

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 TO STAY ISSUANCE OF MANDATE

Respondent U.S. Environmental Protection Agency respectfully moves this Court to stay issuance of the mandate in this case for six months from the date of a stay order, or until January 17, 2018, whichever is later. A stay is needed for EPA to develop 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 the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and Emergency Planning and Community Right-to-Know Act ("EPCRA"). Thousands of small- and medium-sized farms that were exempt from the reporting requirements for almost a decade must suddenly come into compliance. Many have asked EPA for help in determining what

their emissions are and whether they must file reports. Allowing EPA time to develop guidance will aid these farms in complying with the reporting requirements. A stay will also provide relief for these farms from enforcement suits during the transition.

Petitioners Waterkeeper Alliance, et al., (“Waterkeeper Petitioners”) oppose this motion. Petitioner National Pork Producers Council (“Pork Producers”) and Intervenor United States Poultry and Egg Association (“USPOULTRY”) do not oppose this motion.

BACKGROUND

The underlying facts of this case are set forth in the Court’s April 11, 2017 opinion and are briefly summarized here. Facilities are required to report—to federal authorities under CERCLA and to state and local authorities under EPCRA—releases of hazardous substances when they exceed certain thresholds established by EPA. 42 U.S.C. §§ 9603(a), 11004(a). In 2008, EPA promulgated a rule entitled “CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms,” 73 Fed. Reg. 76,948-60 (Dec. 18, 2008) (the “Rule”). The CERCLA provisions of the rule exempted from the reporting requirements all air releases of hazardous substances exceeding reportable quantities from animal waste at farms. The EPCRA reporting exemption was similar but applied only to farms housing fewer animals than the thresholds for large concentrated animal feeding operations or “CAFOs.”

In these consolidated petitions for review, Waterkeeper Petitioners challenged the Rule in its entirety, while Pork Producers argued that the EPCRA exemption should have applied to all farms. On April 11, 2017, this Court granted Waterkeeper Petitioners' petition and vacated the Rule. *See* No. 09-1017, Opinion (Apr. 11, 2017) [hereinafter "Opinion"]. On April 11, 2017, the Court also ordered "that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc." *See* No. 09-1017, Order (Apr. 11, 2017).

On May 19, 2017, EPA moved for an extension of time to file a motion to stay issuance of the mandate. This Court granted the motion on May 31, 2017, ordering that EPA could file such a motion within 14 days of the resolution of any petitions for rehearing. *See* No. 09-1017, Per Curiam Order (May 31, 2017). On June 2, 2017, Pork Producers and USPOULTRY filed a petition for panel rehearing, which this Court denied on July 3, 2017. *See* No. 09-1017, Per Curiam Order (July 3, 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.

1. Staying the Mandate Would Enable EPA to Develop Guidance for Farms to Measure and Estimate Air Emissions.

A stay of the issuance of the mandate is reasonable to allow EPA time to develop guidance for farms on how to measure or estimate their emissions in order to come into compliance with the reporting requirements.

As recognized by this Court, measuring emissions of hazardous substances into the air from decomposing animal waste can be difficult for a number of reasons, such as the location of waste in open or spacious areas and the variability in type of feed and climate conditions. Opinion at 6 (“There appears to have been no clear resolution of the best way to measure these releases, which after all do not come conveniently out of a smokestack.”) (citing National Research Council of the National Academies, *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs* 2, 99-101 (2003)); *see also* EPA’s Br. 12-13 (Apr. 18, 2016). As explained in EPA’s brief, the National Research Council of the National Academies concluded in a 2003 report that existing methodologies for estimating air emissions from farms were generally inadequate because of the limited data on which they were based. EPA’s Br. 13 (Apr. 18, 2016) (citing JA 719, 780-82). The National Research Council recommended the development of new standardized, scientifically sound, and practical protocols for measuring air emissions from animal feeding operations. *Id.* (citing JA 724-25).

Since EPA issued the Rule in 2008, approximately 63,000 small- and medium-sized farms have not had to measure and report releases of hazardous substances to the air from animal waste. Declaration of Reginald Cheatham ¶ 5, attached as Exhibit A. After this Court issued its April 11, 2017 decision to vacate the Rule, many of these farms reached out to EPA seeking assistance on how to measure or estimate air

emissions for purposes of coming into compliance with the reporting requirements.

Id. ¶ 6.

In response to the requests for assistance, EPA has begun to develop guidance to aid farms in measuring or estimating their emissions. *Id.* The process of developing the guidance will include reaching out to state and local partners and collecting studies to assess existing methods for estimating emissions to the air. *Id.* ¶ 7. EPA will also work with state environmental offices to identify ways to streamline the reporting process. *Id.* Then, the draft guidance must be reviewed by EPA's Office of Emergency Management and reviewed and approved by senior EPA officials. *Id.* EPA anticipates that this process will be completed in approximately six months. *Id.*

Thus, a stay of the issuance of the mandate for six months, or until January 17, 2018, while EPA develops this guidance is reasonable to help avoid disruption and ease the transition for farms. During this time, EPA also intends to explore possible regulatory or other administrative approaches to address these reporting obligations. *Id.* ¶ 6.

