method. *Id.* ¶ 7. EPA also intends to conduct public outreach to educate farms on how to use the new form. *Id.* ¶ 8.

Third, EPA received comments raising the concern that farms without internet access face additional challenges in complying with the reporting obligation. *Id.* ¶ 7 & Attach. A. In order to mitigate the potential for the National Response Center phone system to crash once reporting begins, EPA and the National Response Center worked to develop an option for farms to report their emission via email. As noted in the December 21, 2017 letter, some farms have limited access to the internet. As such, EPA is working with the National Response Center to ensure a reporting option

remains available for those farms. EPA is working to expand its own information center to handle overflow calls from the National Response Center and needs additional time to train staff to take the reports. However, this system has limited capacity, and EPA and the National Response Center are working to identify other call systems or further expand existing systems to prevent system delays or crashes once the reporting requirements go into effect. *Id.* ¶ 9.

A further stay of the issuance of the mandate is reasonable to allow EPA time to refine and further develop its guidance and conduct necessary outreach. Moreover, as discussed in EPA's July 17 motion, the further stay would provide farms temporary relief from potential legal action while coming into compliance with the reporting requirements. Finally, EPA also intends to use this time to further coordinate with the National Response Center on a process to manage the volume of calls and emails from farmers that are expected once the Court's order is in effect. *Id.* ¶ 2. EPA will endeavor to complete these tasks within three months. Based on the concerns and tasks identified herein, the Agency might seek additional time.

CONCLUSION

Accordingly, EPA requests that this Court stay issuance of its mandate for three months from the date of an order granting a stay of mandate, or until April 23, 2018, whichever is later, to allow time for EPA to complete the guidance, streamlined continuous release reporting form, and additional outreach that will allow farms to come into compliance with the CERCLA release reporting requirements.

Dated: January 18, 2018

Respectfully submitted,

JEFFREY H. WOOD

Acting Assistant Attorney General

Environment and Natural Resources Division

/s/ Erica M. Zilioli

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF
APPELLATE PROCEDURE 27(D) & 32(A)**

This motion complies with the requirements of Fed. R. App. P. 27(d)(2) because it contains 1623 words, excluding any accompanying documents authorized by Fed. R. App. P. 27(a)(2)(B).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

/s/ Erica M. Zilioli

ERICA M. ZILIOLI

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Erica M. Zilioli
ERICA M. ZILIOLI

Exhibit A

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DECLARATION OF REGINALD CHEATHAM

I, Reginald Cheatham, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the Director of the Office of Emergency Management (OEM) in the Office of Land and Emergency Management (OLEM) in the United States Environmental Protection Agency (EPA). The principal focus of my duties, responsibilities, and goals is to manage the implementation of EPA's accident prevention and emergency preparedness regulatory programs authorized under several environmental statutes including the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA). In this capacity, I, along with my staff, am

involved with EPA's administration and implementation of the release reporting requirements of CERCLA section 103 and EPCRA section 304. I have personal knowledge of the facts in this declaration or have received such information in the course of my official duties.

2. The purpose of this declaration is to explain why EPA requires an additional stay of the issuance of the mandate enforcing the Court's decision dated April 11, 2017. As explained further below, EPA requires a three-month extension from the prior stay order, or until Monday, April 23, 2018, to further revise its preliminary guidance, finish developing a streamlined continuous release form, and further coordinate with the National Response Center (NRC) on managing the large volume of reports expected once the reporting requirements commence.

3. On December 18, 2008, EPA promulgated a final rule, entitled the "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms" (73 FR 76948) (Final Rule). The Final Rule provided a full exemption from the reporting requirements under CERCLA section 103 for releases of hazardous substances into the air from animal waste at farms. The Final Rule provided a similar exemption from the reporting requirements under EPCRA section 304 but only for farms that had animals which were stabled or confined (i.e., in barns or feed lots) in numbers less than those of a large concentrated animal feeding operation.

4. On April 11, 2017, the Court issued an order vacating the Final Rule, *Waterkeeper Alliance et. al. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017), effectively eliminating the exemptions provided by the Final Rule. On July 17, 2017, EPA moved for a stay of the issuance of the mandate to enforce the Court's order so that EPA could develop guidance for farms on how to estimate emissions of hazardous substances from animal waste into the air. On August 16, 2017 and November 22, 2017, the Court granted EPA's motions to further the stay the mandate until November 14, 2017 and January 22, 2018, respectively.

