IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL ZOOK, MICHELLE McLAIN-KRUSE, BIRGITTA MEADE, and ANNETTE LAITINEN,	)	No. 13-cv-1315
Plaintiffs,	)	
vs.	)	
GINA McCARTHY and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	RESISTANCE TO DEFENDANT'S MOTION TO DISMISS
Defendants.	)	

INTRODUCTION

The Plaintiffs are residents of Winneshiek County, Iowa, who previously attended North Winneshiek School, currently teach at the school, or have children who attend the school. The school is near several animal feeding operations. As shown by the studies referenced in and attached to Plaintiffs' Complaint, animal feeding operations emit pollutants into the air that cause illness to persons near the operations.

A description and definition of animal feeding operations is found in EPA regulations at 40 C.F.R. § 122.23. An animal feeding operation is an open feed lot or a confinement building, as well as the crop fields where manure from the livestock is applied, where animals are confined and fed or maintained for a total of 45 days or

more in any 12-month period and there are no crops, vegetation, forage growth, or post-harvest residue in the area in and around the lot or confinement building. An animal feeding operation is designated as a concentrated animal feeding operation (CAFO) based primarily on the number of animals present, e.g., more than 2,500 hogs, 1,000 beef cattle, 700 dairy cattle, 125,000 chickens. It is the concentration of animals that causes the problems of air and water pollution.

CAFOs usually have more than the minimum number of animals to qualify as CAFOs. It is common for hog confinement operations to have as many as 10,000 hogs, and it is not uncommon to have as many as 20,000-30,000 animals. Beef cattle in open feedlots can number as many as 4,000-5,000 head. Manure from open feedlots is collected in piles on a short-term basis and then applied to the land. Manure from confinement operations is usually collected in large pits under the facility. The manure is then emptied once or twice a year and applied (or over applied) to crop fields.

During the time that the manure is in the piles or in the pits, it is undergoing anaerobic digestion, constantly generating and sending poisonous sewer gases into the air. But unlike a municipal sewage treatment plant, the animal

waste is not treated and the pollutants are not diluted. Thus, the manure from hogs, which is 5 times more polluting than human waste, in a 10,000 head CAFO is the same as the waste from a city of 50,000 people, without the pollution control treatment. This is like a third-world country that does not treat its waste and allows it to pollute the air and the water. We would never allow that quantity of human sewage to sit in an open pit without treatment for up to 12 months and then allow it to be dumped on farm fields without being treated, yet that is exactly what is happening with animal sewage.

As the Pew Commission on Industrial Farm Animal Production described it:

> Decomposing manure produces at least 160 different gases, of which hydrogen sulfide (H_2S), ammonia, carbon dioxide, methane, and carbon monoxide are the most pervasive. These gases may seep from pits under the building or they may be released by bacterial action in the urine and feces on the confinement house floor. Possibly the most dangerous gas common to industrial food animal production (IFAP) facilities is hydrogen sulfide. It can be released rapidly when the liquid manure slurry is agitated, an operation commonly performed to suspend solids so that pits can be emptied by pumping. During agitation, hydrogen sulfide levels can soar within seconds from the usual ambient levels of less than 5 ppm to lethal levels of over 500 ppm. Animals and workers have died or become seriously ill in swine industrial farm animal production (IFAP) facilities when hydrogen sulfide has risen from agitated manure in pits under the building. Hydrogen sulfide exposure is most hazardous when the manure pits are located beneath the houses, but an acutely toxic environment can result if gases from outside

> storage facilities backflow into a building (due to inadequate gas traps or other design faults) or if a worker enters a confined storage structure where gases have accumulated.

Pew Commission on Industrial Farm Animal Production, Putting Meat on the Table: Industrial Farm Animal Production in America (Washington, DC: Pew Charitable Trusts and Johns Hopkins Bloomberg School of Public Health, 2008), p. 23.

As shown by the studies referred to in Plaintiffs' Complaint, the health effects of the air pollution from CAFOs have been a concern for many years.

