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Superfund Docket
United States Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave., NW
Washington, DC 20460

**Re: Docket ID No. EPA–HQ–SFUND–2007–0469**
**CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Animal Feeding Operations**

Dear U.S. EPA:

On behalf of the undersigned organizations and individuals, Earthjustice submits the following comments on the proposed administrative reporting exemption from the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and Emergency Reporting and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11001-11050, for air releases of hazardous substances from animal waste at animal feeding operations ("AFOs"). *See* 72 Fed. Reg. 73,700 (Dec. 28, 2007). These comments incorporate the previous comments and attachments submitted by Michele M. Merkel, Senior Counsel, Environmental Integrity Project, in response to EPA's Notice of Availability of a Petition for Exemption from EPCRA and CERCLA Reporting Requirements for Ammonia From Poultry Operations. 70 Fed. Reg. 76,452 (Dec. 27, 2005); Docket ID No. EPA-HQ-SFUND-2005-0013.

For the reasons set forth in detail below, we strongly urge EPA to continue to apply the reporting requirements in CERCLA and EPCRA to air releases of hazardous substances from animal waste. From a public health standpoint, the proposed exemption ignores the increasing body of scientific evidence which shows that ammonia, hydrogen sulfide, and other hazardous emissions from AFOs may have significant impacts on human health and the environment. EPA has ignored such information in its determination that the source and nature of such pollution makes an emergency response "unnecessary, impractical and unlikely," and that the proposal is "is protective of human health and the environment." *See* 72 Fed. Reg. at 73,700-04. Moreover, the proposed exemption is contrary to both the plain language and primary purposes of CERCLA and EPCRA, which were enacted to enable government officials to assess and respond to releases of hazardous substances, as well as to inform the public about contaminants in their communities. EPA has provided no legal justification that would allow it to carve out the proposed exemption from these statutory requirements.

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# I. Statutory Background.

## *A. CERCLA.*

In 1980, Congress found that "[t]he legacy of past haphazard disposal of chemical wastes and the continuing danger of spills and other releases of dangerous chemicals pose what many call the most serious health and environmental challenge of the decade." S. Rep. No. 96-848, 96th Cong., 2d Sess. at 2 (1980). As a result, it enacted CERCLA to address the hazardous pollution problem through a comprehensive and uniform system of notification, emergency governmental response, enforcement, and liability assessment. H.R. Rep. No. 96-1016, 96th Cong., 2d Sess. pt. 1 at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119-20; *see U.S. v. Bestfoods*, 524 U.S. 51, 55 (1998) (CERCLA was enacted in 1980 "in response to the serious environmental and health risks posed by industrial pollution").

As an essential part of this statutory scheme, CERCLA requires facilities to immediately notify the federal government when they release a hazardous substance[1] equal to or above a particular reportable quantity ("RQ").[2] Specifically, Section 103(a) of CERCLA provides that:

> Any person in charge of . . . an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such . . . facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C. 1251 et seq.] of such release.

42 U.S.C. § 9603(a). Congress also established criminal penalties under CERCLA for the failure to report such releases, as well as a strict joint and several liability scheme for response and cleanup costs. *Id.* at §§ 9603(b), 9607.

One telephone call or online report submission to the National Response Center ("NRC") fulfills the requirement to report releases of hazardous substances under Section 103(a) of CERCLA. The specific information provided in the required notification is detailed in CERCLA Section 104(e), which authorizes the collection of release information, entry and inspection of the release site, and sampling activities at the release site for the purposes of "determining the need for response, or choosing or taking any response action under [CERCLA]." *Id*. at § 9604(e).

The primary activity of the Federal government under Section 103 is processing and recording the reported release information, and responding to releases that may pose a significant

[1] Section 101(14) of CERCLA defines the term "hazardous substance" primarily by reference to various Federal environmental statutes, and also authorizes EPA to designate additional substances that "may present substantial danger to the public health or welfare or the environment." 42 U.S.C. §§ 9601(14), 9602(a).

