Comments on Emergency Release Notification Regulations: Reporting for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act

The National Cattlemen’s Beef Association (NCBA) and the undersigned cattle associations appreciate the opportunity to comment in response to the U.S. Environmental Protection Agency’s (EPA or the Agency) proposal to codify the effect of recently-passed legislation on notification requirements for animal waste from farms under the Emergency Planning and Community Right-to-Know Act (EPCRA) Section 304. NCBA is the largest and oldest national trade association representing American cattle producers, working to advance the economic, political, and social interests of its producer-members and to be an advocate for the cattle industry’s policy positions. NCBA strongly supports the EPA’s proposal and recommends adopting this proposal as a final rule.

NCBA members are responsible environmental stewards who manage the land, air, and water that are fundamental to sustaining our environment. We recognize an environmental stewardship code and have adopted policy which states that the NCBA “shall not be compelled to defend anyone in the beef cattle industry who has clearly acted to abuse grazing, water, or air resources.”¹ NCBA promotes our industry’s environmental champions through the Environmental Stewardship Awards Program, recognizing cattle producers who go above and beyond the call of duty to improve our country’s natural resources.² Cattle producers depend on clean air and water to raise livestock. They sustain the land to grow grasses on which cattle forage in turn maintaining, and oftentimes restoring, areas that are critical to wildlife. Maintaining our natural resources is not only a necessity to sustain a beef cattle operation, it’s a way of life for the farm and ranch families entrusted with managing over one-third of America’s land mass.

NCBA supports EPA’s proposal and encourages the Agency to clarify that this proposal does not create a new administrative exemption from the law, but rather codifies the effect of the statutory exemption in

the recently enacted FARM Act. The characterization by EPA of the proposal “to add the reporting exemption” may create the false impression that EPA is creating a new regulatory exemption using its discretionary rulemaking authority. EPA utilized its discretionary rulemaking authority to promulgate the CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste (the 2008 Rule) which was ultimately vacated by the D.C. Circuit.\(^3\) Here, by contrast, EPA is not exercising its discretion to create a new administrative exemption. Rather, the Agency is simply harmonizing its EPCRA regulations with the FARM Act. The FARM Act, as codified in law by the U.S. Congress, effectuated the Agency’s proposed change.

Had EPA chosen to take no regulatory action, the outcome would be the same – the FARM Act explicitly exempts notification requirements for air emissions from certain farms under Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), in turn foreclosing notification requirements under EPCRA section 304.\(^4\) To be clear, EPA was not required by the Administrative Procedure Act to conduct this action in the form of a notice-and-comment rulemaking.\(^5\) EPA proffered this interpretation as such in the interest of good governance; the rulemaking comment period provides transparency to the general public and creates an opportunity for interested stakeholders to give input. While NCBA acknowledges that EPA is under no legal obligation to conduct a notice-and-comment rulemaking, we nonetheless appreciate the transparency of this action and the opportunity to provide our input and feedback.

The prospect of reporting manure emissions under EPCRA is untenable for beef cattle producers and potentially exposes them to liability for failure to report. The expectation created by the D.C. Circuit’s mandate to vacate the 2008 Rule presupposes a world in which reporting compliance is readily-achievable by all cattle producers. As our comments lay out in detail, this is far from the truth. Section I details the data and methodology gap which makes it impossible for all cattle producers to comply with the mandate. Small cattle producers will be harmed the most due to the difficulty of navigating the complexities of the EPCRA reporting obligation and, more importantly, due to the lack of data and methodologies to calculate emissions from pasture-based operations. The likelihood of beef cattle producers completing these reports with a high degree of certainty and accuracy is extremely low. Section II examines recent efforts by NCBA, and other notable agricultural associations, to collaborate with the national association representing state and local emergency responders and their committees (NASTTPO) to satisfy their

\(^4\) 42 U.S. Code § 11004(a).
\(^5\) 5 U.S. Code § 553(b)(B).
informational needs. Since the D.C. Circuit’s decision, NASTTPO has publicly stated that EPCRA air reports for animal waste, *Waterkeeper Alliance v. EPA*, 853 F.3d 527 (2017) on farms have zero benefit to the emergency response community. As such, NCBA resolves to work with NASTTPO to achieve the goals of emergency responders by facilitating a collaborative dialogue between American agricultural producers and emergency responders. And finally, Section III analyzes EPA’s proposal and determines that it is not only reasonable, but also required by congressional action, legislative history, and prior agency action.

I. Background

Cattle feeding operations with over 1,000 head are designated as “large” Concentrated Animal Feeding Operations (CAFOs) and, as such, were required to submit EPCRA reports for air emissions from livestock manure (referred to herein as EPCRA odor reports) pursuant to the 2008 Rule. NCBA submitted robust comments in support of the exemptions contained in the Agency’s the 2008 Rule. Those comments are enclosed. In 2017, the U.S. Court of Appeals for the D.C. Circuit issued a judgment that vacated the 2008 Rule, thereby subjecting all cattle operations, not just the largest, to CERCLA and EPCRA reporting requirements. On March 23, 2018, the President signed into law the Consolidated Appropriations Act of 2018 which included Division S Title XI (the Fair Agricultural Reporting Method Act, or the FARM Act), mandating an exemption from CERCLA for the reporting of air emissions from animal waste at farms. Simply put, the FARM Act explicitly exempts air emissions from animal waste at farms from the CERCLA component of the D.C. Circuit decision. On May 2, 2018, the Court issued its mandate, formally vacating the 2008 rule. In response to passage of the FARM Act, the EPA published a direct final rule on August 1, 2018 amending the CERCLA regulations to conform to the new congressional mandate. The current proposal pertains to the effect of the FARM Act on corresponding EPCRA notification requirements. The D.C. Circuit discussed the interconnected nature of CERCLA and EPCRA reported requirements: In drafting the EPCRA reporting requirements, Congress expressly tied them to CERCLA’s. Repeatedly referring back to CERCLA, Congress set two of the three notification provisions in its new state-targeted measure (EPCRA) to require reports whenever the “release [also] requires a

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6 Letter from Timothy R. Gablehouse, President, National Association of SARA Title III Program Officials, to the Honorable Scott Pruitt, EPA Administrator (June 1, 2017).
8 NCBA’s comments are also available online at www.regulations.gov, ID: EPA-HQ-SFUND-2007-0469-0815.
notification under section 103(a) of CERCLA.” In other words, a release that triggers the CERCLA duty also automatically trips the EPCRA reporting requirements in subsections (1) and (3) of § 11004(a). And under subsection (2), the remaining notice provision, even a release that “is not subject to the notification requirements under section 103(a) of CERCLA” requires EPCRA reporting when it “occurs in a manner which would require notification under section 103(a) of CERCLA.” Thus, all of EPCRA’s reporting mandates piggyback on the CERCLA mandates in one form or another.

The D.C. Circuit’s analysis in this regard leads to an obvious conclusion: because EPCRA reporting requirements are seeded in CERCLA’s, releases exempt from CERCLA reporting requirements are automatically exempt from EPCRA reporting requirements.

a. The science is still sorely lacking.

Much like the CERCLA reporting requirements, the number of cattle that trigger the reporting threshold for EPCRA is far below the 1,000-head threshold of a large CAFO. This is because the reportable quantities for the key pollutant in question (ammonia) are the same under both reporting schemes. A conservative estimate predicts that cattle operations with as few as 330 head are subject to reporting liability. Other research indicates that as few as 208 cattle trigger the reporting requirements. This burden is exceptionally broad due to the nature of CERCLA and EPCRA’s reporting threshold. Unlike other environmental statutes that consider the concentration of a release, CERCLA Section 103(a) and EPCRA Section 304(a) merely consider the amount of release. Lack of a concentration threshold brings thousands of producers into the fold whose emissions are spread over a large land area. Not only does this show the impact the D.C. Circuit decision had on all sectors of the beef cattle industry, but it illustrates the inability of researchers to establish a reliable emission methodology.

The science of emissions estimation on farms is limited in supply and narrow in scope. Scientists fail to agree on an appropriate metric for emissions estimation from farms. A cattle producer taking on the speculative exercise of estimating air emissions from cow manure does nothing more than play a guessing game. The information and metrics currently available – namely worksheets developed by Texas A&M Agrilife Extension and the University of Nebraska-Lincoln to estimate ammonia and hydrogen sulfide emissions – are limited to cattle feeding operations with certain structures subject to climatic conditions present in specific regions of the country. As for pasture-based producers, there are scant data and no

13 Stowell, Ammonia Emissions Estimator; Preece, Ammonia Emissions from Cattle Feeding Operations.
publicly-available emissions methods to estimate the pounds per day of ammonia or hydrogen sulfide emitted from cow manure in a field. Simply put, pasture-based producers cannot report manure emissions from their operations with any degree of confidence.

The EPA has in the past grossly underestimated the number of agricultural operations that would be impacted by the reporting requirements. Following USDA’s 2012 Census on Agriculture (which only includes voluntary surveys completed by 69% of the agricultural industry), our estimate indicates 68,313 beef cattle operations in the United States will be subject to the reporting requirements. For more information, please refer to NCBA’s comments regarding the CERCLA Information Collection Request, enclosed.

b. At present, reporting requirements confuse farmers and ranchers.

Feedlot operators and, even more so, pasture-based cattle producers continue to struggle with interpreting EPA’s regulations to understand what types of releases need to be reported to the government, and how to report that information to the government. The proposed rule clearly delineates the releases that do not need to be reported by farmers and ranchers, providing much needed regulatory certainty to cattle producers across America. In February 2018, Niels Hansen, a third generation Wyoming cattle rancher and member of the NCBA, testified before The U.S. Senate Committee on Environment and Public Works (EPW) regarding the impact of federal environmental regulations on farming and ranching communities. Mr. Hansen testified specifically to the absurdity of requiring ranchers to report air emissions from livestock manure to the government. While livestock producers are relieved to have a codified exemption from CERCLA reporting requirements, confusion still exists as to why local emergency responders need emissions reports, and how such reports will improve response safety.

c. EPCRA reporting requirements needlessly burden small cattle producers.

As the EPA correctly states in the preamble, EPCRA and CERCLA are two separate but interrelated environmental statutes that work together to provide emergency release notifications to federal, state, and local officials. The D.C. Circuit’s directive that farms should report all releases including releases from

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14 2012 USDA Census on Agriculture, Cattle and Calves – Inventory (https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter_1_US/st99_1_012_013.pdf) (Conclusion reached by adding number of farms with over 200 head of “beef cows” with number of farms that have over 200 head of “other cattle.”).
animals outside of an enclosed structure subjects producers to reporting requirements under both statutes.\(^\text{17}\) The Court’s decision not only vacated the reporting exemption for AFOs contained in 40 CFR 355.31(g) but also the section 355.31(h) exemption for releases from animals that are not stabled or otherwise confined. The detrimental effect that this additional regulatory burden would impose on cattle producers cannot be overstated, especially as it relates to small producers. The dearth of reliable data coupled with the legal liability for failing to report places our country’s cattle producers in a precarious situation.

In March 2018, Todd Mortenson, a member of the NCBA, testified before the U.S. Senate EPW committee.\(^\text{18}\) Mr. Mortenson, a cattle rancher and owner of the Mortenson Ranch, spoke to the burdensome aspect of reporting odor emissions under CERCLA, specifically highlighting that the concentration of emissions at his operation is extremely low because the livestock are spread out over 19,000 acres of land.\(^\text{19}\) However, neither CERCLA nor EPCRA set concentration thresholds for reporting, thus forcing ranchers to report emissions based on estimated pounds of air emissions. Mr. Mortenson further asserted that reporting is “no simple task”.\(^\text{20}\) In addition to cattle ranching, Mr. Mortenson volunteers with the Hayes volunteer fire department and EMS in Stanley County, South Dakota. Having the knowledge and experience of a first responder, Mr. Mortenson asserted that the receipt of EPCRA odor reports “would in no way improve my ability to do my job as an emergency responder. Rather, like the CERCLA reporting requirements, [EPCRA odor reports] would impose a burdensome paperwork requirement with no environmental or public health benefit.”\(^\text{21}\)

d. **History shows EPCRA odor reports do not help emergency responders do their job.**

In January 2009, emergency responders across the nation received a flood of EPCRA odor reports from Large CAFOs.\(^\text{22}\) Contrary to the narrative espoused by groups who pursue increased burdens for farmers and ranchers, the reports have not improved the ability of emergency responders to respond to on-farm emergencies. In rural America, volunteer firefighters and EMTs drop everything at home and respond


\(^{19}\) Id at 2.

\(^{20}\) Id at 3.

\(^{21}\) Id at 4.

immediately when they receive a dispatch. Often, volunteer first responders are also the community members who manage emergency response coordination when a natural disaster strikes. Responders need pertinent information that assists them in protecting communities. However, EPCRA odor reports provide no such assistance. This gratuitous documentation was not utilized by emergency responders and, worse still, acted as an impediment to first responders by creating an additional layer of needless information to be reviewed prior to initiating a response. In the words of Mr. Mortenson, “the receipt of this paperwork would in no way improve my ability to do my job as an emergency responder…Rural emergency response teams are already stretched for time and resources – requiring additional, needless paperwork would only compound this burden.”23

II. NCBA is working to enhance the dialogue between farmer/ranchers and emergency responders.

NCBA and cattle producers have proactively developed relationships with state and local emergency responders to grow our mutual understanding of what responders need to perform their jobs safely and effectively. Ongoing discussions with Timothy R. Gablehouse, the president of the National Association of Title III Program Officials (NASTTPO), have yielded a clear and resounding message: State Emergency Response Commissions (SERCs) and Local Emergency Planning Committees (LEPCs) do not need ECPRA odor reports to do their jobs. They need relationships with farm operators and collaborative and open dialogue. When emergency responders are called to a farm, they want to quickly identify potential hazards. On-farm assets, like a chlorine tank or anhydrous ammonia tank, are important to identify and assess prior to initiating a response. Requiring responders to flip through pages of EPCRA odor reports is the least efficient way to identify legitimate hazards. Beyond emergency response, local emergency coordinators need to know if farm employees have adequate training to deal with potential emergencies. This valuable information exchange never involves consideration of odor emissions from cow manure.24

a. NASTTPO asserts that LEPCs and first responders do not utilize EPCRA odor reports.

The NASTTPO represents SERCs and LEPCs which receive EPCRA reports. In its opinion regarding the 2008 Rule, the D.C. Circuit justified vacatur of the 2008 rule in part by proclaiming EPCRA odor reports potentially provide some regulatory benefit to someone, if not the EPA.25 The Court includes an excerpt

23 Id.
24 Letter from Timothy R. Gablehouse, President, National Association of SARA Title III Program Officials, to the Honorable Scott Pruitt, EPA Administrator (June 1, 2017).
25 Waterkeeper, 853 F.3d at 15-17.
from NASTTPO’s comments on the 2008 Rule, asserting that the record suggests “the potentiality of some real benefits” to NASTTPO.\textsuperscript{26} To the contrary, NASTTPO indicated in June 2017 that EPCRA odor reports have zero benefit to LEPCs and SERCs.\textsuperscript{27}

NASTTPO’s 2017 letter to EPA Administrator Scott Pruitt asserts that EPCRA emergency release reports from farms (primarily regarding ammonia from animal manure management) are “of no particular value to LEPCs and first responders and they are generally ignored because they do not relate to any particular event.”\textsuperscript{28} NASTTPO further asserted that “LEPCs and first responders do not need more generic data. They need information that is locally relevant and upon which they can act.” NASTTPO’s letter is enclosed. The goals of the LEPCs and first responders can more effectively be achieved through collaborative dialogue with agricultural producers.

\textbf{b. NCBA, and other notable agricultural organizations, are collaborating with NASTTPO to achieve the informational goals of emergency responders.}

In May 2018, representatives from NCBA, the National Pork Producers Council (NPCC), and the U.S. Poultry and Egg Association (USPE) met with Mr. Gablehouse of NASTTPO. Mr. Gablehouse asserted that NASTTPO members do not want or need manure emission reports and that the reports in question are largely unused by emergency responders. This is due to the reports’ lack of actionable applicability – emergency responders do not respond to and address manure odors. Simply put, an influx of reports about air emissions from livestock farms does not facilitate emergency responses and thus, does not serve the purposes underlying EPCRA Section 304. By contrast, responders do want reports when it relates to the hazardous release from anhydrous ammonia tanks or chlorine tanks that are located on some farming operations. Mr. Gablehouse explained further that NASTTPO desires to facilitate a collaborative dialogue between emergency responders and farm operators so that responders have what they need prior to an emergency: 1) contact information for farm operators; and 2) knowledge about farm operations, including on-farm assets that could pose a potential threat.

In August 2018, NCBA hosted Mr. Gablehouse at NCBA’s 2018 Summer Business Meeting in Denver, Colorado. Mr. Gablehouse addressed a room containing approximately thirty NCBA members regarding his desire to enhance the collaborative dialogue between emergency responders and agricultural producers. NCBA members were generally amenable to Mr. Gablehouse’s presentation. In fact, several

\textsuperscript{26} Id.
\textsuperscript{27} Letter from Timothy R. Gablehouse, President, National Association of SARA Title III Program Officials, to the Honorable Scott Pruitt, EPA Administrator (June 1, 2017).
\textsuperscript{28} Id.
NCBA members disclosed they already have positive relationships with emergency responders in their counties. In fact, some cattle producers are also volunteer firefighters and emergency responders in their respective communities.29 As a result of the meeting with Mr. Gablehouse, NCBA resolved to continue working with NASTTPO to effectuate the goal of enhancing the collaborative dialogue between agricultural producers and emergency responders.

III. NCBA supports EPA’s proposal to codify the effect of the FARM Act on EPCRA notification requirements.

EPA’s proposed amendment to its EPCRA regulations to reflect the statutory exemption established in the FARM Act is well-received and appreciated by the NCBA. Incorporating the FARM Act’s definitions of “animal waste” and “farm” into the ECPRA regulations provides much-needed regulatory clarity to agricultural producers. Clear definitions allow farmers and ranchers to better understand whether a given release should be reported under EPCRA section 304. And most importantly, EPA’s legal justification is grounded in congressional action, legislative history, and prior agency action.

a. Congressional action effectuated the exemption from EPCRA notification requirements.

On March 23, 2018, the President signed into law the Consolidated Appropriations Act of 2018 which included Division S Title XI, the Fair Agricultural Reporting Method Act, or the FARM Act. The FARM Act amended CERCLA by adding language to section 103(e) to exempt air emissions of animal waste at farms from notification requirements of Section 103. Congress provided definitions for “animal waste” and “farm” within the FARM Act that limit the exemption’s scope. In light of the FARM Act’s passage, the EPA had to interpret how this amendment affects EPCRA given the interplay between the two reporting provisions. The Agency should look no further than the D.C. Circuit opinion in Waterkeeper, where the Court explains “in drafting the EPCRA reporting requirements, Congress expressly tied them to CERCLA’s…Thus all of EPCRA’s reporting mandates are piggybacked on the CERCLA mandates in one form or another.”30 The Court further resolved that “cutting back on CERCLA reporting requirements had the automatic effect [emphasis added] of cutting back on EPCRA reporting and disclosure requirements.”31

29 As noted in preceding Section I.c., Todd Mortenson is a cattle rancher as well as a volunteer firefighter and EMS first responder in Stanley County, South Dakota. For further information, see Legislative Hearing on S. 2421, the Fair Agricultural Reporting Method Act: Hearing Before the S. Comm. On Environment and Public Works, 115th Cong. 2-5 (2018) (written testimony of Todd Mortenson, Mortenson Ranch, member of National Cattlemen’s Beef Association).
30 Waterkeeper, 853 F.3d at 10.
31 Id.
The Congressional Research Service (CRS) issued two memoranda regarding the FARM Act’s effect on EPCRA notification requirements, unequivocally concluding the FARM Act exempts releases from reporting under EPCRA section 304(a)(1) and (a)(3). CRS asserts that notification required by section 304(a)(2) is dependent on meeting all three statutory criteria: releases 1) are not federally permitted, 2) are in excess of the reporting quantity, and 3) occur in a manner which would require notification under CERCLA 103(a). CRS further resolves that EPA has historically treated the third statutory criteria, “occurs in a manner”, to mean the nature of the release in terms of how a substance enters the environment, e.g., into the air, into water, etc. This determination comports with EPA’s interpretation as presented in the proposed rule. While CRS failed to make a conclusion regarding the FARM Act’s impact on EPCRA reporting requirements, its analysis only allows for one inference. While air releases from animal waste at farms is not subject to federal permitting requirements, and are in excess of the reporting quantity, they do not occur in a manner reportable under CERCLA 103(a).

c. Prior Agency Action supports this interpretation.

EPA’s proposed interpretation of the FARM Act’s effect on EPCRA section 304(a)(2) is not new. One need only look to the analogous CERCLA pesticide application exemption for guidance on how a statutory CERCLA reporting exemption ties back to EPCRA’s 304(a)(2) notification requirement. Specifically, the FARM Act is codified in the same section of CERCLA as the longstanding pesticide exemption, section 103(e). The codified exemption for the application of pesticide products provides a framework for EPA’s interpretation of the FARM Act’s effect on EPCRA reporting. In 1987, EPA interpreted the relationship between CERCLA Section 103(e) and EPCRA Section 304(a) as follows: “The application of a registered pesticide product generally in accordance with its purpose is exempt from section 103(a) notification under section 103(e) of CERCLA. Because such releases are not reportable under section 103(a) of CERCLA, they are also exempt from release reporting under section 304(a) of [EPCRA], and EPA has clarified the release reporting regulations to include this exemption.” Now that Congress has expanded Section 103(e) to also exempt air emissions from animal waste at farms, it logically follows that such emissions are also exempt from EPCRA release reporting.

33 Id. at 3.
34 Id. at 3-4.
The application of pesticide products registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or handled and stored by an agricultural producer are exempt from CERCLA’s notification requirements. Determining whether EPCRA notification requirements apply to the application of those pesticide products requires the satisfaction of all three criteria in section 304(a)(2). Where pesticide products are not federally permitted and exceed the reporting quantity, the analysis turns to whether such releases “occurs in a manner” which would require notification under CERCLA 103(a). The pesticide application exemption is specifically tied to the nature of pesticide chemicals’ release into the environment rather than to a given chemical component – pesticides being applied, handled, or stored are exempt. The nature of the pesticides’ release, not their chemical makeup, determine reporting requirements. Therefore, releases exempt from CERCLA reporting do not “occur in a manner” reportable under EPCRA. This interpretation does not diminish section 304(a)(2)’s value; the Agency’s proposed rule correctly states that chemicals not listed as CERCLA hazardous substances are generally subject to EPCRA reporting under 304(a)(2) if they are listed as EPCRA extremely hazardous substances (EHSs). Pesticides and animal waste at farms are not subject to the 304(a)(2) reporting requirement, even though they release EHS (EHSs), because the type of release is exempt from CERCLA 103, as opposed to such exemptions being included in the hazardous substance list.36

NCBA supports the regulatory text in the proposed rule and offers, for EPA’s consideration, alternative regulatory text which achieves the legal effect of the proposed rule while also aligning with prior agency action. Rather than adding the FARM Act language directly into the EPCRA regulations, EPA could instead promulgate a single sentence cross-referencing the FARM Act. Such regulatory text would properly reside in section 355.31 and could read, “Any release from animal waste at a farm that is exempt from reporting under section 103(e) of CERCLA.” This is precisely how the pesticide exemption is codified in the EPCRA regulations.37 While the proposed rule is grounded in prior agency action, the alternative regulatory text would align identically with regulatory precedent. Notably, this alternative avoids engendering the false perception that EPA is crafting a new exemption pursuant to the agency’s discretionary rulemaking authority.

Conclusion

NCBA appreciates the opportunity to provide comment on this rulemaking proposal. NCBA supports EPA’s action and supports finalization of this rule as proposed. To state the obvious: odor emissions from

37 See 40 C.F.R. 355.31(c).
the natural breakdown of livestock manure do not constitute an emergency release pursuant to the CERCLA and EPCRA laws. The EPA, under both the Bush and Obama Administrations, understood this. The association, NASTTPO, that represents the responders who receive the EPCRA reports understand this. And Congress reaffirmed this decree through passage of the FARM Act.

Sincerely,

National Cattlemen’s Beef Association
American National CattleWomen
Arkansas Cattlemen’s Association
California CattleWomen
Florida Cattlemen’s Association
Indiana Beef Cattle Association
Iowa Cattlemen’s Association
Kansas Livestock Association
Missouri CattleWomen
Nebraska Cattlemen’s Association
North Carolina Cattlemen’s Association
Ohio Cattlemen’s Association
Oklahoma Cattlemen’s Association
Oregon Cattlemen’s Association
Public Lands Council
South Dakota Cattlemen’s Association
Utah Cattlemen’s Association
Washington Cattle Feeders Association
Washington Cattlemen’s Association
Wyoming Stockgrower’s Association
cc: Andrew Wheeler
    Peter Wright
    Kim Jennings
    Hema Subramanian

Enclosures (8):
    NCBA 2017 Comments; Docket ID No. EPA-HQ-SFUND-2007-0469
    NCBA 2008 Comments; Docket ID No. EPA-HQ-SFUND-2007-0469
    Congressional Testimony; Niels Hansen
    Congressional Testimony; Todd Mortenson
    Letter from NASSTPO to Administrator Pruitt
    CRS Report: *Fair Agricultural Reporting Method Act/FARM Act (S. 2421)*
    NPPC, USPEA Brief in Support of EPA Motion to Stay Issuance of Mandate
The National Cattlemen’s Beef Association (NCBA) appreciates the opportunity to comment in response to the U.S. Environmental Protection Agency’s submission of an Information Collection Request (ICR) for animal wastes at farms under CERCLA Section 103. NCBA is the largest and oldest national trade association of American cattle producers, working to advance the economic, political, and social interests of its producer-members and to be an advocate for the cattle industry’s policy positions. The Environmental Protection Agency (EPA) solicits input in response to its OMB Information Collection Request. All livestock operations need a method of reporting that is easy to understand and easy to complete. In the ICR, EPA estimates that 44,990 operations will be required to report their ammonia and hydrogen sulfide emissions following the D.C. Circuit’s Waterkeeper decision. This number is woefully inadequate and vastly underrepresents the universe of producers who will be impacted by these reporting requirements.

Cost and Burden Estimation Inaccuracies

EPA’s cost and burden estimation states that 44,900 livestock operations will be impacted by the reporting requirement. However, EPA has provided no reasoning for its conclusion, leaving stakeholders to guess at EPA’s determination methodology. This estimation only represents the tip of the iceberg, likely including only the largest operations required to report – but not all operations that are subject to reporting liability. The number of cattle that will trigger the reporting threshold is far below the 1,000-head threshold for a large CAFO – the type of livestock operation routinely regulated by the EPA. Our conservative estimate shows that cattle operations with as few as 330 head will be subject to reporting liability. Other research indicates that as few as 208 cattle

1 See generally Waterkeeper Alliance v. EPA, 853 F.3d 527 (2017).
will trigger the reporting requirements. Not only does this show the impact that this reporting requirement will have on all sectors of the beef industry, but also illustrates the inability of researchers to establish a reliable emission methodology. Following USDA’s 2012 Census on Agriculture (which only includes voluntary surveys completed by 69% of the agricultural industry), our estimate indicates 68,313 beef cattle operations in the United States will be subject to reporting requirements. This number far exceeds EPA’s estimation, and cattle are just one of the species subject to this requirement.

Applicability to Pasture-based Operations

In addition to the exclusive consideration of large CAFOs, a primary reason for EPA’s inaccurate burden estimation is the agency’s failure to include pasture-based operations in its determination. There has been significant uncertainty as to whether pasture-based operations were to be included in the reporting requirements, culminating in EPA including information on their webpage. The recently added Frequently Asked Question provides the following information:

Do farms that have cattle that reside primarily outside of an enclosed structure and graze on pastures, need to comply with reporting releases of hazardous substances from animal wastes under CERCLA section 103?

Yes. EPA considers all contiguous property under common ownership to be a single facility for reporting purposes. For purposes of determining whether you have a reportable release, a person must identify all the sources of hazardous substances releases, identify the quantities that are emitted from each source, and aggregate the quantities released for the facility. In making this determination, farms should include all releases from the facility, including releases from animal waste due to animals that reside primarily outside of an enclosed structure.

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4 2012 USDA Census on Agriculture, Cattle and Calves – Inventory (https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter_1_US/st99_1_012_013.pdf) (Conclusion reached by adding number of farms with over 200 head of “beef cows” with number of farms that have over 200 head of “other cattle.”).
This statement directly contradicts EPA’s burden estimation which, to the best of our knowledge, only considers cattle on feed numbers from the USDA NASS survey. In addition to not including these operations, EPA fails to account for the work that must be done on the producers’ behalf to ensure that their emissions are accurately reported.

Burden on the American Public

In addition to considering the burden and costs of such a requirement to livestock producers, EPA should take into consideration the cost and burden that such a requirement will place on the American public. In previous comments, NCBA has outlined the dangers of requiring an estimated 100,000 livestock operations to report low-level, continuous emissions. Such an exercise places tremendous stress on the U.S. Coast Guard’s National Response Center, severely limiting their ability to respond to legitimate emergency releases. In a declaration to the D.C. Circuit Court, Dana Tulis, Director of Incident Management and Preparedness for the U.S. Coast Guard, stated that “phone calls have increased from approximately 100-150 calls per day to over 1,000 calls per day” and that “wait times have been up to two hours for calls, many of which require immediate action.”\(^6\) Not only does this make it difficult for other regulated entities to report emergency releases, but it places the American public in danger. True hazardous substance releases pose a threat to the public health and response coordination will become further congested due to the influx of farm reports. This will severely impact the ability of the National Response Center to carry out its job. To be clear, this contravenes the purpose of the reporting requirements and will hurt Americans.

Cost and Burden Estimation Omissions

The April court decision opens the door to a much broader universe of operations becoming subject to these reporting requirements. Take for example, zoos and wildlife refuges that cultivate animals which in aggregate will trigger the ammonia and hydrogen sulfide emissions thresholds. There are currently 170 accredited zoos and wildlife sanctuaries across that country which may now face potential reporting liability.\(^7\) This does not include operations unaccredited, or recreational hunting

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\(^6\) Tulis Aff. 2 (Waterkeeper Alliance v. EPA, 853 F.3d 527 (2017)).

\(^7\) Currently Accredited Zoos and Aquariums, Association of Zoos and Aquariums (https://www.aza.org/current-accreditation-list).
operations. Like pasture-based livestock, there is no adequate research from which these facilities could base a realistic estimation.

The monetary burden calculation should consider all beef operations with over 330 head, including pasture-based operations. Additionally, it should consider the impact of such reporting requirements on other animal operations, including zoos and wildlife refuges.

**The Need for a Simplified Reporting Form**

If farmers and ranchers are expected to comply with CERCLA reporting requirements, they cannot be expected to do it with the same level of technical analysis used by traditionally regulated industry. NCBA strongly supports the development of a simplified reporting form, to be used by any farmer reporting continuous emissions from manure. A one-page report is adequate to convey the release information required by statute. NCBA has developed a one-page model report that (1) meets all reporting requirements according to the Continuous Release Report Checklist and (2) does not allow regulated entities to submit extraneous information. NCBA encourages EPA to strictly follow the Continuous Release Report Checklist to ensure that operations do not submit extraneous information. Additionally, any OMB-approved form should be easy to comprehend and complete for someone who does not have training in the technical intricacies of CERCLA. The current OMB-approved form (OMB No. 2050-0086) is overly burdensome and too complicated for most agricultural producers who are on the hook for this requirement. Regardless of the length of the form developed, NCBA urges EPA to include disclaimers related to the applicability of the University of Nebraska-Lincoln research cited on the agency’s webpage, the lack of applicability of such research to pasture-based operations, and warnings about the potential release of farm information via Freedom of Information Act (FOIA) requests.

