**ARGUED DECEMBER 12, 2016**
**DECIDED APRIL 11, 2017**

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

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

**WATERKEEPER PETITIONERS'**
**OPPOSITION TO MOTION FOR FURTHER STAY OF MANDATE AND**
**CROSS-MOTION FOR CLARIFICATION OF MANDATE**

Petitioners Waterkeeper Alliance, Sierra Club, Humane Society of the United States, Environmental Integrity Project, and Center for Food Safety (collectively, "Waterkeeper Petitioners") hereby oppose the Motion for Further Stay of Issuance of Mandate of Respondent U.S. Environmental Protection Agency ("EPA" or the "Agency") [Doc. 1702059] ("Motion for Further Stay"), and cross-move the Court to: (i) clarify the mandate by supplementing its April 11, 2017 Opinion in this matter; and (ii) retain jurisdiction over this matter for three years after issuance of the mandate to ensure EPA's compliance.

The mandate at issue in EPA's motion and Waterkeeper Petitioners' cross-motion will vacate a final rule adopted by EPA in 2008—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"). The Final Rule exempted emissions of hazardous substances from animal waste at animal feeding operations ("AFOs") from the general requirement that facilities must report all releases of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, and the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11001 *et seq*. In April 2017, this Court found EPA's AFO exemption unlawful. *See* Op. 18 (Apr. 11, 2017) [Doc. 1670473].

This Court has already stayed the mandate for 90 days, through November 14, 2017, Order (Aug. 16, 2017) [Doc. 1689073], based on EPA's representation in July 2017 that it needed time to "develop guidance for farms on how to measure or estimate their emissions in order to come into compliance with the reporting requirements" of CERCLA and EPCRA. EPA's Mot. to Stay Issuance of Mandate 4 (July 17, 2017) [Doc. 1684518] ("July Stay Motion"). On October 25, 2017, EPA released "preliminary guidance" documents. *See* EPA, CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from

Animal Waste at Farms ("Interim Guidance") (November 1, 2017 version attached as Attachment 1); EPA, Does EPA interpret EPCRA Section 304 to require farms to report releases from animal waste? (Oct. 25, 2017) ("EPCRA Q&A") (attached as Attachment 2).

EPA now seeks additional time, claiming it needs to finalize the interim guidance and to continue work on its "preliminary interpretation" of EPCRA. Mot. for Further Stay 2, 3. But in fact, EPA is *not* seeking time to help AFOs "come into compliance," but rather time to promulgate an illegal rule so that they *never* have to comply. EPA's "preliminary interpretation" would thus violate the Court's mandate by directing AFOs that they *need not* comply with EPCRA. In an about-face from the Agency's prior positions, EPA's interim guidance documents adopt an industry theory in order to immediately exempt *all* AFOs from EPCRA's reporting requirement. This new exemption has an even broader effect than the Final Rule this Court found to be illegal.[1] And EPA sidesteps the required rulemaking procedure of the Administrative Procedure Act by having this

[1] In EPA's own words, the illegal Final Rule was "narrowly crafted" because it required larger AFOs to report releases from animal waste into air under EPCRA, and required all AFOs to report releases into media other than air (*e.g.*, water) or from sources other than animal waste (*e.g.*, ammonia tanks). *See* EPA Br. at 49–51 (Apr. 18, 2016) [Doc. 1609103]. But EPA's sweeping new EPCRA interpretation would eliminate these carve-outs, and exempt *any* release from *any* source on *any* AFO.

exemption take immediate effect, even before the start of its proposed rulemaking process.

The Court should not further delay issuance of the mandate in order to give EPA more time to effectuate its illegal interpretation of EPCRA. Moreover, because this interpretation is at odds with the Court's ruling, it cannot stand. The Court's Opinion means what it says: not only was the Final Rule's exemption illegal, EPA has no "discretion to fashion *other exemptions*" from the EPCRA reporting requirement. Op. 12 (emphasis added).

Waterkeeper Petitioners therefore respectfully request that the Court: deny the request for further stay of the mandate; clarify that its mandate does not allow the blanket EPCRA exemption that EPA now seeks to create; and retain jurisdiction for three years, or as long as the Court deems sufficient, to ensure that the reporting requirements in EPCRA and CERCLA are finally enforced as to AFOs, after nearly a decade during which EPA has tried multiple ways to thwart and delay implementation, resulting in denial of basic public health information to rural communities across the country.

