

**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,	)	Nos. 09-1017 &
	)	09-1104 (Consolidated)
v.	)	
	)	
U.S. ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

**EPA’S REPLY IN SUPPORT OF**  
**MOTION TO STAY ISSUANCE OF MANDATE**

Good cause exists for the Court to stay issuance of the mandate in this case while Respondent U.S. Environmental Protection Agency (“EPA”) develops 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 reporting requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and Emergency Planning and Community Right-to-Know Act (“EPCRA”). In the absence of such guidance, the kind of “disruption” described in the declarations submitted by Petitioner National Pork Producers Council and Intervenor United States Poultry and Egg Association (collectively, “Pork Producers”) could ensue. The fact that a stay of the

mandate would also provide temporary relief from enforcement actions to the thousands of small and medium farms affected by the Court's vacatur of EPA's 2008 rule further supports granting EPA's motion.

### **ARGUMENT**

The guidance EPA is developing on how to estimate air emissions from animal waste could help thousands of farms comply with the reporting requirements and minimize disruption in two ways. First, farms will be able to determine whether their emissions actually exceed the reportable quantities that trigger the reporting requirements. Without guidance, some farms may over- or underestimate their emissions, resulting in over- or underreporting. Given the burdens imposed on farms to prepare release reports and on response agencies who have to process them, *see* EPA's Br. 48-49 (Apr. 18, 2016), the guidance could help avoid the over-reporting scenario. After all, many farms that must come into compliance with the reporting requirements are not concentrated animal feeding operations or CAFOs, as Petitioners Waterkeeper Alliance, *et al.* (collectively, "Waterkeeper Petitioners") assert repeatedly, *see* Waterkeeper Ptrs.' Opp'n 2-5 (July 27, 2017), but rather small- and medium-sized farms. Second, guidance will promote more consistent reporting with improved data to help federal and local response agencies, should such agencies choose to respond to the release. Improved reporting also benefits entities that have expressed an interest in seeing the reports—including Waterkeeper Petitioners.

Waterkeeper Petitioners contend that EPA's guidance would not "meaningfully" reduce disruption to covered farms from having to suddenly come into compliance, because large CAFOs have been reporting their emissions since the 2008 administrative reporting exemption rule at issue in this case went into effect and all farms had to comply before the 2008 rule went into effect. Waterkeeper Ptrs.' Opp'n 4 (July 27, 2017). Contrary to Waterkeeper Petitioners' assertions, however, the potential disruption to farmers is real, as vividly described in the declarations attached to the Brief of National Pork Producers Council and U.S. Poultry & Egg Association (collectively, "Pork Producers"). *See, e.g.*, Pork Producers' Br. Ex. 1, Pagel Decl. ¶¶ 9-13 (July 27, 2017); *Id.* at Ex. 4, Bredwell Decl. ¶¶ 15-17. In addition, the fact that all farmers were subject to the reporting requirements before 2008 does not mean they understood how to meet those requirements.

Waterkeeper Petitioners also argue that providing relief from enforcement actions while farms figure out whether they have reportable releases and how to prepare reports "does not constitute 'good cause,'" because small- and medium-sized farms are no differently situated than large CAFOs, which have been reporting. Waterkeeper Ptrs.' Opp'n 5 (July 27, 2017). As noted above, the declarations submitted by Pork Producers illustrate the challenges faced by the large CAFOs when they attempted to report their emissions beginning in 2009. Waterkeeper Petitioners offer no explanation as to why smaller farms would suddenly be able to determine whether their emissions exceed the reportable quantities, as opposed to when the

CERCLA/EPCRA administrative reporting exemption was in place. In addition, farmers have real concerns about enforcement stemming from these estimates, ranging from inaccurate reports being submitted to governmental agencies to not reporting at all in reliance on existing methodologies that show insufficient emissions to report. *See, e.g.*, Pork Producers' Br. Ex. 6, Hebert Decl. ¶¶ 6-8 (July 27, 2017); *Id.* at Ex. 4, Bredwell Decl. ¶¶ 7-8; *Id.* at Ex. 3, Wolf. Decl. ¶ 27 (explaining that the reporting threshold for emissions from waste from pigs would be 3300 pigs using one methodology but only 2700 using a second). As one farmer explained, a single tool prepared by a university resulted in a high estimate that was 170 lbs/day greater than the low estimate. *Id.* at Ex. 8, Bierman Decl. ¶ 8. Farms should not face the uncertain risk of being penalized while waiting for EPA to issue guidance that will help them comply with the reporting requirements.

Finally, Waterkeeper Petitioners argue that a six-month stay of the mandate is not justified because EPA has been collecting data and working on emission estimating methodologies for over a decade. Waterkeeper Ptrs.' Opp'n 6 (July 27, 2017). However, this merely highlights the complexity of developing guidance for an entire industry with all of the variables involved (animal, feed, climate, farm configuration, etc.). As Waterkeeper Petitioners themselves point out, EPA in August 2016 acknowledged that the emission estimation methodologies "were still 'under development.'" *Id.* (quoting 81 Fed. Reg. 58,010, 58,032-33 (Aug. 24, 2106)). Since the methodologies are not completed, the additional six months are reasonably

needed for EPA to seek more input from state and local entities and finalize the guidance. *See* EPA's Mot. to Stay Issuance of Mandate 6 (July 17, 2017). As indicated in EPA's Motion, the Agency also intends to explore possible regulatory or other administrative approaches to address the reporting obligations during this time. *Id.*

### CONCLUSION

Accordingly, there is good cause for this Court to 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.

Dated: August 3, 2017

Respectfully submitted,

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

This reply complies with the requirements of Fed. R. App. P. 27(d)(2) because it contains 954 words, excluding any accompanying documents authorized by Fed. R. App. R. 27(a)(2)(B).

This reply 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 August 3, 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.

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