**General Applicability of Emissions Research**

The report form should indicate that reports based on the available research is quite limited in breadth and scope and therefore will not accurately correspond to every type of livestock operation in the United States that are subject to these requirements. According to Dr. Rick Stowell, co-

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creator of UNL’s Ammonia Estimator Worksheet, “While I can place some confidence in differentiating between a 1,000-head feedlot and a 200-head feedlot, given all of the variability involved on AFOs and in research, I would not place much confidence in saying that a 300-head lot is definitely emitting more NH₃ than the neighboring 200-head lot or that we can be certain that either is above or below the threshold.”10 To protect livestock operations who follow the statutory and regulatory reporting requirements to the best of their ability, EPA must include a disclaimer in the report regarding the general applicability of such reporting information.

**Applicability of Research to Pasture-based operations**

For pasture-based livestock, no research exists quantifying per head ammonia or hydrogen sulfide emissions. However, research does indicate that ammonia emissions differ significantly based on diet and confinement. Requiring pasture-based operations to report using tools provided on EPA’s webpage (research that focuses exclusively on grain-fed animals) is inadequate, and will lead to substantially inaccurate reporting. Since pasture-based operations are now required to report, according to EPA’s website guidance11, EPA has a duty to develop a methodology for farmers to calculate those emissions, and in the interim, provide ample flexibility in what the agency accepts as a completed report. NCBA urges EPA to include a disclaimer in the report regarding the lack of research on ammonia and hydrogen sulfide emissions of pasture-based animals, which will result in almost guaranteed inaccuracy of reports filed by pasture-based operations.

**The Legal Duty for Government to Protect Farm Location Information**

Farm location information, often synonymous to residential information, can be protected under Exemption 6 of the Freedom of Information Act (FOIA).12 Personal privacy interests are generally protected by FOIA, with Exemption 6 protecting “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.”13 In *American Farm Bureau v. EPA*, the U.S. Court of Appeals for the 8th

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10 Statement made by Dr. Rick Stowell in an email to Scott Yager, Chief Environmental Counsel for the National Cattlemen’s Beef Association (Communication on November 7, 2017).

11 “Farms should include all releases from the facility, including releases from animal waste due to animals that reside primarily outside of an enclosed structure.” [https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms#Questions](https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms#Questions).


13 Id.
Circuit reversed the lower court opinion and concluded that the EPA abused its discretion in deciding that the information at issue was not exempt from mandatory disclosure under FOIA Exemption 6. In that case, farm groups sought to restrain the EPA from releasing certain farm information to environmental advocacy groups pursuant to FOIA requests. That information included farm locations that were also residential addresses, personal phone numbers, and other information. Disclosure of private farm information in no way provides knowledge of federal agency activities and therefore should not be disclosed to the public. Many American agricultural operations are carried out on the same property as a private residence. Not only do the residence and operation share real property, but also physical and mailing addresses.

To prevent the release of residential addresses in violation of the Privacy Act of 1974 and FOIA Exemption 6, NCBA recommends the following alternatives:

1. Limit required location information to county and state, rather than requiring regulated entities to list their operation address.
2. Include a directive on all reporting forms that directs federal agency employees to redact private farm information before distributing documents to the public.
3. Include an option on the form for farmers to indicate if their farm is co-located with their private residence.

We appreciate the opportunity to comment on this important issue and we look forward to further engagement.

Sincerely,

Scott Yager
Chief Environmental Counsel

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14 American Farm Bureau v. EPA, No. 15-1234 (8th Cir. 2016).
March 27, 2008

The Honorable Stephen Johnson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC  20460

Re: CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste  
Docket ID No. EPA-HQ-SFUND-2007-0469

Dear Administrator Johnson:

   The National Cattlemen’s Beef Association (“NCBA”) is the national trade association representing U.S. cattle producers with nearly 29,000 individual members and sixty-four state affiliate, breed and industry organization members. Together NCBA represents more than 230,000 cattle breeders, producers and feeders, and is the marketing organization for the largest segment of the nation’s food and fiber industry.

   NCBA members are responsible environmental stewards who love and respect the land, air and water that are fundamental to sustaining our way of life. We recognize an environmental stewardship code and have adopted policy that states that the Association “shall not be compelled to defend anyone in the beef cattle industry who has clearly acted to abuse grazing, water, or air resources.” 2005 Policy, National Cattlemen’s Beef Association, Property Rights and Environmental Management Policy 1.1. Cattle producers will continue to work every day to protect and improve the environment so that they and future generations will be able to continue to live off the land.

   On December 28, 2007, the EPA issued proposed regulations to establish an administrative reporting exemption from the notification requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and the Emergency Planning and Community Right-to-Know Act (“EPCRA”) for releases of hazardous substances, such as ammonia and hydrogen sulfide, to the air where the source of the release is animal waste at farms. While NCBA strongly supports the proposed exemption, we believe there are strong legal arguments that open air Cattle Operations are not regulated under these laws in the first place. This finding was the result of an extensive legal analysis conducted by the law firm of Holland & Hart (and largely included in our comments below) at NCBA’s request and included in a White Paper on the subject matter NCBA submitted to the EPA in December 2003, a copy of which is attached to these comments. The analysis provides an additional and
important legal foundation to EPA’s common sense approach to issues contained in the proposed rule. NCBA strongly supports the proposed administrative exemption and urges the EPA to adopt it in a final rule.

I. Cattle Operations

Members of NCBA raise and feed cattle. “Cattle Operations” include operations that raise and feed cattle in open pastures and in open-air cattle feed lots. Grazing of cattle in open pastures is usually in fenced areas, and most feeding operations take place in fenced pens. The naturally occurring and biologically produced air pollutants resulting from cattle operations are described below.

Precipitation runoff from cattle feedlot surfaces is usually contained in runoff retention ponds. The natural surface runoff during precipitation events from the feeding pens into the retention ponds results in those retention ponds containing water for various periods of time, with some being dry for most of the year. The precipitation runoff retention ponds that are part of Cattle Operations may, as described below, contain minor amounts of manure and urea from runoff, and as a result may produce some ammonia and hydrogen sulfide. These ponds are not waste lagoons, nor are they waste treatment facilities. Nutrients that may accumulate in them are periodically removed and recycled as fertilizer to croplands or composted for fertilizer.

“Cattle Operations” generally do not include operations where cattle are raised and fed in barns, nor those where cattle wastes, including manure and urea, are collected or slurried into wastewater lagoons.

A. Hazardous Air Substance “Releases”

Cattle Operations release into the air two “hazardous substances” under CERCLA and EPCRA: ammonia and hydrogen sulfide.

1. Ammonia. The natural breakdown of nitrogen in grass and other feeds (primarily corn, but also including wheat, sorghum, and other grains and foods) during digestion by cattle results in some ammonia in flatulence, belching and exhalation. In addition, the bacterial decomposition of manure and urea excreted by cattle in pastures and feed pens produces ammonia over the weeks and months after it is excreted.

Undisturbed soils also produce ammonia. As noted below, ammonia is ubiquitous, with perhaps half of the global inventory generated by undisturbed soils and biomass burning. The “reportable quantity” (“RQ”) for ammonia under CERCLA and EPCRA is 100 pounds per 24-hour period, an amount that was derived from the Clean Water Act, but is applied by EPA to air and land as well as water. Ammonia is not classified as “hazardous air pollutant” under Title III of the Clean Air Act. 42 U.S.C. § 7412 (1995).
Congress has, however, dealt with the potential adverse effects of ammonia under the Clean Air Act. Subsequent to the disaster at Bhopal, India, Congress in 1990 passed amendments to the Clean Air Act dealing with accidental release prevention. 42 U.S.C.A. § 7412(r)(1995). The Senate Committee dealt specifically with ammonia, stating that:

“...the principle health concern with ammonia is strictly its sudden and accidental release into the atmosphere... Ammonia is not carcinogenic, mutagenic, teratogenic or neurotoxic, in either low or high volumes of exposure, nor does it present any significant public health hazard or environmental hazard through chronic exposure to routine emissions.”... If air emissions of ammonia are hazardous at all, it is only in the case of substantial, sudden, and accidental release. . . .”


The EPA’s implementing regulations for this program under section 112(r) of the Clean Air Act, 42 U.S.C.A. § 7412(r) (1995), establishes threshold quantities for hydrogen sulfide of 10,000 pounds, for anhydrous ammonia, and for ammonia in concentrations of 20% or greater of 20,000 pounds in the process. Under this program, ammonia “used as an agricultural nutrient, when held by farmers, is exempt from all provisions of this part.” 40 C.F.R. §68.125.

2. Hydrogen Sulfide. As noted above, the precipitation runoff retention ponds at Cattle Operations may contain small amounts of sulfur from the trace amounts of urea and manure reaching them as a result of precipitation runoff from pens. This sulfur originates in the soils and plants, grains and other feedstuffs, and in some cases, supplements, on which the cattle are fed. The sulfur in the ponds may produce some amounts of hydrogen sulfide by virtue of anaerobic decomposition. However, precipitation runoff retention ponds at Cattle Operations are designed to be aerobic, not anaerobic. Thus little, if any, hydrogen sulfide is expected to be generated from these ponds.

Many Cattle Operations catch precipitation runoff in small settling areas or channels that precede the retention ponds. Most of the manure waste in the runoff precipitates in these settling basins. This organic material is periodically removed from the settling ponds and used as fertilizer. Retention pond liquids, which also contain some of these nutrients, are also applied to croplands periodically. Most sizeable cattle feed lots in this country are located in net evaporation areas with low rainfall.
II. **ABILITY TO DETERMINE REPORTABLE QUANTITIES**

The requirement of CERCLA and EPCRA to report releases of ammonia and hydrogen sulfide into the air is subject to the determination that a “reportable quantity” is emitted. For both CERCLA and EPCRA, the reportable quantities (“RQ”) of ammonia and hydrogen sulfide are 100 pounds per 24-hour period. 40 C.F.R. §302.4, Table 302.4 & 40 C.F.R. part 355, App. A. Although the ammonia 100 pound RQ was originally derived from the Clean Water Act, EPA stated in its 1985 Final Rule clarifying RQs under CERCLA that the RQ of 100 pounds applies to emissions into the air or water. See 50 Fed Reg. 13456 (Apr. 4, 1985).

EPA has a standard emissions factor document for use in estimating emissions from a wide variety of operations. The document, “Compilation of Air Pollutant Emission Factors” is generally known as “AP-42”. Its estimates generally reflect testing and sampling of several representative sources, giving an average that may be used for broad estimation purposes, but is not expected to be accurate for any particular operation. EPA posts current information and updates on AP-42 on its web site. AP-42 covers the “Food and Agriculture Industries” in Chapter 9. Section 9.4 of Chapter 9 covers “Livestock & Poultry Feed Operations.” Currently, section 9.4 states that “[a]t this time, there is no “AP-42 factor” or estimation method for this category.” (July 14, 1999 update). The document does reference “National Emission Inventory – Ammonia Emissions from Animal Husbandry Operations, Draft Report” (EPA 2004) which makes emission estimates for ammonia from livestock operations, but has not been made final for regulatory use. Chapter 9 references the final report of the National Academy of Sciences (“NAS”) Committee on Air Emissions from Animal Feeding Operations. The purpose of the report is to assess the scientific issues involved in estimating air emissions from animal feeding operations. The report concludes that there is insufficient information for adequate estimation of those emissions at the current time. “Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs” (NAS 2002), ch. 4 at pp.74-97. In addition, there have been various studies in Iowa, Kansas, and elsewhere making crude estimates based on material balance and other techniques. None of these efforts at estimation have been judged sound enough by EPA or the scientific community to support regulatory determinations or emission estimates.

The measurement of ammonia from flatulence and decomposition of manure and urea from cattle operations in open air pastures and feed lots is problematic at best. Direct measurement is not possible or feasible. Because the pollutant is dispersed in the air before measurement (in other words, already a “cloud”), the wind speed and direction, pressure and temperature, stability and mixing characteristics of the atmosphere affect the emission, and measurement depends on capturing the whole cloud in time and space. A vertical and horizontal array of tens of instruments upwind and downwind of the source being measured covering sufficient area is necessary, as is a complete set of meteorological instrumentation and data (wind speed, direction, mixing height,
pressure, etc.). Because these arrays still only measure concentrations at a relatively few points in a cloud of indeterminate size and shape over short periods of time, they are subject to very large error. In order to estimate the quantity of emissions, the concentration data from the few points in the array must be mathematically modeled, spatially averaged, and projected to simulate the cloud’s form and density. Because of the impracticality and cost of operating these large arrays, and their large margin of error, quantitative emission limits for open-air fugitive operations are not a practical air pollution control technique or enforcement tool.

The ammonia produced by cattle and the ammonia and hydrogen sulfide potentially produced by some ponds with some sulfur will vary with characteristics of the ration fed to the cattle, the age of cattle, the acidity and other conditions of the digestive tract, hydration, heat, and the characteristics of the water in the retention ponds. In other words, there are a large number of variables, each of which would have to be held constant while others are varied, in order to derive emission factors. This is impractical. Even with inanimate, inert particulate matter, like fugitive dust, the error in estimation of the amounts emitted in open-air land disturbance has proved to be often an order of magnitude or more - - hardly adequate or appropriate for regulatory determinations or the imposition and enforcement of quantitative controls.

The possible use of some of the estimated emissions quantifications to date has been of concern to representatives of agriculture. Congressman John Boehner expressed that concern to former EPA Administrator Christine Todd Whitman, who responded in a letter to Congressman Boehner dated November 9, 2001 that:

“As you note in your letter, **we do not currently have sound emission estimates to support regulatory determinations for animal agriculture.**”

(Emphasis added.)

Former Administrator Whitman went on to note the work of the National Academy of Sciences relating to estimation of agricultural emissions and EPA’s work with the Department of Agriculture’s Air Quality Task Force, stating that “[w]e will use this [NAS] study to develop scientifically valid emission estimates that can be used to inform our regulatory policy decisions.” Former Administrator Whitman also took note of the Agricultural Air Quality Task Force recommendation that EPA defer implementation of CERCLA programs, stated that she was reviewing the recommendation, and that “I agree that any actions we take need to be based on sound science.” Indeed, an EPA 1994 ammonia emission factors document referenced, R. Battye et al., *Development and Selection of Ammonia Emission Factors: Final Report* (Prepared for U.S. Environmental Protection Agency, 1994) concludes that the national inventory may have left out half of the actual ammonia emissions: “Recent research
indicates that these two categories [undisturbed soils and biomass burning, which
were not estimated] may contribute significantly (up to half) to the global budget
of NH3 emissions.” (id. at p. x)(Emphasis added).

It is fair to conclude that there is not a valid or sound scientific basis for
the estimation of fugitive ammonia or hydrogen sulfide or other emissions from
Cattle Operations, nor sound emissions estimates to support regulatory
determinations, based on no less authority than EPA’s past Administrator
Whitman, the NAS final review, and EPA’s latest updates and assessments. Thus
there is no accepted method for reasonable quantification of fugitive ammonia or
hydrogen sulfide or other emissions from Cattle Operations. There is no sound
or reasonable basis for making a regulatory determination whether the ammonia
or hydrogen sulfide from fugitive emissions from Cattle Operations do or do not
exceed the reportable quantities of those substances from Cattle Operations.

As confirmed by former EPA Administrator Whitman, there are no sound
emissions estimates to support regulatory determinations, and any actions taken
need to be based on sound science that currently does not exist. This view is
supported by (1) the fact that there are no AP-42 emission factors for Cattle
Operations (even though there are studies making estimates of ammonia
emissions from such operations in the AP-42 documents), and (2) the final report
of the NAS committee working on the evaluation of air emissions from such
operations. Given the lack of sound and accepted methods for determining
whether there are reportable quantities of ammonia or hydrogen sulfide from
Cattle Operations, there appears to be no reasonable basis for enforcement of
CERCLA’s or EPCRA’s release reporting requirements on Cattle Operations, nor
any sound basis for reporting estimates of those hazardous substances.

III. ANALYSIS OF THE APPLICABILITY OF CERCLA AND EPCRA
RELEASE REPORTING REQUIREMENTS TO CATTLE OPERATIONS.

A. Release Reporting Requirements of CERCLA and EPCRA Do
   Not Apply to Ammonia and Hydrogen Sulfide From Cattle
   Operations.

   While NCBA strongly supports and appreciates EPA’s proposal to exempt
   animal agriculture from the release reporting provisions of CERCLA and
   EPCRA, NCBA does not believe the release reporting requirements apply to
   ammonia and hydrogen sulfide emissions from Cattle Operations in the first
   place.

B. The Coverage and Purpose of CERCLA and EPCRA Release
   Reporting Requirements.

   NCBA’s exhaustive review of the statutes themselves, their legislative
   history, and their interpretation by EPA and the courts over the course of more
   than 20 years, discovered no mention or indication that air emissions resulting
from flatulence, belching, exhalation, or excretion of urine or manure or their bacterial decomposition, or substances in the air resulting from runoff that encounters and carries relatively small amounts of manure or urea into precipitation runoff retention ponds are covered by the release reporting requirements of CERCLA or EPCRA. The terms of the statutes themselves, which cover “facilities” that “release” “hazardous substances” into the environment (discussed below) do not clearly or comfortably cover the biological and natural processes that result in ammonia and hydrogen sulfide at Cattle Operations. It is not a matter of broad or narrow reading of the terms of the statute, but whether those terms cover the biological and natural processes responsible for generation of ammonia and hydrogen sulfide at Cattle Operations at all. Such coverage is, NCBA believes, ambiguous at best, while the exception for “naturally occurring substances,” 42 U.S.C.A. § 9604(a) (3) (A) (discussed below) does seem to cover those processes.

The most fundamental guide to the meaning of any statute is an understanding of its purpose. As Judge Learned Hand stated in discarding the literal or “plain” meaning of a statute that was inconsistent with its purpose, “. . . statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” Cabell v. Markham, 148 F.2d 737 (2d Cir. 1945), aff’d 326 U.S. 404 (1945); see also Billik v. Berkshire, 154 F.2d 493, 494 (2d Cir. 1946): “Attention must always be given to what Congress sought to accomplish by the statute . . . ‘There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of oversolicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it’” (quoting Federal Deposit Ins. Corp. V. Tremaine, 133 F.2d 827, 830 (2d. Cir. 1943). The Supreme Court has cautioned against reading the “plain” language of a statute to avoid frustrating the purpose of Congress and arriving at an absurd result, stating that: “The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute.” Lynch v. Overholser, 369 U.S. 705, 711 (1962).

NCBA first looked broadly at what Congress did intend to cover in CERCLA and EPCRA, and then more specifically at what purpose Congress had in requiring release reporting.

C. Activities and Substances Congress Intended to Cover.

CERCLA was passed in the wake of Love Canal for the purpose of dealing with the “legacy of hazardous substances and wastes which pose a serious threat to human health and the environment.” S. Rep. No. 99-73, at 12 (1985), and “to clean the worst abandoned hazardous waste [sic] sites in the country . . .” H.R.Rep. No. 99-253, Part 5, at 2 (1985). The legislative history contains a litany of references to “synthetic,” “man-made” chemicals, “chemical contamination,” and the results of “modern chemical technology” as the

In addition to clean up of hazardous waste sites such as Love Canal, the Senate committee stated that the legislation was intended to cover “spills and other releases of dangerous chemicals which can have an equally devastating effect on the environment and human health.” S. Rep. No. 96-848, at 5 (1980) and commented that such releases have resulted in the “loss of livestock and food products to contaminated drinking water and feed . . .” Id. It also noted that Superfund “may be used to compensate an agricultural producer . . . for loss” resulting from such releases of hazardous substances” id. at 78, and that such losses included injury to “livestock” id. at 79.

Congress also indicated the scope of the activities it intended to cover in the provisions it made for funding the “Superfund” to pay for cleanup. The tax it imposed focused on “the type of industries and practices that have caused the problems that are addressed by Superfund;” Congress chose to impose the tax “on the relatively few basic building blocks used to make all hazardous products and wastes.”1 H.R. Rep. No. 99-253, Part 1, at 141 (1985); S. Rep. No. 96-848, at 19 (1980). These building blocks, or chemical “feedstocks,” are comprised of petrochemicals, inorganic raw materials, and petroleum oil because “virtually all hazardous wastes and substances are generated from these [substances].” See id. at 20; see also S. Rep. No. 99-73, at 3 (1985) (“The taxable chemical feedstocks generally are intrinsically hazardous or create hazardous products or wastes when used.”); H.R. Rep. No. 99-253, Part 1, at 141 (1985). (“[T]he problems addressed by CERCLA are byproducts of productions processes that use these raw materials.”). Manure, urea, and their byproducts, are clearly not among these materials.

The fee is levied on feedstock chemicals manufactured or imported into the United States when they are sold or used “by the manufacturer, producer, or importer thereof.” Id. at 7 (emphasis added). By definition, this scheme does not include taxation of ammonia or hydrogen sulfide from livestock, or their wastes. Although not determinative, the taxation provision’s focus on chemical feedstocks supports the reasoning that Congress intended to regulate the sale or

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1 The Internal Revenue Code lists the taxable chemicals and the amount imposed for each. See 26 U.S.C. § 4661(b). Relevant to this memorandum, ammonia is listed as a taxable inorganic raw material, with a tax of $2.64 per ton. Hydrogen sulfide is not a listed taxable chemical. A tax is also imposed on crude oil and petroleum products “entered into the United States for consumption, use, or warehousing.” 26 U.S.C. § 4611-12.
use of synthetic, man-made chemicals with CERCLA, not the generation of ammonia and hydrogen sulfide from Cattle Operations.

The taxation provisions of CERCLA also indicate that substances like ammonia, when used for agricultural purposes, are not covered within the scope of CERCLA. Specifically, “nitric acid, sulfuric acid, ammonia, and methane used to produce ammonia, when used to produce or manufacture fertilizer, … [or] when used as a nutrient in animal feed,” are exempted from taxation. S. Rep. No. 99-11, at 69 (1985); see also S. Rep. No. 99-73, at 9 (1985). The exemption is based largely on the premise that “taxation of these compounds when used to supplement animal feed constitutes a burden on both the animal feed industry and the American agricultural sector which appears to be unnecessary.” Id. Like taxation, regulation of the agricultural sector in the form of reporting requirements for the release of ammonia or hydrogen sulfide from livestock manure and urea would arguably constitute an “unnecessary burden” on Cattle Operations.

Based on Congress’ repeated use of language evidencing its intent to provide a notification scheme for the release of hazardous substances produced as a byproduct of “modern chemical technology,” the absence of a CERCLA taxation provision applicable to Cattle Operations, and the exclusion of day-to-day fertilizer and pesticide application by the agricultural community (see below) from reporting requirements, a reasonable interpretation of CERCLA’s legislative history leads to the conclusion that Congress did not intend to include the routine fugitive emission of ammonia and hydrogen sulfide from Cattle Operations in CERCLA’s and EPCRA’s release reporting requirements. Moreover, to include ammonia and hydrogen sulfide emissions from flatulence and decomposition of urea or manure, while excluding similar day-to-day agricultural operations involving the spreading or distribution of man-made chemical fertilizers and pesticides would result in a burdensome, incongruous, and perhaps even absurd, outcome.


The purpose of the release reporting provisions of CERCLA and EPCRA is to target releases of hazardous substances that present substantial threats to public health and the environment and that require immediate response by the proper officials in order to prevent or minimize their adverse impacts. The report is required to be filed “immediately,” a term that has been very strictly construed. A delay of 1 hour and 22 minutes has been held by EPA to be a violation of the CERCLA and EPCRA requirements. See In Ré: Royster-Clark, Inc. 2001 WL 1848806. As the Senate Committee report noted in explaining the extension of CERCLA’s release reporting requirements to include notification to state and local officials under EPCRA, EPCRA’s release reporting requirements were intended to provide “immediate direct notification of State and local emergency response officials for releases of highly toxic substances, and
particularly those determined by regulation potentially to require response on an emergency basis.” S. Rep. No. 99-11, at p. 8. In other words, the clear purpose of immediate release reporting is to provide authorities with the information needed for immediate response, if necessary.

In the case of ammonia from bacterial decomposition of manure, this requirement would call for immediate notification by hundreds if not thousands of operations. The National Response Center would be inundated with notice from cattle pasturing and feeding operations and numerous other animal agriculture operations. It seems extremely unlikely that those notifications would ever lead to any response action, since there is no evidence of the need to do so. The “releases” are low level; they pose no threat to public health or the environment, and it would be an utter waste of public resources for authorities to investigate and to consider remedial action when it would never lead to any such action.

Some have suggested that these releases could be dealt with by the annual “continuous release” exemption filing. It is not at all clear that that “exemption” would apply. Even if applicable, it is onerous indeed, requiring annual reassessment and characterization of the release. In the case of the fugitive emissions of ammonia from manure in open pastures and feedlots, such studies would be very costly, and the results highly uncertain and unreliable. The following are the requirements for continuous release reporting eligibility and compliance:

A continuous release is “a release that occurs without interruption or abatement or that is routine, anticipated, and intermittent to normal operations or treatment processes.” 40 C.F.R. § 302.8(b). The release must also be “stable in quantity and rate,” which means that it is “predictable and regular in the amount and rate of emission.” Id. A facility, including adjacent or contiguous facilities that are aggregated for the purpose of release reporting, will be deemed to have one continuous release, even if that release is made up of a number of different hazardous substances from a number of sources. See U.S. Environmental Protection Agency, Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance 7 (1997), at http://www.epa.gov/superfund/resources/release/part1-fa.pdf. “A continuous release may be a release that occurs 24 hours a day (e.g., a radon release from a stockpile) or a release that occurs during a certain process (e.g., benzene released during the production of polymers) or a release that occurs intermittently (e.g., the release of a hazardous substance from a tank vent each time the tank is filled).” Id. at 3. If a release qualifies as continuous, the facility can choose to report under the reduced continuous reporting requirements under both CERCLA and EPCRA. See 40 C.F.R. §§ 302.8, 355.40(a)(2)(iii).

Individual facilities have discretion in determining whether their releases qualify as continuous. The person in charge of a facility can rely on “release data, engineering estimates, knowledge of operating procedures, or best
professional judgment to establish the continuity and stability of the release.” 40 C.F.R. § 302.8(d)(1)-(2). Historical reporting of releases to the NRC can also be used to establish continuity. See id. “Monitoring data are not required. Regardless of which method is used, however, all estimates reported for a particular release must have a sound technical basis.” U.S. Environmental Protection Agency, Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance 5 (1997), at http://www.epa.gov/superfund/resources/release/part1-fa.pdf. (Emphasis added.) Further, the EPA may question the basis for the determination, and it is important for a facility to fully document its determination that a release is continuous. See U.S. Environmental Protection Agency, Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance 10 (1997), at http://www.epa.gov/superfund/resources/release/part1-fa.pdf.

Once the person in charge of a facility determines that the release from the facility would qualify as “continuous,” a three-step reporting procedure is triggered. First, the person in charge must notify the NRC, SERC, and LEPC by telephone to alert these authorities of the facility’s intent to report the release as continuous. See 40 C.F.R. § 302.8(d)(3); U.S. Environmental Protection Agency, Superfund Continuous Release Reporting Process, http://www.epa.gov/oerrpage/superfund/programs/er/triggers/haztrigs/crelproc.htm.

Then, within 30 days of the initial telephone notification, the person in charge must submit written notification of the continuous release to the NRC, SERC, and LEPC. See 40 C.F.R. § 302.8(e)(i); U.S. Environmental Protection Agency, Superfund Continuous Release Reporting Process, http://www.epa.gov/oerrpage/superfund/programs/er/triggers/haztrigs/crelproc.htm. The written report must contain a detailed description of the facility, surrounding area, and each hazardous substance to be released, including the source of the release, past release information, and the frequency of the release. See 40 C.F.R. § 302.8(e)(1). The written report must also include a “brief statement describing the basis for stating that the release is continuous and stable in quantity and rate.” Id. § 302.8(e)(1)(iv)(E). All reported information must be “accurate and current to the best knowledge of the person in charge.” Id. § 302.8(e)(1)(iv)(H). The purpose of the written report is to confirm the facility’s intent to report the release as continuous and give the EPA sufficient information about the release to enable it to determine if the release qualifies as a continuous release. See U.S. Environmental Protection Agency, Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance 7 (1997), at http://www.epa.gov/superfund/resources/release/part1-fa.pdf.

Finally, “within 30 days of the first anniversary of the initial written notification, the person in charge of the facility or vessel shall evaluate each hazardous substance release reported to verify and update the information
submitted in the initial written notification.”  Id. § 302.8(f). This written report must contain substantially the same information as the initial report, “but should be based on release data and information gathered over the previous year since the submission of the initial written report. The continuous release must be reassessed annually to determine whether information previously submitted has changed.” U.S. Environmental Protection Agency, Superfund Continuous Release Reporting Process, http://www.epa.gov/oerrpage/superfund/programs/er/triggers/haztrigs/crelproc.htm. After submittal of the one-year anniversary report, the EPA requires the facility to perform an annual internal reassessment of its release, but the facility need not submit a written report “unless there is a change in the information previously submitted to EPA.” U.S. Environmental Protection Agency, Reporting Requirements for Continuous Releases of Hazardous Substances, A Guide for Facilities on Compliance 8 (1997), at http://www.epa.gov/superfund/resources/release/part1-fa.pdf.

The occurrence of two additional circumstances will also trigger further reporting requirements: 1) a statistically significant increase in the release; or 2) a change in previously submitted release information. A statistically significant increase is “an increase in the quantity of the hazardous substance released above the upper bound of the reported normal range of the release.” 40 C.F.R. § 302.8(b). The normal range, in turn, is “all releases . . . of a hazardous substance reported or occurring over any 24-hour period under normal operating conditions during the preceding year. Only releases that are both continuous and stable in quantity and rate by may be included in the normal range.” Id. Thus, if a release exceeds the normal range within any 24-hour period, the person in charge must notify the NRC, SERC, and LEPC. If the exceeding release is a new, continuous and stable release, it may be established as a continuous release through the same procedure – telephone and written notification – as any other continuous release. See id. § 302.8(g)(2).

A change in previously submitted release information includes a change in the composition or source of the release, or a change in the information submitted in the initial written notification. See id. § 302.8(c)(4). A change in source or composition will be considered a “new” release and “must be qualified for reporting [as a continuous release] by the submission of initial telephone notification and initial written notification...as soon as there is a sufficient basis for asserting that the release is continuous and stable in quantity and rate.” Id. § 302.8(g)(1).

If a change in previously submitted release information includes a change in other information initially included in the written report, written notification of the change must be submitted to the EPA within 30 days of a determination that the old information is no longer valid. See id. § 302.8(g)(3).

Because emissions from cattle operations vary widely depending on climate, feed, weather, age of cattle, and many other variables, the potential
ability of cattle operations to submit continuous release filings is not at all clear and, as the description above details, hardly a simple process. NCBA does not believe CERCLA and EPCRA laws were intended to cover emissions from manure and that the purpose of release reporting is not fulfilled by submitting reports on emissions from it. It is extremely unlikely that such reports would lead to any response action since there is no evidence of the need to do so since the releases pose no threat to public health or the environment.

E. Relevant Exemptions from CERCLA.

In EPCRA, Congress, recognizing that “CERCLA response authorities are extremely broad . . .” excluded from the scope of the federal response authority the release or threat of release “of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found.” 42 U.S.C. § 104(a)(3)(A); and see also S. Rep. No. 99-11, at 16 (1985). The Senate committee report clarified this exception from EPA’s response authority, noting that naturally occurring releases, such as “diseases or contamination resulting from animal waste (e.g. beaver excrement),” are excluded from the response program. S. Rep. No. 99-11, at 16 (1985). Thus naturally occurring animal waste, such as urine, urea and manure, in its unaltered form, or altered solely through naturally occurring process or phenomena, are excluded from EPA’s response authority.