## STATEMENT OF FACTS

In its Opinion vacating the Final Rule, this Court recognized that AFOs have "substantial" emissions of "serious pollutants" that can cause people to "become seriously ill and even die[]." Op. 2, 14. Information about these pollutants is thus

critically important to state and local regulators and response agencies, *see id.* at 15–16, and the public has a statutory right to this information, *see id.* at 9-11. But for over a decade, EPA has sought to undermine and delay enforcement of CERCLA and EPCRA's "sweeping reporting mandate," *id.* at 12, thereby denying communities across the country basic information that they can use to protect their families' health.

### A. Prior EPA Efforts to Evade CERCLA/EPCRA Reporting Requirements

In 2005, EPA first undermined the CERCLA/EPCRA reporting mandates by entering into an agreement with thousands of AFOs—including over 90% of large AFOs—to suspend the Agency's CERCLA/EPCRA reporting enforcement while it developed methodologies to estimate air emissions from AFOs.[2] *See* Waterkeeper Pet'rs' Opening Br. 11–12 (Apr. 18, 2016) [Doc. 1609280]. EPA has delayed its

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[2] As this Circuit recognized, this agreement contains "no statement with regard to substantive statutory standards" and is therefore an exercise of the Agency's enforcement discretion and not its rulemaking power. *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1034 (D.C. Cir. 2007); *see also id.* at 1033 ("Petitioners argue that the Agreement is intended to 'prescribe law' because it grants an exemption from the Acts for a specified period of time. We disagree. The Agreement merely defers enforcement of the statutory requirements . . ."). Though EPA's Interim Guidance misrepresents this agreement by claiming covered AFOs "are not expected to report air releases of hazardous substances from animal wastes under CERCLA and EPCRA," Interim Guidance at "Frequent Questions," the agreement does not affect AFOs' underlying obligation to comply with statutory reporting requirements, which can still be enforced through citizen suits against covered AFOs.

development and publication of these estimating methodologies for over a decade. According to a recent EPA Office of Inspector General report, EPA represented that it would begin publishing these methodologies by 2009, but as of May 2017, EPA had still "not finalized its work plan or established timeframes to finish the methodologies." Office of Inspector General, EPA, Improving Air Quality: Eleven Years After Agreement, EPA Has Not Developed Reliable Emission Estimation Methods to Determine Whether Animal Feeding Operations Comply With Clean Air Act and Other Statutes, Report No. 17-P-0396, at 10–11 (Sept. 19, 2017) ("OIG Report") (attached as Attachment 3). Covered AFOs have thus enjoyed a "virtual free pass" from EPA enforcement of statutory violations for over a decade, *Ass'n of Irritated Residents*, 494 F.3d at 1039 n.3 (Rogers, J., dissenting), and with no end in sight.

In 2008, EPA undermined the statutes' reporting mandate for a second time by promulgating the illegal Final Rule, which this Court vacated six months ago. In response to petitions to review that Rule, in 2010, EPA moved this Court for voluntary remand without vacatur "to reevaluate the policy choices reflected in the Final Rule," representing that the Agency "inten[ded] to consider vacatur of all or part of the Final Rule." EPA's Reply to Pet'r's Opp'n to EPA's Mot. for Voluntary Remand at 1, 4 (Aug. 9, 2010) [Doc. 1259656] (citations omitted). This Court granted remand without vacatur that year, Order (Dec. 10. 2010) [Doc.

1272527], but EPA sat on the remanded rule for five years, until the Court recalled its previous mandate in response to a motion from Waterkeeper Petitioners. Order (Sept. 23, 2015) [Doc. 1574476]. As a result of EPA's delay in reevaluating its regulation, the illegal Final Rule exempted AFOs from CERCLA/EPCRA reporting for nearly a decade—and to this very day.