[2] Section 102(b) of CERCLA establishes RQs at one pound for releases of hazardous substances, except for those substances for which RQs were established pursuant to Section 311(b)(4) of the federal Clean Water Act or if EPA establishes a different RQ under Section 102(a). 42 U.S.C. § 9602(b). A 24-hour period is used for measuring whether the RQ of a hazardous substance has been released. *See* 40 C.F.R. § 302.6(a).

hazard to public health or the environment. When it receives a notification, the NRC immediately notifies the appropriate Federal On-Scene Coordinator, who evaluates the circumstances surrounding the release and determines whether a government response action is needed. NRC personnel are also responsible for entering release information into the Emergency Response Notification System, a national data base that stores release information by facility and is publicly accessible through the NRC website.[3]

## *B. EPCRA.*

In addition to notifying the NRC pursuant to Section 103 of CERCLA, the Emergency Planning and Community Right-to-Know Act requires facilities that release hazardous substances to immediately notify state and local emergency response authorities. Specifically, Section 304 of EPCRA provides that:

> If a release of an extremely hazardous substance referred to in Section 11002(a) of this title occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires notification under section 103(a) of [CERCLA], the owner or operator of the facility shall immediately provide notice as described in subsection (b) of this section.

42 U.S.C. § 11004(a)(1).

The notice must be must be given to the designated state emergency response commission ("SERC") and the emergency coordinator for the appropriate local emergency planning commission ("LEPC"). *Id*. at § 11004(b); 40 C.F.R. § 355.40(b)(1). Pursuant to Section 304(b), the notice must contain "[a]ny known or anticipated acute or chronic health risks associated with the emergency and, where appropriate, advice regarding medical attention necessary for exposed individuals," as well as "[p]roper precautions to take as a result of the release, including evacuation (unless such information is readily available to the community emergency coordinator pursuant to the emergency plan)." 42 U.S.C. § 11004(b)(2)(F), (G). The statute also requires a written follow-up emergency notice to the SERC and the LEPC "as soon as practicable after a release." *Id.* at § 11004(c).

Reporting to state and local authorities pursuant to Section 304 of EPRCA, as well as to the NRC under CERLCA, provides for a coordinated effort among response officials and helps to ensure that an efficient response action, if necessary, is taken. Congress was aware that releases of hazardous substances were already reported to the NRC when it enacted Section 304, but it determined that reporting to all potentially affected government jurisdictions was necessary and appropriate for such hazardous releases. Moreover, since some SERCs and LEPCs may not possess the resources necessary for a proper response action, notification to the NRC ensures that the Federal government is alerted to releases and allows for a timely response in the event of an emergency.

[3] Public information from the NRC is available at http://www.nrc.uscg.mil/foia.html.

# II. Procedural Background.

On August 5, 2005, EPA received a petition from the National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association, seeking an exemption from the reporting requirements in Section 103 of CERCLA and Section 304 of EPCRA for ammonia emissions from poultry operations.[4] The petition was filed in response to two federal courts decisions finding that the reporting requirements in CERCLA and EPCRA applied to such facilities.[5] EPA published a notice in the *Federal Register* on December 27, 2005 that acknowledged receipt of the petition and requested public comment. *See* 70 Fed Reg. 76,452. Several groups voiced opposition to the proposed exemption and requested that EPA continue to require reporting for hazardous releases of ammonia from poultry operations.[6]

The Poultry Petition also responded to EPA's issuance of an "Air Compliance Agreement" on January 31, 2005, which purported to settle several thousand CERCLA and EPCRA reporting violations committed by AFOs.[7] 70 Fed. Reg. 4,958 (Jan. 31, 2005). Acknowledging that AFOs "can have negative impacts on nearby residents, particularly with respect to objectionable odors and other nuisance problems that can affect their quality of life," the agency agreed to drop its CERCLA and EPCRA claims against sources that would undertake monitoring needed to "produce a scientifically sound basis for measuring and estimating air emissions from AFOs." *Id.* at 4,959-60. At the time, EPA maintained that "the Air Compliance Agreement will be the quickest and most effective way to bring the entire AFO industry "into compliance with…section 103 of CERCLA, and section 304 of EPCRA." *Id*. at 4,961. Given its "virtual free pass for statutory violations," over 2,600 AFOs representing 14,000 farms, or approximately 92% percent of large AFOs, have signed up. *See Association of Irritated Residents v. EPA*, 494 F.3d 1027, 1039 n.3 (D.C. Cir. 2007). EPA recently stated that monitoring is expected to be completed in the spring of 2009. 72 Fed. Reg. at 73,703.[8]

On December 27, 2007, EPA followed these developments by issuing a proposed rule that goes well beyond the earlier exemption sought by the poultry industry and appears entirely contrary to the purposes of the Air Compliance Agreement. 72 Fed. Reg. 73,300. In its current proposal, EPA would create an administrative reporting exemption from the requirements in Section 103 of CERCLA and Section 304 of EPCRA that applies to releases of *all* hazardous substances to the air, such as emissions of ammonia, hydrogen sulfide, nitrous oxide, and volatile organic compounds, when the source of those emissions is animal waste at farms, including

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[4] *See* National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association, Petition for Exemption From EPCRA and CERCLA Reporting Requirements For Ammonia Emissions from Poultry Operations (Aug. 5, 2005), Docket ID No. EPA-HQ-SFUND-2005-0013-0002 (hereinafter "Poultry Petition").