The flatulence, urine, urea, and manure, and the releases that result from them at dry, open-air Cattle Operations fall, we believe, within the purpose and terms of this exemption from EPA’s response authority. Flatulence and the excretion of manure and urine from cattle are surely naturally occurring, and the location of that excretion is surely “where it is naturally found,” i.e. wherever the cattle happen to be, whether in a feed pen or a pasture. The manure and urine are unaltered. The precipitation and surface runoff affecting them are naturally occurring processes. The only change in the location of these animal wastes occurs when they are periodically removed from the cattle pens and recycled through composting and/or application to croplands. That movement does not, materially affect the bacterial decomposition of the manure or urea, which occurs independent of its removal, transportation, sometimes composting, and application to croplands as fertilizer. The “normal application of fertilizer” is separately excluded from the definition of CERCLA “releases” that require reporting. 42 U.S.C.A. § 101 (22).

Some might argue that livestock are not “naturally” contained within fenced pens or in the large numbers involved in modern Cattle Operations. However, this ignores that the CERCLA exemption is directed at whether the substance is naturally-occurring, not at the context or circumstances in which the substance might be released.
F. Effect of the Exemption of Cattle Operations from Response Authority on Interpretation of CERCLA and EPCRA Release Reporting Obligations.

Generally, a statute should be interpreted as a whole, and the individual provisions should be analyzed in accordance with the object and policy of the entire law. See Abramson v. U.S., 42 Fed. Cl. 621, 629 (1998) (citing Kelly v. Robinson, 479 U.S. 36, 43 (1986)). “In construing a statute, courts should not attempt to interpret a provision such that it renders other provisions of the same statute inconsistent, meaningless, or superfluous.” Id. (citing Boise Cascade Corp. v. U.S., 942 F.2d 1427, 1432 (9th Cir. 1991)). To require a facility to report a release of a naturally occurring substance would not only be inconsistent with Congress’ clear intent under § 104 to exclude such substances from the federal government’s management under CERCLA and EPCRA, but it would also lead to the incongruous result of reporting releases under § 103 that would never be responded to under § 104.

Because the purpose of reporting a release under § 103 is to alert the proper authorities of the release so that they can best determine how to respond to the release, it would be superfluous to require reporting for a release that is statutorily excluded from the federal government’s response authority. While the legislative history indicates that Congress only intended to cover modern chemical technology, synthetic chemicals and man-made processes and substances, even if CERCLA and EPCRA were interpreted to cover flatulence, manure, urine and their decomposition, the resulting ammonia and hydrogen sulfide from them falls fairly within the statutory exclusion of “naturally occurring substances” from response action.

If response action for those releases is prohibited, it then makes sense to interpret CERCLA § 103 reporting requirements not to include those substances and activities, because to do so would render the release reporting requirement of section 103 superfluous. EPA has so interpreted the “naturally occurring substance exemption” in the case of radionuclides from undisturbed lands. 63 Fed. Reg. 13460, 13462, col.2 (March 19, 1998), declaring that: “[r]eporting of naturally occurring radionuclide releases from undisturbed land holdings is unnecessary because CERCLA section 104(a)(3) generally precludes removal or remedial actions in response to a release “of a naturally occurring substances in its unaltered form or altered solely through naturally occurring process or phenomena, from a location where it is naturally found.”

EPA has stated the purpose for release reporting notification under CERCLA, and its interpretation of authority for granting exemptions, in cases where the release does not already fall clearly within a statutory exemption, as follows:

“This purpose, as the Agency has previously stated on numerous occasions, is to require notification of releases so that the
appropriate federal personnel can evaluate the need for a federal response action and undertake any necessary response (removal or remedial action) in a timely fashion.’ [citation omitted] . . . Thus if the Agency determines that the federal government would never, or would only rarely, take a response action as a consequence of the harm posed by the release or because of the infeasibility of a federal response, a basis for an exemption from the section 103 reporting requirements may exist.”


Based on this interpretation, EPA exempted release of naturally occurring radionuclides from large, generally undisturbed land holdings, such as golf courses and parks, along with those activities that involve the disturbance of large areas of land, such as farming or building construction.” Id.

With respect to disturbance of large areas of land, such as farming that caused releases of “reportable quantities” of radionuclides, EPA concluded that those “activities rarely would pose a hazard to the public health or welfare or the environment because releases would be dispersed widely in the environment at levels not much (if at all) above natural background. Id.

In the same rulemaking EPA exempted “the dumping of coal and coal ash, as well as radionuclide releases to all media from coal and coal ash piles, at utility and industrial facilities with coal-fired boilers.” Id. EPA explained that it did so because “the Agency believes that the submission of individual reports from each industrial and utility facility with coal and coal ash piles may not be consistent with the purposes of the section 103 reporting requirement.” Id. at 22529. (Emphasis added). It found that the concentration levels emitted from these piles “will always be emitted continuously at low levels spread over large areas” [and] “never will be emitted at a high rate or in an unusually large amount as the result of a sudden episodic release . . . . Perhaps more importantly, however, a response action (i.e., removal or remedial action) under CERCLA does not appear to be the most appropriate federal regulatory response to radiation releases that are (1) similar in amount and concentration across an entire sector of industry; (2) pose acceptable exposure risks; and (3) disperse quickly in the environment such that a response is not necessary to cleanup the accumulation of what has already been released.”

Id.

On March 19, 1998, EPA broadened these exemptions from release reporting requirements for radionuclides for land disturbance “to include land
disturbance incidental to extraction activities at all mines except limited categories with elevated radionuclide concentrations. 63 Fed. Reg. 13460, 13462, col. 2. It stated its authority to do so as follows:

CERCLA sections 102(a), 103, and 115 together provide EPA with authority to grant administrative reporting exemptions. Such exemptions may be granted for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate. Requiring reports of such releases would serve little or no useful purpose and could, instead, impose a significant burden on the Federal response system and on the persons responsible for notifying the Federal government of the release. Through such reporting exemptions, therefore, the Federal response system is able to more efficiently implement CERCLA and EPCRA and more effectively focus on reports of releases that are more likely to pose a significant hazard to human health and the environment.


EPA’s interpretation of the scope of the naturally occurring substance exemption, and its authority to broaden it to cover other activities where response action is inappropriate, infeasible and unnecessary, have evident application and relevance to Cattle Operations. EPA’s determination that activities that fall within section 104(a)(3)’s exemption from response action need not report under section 103 means that if Cattle Operations fall within section 104(a)(3)(A)’s exemption of naturally occurring substances, there is no need to report such releases under section 103 of CERCLA.

Second, NCBA believes that manure falls within the criteria under which EPA has exercised its authority to exempt activities that result in low exposure and slow release over large areas to releases that pose little risk and disperse quickly, making response infeasible and inappropriate.

**G. The Release Reporting Requirements of CERCLA and EPCRA, Read Fairly and In Accordance with their Purpose, Do Not Cover Cattle Operations.**

The CERCLA and EPCRA definitions and reporting requirements are largely the same and have been described as “inextricably intertwined.” In re: Thoro Products Co. 1992 WL 143993 *10 (E.P.A.). In fact, for hazardous substances such as ammonia and hydrogen sulfide listed under both CERCLA and EPCRA, the reporting requirements of CERCLA are the trigger for reporting under EPCRA 42 U.S.C. §11004(a); if the release of a hazardous substance is exempt from CERCLA reporting requirements, it will be exempt from EPCRA requirements as well. Id. CERCLA section 103(a) requires release reporting from “facilities” that release “hazardous substances” into the “environment.”
“Facilities” cover a broad range of buildings, installations, impoundments, and areas, all of which are subject to the condition that they are “where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located . . .” 42 U.S.C. 9601(9). None of these terms would seem to apply to the generation of ammonia or hydrogen sulfide from flatulence or the excretion by cattle of urine or manure, nor to their bacterial decomposition. In other words, those biological processes do not fall within the normal meanings and uses of “deposit, storage, disposal or location” of ammonia or hydrogen sulfide. Those statutory terms all seem to connote the activity and involvement of humankind, not a naturally occurring biological process such as excretion by cattle of manure and urine and its biological decomposition into ammonia, or anaerobic decomposition into hydrogen sulfide.

The term “release” includes “any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discharging of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . .” 42 U.S.C. 9601(22). Again, none of these terms would normally be used to describe the excretion of urine or manure from cattle on feed pen surfaces or the ground; each of these terms connotes anthropomorphic causation, not biological excretion and bacterial decomposition.

The “environment” 42 U.S.C. § 9601(8), however, clearly includes the ambient air to which the general public has access, as well as outdoor areas. We assume that any amounts of ammonia or hydrogen sulfide that may be generated at Cattle Operations could be transported off the property.

EPCRA’s definition of “facility” includes:

all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person).


EPCRA notification is only required for release from facilities where a hazardous substance is produced, used or stored. Again, the terms “buildings, equipment, structures and other stationary items” do not comfortably or clearly include cattle feeding, roaming, and cavorting in feed pens or pastures, and the “extremely hazardous substance” resulting from their excretion of urine and manure and its bacterial or anaerobic decomposition do not comport with ordinary notions of the “production, storage, or use” of a “hazardous chemical” intended to be covered by EPCRA. Indeed, the definition of “hazardous chemical” excludes “any substance to the extent it is used in routine agricultural
operations.” In our view, neither hydrogen sulfide nor ammonia that disperses as a gas from flatulence, urination, defecation, or bacterial or anaerobic decomposition, is “applied, administered, or used” in routine agricultural activities. However, if EPA were to view those gases as produced, stored or used within EPCRA’s meaning, they would surely also be viewed as routine agricultural activities. There is nothing much more routine for cattle than urinating and defecating.

At the very least, there is a lack of plain and clear meaning and coverage of Cattle Operations by the bare words of these statutes. When that is the case, it is necessary to turn to the purpose of the statute as the touchstone of its meaning and to the legislative history to determine if there was an intent to cover Cattle Operations. As described above in seeking to discover the purpose of CERCLA and EPCRA, their coverage, and particularly the purpose of their release reporting requirements, those statutes repeatedly refer to modern chemical technology, synthetic chemicals, and hazardous substances and wastes resulting from human activity.

The references to agriculture in the legislative history refer to Cattle Operations as a resource to be protected and compensated for loss rather than as operations which are a source of hazardous wastes to be regulated. To the extent there is mention or explicit treatment of agricultural activities or livestock, it is to exempt such activities as the “normal application of fertilizer.” 42 U.S.C. 9601(22)(D). The legislative history of that provision reflects Congressional awareness that chemical fertilizers did contain hazardous substances, but exempted them in normal use in agriculture. The removal, transportation, composting, and application to croplands of (1) manure and (2) sedimentation and retention pond liquids and soils as fertilizer, may well be covered by this exemption from the definition of “release” even if they are thought to be covered by the term “facilities.” As noted above, it would be incongruous, if not patently absurd, to construe the coverage of CERCLA and EPCRA release reporting to exempt the application of pesticides and chemical fertilizers, and routine agricultural operations, but to treat flatulence, urination and defecation as “releases” of “hazardous substances” from “facilities.”

IV. PROPOSED DEFINITIONS

EPA asked for comments on its proposed definitions for “animal waste” and “farm.” NCBA supports the proposed definition for animal waste:

means manure (feces, urine, other excrement, and bedding produced by livestock that has not been composted), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other materials typically found with animal waste.
NCBA also believes EPA appropriately defines “farm” by using the definition found in the National Agricultural Statistics Service (NASS) Census of Agriculture:

(a) [A]ny place whose operation is agricultural and from which $1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. Operations receiving $1000 or more in Federal government payments are counted as farms, even if they have no sales and otherwise lack the potential to have $1,000 or more in sales; or, (b) a Federal or State poultry, swine, dairy or livestock research farm.

V. CONCLUSION ON CERCLA AND EPCRA RELEASE REPORTING APPLICABILITY.

In conclusion, NCBA believes that CERCLA and EPCRA release reporting requirements when read fairly and in accordance with their purpose, and consistent with the other provisions of the statute, do not apply to Cattle Operations as described and defined above. One winces at the strained and distorted interpretations that would reach the conclusion that they are covered. At the same time, NCBA believes that ammonia and hydrogen sulfide from Cattle Operations fall within the naturally occurring substances exemption from EPA’s response authority, and therefore do not require reporting consistent with EPA’s prior interpretations. We also believe Cattle Operations fit the criteria under which EPA has exempted other activities where response action is not appropriate or feasible, such as release of reportable quantities of radionuclides from mines, farming and land disturbance.

In light of these conclusions, NCBA believes it is entirely appropriate to treat Cattle Operations as not covered by CERCLA and EPCRA release reporting and response authorities and to exempt them from these regulations. We commend the EPA for taking the common sense approach in the proposed rule and urge the adoption of the exemption in the final rule.

Thank you for your consideration of NCBA’s comments.

Sincerely,

Terry Stokes, CEO
National Cattlemen’s Beef Association

Attachment
December 10, 2003

The Honorable Michael O. Leavitt
Administrator
U. S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC  20460

Re: Application of Clean Air Act Major Source Permit Programs and CERCLA/EPCRA Release Reporting Requirements to Cattle Operations.

Dear Administrator Leavitt:

In the course of the last year members of your staff, as well as representatives of the Office of General Counsel, have taken the time to meet with and to assist representatives of the National Cattlemen’s Beef Association (“NCBA”) tasked to address NCBA members’ concerns with complying with Clean Air Act major source permitting requirements and CERCLA/EPCRA release reporting requirements for cattle operations. NCBA itself, through its air working group, has devoted extensive resources and study to the air quality concerns that have been expressed by its members and others. Our meetings with Ms. Shaver and representatives of EPA’s Emissions Standards Division in October 2002, with Mr. Holmstead and Mr. Wehrum of EPA’s Office of Air and Radiation, and Mr. Page of EPA’s Office of Air Quality Planning and Standards in December 2002, and with Ms. Horinko and representatives of EPA’s Office of Solid Waste and Emergency Response and Office of General Counsel in April 2003, reviewed and discussed in considerable depth the potential requirements of EPA’s major source Clean Air Act permit programs and CERCLA’s and EPCRA’s release reporting requirements for cattle operations. The consultation and advice of your staffs is greatly appreciated. It has and will continue to assist NCBA members with voluntary compliance with applicable laws.

The purpose of this letter is to convey NCBA’s understanding of the Clean Air Act’s major source permitting and CERCLA/EPCRA’s release reporting requirements to the cattle operations of our members, and to seek your concurrence either formally or informally, through ruling or policy guidance as you deem appropriate. NCBA would like to be able to confirm its understanding of the application of these laws by EPA to cattle operations, and to convey that understanding to its membership.
One of the results of NCBA’s consultation with EPA and its own review has been to define and to limit carefully the activities of NCBA members on which we seek your general confirmation of NCBA’s understanding and position. The “Cattle Operations” treated in the attached White Paper and Addendum of supporting authorities include only the grazing and feeding of cattle in open-air pastures and feedlots. The primary wastes from these operations, manure and urea, are beneficially recycled as fertilizer. No barns or wastewater lagoons are included in “Cattle Operations” as defined for purposes of your consideration of this issue in NCBA’s White Paper. The only ponds involved are precipitation retention ponds. Similarly, Cattle Operations do not include any sources of non-fugitive emissions that exceed the thresholds for the Clean Air Act’s major source permit programs, namely those of Title V, Prevention of Significant Deterioration (“PSD”) and nonattainment New Source Review (“NSR”). This carefully limited definition of Cattle Operations accurately describes the open-air pasturing and feeding operations of the overwhelming majority of NCBA members.

Based on Cattle Operations as defined and limited in attached White Paper and Addendum, NCBA seeks EPA’s concurrence in its understanding that:

1. The Clean Air Act’s major source permit programs (Title V, PSD & NSR) do not require permits for Cattle Operations.

2. The release reporting requirements of CERCLA and EPCRA do not apply to Cattle Operations.

NCBA’s basis for its understanding is spelled out in the attached White Paper and Addendum of supporting legal authorities, which was developed based upon our consultation with EPA and others.

One of NCBA’s primary concerns is that Cattle Operations not be confused with other operations whose compliance EPA is also assessing. It is our belief that Cattle Operations present a clear and straightforward application of law to facts that may be readily addressed by EPA. If NCBA can be of any further assistance, or provide any further information, please contact me at 303-694-0305, or Ms. Tamara Thies at 202-347-0228. Again, we thank you for your help and consideration of NCBA’s request.

Very truly yours,

Terry Stokes, CEO
National Cattlemen’s Beef Association
This NCBA White Paper addresses the concern expressed by many NCBA members with respect to compliance with Clean Air Act major source permit requirements and the application of release reporting requirements under CERCLA/EPCRA to the cattle operations of most of its members, namely open-air grazing and feeding of cattle in pastures or feedlots. Over the last year NCBA staff and its Air Working Group have devoted themselves to resolving those compliance issues for open pasture and open-air, cattle feeding operations with precipitation runoff retention and settling ponds, but no animal feeding barns or wastewater lagoons or major point sources, such as stationary diesel engines exceeding applicable permit thresholds (“Cattle Operations”). An intensive and detailed legal and technical review has led NCBA to conclude that such cattle operations (1) are not subject to Clean Air Act major source permitting requirements, and (2) were not intended to be covered, and either are already, or should be, exempted from CERCLA/EPCRA release reporting requirements. This White Paper summarizes NCBA’s position and basis for these conclusions. The attached Addendum on legal authorities provides more detail on the legal and factual basis for NCBA’s position.

CLEAN AIR ACT PERMIT REQUIREMENTS

NCBA’s analysis of the Clean Air Act’s major source or major stationary source permit programs (namely the Title V, Prevention of Significant Deterioration (“PSD”), and non-attainment New Source Review) concludes that Cattle Operations do not require any of those permits. The reason for this is that the emissions from Cattle Operations are almost entirely fugitive emissions. The non-fugitive emissions of even the largest Cattle Operation do not approach the permit’s thresholds for these permits. Fugitive emissions from Cattle Operations do not count in determining whether the permit thresholds of these permit programs apply. As a result, it will serve no useful purpose for determining permit thresholds or applicability to attempt to quantify fugitive emissions from Cattle Operations.

Cattle Operations are “minor sources” under the Clean Air Act. In addition, EPA has acknowledged that there are no scientifically sound emissions
factors or quantification or modeling techniques currently in existence that are adequate for regulatory determinations.

Finally, many if not most states with significant cattle operations already have in place conservation laws and air quality control regulations requiring best management practices and controls for cattle operations. Local nuisance and odor problems are more appropriately left to state and local authority.

CERCLA AND EPCRA RELEASE REPORTING

CERCLA and EPCRA’s release reporting requirements, read fairly and in accordance with their purpose, do not apply to Cattle Operations. Those laws, adopted in response to Love Canal and Times Beach, were designed to deal with synthetic, man-made, manufactured and produced chemicals, and the hazardous wastes resulting from modern chemical technology. The legislative history contains a litany of references to Congress’ purpose to cover such hazardous waste facilities. Congress treated cattle, livestock and agricultural operations as valuable resources that may be adversely affected by such chemicals and releases, and may be compensated for their losses, with explicit exemptions for the application of fertilizer to cropland or the use of pesticides.

Congress also created an exclusion from response (clean up) action for “naturally occurring substances” that we believe covers the ammonia from flatulence, urination, defecation, and the bacterial decomposition of manure and urea, as well as the formation of whatever hydrogen sulfide and ammonia may evolve from precipitation runoff that contacts the urea, manure or soils and is collected in precipitation runoff retention ponds. The legislative history of this exemption makes explicit reference to “animal wastes.”

The clear purpose of release reporting under CERCLA and EPCRA is to provide immediate notice to government agencies, enabling emergency response action by them. In accordance with EPA’s interpretation of this exclusion, and precedent that has excluded golf courses and farms from release reporting requirements for radionuclides, as well as established rules of statutory construction, NCBA submits that Cattle Operations are within the naturally occurring substances exclusion from EPA’s response authority. CERCLA and EPCRA should not be interpreted to require release reporting that the agencies receiving it are prohibited from responding to; to do so would be wasteful, superfluous and futile.

In addition, EPA has excluded from release reporting those operations where response actions are infeasible or inappropriate, even where they are not explicitly exempted as naturally occurring substances, fertilizer or pesticides. It has done so, for instance, with radionuclides from dumping of coal and coal ash, and coal ash piles at power plants and industrial operations, as well as those from most mining operations. Cattle Operations, even if covered as “facilities” “releasing” “hazardous substances,” and even if not within the naturally
occurring substance exclusion, are very clearly with EPA’s established grounds for exemption from release reporting, which include (1) continuous low level emissions over large areas, (2) rapid dispersion in the environment, and (3) acceptable exposure risk, all of which make response action infeasible or inappropriate. Congress explicitly recognized the low risk of low-level, continuous ammonia releases. Ammonia and hydrogen sulfide are not listed as hazardous air pollutants under the Clean Air Act.

Based on the results of NCBA’s work, NCBA is requesting that EPA provide a clear ruling, or explicit guidance, that Cattle Operations are not subject to Clean Air Act major source permitting requirements or release reporting requirements under CERCLA/EPCRA.

RTC
Addendum Attached.

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ADDENDUM IN SUPPORT OF 
NCBA WHITE PAPER 
ON APPLICABILITY OF 
(1) CERCLA, /EPCRA RELEASE REPORTING 
AND 
(2) CLEAN AIR ACT PERMIT REQUIREMENTS.

This Addendum to the attached National Cattleman’s Beef Association (“NCBA”) White Paper dated November 20, 2003, provides the legal analyses and authorities supporting NCBA’s position on the applicability of (1) the release reporting requirements of the Comprehensive Environmental, Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq. (“CERCLA”) and the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001 et seq. (“EPCRA”), to certain hazardous air substances (specifically ammonia and hydrogen sulfide), and (2) the Clean Air Act’s major stationary source permitting programs to the air pollutants that may result from “Cattle Operations” as described and defined for purposes of this White Paper (see especially sections I. & II. below).
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I. CATTLE OPERATIONS

Members of the National Cattlemen’s Beef Association (“NCBA”) raise and feed cattle. “Cattle Operations” include operations that raise and feed cattle in open pastures and in open-air cattle feed lots. Grazing of cattle in open pastures is usually in fenced areas, and most feeding operations take place in fenced pens. The naturally occurring and biologically produced air pollutants resulting from cattle operations, as well as related man-made sources of air pollutants, are described in this and following sections of the Addendum.

Precipitation runoff from cattle feedlot surfaces is usually contained in runoff retention ponds. The natural surface runoff during precipitation events from the feeding pens into the retention ponds results in those retention ponds containing water for various periods of time, with some being dry for most of the year. The precipitation runoff retention ponds that are part of Cattle Operations may, as described below, contain minor amounts of manure and urea from runoff, and as a result may produce some ammonia and hydrogen sulfide. These ponds are not waste lagoons, nor are they waste treatment facilities. Nutrients that may accumulate in them are periodically removed and recycled as fertilizer to croplands or composted for fertilizer.

“Cattle Operations” as defined and used in this White Paper do not include operations where cattle are raised and fed in barns, nor those where cattle wastes, including manure and urea, are collected or slurried into wastewater lagoons.

A. Hazardous Air Substance “Releases”

The “hazardous substances” in air potentially requiring release reporting under CERCLA and EPCRA are ammonia and hydrogen sulfide.

1. Ammonia. The natural breakdown of nitrogen in grass and other feeds (primarily corn, but also including wheat, sorghum, and other grains and foods) during digestion by cattle results in some ammonia in flatulence, belching and exhalation. In addition, the bacterial decomposition of manure and urea excreted by cattle in pastures and feed pens produces ammonia over the weeks and months after it is excreted.

Undisturbed soils also produce ammonia. As noted below, ammonia is ubiquitous, with perhaps half of the global inventory generated by undisturbed soils and biomass burning. The “reportable quantity” (“RQ”) for ammonia under CERCLA and EPCRA is 100 pounds per 24-hour period, an amount that was derived from the Clean Water Act, but is applied by EPA to air and land as well as water. Ammonia is not classified as “hazardous air pollutant” under Title III of the Clean Air Act. 42 U.S.C. § 7412 (1995).
Congress has, however, dealt with the potential adverse effects of ammonia under the Clean Air Act. Subsequent to the disaster at Bhopal, India, Congress in 1990 passed amendments to the Clean Air Act dealing with accidental release prevention. 42 U.S.C.A. § 7412(r)(1995). The Senate Committee dealt specifically with ammonia, stating that:

“. . . the principle health concern with ammonia is strictly its sudden and accidental release into the atmosphere . . . Ammonia is not carcinogenic, mutagenic, teratogenic or neurotoxic, in either low or high volumes of exposure, nor does it present any significant public health hazard or environmental hazard through chronic exposure to routine emissions.” . . . If air emissions of ammonia are hazardous at all, it is only in the case of substantial, sudden, and accidental release. . . .”


The EPA’s implementing regulations for this program under section 112(r) of the Clean Air Act, 42 U.S.C.A. § 7412(r) (1995), establishes threshold quantities for hydrogen sulfide of 10,000 pounds, for anhydrous ammonia, and for ammonia in concentrations of 20% or greater of 20,000 pounds in the process. Under this program, ammonia “used as an agricultural nutrient, when held by farmers, is exempt from all provisions of this part.” 40 C.F.R. §68.125.

2. Hydrogen Sulfide. As noted above, the precipitation runoff retention ponds at Cattle Operations may contain small amounts of sulfur from the trace amounts of urea and manure reaching them as a result of precipitation runoff from pens. This sulfur originates in the soils and plants, grains and other feedstuffs, and in some cases, supplements, on which the cattle are fed. The sulfur in the ponds may produce some amounts of hydrogen sulfide by virtue of anaerobic decomposition. However, precipitation runoff retention ponds at Cattle Operations are designed to be aerobic, not anaerobic. Thus little, if any, hydrogen sulfide is expected to be generated from these ponds.

Many Cattle Operations catch precipitation runoff in small settling areas or channels that precede the retention ponds. Most of the manure waste in the runoff precipitates in these settling basins. This organic material is periodically removed from the settling ponds and used as fertilizer. Retention pond liquids, which also contain some of these nutrients, are also applied to croplands periodically. Most sizeable cattle feed lots in this country are located in net evaporation areas with low rainfall.
B. Particulate Matter and Other Sources of Air Pollution At Cattle Operations

The action of cattle hooves on dried manure and soil also produces dust (coarse particulate matter), particularly in the arid and semi-arid areas of the United States where most Cattle Operations are conducted. In cattle feed lots, the dried manure is periodically scraped and removed from the pen surface in a process that takes a matter of hours, and generally occurs at least once a year. The manure is then applied to croplands or composted for later use as fertilizer. The dried manure in the pens is also mounded for habitat purposes, and compacted to form a nearly impermeable seal to prevent percolation of water through the pen surface to potential groundwater aquifers. As noted above, most Cattle Operations of significant size are located in arid areas, where water is a scarce, and carefully protected, resource.

Particulate matter is also produced by feed delivery trucks on the roads in the feed lot, and by open loading and unloading of silage and other feed materials into trucks and feed bunkers. Cowboys on horseback in the pens, as well as other housekeeping operations and light vehicles and trucks supplying and servicing the feed lot also produce some dust from roads as well as engine exhaust.

Other air pollution sources present at typical Cattle Operations include feed mills, which store and prepare the feed. These feed mills typically include temporary feed storage facilities, (1) to which corn and other grains are transported by train and truck, mixed with various supplements and other ingredients, and loaded by truck and front-end loaders, and (2) from which rolled and prepared grains are loaded onto trucks that convey them to feeding “bunkers” on the periphery of the feeding pens. Truck loading and unloading of feed materials, small gas-fired steam boilers for warming feed corn, and the use of scrapers and light truck and other vehicles often powered by diesel engines for transporting grains and feed, together with space and water heating for office and employee quarters, and light vehicles, round out the sources of air pollutants at typical Cattle Operations. Their fugitive and non-fugitive emissions are treated below.

The coarse PM10 national ambient air quality standard (“NAAQS”) that was adopted by EPA in 1997 was vacated by the Court of Appeals for the District of Columbia in American Trucking Assn. v. EPA, 175 F.3d 1027, 1057 (D.C.Cir. 1997) because it was confounded by including fine and coarse PM. On remand from the Court, EPA is considering the adoption of a new coarse PM standard. NCBA submits that the consensus of sound scientific opinion remains that there are no substantial health or welfare effects from fugitive dust or particulate matter at ambient levels.

In addition the new fine PM standard (that by definition should not include fugitive dust or coarse PM) is measuring on the order of 50 percent
fugitive dust, making it also confounded in the same way that led the Court to vacate the PM10 coarse standard. In the meantime, the pre-1997 PM10 standards, which are as confounded by including fine and coarse PM as the coarse PM standard vacated by the Court, are being maintained in effect by EPA. NCBA strongly encourages EPA to revise its measurement and analysis methods to separate fine and coarse PM, and to perform the research necessary to determine whether coarse PM has substantial adverse effects at ambient levels.

II. SOURCES AND SUBSTANCES NOT COVERED

The Cattle Operations addressed by this White Paper do not, by definition, include any major stationary sources of non-fugitive emissions that in the aggregate would exceed any of the permit thresholds of the Title V, PSD or nonattainment New Source Review permit programs, such as diesel engines used for power generation or pumping water. Cattle Operations do not include beef slaughterhouses, tanneries, or rendering operations, nor barns in which cattle are fed and from which manure and urea are conveyed to wastewater lagoons. Nor does this White Paper treat the requirements applicable to the tailpipe emissions from mobile sources used at Cattle Operations. In other words, for purposes of this White Paper, Cattle Operations do not include “major stationary sources” under EPA’s Title V, PSD, or NSR permitting programs that may be located on, or adjacent or contiguous to, a Cattle Operation.

III. FUGITIVE AND NON-FUGITIVE EMISSIONS FROM CATTLE OPERATIONS; “MINOR SOURCE” STATUS OF CATTLE OPERATIONS

The emissions of concern at Cattle Operations are almost entirely “fugitive emissions.” Fugitive emissions are not counted in determining whether a permit is required under the Clean Air Act’s major source permitting programs, with few exceptions (so-called “listed sources” that do not include Cattle Operations). “Fugitive emissions” are “those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.” 40 C.F.R. §52.21(b)(20).

Because cattle grazing and feeding in fenced pens or pastures are open-air operations, and could not reasonably be enclosed and vented through a pipe, chimney, vent or other opening, emissions from them are virtually all fugitive emissions. Ammonia in flatulence, urination, defecation, and bacterial decomposition of manure and urea are fugitive emissions. So is the particulate matter that becomes airborne from pen surfaces, roads, alleys, and open areas due to wind and activities such as loading and unloading, hoof action on pen surfaces, and dust from trucks, light vehicles, cowboys, and surface disturbance. The emissions that may come from precipitation runoff retention ponds, which may include small amounts of ammonia or hydrogen sulfide, and perhaps other compounds, are also fugitive emissions.
As noted above, the activities that can result in fugitive emissions are multiple, including wind on soils and pen surfaces, hoof action on the same surfaces, feed truck and front end loaders loading feed, feed trucks unloading feed, front end loaders scraping and loading and contouring dried manure for recycling on croplands or composting, trucks being loaded and hauling dried manure and other supplies, maintaining roads and alleys, dust from traffic on them, and numerous other activities in the pens, including cowboys on horses whose hooves also produce some fugitive dust.

It is neither feasible nor reasonable to enclose and vent through a stack and control device the fugitive emissions from open-air Cattle Operations. Cattle Operations cover tens to thousands of acres. They require access by feed trucks, ingress and egress by the cattle and by horses, light vehicles, scrapers, loaders and unloaders. Even if it were feasible (and we do not believe it is) to enclose and vent such operations, it is certainly not economical, nor is there any conceivable cost-benefit analysis that would support doing so. The pollutants involved, primarily fugitive dust and ammonia, have no substantial health or welfare effects at ambient levels as long as they are reasonably controlled through the use of good management practices.

In addition, as noted above, Cattle Operations, for purposes of this White Paper and any policies, rulings, regulations or guidance that may be based on it, do not include non-fugitive emissions from Cattle Operations, such as those enumerated above (feed mills, grain storage, space and water heating et al.) that may emit, or have the potential to emit, 100 tons per year or more of any single regulated pollutant or lower thresholds in serious or severe non-attainment areas which may be applicable. Cattle Operations so defined are below the thresholds for major source permit applicability (see discussion below of Clean Air Act Permit Requirements). They are classified as “minor sources” for Clean Air Act purposes.