5. As discussed in EPA's prior motions to stay the mandate, over 44,000 farms have been operating without the requirement of reporting aerial releases of hazardous substances from animal waste since the promulgation of the Final Rule in 2008. Such a release report is difficult to prepare, in part because it requires an estimate of the amount of the aerial emissions from animal waste (e.g., ammonia or hydrogen sulfide) to determine if the reportable quantity threshold which triggers reporting has been met. Estimating such emissions is challenging due to the variables involved, including but not limited to the variation of animal type and size of animal (i.e. dairy cows, heifers, horses, hogs, turkeys, chickens, etc.), animal number, feed composition, waste storage/handling practices, farm size, geographic location of the farm and variation in climate.

6. After the Court's April 11, 2017 order, EPA received numerous inquiries from farms and farm representatives expressing confusion as to how to meet their

reporting obligations since the Court's ruling. Farms have also expressed concern over potential legal action against them for noncompliance.

7. In response to these inquiries and concerns, EPA issued preliminary guidance to assist farms with meeting their reporting requirements. The guidance was posted to EPA's website on October 25, 2017 and includes information for farms to understand their obligations, estimate emissions, and complete reporting forms. As part of developing this preliminary guidance, EPA solicited input from farmers and the public. Comments received indicate that confusion remains as to how farms will meet their reporting obligations. Furthermore, farms with limited internet access may not even be aware of EPA's guidance. See, for example, the attached December 21, 2017, letter from the U.S. Senate. EPA needs additional time to conduct outreach to farms that have limited internet access and may not be aware of the reporting requirements.

8. As noted above, EPA is continuing to develop a streamlined continuous release form to make it easier for farms to report. The form, however, is still undergoing review by the Office of Management and Budget (OMB) and will likely not be finalized by January 22, 2018. Additional time will allow the Agency to respond to potential comments, finalize the form and conduct public outreach to educate farms on the use of the new form.

9. Finally, EPA and the National Response Center worked to develop an option for farms to report their emission via email over the internet to prevent long

call delays and potential system crashes once tens of thousands of farms begin to report. EPA is continuing to coordinate with the National Response Center to ensure a reporting option remains available for farms that have no or limited access to the internet. Part of this work has involved EPA expanding its own information center to handle overflow calls from the National Response Center. Additional time would also allow the Agency to identify other call systems to prevent system delays or crashes once the reporting requirements go into effect.

10. Based on the foregoing, Office of Emergency Management staff need time to further improve existing preliminary guidance, respond to potential comments from the OMB review and complete the streamlined continuous release reporting form, and finalize the reporting options for farms with the NRC. Any renewed guidance and form must be reviewed by me, as part of my duties as the Director of the Office of Emergency Management, and then reviewed and approved by senior EPA officials and reviewed and approved by the Office of Management and Budget. A further stay of the mandate will assist the Agency with completing this work. EPA will endeavor to complete these tasks within three months, but if that is not feasible, the Agency might need to seek additional time.

Executed on 01/19/2018

By: 

Reginald Cheatham
Director
Office of Emergency Management

Office of Land & Emergency
Management
U.S. Environmental Protection Agency
Headquarters, Washington D.C. 20460

Attachment A

United States Senate

WASHINGTON, DC 20510

December 21, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Pruitt:

We are a bipartisan group of Senators representing states where poultry farming is a key part of the economy. We are writing to share our constituents' serious questions and concerns about recent guidance promulgated by the Environmental Protection Agency (EPA). This guidance seeks to implement an April 2017 ruling by the U.S. Court of Appeals for the District of Columbia (*Waterkeeper Alliance v. EPA*) regarding the duty of livestock producers to report air emissions from their facilities under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In our view, this guidance is woefully inadequate and unclear; the EPA must take immediate action to clarify the types of farming operations to which it applies and to simplify the reporting procedure for any farms that must use it.