### B. EPA'S October 25, 2017 Interim Guidance and EPCRA Q&A

Now, in a third and last-ditch attempt to subvert implementing EPCRA with respect to AFOs, EPA has resuscitated an industry theory for exempting *all* AFOs from *all* EPCRA reporting. On October 25, 2017, EPA published an "interim guidance," the stated purpose of which is "to assist farms in complying with requirements to report air releases of hazardous substances from animal waste under CERCLA and EPCRA." Interim Guidance at "Purpose." However, in an Orwellian twist, despite having the stated purpose of "assist[ing] farms in complying with . . . EPCRA," *id*., the Interim Guidance actually exempts AFOs from reporting under EPCRA. Specifically, the Interim Guidance states: "EPA interprets the statute to exclude farms that use substances in 'routine agricultural operations' from reporting under EPCRA section 304." *Id.* at "Frequent Questions." Linked to this Interim Guidance is a separate document entitled, "Does EPA interpret EPCRA Section 304 to require farms to report releases from animal waste?" ("EPCRA Q&A"). That document explains

> As written, EPCRA section 304 requires all facilities "at which a hazardous chemical is produced, used or stored" to report releases of reportable quantities of any EPCRA Extremely Hazardous Substance and of any CERCLA hazardous substance. Congress, however, created an exception relevant to farms. As indicated above, EPCRA reporting turns on whether a facility produces, uses, or stores a hazardous chemical. The term "hazardous chemical,"[3] as defined in EPCRA sections 329(5) and 311(e), does not include "any substance to the extent it is used in routine agricultural operations."
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> Therefore, *if a farm only uses substances in "routine agricultural operations", the farm would not be a facility that produces, uses or stores "hazardous chemicals," and would therefore not be within the universe of facilities which are subject to EPCRA section 304 release reporting*. Because such farms fall outside of EPCRA section 304, they are not required to report any releases of EPCRA extremely hazardous substances or CERCLA hazardous substances, including any releases from animals or animal waste.
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> . . . .
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> EPA thus interprets the phrase "used in routine agricultural operations" to include, for example, the handling and storage of waste for potential use as fertilizer. In creating the routine agricultural operation exception, Congress demonstrated its intent to treat farms differently than other types of facilities. EPA does not believe Congress intended the generation, handling or storage of animal waste to subject farms to reporting if

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[3] The terms "hazardous chemical" and "extremely hazardous substance" have distinct uses under EPCRA. EPCRA reporting requirements apply to releases of "extremely hazardous substances." 42 U.S.C. § 11004(a). *See infra* Argument II.B.3.

> they do not otherwise produce, use or store hazardous chemicals.

EPCRA Q&A (emphasis added).[4] Thus, EPA's Interim Guidance rewrites EPCRA's "used in routine agricultural operations" provision to apply to substances "produced" or "stored" in routine agricultural operations, expanding an exemption that, by the terms of the statute, applies only to substances "used" in routine agricultural operations. *See infra* Argument II.B.3. On the basis of this misreading of EPCRA, the Interim Guidance directs all AFOs that they need not comply with the EPCRA reporting mandate. *See* Interim Guidance at "Frequent Questions."

EPA explains that it "intends to conduct a rulemaking to clarify its interpretation of 'used in routine agricultural operations' as it pertains to EPCRA reporting requirements." Interim Guidance at "Frequent Questions"; *see also* EPCRA Q&A. Nevertheless, EPA intends to implement this new EPCRA

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[4] *See also* EPA, CERCLA and EPCRA Reporting Requirements of Air Releases of Hazardous Substances from Animal Waste at Farms 1 (Nov. 6, 2017) (attached as Attachment 4) ("Do I Need to Submit an EPCRA Continuous Release Report? Not for routine agricultural operations. EPA interprets the statute to exclude farms that use substances in 'routine agricultural operations' from reporting under EPCRA 304. This encompasses regular and routine operations at farms, animal feeding operations, nurseries, other horticultural operations, and aquaculture.").

exemption immediately.[5] *See* Mot. for Further Stay 3 ("The preliminary guidance consists of . . . 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.").[6]

Prior to the issuance of the Interim Guidance, EPA had expressly and repeatedly rejected the EPCRA theory it now espouses. Specifically, on at least three occasions, EPA has stated that EPCRA applies to AFOs' emissions and that the exemption of a "substance to the extent it is *used* in routine agricultural

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[5] Indeed, AFOs are already relying on the Interim Guidance and EPCRA Q&A to claim that they have no legal obligation to report under EPCRA. *See* Defendant's Supplemental Citation of Authority in Support of its Response to Plaintiff's Motion for Partial Summary Judgment at 3–4, *Don't Waste Arizona v. Hickman's Egg Ranch* (D. Ariz. 2017) (No. 16-cv-03319-GMS) (attached as Attachment 5).