In addition, no reasonable or reliable quantification of the fugitive “emissions” of ammonia, methane, hydrogen sulfide, other reduced sulfur compounds, volatile organic compounds, sulfur dioxide, carbon monoxide, carbon dioxide, nitrogen oxides, particulate matter or other regulated air pollutants from Cattle Operations exists, and it is doubtful whether a reasonable quantification of such biological byproduct and secondary “emissions” at open air operations is practical, necessary or desirable. Reasonable control of fugitive emissions from Cattle Operations is accomplished through the application of best or reasonable management or control practices (“Best Management Practices” or “BMPs”) which need no quantification for use or enforcement.

IV. ABILITY TO DETERMINE REPORTABLE QUANTITIES AND PERMIT APPLICABILITY_THRESHOLDS

The requirement of CERCLA and EPCRA to report releases of ammonia and hydrogen sulfide into the air is subject to the determination that a
“reportable quantity” is emitted. For both CERCLA and EPCRA, the reportable quantities (“RQ”) of ammonia and hydrogen sulfide are 100 pounds per 24-hour period. 40 C.F.R. §302.4, Table 302.4 & 40 C.F.R. part 355, App. A. Although the ammonia 100 pound RQ was originally derived from the Clean Water Act, EPA stated in its 1985 Final Rule clarifying RQs under CERCLA that the RQ of 100 pounds applies to emissions into the air or water. See 50 Fed Reg. 13456 (Apr. 4, 1985). The Clean Air Act’s permit requirements for major sources also contain thresholds for nonfugitive, and, at a few listed sources (none of which are included in Cattle Operations), include fugitive emissions, discussed below under Clean Air Act Permit Requirements.

EPA has a standard emissions factor document for use in estimating emissions from a wide variety of operations. The document, “Compilation of Air Pollutant Emission Factors” is generally known as “AP-42”. Its estimates generally reflect testing and sampling of several representative sources, giving an average that may be used for broad estimation purposes, but is not expected to be accurate for any particular operation. EPA posts current information and updates on AP-42 on its web site. AP-42 covers the “Food and Agriculture Industries” in Chapter 9. Section 9.4 of Chapter 9 covers “Livestock & Poultry Feed Operations.” As of October 30, 2003, section 9.4 stated that “[a]t this time, there is no “AP-42 factor” or estimation method for this category.” (July 14, 1999 update). The document does reference “Development and Selection of Ammonia Emission Factors” (EPA 1994) which does make emission estimates for ammonia from livestock operations, but does not adopt those factors as standard emission factors for regulatory use. The Table of Contents of AP-42 to section 9 references the final report of the National Academy of Sciences (“NAS”) Committee on Air Emissions from Animal Feeding Operations. The purpose of the report is to assess the scientific issues involved in estimating air emissions from animal feeding operations. The report concludes that there is insufficient information for adequate estimation of those emissions at the current time. “Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs” (NAS 2002), ch. 4 at pp.74-97 In addition, there have been various studies in Iowa, Kansas, and elsewhere making crude estimates based on material balance and other techniques. None of these efforts at estimation have been judged sound enough by EPA or the scientific community to support regulatory determinations or emission estimates.

The measurement of ammonia from flatulence and decomposition of manure and urea, as well as particulate matter, volatile organic compounds and other substances from Cattle Operations in open air pastures and feed lots is problematic at best. Direct measurement is not possible or feasible. Because the pollutant is dispersed in the air before measurement (in other words, already a “cloud”), the wind speed and direction, pressure and temperature, stability and mixing characteristics of the atmosphere affect the emission, and measurement depends on capturing the whole cloud in time and space. A vertical and horizontal array of tens of instruments upwind and downwind of the source being measured covering sufficient area is necessary, as is a complete set of
meteorological instrumentation and data (wind speed, direction, mixing height, pressure, etc.). Because these arrays still only measure concentrations at a relatively few points in a cloud of indeterminate size and shape over short periods of time, they are subject to very large error. In order to estimate the quantity of emissions, the concentration data from the few points in the array must be mathematically modeled, spatially averaged, and projected to simulate the cloud’s form and density. Because of the impracticality and cost of operating these large arrays, and their large margin of error, quantitative emission limits for open-air fugitive operations are not a practical air pollution control technique or enforcement tool. Typical air pollution control regulations for open-air fugitive sources prescribe a menu of best management practices or reasonable control techniques that may be applied, such as collection of loose dust using loaders and box blades, speed limits for vehicles on dirt roads, wind breaks, chemical dust suppressants on roads and heavily used areas, and, where reasonably available and not hampering good conservation practice in areas with short water supplies, the watering of roads, pen surfaces and dusty work areas using trucks or sprinklers, for which quantification is unnecessary.

The ammonia produced by cattle and the ammonia and hydrogen sulfide potentially produced by some ponds with some sulfur will vary with characteristics of the ration fed to the cattle, the breed of cattle, the acidity and other conditions of the digestive tract, hydration, heat, and the characteristics of the water in the retention ponds. In other words, there are a large number of variables, each of which would have to be held constant while others are varied, in order to derive emission factors. This is impractical. Even with inanimate, inert particulate matter, like fugitive dust, the error in estimation of the amounts emitted in open-air land disturbance has proved to be often an order of magnitude or more - - hardly adequate or appropriate for regulatory determinations or the imposition and enforcement of quantitative controls.

The possible use of some of the estimated emissions quantifications to date has been of concern to representatives of agriculture. Congressman John Boehner expressed that concern to EPA Administrator Christine Todd Whitman, who responded in a letter to Congressman Boehner dated November 9, 2001 that:

“As you note in your letter, we do not currently have sound emission estimates to support regulatory determinations for animal agriculture.”

(Emphasis added.)

Administrator Whitman went on to note the work of the National Academy of Sciences relating to estimation of agricultural emissions and EPA’s work with the Department of Agriculture’s Air Quality Task Force, stating that “[w]e will use this [NAS] study to develop scientifically valid emission estimates that can be used to inform our regulatory policy decisions.” Administrator Whitman also took note of the Agricultural Air Quality Task Force recommendation that EPA
defer implementation of Clean Air Act and CERCLA programs, stated that she was reviewing the recommendation, and that “I agree that any actions we take need to be based on sound science.” Indeed, the EPA 1994 ammonia emission factors document referenced, R. Battye et al., Development and Selection of Ammonia Emission Factors: Final Report (Prepared for U.S. Environmental Protection Agency, 1994) concludes that the national inventory may have left out half of the actual ammonia emissions: “Recent research indicates that these two categories [undisturbed soils and biomass burning, which were not estimated] may contribute significantly (up to half) to the global budget of NH3 emissions.” (id. at p. x)(Emphasis added).

It is fair to conclude that there is not a valid or sound scientific basis for the estimation of fugitive ammonia, hydrogen sulfide, particulate matter, or other emissions from Cattle Operations, nor sound emissions estimates to support regulatory determinations, based on no less authority than EPA’s immediate past Administrator, the NAS final review, and EPA’s latest updates and assessments. Thus there is no accepted method for reasonable quantification of fugitive ammonia, hydrogen sulfide, particulate matter or other emissions from Cattle Operations. There is no sound or reasonable basis for making a regulatory determination whether the ammonia or hydrogen sulfide from fugitive emissions from Cattle Operations do or do not exceed the reportable quantities of those substances from Cattle Operations. Because Cattle Operations are not a listed source, and by definition for purposes of this White Paper their non-fugitive emissions do not exceed the thresholds for Clean Air Act major sources in attainment or unclassifiable (Prevention of Significant Deterioration) or nonattainment (NSR) areas, nor for Title V Operating permits, there is no need to quantify their fugitive emissions for purpose of determining Clean Air Act permit applicability requirements.

As confirmed by immediate past Administrator Whitman, of EPA, there are no sound emissions estimates to support regulatory determinations, and any actions taken need to be based on sound science that currently does not exist. This view is supported by (1) the fact that there are no AP-42 emission factors for Cattle Operations (even though there are studies making estimates of ammonia emissions from such operations in the AP-42 documents), and (2) the final report of the NAS committee working on the evaluation of air emissions from such operations. Given the lack of sound and accepted methods for determining whether there are reportable quantities of ammonia, hydrogen sulfide, or particulate matter from Cattle Operations, there appeared to be no reasonable basis for enforcement of CERCLA’s or EPCRA’s release reporting requirements on Cattle Operations, nor any sound basis for reporting estimates of those hazardous substances. Fugitive emissions from Cattle Operations are not required to be quantified for purposes of Clean Air Act major source permits (PSD, NSR, or Title V). While fugitive emissions of hazardous air pollutants are required to be included in determining major source status for purposes of Title V permits, neither ammonia nor hydrogen sulfide are hazardous air pollutants,
V. CLEAN AIR ACT PERMIT REQUIREMENTS APPLICABLE TO CATTLE OPERATIONS

As noted above in the sections defining Cattle Operations for purposes of determining the applicability of Clean Air Act permit requirements, and the section on the fugitive and non-fugitive emissions from Cattle Operations, the emissions from Cattle Operations are composed of:

1. Fugitive emissions, primarily of particulate matter from wind and hoof action on pen surfaces and open or disturbed areas, but also including ammonia, hydrogen sulfide, methane, trace amounts of volatile organic compounds and other gases from flatulence, urination, defecation, and bacterial and anaerobic decomposition of manure and urea;

2. Non-fugitive emissions from stationary sources that in the aggregate are less than the major source permit thresholds.

The Clean Air Act permit programs we have considered include those for Prevention of Significant Deterioration (“PSD”), 42 U.S.C. §7470 et seq., 40 C.F.R. §§ 51.166 & 52.21, those for nonattainment New Source Review (“NSR”), 42 U.S.C. § 7501 et seq., 40 C.F.R. §§ 51.165, 52.24, and Appendix S to Part 51, and the Title V operating permit program 42 U.S.C § 7661 et seq., 40 C.F.R. part 70. These are the Clean Air Act’s permit programs for “major stationary sources” and “major modifications” to such sources.

Fugitive emissions do not count in determining whether Cattle Operations exceed the 100 ton per year, 250 ton per year, or other permit thresholds applicable under the PSD, NSR or Title V permit programs. 42 U.S.C. § 7602(j), 40 C.F.R. §§ 51.165(a)(1)(iv)(A)(2)(C), 51.166(b)(1)(iii), 52.21(b)(1)(iii), 52.24(f)(4)(iii). 70.2 (subsection (2) of definition of “major source”) as amended on November 27, 2001. Fugitive emissions only count towards determining those permit thresholds for certain “listed” sources.

The “listed” sources include specific listed sources such as power plants, refineries and smelters, but also include sources for which either New Source Performance Standard (“NSPS”) or National Emission Standards for Hazardous Air Pollutants (“NESHAPs”) were applicable as of August 7, 1980. Id. Cattle Operations are not among the specifically listed sources. The sources for which NSPS and NESHAPs had been adopted and were in effect as of August 7, 1980 include only one category that appeared to us to have possible presence at or application to Cattle Operations, namely “grain elevators.” 40 C.F.R. 60.300. These are defined in turn to include “grain terminal elevators” (which
specifically exclude “livestock feedlots”), and “grain storage elevators.” 40 C.F.R. § 300(a).

The latter definition includes “any grain elevator located at any wheat flour mill, wet corn mill, dry corn mill (human consumption), rice mill, or soybean oil extraction plant, which has a permanent grain storage capacity of 335,200 m³ (ca. 1 million bushels).” 40 C.F.R. §60.301(f). We have reviewed the customary, ordinary, accepted meaning of these terms, and their standard meaning and use in the agricultural community, with knowledgeable NCBA members. The only category of potential applicability was “wet corn mill.” The facilities at Cattle Operations are not, in the opinion of NCBA members, “wet corn mills.”

The reason that fugitive emissions are not counted in making Clean Air Act permit applicability threshold determinations, and have been excluded as described above, is the decision of the Court of Appeals for the District of Columbia in Alabama Power Co. v. Costle, 636 F.2d 323, 368-370 (D.C. Cir. 1979), where the Court held that EPA must conduct a rulemaking pursuant to section 302(j) of the Clean Air Act, 42 U.S.C. § 7602(j) prior to including fugitive emissions in the definition of “major stationary source” for permitting purposes under the PSD program. EPA has followed that decision’s requirement in its nonattainment NSR and Title V, as well as its PSD permit programs. EPA has not conducted a rulemaking for the purpose of including air emissions from Cattle Operations or from agricultural operations. In our opinion, it would not be a valid exercise of EPA authority to include such emissions without first conducting the kind of tailored, special rulemaking the Court contemplated in the Alabama Power case. Id at 379-370, fn. 19.

“Hazardous air pollutants” (“HAPs”) are not covered by the PSD permit program. They were specifically excluded from that program by the Clean Air Act Amendments of 1990. 42 U.S.C. § 7412. Title V permits are required for “major sources” of hazardous air pollutants, i.e., those with emissions, including fugitive emissions, over 10 tons per year of any single HAP or 25 tons per year of all HAPs combined. Neither ammonia nor hydrogen sulfide is a HAP. It is NCBA’s understanding from the environmental managers of NCBA members that there are no other HAPs exceeding these thresholds from Cattle Operations. It is also NCBA’s understanding that there is no reasonable basis for estimation or quantification of the trace amounts of HAPs that may be involved in Cattle Operations.

Cattle Operations have not been listed as sources of HAPs, and no standards have been adopted for them under EPA’s so-called “Maximum Available Control Technology” (“MACT”) requirements under Title III and 40 C.F.R. part 63.

NCBA submits that Cattle Operations are properly categorized and regulated as “minor sources” that are not required to obtain PSD, NSR or Title V
permits, but may be required to obtain state “minor source” permits and to comply with state best management and control practice regulations.

Conclusion on CAA Major Source Permit Requirements.

Because the non-fugitive emissions from Cattle Operations do not exceed the permit applicability thresholds for PSD, NSR or Title V permits, those permits are not applicable to Cattle Operations. Cattle Operations are correctly classified as “minor sources.” Because most emissions from Cattle Operations are fugitive emissions, which are not counted toward permit applicability, there is no need to quantify those emissions for that purpose.

VI. Analysis of the Applicability of CERCLA and EPCRA Release Reporting Requirements to Cattle Operations.

Release Reporting Requirements of CERCLA and EPCRA Do Not Apply to Ammonia and Hydrogen Sulfide From Cattle Operations.

Our review of the provisions of the release reporting provisions of CERCLA and EPCRA, and their application to releases of ammonia and hydrogen sulfide from Cattle Operations, leads us to the conclusion that they do not apply to ammonia and hydrogen sulfide from Cattle Operations.

A. The Coverage And Purpose of CERCLA and EPCRA Release Reporting Requirements.

NCBA’s exhaustive review of the statutes themselves, their legislative history, and their interpretation by EPA and the courts over the course of more than 20 years, discovered no mention or indication that air emissions resulting from flatulence, belching, exhalation, or excretion of urine or manure or their bacterial decomposition, or substances in the air resulting from runoff that encounters and carries relatively small amounts of manure or urea into precipitation runoff retention ponds are covered by the release reporting requirements of CERCLA or EPCRA. The terms of the statutes themselves, which cover “facilities” that “release” “hazardous substances” into the environment (discussed below) do not clearly or comfortably cover the biological and natural processes that result in ammonia and hydrogen sulfide at Cattle Operations. It is not a matter of broad or narrow reading of the terms of the statute, but whether those terms cover the biological and natural processes responsible for generation of ammonia and hydrogen sulfide at Cattle Operations at all. Such coverage is, NCBA believes, ambiguous at best, while the exception for “naturally occurring substances,” 42 U.S.C.A. § 9604(a) (3) (A) (discussed below) does seem to cover those processes.

The most fundamental guide to the meaning of any statute is an understanding of its purpose. As Judge Learned Hand stated in discarding the literal or “plain” meaning of a statute that was inconsistent with its purpose, “...
statutes always have some purpose or object to accomplish, whose sympathetic
and imaginative discovery is the surest guide to their meaning.” Cabell v.
Markham, 148 F.2d 737 (2d Cir. 1945), aff’d 326 U.S. 404 (1945); see also Billik
v. Berkshire, 154 F.2d 493,494 (2d Cir. 1946): “Attention must always be given
to what Congress sought to accomplish by the statute . . . ‘There is no surer
guide in the interpretation of a statute than its purpose when that is sufficiently
disclosed; nor any surer mark of oversolicitude for the letter than to wince at
carrying out that purpose because the words used do not formally quite match
with it’” (quoting Federal Deposit Ins. Corp. V. Tremaine, 133 F.2d 827, 830
(2d. Cir. 1943). The Supreme Court has cautioned against reading the “plain”
language of a statute to avoid frustrating the purpose of Congress and arriving at
an absurd result, stating that: “The decisions of this Court have repeatedly
warned against the dangers of an approach to statutory construction which
confines itself to the bare words of a statute.” Lynch v. Overholser, 369 U.S.
705, 711 (1962).

We have first looked broadly at what Congress did intend to cover in
CERCLA and EPCRA, and then more specifically at what purpose Congress had
in requiring release reporting.

B. Activities and Substances Congress Intended to Cover.

CERCLA was passed in the wake of Love Canal for the purpose of dealing
with the “legacy of hazardous substances and wastes which pose a serious threat
to human health and the environment.” S. Rep. No. 99-73, at 12 (1985), and “to
clean the worst abandoned hazardous waster [sic] sites in the country . . .”
litany of references to “synthetic,” “man-made” chemicals, “chemical
contamination,” and the results of “modern chemical technology” as the
problems CERCLA intended to address. S. Rep. No. 96-848 at 2-6, 12 (1980);
99-253, part 5, at 2 (1985). It contains no reference to an intention to clean up
manure or urea, or their byproducts, from cattle or any other agricultural
operations.

In addition to clean up of hazardous waste sites such as Love Canal, the
Senate committee stated that the legislation was intended to cover “spills and
other releases of dangerous chemicals which can have an equally devastating
and commented that such releases have resulted in the “loss of livestock and
food products to contaminated drinking water and feed . . .” Id. It also noted that
Superfund “may be used to compensate an agricultural producer . . . for loss”
resulting from such releases of hazardous substances” id. at 78, and that such
losses included injury to “livestock” id. at 79.

Congress also indicated the scope of the activities it intended to cover in
the provisions it made for funding the “Superfund” to pay for cleanup. The tax it
imposed focused on “the type of industries and practices that have caused the problems that are addressed by Superfund;” Congress chose to impose the tax “on the relatively few basic building blocks used to make all hazardous products and wastes.”

2 H.R. Rep. No. 99-253, Part 1, at 141 (1985); S. Rep. No. 96-848, at 19 (1980). These building blocks, or chemical “feedstocks,” are comprised of petrochemicals, inorganic raw materials, and petroleum oil because “virtually all hazardous wastes and substances are generated from these [substances].” See id. at 20; see also S. Rep. No. 99-73, at 3 (1985) (“The taxable chemical feedstocks generally are intrinsically hazardous or create hazardous products or wastes when used.”); H.R. Rep. No. 99-253, Part 1, at 141 (1985). (“[T]he problems addressed by CERCLA are byproducts of productions processes that use these raw materials.”). Manure, urea, and their byproducts, are clearly not among these materials.

The fee is levied on feedstock chemicals manufactured or imported into the United States when they are sold or used “by the manufacturer, producer, or importer thereof.” Id. at 7 (emphasis added). By definition, this scheme does not include taxation of ammonia or hydrogen sulfide from livestock, or their wastes. Although not determinative, the taxation provision’s focus on chemical feedstocks supports the reasoning that Congress intended to regulate the sale or use of synthetic, man-made chemicals with CERCLA, not the generation of ammonia and hydrogen sulfide from Cattle Operations.

The taxation provisions of CERCLA also indicate that substances like ammonia, when used for agricultural purposes, are not covered within the scope of CERCLA. Specifically, “nitric acid, sulfuric acid, ammonia, and methane used to produce ammonia, when used to produce or manufacture fertilizer, … [or] when used as a nutrient in animal feed,” are exempted from taxation. S. Rep. No. 99-11, at 69 (1985); see also S. Rep. No. 99-73, at 9 (1985). The exemption is based largely on the premise that “taxation of these compounds when used to supplement animal feed constitutes a burden on both the animal feed industry and the American agricultural sector which appears to be unnecessary.” Id. Like taxation, regulation of the agricultural sector in the form of reporting requirements for the release of ammonia or hydrogen sulfide from livestock manure and urea would arguably constitute an “unnecessary burden” on Cattle Operations.

Based on Congress’ repeated use of language evidencing its intent to provide a notification scheme for the release of hazardous substances produced

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2 The Internal Revenue Code lists the taxable chemicals and the amount imposed for each. See 26 U.S.C. § 4661(b). Relevant to this memorandum, ammonia is listed as a taxable inorganic raw material, with a tax of $2.64 per ton. Hydrogen sulfide is not a listed taxable chemical. A tax is also imposed on crude oil and petroleum products “entered into the United States for consumption, use, or warehousing.” 26 U.S.C. § 4611-12.
as a byproduct of “modern chemical technology,” the absence of a CERCLA taxation provision applicable to Cattle Operations, and the exclusion of day-to-day fertilizer and pesticide application by the agricultural community (see below) from reporting requirements, a reasonable interpretation of CERCLA’s legislative history leads to the conclusion that Congress did not intend to include the routine fugitive emission of ammonia and hydrogen sulfide from Cattle Operations in CERCLA’s and EPCRA’s release reporting requirements. Moreover, to include ammonia and hydrogen sulfide emissions from flatulence and decomposition of urea or manure, while excluding similar day-to-day agricultural operations involving the spreading or distribution of man-made chemical fertilizers and pesticides would result in a burdensome, incongruous, and perhaps even absurd, outcome.


The purpose of the release reporting provisions of CERCLA and EPCRA is to target releases of hazardous substances that present substantial threats to public health and the environment and that require immediate response by the proper officials in order to prevent or minimize their adverse impacts. The report is required to be filed “immediately,” a term that has been very strictly construed. A delay of 1 hour and 22 minutes has been held by EPA to be a violation of the CERCLA and EPCRA requirements. See In Re: Royster-Clark, Inc. 2001 WL 1848806. As the Senate Committee report noted in explaining the extension of CERCLA’s release reporting requirements to include notification to state and local officials under EPCRA, EPCRA’s release reporting requirements were intended to provide “immediate direct notification of State and local emergency response officials for releases of highly toxic substances, and particularly those determined by regulation potentially to require response on an emergency basis.” S. Rep. No. 99-11, at p. 8. In other words, the clear purpose of immediate release reporting is to provide authorities with the information needed for immediate response, if necessary.

In summary, CERCLA and EPCRA were intended to provide for the cleanup of hazardous waste sites such as Love Canal; CERCLA created the Superfund to clean up such sites through a tax on the chemicals and other substances from which the hazardous substances were derived. Finally CERCLA and EPCRA required immediate reporting of releases of hazardous substances that might imperil human health or the environment in order to allow federal, state and local authorities to respond to those threats in a timely fashion. As set forth below, the only mention of livestock operations in the course of consideration of this legislation was as a resource that needed to be protected from such hazardous substances, not as a source of such hazardous substances that needed to be regulated, reported, or taxed.
D. Relevant Exemptions from CERCLA.

In EPCRA, Congress, recognizing that “CERCLA response authorities are extremely broad . . .” excluded from the scope of the federal response authority the release or threat of release “of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found.” 42 U.S.C. § 104(a)(3)(A); and see also S. Rep. No. 99-11, at 16 (1985). The Senate committee report clarified this exception from EPA’s response authority, noting that naturally occurring releases, such as “diseases or contamination resulting from animal waste (e.g. beaver excrement),” are excluded from the response program. S. Rep. No. 99-11, at 16 (1985). Thus naturally occurring animal waste, such as urine, urea and manure, in its unaltered form, or altered solely through naturally occurring process or phenomena, are excluded from EPA’s response authority.

The flatulence, urine, urea, and manure, and the releases that result from them at dry, open-air Cattle Operations fall, we believe, within the purpose and terms of this exemption from EPA’s response authority. Flatulence and the excretion of manure and urine from cattle are surely naturally occurring, and the location of that excretion is surely “where it is naturally found,” i.e. wherever the cattle happen to be, whether in a feed pen or a pasture. The manure and urine are unaltered. The precipitation and surface runoff affecting them are naturally occurring processes. The only change in the location of these animal wastes occurs when they are periodically removed from the cattle pens and recycled through composting and/or application to croplands. That movement does not, materially affect the bacterial decomposition of the manure or urea, which occurs independent of its removal, transportation, sometimes composting, and application to croplands as fertilizer. The “normal application of fertilizer” is separately excluded from the definition of CERCLA “releases” that require reporting. 42 U.S.C.A. § 101 (22).

E. Effect of the Exemption of Cattle Operations from Response Authority on Interpretation of CERCLA and EPCRA Release Reporting Obligations.

Generally, a statute should be interpreted as a whole, and the individual provisions should be analyzed in accordance with the object and policy of the entire law. See Abramson v. U.S., 42 Fed. Cl. 621, 629 (1998) (citing Kelly v. Robinson, 479 U.S. 36, 43 (1986)). “In construing a statute, courts should not attempt to interpret a provision such that it renders other provisions of the same statute inconsistent, meaningless, or superfluous.” Id. (citing Boise Cascade Corp. v. U.S., 942 F.2d 1427, 1432 (9th Cir. 1991)). To require a facility to report a release of a naturally occurring substance would not only be inconsistent with Congress’ clear intent under § 104 to exclude such substances from the federal government’s management under CERCLA and EPCRA, but it would also lead to the incongruous result of reporting releases under § 103 that would never be responded to under § 104.
Because the purpose of reporting a release under § 103 is to alert the proper authorities of the release so that they can best determine how to respond to the release, it would be superfluous to require reporting for a release that is statutorily excluded from the federal government’s response authority. While the legislative history indicates that Congress only intended to cover modern chemical technology, synthetic chemicals and man-made processes and substances, even if CERCLA and EPCRA were interpreted to cover flatulence, manure, urine and their decomposition, the resulting ammonia and hydrogen sulfide from them falls fairly within the statutory exclusion of “naturally occurring substances” from response action.

If response action for those releases is prohibited, it then makes sense to interpret CERCLA § 103 reporting requirements not to include those substances and activities, because to do so would render the release reporting requirement of section 103 superfluous. EPA has so interpreted the “naturally occurring substance exemption” in the case of radionuclides from undisturbed lands. 63 Fed. Reg. 13460, 13462, col.2 (March 19, 1998), declaring that: “[r]eporting of naturally occurring radionuclide releases from undisturbed land holdings is unnecessary because CERCLA section 104(a)(3) generally precludes removal or remedial actions in response to a release “of a naturally occurring substances in its unaltered form or altered solely through naturally occurring process or phenomena, from a location where it is naturally found.”

EPA has stated the purpose for release reporting notification under CERCLA, and its interpretation of authority for granting exemptions, in cases where the release does not already fall clearly within a statutory exemption, as follows:

“This purpose, as the Agency has previously stated on numerous occasions, is to require ‘notification of releases so that the appropriate federal personnel can evaluate the need for a federal response action and undertake any necessary response (removal or remedial action) in a timely fashion.’ [citation omitted] . . . Thus if the Agency determines that the federal government would never, or would only rarely, take a response action as a consequence of the harm posed by the release or because of the infeasibility of a federal response, a basis for an exemption from the section 103 reporting requirements may exist.”


Based on this interpretation, EPA exempted release of naturally occurring radionuclides from large, generally undisturbed land holdings, such as golf courses and parks, along with those activities that involve the disturbance of large areas of land, such as farming or building construction.” Id.
With respect to disturbance of large areas of land, such as farming that caused releases of “reportable quantities” of radionuclides, EPA concluded that those “activities rarely would pose a hazard to the public health or welfare or the environment because releases would be dispersed widely in the environment at levels not much (if at all) above natural background. *Id.*

In the same rulemaking EPA exempted “the dumping of coal and coal ash, as well as radionuclide releases to all media from coal and coal ash piles, at utility and industrial facilities with coal-fired boilers.” *Id.* EPA explained that it did so because “the Agency believes that the submission of individual reports from each industrial and utility facility with coal and coal ash piles may not be consistent with the purposes of the section 103 reporting requirement.” *Id.* at 22529. (Emphasis added). It found that the concentration levels emitted from these piles

“will always be emitted continuously at low levels spread over large areas” [and] “never will be emitted at a high rate or in an unusually large amount as the result of a sudden episodic release . . . . Perhaps more importantly, however, a response action (i.e., removal or remedial action) under CERCLA does not appear to be the most appropriate federal regulatory response to radiation releases that are (1) similar in amount and concentration across an entire sector of industry; (2) pose acceptable exposure risks; and (3) disperse quickly in the environment such that a response is not necessary to cleanup the accumulation of what has already been released.”

*Id.*

On March 19, 1998, EPA broadened these exemptions from release reporting requirements for radionuclides for land disturbance “to include land disturbance incidental to extraction activities at all mines except limited categories with elevated radionuclide concentrations. 63 Fed. Reg. 13460, 13462, col. 2. It stated its authority to do so as follows:

CERCLA sections 102(a), 103, and 115 together provide EPA with authority to grant administrative reporting exemptions. Such exemptions may be granted for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate. Requiring reports of such releases would serve little or no useful purpose and could, instead, impose a significant burden on the Federal response system and on the persons responsible for notifying the Federal government of the release. Through such reporting exemptions, therefore, the Federal response system is able to more efficiently implement CERCLA and EPCRA and more effectively focus on reports of releases that
are more likely to pose a significant hazard to human health and the environment.


EPA’s interpretation of the scope of the naturally occurring substance exemption, and its authority to broaden it to cover other activities where response action is inappropriate, infeasible and unnecessary, have evident application and relevance to Cattle Operations. EPA’s determination that activities that fall within section 104(a)(3)’s exemption from response action need not report under section 103 means that if Cattle Operations fall within section 104(a)(3)(A)’s exemption of naturally occurring substances, there is no need to report such releases under section 103 of CERCLA.

F. The Release Reporting Requirements of CERCLA and EPCRA, Read Fairly and In Accordance with their Purpose, Do Not Cover Cattle Operations.

The CERCLA and EPCRA definitions and reporting requirements are largely the same and have been described as “inextricably intertwined.” In re: Thoro Products Co. 1992 WL 143993 *10 (E.P.A.). In fact, for hazardous substances such as ammonia and hydrogen sulfide listed under both CERCLA and EPCRA, the reporting requirements of CERCLA are the trigger for reporting under EPCRA 42 U.S.C. §11004(a); if the release of a hazardous substance is exempt from CERCLA reporting requirements, it will be exempt from EPCRA requirements as well. Id. CERCLA section 103(a) requires release reporting from “facilities” that release “hazardous substances” into the “environment.” “Facilities” cover a broad range of buildings, installations, impoundments, and areas, all of which are subject to the condition that they are “where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located . . .” 42 U.S.C. 9601(9). None of these terms would seem to apply to the generation of ammonia or hydrogen sulfide from flatulence or the excretion by cattle of urine or manure, nor to their bacterial decomposition. In other words, those biological processes do not fall within the normal meanings and uses of “deposit, storage, disposal or location” of ammonia or hydrogen sulfide. Those statutory terms all seem to connote the activity and involvement of humankind, not a naturally occurring biological process such as excretion by cattle of manure and urine and its biological decomposition into ammonia, or anaerobic decomposition into hydrogen sulfide.

The term “release” includes “any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discharging of barrels,
containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . .” 42 U.S.C. 9601(22). Again, none of these terms would normally be used to describe the excretion of urine or manure from cattle on feed pen surfaces or the ground; each of these terms connotes anthropomorphic causation, not biological excretion and bacterial decomposition.

The “environment” 42 U.S.C. § 9601(8), however, clearly includes the ambient air to which the general public has access, as well as outdoor areas. We assume that any amounts of ammonia or hydrogen sulfide that may be generated at Cattle Operations could be transported off the property.

EPCRA’s definition of “facility” includes:

all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person).