In this action, the Plaintiffs are asking the Court to require EPA to undertake its duty to regulate animal feeding operations under the Clean Air Act.

STANDARD OF REVIEW

The Defendants have correctly stated the standard of review on a motion to dismiss and the applicable provisions of the Clean Air Act in sections (I)(A) and II of their Memorandum. The Plaintiffs will not repeat those statements.

ARGUMENT

A. Plaintiffs' Claims

Plaintiffs make two claims in this case. First, Plaintiffs claim that EPA has a non-discretionary duty to

list ammonia and hydrogen sulfide as criteria pollutants under the Clean Air Act. Second, Plaintiffs claim that EPA has a non-discretionary duty to list animal feeding operations as stationary sources of air pollution under the Clean Air Act. There is no question that pursuant to Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7409, EPA has a non-discretionary duty to list pollutants that may reasonably be anticipated to endanger public health and welfare, and to establish ambient air quality standards for such pollutants. Likewise, § 111 of the Clean Air Act, 42 U.S.C. § 7411, imposes on EPA a non-discretionary duty to designate animal feeding operations as stationary sources of air pollution.

Section 108, 42 U.S.C. § 7408, clearly says that EPA "shall" list pollutants that may reasonably be anticipated to endanger public health or welfare, § 109, 42 U.S.C. § 7409, clearly says that EPA "shall" adopt regulations regarding such pollutants, and § 111, 42 U.S.C. § 7411, clearly says that EPA "shall" list stationary sources of air pollution that may reasonably be anticipated to endanger public health or welfare. The law is firmly established that use of the word "shall" creates a mandatory duty. See, Bennett v. Spear, 520 U.S. 154, 175,

117 S.Ct. 1154 (1997); Allied Pilots Ass'n. v. Pension Benefit Guar. Corp., 334 F.3d 93, 98 (D.C. Cir. 2003).

Plaintiffs bring this action as a citizen suit pursuant to 42 U.S.C. § 7604. Section 7604(a)(2) authorizes any person to bring a civil action against the EPA for failure to perform any non-discretionary act or duty under the Clean Air Act, including action unreasonably delayed. Contrary to the allegation of the Defendants in this case, there is nothing in that section that limits its terms to situations where the agency's duty is subject to a time-certain deadline. The Defendants' reliance on Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987) is misplaced.

The Thomas case addressed the law as it was in 1987, when district courts had jurisdiction of a violation of a non-discretionary duty where there was a date-certain deadline, but courts of appeals had jurisdiction pursuant to the Administrative Procedure Act of all unreasonable delay cases. But, as explained in the Defendants' brief herein, the law was amended in 1990 to give district courts jurisdiction over unreasonable delay claims. Therefore, unreasonable delay under the Clean Air Act is a violation of a non-discretionary duty. So it appears that, after the 1990 amendment to the law, there is really no distinction between a failure to meet a time-certain deadline and

unreasonable delay. Both are violations of a mandatory, non-discretionary duty over which this Court has jurisdiction.

In any event, the Plaintiffs' claims are that the EPA has a non-discretionary duty, "from time to time," to revise the list of air pollutants and stationary sources that may reasonably be anticipated to endanger public health and welfare. Failure to undertake this duty has been addressed by the courts as a non-discretionary duty unreasonably delayed. See, Center for Biological Diversity v. EPA, 794 F.Supp.2d 151 (D.D.C. 2011); Friends of the Earth v. EPA, 934 F.Supp.2d 40 (D.D.C. 2013).

EPA's Duty to Make Endangerment Findings

EPA's argument boils down to the allegation that the endangerment finding that precedes the requirement to revise the listing of criteria pollutants and stationary sources under the Clean Air Act is a discretionary act that cannot be challenged by a citizen suit under 42 U.S.C. § 7604. This question has been considered in two cases in this Court with directly opposite results. Center for Biological Diversity v. EPA, 794 F.Supp.2d 151 (D.D.C. 2011); Friends of the Earth v. EPA, 934 F.Supp.2d 40 (D.D.C. 2013).