[6] EPA seeks to promulgate this EPCRA exemption entirely outside of the rulemaking process required by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. *See* EPA Mot. 3. But EPA's EPCRA exemption is a legislative rule that "adopts a new position inconsistent with existing regulations, [and] otherwise effects a substantive change in existing law or policy," and therefore can only be promulgated through formal rulemaking. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (citing *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995)).

operations" from EPCRA's definition of "hazardous chemical," 42 U.S.C. § 11021(e)(5) (emphasis added), does not exempt all farms from EPCRA reporting.

First, in the Preamble to the Final Rule, EPA confirms that EPCRA reporting applies to AFOs' emissions, stating, "Owners and operators of farms, like all other facilities, are required to report the release of hazardous substances into the environment in accordance with . . . EPCRA section 304." 73 Fed. Reg. at 76,951. In commenting on the Proposed Rule, industry cited EPCRA's "routine agricultural operations" provision to argue that AFOs should be exempt from reporting. However, EPA flatly rejected this reading, responding: "Based on the language of [EPCRA], there is no indication that Congress meant to exclude emissions from manure from reporting requirements under [this statute]." EPA, Resp. to Comments 15 (Dec. 12, 2008) [JA614].

Second, EPA directly addressed the issue in its Response Brief in this litigation. EPA Br. at 37–38 & n.22 (Apr. 18, 2016) [Doc. 1609103]. There, EPA clarified that the Agency's statement in the Response to Comments—that "there is no indication that Congress meant to exclude emissions from manure from [EPCRA] reporting requirements"—was a "direct response" to industry's theory that AFOs are exempt from EPCRA reporting because of "the exclusion of substances 'used in routine agricultural operations' from the scope of 'hazardous chemicals,'" among other industry arguments. *Id.*

Third, EPA also rejected this argument in Petitioner National Pork Producers Council's ("NPPC's") Western District of Wisconsin challenge to the Final Rule, *National Pork Producers Council v. Jackson*, 638 F. Supp. 2d 1020 (W.D. Wis. 2009). In response to NPPC's argument that the "routine agricultural operations" provision exempted all AFOs from EPCRA reporting, EPA wrote,

> The exception for "routine agricultural operations" is quite obviously directed at farms or other agricultural operations, but that does not mean that farms are not subject to EPCRA in the first instance . . . As noted in *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 713–14 (W.D. Ky. 2003), operating a farm or animal feeding operation and utilizing a covered substance in "routine agricultural operations," are not necessarily synonymous. The question of whether a particular farm falls within the "routine agricultural operations" exception depends on a factual determination to be made based on the specific farm being subjected to a specific enforcement action.

Reply Brief for Defendant at 12–13, *Nat'l Pork Producers Council v. Jackson*, 638 F. Supp. 2d 1020 (W.D. Wis. 2009) (No. 09–cv–73–slc), 2009 WL 1630976 (attached as Attachment 6). EPA succeeded in dismissing NPPC's challenge to the Final Rule, which NPPC based on the theory that the "routine agricultural operations" provision exempted all AFOs from all EPCRA reporting. *See Nat'l Pork Producers Council*, 638 F. Supp. 2d at 1023.

EPA has thus thrice rejected the same EPCRA exemption it now adopts without going through proper rulemaking procedures.[7]

## ARGUMENT

### I. THE COURT SHOULD NOT ALLOW AN ADDITIONAL STAY OF THE MANDATE.

"A motion to stay the issuance of a mandate will not be granted unless 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 cause for staying the mandate has been shown. *See California v. Am. Stores Co.*, 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. EPA*, 489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph, J., concurring) (decisions on

[7] In addition to these prior express rejections of the EPCRA theory that EPA now espouses, EPA's prior enforcement actions against AFOs for violations of the EPCRA reporting mandate are implicit admissions by EPA that the "routine agricultural operations" provision does not exempt all AFOs from all EPCRA reporting. *See, e.g.*, Consent Decree Between United States of America and Citizens Legal Environmental Action Network, Inc. and Premium Standard Farms, Inc. and Continental Grain Co., Inc., *Citizens Legal Envtl. Action Network v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6 (W.D. Mo. Jan. 23, 2002), http://www2.epa.gov/sites/production/files/documents/psfcd.pdf.

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.").