EPCRA notification is only required for release from facilities where a hazardous substance is produced, used or stored. Again, the terms “buildings, equipment, structures and other stationary items” do not comfortably or clearly include cattle feeding, roaming, and cavorting in feed pens or pastures, and the “extremely hazardous substance” resulting from their excretion of urine and manure and its bacterial or anaerobic decomposition do not comport with ordinary notions of the “production, storage, or use” of a “hazardous chemical” intended to be covered by EPCRA. Indeed, the definition of “hazardous chemical” excludes “any substance to the extent it is used in routine agricultural operations.” In our view, neither hydrogen sulfide nor ammonia that disperses as a gas from flatulence, urination, defecation, or bacterial or anaerobic decomposition, is “applied, administered, or used” in routine agricultural activities. However, if EPA were to view those gases as produced, stored or used within EPCRA’s meaning, they would surely also be viewed as routine agricultural activities. There is nothing much more routine for cattle than urinating and defecating.

At the very least, there is a lack of plain and clear meaning and coverage of Cattle Operations by the bare words of these statutes. When that is the case, it is necessary to turn to the purpose of the statute as the touchstone of its meaning and to the legislative history to determine if there was an intent to cover Cattle Operations. As described above in seeking to discover the purpose of CERCLA and EPCRA, their coverage, and particularly the purpose of their release reporting requirements, those statutes repeatedly refer to modern chemical
technology, synthetic chemicals, and hazardous substances and wastes resulting from human activity.

The references to agriculture in the legislative history refer to Cattle Operations as a resource to be protected and compensated for loss rather than as operations which are a source of hazardous wastes to be regulated. To the extent there is mention or explicit treatment of agricultural activities or livestock, it is to exempt such activities as the “normal application of fertilizer.” 42 U.S.C. 9601(22)(D). The legislative history of that provision reflects Congressional awareness that chemical fertilizers did contain hazardous substances, but exempted them in normal use in agriculture. The removal, transportation, composting, and application to croplands of (1) manure and (2) sedimentation and retention pond liquids and soils as fertilizer, may well be covered by this exemption from the definition of “release” even if they are thought to be covered by the term “facilities.” As noted above, it would be incongruous, if not patently absurd, to construe the coverage of CERCLA and EPCRA release reporting to exempt the application of pesticides and chemical fertilizers, and routine agricultural operations, but to treat flatulence, urination and defecation as “releases” of “hazardous substances” from “facilities.”

VII. CONCLUSION ON CERCLA AND EPCRA RELEASE REPORTING APPLICABILITY.

In conclusion, NCBA believes that CERCLA and EPCRA release reporting requirements when read fairly and in accordance with their purpose, and consistent with the other provisions of the statute, do not apply to Cattle Operations as described and defined above. In addition, NCBA believes that ammonia and hydrogen sulfide from Cattle Operations either fall within the naturally occurring substances exemption from EPA’s response authority, and therefore do not require reporting consistent with EPA’s prior interpretations, or fit the criteria under which EPA has exempted other activities where response action is not appropriate or feasible, such as release of reportable quantities of radionuclides from mines, farming and land disturbance.

In light of these conclusions, NCBA does not believe that it is appropriate to treat Cattle Operations as covered by or subject to enforcement for CERCLA or EPCRA release reporting violations. To the contrary, NCBA believes it is entirely appropriate to treat Cattle Operations as not covered by CERCLA and EPCRA release reporting and response authorities.

NCBA did consider advising its several thousand members to file the notices and reports under CERCLA’s and EPCRA’s release reporting requirements. However, even if Cattle Operations were eligible for “continuous release” reporting, the cost and burden of developing the information required, and updating it, would be very great. More to the point, however, is the fact that the reports would never lead to any response action, and would be sheer waste.
The problem presented by the reporting alternative is that there is simply no sound basis for deciding which operations should report and which should not, nor how much and what they should report. That alternative likewise seems unjustified by either the statutes themselves, which do not clearly cover Cattle Operations in the first place, and by the exemptions, which seem likely to cover the generation of ammonia and hydrogen sulfide as naturally occurring releases that are exempt from the response actions that are intended by CERCLA and EPCRA to be triggered by release reporting. Indeed, the most that would seem to be justified is a request to EPA to clarify that CERCLA and EPCRA release reporting requirements do not apply to Cattle Operations, or, failing that, that EPA create an exemption from release reporting similar to those for other releases of reportable quantities of hazardous substances for which response action is inappropriate, infeasible, and unnecessary such as that for radionuclides from farming.
Testimony

on behalf of the

National Cattlemen’s Beef Association, Public Lands Council

with regards to

“The Impact of Federal Environmental Regulations and Policies on American Farming and Ranching Communities”

submitted to the

United States Senate
Committee on Environment and Public Works

John Barrasso, Chairman

submitted by

Niels Hansen
PH Livestock
Member
National Cattlemen’s Beef Association, Public Lands Council

February 7, 2018
Washington, DC
Good morning, my name is Niels Hansen. I’m a third generation rancher from Rawlins, Wyoming. The family ranch was started in the 1890s as a sheep and remount horse ranch. Over the years my family changed from raising horses to raising cattle and in 1984 made the final change from a cow/calf, sheep operation to a cow/calf/yearling operation, and the ranch continues to be totally family owned and operated.

I am the immediate past president of the Wyoming Stock Growers Association, the current Secretary/Treasurer for the National Public Lands Council and a past Chairman of the Wyoming State Grazing Board. I’m testifying before you today representing family ranchers throughout the country operating on both private and public lands, all of whom have a stake in protecting the environment in which they live and work. Thank you Chairman Barrasso and Ranking Member Carper for allowing me to testify today on the impact of federal regulations and policies on American farming and ranching communities.

U.S. ranchers own and manage considerably more land than any other segment of agriculture—or any other industry for that matter. Ranchers graze cattle and sheep on approximately 666.4 million acres of the approximately 2 billion acres of the U.S. land mass. In addition, the acreage used to grow hay, feed grains, and food grains add millions more acres of land under cattlemen’s stewardship. Some of the biggest challenges and threats to our industry come from urban encroachment, natural disasters, and government overreach. Since our livelihood is made on the land, through the utilization of our natural resources, protecting the land not only makes good environmental sense; it is fundamental for our industry to remain strong. Cattle producers pride themselves on being good stewards of our country’s natural resources. We maintain open spaces, healthy rangelands, provide wildlife habitat and feed the world. Despite these critical contributions, our ability to effectively steward these resources is all too often hampered by excessive federal regulations like the ones we are discussing today.

When we talk of overly-burdensome regulations, we always need to talk about the Environmental Protection Agency (EPA). The 2015 Waters of the United States (or “WOTUS”) Rule continues to be a top concern for cattle producers as long as it remains on the books. I am extremely concerned about the devastating impact this rule could have – not only on my own ranch, but on cattle operations across the United States. As a livestock producer, the 2015 WOTUS Rule has the potential to negatively affect every aspect of my operation by placing the regulation of every tributary, stream, pond, and dry streambed in the hands of the federal government, rather than the states and localities that understand Wyoming's unique water issues. The overly broad standards of the 2015 WOTUS definition, combined with its seriously ambiguous language create more questions than answers. I look forward to the rescission and replacement of the 2015 WOTUS Rule under Administrator Scott Pruitt. Just last week, the EPA under Mr. Pruitt’s leadership issued the WOTUS “delay rule” which gives the Agencies breathing room to repeal and replace without concern for the 2015 Rule becoming effective law for two years. Any definition of "waters of the United States" should allow me to determine, without spending thousands of dollars on consultants, engineers, and attorneys, whether I have a federally regulated waterbody on my land.

While WOTUS is a significant concern for American cattle producers, it is just the tip of the iceberg for environmental regulations that impact our industry. Another pending requirement is CERCLA and EPCRA reporting, which will require farmers and ranchers to report manure odors
to the government for emergency response coordination. Let me say that again because the absurd bears repeating-- the CERCLA and EPCRA reporting requirements force farmers and ranchers to report manure odors to the government so the government can coordinate an emergency response to the manure odors.

It shouldn’t need to be said, but Congress never intended these laws to govern everyday farm and ranch activity. In 2008, the EPA exempted most livestock operations from these reporting requirements. This exemption was put in place by the Bush W. Administration and defended in court by the Obama Administration for eight years. However, in April 2017, environmental activist groups won their lawsuit, eliminating these exemptions for agriculture. When the mandate issues, nearly 200,000 farmers and ranchers will be on the hook to report low-level livestock manure odors to the government. To clarify that Congress never intended for livestock producers to report their low-level manure smells to the National Response Center, a change in the law is necessary.

Importantly, emergency responders see no value in receiving continuous release reports from livestock operations. Obtaining this information provides no benefit, and does not allow responders to be more prepared or safer in an emergency situation. In fact, these reports have the opposite effect - inhibiting responders' ability to do their job effectively and limiting vital resources. The sudden influx of agricultural reports will significantly hinder emergency response coordination and response capability. The National Association of SARA Title III Program Officials, which represents state and local emergency response commissions, notes that continuous release reports "are of no value to [Local Emergency Planning Committees] and first responders" and that the reports "are generally ignored because they do not relate to any particular event." The U.S. Coast Guard stated that early calls from farmers have "increased [initial notifications] from approximately 100-150 calls per day (not associated with air releases from farms) to over 1,000 phone calls per day." This influx has negatively impacted the Coast Guard's ability to coordinate responses for true emergencies. The Coast Guard further indicated the abundance of farm calls meant that "wait times have been up to two hours for calls, many of which require immediate attention". CERCLA and EPCRA were intended to focus on significant events like spills and explosions, not routine emissions from farms and ranches. As you can see, these reporting requirements have already begun to hurt responders' ability to do their job to protect the public health and environment. When the reporting mandate issues, the floodgates will open, crippling America's first line of hazardous emergency defense.

Information related to farm and residence location information must be protected. Unfortunately, the federal agencies handling it have an established record of misuse and blatant disregard for privacy laws. Many of the families who manage livestock operations live on their farms, so any data required by the government, like the data required for CERCLA and EPCRA reporting, creates a situation ripe for abuse. In addition to general information availability concerns, cattle producers also face significant risk of trespass and property damage. The widespread collection and dissemination of farm information by the government will put the privacy of producers and safety of our food system at risk, as individuals will have unfettered access to farm location data. Additionally, government agencies should not use aerial surveillance, by manned or unmanned aircraft, to conduct environmental enforcement actions. These type of governmental activities, simply put, further engender distrust between farmers and the federal government and put our farmers and ranchers at risk. Technological progress necessitates the
progression of the law, to ensure that farmers and ranchers' privacy is protected from drone use by both public and private parties.

Another regulation is the Spill Prevention, Control, and Countermeasure (or “SPCC”) rule for farms, which requires farmers to develop and certify a control plan and install secondary containment structures for oil storage. This is a regulation that originally applied to oil refineries that now applies to farms and ranches. While the original scope of the law is well-intended, these requirements create an undue burden on farmers and ranchers, who are located in the most remote parts of the country and need oil storage to power our farm equipment. Senator Fischer was instrumental in providing much-needed regulatory relief for farmers by championing language in the 2016 WIIN Act. But more can be done to reduce this unnecessary burden for our nation’s farmers and ranchers.

Cattle producers throughout the country continue to suffer the brunt of regulatory and economic uncertainty due to the abuse of the Endangered Species Act. Simply put, the Endangered Species Act is broken. Years of abusive litigation by radical environmental groups have taken a toll, and the result is a system badly in need of modernization. Today more than two thousand species throughout the world are listed as either Threatened or Endangered, with new petitions stacking up by the hundreds due to groups that have set up “petition assembly lines” to churn out new filings by the dozen. When the Fish and Wildlife Service fails to respond to this avalanche of procedural paperwork, the groups sue, tying up the court system and sapping the agency of money that should be used for species recovery and delisting efforts. Similar legal challenges hamper the process at every turn, particularly regarding the delisting process. In the current environment, it's almost a foregone conclusion that even the most scientifically sound delisting proposal – for a species that has far surpassed recovery goals - will immediately draw legal challenges drawing the process out needlessly.

Despite the crippling impacts to our industry, it is our position that modernization of the Endangered Species Act must be addressed in a bipartisan manner. It is in this spirit of bipartisan problem-solving that PLC and NCBA participated heavily in the Western Governor's ESA Initiative led by Wyoming Governor Matt Mead. This multi-year effort included stakeholders from across the spectrum and resulted in a set of commonsense recommendations to this body last year that were approved by all but one of the sitting western governors. These recommendations truly represent a path forward on ESA and I sincerely hope this body incorporates them into their efforts on this critical issue.

Another equally important aspect to restoring science and sound policy-making to the forefront in environmental regulation are the Equal Access to Justice Act (EAJA) and the ESA Judgement Fund. These tools were created to give Americans the ability to pursue litigation against their government without fear of financial ruin. They were not created to serve as bank accounts for activist groups, yet that’s how they are being used. Every time the FWS settles a lawsuit or enters a settlement agreement like the infamous 2011 “mega-settlement” with the Center for Biological Diversity and WildEarth Guardians, these “factory litigants” receive a windfall profit, which only reinforces their action and encourages more abuse. Recently, an activist law group in Idaho called "Advocates for the West" claimed that a full third of their 2016 annual budget came from legal awards and judgments. Taxpayer funded judicial activism was not what the
creators of these tools intended. Congress must act to end this perverse incentive-based system and ensure that these funds are available to our veterans, social security recipients, and others in real need.

A big point I’d like you to take away from this hearing is that voluntary conservation really works for ranchers and the environment. A one-size fits all approach that accompanies top-down regulation does not work in my industry. Mandatory rules and requirements make it harder for ranchers to utilize the unique conservation practices that help their individual operations thrive. I believe that economic activity and conservation go hand in hand and we are always looking for new, innovative ways to provide tangible benefits to the environment, and help to improve our ranching lands.

Ranchers represent the single greatest opportunity for real conservation benefit in the country and I conclude today with a plea on behalf of cattle and sheep producers across the country. Turn us loose. By freeing our industry from overly burdensome federal regulations and allowing us to provide the kind of stewardship and ecosystem services only we can, you will do more for healthy ecosystems and environments than top down restrictions from Washington ever can.

Thank you, I look forward to responding to any questions the committee may have.
Biography

Niels Hansen is a third generation rancher from Rawlins Wyoming. The family ranch was started in the 1890’s as a sheep and remount horse ranch. Over the years the family has had to change from raising horses to raising cattle and in 1984 made the final change from a cow/calf, sheep operation to a cow/calf/ yearling operation but the ranch continues to be totally family owned and operated.

Working cooperatively with the University of Wyoming and the BLM, Niels has been a leader in developing and advocating for Cooperative Rangeland Monitoring. With over 20 years of monitoring data from the family ranch, he has shown the benefits of good land and livestock management for the land, the business, and the community.

Niels has served on a number of boards and committees at the state and local level including serving as an officer and member of the Christ Lutheran Church, the Rawlins/Carbon County Airport Board, and the Rawlins Search and Rescue where he uses his private pilot’s license. He has served as the Chairman of the Rawlins and the Wyoming State Grazing Board. He was on the founding board and served 10 years on the Wyoming Animal Damage Management Board working to reduce conflicts with wild and domestic animals and the public. Niels served as the Chairman of the Wyoming Stock Growers Association (WSGA) Federal Lands committee through the Department of Interior Reform 94 effort and also Chaired the WSGA Wildlife committee. He has been a long time member of the WSGA Board of Directors and served one term as the Region 5 Vice-President. Niels will complete his term as President of the Wyoming Stock Growers in June.

In 2000 the ranch received the BLM Rangeland Management Stewardship Award. In 2001 they were named the Little Snake River Conservation District Cooperator of the Year award recipient and in 2004 was co-winner of the Wyoming Stock Growers Association Stewardship Award. Niels won the Wyoming Department of Agriculture – Excellence in Agriculture Award in 2007 and was inducted into the Wyoming Agriculture Hall of Fame in 2011.
Testimony

on behalf of the

National Cattlemen’s Beef Association

with regards to

“Legislative Hearing on S. 2421, the Fair Agricultural Reporting Method Act”

submitted to the

United States Senate
Subcommittee on Superfund, Waste Management, and Regulatory Oversight
Committee on Environment and Public Works
Mike Rounds, Chairman

submitted by

Todd Mortenson
Mortenson Ranch
Member
National Cattlemen’s Beef Association

March 8, 2018
Washington, DC
Good morning, my name is Todd Mortenson. I live with my wife Deb on a ranch located in west central South Dakota in Stanley County, along the Cheyenne River. My grandfather, Ben Young, started the home ranch in the 1930s and added ground in Ziebach county when the Oahe dam was built, flooding their bottom lands in the late 1950s.

I am a member of the South Dakota Cattlemen’s Association and the National Cattlemen’s Beef Association, and I’m testifying before you today representing cattle producers and family ranchers, each of whom have a stake in protecting the environment. Thank you, Chairman Rounds and Ranking Member Booker, for allowing me to testify today on the issue of CERCLA reporting for agriculture, and the importance of the FARM Act.

American cattlemen own and manage considerably more land than any other segment of agriculture—or any other industry for that matter. Ranchers graze cattle on approximately 666.4 million acres of the approximately two billion acres that makes up the United States’ land mass. In addition, the acreage used to grow hay, feed grains, and food grains add millions more acres of land under cattlemen’s stewardship. Some of the biggest challenges to our industry come from urban encroachment, natural disasters, and government overreach. Since our livelihood is made on the land, through the utilization of our natural resources, protecting the land not only makes good environmental sense; it is fundamental for our industry to remain strong. Cattle producers pride themselves on being good stewards of our country’s natural resources. We maintain open spaces, healthy rangelands, provide wildlife habitat and feed the world. But to provide all these important functions, we must be able to operate without excessive federal burdens, like the one we are discussing today.

Farmers and ranchers truly are America’s original environmentalists. In fact, I would say we care more than anyone about the land we manage, because our operations directly impact not only the health of our livestock, but the water we drink and the air we breathe. I work hard to implement conservation practices that improve the environmental sustainability of my operation, ensuring that I’ll be able to pass my ranch on to the next generation. For example, we move cattle to the uplands during summer months, allowing increased native plant growth and decreased sediment flow through ranch creeks. Additionally, in the spring, our herds graze on grasses in riparian areas while stamping seeds into the ground to help increase future vegetation growth.

While I fully support conservation practices that benefit and improve environmental quality, I cannot support needless requirements that burden the agricultural community while providing no environmental or public health benefit. A prime example of this is the burdensome reporting requirement under CERCLA, which requires farmers and ranchers to report manure odors to multiple agencies within the federal government for emergency response coordination. On my pasture-based cow/calf operation, I manage 1,295 cattle on 19,000 acres of land. The concentration of emissions is extremely low, because my cattle are spread over such a large area. However,
CERCLA reporting requirements do not take concentration into account – only release. It makes no difference whether my cattle are spread over 10 acres or 10,000 acres. If my 1,295 cattle emit over 100 pounds of ammonia or hydrogen sulfide per day, I am required to report their emissions to the US Coast Guard and EPA. Our best estimation of how many beef cattle it takes to trigger the reporting requirement is 208 head of cattle. Clearly, I would fall under these reporting requirements.

It is clear that Congress never intended this law to govern routine manure odors from everyday farm and ranch activity. The EPA understands this and, in 2008, exempted agricultural operations from reporting requirements under the Superfund law. While the exemption was put in place by the Bush W. Administration, it was defended in court by the Obama Administration for eight years. In defending the exemption, the Obama EPA argued that Congress did not include an exemption for manure emissions because they never considered that these low-level releases would fall into the possible realm of regulation. However, in April 2017, environmental groups won their lawsuit when the D.C. Circuit court found that Congress provided no exemption for agriculture. When the mandate issues on May 1, 2018, over 200,000 farmers and ranchers will be required to report low-level manure odors to the federal government.

Reporting is no simple task. It is a three-step process that spans, at minimum, one year. The first step is an initial call to the Coast Guard, the agency tasked with coordinating emergency response for the nation’s oil spills, chemical plant explosions, and other hazardous emergencies. The Coast Guard is on record stating that these reports do not help them at all – in fact, they only hurt their ability to respond to true environmental and public health emergencies. In a November 14, 2017 declaration to the D.C. Circuit Court, Director of Incident Management and Preparedness for the USCG Dana Tulis indicated that early reports from livestock operations "increased [call volume] from approximately 100-150 calls per day (not associated with air releases from farms) to over 1,000 phone calls per day." This influx of non-emergency reports negatively impacts the Coast Guard's ability to coordinate response for true emergencies. The Coast Guard further indicated the abundance of farm calls meant that "wait times have been up to two hours for calls, many of which require immediate attention."

The initial call to the Coast Guard is followed by two written reports sent to the EPA, over the span of one year. These reports require specific, detailed information regarding my cattle’s emissions – information that I simply don’t have. Research in this area is limited, to say the least. Only two land-grant universities have completed studies related to calculating emissions from livestock on a per-pound basis, and the EPA has completed no research in the area. Further, those who are considered experts in this area are not confident that available reporting methodologies

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1 Tulis Aff. 2 (Waterkeeper Alliance v. EPA, 853 F.3d 527 (2017)).
should be widely depended upon. According to Dr. Rick Stowell, co-creator of the University of Nebraska Lincoln’s Ammonia Estimator Worksheet, “While I can place some confidence in differentiating between a 1,000-head feedlot and a 200-head feedlot, given all of the variability involved on AFOs and in research, I would not place much confidence in saying that a 300-head lot is definitely emitting more NH3 than the neighboring 200-head lot or that we can be certain that either is above or below the threshold.” For pasture-based livestock, no research exists quantifying per-head ammonia or hydrogen sulfide emissions. However, research does indicate that ammonia emissions differ significantly based on diet and confinement. Requiring pasture-based operations to report using tools provided on EPA’s webpage (research that focuses exclusively on grain-fed animals) is inadequate, and will lead to substantially inaccurate reporting. It should also be noted that this reporting requirement is not a “one and done” obligation. Any time I decide to increase the size of my heard, I have to file additional paperwork with the government.

In addition to concerns I have related to the accuracy of my reports, I also worry that I will be providing my specific residential location information to the EPA – an agency with an established record of farm location information misuse. The widespread collection and dissemination of farm location information by the government will put the privacy of producers and safety of our food system at risk, as individuals will have unfettered access to farm and residential location data. Many of the families who manage livestock operations live on their farms, so any data required by the government, like the data required for CERCLA reporting, creates a situation ripe for abuse.

To clarify these exemptions, Congress needs to change the law to reflect its intent that livestock producers are exempt from CERCLA reporting requirements. The FARM Act, introduced on February 13, 2018, provides the relief that farmers, ranchers, and first responders need under CERCLA, and carries strong bipartisan support, as was exhibited by the Bush and Obama Administrations. In 2018, its not often that Republicans and Democrats can agree on anything, and I for one am proud of you all for putting aside your differences and making your constituents a priority. CERCLA truly is one of our most vital environmental statutes – it provides the tools we need to efficiently and effectively cleanup releases that harm both the environment and public health. Unfortunately, we all know that environmental agencies are given low funding priority at both the federal and state level. The FARM Act will ensure that precious time and monetary resources are not siphoned from important cleanup efforts to address a paperwork requirement with no environmental or public health benefit.

In addition to maintaining my ranch, I also volunteer with the Hayes volunteer fire department and EMS First Responder in Stanley County, South Dakota. While I did not receive EPCRA reports from agricultural operations in 2009, because there are no large CAFOs in my county, the receipt of this paperwork would in no way improve my ability to do my job as an emergency responder.

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3 Statement made by Dr. Rick Stowell in an email to Scott Yager, Chief Environmental Counsel for the National Cattlemen’s Beef Association (Communication on November 7, 2017).
Rather, like the CERCLA reporting requirements, it would impose a burdensome paperwork requirement with no environmental or public health benefit. Rural emergency response teams are already stretched for time and resources – requiring additional, needless paperwork would only compound this burden.

Thank you for taking the time to hear my concerns, and for listening to livestock producers around the country. As the May 1, 2018 reporting deadline quickly approaches, only Congress can ensure that the agricultural community is protected from this reporting burden, the reliability of our emergency response coordination is maintained, and the integrity of the Superfund law is not degraded. The key to environmental sustainability is working together with stakeholders, not fighting us. Thank you for your time, and thank you for your support of the FARM Act.
June 1, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

Re: CAFOs and Emergency Release Reporting

Dear Administrator Pruitt:

I am writing on behalf of the National Association of SARA Title III Program Officials (NASTTPO), which is made up of members and staff of State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCS), Local Emergency Planning Committees (LEPCs), various federal, state and local agencies, private industry and the vast number of volunteers that perform emergency planning and emergency response activities for their communities. Our membership is dedicated to working together with regulated facilities, transportation entities and communities at large to improve community preparedness for emergency events including hazardous materials releases.

NASTTPO over the past several years has had the opportunity to work with various industry groups on emergency preparedness related rulemaking programs at EPA. These experiences have taught us that the most important thing to LEPCs and first responders is not detailed regulatory requirements for a facility’s relationship to these groups, but rather the simple act of open dialog and coordination. Following the DC Circuit decision in Waterkeeper Alliance v EPA, we have had meaningful and encouraging discussions with the U.S. Poultry and Egg Association along these lines. NASTTPO believes that open dialog and coordination can be more effective than release reporting for farms that do not handle quantities of EPCRA EHS chemicals but are nevertheless expected to report regarding animal manure management.

We have had experience with EPCRA emergency release reports as well as CERCLA continuous release reports from farms primarily regarding ammonia from animal manure management. These reports are of no particular value to LEPCs and first responders and they are generally ignored because they do not relate to any particular event. (This should be contrasted to the few farms that utilize gas chlorine for water treatment where emergency release reports are useful because they are event specific.)
LEPCs and first responders do not need more generic data. They need information that is locally relevant and upon which they can act. This goal is best obtained by a program that promotes coordination between the regulated facilities and these local groups. Recent discussions suggest that such a program involving farms may be achievable.

We are in favor of reducing regulatory burdens if coordination on the information needs of LEPCs and first responders occurs. The information we want from farms is community-specific. Only the LEPC and local first responders can determine what information they need from a farm as part of their emergency planning process. What we really need is coordination between the farm and local responders and LEPCs. We want them to talk to each other.

Thank you.

Timothy R Gablehouse
President
410 17th St, Ste 275
Denver CO 80202
(303) 572-0050
This memorandum responds to your request for an analysis of the potential effects of amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) proposed in the Fair Agricultural Reporting Method Act or “FARM Act” (S. 2421), as introduced in the 115th Congress on February 13, 2018. The bill would exempt air releases of hazardous substances emitted by animal waste at farms from requirements under CERCLA to notify the National Response Center. These amendments also would have a bearing on the applicability of requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA) to notify state and local officials of such releases. However, EPCRA may continue to apply to the reporting of releases of separately listed extremely hazardous substances that are not contingent upon reporting under CERCLA, unless these releases may be covered by an exemption under EPCRA in current law for substances used in routine agricultural operations.

Overview

Whether the reporting requirements of CERCLA and EPCRA should be applied to air releases of hazardous substances from animal waste has been a long-standing issue addressed in multiple hearings and legislation in Congress. The purpose of reporting releases under these statutes is to inform federal, state, and local emergency response officials if a response action were warranted to protect human health and the environment. Some have observed though that reporting may impose a compliance burden without a commensurate need if the relative risks of air releases would not warrant a response action in most instances. Although others may still value the information gained from reporting to evaluate sources of air emissions for regulatory planning or other purposes, such utility would be incidental to the response objectives of CERCLA and EPCRA. Potential disclosure of release reports to the public also has been an issue, but certain protections are available in current law for sensitive and confidential information.

During the George W. Bush Administration, the U.S. Environmental Protection Agency (EPA) finalized a rule in 2008 to exempt air releases of hazardous substances emitted by animal waste at most farms from reporting under CERCLA and EPCRA, because of its expectation that the relative risks would make a response action unlikely or impractical in most cases. EPA did apply EPCRA to require reporting from large concentrated animal feeding operations (CAFOs) based on the number and type of livestock, in response to some public comments expressing desire for the information. Litigation challenging EPA’s authority to create this administrative exemption led to a U.S. Court of Appeals for the D.C. Circuit decision in April 2017 (Waterkeeper Alliance, et al., v. EPA) that vacated the 2008 rule. In response to
petitions from EPA during the Trump Administration, the court subsequently stayed (i.e., delayed) the issuance of an order to lift the exemption in the 2008 rule until May 1, 2018.

EPA has released guidance that instructs farms to notify the National Response Center under CERCLA once the court issues its order, if air releases of hazardous substances emitted by animal waste are equal to or exceed reportable quantities. The EPA guidance indicates that farms should not report releases to state and local officials under EPCRA though, based on the Trump Administration’s interpretation that air releases from animal waste would be covered under the exemption for substances used in routine agricultural operations. The U.S. Court of Appeals April 2017 decision did not refer to this exemption.

If enacted into law, S. 2421 would amend CERCLA to provide an exemption from the reporting of air releases of hazardous substances emitted by animal waste at farms. In turn, this amendment would have the effect of exempting such releases of hazardous substances from reporting under EPCRA that is contingent upon reporting required under CERCLA. However, the potential applicability of EPCRA to air releases of separately listed extremely hazardous substances may depend on whether the Trump Administration’s interpretation of the exemption for substances used in routine agricultural operations is challenged. Any potential reporting requirements under state or local laws may continue to apply though, as neither CERCLA nor EPCRA would preempt such requirements.

The following sections of this memorandum discuss the purposes of CERCLA and EPCRA in current law, the types of hazardous substances and extremely hazardous substances that may be released from animal waste at farms, the George W. Bush Administration 2008 rule, the D.C. Circuit April 2017 decision that vacated this rule, the Trump Administration’s guidance issued in response to the reversal of the rule, and how the amendments to CERCLA proposed in S. 2421 may affect reporting requirements. I hope that this information is helpful to the Committee. I remain available if the Committee needs further assistance from CRS in consideration of S. 2421 and related issues.

CERCLA

Enacted in 1980, CERCLA authorized the Superfund program administered by EPA to remediate environmental contamination from releases of hazardous substances at sites elevated for priority federal attention in coordination with the states, and established the financial liability of “potentially responsible parties” (PRPs) associated with a release. Congress has amended CERCLA in multiple laws over time to clarify the applicability of the statute to federal facilities, and to modify various response, liability, and enforcement provisions to address issues that arose during the course of implementation. Although risks posed by abandoned hazardous waste sites were a central topic in the debate of legislation that led to the enactment of CERCLA, the final bill that Congress enacted included language more broadly addressing past or present releases of hazardous substances across environmental media and industrial, commercial, and governmental sectors.

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3 For a broader discussion of the scope and purposes of CERCLA than presented in this memorandum, see CRS Report R41039, Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act, by David M. Bearden.
Applicability to Releases

CERCLA generally applies to the release, or the substantial threat of a release, of a hazardous substance into the environment within the United States or under the jurisdiction of the United States. The geophysical scope of the environment covered under CERCLA encompasses multiple media. The term “environment” is defined in Section 101(8) to include surface water, groundwater, a drinking water supply, surface soils, sub-surface soils, or ambient air. As defined in Section 101(22), the term “release” also is relatively broad in terms of the manner in which a hazardous substance may enter the environment, including spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.

Section 101(14) of CERCLA references specific categories of chemicals designated under other laws as hazardous substances subject to CERCLA. Section 102 authorizes EPA to designate additional hazardous substances that may present substantial danger to public health or welfare, or the environment, if a release were to occur. Section 102 also authorizes EPA to establish a quantitative threshold for each hazardous substance to determine when a release must be reported to the federal government. Section 103 requires the person responsible for a release to notify the National Response Center, if the release is equal to or exceeds the reportable quantity during a 24-hour period. Section 103(f) authorizes an exception to offer compliance flexibility for a continuous release that is “stable in quantity and rate,” in which case notice may be provided to the National Response Center on an annual basis as an alternative to daily notification. However, Section 103(f) requires intervening updates during the year to report a “statistically significant increase” in the quantity of a release above that previously reported or occurring.