In Friends of the Earth v. EPA, supra, the court looked primarily to the text of the statute at issue in that case, 42 U.S.C. § 7571(a)(2)(A), to determine that the endangerment finding is not a non-discretionary act. But the court's analysis does not really support its conclusion. First, the court admits that Congress did not clearly separate the phrase concerning the endangerment finding from the mandatory word "shall" using any grammatical separation, such as punctuation. "When several words are followed by a clause which is applicable as much to the first and other words as the last, the natural construction of the language demands that the clause be read as applicable to all." Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348, 40 S.Ct. 516 (1920).

Nor does the statute use a conditional sentence, such as "if the Administrator finds in his judgment that any air pollutant causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare, then it shall issue emission standards." Friends of the Earth supra at 48. Instead, the statute uses the word "which." The court concluded, therefore, that "it is not clear that Congress intended to establish the making of endangerment findings as a mandatory duty, and the language also falls short of a clear indication that Congress

intended to designate it to be a discretionary activity." Id. at 49.

The court then confronted the EPA's argument (the same argument it makes in this case) that the phrase "in his judgment" creates a discretionary action. The court did not agree with this argument. The court said:

> While the use of "in his judgment" reveals that Congress sought to assign the agency the responsibility to judge or determine which pollutants belong to the category the agency is required to regulate, it does not signal that Congress necessarily gave the agency complete discretion over whether and when to make that determination. The provision states that the Administration shall issue standards applicable to the emission of "any air pollutant . . . which in his judgment causes . . . ." The decision committed to agency expertise is the substance of the determination – whether an air pollutant meets the criteria – and the word "judgment" appears to be simply a synonym for decision or determination. Thus, the sentence has the same meaning as if it said "which he finds" or "which he determines." So, the text of the statute alone does not clearly indicate that making the determination is only a discretionary duty.

Id. at 49.

This position comports with the decision in other cases interpreting §§ 108, 109, and 111, or sections of the Clean Air Act with similar structures, that the existence of language affording an agency some discretion over its regulatory decisions does not render discretionary a clear mandatory duty to conduct rulemaking. In Environmental Defense Fund v. Thomas, for example, plaintiffs sought to

compel EPA to revise the NAAQS for sulfur dioxides under Section 109(d) of the Clean Air Act. That section provided that "the Administrator shall complete a thorough review of the criteria published under Section 108 . . . and promulgate such new standards as may be appropriate." Id. at 895 (emphasis added). In that case, much as it does here, EPA argued that the phrase "as may be appropriate" gave it discretion "simply not to address the issue with a formal public opinion." Id. at 898. The Court of Appeals for the Second Circuit rejected that argument, holding that "[t]he words 'as may be appropriate' clearly suggest that the Administrator must exercise judgment and the presence of 'shall' in the section implies only that the district court has jurisdiction to order the Administrator to make some formal decision whether to revise the NAAQS, the content of that decision being within the Administrator's discretion." Id. at 898-899; see also, Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1047 (D.C. Cir. 1999)(adopting the Second Circuit's reasoning regarding mandatory duty from Am. Lung Ass'n v. Reilly, 962 F.2d 258, 262-263 (2d Cir. 1992), which cited Envtl. Def. Fund v. Thomas, with approval); Sierra Club v. Leavitt, 355 F.Supp.2d 544, 549 (D.D.C. 2005)(holding that a statutory clause that provides

an agency flexibility in determining the substance of a regulation does not nullify a clear mandatory duty).

The court in Friends of the Earth then seems to misapprehend the structure of the statute creating the EPA's duty. The court acknowledged that the requirement to revise the listings "from time to time" creates a meaningful standard for judicial review of unreasonable delay cases. Id. at 51. Furthermore, in footnote 5, the court stated that it was not suggesting that it was the vagueness of the phrase "from time to time" that allegedly makes the endangerment finding discretionary. Rather, it was the court's view that a chain of inferences and intrusion on agency discretion are required to establish a deadline for the endangerment finding.