None of these factors warrant a further delay in issuing the mandate. First, the balance of the equities weighs strongly in favor of denial of the stay because EPA seeks additional time to undermine, rather than further, implementation of the Court's Opinion. In its original motion to stay the mandate, EPA told the Court that it needed "time to develop guidance for farms on how to measure or estimate their emissions in order to come into compliance with the reporting requirements." July Stay Mot. 4. But EPA has instead abused this time to develop an Interim Guidance that would thwart the Court's ruling and the EPCRA statute. *See infra* Argument II. The Court should not give EPA more time to pursue its impermissible ends. *See Siggers v. Tunica Cty. Bd. of Supervisors*, 502 U.S. 933, 935 (1991) (Blackmun, J., dissenting) ("The mere passage of time does not create a balance of equities in the county's favor in the face of the county's failure to comply with [statutory] requirements . . .").

In addition, no party will suffer irreparable harm if the mandate were to issue as currently scheduled. EPA has now released the guidance that it claimed

was necessary for AFOs to estimate their emissions.[8] *See* Interim Guidance. EPA has thus satisfied the rationale for its original stay. *See* July Stay Mot. 4. Nevertheless, EPA now seeks time to accept comments on the Interim Guidance—including the illegal EPCRA interpretation—and to develop an AFO-specific continuous release report. *See* Mot. for Further Stay 5–6. It is notable that EPA adopted its illegal interpretation of EPCRA and claimed that it has immediate effect *without following APA-mandated procedures*, yet requests an additional delay of the mandate under the guise of seeking comments on its Interim Guidance. The Court should not countenance EPA's use of notice and comment *only* when it serves the Agency's interests in delay. Moreover, nothing prevents AFOs with continuous releases from using the Interim Guidance to complete and submit the currently available continuous release report form, notwithstanding any amendments to the guidance EPA may issue later. *See* Comments of the Dairy Education Alliance et al. Ex. B (Mar. 27, 2008) [JA533–41] (AFO release report using generally applicable continuous release form).

Finally, the public interest weighs heavily in favor of denial of the stay. EPA has been denying communities their statutory right to information about

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[8] Though EPA continues to delay in finalizing its official emission estimation methodology, *see generally* OIG Report, EPA's Interim Guidance now provides links to pre-existing, external methods to estimate emissions that EPA will deem acceptable until it finalizes its own methods, *see* Interim Guidance at "Resources."

emissions for over a decade. Now, with its new EPCRA exemption, EPA intends to deny the public's access to that information in perpetuity. EPA has acted against the public interest for long enough; this Court must not allow any further delay of Congress's mandate or the Court's own.

## II. THE COURT SHOULD CLARIFY THAT ITS MANDATE DOES NOT ALLOW FOR EPA'S NEW EPCRA EXEMPTION.

EPA's Interim Guidance and EPCRA Q&A show that EPA has misunderstood the Court's Opinion in this matter. To correct this misunderstanding, Waterkeeper Petitioners ask that when the Court issues the mandate, it clarify that the Opinion's analysis of EPCRA does not allow the exemption EPA has announced in its Interim Guidance and EPCRA Q&A. This Court has the authority to clarify its mandate and should do so for three reasons: first, the Court already held that EPCRA does not provide leeway for any additional exceptions; second, the Court already implicitly rejected EPA's newly adopted interpretation; and third, EPA's proposed interpretation is contrary to the plain meaning of EPCRA.

### A. The Court Has Broad Authority to Clarify its Mandate.

This Court has broad authority to clarify that the construction of EPCRA in the Interim Guidance and EPCRA Q&A is inconsistent with the Court's Opinion. In *NetCoalition v. Securities and Exchange Commission*, 715 F.3d 342 (D.C. Cir. 2013), this Court held that it may "correct any misconception of [its] mandate by .