Reporting requirements under CERCLA provide a mechanism through which the federal government may become aware of a release to determine whether a response action may be warranted to fulfill the objective of the statute to protect human health and the environment. Whether a response action is warranted generally would depend on the potential risks of exposure at the site where the release occurs. Reportable quantities merely serve as thresholds to determine the quantity of a release that is subject to notification, but do not necessarily indicate a particular level of risk. As for any chemical, the potential risks of a release would depend on the concentration, duration, and frequency of exposure (i.e., the dose), the conditions of exposure, and individual characteristics of the exposed individual.

Once a release is reported, Section 103(a) requires the National Response Center to notify EPA and other appropriate federal agencies, and the state in which the release occurs. If warranted, Section 104 authorizes federal actions to respond to the release in coordination with the state, including enforcement of liability. The federal response authorities of CERCLA are Presidential authorities delegated to EPA

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5 42 U.S.C. §9601(8).
7 42 U.S.C. §9601(14).
8 42 U.S.C. §9602.
9 Designated hazardous substances and reportable quantities are codified in federal regulation at 40 C.F.R. Part 302.
10 42 U.S.C. §9603. The U.S. Coast Guard administers the National Response Center.
12 Releases reported under CERCLA also generate data that some may desire to evaluate sources of pollution for regulatory planning or other purposes, although this utility would be incidental to the statutory objective of CERCLA.
and other federal agencies on the National Response Team.\footnote{Executive Order 12580, Superfund Implementation, January 23, 1987.} The procedures for taking response actions under CERCLA are outlined in the National Oil and Hazardous Substances Pollution Contingency Plan.\footnote{40 C.F.R. Part 300.}

Section 107 of CERCLA establishes the categories of PRPs who may be held liable for response costs, natural resource damages, and the costs of federal studies of potential health hazards that may be associated with a release.\footnote{42 U.S.C. §9607.} Federal response actions are subject to annual appropriations but may be recovered from the liable parties. PRPs generally may include current and past site owners and operators, persons who arranged for the treatment, disposal, or transport of a hazardous substance, and transporters who selected a site for disposal.

Section 104 also authorizes federal actions to respond to releases of other pollutants or contaminants that are not designated as hazardous substances, if the release would present an imminent and substantial danger to public health or welfare. However, CERCLA does not establish liability for such releases, nor does the statute require the reporting of such releases.

**Statutory Exemptions**

Although CERCLA is relatively broad in its applicability to releases of hazardous substances, Congress has excluded certain types of substances or releases from the statutory definitions in Section 101 that it did not intend to be subject to the statute. Section 107(b) of CERCLA also provides defenses to liability for certain conditions beyond a party’s control such as an act of God, act of war, or an act or omission of a third party.\footnote{42 U.S.C. §9607(b).} In the 1980 enactment and subsequent amendments, Congress also has exempted specific categories of parties, circumstances, or uses that it did not intend to be subject to liability or reporting requirements, but for which federal authority remains available to respond to a release if warranted to protect human health and the environment.

Some of these exclusions or exemptions are based on practical considerations, whereas others are intended to avoid duplication or overlap with other laws that apply to the same releases. Among the exclusions or exemptions more directly relevant to the agricultural sector, Congress excluded the “normal application of fertilizer” from the definition of the term “release” in Section 101(22) of CERCLA, making such use not subject to the statute in its entirety. Congress also excluded hazardous substances that may be released as a result of the proper application of a pesticide from liability under the statute in Section 107(i),\footnote{42 U.S.C. §9607(i).} and reporting requirements in Section 103(e).\footnote{42 U.S.C. §9603(e).} The availability of the pesticide exemption is dependent upon proper application of the pesticide in accordance with federal registration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).\footnote{7 U.S.C. §§136-136y. Demonstration of the proper application of a federally registered pesticide generally would be subject to documentation of its use.} Congress included both the fertilizer exclusion and the pesticide exemption in the 1980 enactment. Congress has not since amended CERCLA to exempt the agricultural sector more broadly.

**EPCRA**

Once CERCLA required the reporting of releases of hazardous substances to the federal government, questions arose as to whether federal law also should require reporting of the same information directly to
state and local governments to help facilitate their emergency response capabilities. This question was among the prominent topics in the debate of the 1986 amendments to CERCLA. Although some state and local laws at that time addressed releases of hazardous substances, response authorities and capabilities varied among jurisdictions. Congress developed uniform federal requirements for the reporting of releases to state and local governments in EPCRA under Title III of the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499). Title III enacted EPCRA as a separate law, and not as an amendment CERCLA.

EPCRA addresses emergency notification of releases at the state and local level to complement the reporting of releases to the federal government under CERCLA. Similar in objective to CERCLA, release notification under EPCRA provides a mechanism for state and local governments to determine whether a response action may be warranted under their own respective authorities, or in coordination with a federal response. Reporting under EPCRA also provides an earlier opportunity for state and local governments to become aware of a release instead of relying upon subsequent notification from the National Response Center once a release is reported to the federal government. However, EPCRA does not authorize federal actions to respond to a release, nor does the statute establish liability for releases. Federal response authorities and liability for releases are rooted in CERCLA.

EPCRA also requires notification at the state and local level for emergency planning purposes if a facility stores extremely hazardous substances or other hazardous chemicals in excess of certain amounts. These notification requirements are intended to enhance state and local emergency preparedness in the event of an actual release. Other provisions of EPCRA also require the reporting of toxic chemicals used at a facility in excess of certain amounts to EPA for public disclosure in the federal Toxic Release Inventory (TRI). These emergency planning and TRI disclosure requirements apply to the presence or use of chemicals at a facility, in addition to actual releases into the environment.

Section 324 of EPCRA generally requires information on chemicals reported for emergency planning purposes, disclosure on the TRI, and followup emergency notices of actual releases to be made available to the general public. CERLA does not include similar public disclosure requirements. However, followup emergency notices subject to EPCRA generally would include information on releases of hazardous substances that are subject to CERCLA. Section 322 of EPCRA authorizes the withholding of certain sensitive or confidential information from disclosure to the general public under Section 324. As a matter of practice, the National Response Center also maintains a publicly available database that tracks the nature and general location of releases of hazardous substances reported under CERCLA, but not private or confidential information. The following discussion of EPCRA focuses on emergency notification of releases into the environment potentially relevant to air releases, and statutory exemptions from notification in current law.

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25 For emergency planning, reportable quantities of extremely hazardous substances are codified in federal regulation at 40 C.F.R. Part 355, Appendix A, and of hazardous chemicals are codified in federal regulation at 40 C.F.R. Part 370.

26 Threshold quantities subject to reporting for the TRI are codified in federal regulation at 40 C.F.R. Part 372.


29 Information publicly disclosed from the database is available in reports that track releases by calendar year, available on the National Response Center’s website at: http://nrc.uscg.mil.

30 For a broader discussion of EPCRA than presented in this memorandum, see CRS Report RL32683, The Emergency Planning and Community Right-to-Know Act (EPCRA): A Summary, by David M. Bearden.
Emergency Release Notification

Section 301 of EPCRA established the framework for the formation of State Emergency Response Commissions (SERCs) appointed by the governor of each state, and Local Emergency Planning Committees (LEPCs) within each state appointed by the respective SERC. Section 302 authorizes EPA to establish quantitative thresholds for the reporting of releases of extremely hazardous substances into the environment. Most of these substances also are listed as hazardous substances under CERCLA, but some of these substances are not designated under CERCLA. Section 304 of EPCRA applies to emergency notification of releases into the environment. This provision outlines three situations in which the reporting of releases of extremely hazardous substances or hazardous substances is required. In each situation, the person responsible for the release must notify the SERC and the appropriate LEPC that covers the local jurisdiction where the release occurs.

Two of these situations are contingent upon the release being subject to reporting to the National Response Center under Section 103 of CERCLA. Section 304(a)(1) of EPCRA requires the notification of a release of an extremely hazardous substance to the SERC and the appropriate LEPC, if the release also would require notification as a hazardous substance under Section 103 CERCLA. If a substance is not designated as an extremely hazardous substance, Section 304(a)(3) requires the reporting of a release to the SERC and the appropriate LEPC if the release still would require notification as a hazardous substance under Section 103 of CERCLA.

Section 304(a)(2) of EPCRA covers a third situation in which a substance is separately listed as an extremely hazardous substance, but is not subject to reporting under Section 103 of CERCLA. Section 304(a)(2) requires the reporting of a release of a separately listed extremely hazardous substance in such instances, if the release:

- is not a federally permitted release as defined in Section 101(10) of CERCLA,
- is in an amount in excess of a reportable quantity that EPA designated under Section 302, and
- “occurs in a manner” which would require notification under Section 103 of CERCLA.

With respect to the third criterion, the phrase “occurs in a manner” generally has been implemented over time to mean the nature of the release in terms of how the substance enters the environment. Section 329 of EPCRA defines the term “release” and “environment” similar in scope to CERCLA. The regulations that EPA promulgated to implement Section 304 reflect these statutory definitions.
Statutory Exemptions

In any of these scenarios involving extremely hazardous substances or hazardous substances, Section 304(a)(4) exempts a release of either substance from reporting under EPCRA, if the release would result in exposure to persons solely within the site or sites on which a facility is located.\(^41\) Other factors also may determine whether a release is subject to reporting under EPCRA. In each instance of applicability, Section 304 refers to the reporting of a release at facilities where a hazardous chemical is produced, used, or stored. Conversely, if a hazardous chemical is not produced, used, or stored, at a facility, the reporting requirements do not apply.

Section 311(e) generally defines the term “hazardous chemical” to mean any such chemical regulated under the Occupational Safety and Health Act that is subject to federal requirements for hazard communication in the workplace.\(^42\) However, Congress excluded certain uses from this definition in EPCRA, thereby exempting these uses from reporting requirements of the statute. Among those more directly relevant to the agricultural sector, uses of “any 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” are excluded from EPCRA. The statute does not further describe or define the scope of these uses though. Section 329(5) cross-references the definition in Section 311(e) for application of this exclusion across the requirements of the statute. Congress did not include a similarly broad exclusion from CERCLA for releases of hazardous substances used in routine agricultural operations.

Animal Waste

“Animal waste” per se is not designated in CERCLA as a hazardous substance or in EPCRA as an extremely hazardous substance. Numerous studies have examined the chemical constituency of animal waste, and associated chemical by-products that may be generated from decomposition of the organic matter. For example, a 2003 study by the National Research Council found that air emissions from animal waste commonly include ammonia, hydrogen sulfide, methane, volatile organic compounds, and particulate matter that may consist of various chemicals.\(^43\) Of these chemicals, ammonia and hydrogen sulfide are designated as hazardous substances in regulation under CERCLA\(^44\) and as extremely hazardous substances in regulation under EPCRA.\(^45\) The threshold for the reportable quantity of a release of ammonia or hydrogen sulfide into the environment under either CERCLA or EPCRA is 100 pounds during a 24-hour period into any media (e.g., air, water, or soils).

If such quantity were released into the ambient air, the concentrations generally would decline with increasing distance from the point of release as a result of dispersion.\(^46\) The National Research Council 2003 study noted that potential risks from air releases would depend on exposure that may vary by site and among individuals. The Council found “little scientific evidence” that exposures beyond the boundaries of animal feeding operations have significant effects on human health because the

\(^41\) 42 U.S.C. §11004(a)(4).
\(^42\) 42 U.S.C. §11021(e). This provision of EPCRA references the Occupational Safety and Health Administration’s definition of a hazardous chemical codified in federal regulation at 29 C.F.R. §1910.1200(c) that means “any chemical which is classified as a physical hazard or a health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified.”
\(^44\) 40 C.F.R. §302.4.
\(^45\) 40 C.F.R. Part 355, Appendix A.
\(^46\) The rate of dispersion of a chemical released into ambient air would depend on multiple factors (e.g., properties of the chemical, wind, temperature, humidity, and interaction with other chemicals present in the atmosphere).
The concentrations “usually” are below threshold levels that would present a health risk. The Council observed that risks of inhalation may be more significant within the boundaries of an animal feeding operation and within enclosed animal housing where concentrations are higher. The Council identified technical challenges in capturing and measuring air releases from animal waste for regulatory purposes, but recommended additional research and the development of best management practices to mitigate air releases. Additional studies have examined these issues since that time.

**EPA 2008 Rule**

As a matter of implementation, EPA historically has not applied CERCLA and EPCRA to air releases of hazardous substances from animal waste at farms, with the exception of large concentrated animal feeding operations (CAFOs) subject to EPCRA under a 2008 rule. On December 18, 2008, EPA finalized a rule during the George W. Bush Administration to establish an administrative exemption from reporting requirements of CERCLA for air releases of hazardous substances from animal waste at all farms, and to apply EPCRA only to large CAFOs of certain sizes. The rule specified thresholds for the maximum number of livestock by type that an operation could stable or confine to qualify for the exemption from reporting under EPCRA. The rule exempted air releases from animal waste of livestock that are not stabled or confined. Operations that stable or confine livestock in numbers equal to or greater than the following thresholds were considered sufficiently large to make them subject to emergency notification requirements for air releases in excess of reportable quantities under EPCRA:

- 700 mature dairy cows, whether milked or dry;
- 1,000 veal calves;
- 1,000 cattle other than mature dairy cows or veal calves (cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs);
- 2,500 swine each weighing 55 pounds or more;
- 10,000 swine each weighing less than 55 pounds;
- 500 horses;
- 10,000 sheep or lambs;
- 55,000 turkeys;
- 30,000 laying hens or broilers, if the farm uses a liquid manure handling system;
- 125,000 chickens (other than laying hens), if the farm uses other than liquid manure handling system;
- 82,000 laying hens, if the farm uses other than a liquid manure handling system;
- 30,000 ducks (if the farm uses other than a liquid manure handling system); or
- 5,000 ducks (if the farm uses a liquid manure handling system).

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48 For example, see National Association of Local Boards of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, 2010, prepared under a cooperative agreement with the Centers for Disease Control and Prevention, available at: https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf. This study includes a bibliography of numerous other studies as well.


50 40 C.F.R. §355.31(g).
In the preamble to the final rule, EPA noted a petition submitted in August 2005 by the National Chicken Council, National Turkey Federation, and U.S. Poultry and Egg Association requesting an administrative exemption from CERCLA and EPCRA reporting requirements specifically for ammonia emissions from poultry operations. However, EPA indicated that the final rule was not a direct response to that petition. EPA stated that the exemption from reporting was warranted in its view because a response action would be “impractical” or “unlikely” in most instances, and that the exemption was consistent with the agency’s goal of reducing the “burden” of reporting releases for which response actions most often are not expected. EPA explained that its decision to apply EPCRA to large CAFOs was based on a response to public comments on the 2007 proposed rule by some who expressed a desire for this information because of the potentially greater magnitude of air releases. The proposed rule would have exempted CAFOs of any size from reporting requirements.

The 2008 rule did not exempt air releases from animal waste at farms from liability under Section 107 of CERCLA or otherwise restrict EPA’s authority under Section 104 to take federal response actions if warranted to protect human health and the environment. The 2008 rule also did not exempt air releases of hazardous substances from other potential sources at farms, or releases of hazardous substances from animal waste into other environmental media (e.g., soil, groundwater, or surface water), if such releases were to exceed thresholds for reporting.

However, releases from animal waste into surface waters in compliance with a Clean Water Act discharge permit would be treated as a “federally permitted release” under Section 101(10) of CERCLA. Section 103(a) exempts federally permitted releases from reporting under the statute, and Section 107(j) exempts federally permitted releases from liability under the statute. Federally permitted releases exempt under CERCLA also are exempt from reporting under EPCRA. Exemptions for federally permitted releases are based on the presumption that regulation under another federal law would address potential risks. In current law, there is no similar permitting of air releases of hazardous substances from animal waste upon which to base a federally permitted release exemption.

Litigation Challenging the EPA 2008 Rule

The Waterkeeper Alliance and other organizations filed a petition for review in court to challenge EPA’s authority to issue the 2008 rule, arguing against EPA’s conclusion that the reporting of hazardous substance releases from animal waste at farms under CERCLA and EPCRA is “unnecessary.” On April 11, 2017, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) granted the petition and vacated the exemptions from reporting in the 2008 rule. The court held that Congress did not authorize EPA to exempt releases of hazardous substances from the statutory reporting requirements under CERCLA and EPCRA. The court concluded that the information gained from this reporting

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52 Ibid., 73 Federal Register 76949.
53 Ibid., 73 Federal Register 76950.
60 Id. at 534-36.
would not have “trivial or no value,” but that the information could potentially provide “some real benefits” to the public and local emergency responders.\(^6\) The court subsequently approved multiple EPA motions to stay (i.e., delay) the issuance of an order to lift the exemptions in the 2008 rule to allow more time to develop procedures for reporting and collecting release data, considering the potentially large number of farms that had not reported previously under the 2008 rule. The court granted the most recent stay on February 1, 2018, extending it until May 1, 2018.\(^6\)

**Trump Administration Guidance**

During the Trump Administration, EPA has issued guidance to instruct farms that they should comply with the reporting of air releases under Section 103 of CERCLA through filing annual continuous release reports with the National Response Center once the court order becomes effective after the expiration of the stay.\(^6\) EPA has issued guidelines for farms to estimate the quantity of continuous releases using various existing methodologies, and has announced that the agency is developing additional methodologies to better inform emission estimates. This guidance for continuous release reporting and emission estimates applies to reporting under Section 103 of CERCLA.

EPA also has issued separate guidance outlining the Trump Administration’s interpretation that farms using substances in “routine agricultural operations” are excluded from emergency notification of releases under Section 304 of EPCRA.\(^6\) Based on this interpretation, EPA has announced that farms are not required to report air releases from animal waste to state and local officials, and that the agency intends to conduct a rulemaking on its interpretation of this exemption. The George W. Bush Administration did not render an interpretation of the “routine agricultural operations” exemption in its 2008 rule and instead determined that Section 304 of EPCRA did apply to large CAFOs. The April 2017 D.C. Circuit decision made no reference to this particular exemption in EPCRA.

**S. 2421**

As introduced, S. 2421 would amend Section 103(e) of CERCLA to exempt “air emissions from animal waste (including decomposing animal waste) at a farm” from reporting to the National Response Center regardless of the quantity of the release of hazardous substances in air emissions. The bill would define the term “animal waste”:

- to mean “feces, urine, or other excrement, digestive emission, urea, or similar substances emitted by animals (including any form of livestock, poultry, or fish),” and
- to include “animal waste that is mixed or commingled with bedding, compost, feed, soil, or any other material typically found with such waste.”

S. 2421 would define the term “farm” to mean a site or area (including associated structures) that:

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\(^6\) Id. at 535-38.


\(^6\) During the Trump Administration, EPA has issued guidance for farms to report air releases from animal waste once the court order becomes effective. See “CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms” available at: https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms (as viewed on March 7, 2018).

is used “for the production of a crop;” or “the raising or selling of animals (including any form of livestock, poultry, or fish);” and
• “under normal conditions, produces during a farm year any agricultural products with a total value equal to not less than $1,000.”

S. 2421 would not exempt such air emissions from federal response authority under Section 104 if action were warranted to protect human health and the environment, or potential liability under Section 107.

In current law, Section 103(e) of CERCLA exempts the proper application of a federally registered pesticide from reporting. S. 2421 would strike Section 103(e) in its entirety, reinsert this existing exemption, and add an exemption for air emissions from animal waste at farms as defined in the bill. S. 2421 would not alter the treatment of pesticides under CERCLA in current law.

S. 2421 would not amend EPCRA. However, exempting releases of hazardous substances in air emissions from animal waste at farms from reporting under Section 103 of CERCLA would have the effect of exempting such releases from reporting to state and local officials under Section 304(a)(1) and Section 304(a)(3) of EPCRA. Reporting is required under both of these provisions contingent upon reporting of hazardous substances required under Section 103 of CERCLA. Exempting a release from reporting under Section 103 of CERCLA thereby would exempt the same release from reporting under these two provisions in Section 304 of EPCRA.

Whether releases of extremely hazardous substances in air emissions from animal waste would remain subject to other provisions of EPCRA would depend on two factors. First, Section 304(a)(2) applies to releases of separately listed extremely hazardous substances that are not subject to reporting as hazardous substances under Section 103 of CERCLA. For example, ammonia and hydrogen sulfide are listed separately as extremely hazardous substances under EPCRA, not only as hazardous substances under CERCLA. An exemption from CERCLA therefore may not necessarily apply to separately listed extremely hazardous substances covered under Section 304(a)(2) of EPCRA. Second, if substances released from animal waste may be considered substances used in routine agricultural operations, such releases may be exempt from reporting under EPCRA altogether, as the Trump Administration has interpreted.

If enacted into law, S. 2421 would amend CERCLA to provide an exemption from the reporting of air releases of hazardous substances emitted by animal waste at farms. In turn, this amendment would have the effect of exempting the same releases of hazardous substances from reporting under EPCRA that is contingent upon reporting required under CERCLA. However, the potential applicability of EPCRA to air releases of separately listed extremely hazardous substances may depend on whether the Trump Administration’s interpretation of the exemption for substances used in routine agricultural operations is challenged. Any potential reporting requirements under state or local laws may continue to apply though, as neither CERCLA nor EPCRA would preempt such requirements.
This memorandum responds to your request for a more detailed discussion of the analysis presented in a CRS memorandum provided on March 7, 2018. CRS prepared this earlier memorandum to respond to your initial request for an analysis of amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in the Fair Agricultural Reporting Method Act or “FARM Act” (S. 2421), as introduced on February 13, 2018. As discussed in the March 7th CRS memorandum, S. 2421 would exempt air releases of hazardous substances emitted by animal waste at farms from reporting requirements under CERCLA, and would have a bearing on the applicability of reporting requirements under Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA).

This supplemental memorandum elaborates upon the analysis presented in the March 7th CRS memorandum to outline circumstances in which the emergency notification requirements in Section 304 of EPCRA would apply under current law, and the bearing of S. 2421 on the applicability of these requirements to air releases emitted by animal waste. The March 7th CRS memorandum provides additional background information in support of this analysis, and offers a broader examination of how S. 2421 would define the terms “animal waste” and “farm” for purposes of the bill. I hope that this supplemental memorandum is helpful to address your questions about circumstances in which EPCRA may continue to apply if S. 2421 were enacted. If you need further assistance from CRS in consideration of this legislation or related issues, please do not hesitate to contact me.

Section 304 of EPCRA

As explained in the March 7th CRS memorandum, Section 304 of EPCRA outlines three situations in which the reporting of releases of extremely hazardous substances or hazardous substances into the environment is required.¹ In each situation, the person responsible for the release must notify the State Emergency Response Commission (SERC) and the appropriate Local Emergency Planning Committee.

¹ 42 U.S.C. §11004.
(LEPC) that covers the local jurisdiction where the release occurs. Two of these situations are contingent upon the release being subject to notification under Section 103 of CERCLA for reporting to the National Response Center. The third situation is not contingent upon reporting under CERCLA. The three situations covered in Section 304 of EPCRA are as follows.

- Section 304(a)(1) requires notification of releases of extremely hazardous substances listed under EPCRA, if the release would require notification for hazardous substances under Section 103 of CERCLA.
- Section 304(a)(3) requires notification of releases of other hazardous substances that are not separately listed as extremely hazardous substances under EPCRA, if the release would require notification under Section 103 of CERCLA.
- Section 304(a)(2) requires notification of releases of extremely hazardous substances listed under EPCRA (but that are not subject to notification under CERCLA), if three criteria are met.

In this third situation, releases of extremely hazardous substances listed under EPCRA would require notification under Section 304(a)(2), if the release:

- (A) is not a federally permitted release as defined in Section 101(10) of CERCLA;
- (B) is in an amount in excess of a reportable quantity that the U.S. Environmental Protection Agency (EPA) designated under Section 302 of EPCRA;
- (C) “occurs in a manner” that would require notification under Section 103 of CERCLA.

S. 2421

S. 2421 would amend Section 103(e) of CERCLA to exempt “air emissions from animal waste (including decomposing animal waste) at a farm” from reporting to the National Response Center regardless of the quantity of the release of hazardous substances in air emissions. The bill would not amend Section 304 or any other provisions of EPCRA. Although S. 2421 would not amend this statute, the bill would have the effect of eliminating reporting requirements under Section 304(a)(1) and Section 304(a)(3) of EPCRA for air releases of hazardous substances emitted by animal waste at farms, in so far as the terms “animal waste” and “farm” are defined in the bill.

Both Section 304(a)(1) and Section 304(a)(3) of EPCRA are contingent upon reporting required under Section 103 of CERCLA. Exempting a release from reporting under Section 103 of CERCLA thereby would have the effect of exempting the same release from reporting under Section 304(a)(1) and Section 304(a)(3) of EPCRA. The April 2017 court decision referenced in the March 7th CRS memorandum (Waterkeeper Alliance, et al., v. EPA) described this statutory relationship in terms of “a release that triggers the CERCLA duty also automatically trips the EPCRA reporting requirements in subsections (1) and (3)” of Section 304.

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6 42 U.S.C. §9601(10).
7 42 U.S.C. §11002.
S. 2421 would not have a bearing on the reporting of releases of extremely hazardous substances under Section 304(a)(2) of EPCRA though, as this provision is not contingent upon reporting required under Section 103 of CERCLA. If the exemption from CERCLA in S. 2421 were enacted, the applicability of Section 304(a)(2) therefore would remain the same as in current law. An air release of an extremely hazardous substance emitted by animal waste at a farm would be subject to Section 304(a)(2) if all three statutory criteria for reporting were met.

An air release of an extremely hazardous substance emitted by animal waste would satisfy the first criterion in Section 304(a)(2)(A) if it were not a federally permitted release. Section 101(10) of CERCLA defines the term “federally permitted release” to mean releases regulated under other specific laws. Section 101(10)(H) authorizes a federally permitted release for “any emission into the air” subject to a permit, regulation, or State Implementation Plan, pursuant to the Clean Air Act.9 CRS is not aware of the use of these authorities to regulate air releases emitted by animal waste upon which a federally permitted release presently could be based. If such air releases were permitted under the Clean Air Act, the releases would be exempt from reporting and liability under CERCLA as a federally permitted release, and thereby exempt from reporting to state and local officials under Section 304 of EPCRA.

An air release of an extremely hazardous substance emitted by animal waste would satisfy the second criterion in Section 304(a)(2)(B) if the quantity of the release were to exceed the quantitative threshold for reporting that EPA designated in federal regulation pursuant to Section 302 of EPCRA.10 For example, EPA separately listed ammonia and hydrogen sulfide (substances commonly emitted by animal waste) as extremely hazardous substances, and designated 100 pounds released during a 24-hour period as the threshold for reporting under Section 302 of EPCRA. Air releases of ammonia or hydrogen sulfide emitted by animal waste in excess of 100 pounds during a 24-hour period therefore would satisfy this second criterion in Section 304(a)(2)(B).

An air release of an extremely hazardous substance emitted by animal waste (e.g., ammonia or hydrogen sulfide) would satisfy the third criterion of Section 304(a)(2)(C) of EPCRA, if the release were to occur in the same manner as a “release” that would require reporting under CERCLA. As outlined in the March 7th CRS memorandum, the term “release” in CERCLA is relatively broad with respect to the manner in which a hazardous substance may enter the environment, including spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.11 The term “environment” is defined in Section 101(8) of CERCLA to include surface water, groundwater, a drinking water supply, surface soils, sub-surface soils, or ambient air.12 Section 329 of EPCRA defines the terms “release” and “environment” similar in scope to CERCLA.13 The federal regulations promulgated under Section 304 of EPCRA reflect these statutory definitions.14 Both CERCLA and EPCRA generally treat emissions into the ambient air as releases into the environment.

In implementation, EPA has treated the phrase “occurs in a manner” in EPCRA Section 304(a)(2)(C) to mean the nature of the release in terms of how a substance enters the environment, not that reporting is required under Section 103 of CERCLA. Otherwise, Section 304(a)(2) would be rendered meaningless in

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10 Reportable quantities for extremely hazardous substances subject to emergency release notification under Section 304 of EPCRA are codified in federal regulation at 40 C.F.R. Part 355, Appendix A.
12 42 U.S.C. §9601(8).
13 42 U.S.C. §11049. The definition of the term “release” in EPCRA is nearly identical to that in CERCLA. The definition of the term “environment” in EPCRA is similar to CERCLA, but is more generally worded in its description to encompass “water, air, and land and the interrelationship which exists among and between water, air, and land and all living things.”
14 40 C.F.R. §355.61.
covering releases of extremely hazardous substances that do not require reporting as hazardous substances under CERCLA, while requiring reporting under CERCLA at the same time.

The March 7th CRS memorandum observed that the exemption from reporting under Section 103 of CERCLA in S. 2421 may not necessarily exempt releases of separately listed extremely hazardous substances from reporting under Section 304(a)(2) of EPCRA. The applicability of this provision to a particular release would depend on whether all three statutory criteria outlined above are met. Regardless of these criteria though, Section 304 in its entirety may not apply to air releases from animal waste at farms if the Trump Administration’s interpretation of the exemption for substances used in routine agricultural operations is not challenged. S. 2421 would not have a bearing on this exemption.

Also as noted in the March 7th CRS memorandum, potential reporting requirements under state or local laws may continue to apply regardless of an exemption in federal law, as neither CERCLA nor EPCRA would preempt such state or local requirements.

15 The March 7th CRS memorandum provides further discussion of the Trump Administration’s interpretation of the exemption in Section 311(e) of EPCRA for substances used in routine agricultural operations. This interpretation is outlined in the following agency guidance: EPA, Office of Land and Emergency Management, Does EPA Interpret EPCRA Section 304 to require farms to report releases from animal waste?, October 25, 2017, available at: https://www.epa.gov/epcra/question-and-answer-epcra-reporting-requirements-air-releases-hazardous-substances-animal.
ARGUED DECEMBER 12, 2016
DECLINED APRIL 11, 2017

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

WATERKEEPER ALLIANCE, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

NOS. 09-1017 &
09-1104 (CONSOLIDATED)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY
& EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION
TO STAY ISSUANCE OF MANDATE

Respondent-Intervenors National Pork Producers Council (“NPPC”) and
U.S. Poultry & Egg Association (“USPOULTRY”) respectfully submit this brief
in support of EPA’s motion to stay the issuance of the mandate (Doc. No.
1684518).

1 NPPC and USPOULTRY are both respondent-intervenors in Case No. 09-1017. NPPC is the petitioner in Case No. 09-1104, and USPOULTRY is a petitioner-intervenor in that case.
INTRODUCTION

By the time the mandate issues (at which point reports will be due “immediately”), farmers at tens of thousands of small and medium sized farms will have had to determine whether the animal waste at their farms may emit hazardous substances like ammonia in amounts exceeding EPA’s CERCLA and EPCRA reporting thresholds. Unless EPA is given time to develop guidance on how to comply with the statutory reporting provisions, there will be no uniformity in how farms estimate their emissions.

Absent the requested stay, the holding in this case will result in a repeat performance of a reporting fiasco. As described below, in January 2009, when the recently-vacated rules went into effect, larger farms flooded state and local emergency planning authorities with emissions estimates that the agencies did not know what to do with. This time, when the mandate issues (or within a few days thereafter), tens of thousands of farmers who own smaller farms will repeat this futile exercise.

Unless EPA is given time to provide guidance, these farmers—primarily family farmers—will have to grapple with a federal reporting requirement without help from the government. These small farmers would largely be on their own—

they do not have technical or legal assistance of the type needed to interpret EPA’s reporting regulations. A pre-guidance reporting deadline would be an unfriendly introduction to CERCLA and EPCRA. A six-month stay would allow EPA to provide the guidance necessary for the nation’s small and medium farms—by far the majority of farms in this country—to comply with a regulatory scheme that at present is foreign to them.

**LEGAL STANDARD**

Under D.C. Circuit Rule 41(a)(2), this Court may stay issuance of the mandate for “good cause.” Although typically only lasting up to 90 days, this Court has previously granted stays with a longer term where regulatory compliance was at issue. *See Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854–55 (D.C. Cir. 1987) (granting six-month stay of mandate).