[5] *Id*. at 1.

[6] *See, e.g.*, Comment from Michele M. Merkel, Senior Counsel, Environmental Integrity Project, Docket ID No. EPA–HQ–SFUND–2005–0013 (hereinafter "Merkel Comments").

[7] EPA defines AFOs as farms or feedlots where animals are kept and raised in confined areas for at least 45 days over a 12-month period. 40 C.F.R. § 122.23(b)(1). Concentrated animal feeding operations ("CAFOs") are defined as "Large" or "Medium" based on the number of animals at each facility. *Id.* at § 122.23(b)(2).

[8] *See also* EPA, *Animal Feeding Operations Air Agreements*, *available at* http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr-0501.html.

poultry, swine, dairy, and livestock research operations. *Id*. These comments are submitted in response to EPA's current proposal.

# III. The Animal Agricultural Industry and Its Impacts on Human Health and the Environment.

A growing number of scientific studies and government reports link negative human health and environmental impacts with the concentration of animal waste at animal feeding operations. EPA is well aware of the toxicity from the contaminants associated with animal waste, and that the volume and concentration of such waste is increasing with the growing scale of AFOs.[9] As the agency has previously explained:

> AFOs cluster animals, feed, manure and urine, wastewater, dead animals, and production operations on a small land area. Feed is brought to the animals rather than the animals grazing in pastures, fields, or on rangeland. There are approximately 450,000 AFOs in the United States. Common types of AFOs include dairies, cattle feedlots, and poultry farms….[T]he growing scale and concentration of AFOs has contributed to negative environmental and human health impacts. Pollution associated with AFOs degrades the quality of waters, threatens drinking water sources, and may harm air quality.[10]

Given the expected increase in releases of hazardous substances from these facilities, the reporting requirements of CERCLA and EPCRA have never been so vital to the protection of human health and the environment.

## *A. Structure of the Industry.*

There has been a dramatic shift in the structure of animal agricultural operations in the United States over the last half century from small farms to large scale industrial AFOs. For example, an average poultry operation in the 1950s might have contained 500 chickens, while today the average concentration is between 20,000 and 30,000 birds.[11] Similarly, the average animal density at swine farms increased by 200% between 1980 and 2000.[12] Nationwide, livestock production has risen by 10%, while the total number of farms has decreased by 51%.[13]

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[9] EPA, *Emissions from Animal Feeding Operations,* Draft (Aug. 15, 2001) at xi, *available at* http://www.epa.gov/ttn/chief/ap42/ch09/draft/draftanimalfeed.pdf, (submitted to docket) (hereinafter "EPA Emissions Report").

[10] EPA, *Animal Waste: What's the Problem? available at* http://www.epa.gov/region09/animalwaste/problem.html (hereinafter "EPA, What's the Problem?").

[11] National Research Council, *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs* (Dec. 12, 2002) at 31, *available at* http://www.epa.gov/ttn/chief/ap42/ch09/draft/draftanimalfeed.pdf, (submitted to docket) (hereinafter "National Research Council Report").

[12] Thorne, PS, *Environmental Health Impacts of Concentrated Animal Feeding Operations: Anticipating Hazards - Searching for Solutions*, Environmental Health Perspectives. Vol. 115, No. 2 at 296 (2007), (submitted to docket).

[13] National Research Council Report at 16.

In fact, poultry, swine, dairy, and cattle densities within any given facility in the U.S. have increased on average on average over the past few decades between 50-176%.[14]

While the largest AFOs make up just a small percentage of total industry operations, they often account for an enormous amount of the overall production. For instance, swine operations with more than 5,000 animals made up just 1.7% of the total number of farms in 1997, but produced 40.2% of the national inventory.[15] Large beef feedlots with over 1,000 head of cattle produced 85% of beef sold from the U.S. despite comprising just 2% of the total number of feedlots nationwide.[16] This trend in the concentration of AFOs is particularly important because the whole farm site is the regulated "facility"[17] for purposes of the reporting requirements in CERCLA and EPCRA. *See Sierra Club v. Tyson Foods*, 299 F. Supp. 2d 693, 707 (W.D. Ky. 2003).

