

ARGUED DECEMBER 12, 2016

DECIDED APRIL 11, 2017

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

WATERKEEPER ALLIANCE, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Nos. 09-1017 &
)	09-1104 (Consolidated)
)	
U.S. ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	
)	

**PETITIONERS’ OPPOSITION TO
EPA’S MOTION TO STAY ISSUANCE OF MANDATE**

Petitioners Waterkeeper Alliance, Sierra Club, Humane Society of the United States, Environmental Integrity Project, and Center for Food Safety (collectively, “Waterkeeper Petitioners”) file this opposition to the Motion to Stay Issuance of Mandate of Respondent U.S. Environmental Protection Agency (“EPA” or the “Agency”) [Doc. 1684518] (“Motion to Stay” or “Motion”).

On April 11, 2017, this Court vacated a final rule adopted by EPA, CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms, 73 Fed. Reg. 76,948 (Dec. 18, 2008) (codified at 40 C.F.R. pts. 302 & 355) (“Final Rule”), because the Final Rule “can’t be justified either as a reasonable interpretation of any statutory ambiguity or implementation of a *de minimis* exception.” Op. at 18 (Apr. 11, 2017) [Doc. 1670473]. The vacated Final Rule “generally exempt[ed] farms from

(“CERCLA”), 42 U.S.C. § 9601 *et seq.*] and [Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 U.S.C. § 11001 *et seq.*] reporting requirements for air releases from animal waste,” but the Final Rule “retain[ed] the reporting requirement for [large] CAFOs under EPCRA.” *Id.* at 3.

Now, over three months since the Court’s Order, EPA moves to stay the Court’s mandate for an additional six months. EPA argues that it needs time to develop guidance on how to estimate emissions of hazardous substances from CAFOs. Motion to Stay at 1. But EPA’s Motion ignores that CAFOs have been reporting releases without any guidance for over a decade. And EPA has been collecting and analyzing emissions data, similarly for over a decade, for the purpose of developing guidance – but guidance still has not issued. EPA fails to set forth facts showing good cause for the stay, and the Court should deny the Motion on that basis.¹

STANDARD OF REVIEW

This Circuit will grant a motion to stay issuance of the mandate only if “the motion sets forth facts showing good cause for the relief sought.” D.C. Cir. R. 41(a)(2). Courts consider traditional stay factors when determining whether good

¹ EPA asked Waterkeeper Petitioners if they could consent to a stay of the mandate so that the Agency could develop guidance. Waterkeeper Petitioners asked if EPA would agree to share a copy of its draft guidance and allow for them to provide input on the guidance. EPA would not agree to this request. Waterkeeper Petitioners’ opposition is based, in part, on EPA’s refusal to agree to seek their input on the draft guidance.

492 U.S. 1301, 1304–07 (1989) (considering whether movant for stay of mandate has made adequate showing of irreparable injury, probability of success, and balance of equities in favor of stay); *United States v. Microsoft Corp.*, No. 00-5212, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (denying stay of mandate for failure to show “substantial harm”); see also *Natural Res. Def. Council v. E.P.A.*, 489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph, J., concurring) (decisions on motions to stay the vacatur of an agency rule are to be “made in accordance with this court’s long-standing principles governing stays—irreparable harm, probability of success, public interest, and so forth.”). If this Court grants a motion to stay the mandate, “the stay ordinarily will not extend beyond 90 days from the date that the mandate otherwise would have issued.” D.C. Cir. R. 41(a)(2).

ARGUMENT

I. EPA HAS FAILED TO MAKE THE REQUIRED SHOWING OF GOOD CAUSE FOR A STAY OF THE MANDATE.

A. EPA Fails to Show Why It Must Complete An Emission Estimation Guidance Before the Mandate Issues.

EPA’s Motion to Stay seeks time to create emission estimation guidance, which it asserts would “avoid disruption” and provide “temporary relief from th[e] risks [of enforcement actions]” for the small- and medium-sized CAFOs that are subject to reporting under EPCRA and CERCLA as a result of the Court’s April 11, 2017 Order. Motion to Stay at 6, 8. EPA’s reasoning is flawed.

“disruption” from having to comply with EPCRA and CERCLA by reporting releases of hazardous substances that exceed reportable quantities, EPA’s Motion does not persuasively explain why the “disruption” of complying with federal law would be meaningfully less if a guidance document were in place. Indeed, EPA ignores the fact that all CAFOs were subject to the EPCRA/CERCLA release reporting requirements prior to 2008. Moreover, the illegal exemption in the now-vacated Final Rule retained the EPCRA reporting requirement for large CAFOs.² As a result, even without the guidance that EPA suddenly considers a prerequisite to release reporting, many CAFOs affected by the Court’s Order have in fact already been subject to release reporting requirements. EPA has failed to establish

² Industry Petitioners admit that “many large CAFOs (subject to EPA’s CERCLA exemption, but carved out from EPA’s partial EPCRA exemption in the [Final Rule]) submitted EPCRA reports” while the Final Rule was in force. Nat’l Pork Producers Council’s & U.S. Poultry & Egg Ass’n’s Pet. for Reh’g at 6 (June 2, 2017) [Doc. 1677995]; *see also* Nat’l Pork Producers Council’s & U.S. Poultry & Egg Ass’n’s Opp’n to Mot. to Strike Decl. of Timothy R. Gablehouse at 5 (June 13, 2017) [Doc. 1679378] (“many large farms have been providing the information required by the 2008 EPCRA rule”). Thus, even if these large CAFOs experienced some confusion in 2009 soon after they realized that they were required to report under EPCRA, *see* Nat’l Pork Producers Council’s & U.S. Poultry & Egg Ass’n’s Br. in Support of Motion to Stay at 3–8 (July 27, 2017) [Doc. 1686173], that did not prevent the facilities from ultimately complying with their reporting obligations even without EPA guidance.