2. Staying the Mandate Would Provide Farms Relief from Enforcement Actions While Coming into Compliance.

A stay of the issuance of the mandate would also provide farms relief from potential legal action while coming into compliance with the reporting requirements. Noncompliance with the CERCLA and EPCRA reporting requirements carries risk of

administrative, civil, or criminal penalties. For example, CERCLA authorizes the President (through EPA) to assess administratively or file a civil action to recover penalties exceeding \$50,000 per day for non-compliance with the CERCLA section 103 reporting requirements, and exceeding \$160,000 per day for second or subsequent violations. 42 U.S.C. § 9609(a)-(c).¹ The statute also provides for criminal fines and imprisonment for certain reporting violations. *Id.* § 9603(b). EPCRA authorizes EPA to pursue similar administrative, civil, or criminal penalties for violations of the EPCRA section 304 reporting requirements. *Id.* § 11045(b).

In addition to EPA's enforcement authority, both CERCLA and EPCRA contain citizen suit provisions. Under CERCLA, any person may commence a civil action against farms that do not meet their reporting obligations under CERCLA section 103, 42 U.S.C. § 9603. *Id.* § 9659(a)(1). Under EPCRA, any person may commence a civil action against farms that fail to submit followup emergency notices under EPCRA section 304(c), 42 U.S.C. § 11004(c). *Id.* § 11046(a)(1)(A)(i).

Farms have reached out to EPA to express concerns about potential enforcement actions—whether by EPA or by a private party through a citizen suit—while they take steps to come into compliance. Cheatham Decl. ¶ 6. Until EPA issues guidance on estimating aerial emissions, farms will be vulnerable to potential

¹ The CERCLA and EPCRA statutory penalties were adjusted for inflation by the “Civil Monetary Penalty Inflation Adjustment Rule.” 82 Fed. Reg. 3633 (Jan. 12, 2017).

legal action. A stay of issuance of the mandate would allow farms temporary relief from these risks and enable them to focus on coming into compliance.

CONCLUSION

Accordingly, EPA requests that this Court stay issuance of its mandate for six months from the date of an order granting a stay of mandate, or until January 17, 2018, whichever is later, to allow time for EPA to develop guidance that will allow farms to come into compliance with the CERCLA and EPCRA reporting requirements without fear of enforcement actions.

Dated: July 17, 2017

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 1658 words, excluding any accompanying documents authorized by Fed. R. App. R. 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 July 17, 2017, 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 a stay of the issuance of the mandate enforcing the Court's decision dated April 11, 2017. As explained further below, EPA requires an approximate six-month extension from the date of this filing, to January 17, 2018, to develop guidance to assist farms with their CERCLA and EPCRA reporting obligations before they become legally enforceable.

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). As a result, farms that have previously operated under the exemptions provided by the Final Rule will

now be required to report emissions of hazardous substances into the air under CERCLA section 103 and EPCRA section 304 once the Court issues its mandate.

5. Since the promulgation of the Final Rule near the end of 2008, approximately 63,000 farms have been operating without the requirement of reporting aerial releases of hazardous substances from animal waste. A release report for farms is difficult to prepare, in part, because it requires a measurement 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. Measuring or estimating such emissions is challenging due to the variables involved, including but not limited to the variation of animal type and size (i.e. dairy cows, heifers, horses, hogs, turkeys, chickens, etc.), animal number, feed composition, farm size, geographic location of the farm and variation in climate. By way of comparison, measurement of wastewater amounts from a discrete outflow pipe tends to be more straightforward than measuring air emissions from a multi-acre open air manure lagoon or from the venting of a poultry house. Additionally, there is no one scientifically established methodology for estimating aerial releases of hazardous substances from animal waste and, therefore, there are variations in estimates of animal emissions rates, making it difficult for farms to determine whether a release of a reportable quantity of a hazardous substance has occurred.

6. OEM staff has received numerous inquiries from farms and farm representatives expressing confusion as to how to meet the CERCLA and EPCRA

reporting obligations since the Court's ruling. Farms have also expressed concern over potential legal action against them for noncompliance. EPA reasonably requires a stay of the mandate until January 17, 2018 to develop guidance on estimating aerial emissions, which will help avoid disruption and ease the transition to compliance for existing facilities, and assist new and future farms. In addition, EPA intends to use this time to explore possible regulatory or other administrative approaches to address these reporting obligations.

7. Based on the foregoing, OEM staff need time to draft and finalize guidance that is substantively and technically sufficient. The work will involve contacting state and local environmental and farming agencies and universities to collect existing studies on aerial releases from farms and analyze and assess current methods for estimating aerial emissions. We will also work with our Regional EPA office and State environmental offices to identify ways to assist farms in estimating their releases and streamline reporting. The guidance must be reviewed by me, as part of my duties as the Director of OEM, and then reviewed and approved by senior EPA officials. A stay of the issuance of the mandate until January 17, 2018 is necessary to ensure the Agency makes a considered decision.

Executed on 7/17/17By: 

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