. . [an] administrative agency subject to [its] authority." *Id.* at 354 (quoting *Office of Consumers' Counsel, State of Ohio v. Fed. Energy Regulatory Comm'n*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) (per curiam)). If the Court can correct "a misconception of its mandate" after the mandate issues, it can surely take steps to ensure that any incipient misconception of the mandate is foreclosed when it first issues the mandate. *See Greater Boston Television Corp. v. Fed. Commc'n Comm'n*, 463 F.2d 268, 278 (D.C. Cir. 1971) ("An appellate court . . . has continuing power to accept and pass upon a petition to clarify an outstanding mandate.") (collecting cases); *cf. Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1032 (D.C. Cir.), *supplemented*, 705 F.2d 1343 (D.C. Cir. 1983) ("*PEPCO II*") (citing *Floersheim v. Engman*, 494 F.2d 949 (D.C. Cir. 1973) (finding that the Court has an "inherent power to construe the mandate of [its] earlier decision."); *Finberg v. Sullivan*, 658 F.2d 93, 97 n.5 (3d Cir. 1980) ("Because the obligations of the parties are not fixed until the Court's mandate

issues, it would appear to follow that the Court retains authority to amend its judgment until it issues its mandate.").[9]

### B. The Court Should Clarify that its Mandate Does Not Allow the Sweeping EPCRA Exemption EPA Seeks to Adopt.

#### 1. The Opinion Forecloses the Interpretation of EPCRA Set Forth in the Interim Guidance and EPCRA Q&A.

This Court should clarify that its April 2017 Opinion does not allow the blanket EPCRA exemption that EPA now seeks to implement in its Interim Guidance. That Opinion held that both CERCLA and EPCRA contain "sweeping reporting mandate[s]" without any "language of delegation" to EPA. Op. 12. EPA thus has no "discretion to fashion other exemptions" from the statutes' mandates. *Id.*; *see also id.* 11–12 (not listing the "routine agricultural operations" provision on which EPA now relies as an example of statutory exemptions from the CERCLA/EPCRA reporting requirement for AFOs). Nor does EPA's general

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[9] Pursuant to Fed. R. App. P. 41(a), "[u]nless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs." "While a mandate can be a formal order, it usually consists of nothing more than a certified copy of the judgment and copies of any opinion and direction as to costs that the court may have issued." *United States v. Campbell*, 168 F.3d 263, 267 n.3 (6th Cir. 1999) (quoting 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3987, at 687 (1996)). This Court thus can clarify its mandate either by issuing a formal mandate or order, or by supplementing its April 11, 2017 Opinion prior to issuance of the mandate. *See Greater Boston Television*, 463 F.2d at 277 (finding that a court's inherent power and 28 U.S.C. § 2106 both authorize the court to "affirm, modify, or vacate any judgment or order.").

rulemaking authority under these statutes "give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble," *id.* at 13, because "[a]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate," *id.* (quoting *Util. Air Regulatory Grp. v. E.P.A.*, __ U.S. __, 134 S. Ct. 2427, 2446 (2014)). Finally, this Court held that the many benefits of release reporting by AFOs—including reporting to state and local agencies under EPCRA—prevents EPA from crafting a reporting exemption under the *de minimis* doctrine. Op. 13–18.

Contrary to this Court's holding that EPCRA's "sweeping reporting mandate" forbids EPA from creating or expanding reporting exemptions, Op. 12, EPA now attempts to stretch EPCRA's limited exemption of facilities to the extent they "use" hazardous chemicals in routine agricultural operations until it exempts all AFOs from all EPCRA reporting. This Court held that the few EPCRA provisions that exempt reporting must, if anything, be narrowly read. On the face of EPCRA's "sweeping reporting mandate," Op. 12, EPA has no discretion to fashion an equally sweeping exemption from that mandate.

### 2. The Court Already Implicitly Rejected EPA's New Interpretation of EPCRA.

The Court's Opinion tacitly rejects EPA's interpretation of the "routine agricultural operations" EPCRA exemption. EPA's newly adopted EPCRA interpretation was squarely before this Court in NPPC's petition for review of the

EPCRA portions of the Final Rule—a petition that this Court dismissed. NPPC argued that "manure that is 'used in routine agricultural operations' is excluded from the definition of 'hazardous chemical' and thus, is not subject to any of EPCRA's requirements." NPPC Opening Br. 20–21 (Apr. 18, 2016) [Doc. 1609137] (citing 42 U.S.C. §§ 11021(e), 11049); *see also id.* at 6 n.3 ("farms that release hazardous chemicals as part of routine agricultural operations are not subject to EPCRA reporting requirements"); NPPC Reply Br. 13 n.5 (Apr. 18, 2016) [Doc. 1609140]. This Court acknowledged NPPC's arguments against the Final Rule's EPCRA carve-out, Op. 7, but nevertheless dismissed NPPC's petition when it vacated the Final Rule, *id.* at 18.