required by EPCRA and CERCLA.³

Second, EPA’s interest in providing “temporary relief from th[e] risks [of enforcement actions]” does not constitute “good cause” justifying further stay of the mandate – especially because EPA has not offered a convincing reason that small and medium CAFOs are in a different position than large CAFOs, which have been reporting under EPCRA despite the Final Rule, or in a different position than CAFOs that release over reportable quantities of hazardous substances, all of which were obligated to report under EPCRA and CERCLA before the illegal exemption adopted in the Final Rule.

Thus, EPA’s argument that it must issue guidance prior to the reinstatement of the reporting requirement is without merit, and EPA fails to show good cause to stay the mandate.

B. EPA Fails to Show Why the Court Should Provide EPA Time to Develop its Guidance.

³ EPA bears the burden of setting forth facts to show good cause for the stay. D.C. Cir. R. 41(a)(2). Though Industry Petitioners also submit declarations in support of a stay of the mandate, these fail to provide a persuasive reason as to why any potential “disruption” that would result from CAFOs finally fulfilling their obligations under the law would be mitigated if the mandate were to issue after EPA completes its guidance. *See* Nat’l Pork Producers Council’s & U.S. Poultry & Egg Ass’n’s Br. in Support of Motion to Stay at 3–8. The sample continuous release report in the record shows that, even without EPA’s guidance, methodologies exist for facilities to estimate their emissions and submit release reports, and that an estimated range of emissions is acceptable for the purposes of the release report. *See* Comments of Dairy Education Alliance et al. Ex. B (Mar. 27, 2008) [JA533–41].

explain why it needs six months to develop one. EPA's Motion asserts that EPA is only now beginning to collect and analyze data to develop the guidance. Motion to Stay at 6. But EPA has previously represented that it has been working towards this guidance for *over a decade*. In 2005, EPA began to collect air emissions data from CAFOs with the goal of developing recommended emission estimation methodologies by 2011. Final Rule, 73 Fed. Reg. at 76,951. In August 2016, EPA indicated that these emission methodologies were still "under development using data collected during the period 2007–2009." Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements, 81 Fed. Reg. 58,010, 58,032–33 (Aug. 24, 2016).

In support of its Motion, EPA submits a declaration of Reginald Cheatham, Director of EPA's Office of Emergency Management, which represents that EPA seeks a stay because it needs time to "collect existing studies on aerial releases from farms and analyze and assess current methods for estimating aerial emissions." Cheatham Decl. ¶ 7 (July 17, 2017), *attached to* Motion to Stay as Exhibit A. But EPA's Motion does not attempt to reconcile Mr. Cheatham's assertions with the fact that EPA has been collecting and analyzing this type of data for over a decade.

guidance, and the Court must not reward EPA's dilatory pace until now.⁴ The tens of thousands of communities that live near the "approximately 63,000" CAFOs whose reporting was exempted by the Final Rule, Motion to Stay at 5, have been waiting nearly a decade for access to the release reports to which they are statutorily entitled. These communities should not have to wait an additional nine months following the Court's finding that the Final Rule is illegal.⁵

CONCLUSION

For the reasons set forth above, the Court should deny EPA's Motion to Stay Issuance of Mandate in its entirety.

Should the Court decide that a stay is warranted, we urge the court to limit it to no longer than 90 days. *See* D.C. Cir. R. 41(a)(2) ("If the motion is granted, the stay ordinarily will not extend beyond 90 days from the date that the mandate otherwise would have issued."); *see also* *Natural Res. Def. Council*, 489 F.3d at 1265 (Rogers, J., concurring in part and dissenting in part) ("as a practical matter, a lengthy . . . stay of the mandate is problematic.").

⁴ EPA's delay in developing emission estimation guidance calls to mind the four years that EPA failed to reconsider the Final Rule upon this Court's remand. *See* Mot. to Recall Mandate or, in the Alternative, Pet. for Writ of Mandamus at 3–4 (April 15, 2015) [Doc. 1547371].

⁵ To the extent that EPA seeks more time merely to determine a new way to absolve CAFOs from the reporting requirement, *see* Motion to Stay at 6 ("EPA also intends to explore regulatory or other administrative approaches to address these reporting obligations"), that is not a valid basis to stay this Court's mandate.

Dated: July 27, 2017

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This opposition complies with the requirements of Fed. R. App. P. 27(d)(2) because it contains 1,800 words, excluding any accompanying documents authorized by Fed. R. App. P. 27(a)(2)(B).

This brief 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 this brief has been prepared in a proportionally spaced typeface (Microsoft Word 2010 Times New Roman) in 14 point font.

This brief has been scanned for viruses and is virus free.

Dated: July 27, 2017

/s/ Jonathan J. Smith

I hereby certify that on July 27, 2017, I served a true and correct copy of the foregoing Brief of Petitioners Waterkeeper Alliance, Sierra Club, Humane Society of the United States, Environmental Integrity Project, and Center for Food Safety on the following via first-class mail:

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Dated: July 27, 2017

/s/ Jonathan J. Smith