It is not clear from the court's opinion what inferences would have to be made to establish a deadline. And a proper construction of the statute makes the endangerment finding non-discretionary if the mandatory intent of the statute is to be carried out. The Plaintiffs submit that if the requirement of revising the statutory listings "from time to time" is, as the court said in Am. Lung Ass'n. v. Reilly, 962 F.2d 258 (2d Cir. 1992), a meaningful standard on which to judge unreasonable delay, a

court can determine whether the delay is unreasonable based on the specific facts of each case.

What the court in Friends of the Earth misapprehended, however, is that the EPA cannot carry out its non-discretionary duty to revise the lists of pollutants and stationary sources "from time to time" without making an endangerment finding. Therefore, it is obvious that the endangerment finding must also be made "from time to time" in order for the listings, as required, to be made "from time to time." And as the court conceded in Friends of the Earth, that phrase establishes a "meaningful standard for judicial review" in unreasonable delay cases. Therefore, it does in this case, as well.

The decision of the Second Circuit in NRDC v. Train, 545 F.2d 320 (2nd Cir. 1976), although distinguishable in many respects from this case, is illustrative in demonstrating the correct analysis for interpreting the statute in this case. In Train, the EPA argued that it did not have to list lead as a criteria pollutant under the Clean Air Act because § 108(C) mandates listing for any pollutant "for which [the Administrator] plans to issue air quality criteria." The EPA's argument was that since the EPA did not intend to issue air quality criteria for lead, it did not have to list lead as a criteria pollutant. In

other words, the EPA argued that it had the discretion not to list lead as a pollutant.

The Train court held that the EPA's interpretation of the statute was "contrary to the structure of the Act as a whole, and that if accepted, it would vitiate the public policy underlying the enactment of the 1970 Amendments as set forth in the Act and in its legislative history." Id. at 324. The Train court went on:

> Section 108(a)(1) contains mandatory language. It provides that "the Administrator shall . . . publish . . . a list . . . ." (Emphasis added). If the EPA interpretation were accepted and listing were mandatory only for substances "for which [the Administrator] plans to issue air quality criteria . . .", then the mandatory language of § 108(a((1((A) would become mere surplusage.

Id. at 324-325. This analysis applies equally to the requirement for the endangerment finding at issue in this case.

The court in Friends of the Earth then purported to consider the structure and purpose of the statute at issue. But in doing so, the court relied on the opinion in Sierra Club v. Thomas, supra. As previously discussed, the Thomas case is not relevant. The court in Friends of the Earth cited the statement in Thomas that a non-discretionary duty is one that is clear-cut and involves a ministerial act. The court then went on to say that if the duty is not

clear-cut and simply ministerial, it is an issue that must be presented to the Court of Appeals. Of course, this analysis overlooks the fact that when Thomas was decided, the district courts had no jurisdiction over unreasonable delay cases. Now they do. And the court in Friends of the Earth acknowledged that the phrase "from time to time" is sufficient to give rise to an unreasonable delay claim and that the phrase "in his judgment" does not make the endangerment finding discretionary.

Therefore, the Plaintiffs believe the Friends of the Earth case was not correctly decided.

The other pertinent case is Center for Biological Diversity v. EPA, supra. That case, just as with Friends of the Earth, alleged EPA's failure to list pollutants pursuant to 42 U.S.C. § 7571(a)(2)(A). The court in Center for Biological Diversity found that treating the endangerment finding as a discretionary act would defeat the purpose of the statute "by allowing EPA to shirk its duty to combat air pollution." Id., 794 F.Supp.2d at 159-160. The court correctly concluded that the relevant paragraph could not be read in a vacuum, but must be read with reference to the rest of the statute.

The court in Center for Biological Diversity was simply following the guidance from the Supreme Court and

the Court of Appeals for the D.C. Circuit. In construing a statute, "the [statutory] language itself, the specific context in which that language is used, and the broader context of the statute as a whole" must be examined. Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S.Ct. 843 (1997). A court should use "all traditional tools of statutory interpretation, including text, structure, purpose, and legislative history, to ascertain Congress' intent . . . ." Nat'l. Cable & Telecomms. Ass'n. v. FCC, 567 F.3d 659, 663 (D.C. Cir. 2009).