## *B. Human Health and Environmental Impacts of Hazardous Air Releases From Animal Waste.*

The pollution problems associated with AFOs are largely due to the fact that these facilities, by definition, produce large amounts of animal waste in small areas. For example, one dairy cow generates approximately 120 pounds of wet manure per day, which is equivalent to the waste from 20-40 people.[18] Nationwide, the total animal waste generated by AFOs is equivalent to 3.3 times the solid waste produced by the entire U.S population.[19]

This large amount of waste emits correspondingly large amounts of harmful contaminants into the air, including emissions of ammonia, hydrogen sulfide, endotoxins, particulate matter, and volatile organic compounds. As EPA has noted:

> [A]ir quality problems associated with AFOs are caused by gases emitted from the decomposition of animal wastes and by the dust generated by animal activity and farming practices. These air pollutants can cause respiratory illness, lung inflammation, and increase vulnerability to respiratory diseases, such as asthma. Emissions of reactive organics and ammonia from AFOs can play a role in the formation of ozone (smog) and particulates, air pollutants regulated by Clean Air Act to protect public health . . . . Emissions from AFOs are a major concern in

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[14] EPA, *Environmental Assessment of Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations* (Jan. 2001) at 1-4 (submitted to docket).

[15] EPA Emissions Report at 5-3.

[16] *Id.* at 3-2. *See also* National Research Council Report at 23.

[17] Section 101(9)(B) of CERCLA defines a facility as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." 42 U.S.C. § 9601(9)(B).

[18] EPA, What's the Problem?

[19] The U.S. Department of Agriculture estimates annual AFO waste production at 500 million tons, while EPA estimates that 150 million tons of waste is generated by the U.S. population each year. *See* 68 Fed. Reg. 7,176, 7,180 (Feb. 12, 2003) (Final Rule for National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations).

areas, such as the San Joaquin Valley and California's South Coast, where ozone and particulate matter often exceed national health standards.[20]

Of these contaminants, ammonia and hydrogen sulfide are considered the most dangerous to human health and are listed as hazardous substances for CERCLA and EPCRA reporting purposes.[21] Human exposure to ammonia triggers respiratory problems, causes nasal and eye irritation, and in extreme circumstances can even be fatal.[22] Ammonia concentrations of greater than 100 parts per million ("ppm") have been regularly reported on poultry farms, with maximum concentrations reaching over 200 ppm,[23] far exceeding every recognized safety threshold for ammonia exposure.[24] Exposure to hydrogen sulfide can also lead to health problems, with even small concentrations (30-50 ppm) triggering headaches, nausea, eye, skin, and respiratory irritation.[25] Hydrogen sulfide also targets the nervous system, and chronic low-level exposure can lead to impaired balance, visual field performance, color discrimination, hearing, memory, mood, and intellectual function.[26] Higher levels of exposure (greater than 500 ppm) can cause a loss of consciousness and possibly death.[27]

AFOs account for 73% of the total ammonia emissions in the U.S.[28] This is not surprising given the large releases of ammonia that have been reported from single farms. For example, one dairy operation in Oregon containing 52,000 cows has reported emitting 5.5 million pounds of ammonia per year, the equivalent of that produced by the largest industrial manufacturing plants.[29] In addition, an egg farm in Ohio has reported ammonia emissions of

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[20] EPA, What's the Problem?

[21] 40 C.F.R. § 302.4; *see also* Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, 2007 CERCLA Priority List of Hazardous Substances, *available at* http://www.atsdr.cdc.gov/cercla/07list.html.

[22] Schiffman, S.S., *et al*., *Health Effects of Aerial Emissions from Animal Production and Waste Management Systems*, National Center for Manure and Animal Waste Management (Dec. 11, 2001) at 11, *available at* http://www.cals.ncsu.edu/waste_mgt/natlcenter/summary.pdf, (submitted to docket).

[23] *Id.*; Iowa State University and The University of Iowa Study Group, *Iowa Concentrated Animal Feeding Operations Air Quality Study* (Feb. 2002), at 123, *available at* http://www.ehsrc.uiowa.edu/cafo_air_quality_study.html, (submitted to docket) (hereinafter "Iowa Air Quality Study").

