

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 MOTION FOR FURTHER STAY OF ISSUANCE OF MANDATE**

Pursuant to this Court’s August 16, 2017 Order, Respondent U.S. Environmental Protection Agency respectfully moves this Court for an additional stay of the issuance of the mandate in this case for two months from the date of a stay order, or until January 17, 2018, whichever is later. As explained in EPA’s prior motion 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. For the reasons stated in more detail

herein, the requested additional stay of the issuance of the mandate is warranted to allow time for EPA to finalize its guidance. The additional time would also provide the benefit of giving EPA time to initiate a related rulemaking process.

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

### **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 consists 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; and (2) EPA's preliminary interpretation of EPCRA to exclude farms that use substances in routine agricultural operations from reporting under EPCRA section 304, until the Agency completes a rulemaking on the interpretation of "used in routine agricultural operations" as it pertains to EPCRA reporting requirements.

With regard to CERCLA reporting, EPA has made progress in compiling a variety of resources for farms to understand their obligations, estimate their emissions, and complete the reporting forms. *See* <https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms>. In the preliminary guidance, EPA solicited public comment for 30 days, and the Agency needs additional time to incorporate feedback received and improve the guidance. *Id.* EPA is also developing a more streamlined continuous release reporting form for farms.

With regard to EPCRA reporting, EPA issued a preliminary interpretation of certain EPCRA provisions as excluding farms that use substances in routine agricultural operations from the reporting requirements in section 304 of EPCRA, 42 U.S.C. § 11004. *See* <https://www.epa.gov/epcra/question-and-answer-epcra-reporting-requirements-air-releases-hazardous-substances-animal> ("Preliminary

EPCRA Interpretation”). Only facilities where “hazardous chemicals” are “produced, used, or stored” must report under section 304(a). 42 U.S.C. § 11004(a). Excluded from the definition of “hazardous chemical,” *see id.* § 11049(5), is “[a]ny substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.” *Id.* § 11021(e)(5). The Agency noted in the Preliminary EPCRA Interpretation that, in previous policy interpretations, it had identified certain specific examples of substances used in routine agricultural operations, such as paints used for maintaining farm equipment, fuels used at the farm to operate machinery or to heat buildings in a farm for housing animals, and chemicals used for growing and breeding fish and aquatic plants in an aquacultural operation. The Agency further stated that, similar to these prior examples, “the feeding and breeding of animals, as well as the expected handling and storage of the animals’ waste, would also be considered a routine agricultural operation,” and stated its intent to conduct a rulemaking on the interpretation of “used in routine agricultural operations” as it pertains to the EPCRA reporting requirements for farms.

## 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 Two Months.**

Although EPA has made substantial progress and released preliminary guidance on October 25, 2017, two key aspects of the development of the CERCLA guidance remain. First, EPA has solicited input from stakeholders for a 30-day period, specifically asking if there are other available resources that should be added to

the guidance. *Id.*; Declaration of Reginald Cheatham ¶ 7, attached as Exhibit A. The Agency intends to evaluate the submissions received and amend its guidance as appropriate. Cheatham Decl. ¶¶ 7-8.

Second, EPA is in the process of developing a new form to report continuous releases that is better suited for farms than the existing form. *Id.* Estimating emissions is complex given the numerous variables involved, and a more user-friendly form for farms should help promote reporting. *Id.* ¶¶ 5-7. Once available, this form should make reporting easier for farms that elect the continuous release reporting method. *Id.* ¶ 7. EPA anticipates that this form will be finalized by mid-January 2018. *Id.*

A further stay of the issuance of the mandate is reasonable to allow EPA time to finish developing these guidance materials. Stakeholders may be able to provide valuable input to help refine the guidance. The streamlined continuous release form EPA is developing for farms will reduce the burden on farms. The additional two months would also give farms necessary time to review and utilize these guidance materials before having to file their reports. 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 coordinate with the National Response Center to identify a process to manage the volume of calls from farmers that are expected once the Court's order is in effect. Cheatham Decl. ¶ 2.

Lastly, as noted above, EPA plans to conduct a rulemaking on the term “used in routine agricultural operations” under EPCRA, and the additional two months would also have the benefit of giving EPA time to initiate that rulemaking.

### CONCLUSION

Accordingly, EPA requests that this Court stay issuance of its mandate for two 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 finalize the guidance that will allow farms to come into compliance with the CERCLA release reporting requirements.

Dated: October 30, 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 1429 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 October 30, 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 approximately two-month extension from the date of a stay order, or until January 17, 2018 (whichever is later), to revise newly issued preliminary guidance based on anticipated public feedback, and to develop a streamlined continuous release reporting form for farms. The extension will also provide farmers with time to review the guidance and comply with their reporting obligations before they become legally enforceable. EPA also intends to use this time to coordinate with the National Response Center to identify a process to manage the volume of calls from farmers that are expected once the order is in effect.

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, the Court stayed the mandate through November 14, 2017, stating "[i]f necessary, EPA may request an extension of the stay" and any such request "should include a status update on EPA's efforts to develop guidance."

5. As discussed in my prior declaration attached to EPA's July 17 motion, 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. OEM staff has 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 is soliciting input from farmers and the public for a period of 30 days. Such input may help the Agency improve the guidance by providing, for example, additional resources which farmers may use to estimate emissions. In addition to the preliminary guidance, EPA plans to develop a more user-friendly continuous release reporting form to make it easier for farms to report. As noted above, estimating emissions is complex and a more user-friendly form for farms should help promote reporting. The Agency plans to finalize a new form by mid-January 2018.

8. Based on the foregoing, OEM staff need time to review any comments received and, if necessary, revise and finalize guidance that is substantively and technically sufficient. We will also be reviewing the existing continuous release

reporting form to develop a simpler form that will reduce the reporting burden on farms. Any renewed guidance and form must be reviewed by me, as part of my duties as the Director of OEM, and then reviewed and approved by senior EPA officials and reviewed and approved by OMB. A further stay of the mandate will assist the Agency with completing this work.

Executed on 30 Oct 2017

By:  \_\_\_\_\_

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