But construction of the statutory language "does not end here, but must continue to 'the language and design of the statute as a whole.'" Am. Scholastic TV Programming Found. v. FCC, 46 F.3d 1173, 1178 (D.C. Cir. 1995)(quoting Fort Stewart Sch. V. FLRA, 495 U.S. 641, 645, 110 S.Ct. 2043 (1990). See also, Roberts v. Sea-Land Servs. Inc., 132 S.Ct. 1350, 1357 (2012); Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997). A court must also "exhaust the traditional tools of statutory construction, including examining the statute's legislative history to shed new light on congressional intent, notwithstanding statutory language that appears superficially clear." Sierra Club v. EPA, 551 F.3d 1019, 1027 (D.C. Cir. 2008).

As discussed previously, the entire language and thrust of §§ 7408, 7409 and 7411, are mandatory, using the word "shall." If the endangerment clause were discretionary, the mandatory commands to list pollutants, establish emission standards, and list stationary sources "from time to time" would be meaningless since those mandatory duties cannot be accomplished without an endangerment finding. In other words, if, as the EPA argues, it does not have to ever make an endangerment finding, it would never have to list pollutants, establish emission standards, or list stationary sources, a position clearly at odds with the mandatory intent of the statutes. EPA is arguing, therefore, that it is free to flout the will of Congress.

It is also important to determine legislative history, as did the court in Center for Biological Diversity, along with the language of the statute. Chevron , U.S.A., Inc. v. NRDC, 467 U.S. 837, 851-853, 862-864, 104 S.Ct. 2778 (1984); Aid Ass'n. for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1176-78 (D.C. Cir. 2003). The 1977 amendments to the Clean Air Act pertaining to the endangerment finding were a response to the decision in Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), where the court said that the Clean Air Act "and common sense . . . demand regulatory

action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable," as quoted in Massachusetts v. EPA, 549 U.S. 497, 506, n. 7, 127 S.Ct. 1438 (2007). So, the 1977 amendments were designed to make it clear that the Clean Air Act "demand[s] regulatory action." A "demand" for regulatory action indicates that Congress intended a mandatory duty.

The legislative history of the 1970 amendments to the Clean Air Act was also relied upon in NRDC v. Train, supra, to determine that EPA's duty to list lead as a criteria pollutant was mandatory. The Train court noted that the Clean Air Act Amendments of 1970 were a reaction by Congress to the lack of progress in combating air pollution under the prior law.

Applicable to this case, Congress made the following statement in explaining the Clean Air Act Amendments of 1970:

> Air pollution continues to be a threat to the health and well-being of the American people. While a start has been made in controlling air pollution since the enactment of the Air Quality Act of 1967, progress has been regrettably slow. This has been due to a number of factors: . . . (6) last, but not least, failure on the part of the National Air Pollution Control Administration to demonstrate sufficient aggressiveness in implementing present law. . . . Therefore, it is urgent that Congress adopt new clean air legislation which will make possible the more expeditious imposition of specific emission standards both for mobile and stationary sources and the

effective enforcement of such standards by both State and Federal agencies.

U.S. Cong. & Admin. News, V. 3, p. 5360 (1970).

It is significant that the EPA in this case did not provide any analysis of the Center for Biological Diversity case as the Plaintiffs have done here. The EPA in its Memorandum simply says in footnote 8 at p. 13 that it believes the Center for Biological Diversity case was wrongly decided, as if the EPA's unsupported opinion is sufficient argument for this Court.