[24] For example, the National Institute for Occupational Safety and Health has set an occupational exposure limit for ammonia at 25 ppm. while the Occupational Safety & Health Administration ("OSHA") sets a limit of 50 ppm. *See* Donham, Kelley J, *et al.*, *Exposure Limits Related to Air Quality and Risk Assessment*, Chapter 8 in Iowa Air Quality Study at 166; OSHA, *Safety and Health Topics: Ammonia*, *available at* http://www.osha.gov/dts/chemicalsampling/data/CH_218300.html.

[25] Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, *Toxicological Profile for Hydrogen Sulfide, Chapter 3: Health Effects* (July 2006) at 21, *available at* http://www.atsdr.cdc.gov/toxprofiles/tp114.html, (submitted to docket).

[26] *Id.* at 64.

[27] *Id*. at 22-26.

[28] Harris, D. Bruce, *et al.*, *Ammonia Emissions Factors from Swine Finishing Operations*, at 1, *available at* http://www.epa.gov/ttn/chief/conference/ei10/ammonia/harris.pdf, (submitted to the docket).

[29] *See* Testimony of Michele M. Merkel, Senior Counsel, Environmental Integrity Project, before the House Subcommittee on Environment & Hazardous Materials of the Committee on Energy and Commerce, *available at* http://bulk.resource.org/gpo.gov/hearings/109h/27001.txt.

over 4,300 pounds per day.[30] Similarly, EPA estimates that large dairy and swine AFOs emit 100,000 pounds of hydrogen sulfide annually.[31]

Adverse impacts due to hazardous emissions from animal waste have been frequently observed among workers at AFO facilities. For example, Bowman and others compiled studies on occupational health at AFOs and found that chronic exposure to animal waste emissions resulted in respiratory diseases and deterioration of central nervous system function.[32] In a survey of several swine AFOs, conditions such as chronic bronchitis and asthma were more prevalent among workers compared to those who did not work at those animal farms.[33] Many of these impacts occurred despite the fact that the emissions exposure limits set by the National Institute for Occupational Safety and Health were often not exceeded.[34] In a powerful example of public health impacts, one study found that sudden hydrogen sulfide exposure during manure agitation caused the deaths of at least 19 workers at AFOs in Iowa.[35] Because of these impacts, several studies have called for more stringent exposure limits to be set.[36]

The negative health effects associated with animal waste emissions have also been observed in neighboring communities.[37] For example, in Keokuk County, Iowa, Merchant and others found that the prevalence of childhood asthma increased in relation to the size of swine farms close to local populations.[38] In another study, residents near a large North Carolina swine AFO with 6,000 hogs had significantly greater incidences of headaches, runny noses, sore throats, excessive coughing, diarrhea, and burning eyes compared to families living over two miles away.[39] In Iowa, 18 residents living within a 2-mile radius of a large swine AFO reported bronchitis, shortness of breath, hyperactive airways, nausea, and dizziness at a far greater incidence that residents located further away.[40] As EPA has recognized:

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[30] U.S. Department of Justice, *Ohio's Largest Egg Producer Agrees to Dramatic Air Pollution Reductions from Three Giant Facilities* (Feb. 23, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/February/04_enrd_105.htm (hereinafter "Buckeye Egg Farm Settlement").

[31] EPA, *Non-Water Quality Impact Estimates for Animal Feeding Operations* (2002), at 2-30, available at http://www.epa.gov/npdes/pubs/cafo_nonwaterquality.pdf, (submitted to docket).

[32] Bowman, A., *et al*., Increased Animal Waste Production from Concentrated Animal Feeding Operations (CAFOs): Potential Implications for Public and Environmental Health, The Nebraska Center for Rural Health Research Occasional Paper Series, No. 2 (2000), at 4-5, (submitted to docket).

[33] Cole, D., *et al*., *Concentrated Swine Feeding Operations and Public Health: A Review of Occupational and Community Health Effects*, Environmental Health Perspectives, Vol. 108, No. 8 (2000), (submitted to docket) (hereinafter "Cole Study").

[34] *Id.* at 686.

[35] Iowa Air Quality Study at 132.

[36] Cole Study at 686-89. Lowering OSHA's ammonia occupational exposure limit from 50 ppm to 7.5 ppm was suggested.