On April 11, 2017, the D.C. Circuit Court vacated a 2008 EPA rule that exempted most farms from certain release reporting requirements under two statutes, CERCLA and the Emergency Planning and Community Right to Know Act. Following two requests from the Administration, the D.C. Circuit Court extended the effective date of its decision to January 22, 2018.^[1]

With five weeks remaining before the new effective date, farmers in our states are asking us urgent questions and raising serious concerns about the applicability of the new reporting requirements and the recently issued guidance. Some are unaware of the guidance that your agency has already prepared, while others are frankly stating that they find it to be unclear and unhelpful. Many have expressed frustration trying to navigate a new process with which they have previously had no experience. Quite simply, our constituents deserve better. The EPA must take additional efforts to communicate with farmers on this matter including how to identify, measure, or calculate emissions to determine whether an operation is subject to reporting requirements.

With these concerns in mind, we ask that you review and respond to the following questions, and that you brief our offices on the matter within the next three weeks:

^[1] <https://www.epa.gov/newsreleases/dc-circuit-court-grants-trump-epa-request-extend-deadline-farmers-report-emissions>

1. How are you working with farmers and others in the regulated community to help them identify whether they are subject to any new reporting requirements? In light of the D.C. Circuit's ruling more than eight months ago, do you expect to take any further administrative action to clarify the size or levels of emissions produced by farming operations that might be covered by these requirements? Do you anticipate further requesting a delay in the compliance deadline in order to do so?
2. What other federal, state, and local partners are you working with to assist farmers in understanding any new reporting obligations? How are you working with the United States Department of Agriculture in this regard?
3. As we mentioned, some of our constituents have expressed to us that the current reporting process and methodology is confusing. What steps are you taking to simplify your guidance and streamline the reporting process?
4. For farmers who may have limited access to the internet, what steps are you taking to assist these individuals in meeting any new reporting requirements? For those that do have such access, what steps are you taking to simplify reporting?

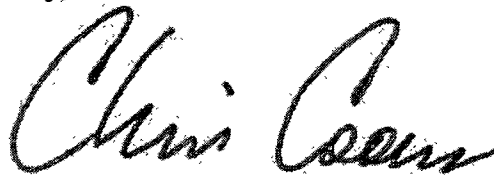
Our farmers care deeply about the environment and pride themselves on being good stewards of their land. We look forward to working with you to ensure that they have the resources they need to adequately understand and determine if they must comply with the EPA's requirements, and we await your prompt response to our information and briefing requests.

For any questions regarding this request, please contact Brian Papp with Senator Carper at 202-224-5042, Leah Rubin Shen with Senator Coons at 202-224-2441, or Jack Overstreet with Senator Isakson at 202-224-3643.

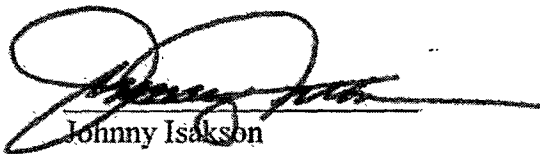
Sincerely,



Thomas R. Carper
U.S. Senator



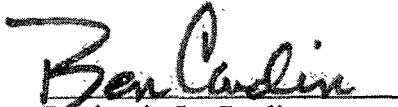
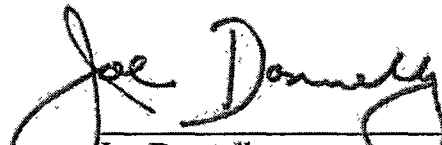
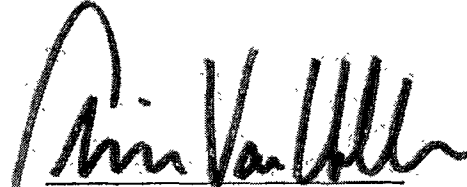


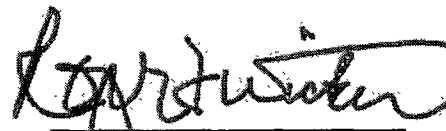
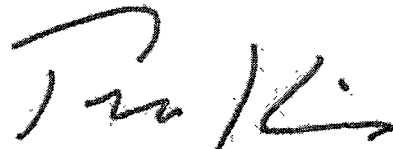
Christopher A. Coons
U.S. Senator



Johnny Isakson
U.S. Senator



David A. Perdue
U.S. Senator


Benjamin L. Cardin
U.S. Senator
Joe Donnelly
U.S. Senator
Chris Van Hollen
U.S. Senator
Joni K. Ernst
U.S. Senator
Mark R. Warner
U.S. Senator
Roger F. Wicker
U.S. Senator
Tim Kaine
U.S. Senator

CC: The Honorable Sonny Perdue
Secretary
United States Department of Agriculture