**ARGUMENT**

I. Prior to Issuance of the Mandate, Tens of Thousands of Small and Medium-Sized Farms Must Estimate Their Emissions to Determine Whether They Need to Report.

Under the recently vacated 2008 reporting rule, the nation’s largest farms were required to comply with the EPCRA emergency reporting provision, and they have done their best to provide rough estimates to the local authorities using
various methods.³ Paul J. Bredwell III, USPOULTRY’s Vice President of Environmental Programs, explains that on January 20, 2009, the day that the EPCRA reporting rules went into effect for large CAFOs, the reporting situation “could be easily characterized as chaotic.” Declaration of Paul J. Bredwell III (attached as Ex. 4) ¶ 15. Mr. Bredwell received a call from the office of the Maryland State Emergency Planning Commission “asking [him] what the reports were and what were they supposed to do with them.” Id. ¶ 16. The caller “was puzzled as to why the reports were being submitted and acknowledged it was wasting their time.” Id.

Likewise, Michael Formica, NPPC’s Assistant Vice President & Legal Counsel, Domestic Affairs, recounts how state and local emergency response coordinators were “overwhelmed” by the volume of reports, to the point where they reportedly “rejected the hundreds of reports that followed” after fax machines ran out of paper, took “phone[s] off the hook,” and actually began telling pork producers “that there was no reporting requirement and that the rule was simply an

³See, e.g., Declaration of John Pagel (attached as Ex. 1) ¶¶ 2, 10; Declaration of Jim Winn (attached as Ex. 2) ¶¶ 2, 10. Farms covered by Air Consent Agreements have also reported to the National Response Center and to local authorities, but their emissions estimates are unavoidably imprecise and of limited utility. See, e.g., Declaration of Douglas Wolf (attached as Ex. 3) ¶¶ 21–22. These and other declarations, which are attached as exhibits to this brief, were originally filed in the U.S. District Court for the District of Wisconsin in the related case, Nat’l Pork Producers Council v. Jackson, No. 09-cv-73.
internet hoax.” Declaration of Michael C. Formica (attached as Ex. 9) ¶¶ 7-9 (emphasis added). Even EPA appears to have been confused in the early days of the 2008 reporting rule: EPA Region 4 reportedly informed state officials that “they did not need to accept the reports and instead to direct any farmers to [contact] EPA’s Office of Water. Id. ¶ 9.

If the 2009 reporting trigger produced a situation that was “chaotic,” the upcoming days immediately following issuance of the mandate are sure to be worse. Now small and medium farms—defined by the number of the particular type of animal they produce⁴—will be required to determine whether they must file CERCLA and EPCRA reports. They represent the majority of farms in the United States. For example, there are more than 40,000 poultry farms in the United States, and about 90% of chicken broiler farms are small or medium entities not previously subject to the reporting requirement. Bredwell Decl. ¶ 10.⁵ The number of poultry farms alone required to report could cause the National Response Center to receive more reports in a few days than it typically receives in a year. See Formica Decl. ¶¶ 12–13 (noting 33,665 reports received in 1994, and 24,193 received in 2016).

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⁵ The cutoff for large chicken (broiler) farms that use dry manure handling systems is 125,000 birds per growing cycle.
Most of the farmers managing these operations will find the new mandatory Federal reporting requirements to be “highly intimidating,” and they will be “extremely fearful of possible civil and criminal consequences if they make mistakes in what they report, or how they report it.” Declaration of Thomas R. Hebert (attached as Ex. 6) ¶ 6. They also are concerned about citizen suits, which “have the ability to put the livelihood of poultry and egg producers at risk.” Bredwell Decl. ¶ 8. Consequently they may choose to submit release reports for emissions that turn out to be below the legal reporting threshold.” Id.

Compounding these fears is the “complexity and scope of the written reporting requirements such as those set forth in EPA’s regulations.” Hebert Decl. ¶ 8. For instance, farmers are likely to be confused by the requirement to submit information on the identity and location of “sensitive” populations and ecosystems within a one-mile radius of their farms, and the frequency of the release of substances from animal waste, the fraction of the release from each release source, and the specific period over which it occurs. See id. And farmers are currently struggling with interpreting unfamiliar terms in EPA’s regulations. See id.; see

6 See also EPA Mot. (Doc. No. 1684518) at 6–7; Declaration of Laurie Fischer (attached as Ex. 7) ¶ 8 (“I have been informed by [Dairy Business Association of Wisconsin] members that the chemical substances, including manure, on their farms are used only for ordinary farming purposes but that they have made emergency reports under EPCRA for fear that they may be subject to large fines or criminal penalties if they do not make these reports.”).
also Formica Decl. ¶ 4 (“Just this week I have had conversations with leading pork producing companies—sophisticated operations—that are struggling with the details of what they are required to report, the process they need to use to calculate their estimated emissions, and the accuracy of the various techniques as applied to particular farms.”).

The confusion and fear that farmers are already experiencing is understandable: the “vast majority” of farmers have limited or no experience with mandatory environmental reporting under state or Federal law, and are without staff or outside counsel to advise and assist in the preparation of such reports. Hebert Decl. ¶ 6; see also Formica Decl. ¶ 5 (explaining how, in rural areas where many pork farmers reside, “there is a lack of legal assistance” and the “legal professionals that do provide services in [those] areas tend to be generalists, focusing on contracts, estate planning, and real estate, not specialists in federal environmental law.”). Many small farms, not being part of a large communications network, may also not learn of the new requirements for some time. Bredwell Decl. ¶¶ 12–13.

Nevertheless, farmers will take these requirements seriously, and will seek direction as to how to properly and correctly estimate their reported emissions. Hebert Decl. ¶ 6. But in the absence of such direction or guidance by EPA, small and medium sized farms will be placed in the untenable position of making
inaccurate and unreliable estimates based on “research or monitoring data from farms that do not have the same operating setup as their own systems, are not located in the same geographical locations, or do not have the same climates and operating conditions.” Hebert Decl. ¶ 7.

That many farmers reached out to EPA after this Court’s April 11, 2017 decision is a testament to the significance of this issue to them and the anxiety they face. EPA Mot. at 5–6. That significance was also demonstrated in 2009 by the voluminous number of calls made to NPPC from farmers concerned about compliance.7 In sum, an immediate reporting requirement will necessitate immediate compliance, and without guidance from EPA these farmers will be rightfully anxious about how to proceed.

II. Without a Reliable Estimation Method, Pre-Guidance Reporting Will Be Difficult.

A. EPA has yet to identify an authoritative method of estimation.

As this Court has recognized, regulators and scientists have thus far not been able to coalesce around one widely recognized and accepted method for estimating emissions. EPA Mot. at 5. Extant methods are unreliable, returning widely

7 Wolf Decl. ¶ 26 (“[NPPC’s] phone lines were overrun with calls from nervous producers who had no idea how to comply, as well as producers who attempted to comply only to be with bewilderment or misinformation from the state and local officials receiving the calls.” NPPC staff even received phone calls from state and local emergency planning authorities who were confused about the reports and who had been unable to get guidance from EPA.”).
varying results not only on a technique-by-technique basis, but also a study-by-
study basis. As Mr. Bredwell explains, “[c]urrent research does not allow a 
poultry producer to estimate when they exceed the reporting threshold much less 
know what the upper bound of emission may be, which is also required when 
reporting.” Bredwell Decl. ¶ 7; see also Hebert Decl. ¶ 5 (“There are no nationally 
recognized or widely accepted air emissions estimation methodologies that 
livestock and poultry farmers or regulatory authorities could use to calculate or 
estimate ammonia (or other) air emissions from the manure produced by animals 
raised at livestock and poultry farms.”).

EPA’s Science Advisory Board (“SAB”) has recognized this problem. The 
SAB examined the emissions-estimating methodologies EPA had developed after 
EPA reviewed data from responses to a 2011 call for information and the National 
Air Emissions Monitoring Study. The SAB found that the data were valid for the 
farms actually assessed, but not sufficient to estimate emissions nationwide. Letter 
from Dr. David T. Allen, Chair, Science Advisory Board, to Hon. Bob Perciasepe, 
Acting Administrator, U.S. EPA, April 19, 2013, available at 
https://yosemite.epa.gov/sab/SABPRODUCT.NSF/81e39f4c09954fcb85256ead00 
6be86e/08A7FD5F8BD5D2FE85257B52004234FE/$File/EPA-SAB-13-003- 
unsigned+.pdf (last visited July 21, 2017). Numerous factors complicate emissions 
estimation, including the number of species from which emissions are to be
estimated, varying geographical and seasonal climatic conditions, and differing manure management techniques. Bredwell Decl. ¶ 6. As Mr. Bredwell explains, “researchers discovered that establishing a one-size-fits-all emissions estimation methodology was virtually impossible.” Id.

Real-world application reflects the present uncertainty in the scientific community. For example, Chad Bierman, a Wisconsin farmer who owns a pork farm (and has a master’s degree in animal science and genetics), used one emissions estimator from the University of Nebraska to estimate the amount of ammonia emissions that might come from his farm. That tool estimated anywhere from 165 to 335 pounds per day of ammonia emissions. See, e.g., Declaration of Chad Bierman (attached as Ex. 8) ¶¶ 13–14 (noting that while “[u]niversities and others have developed preliminary [estimation] techniques, . . . these estimates vary substantially,” and describing the results of application of one of these models to his farm). Farmers should not have to determine whether they must report based on a tool that provides one estimate that is over 100% greater than another. Doing so would only add to the anxiety immediate compliance requirements would cause.

B. **EPA has not provided guidance on the definitions of key terms underlying the reporting requirements.**

Under these circumstances, farmers do not understand how to demonstrate compliance. Without a uniform way to estimate emissions or clarity as to what must be measured, farmers will have no certainty that they are reporting what is
required in the manner required. Not only are farmers without adequate tools to estimate their emissions, but they also lack guidance as to the scope of the activity covered by the rules and the meaning of key terms in EPA’s reporting regulations. See Hebert Decl. ¶¶ 7–8.

For example, certain categories of farms may qualify for reduced reporting if their releases are “continuous and stable.” 40 C.F.R. § 302.8. But how are farmers to know whether their emissions qualify as “without interruption or abatement or that is routine, anticipated, and intermittent and incidental to normal operations”? Id. § 302.8(b). Or “predictable and regular in amount and rate of emission,” particularly given the variables inherent in emissions estimation identified above? Id. Without guidance as to who qualifies, no farmer will assume that she qualifies, and therefore farmers may provide reports that are wholly unnecessary. And once a report is made, follow-up requirements are triggered, e.g., id. § 355.40(b), which will be time consuming and no more helpful, especially in the absence of a way to accurately estimate emissions. Moreover, CERCLA exempts the “normal application of fertilizer” from the definition of “release,” 42 U.S.C. § 9601(22)(D). EPCRA exempts “[a]ny substance to the extent it is used in routine agricultural operations” from the definition of “hazardous chemical,” 42 U.S.C. § 11021(e)(5). Due to the complex yet undefined nature of not only the requirements but also the
exemptions, farmers do not even know what emissions they are supposed to estimate and report.

As noted above, farmers have already expressed the concern that they do not know how to comply. We are not aware of any changes between April 11 and the date of this filing that would meaningfully aid farmers in complying with the new requirements. Since EPA is already working on guidance, it should be allowed to continue. EPA Mot. at 6.

III. Absent EPA Guidance, Erroneous Reporting Could Be Costly for Farmers While Providing Limited Benefits to Regulators or the Public.

A. Severe consequences can flow from erroneous reporting.

EPA has already identified the potential consequences farmers face from submitting defective reports, even if the defects are not the fault of the farmers. See EPA Mot. at 6–8. Citizen suits are also a possibility, and would have the additional threat of liability for attorneys’ fees, which small farms in particular would be wholly unequipped to pay. See Bredwell Decl. ¶ 8. At the same time, it is these small farmers who will disproportionately bear the brunt of the reporting requirements, and therefore the associated costs and potential liability.

B. The potential consequences are out of proportion to any benefits from the reports.

Not only are the estimates sure to be unreliable, but the authorities receiving the reports will not know what to do with them. In Wisconsin, for example, when
farmers began providing reports to state and local authorities, these authorities were confused as to why the reports were being made, and they did not know how they were supposed to use the information. Some agency staff even went so far as to ask the farmers for information regarding the EPCRA reporting requirements. Fischer Decl. ¶ 7; Winn Decl. ¶¶ 10–13; Pagel Decl. ¶¶ 10–13.

The President of the National Association of SARA Title III [i.e., EPCRA] Program Officials has expressed in a letter to Administrator Pruitt that the reports received thus far “are of no particular value” and “are generally ignored because they do not relate to any particular event.” Declaration of Timothy R. Gablehouse (attached as Ex. 5), Ex. A at 1. Instead, Mr. Gablehouse suggests that “open dialog and coordination can be more effective,” and that “[o]nly the LEPC and local first responders can determine what information they need from a farm as part of their emergency planning process.” Id. at 1–2; see also, e.g., 73 Fed. Reg. 76,948, 76,954/2 (Dec. 18, 2008) (noting that many local responders believe the reporting “is of little value”). Mr. Gablehouse’s views demonstrate the need for guidance from EPA before farms begin to report.

Without EPA guidance, these reports will also have limited benefits to the public. Only accurate information can actually “help local communities protect
public health, safety, and the environment from chemical hazards,” the purpose of EPCRA. If local emergency response coordinators find the reports they have received so far to be useless, the information is unlikely to be useful to anyone else. Indeed, erroneous reporting will be more likely to have a detrimental effect, unnecessarily causing concern to the public. When promulgating the exceptions, for example, EPA noted that studies submitted “indicating the potential health issues associated with the emissions from animal waste at farms” had to do with on-farm issues, whereas the reporting is targeted at off-site emissions. 73 Fed. Reg. at 76,955/2. Immediate reporting of inaccurate information would do a disservice to communities that receive it.

CONCLUSION

Because issuance of the mandate before EPA can provide guidance will trigger confusion among farmers and agencies without benefiting the public, this Court should grant EPA’s request to stay the mandate for six months so it can avert a reporting fiasco.

DATED: July 27, 2017

Respectfully submitted,

/s/ David Y. Chung
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David Y. Chung
Elizabeth B. Dawson
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Counsel for National Pork Producers
Council and U.S. Poultry & Egg Association
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3,091 words, calculated using the Word Count feature of Microsoft Word 2010. This brief complies with the typeface and type-style requirements of Rule 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

/s/ David Y. Chung
David Y. Chung
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing brief to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Nos. 09-1017 &
09-1104 (Consolidated)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY
& EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION
TO STAY ISSUANCE OF MANDATE

EXHIBIT 1

DECLARATION OF JOHN PAGEL
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL PORK PRODUCERS COUNCIL
122 C Street, N.W.
Suite 875
Washington, D.C. 20001,

and

WISCONSIN PORK ASSOCIATION
9185 Old Potosi Road
Lancaster, WI  53813,

Plaintiffs,

and

DAIRY BUSINESS ASSOCIATION, INC.
4039 Ponce De Leon Boulevard
Oneida, WI  54155,

Intervening Plaintiff,

v.

LISA P. JACKSON
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C.  20460,

Defendant.

DECLARATION OF JOHN PAGEL IN SUPPORT OF
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

I, John Pagel, declare as follows:

1. I operate the Pagel’s Ponderosa dairy farm located in Kewaunee County,
Wisconsin and I am a member of the Dairy Business Association, Inc. I make this declaration
based upon my personal knowledge and in support of the Motion for Summary Judgment of the National Pork Producers Council, Wisconsin Pork Association and Dairy Business Association, Inc. I understand that the information that I am providing in this declaration will be used to determine whether my farm and similar farms qualify for a statutory exemption to emergency reporting requirements under the federal Emergency Planning and Community Right-to-Know Act (“EPCRA”). I have authorized the Dairy Business Association, Inc to represent my interests for this purpose.

2. My farm in Kewaunee County houses more than 700 mature dairy cows. These animals are stabled or otherwise confined in pens, barns or similar structures. As a large CAFO in Wisconsin, I operate pursuant to Wisconsin Pollution Discharge Elimination System WPDES Permit # 0059374.

3. I use a variety of substances on my farm. Those substances include pesticides, commercial fertilizer, substances used for cleaning facilities and equipment, and manure (animal excrement) produced by animals on my farm. I am aware of no chemicals at my farm other than those used in my ordinary farm operations.

4. Manure generated and stored on my farm is an excellent source of plant nutrients. Manure contains many of the elements required for plant growth (including nitrogen, phosphorus and potassium). Manure is also a soil enhancer that provides positive benefits to soil quality. The manure produced by and utilized by my farm is a valuable resource. I apply manure to fields throughout the cropping season in accordance with a comprehensive nutrient management plan which requires nutrients be utilized as fertilizer for plants.

5. I am told that ammonia, hydrogen sulfide and other substances are emitted from manure.
6. My farm uses a manure management system that involves the collection, storage, and land application of manure. My system includes a flume system and an anaerobic digester that first heats the manure to a temperature of 100° F, and then the methanogenic bacteria converts some of the energy of manure into a biogas which consists primarily of methane (CH₄, the same as natural gas) and CO₂. The digested manure is then pumped to a manure solids separator. The mechanical manure separator separates the digested manure into solid and liquid factions. The remaining solids are either utilized for animal bedding or applied to fields as fertilizer in accordance with my farm’s nutrient management plan. The liquid manure, with most of the solids removed, is then transferred into storage pits. Periodically, the storage pits are emptied and the liquid manure is applied to fields in accordance with my farm’s nutrient management plan.

7. I own or lease all of the cropland upon which I spread manure to fertilize crops.

8. I typically spread manure twice a year. I spread in the spring prior to planting corn crops. I also apply manure in the fall after crop harvest.

9. I cannot conclusively or reliably determine the amount of ammonia, hydrogen sulfide or other substances being emitted from the manure on my farm. Universities and others have developed preliminary techniques for estimating these rates. However, these estimates vary substantially from technique to technique and also from study to study.

10. I have reported an emissions estimate to the Kewaunee County Emergency Planning Committee and Wisconsin Emergency Management.

11. When I contacted the Kewaunee County Emergency Planning Committee to provide my initial telephone notification, the person I spoke with had no idea why I had called to report routine air emissions from my farm and expressed confusion as to what she was supposed
to do with the information I had provided. I explained to the employee that the U.S.
Environmental Protection Agency directed me to report my emissions to local emergency
management officials.

12. When I contacted Wisconsin Emergency Management to provide my initial
telephone notification, agency personnel were unavailable so I left a voicemail reporting my
emission estimates. The next day I called to confirm receipt of my voicemail emission report,
but no knowledgeable personnel were available. A person from the Wisconsin Emergency
Management support staff agreed to take my name, telephone number and address, but she did
not seem to understand the purpose of my call.

13. I submitted a follow-up written notification to both the local and State agencies
within 30 days of my initial telephone notification. Upon receipt of my written notification, the
Kewaunee County Emergency Planning Committee commented that they did not have any
resources available for farms seeking to report emissions. A Kewaunee County staff person then
requested that I send an extra copy of the forms I was submitting in the event that other farms
requested information about how to report their emissions pursuant to the new EPCRA rule.

I declare under penalty of perjury under the laws of the United States of America that the
foregoing is true and correct.

Executed this 20th day of March, 2009.

s / John Pagel
John Pagel
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing Declaration of John Pagel to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Nos. 09-1017 &
09-1104 (Consolidated)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY
& EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION
TO STAY ISSUANCE OF MANDATE

EXHIBIT 2

DECLARATION OF JIM WINN
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

NATIONAL PORK PRODUCERS COUNCIL
122 C Street, N.W.
Suite 875
Washington, D.C. 20001,

and

WISCONSIN PORK ASSOCIATION
9185 Old Potosi Road
Lancaster, WI 53813,

Plaintiffs,

and

DAIRY BUSINESS ASSOCIATION, INC.
4039 Ponce De Leon Boulevard
Oneida, WI 54155,

Intervening Plaintiff,

v.

LISA P. JACKSON
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460,

Defendant.

DECLARATION OF JIM WINN IN SUPPORT OF
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

I, Jim Winn, declare as follows:

1. I operate the Cottonwood Dairy farm located in Lafayette County, Wisconsin and I am a member of the Dairy Business Association, Inc. This declaration is made on the basis of
my own personal knowledge and is offered in support of the Motion for Summary Judgment of the National Pork Producers Council, Wisconsin Pork Association and Dairy Business Association, Inc. I understand that the information that I am providing in this declaration will be used to determine whether my farm and similar farms qualify for a statutory exemption to emergency reporting requirements under the federal Emergency Planning and Community Right-to-Know Act (“EPCRA”). I have authorized the Dairy Business Association, Inc to represent my interests for this purpose.

2. My farm in Lafayette County houses more than 700 mature dairy cows. These animals are stabled or otherwise confined in pens, barns or similar structures. As a large CAFO in Wisconsin, I operate pursuant to Wisconsin Pollution Discharge Elimination System WPDES Permit # 0059021.

3. I use a variety of substances on my farm. Those substances include pesticides, commercial fertilizer, substances used for cleaning facilities and equipment, and manure (animal excrement) produced by cows on my farm. I use all of these substances for farm purposes. I am aware of no chemicals at my farm other than those used in my ordinary farm operations.

4. The manure generated and stored on my farm is as an excellent source of nutrients for crops. Manure contains many of the elements required for plant growth – including nitrogen, phosphorus, and potassium. Manure is also a soil enhancer that provides positive benefits to soil quality. The manure produced by and utilized by my farm is a valuable resource. I typically apply manure to fields throughout the cropping season in accordance with a comprehensive nutrient management plan which requires that nutrients be utilized as fertilizer for plants.

5. It is my understanding that ammonia, hydrogen sulfide and other substances are released to the air from manure.
6. My farm utilizes a manure management system that involves the collection, storage, and land application of manure. Manure and other substances, such as feed and water, are collected and transferred into storage pits. Periodically, the storage pits are emptied and the solid and liquid manure is applied to fields in accordance with my farm’s nutrient management plan.

7. I typically spread manure twice a year. I spread in the spring prior to planting corn crops. I also apply in the fall after harvest.

8. I own or lease some of the agricultural fields upon which I spread manure, and some of the manure is used by neighboring farmers to fertilize their crops.

9. I cannot conclusively or reliably determine the amount of ammonia, hydrogen sulfide or other substances being emitted from the manure on my farm. Universities and others have developed preliminary techniques for estimating these rates. However, these estimates vary substantially from technique to technique.

10. I have reported an emissions estimate to the Lafayette County Emergency Planning Committee and Wisconsin Emergency Management.

11. When I contacted the Lafayette County Emergency Planning Committee to provide my initial telephone notification, agency personnel were unavailable so I left a voicemail reporting my emissions estimate. The next day I received a call back from Lafayette County Emergency Planning employee, John Reichling. Mr. Reichling had no idea why I had called to report air emissions from my farm and expressed confusion as to what he was supposed to do with the information I had provided. I explained to the employee that the U.S. Environmental Protection Agency directed me to report my emissions to local emergency management officials.
12. When I contacted Wisconsin Emergency Management to provide my initial telephone notification, the staff person similarly had no idea what I was talking about, why I was calling or what the agency was supposed to do with the information I had provided. Again, I explained that EPA directed me to report my emissions to local emergency management officials.

13. I submitted a follow-up written notification to both the local and State agencies within 30 days of my initial telephone notification. To date, neither agency has responded to my written notification. I have received no guidance or confirmation that my reporting was in compliance with EPCRA.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 20th day of March, 2009.

_s / Jim Winn

Jim Winn
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing Declaration of Jim Winn to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Nos. 09-1017 &
09-1104 (Consolidated)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY & EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION TO STAY ISSUANCE OF MANDATE

EXHIBIT 3

DECLARATION OF DOUG WOLF
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

NATIONAL PORK PRODUCERS
COUNCIL,

and

WISCONSIN PORK ASSOCIATION,
Plaintiffs,

and

DAIRY BUSINESS ASSOCIATION, INC.

Intervening Plaintiff,

v.

LISA P. JACKSON
Administrator
United States Environmental Protection Agency,

Defendant.

AFFIDAVIT OF DOUG WOLF IN SUPPORT OF
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN )
) ss.
COUNTY OF SAUK )

Douglas Wolf, having been duly sworn on oath states as follows:

1. My name is Douglas Wolf and I reside in Lancaster, Wisconsin.

2. I make this declaration based upon my person knowledge after a lifetime in agriculture and as a member of the leadership of the Wisconsin Pork Association and an officer of the National Pork Producers Council.
3. I am a member of the Wisconsin Pork Association ("WPA") and voluntarily contribute "check off" funds as an investor in the National Pork Producers Council ("NPPC"), the national trade association representing the pork industry.

4. WPA is a non-profit trade association representing the interests of pork producers in Wisconsin. WPA’s members include pork producers residing in the Western District of Wisconsin. WPA has its headquarters in this district, in Grant County, Wisconsin. The mission of the WPA is to ensure the future of the Wisconsin Pork Industry and its membership. The WPA is committed to the success of the pork industry and provides the leadership for focusing on the identification and enhancement of opportunities while resolving industry challenges. The leadership maintains timely communications to the membership on actions taken regarding factors impacting the pork industry.

5. The NPPC is a non-profit trade association comprised of 43 state pork producer organizations, including WPA. NPPC represents the interests of the nation’s pork industry. NPPC’s mission is to serve as an advocate for reasonable legislation and regulations, develop revenue and market opportunities, and protect the livelihood of the nation’s 67,000 pork producers. NPPC’s mission includes representing pork producers in administrative and judicial proceedings involving national regulations and other government actions that affect the production of pork in the U.S.

6. I hold leadership positions and serve as a member of the Board of Directors for both organizations. In addition, at NPPC I serve as the organization’s Vice President, as well as Vice Chairman of its Environmental Policy Committee, where I am frequently involved in industry-wide discussions involving the environmental and regulatory performance of the pork industry. I am in frequent communication with our membership and investors regarding the
regulatory challenges facing the industry. In addition, I also served as Chair of the Conservation subcommittee of NPPC’s Farm Bill Task Force where I served as the point person for the industry in negotiations with Congress and the United States Department of Agriculture over the development of on farm conservation and environmental protection policies associated with the 2008 Farm Bill.

**Background and Agricultural Experience**

7. I have always been involved in agriculture. I was born and raised on my farm, and have worked on the farm my entire life, and possess both a BS in Agricultural Economics from the University of Wisconsin, Platteville and an MS in Meat and Animal Production from the University of Wisconsin, Madison.

8. Growing up, my father raised hogs, operated a dairy, and grew row crops. We worked together as a partnership for 22 years before I took over full ownership of the farm.

9. Together with my son Shannon, I own and operate Wolf L+G Farms, L.L.C., a diversified farm located at 5590 Substation Rd, Lancaster, Wisconsin, that includes a farrow to finish hog operation, raising sows and market pigs. We also raise corn, soybeans, and hay, and we have a permanent pasture where we operate a cow-calf operation and also finish raising some cattle.

10. My farm is located on three separate parcels of land, each individually devoted to the raising of animals and growing of crops, plus a pasture where we graze cattle. In total, we own approximately 1250 acres and lease about 500 acres.

11. On Parcel One, I have a barn for finishing the raising of swine, a feedlot for cattle, and I raise row crops. Parcel Two is located across both a road and a pasture on which I graze cattle. Parcel two includes my sow barn and nursery for piglets, some crop fields, and, on the
other side of the crop fields, a separate barn for weaned pigs weighing up to about 55 pounds.
Parcel three, located approximately one mile away, is a satellite operation that includes both crop
land and space for raising hogs.

12. All the manure from my livestock operations is utilized on the same parcel of land
where the livestock operation is located.

The Routine Use of Manure in Agricultural Operations

13. Through my involvement with NPPC and WPA, and through my personal
experience in farming, I am familiar with the operations of many pork farms in Wisconsin and
around the country. Chemicals on these farms, such as pesticides, fertilizer, cleaning products,
and manure (animal excrement) are commonly used in farm operations. In fact, in my
experience, farmers typically do not keep chemicals – including manure, if manure is viewed as
a “chemical” – on their farms except for use in farm operations.

14. Pork farmers generally consider manure to be a valuable resource. They typically
either use it on their farms – or sell or give it to neighboring farmers for use on those farms –
primarily as a fertilizer and soil enhancer. Manure contains nutrients – such as nitrogen,
potassium, and phosphorus – that are essential for growing crops. In addition, the routine use of
manure serves as a soil conditioner, adding organic matter back to the soil, maintaining its
richness and productivity, increasing the land’s water retention characteristics, and promoting
greater yields than the use of other types of fertilizers.

15. I routinely use a variety of substances in my farm operations. All of the chemical
substances at my farm, including manure, are used only for my ordinary farm operations. These
substances include pesticides, cleaning agents, and fertilizers including manure.
16. I routinely use the manure produced at my farm as a fertilizer and soil enhancer for the raising of our crops, some of which are used for animal feed. The manure is a valuable resource that, used as a major component of my Comprehensive Nutrient Management Plan (CNMP), reduces the amount of chemical fertilizer that would otherwise be applied to agricultural land and enhances the condition of my soils, ensuring the long term, sustainable productivity of my farm.

17. My farm utilizes a manure management system that involves the collection, storage and land application of manure. Manure falls through slots in the floor of the hog barns and is collected and stored in concrete pits approximately eight to ten feet deep and located directly under the barn. From there, manure is transported and incorporated onto each Parcel’s agricultural fields via an umbilical system. The manure is removed from the deep pits and directly pumped through a long hose attached behind my tractor where it is incorporated directly into the land using a chisel plow.

18. In order to maximize the value of my manure and its beneficial characteristics’ and maximize the condition of my farms soils, my CNMP incorporates a rotating 4 year term for manure application per parcel. Under the terms of my CNMP, I bank the soils nutrient allocations, in coordination with my crop rotation schedule, from year one by using a combination of manure and the application of a 28% nitrogen commercial liquid fertilizer. This process allows me to practice no till farming for 3 years and achieve a higher level of environmental performance. Within each individual parcel of land I cycle the area from year to year where I spread manure. For each area, the manure is applied in the spring before planting as well as in the fall after harvest.
19. While my individual CNMP is specifically designed for my farm, routine use of the manure as a fertilizer and soil enhancer is typical of the vast majority of livestock operations in Wisconsin and generally throughout the United States, where the manure is treated as a valuable commodity and is the preferred method of fertilization on our farms. In this country, manure from pork and dairy operations is ordinarily applied to fields as a fertilizer and soil enhancer for agricultural crops.

Air Consent Agreement

20. I understand that ammonia and hydrogen sulfide are substances that can be emitted from manure. However, although my farm raises animals that generate manure, I do not know of any way that I can reliably determine the amount of ammonia or other substances being emitted from the manure at my farm. I am aware that universities and scientists have developed preliminary techniques for estimating these rates. However, these estimates vary substantially from technique to technique and also from study to study.

21. Because of the uncertainty concerning the air emissions associated with my farm, I decided to enter into a Consent Agreement with the U.S. Environmental Protection Agency (EPA) in 2006. In total, approximately 2,568 producers, representing 6,267 farms across the country, agreed to participate in the process with EPA regarding our air emissions. This total includes at least 1,856 pork producers.

22. The air consent agreement has provided a mechanism for funding EPA’s National Air Emissions Monitoring Study (“NAEMS”), a two year study of livestock emissions being conducted by researchers at Purdue University.
23. NAEMS monitoring is currently underway around the nation. The monitoring phase of NAEMS is currently scheduled to conclude in early 2010. Afterwards, EPA will have eighteen months to evaluate all the monitoring data and then publish emission-estimating methods for use by livestock producers. These emission estimating methods are to be publicly available.

The Pork Industry’s Experience with EPCRA Reporting

24. The December 18, 2008 announcement by EPA that pork producers who did not sign an air consent agreement must file reports of the routine emissions from their animal manure under EPCRA has caused significant confusion and concern throughout the industry. While I was not required to make a report because I have signed the air consent agreement, many of my fellow pork producers, both in Wisconsin and around the country, were taken by surprise by EPA’s decision. For most, the first time they heard about EPA’s new requirements came in mid-January 2009, days before the January 20 “effective date” of the EPA notice. As a senior member of NPPC’s leadership and Vice Chair of its Environmental Policy Committee, I heard about many problems producers encountered in attempting to estimate emissions and file reports with their state and local emergency response authorities.