[37] Mitloehner, F.M. and M.B. Schenker, *Environmental Exposure and Health Effects from Concentrated Animal Feeding Operations*, Epidemiology, Vol. 18, No. 3 (2007), (submitted to docket); *see also* Wing, S. and S. Wolf, *Intensive Livestock Operations, Health and Quality of Life Among Eastern North Carolina Residents*, Environmental Health Perspective, Vol. 108, No. 3 (2000), (submitted to docket) (hereinafter "Wing Study").

[38] Merchant, J.A., *et al.*, *Asthma and Farm Exposures in a Cohort of Rural Iowa Children*, Environmental Health Perspectives, Vol. 113, No. 3 (2005), at 350-356, (submitted to docket).

[39] Wing Study.

[40] Tu, K., *et al*., *A Control Study of the Physical and Mental Health of Residents Living Near a Large-Scale Swine Operation*, Journal of Agricultural Safety and Health. Vol. 3, No. 1 (1997), *available at*

> Since the 1970s, the combined forces of population growth and re-location of operations closer to consumer markets . . . have resulted in more AFOs located near densely populated areas . . . . The proximity of large AFOs to human populations thus increases the potential for human health impacts and ecological damage.[41]

Common sense dictates that further consolidation of animal farms and concentration of animal wastes will only exacerbate these adverse health effects.

## *C. Reporting and Mitigating Hazardous Air Emissions from Animal Waste.*

Emissions from single AFO facilities have often far exceeded the reportable quantity levels for hazardous substances, including the ammonia and hydrogen sulfide RQs of 100 pounds per day,[42] triggering the CERCLA and EPCRA reporting requirements. For example, an AFO run by Buckeye Egg Farm in Croton, Ohio was reportedly emitting over 4,300 pounds of ammonia per day during 2003.[43] Premium Standard Farms, Inc., one of the largest producers of swine in the U.S., measured releases of 3 million pounds of ammonia each year from barns and lagoons located at its facility in Somerset, Missouri.[44] A single Ohio Fresh Eggs facility emitted 400,000 to over 750,000 pounds of ammonia each year between 2000 and 2005.[45]

The reporting requirements for hazardous emissions from animal waste contaminants have resulted in accountability and tangible changes within an industry that pollutes so egregiously. For example, Premium Standard Farms settled a case brought by EPA and Citizens Legal Environmental Action Network due in part to their failure to report hazardous emissions under CERCLA and EPCRA.[46] The settlement required the company to, among other things, continuously monitor air emissions from its facilities and reduce the amount of ammonia and hydrogen sulfide from lagoons, where animal waste is often held.[47] In 2003, EPA filed a complaint against Buckeye Egg Farm in response to dangerously high concentrations of ammonia reported in a neighboring community.[48] The case later settled with the company promising to invest $1.4 million in research and air pollution controls.[49]

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http://www.pmac.net/AM/mental_health.html.

[41] EPA, *Environmental and Economic Benefit Analysis of Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations* (2001), at 14, (submitted to docket).

[42] *See* 40 C.F.R. § 302.4.

[43] Buckeye Egg Farm Settlement.

[44] *See* Premium Standard Farms, Air Emissions Monitoring Completion Report (Nov. 17, 2004).

[45] EPA, Toxic Release Inventory, Facility ID No. 43340BCKYG20439, *available at* www.epa.gov/triexplorer.

[46] *Citizens Legal Environmental Action Network v. Premium Standard Farms, Inc.*, Case No. 97-6073-CV-SJ-6 (W.D. Mo.), Consent Decree, *available at* http://www.epa.gov/compliance/resources/decrees/civil/mm/psfcd.pdf.

[47] *Id*.

[48] U.S. Department of Justice, *U.S. Files Complaint Against Buckeye Egg Farm of Ohio* (Nov. 19, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/November/03_enrd_634.htm.

[49] Buckeye Egg Farm Settlement.