It should be clear from the foregoing that the EPA's reliance on the Friends of the Earth case is unjustified. Plaintiffs submit that the Friends of the Earth case was incorrectly decided for the following reasons:

a. The court said in a footnote that a chain of inferences was required to establish a deadline for agency action. However the court acknowledged that "from time to time" is sufficiently definite to determine unreasonable delay, citing Am. Lung Ass'n. v. Reilly, supra. So it is not clear what inferences would have to be made to determine unreasonable delay. A court would simply need to consider the facts of the case and determine if the

delay is unreasonable, just as in an unreasonable delay case under the Administrative Procedure Act.

b. The court also said in the same footnote that establishing a deadline would intrude upon agency discretion and impinge on the agency's ability to organize its operations. But again, granting relief under § 7604 would be no different than granting relief for unreasonable delay under the Administrative Procedure Act, which would also arguably intrude upon agency discretion and impinge on the agency's ability to organize its operations. Furthermore, when § 7604 authorizes district courts to grant relief for violation of non-discretionary duties, including unreasonable delay, it is clear that Congress intended for courts to intrude upon agency decisions to that extent.

c. The court commented that to grant relief a court would have to infer a duty to make an endangerment finding from the overall statutory framework. But that is exactly what a court is required to do, as explained above. That is the essence of statutory construction.

d. The court seemed to believe that a court is limited under § 7604 to compelling a ministerial act or

correcting a clear-cut default. This position is clearly at odds with the language of § 7604, which gives a district court the authority to decide unreasonable delay claims.

e. The court stated that only the Court of Appeals has jurisdiction to determine unreasonable delay claims. In support of that position, the court cited cases that were decided under the law prior to the 1990 amendments giving jurisdiction to the district courts over unreasonable delay cases under the Clean Air Act.

f. It is also significant that in Friends of the Earth the plaintiffs had filed a petition for rulemaking with the EPA and EPA formally responded to that petition. The parties agreed that EPA's response was final agency action. Since final agency action is to be reviewed by the Court of Appeals in the first instance, the district court found that the case should have been presented to the Court of Appeals. In the case before this Court, there has been no petition for rulemaking, so obviously, the EPA has not taken any action that would place jurisdiction with the Court of Appeals.

g. The court also seemed to infer that the means to require the EPA to fulfill its duty to list pollutants and sources is a petition for rulemaking. However, there is nothing in §§ 108, 109 and 111 of the Clean Air Act that requires a petition for rulemaking to ensure that the EPA carries out its duties. The terms and construction of the statutes themselves require the EPA to revise the lists of pollutants and sources "from time to time." When the agency fails to make those required revisions, it has violated the statute. That is why Congress authorized citizen suits under § 7604.

So, for all of the reasons set forth above, the Plaintiffs respectfully submit that the Friends of the Earth case was incorrectly decided and is not applicable to the facts and issues in this case.

CONCLUSION

In this case EPA argues that it has the discretion to never comply with the congressional mandate to periodically revise the list of air pollutants and emission sources subject to the Clean Air Act. As shown by the cases discussed above, EPA habitually grasps words and phrases from various statutes that it claims grant it discretion to

do as it pleases. But the overall context and structure of the statutes in question in this case, as well as the legislative history, make it clear that EPA does not have the discretion it claims to have. EPA simply wants the power to disobey the will of Congress and to fail to protect people like the Plaintiffs who are subject to the well-documented air pollution from CAFOs.

This is not a case where the agency has initiated rulemaking and is just taking too long to complete the task. In this case a rule listing ammonia and hydrogen sulfide as criteria pollutants and listing CAFOs as stationary sources is not even a glimmer in the agency's eye. EPA's inaction is stark in light of the studies and data regarding the health impacts of CAFO air pollution going back to the 1990's, as confirmed by the references in Plaintiff's complaint and Exhibit 1 attached thereto.

At this point, in ruling on a motion to dismiss, this Court would grant the motion only if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006). In that light, we do not know when or if EPA intends to undertake a listing, why EPA claims it has not yet undertaken this rulemaking, and other pertinent facts that

would be obtained during discovery. The Plaintiffs have alleged facts more than sufficient to withstand a motion to dismiss.

For all of the reasons set forth herein, this Court should deny the Defendants' Motion to Dismiss.

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 13, 2014, a copy of the foregoing was served on the counsel of record who are registered with the Court's ECF system.

/s/ *Wallace L. Taylor*
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