25. Producers ran into three major problems. First, EPA failed to effectively communicate to the agricultural community that the agency had issued a final rule and that EPA was requiring the majority of livestock producers nationwide to report manure air emissions without regard to their routine use of the manure. Second, EPA failed to provide any timely guidance to producers – as promised in EPA’s final December 18, 2008 rule (73 Fed. Reg. 76,948, 76,952 (Dec. 18, 2008)) – on how to estimate their emissions or file their reports.
Finally, EPA failed to communicate to state and local emergency response authorities so that they would be prepared to receive these reports.

26. As a result of this failure of communication, the agricultural community across the country was overwhelmed with fear and confusion that continue still to this day. At NPPC, the phone lines were overrun with calls from nervous producers who had no idea how to comply, as well as producers who attempted to comply only to be met with bewilderment or misinformation from the state and local officials receiving the calls. NPPC staff even received phone calls from state and local emergency planning authorities who were confused about the reports and who had been unable to get guidance from EPA.

27. Producers also continue to face difficulty in attempting to estimate their emissions. Without EPA guidance, they were forced to find tools on their own. University extension specialists provided estimating methods, but they have only added to the confusion. In Wisconsin, many producers have tried to estimate emissions using two very different tools that both purport to roughly estimate the amount of emissions that might be associated with the routine manure management practices associated with agricultural operation. One estimator has been distributed by Wisconsin Extension which suggests that a pork producer finishing 2700 pigs will exceed the 100 pound reporting threshold for ammonia attributable to routine manure management activities. A second, more comprehensive estimator distributed by the University of Nebraska suggests that, all else being equal, the reporting threshold for a producer is actually 3333 finishing pigs, 25% higher.

Dated this ______ day of March, 2009.
Subscribed and sworn to before me this
20__ day of March, 2009.

Notary Public
My Commission expires: 3-20-2011

Douglas Wolf
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing Declaration of Doug Wolf to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Nos. 09-1017 &
09-1104 (Consolidated)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY & EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION TO STAY ISSUANCE OF MANDATE

EXHIBIT 4

DECLARATION OF PAUL J. BREDWELL III
ARGUED DECEMBER 12, 2016
DECIDED APRIL 11, 2017

Nos. 09-1017(L), 09-1104

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

WATERKEEPER ALLIANCE, et al.

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITIONS FOR REVIEW OF FINAL ACTION
OF THE ENVIRONMENTAL PROTECTION AGENCY

DECLARATION OF PAUL J. BREDWELL III

I, Paul J. Bredwell III, hereby declare:

1. I am the Vice President of Environmental Programs for the U.S. Poultry & Egg Association (USPOULTRY), the world's largest and most active poultry organization. I have held my position with USPOULTRY for more than 9 years. During that period, I have been engaged in all aspects of poultry and egg production. This includes all aspects of environmental issues associated with raising poultry, including byproducts generated while the birds grow.
2. In 1986, I graduated from the Georgia Institute of Technology with a Bachelor’s Degree in Civil Engineering. I currently hold a Professional’s Engineering License in the states of Georgia, Tennessee, and South Carolina.

3. Prior to joining USPOULTRY I was employed as a consultant engineer and provided civil and environmental consulting services for multiple poultry companies in the United States over a period of 15 years.

4. USPOULTRY is a non-profit organization that progressively serves its poultry and egg members through research, education, communications and technical services. The association aspires to be the leading technical resource and voice for the industries it serves. Members of USPOULTRY include producers and processors of broilers, turkeys, ducks, eggs, and breeding stock, as well as allied companies. Formed in 1947, the association has affiliated organizations in 26 states and has member companies worldwide.

5. An overriding concern of USPOULTRY with regard to reporting ammonia emissions from animal waste is that the lack of a clear scientific basis for calculating those emissions will unavoidably require the submission of reports whose accuracy is unknown.

6. In 2007, animal agricultural organizations and farms that represented major aspects of animal protein production in the United States entered into a consent agreement. The consent agreement included a provision for the agricultural
groups to fund a study, entitled the “National Air Emissions Monitoring Study” (NAEMS). This study collected air emissions data from representative farms every minute of the day over a two-year period. These data were obtained to develop methodologies to estimate emissions from each animal agriculture sector (i.e., broilers, swine, dairy, etc.). After collecting numerous data points that included ammonia concentration, temperature, humidity, and more, researchers discovered that establishing a one-size-fits-all emissions estimation methodology was virtually impossible. Climatic conditions that vary geographically and seasonally affect the decomposition of manure. Likewise, manure-management techniques like house-cleanout frequency, temperature-humidity set points and ventilation fan operation make every farm unique.

7. The lack of any scientifically validated methodology puts poultry and egg producers in an impossible position. To protect themselves from potential civil and criminal liability, they will be forced to submit uncertain emission reports that no one can verify. Current research does not allow a poultry producer to estimate when they exceed the reporting threshold much less know what the upper bound of emissions may be, which is also required when reporting.

8. The citizen lawsuit provisions within the CERCLA and EPCRA statutes are extremely concerning to our members. These lawsuits have the ability to put the livelihood of poultry and egg producers at risk. This risk alone is
intimidating to poultry producers, who may choose to submit release reports for emissions that turn out to be below the legal reporting threshold.

9. In addition, the large number of producers makes communicating the reporting requirement difficult. Raising commercial poultry continues to be an agricultural operation dominated by the relatively small family farmer, with most production occurring under contract with a producer. The farmer or “grower” normally supplies housing with all the necessary heating, cooling, feeding and watering systems, and the labor to facilitate bird growth. The producer supplies the chicks (or poults), feed, and veterinary medicines.

10. The number of broiler growers is estimated at over 32,000, while there are estimated to be more than 8,000 turkey growers, resulting in a total of more than 40,000 poultry growers in the U.S. According to a survey of poultry contract growers conducted by the National Chicken Council and U.S. Poultry & Egg Association, 92% of growers in the U.S. raise 125,000 birds or less each cycle, which is roughly equivalent to five or six poultry houses on site (depending

1 The survey provides a snapshot of 16,311 poultry growers around the nation; approximately were 500 turkey growers with the balance of responses from broiler growers. Portions of the survey results were published at Starkey, J., CAFO Revisions: Regulation Without Purpose?, WATT PoultryUSA (Jan. 2002).
on the age and the size of the houses). As demonstrated in the chart below, nearly 60% of broiler growers have less than 75,000 birds, which is equivalent to three to four houses on site:

<table>
<thead>
<tr>
<th>Number of Birds Grown Per Cycle (5-6 cycles per year)</th>
<th>Percentage of Growers in U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-25K</td>
<td>8.6</td>
</tr>
<tr>
<td>25-50k</td>
<td>27.4</td>
</tr>
<tr>
<td>50-75k</td>
<td>23.1</td>
</tr>
<tr>
<td>75-100k</td>
<td>19.2</td>
</tr>
<tr>
<td>100-125k</td>
<td>11.6</td>
</tr>
<tr>
<td>125-150k</td>
<td>4.2</td>
</tr>
<tr>
<td>150-200k</td>
<td>4.4</td>
</tr>
<tr>
<td>200k plus</td>
<td>1.4</td>
</tr>
</tbody>
</table>

11. As stated above, the process of raising poultry for production occurs on thousands of privately owned farms across the country. Multiple agricultural operations take place on these farms to compensate for the thin margins they operate under. In addition to raising poultry, these farms will often raise cattle, grow crops, and grow forage. They are truly small businesses that contract with

2 According to the survey by NCC and USPOULTRY, an average broiler grower has approximately 21,000 birds per house, although newer houses can have approximately 25,000 birds per house based on the placing density and the size of the house. The average turkey grower has 3.05 houses with 27,000 birds in each house. Note that most turkey growers likely use one poultry house up to five weeks of age, when the birds are transferred to two “grow out” houses.
poultry companies to grow 1-day old chicks to varying weights according to a specific market.

12. While USPOULTRY offers technical support to poultry and egg producers, these services are extended to them through the USPOULTRY membership the poultry companies hold. As such, USPOULTRY has no contact information for the overwhelming majority of poultry and egg farmers that contract with our members. This fact will make it difficult if not impossible to convey the requirement to report to many poultry producers across the United States.

13. A six-month stay of the reporting mandate will provide EPA and USPOULTRY with the time to develop an outreach campaign that will focus on reaching the largest number of producers possible to make them aware of the upcoming reporting requirement.

14. The following paragraphs demonstrate the difficulty farmers have experienced with the reporting requirements. In August of 2005, the poultry industry filed a petition with the EPA seeking an exemption from EPCRA and CERCLA reporting requirements for the emission of ammonia from poultry houses that operate dry liter systems. Following a three-year rulemaking process the Agency granted all animal feeding operations (AFOs) an exemption from filing CERCLA reports and an exemption for AFOs below the large concentrated animal feeding operation (CAFO) thresholds from filing EPCRA reports.
15. While the poultry industry was disappointed that EPA did not provide the full reporting exemption for ammonia emissions, USPOULTRY attempted to notify as many poultry growers as possible to inform them of the need to submit EPCRA reports if their farm exceeded the CAFO thresholds. USPOULTRY has no way of knowing how many of the approximately 40,000 farms submitted EPCRA reports but the first day of reporting could be easily characterized as chaotic.

16. On January 20, 2009, the day that the EPCRA reporting requirement went into effect, I received a call from the office of Maryland State Emergency Planning Commission asking me what the reports were and what were they supposed to do with them. I informed the caller the reports were being submitted in response to EPA’s rule and in accordance the EPCRA reporting requirement. The individual I spoke with was puzzled as to why the reports were being submitted and acknowledged it was wasting their time. To my knowledge, neither the multiple reports filed on January 20, 2009 nor any of the EPRCA reports filed later resulted in an emergency response.

17. The situation was identical when poultry farmers notified Local Emergency Planning Committees (LEPCs), which are typically members of the local fire departments – often volunteer fire departments. In an attempt to understand how the LEPCs viewed receiving EPCRA reports, USPOULTRY reached out to the president of the National Association of SARA Title III Program
Officials (NASTTPO), Tim Gablehouse. Mr. Gablehouse informed USPOULTRY that while their organization is very interested in understanding the hazards their members may face when responding to an emergency on a farm, EPCRA reports that merely notify of releases of non-life-threatening, low concentrations of ammonia, do not provide meaningful information that enhances their ability to plan for emergency responses.

18. Nothing has changed since 2009 that would make a six-month stay of the reporting mandate affect state and local emergency planning capabilities or threaten the life of first responders or the public.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26 day of July, 2017, in Fayetteville, Arkansas.

Paul J. Bredwell III, P.E.
Vice President – Environmental Programs
U.S. Poultry & Egg Association
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing Declaration of Paul J. Bredwell III to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Nos. 09-1017 & 09-1104 (Consolidated)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY & EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION TO STAY ISSUANCE OF MANDATE

EXHIBIT 5

DECLARATION OF TIMOTHY R. GABLEHOUSE
ARGUED DECEMBER 12, 2016
DECIDED APRIL 11, 2017

Nos. 09-1017(L), 09-1104

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

WATERKEEPER ALLIANCE, ET AL.

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITIONS FOR REVIEW OF FINAL ACTION
OF THE ENVIRONMENTAL PROTECTION AGENCY

DECLARATION OF TIMOTHY R. GABLEHOUSE IN SUPPORT OF
NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY
& EGG ASSOCIATION’S PETITION FOR REHEARING
DECLARATION OF TIMOTHY R. GABLEHOUSE

I, Timothy R. Gablehouse, hereby declare the following:

1. I am the President of the National Association of SARA Title III Program Officials.

2. Attached as Exhibit A to this Declaration is a true and correct copy of a letter that I sent to U.S. Environmental Protection Agency Administrator Scott Pruitt dated June 1, 2017.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of June, 2017, in Denver, Colorado.

/s/ Timothy R. Gablehouse
Timothy R. Gablehouse
EXHIBIT A
June 1, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

Re: CAFOs and Emergency Release Reporting

Dear Administrator Pruitt:

I am writing on behalf of the National Association of SARA Title III Program Officials (NASTTPO), which is made up of members and staff of State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCS), Local Emergency Planning Committees (LEPCs), various federal, state and local agencies, private industry and the vast number of volunteers that perform emergency planning and emergency response activities for their communities. Our membership is dedicated to working together with regulated facilities, transportation entities and communities at large to improve community preparedness for emergency events including hazardous materials releases.

NASTTPO over the past several years has had the opportunity to work with various industry groups on emergency preparedness related rulemaking programs at EPA. These experiences have taught us that the most important thing to LEPCs and first responders is not detailed regulatory requirements for a facility’s relationship to these groups, but rather the simple act of open dialog and coordination. Following the DC Circuit decision in Waterkeeper Alliance v EPA, we have had meaningful and encouraging discussions with the U.S. Poultry and Egg Association along these lines. NASTTPO believes that open dialog and coordination can be more effective than release reporting for farms that do not handle quantities of EPCRA EHS chemicals but are nevertheless expected to report regarding animal manure management.

We have had experience with EPCRA emergency release reports as well as CERCLA continuous release reports from farms primarily regarding ammonia from animal manure management. These reports are of no particular value to LEPCs and first responders and they are generally ignored because they do not relate to any particular event. (This should be contrasted to the few farms that utilize gas chlorine for water treatment where emergency release reports are useful because they are event specific.)
LEPCs and first responders do not need more generic data. They need information that is locally relevant and upon which they can act. This goal is best obtained by a program that promotes coordination between the regulated facilities and these local groups. Recent discussions suggest that such a program involving farms may be achievable.

We are in favor of reducing regulatory burdens if coordination on the information needs of LEPCs and first responders occurs. The information we want from farms is community-specific. Only the LEPC and local first responders can determine what information they need from a farm as part of their emergency planning process. What we really need is coordination between the farm and local responders and LEPCs. We want them to talk to each other.

Thank you.

Timothy R Gablehouse
President
410 17th St, Ste 275
Denver CO 80202
(303) 572-0050
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing Declaration of Timothy R. Gablehouse to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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.,

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U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

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NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY & EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION TO STAY ISSUANCE OF MANDATE

EXHIBIT 6

DECLARATION OF THOMAS R. HEBERT
I, Thomas R. Hebert, hereby declare:

1. I am the managing director of Bayard Ridge Group LLC in Washington, DC. I am a regulatory, programmatic, and legislative policy consultant who has worked for livestock and poultry farmers for 19 years, advising them on environmental policy matters that directly involve their farming operations. I hold an undergraduate degree in Horticulture and a Master of Science degree in Agriculture Economics, both from Michigan State University.
2. Before entering the private sector as a consultant, I was the Deputy Under Secretary for Natural Resources in the U.S. Department of Agriculture (USDA) from 1993 to 1998. In that role, my primary responsibilities included the development and implementation of policy for the programs of the USDA’s Natural Resources Conservation Service. I also led much of USDA’s work with other federal agencies and the White House to develop the Administration’s 1996 Farm Bill proposals, as well as the implementation of Farm Bill provisions. From 1989 to 1993, I served as a Senior Economist for the U.S. Senate Committee on Agriculture, Nutrition and Forestry. During that time, I played a key role in the development and passage of the conservation title for the 1990 Farm Bill.

3. My areas of policy and regulatory expertise include Clean Water Act regulatory requirements applicable to concentrated animal feeding operations (CAFOs); manure and nutrient management related to water quality; and monitoring of air emissions from manure as it may relate to Federal requirements and policy stemming from the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know-Act (EPCRA). Livestock and poultry farmers look to me for expert advice and counsel on whether and how Federal environmental regulatory requirements apply to their operations.
4. Through my roughly 19 years of consulting experience and my prior government service, I have become deeply familiar with farmers’ livestock and poultry production systems, as well as how they manage those systems. I have developed a thorough understanding of how livestock and poultry farmers are affected by environmental regulatory requirements, including how requirements can vary depending on the size of their farms. I also understand how the farmers’ ages and their backgrounds shape and affect how they react to and deal with such requirements.

5. There are no nationally recognized or widely accepted air emissions estimation methodologies that livestock and poultry farmers or regulatory authorities could use to calculate or estimate ammonia (or other) air emissions from the manure produced by animals raised at livestock and poultry farms. I believe that the manure being managed by tens of thousands of livestock and poultry producers may be emitting to the air more than 100 pounds of ammonia per day. Farms that exceed that threshold would be subject to the CERCLA and EPCRA reporting requirements.

6. These tens of thousands of livestock and poultry producers will include all of the large CAFOs in this country, and essentially all of the medium-sized producers, as well as a large proportion of the small livestock and poultry producers. The vast majority of all of these operations will have either limited or
no experience with mandatory environmental reporting under state or Federal law. In my professional judgment, except for approximately 1,000 of these farms, these operations do not have staff to handle such reporting requirements, nor do they have outside legal counsel with experience in such matters. Once they are informed of reporting requirements, farmers will take them with the utmost seriousness. Without question, these farmers will find mandatory, Federal reporting requirements to be highly intimidating. It is not an obligation that they will take lightly and they will be extremely fearful of possible civil and criminal consequences if they make mistakes in what they report, or how they report it. Lacking prior experience or context, they will be looking for precise direction as to how to properly and correctly estimate their reported emissions.

7. Given that there are no nationally recognized or widely accepted air emissions estimation methodologies that livestock and poultry farmers or regulatory authorities can use, farmers will be forced to rely on research or monitoring data from farms that do not have the same operating setup as their own systems, are not located in the same geographical locations, or do not have the same climates and operating conditions. Farmers will either have to use these estimates or extrapolate from those estimates to develop estimates for their own operations. In either case, they will have to do this knowing that the estimates are
probably wrong. As a result, they will be fearful about exposing themselves to significant new liabilities for errors arising through no fault of their own.

8. These fears will be profoundly magnified by the complexity and scope of the written reporting requirements such as those set forth in EPA’s regulations. Just to name a few items, farmers will be required to provide information on the identity and location of “sensitive” populations and ecosystems within a one-mile radius of their farms; and the frequency of the release and fraction of the release from each release source and the specific period over which it occurs. In addition, many of the most critical terms currently used in the current regulations are totally unfamiliar to farmers, and will cause confusion. For instance, how will farmers know whether, under CERCLA, the ammonia that is released into the air from manure on their farms constitute “continuous and stable” emissions when those farmers do not have a uniform, reliable method to estimate these emissions? And, assuming their emissions are “continuous and stable,” how will farmers know whether there is a “statistically significant increase” in emissions without a uniform, reliable method to estimate them? No guidance on these and a host of other questions relevant to CERCLA/EPCRA emergency release reporting by farming operations has ever been issued by EPA. Nearly every livestock and poultry producer that I have spoken with on this subject of reporting under CERCLA over the last three months has had these and other questions.
I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of July, 2017, in Washington, DC.

[Tom H. Hebert's signature]

Thomas R. Hebert
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing Declaration of Thomas R. Hebert to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Nos. 09-1017 & 09-1104 (Consolidated)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY & EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION TO STAY ISSUANCE OF MANDATE

EXHIBIT 7

DECLARATION OF LAURIE FISCHER
I, Laurie Fischer, declare as follows:

1. I am the Executive Director of the Dairy Business Association of Wisconsin, Inc., (“DBA”) located in Outagamie County, Wisconsin. I make this declaration based upon my personal knowledge and in support of the Motion for Summary Judgment of the National Pork Producers Council, Wisconsin Pork Association and Dairy Business Association, Inc.

2. DBA is a non-profit trade association representing milk producers, processors, dairy professionals, and associated vendors. DBA’s charge, embodied in its mission statement
“Keeping the Cows in Wisconsin,” is to grow the state’s dairy industry and dairy processing infrastructure and preserve Wisconsin as “America's Dairyland.”

3. DBA’s members include at least 100 farms in Wisconsin that would qualify as “large CAFOs” because they house more than 700 mature dairy cows or 1000 cattle other than mature dairy cows. DBA’s members include dairy farms in the Western District of Wisconsin.

4. I am personally aware of the nature of the operations of most of DBA’s 677 farm members, as well as the operations of other dairy farms in Wisconsin and elsewhere. Chemicals on these farms, such as pesticides, commercial fertilizer, substances used for cleaning, and manure (including manure, other animal excrement, and bedding or other materials that become intermingled with manure), are commonly used in farm operations. The farms that I know of use chemicals or other substances only in their ordinary farm operations. They do not use chemicals for other purposes.

5. The manure produced at dairy farms is used principally as a fertilizer and soil enhancer on fields where farm crops are grown, either by the dairy farm itself or by other nearby farms. Manure is widely recognized as an excellent source of plant nutrients and as a soil enhancer that provides positive benefits to soil quality. Manure contains many of the elements required for plant growth (including nitrogen) and therefore is a good source of nutrients. Manure is routinely used on farms, including dairy farms, as a valuable resource that reduces the amount of commercial fertilizer that would otherwise be applied to agricultural land.

6. It is my understanding that ammonia, hydrogen sulfide, and other chemical substances are emitted from animal manure.

7. I have been informed by some DBA members that they have attempted to report their routine air emissions to local and state authorities in response to the U.S. Environmental
These farmers indicate that the local and state authorities have expressed confusion as to why farmers were calling to report routine farm air emissions and what they were supposed to do with the information provided. Some agency staff have asked farmers for information regarding the EPCRA reporting requirements.

8. I have been informed by DBA members that the chemicals substances, including manure, on their farms are used only for ordinary farming purposes but that they have made emergency reports under EPCRA for fear that they may be subject to large fines or criminal penalties if they do not make these reports.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 20th day of March, 2009.

s / Laurie Fischer
Laurie Fischer
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing Declaration of Laurie Fischer to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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,

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U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Nos. 09-1017 &
09-1104 (Consolidated)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY
& EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION
TO STAY ISSUANCE OF MANDATE

EXHIBIT 8

DECLARATION OF CHAD BIERMAN
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

NATIONAL PORK PRODUCERS
COUNCIL,

and

WISCONSIN PORK ASSOCIATION,

Plaintiffs,

and

DAIRY BUSINESS ASSOCIATION, INC.

Intervening Plaintiff,

v.

LISA P. JACKSON
Administrator
United States Environmental Protection
Agency,

Defendant.

Case No: 3:09-cv-00073-slc

DECLARATION OF CHAD BIERMAN IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT

I, CHAD BIERMAN declare as follows:

1. My name is Chad Bierman and I reside in La Crosse County, Wisconsin. I make this declaration based upon my personal knowledge.

2. I am a member of the Wisconsin Pork Association and voluntarily contribute “check off” funds to the National Pork Producers Council. I understand that the information that I am providing in this declaration will be used to determine whether my farm and similar farms qualify for a statutory exemption to
emergency reporting requirements under the federal Emergency Planning and Community Right-to-Know Act (“EPCRA”). I have authorized the National Pork Producers Council and Wisconsin Pork Association to represent my interests for this purpose.

3. I have spent nearly all my life in and around animal agriculture. During my childhood, my family operated a pork farm. In college I studied agriculture. I have received a Bachelor of Science degree in animal science and a Master’s Degree in animal science and genetics, both from South Dakota State University. I am currently a Ph.D. candidate in the animal science department at the University of Wisconsin—Madison campus.

4. I am the General Manager of the Babcock Genetics, Inc. (“Babcock”) pork farm located at N6671 County Hwy XX, Holmen, Wisconsin (the “Babcock Pork Farm”). The Babcock Pork Farm is located on one parcel of land that is devoted to the raising of swine for the production of pork.

5. The Babcock Pork Farm independently houses more than 2,500 swine that weigh 55 pounds or more. These swine are raised in environmentally controlled barns that have collection pits under the slatted floors.

6. A variety of chemical substances are used in the ordinary farming operations of the Babcock Pork Farm. These substances include pesticides, chemical fertilizers, cleaning agents, and manure (swine excrement, which may be mixed with dirt, bedding material, or other materials from the areas where the
animals are housed). I am aware of no chemicals at my farm other than those used in routine farm operations.

7. Manure produced at the Babcock Pork Farm is used for farm purposes, either as a fertilizer or soil enhancer on fields where crops are grown. Manure is widely recognized as a valuable resource because it is an excellent source of plant nutrients and a soil enhancer that provides positive benefits to soil quality. Manure contains many of the elements required for plant growth (including nitrogen, phosphorus and potassium) and therefore is a good source of nutrients.

8. It is my understanding that ammonia and hydrogen sulfide are substances that can be emitted from manure, including from the manure at the Babcock Pork Farm.

9. The Babcock Pork Farm utilizes a manure management system that involves the collection, storage, and land application of manure. Manure and other substances, such as feed and water, fall through perforations in the floor of the barns and into storage pits. Periodically, this manure is drained from the storage pits with the assistance of a scraping device and into a lift station. From the lift station, the manure is pumped into a two-phase purifying lagoon system. The manure is pumped into the first lagoon, which breaks down coarse solids. From this first lagoon, water flows into a second lagoon for further purifying. Both of these lagoons have clay and synthetic liners on top of the clay liner. The
manure is converted to liquid form and to date we have not had to remove solids from either lagoon.

10. Liquid from the second lagoon is pumped through an underground piping system to a pivot irrigation device. This pivot irrigation device spreads the liquid nutrients onto agricultural fields on which crops are grown. During the crop season, the pivot irrigation system has the potential to operate virtually every day.

11. Babcock owns or leases all of the 600 acres of agricultural fields upon which manure is applied to fertilize crops. The crops grown on these fields include corn, soybeans and alfalfa.

12. The Wisconsin Department of Natural Resources ("WDNR") has issued a Wisconsin Pollution Discharge Elimination System ("WPDES") permit (No. WI-005-6529-04-0) authorizing and regulating the manure management activities associated with the agricultural operations on the Babcock Pork Farm. Among other things, this WPDES permit requires that all landspreading of manure comply with a “Nutrient Management Plan” that is approved by the WDNR.

13. I cannot conclusively or reliably determine the amount of ammonia, hydrogen sulfide, or other substances being emitted from the manure on the Babcock Pork Farm. Universities and others have developed preliminary techniques for estimating these rates. However, I understand that these estimates vary substantially from technique to technique and also from study to study.

14. I have used an emission estimator prepared by the University of Nebraska that purports to roughly estimate the amount of ammonia emissions that
might be associated with the manure at the Babcock Pork Farm. Depending upon the assumptions that are made, this estimator suggests that there could be between 165 and 335 lbs/day of ammonia emissions attributable to the manure at the Babcock Pork Farm.

15. On January 20, 2009, I telephoned the designated contacts for the La Crosse County Emergency Planning Committee and Wisconsin Emergency Management to report the ammonia emission estimates associated with the Babcock Pork Farm as derived using the University of Nebraska emissions estimator. During my conversation with the Wisconsin Emergency Response contact, I was told that its staff was unaware that farms were required to report emissions-related information until that day (i.e., January 20, 2009) and that staff were not prepared for the calls.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 20th day of March, 2009.

s / Chad Bierman
Chad Bierman
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing Declaration of Chad Bierman to be served by the Court’s CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung
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,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Nos. 09-1017 & 09-1104 (Consolidated)

NATIONAL PORK PRODUCERS COUNCIL’S AND U.S. POULTRY & EGG ASSOCIATION’S BRIEF IN SUPPORT OF EPA’S MOTION TO STAY ISSUANCE OF MANDATE

EXHIBIT 9

DECLARATION OF MICHAEL C. FORMICA
ARGUED DECEMBER 12, 2016
DECIDED APRIL 11, 2017

Nos. 09-1017(L), 09-1104

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

WATERKEEPER ALLIANCE, ET AL.

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITIONS FOR REVIEW OF FINAL ACTION
OF THE ENVIRONMENTAL PROTECTION AGENCY

DECLARATION OF MICHAEL C. FORMICA

I, Michael C. Formica, hereby declare:

1. I am currently employed by the National Pork Producers Council (NPPC), a trade association representing the nation’s hog farms, in its Washington, D.C. public policy office, where I serve as the Assistant Vice President & Legal Counsel, Domestic Affairs. This declaration is made based upon my personal knowledge and is offered in support of a request that this Court stay its mandate for a period of six months.
2. I have been an employee of NPPC since August 2006. During the course of my employment, though my duties have grown, I have been the primary individual responsible for dealing with environmental compliance issues on behalf of the organization. I also manage NPPC’s Environmental Policy Committee. This work has given me extensive experience working directly with pork producers and other livestock farmers regarding their compliance with federal environmental laws and regulations generally, and specifically with regard to air emissions reporting rules.

3. In this declaration I will focus on my experience with the CERCLA and EPCRA reporting rules.

4. The struggle to estimate emissions from pork farms is not academic, or limited to the smallest farms. Just this week I have had conversations with leading pork producing companies—sophisticated operations—that are struggling with the details of what they are required to report, the process they need to use to calculate their estimated emissions, and the accuracy of the various techniques as applied to particular farms.

5. Most pork farms are smaller farms not previously subject to the reporting rules. In the rural areas where these farmers reside, just as there is a consistent lack of medical professionals, there is a lack of legal assistance. And the legal professionals that do provide services in rural areas tend to be generalists,
focusing on contracts, estate planning, and real estate, not specialists in federal environmental law. As a result, these farmers will have difficulty understanding the reporting requirements, and will seek guidance from EPA and the USDA.

6. I experienced this problem firsthand in 2009 when the reporting rules first took effect. Mass confusion resulted from the lack of guidance at that time, much of it caused by regulatory officials who were unaware that the reports were coming in or what they were for.

7. When the 2008 rule was issued, EPA failed to provide any guidance as to how agricultural operations should calculate, or even estimate, their emissions. Similarly, EPA provided no guidance, or even notice, to the state or local authorities receiving these reports as to what they would receive and why.

8. The result was chaos. Producers experienced multitudes of problems filing the reports. Many of the state and local emergency response coordinators at the time used fax machines. Typically, after the first 20 or so reports arrived, the fax machines ran out of paper and rejected the hundreds of reports that followed. In other offices, the voicemail systems were overwhelmed. We also heard reports that some offices that were open simply took the phone off the hook because so many reports were coming in.

9. In some states, instead of a lack of information, there was a significant amount of disinformation. For instance, producers in the state of Illinois were told
by state officials that there was no reporting requirement and that the rule was simply an internet hoax. Officials from EPA Region 4 were reported to have told state and county officials in North Carolina that they did not need to accept the reports and instead to direct any farmers to the EPA Office of Water.

10. Most shockingly for me personally was that when I returned home after attending the Presidential Inauguration (under EPA’s 2008 Rule, EPCRA reports were due to be filed on January 20, 2009) I had phone messages from local officials from around the country who were trying to figure out why these reports were filed. They had found my home telephone number after hearing from pork producers trying to make the reports that I had information on the regulatory program that was prompting these reports.

11. If the Court’s mandate were to issue immediately, we could expect something similar to occur today—but on a larger scale, because the universe of farms subject to the rule would be significantly greater. We conservatively estimate that there are somewhere between 60,000 and 100,000 livestock farms nationwide that might potentially be subject to a reporting requirement.

12. I had staff at NPPC examine the reporting rate at the National Response Center. As of July 26, 2017, there have been a total of 13,478 reported releases in 2017 to the National Response Center based upon its annual table of
reports received published at http://nrc.uscg.mil/. That averages out to a daily rate of 65.11 reports a day received by the NRC.

13. Going back to 1990, the average daily rate for reports to the National Response Center is 89.52, with the total volume of reports received in any one year ranging from a high of 33,665 in 1994 to the 24,193 reports received last year (in 2016). However, when this Court’s decision takes effect, the National Response Center will likely receive significantly more reports over a few days than it has ever received in a full year over the 27 years of its existence.

Executed this 27th day of July, 2017, in Washington, D.C.

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Michael C. Formica
CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I caused copies of the foregoing

Declaration of Michael C. Formica to be served by the Court’s CM/ECF system,

which will send a notice of the filing to all registered CM/ECF users.

/s/ David Y. Chung
David Y. Chung