EPA's actions underscore the importance of the CERCLA and EPCRA reporting requirements for inducing AFOs to incorporate mitigation measures needed for the protection of public health. While the most effective way to reduce AFO emissions is to reduce the size of operations, so that the amount of waste is reduced and more easily managed, studies have also demonstrated the effectiveness of certain animal waste mitigation measures in preventing the most harmful AFO emissions, such as ammonia and hydrogen sulfide, from being released.[50] For example, hazardous emissions from buildings, which are "point source releases," can be reduced by treating the air with washing walls or biofilters.[51] Biofilters, consisting of microbes in some organic media, have been proven to remove 50 to 83% of ammonia and 80 to 86% of hydrogen sulfide from facility air before it is released to the ambient environment.[52] Covering manure storage structures and composting solid manure will also reduce hazardous releases, while directly injecting manure is the most effective way to control hazardous emissions during land application.[53] Other methods to reduce AFO emissions include diet manipulation or adding enzyme additives to litter.[54] Techniques such as acidification of manure can suppress ammonia formation by up to 70%; swine and poultry AFOs have successfully employed this method in the past.[55] In combination, these management practices (*e.g.*, diet, enzyme additives, and injection) may significantly reduce overall emissions at AFOs. Moreover, with facility-specific emissions data, mitigation techniques can be deployed in a precise manner to eliminate the higher priority emissions.

With the growing size of AFO facilities, and the increasing concentrations of animal waste, EPA should be working to "conduct coordinated research to determine which emissions…from animal production systems are the most harmful to the environment and human health and to develop technologies that decrease their release into the environment."[56] As stated by John Carlin, Chairman of the Pew Commission on Industrial Farm Animal Production:

> Clearly we must balance the imperative of human and environmental health with an ever growing consumer demand for safe, abundant animal-based food products…Monitoring is a basic component of strategies to protect the public from harmful effects resulting from contamination or disease, yet monitoring systems in industrial food animal production are inadequate – a situation that makes mandatory reporting of toxic emissions even more important.[57]

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[50] EPA Emissions Report at 9-15 – 9-40.

[51] Iowa Air Quality Study at 203.

[52] EPA Emissions Report at 9-20

[53] Iowa Air Quality Study at 203.

[54] *Id.*

[55] EPA Emissions Report at 9-17

[56] National Research Council Report at 10.

[57] Pew Commission on Industrial Farm Animal Production, *Expert Panel Highlights Threats to Public Health and Environment from Industrial Animal Agriculture Wastes* (Feb. 29, 2008), *available at* http://www.ncifap.org/index.html.

Reiterating these concerns, the House Committee on Energy and Commerce recently expressed concern about the health impacts of hazardous emissions from animal waste and found that EPA's proposed exemption appears "ill-considered and contrary to the public interest."[58]

# IV. The Proposed Administrative Reporting Exemption for Hazardous Air Emissions From Animal Waste Violates CERCLA and EPCRA.

## *A. EPA Lacks Authority to Carve Out Regulatory Reporting Exemptions Beyond Those Provided by Congress.*

In seeking to exempt AFOs from their obligations under CERCLA Section 103(a) and EPCRA Section 304 to report hazardous emissions from animal waste, EPA does not propose to alter the amount of emissions that triggers statutory reporting obligations as established under CERCLA Section 102(a). To the contrary, EPA confirms that "[n]othing in this proposed rule...would change the notification requirements if hazardous substances are released to the air from any other source other than animal waste at farms (*i.e.*, ammonia tanks)." 72 Fed. Reg. at 73,700. But once EPA establishes reportable quantities of hazardous substances under Section 102(a), CERCLA Section 103(a) requires a facility to report emissions in excess of those thresholds except under very narrowly defined circumstances. Likewise, Section 304(a)(1) of EPCRA requires reporting of any release that must be reported under Section 103(a) of CERCLA. Since EPA's proposed exemption for hazardous emissions from animal waste does not fall within CERCLA's narrow statutory exceptions, the exemption would violate both CERCLA and EPCRA.

Specifically, Section 103(a) of CERCLA directs that "[a]ny person in charge of a . . . facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such . . . facility in quantities equal to or greater than those determined pursuant to section [102] of this title, immediately notify the National Response Center established under the Clean Water Act of such release." 42 U.S.C. § 9603(a) (emphasis added). In using the word "any" to describe those releases in excess of the reportable threshold, Congress made clear its intention that for that provision to be read broadly to cover all such releases. *See United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind."); *Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002) (same).[59]

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[58] Letter from John D. Dingell, Chairman, House Committee on Energy and Commerce, to Stephen L. Johnson (Mar. 18, 2008), at 3, *available at* http://energycommerce.house.gov/Press_110/110nr228.shtml, (submitted to docket), (hereinafter "Dingell Letter").