To the extent that this Court dismissed NPPC's interpretation of the "routine agricultural operations" provision in an implicit manner only, it is because EPA expressly *rejected* that interpretation in this litigation, so the Court had no reason to directly address the issue. *See supra* Statement of Facts. Moreover, EPA is judicially estopped from arguing that the "routine agricultural operations" provision exempts all farms from all EPCRA reporting because it succeeded in dismissing NPPC's petition in this litigation, as well as NPPC's claim in the Western District of Wisconsin, based on EPA's prior, contrary position. *See supra* Statement of Facts; *see also Aera Energy LLC v. Salazar*, 642 F.3d 212, 219 (D.C. Cir. 2011) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)) ("Where

a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . .").

### 3. EPA's New Interpretation Cannot Be Squared with the Plain Meaning of EPCRA.

Furthermore, on its face, EPA's newly adopted EPCRA exemption violates the clear language of the statute and cannot stand. Under EPCRA, any facility that "produce[s], use[s], or store[s]" a "hazardous chemical" must report releases of "extremely hazardous substances" above reportable quantities. 42 U.S.C. § 11004(a). EPCRA defines "hazardous *chemical*" based on the definition in Occupational Safety and Health Administration ("OSHA") regulations, with certain added exceptions.[10] *See* 42 U.S.C. §§ 11021(e), 11049(5). EPCRA defines "extremely hazardous *substance*," meanwhile, as a substance included in EPA's list of such substances. *See* 42 U.S.C. §§ 11002(a), 11049(3); 40 C.F.R. pt. 355, app. A.

[10] OSHA defines "hazardous chemical" as "any substance, or mixture of substances" "which is classified as a physical hazard or a health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified." 29 C.F.R. § 1910.1200(c).

Ammonia and hydrogen sulfide are classified as both "hazardous chemicals" and "extremely hazardous substances" under EPCRA.[11] Because these pollutants are "hazardous chemicals" under EPCRA, and AFOs produce these "serious pollutants," Op. 2, AFOs are facilities at which hazardous chemicals are "produced" and therefore must report under EPCRA.[12] 42 U.S.C. § 11004(a).

EPCRA excludes from the definition of "hazardous chemical" "[a]ny substance to the extent it is *used* in routine agricultural operations." 42 U.S.C. § 11021(e)(5) (emphasis added). But that provision does not exempt AFOs from reporting under EPCRA, because the gaseous ammonia and hydrogen sulfide that are emitted from AFOs are not "used" by AFOs in any sense of the word. *See* Op. 14–15 (quoting Final Rule, 73 Fed. Reg. at 76,957) (explaining that, rather than being used in agricultural operations, "hydrogen sulfide . . . and ammonia 'are

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[11] OSHA classifies anhydrous ammonia and hydrogen sulfide as "toxic and reactive *highly hazardous chemicals* which present a potential for a catastrophic event at or above [a] threshold quantity." 29 C.F.R. § 1910.119 app. A (emphasis added); *see also* 29 C.F.R. § 1910.1000 tbl.Z-1 (listing ammonia and hydrogen sulfide as air contaminants). These substances are therefore "hazardous chemicals" under EPCRA. *See* 42 U.S.C. §§ 11021(e), 11049(5). In addition, ammonia and hydrogen sulfide both appear in EPA's list of EPCRA "extremely hazardous substances." 40 C.F.R. pt. 355, app. A.

[12] AFOs may produce, use, or store other substances, in addition to ammonia and hydrogen sulfide, that would satisfy EPCRA's broad definition of "hazardous chemical." This is an additional reason they are subject to the EPCRA reporting requirement.

rapidly released from the manure [into air] and may reach toxic levels or displace oxygen, increasing the risk to humans and livestock'" as a byproduct of pit agitation). The Western District of Kentucky directly addressed this issue and concluded that chicken AFOs do not "use" the ammonia from chicken manure. It found:

> In the present case, Plaintiffs contend that the venting of gaseous ammonia into the atmosphere must be reported under EPCRA, not that the storage of chicken manure or the application of chicken manure to farm fields is subject to the reporting requirements. *The Defendants do not store gaseous ammonia in their chicken houses for agricultural use. They do not use this ammonia in an agricultural operation.* Instead, as pointed out by the Plaintiffs, the Defendants try to get rid of it because it is harmful to the chickens. Accordingly, the Court finds that the routine agricultural use exemption does not apply to the facts of this case.

*Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 713–14 (W.D. Ky. 2003) (emphasis added).

EPA's Interim Guidance now construes this "routine agricultural operations" provision as exempting all AFOs from all EPCRA reporting, in contravention of the plain reading of the statute. Congress required reporting by facilities where a hazardous chemical is "produced, used, or stored," 42 U.S.C. § 11004(a), but exempted from the definition of hazardous chemical only those substances "to the extent [they are] used" in routine agricultural operations, *id.* § 11021(e)(5). Congress was clear that this exception applies to a substance only to "to the extent"

it is used in routine agricultural operations. *Id.* Under any plain reading of the statute, the phrase "produced, used, or stored" is broader than the term "used." The reporting mandate—which applies to facilities that "produce[], use[], or store[]" hazardous chemicals—must therefore be broader than its exemption—which applies only to those chemicals "used" in routine agricultural operations.

In contravention of the plain terms of EPCRA, EPA's Interim Guidance treats the phrase "produced, used, or stored" as coextensive with the term "used." *See* EPCRA Q&A ("if a farm only *uses* substances in 'routine agricultural operations,' the farm would not be a facility that *produces, uses or stores* 'hazardous chemicals'") (emphasis added). EPA's contorted reading of EPCRA would have the narrow exception swallow the broad mandate. Specifically, EPA treats the words "produced" and "stored" "as stray marks on a page—notations that Congress regrettably made but did not really intend." *Advocate Health Care Network v. Stapleton*, __ U.S. __, 137 S. Ct. 1652, 1659 (2017). But a plain reading must "give effect, if possible, to every clause and word" of EPCRA. *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence,

or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted).

EPA's guidance contorts EPCRA's language to find a total AFO exemption, but "[t]he problem with this argument is that" EPA can "cite no authority which exempts animal production facilities from the reporting requirements of EPCRA . . . . If Congress had intended such a result, it could have excluded animal production facilities, such as poultry and swine, from the reporting requirements." *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 706 (W.D. Ky. 2003); *cf.* 42 U.S.C. § 11023(b)(1) (specifying Standard Industrial Classification for which EPCRA Toxic Release Inventory provisions apply, but not including agricultural industries); 42 U.S.C. § 9601(14) (exempting petroleum and natural gas products from CERCLA's definition of "hazardous substance").

A plain reading of EPCRA does not permit the contorted statutory construction that EPA sets forth to justify its newest AFO exemption.

* * *

With its Interim Guidance and EPCRA Q&A, EPA is running roughshod over the Court's Opinion and the plain language of EPCRA, not to mention the Administrative Procedure Act. Since the mandate has not yet issued, this Court should use the issuance of the mandate as an opportunity to clarify that its Opinion does not allow EPA to implement or otherwise promulgate its new, total EPCRA

exemption. *See Dilley v. Alexander*, 627 F.2d 407, 411 (D.C. Cir. 1980) ("There could be no more good cause provided, nor injustice incurred, than by the misconstruction of our mandate by the [agency] . . . below."). Given EPA's storied history of attempts to evade enforcing CERCLA and EPCRA by any means necessary, *see supra*, Waterkeeper Petitioners additionally request that the Court retain jurisdiction for three years, or until such time as the Court deems necessary to ensure that EPA will implement and enforce Congress's reporting mandate.

## CONCLUSION

For the reasons set forth above, Waterkeeper Petitioners respectfully request that the Court deny EPA's Motion for Further Stay of Mandate; issue a formal mandate or supplemental opinion that clarifies that the Court's April 11, 2017 Opinion does not allow EPA to exempt all AFOs from EPCRA reporting; and retain jurisdiction for three years after issuance of the mandate, or whatever time the Court deems reasonable.

Dated: November 9, 2017

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## CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of D.C. Cir. R. 27(c) because it contains 6,031 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: November 9, 2017

/s/ Jonathan J. Smith

**CERTIFICATE OF SERVICE**

I hereby certify that on November 9, 2017, I filed the above motion with the Court's CM/ECF system, which will send notice to all parties. Counsel for EPA has agreed to waive service of paper copies for Mr. Jeffrey H. Wood, Acting Assistant Attorney General, U.S. Department of Justice.

Dated: November 9, 2017

/s/ Jonathan J. Smith