[59] *See also Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589 (1980) (construing the phrase "any other final action" in Section 307 of the Clean Air Act ("CAA") to mean "exactly what it says, namely, any other final action") (emphasis in original); *Engine Mfrs. Ass'n. v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) (CAA Section 209(a)'s reference to "any standard" "is categorical"); *Pasquantino v. United States*, 125 S.Ct. 1766 (2005) (holding that a wire fraud statute covering "any scheme or artifice to defraud" encompasses "without differentiation" all different kinds of schemes or artifices to defraud); *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (where CAA requires new source review ("NSR") for "any physical change," NSR applies "whenever a source conducts an emission-increasing activity that fits within one of the ordinary meanings of 'physical change'").

The only two exceptions from this requirement are spelled out in CERCLA Section 103(f), which allows for "[e]xemptions from notice and penalty provisions for substances reported under other Federal law or is in continuous release, etc." That provision states in full that:

> No notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance-- (1) which is required to be reported (or specifically exempted from a requirement for reporting) under subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] or regulations thereunder and which has been reported to the National Response Center, or (2) which is a continuous release, stable in quantity and rate, and is-- (A) from a facility for which notification has been given under subsection (c) of this section, or (B) a release of which notification has been given under subsections (a) and (b) of this section for a period sufficient to establish the continuity, quantity, and regularity of such release: Provided, That notification in accordance with subsections (a) and (b) of this paragraph shall be given for releases subject to this paragraph annually, or at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring.

42 U.S.C. § 9603(f) (emphasis added).

Neither of these two exemptions authorizes EPA's proposed blanket exemption for hazardous emissions from animal waste. The only possible match would be the "continuous release" exemption (emphasized in above statutory text), given EPA's attempt to justify the proposed animal waste exemption in part on the basis that such emissions are "on-going." *See* 72 Fed. Reg. at 73,704. But even if EPA had provided sufficient factual support for a claim that the statutory "continuous release" exemption applies to AFO animal waste (which it has not), the proposed exemption runs afoul of key statutory limits. Significantly, while the statute offers the "continuous release" exemption only where notifications have already been given "for a period sufficient to establish the continuity, quantity, and regularity of such release," and directs that even where the exemption applies, a facility must file an annual notification and additional notifications "at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released," 42 U.S.C. § 9603(f), none of these limitations appear in EPA's proposal.

Where, as here, Congress uses broad mandatory language to describe a duty (*i.e.*, requiring the reporting of "any release" exceeding the reportable threshold), and then expressly defines the exceptions from that broad mandate, EPA lacks authority to carve out additional regulatory exemptions beyond those specified in the statute. *See New York v. EPA,* 443 F.3d 880, 885 (D.C. Cir. 2006) ("Because Congress expressly included one limitation" on the statute's coverage, "the court must presume that Congress acted intentionally and purposely when it did not include others"). *See also Coosemans Specialties v. Dept. of Agric.,* 482 F.3d 560, 569 (D.C. Cir. 2007) ("The use of absolute language in § 499h(b) describing the scope of the employment restrictions, the broad definition of employment to include '*any* affiliation,' and the inclusion of a specific exception for persons who make a certain showing – all militate against judicially

created exceptions"); *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002) (where Congress included some transport-based exemptions, "[w]e cannot but infer from the presence of these specific exemptions that the absence of any other exemption for the transport of ozone was deliberate").

If Congress had wanted to exempt animal wastes from CERCLA's and EPCRA's reporting requirements, it certainly knew how to do so. For example, Congress chose to exempt "the normal application of fertilizer" from the CERCLA definition of "release." *See* 42 U.S.C. § 9601(22)(D). The existence of that exemption further confirms that Congress acted intentionally in omitting any other agricultural exemption from the reporting requirements in Section 103(a). As the court stated in *Sierra Club v. Tyson Foods*:

> Defendants cite no authority which exempts animal production facilities from the reporting requirements of EPCRA and CERCLA. If Congress had intended such a result, it could have excluded animal production facilities, such as poultry and swine, from the reporting requirements. Congress clearly knew how to exempt certain items from the reporting requirements of CERCLA and EPCRA as demonstrated by the fertilizer exclusion under CERCLA Section 101(22)(D).

299 F. Supp. at 706.

## *B. EPA Has Offered No Legally Cognizable Reason That Could Justify a Departure From the Plain Meaning of the Statute.*

The Supreme Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The only possible exception is where an agency can show "either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). This showing must be "extraordinarily convincing." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001). *Accord NPR v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (finding an "[e]xtremely strong" presumption that a statute's plain language reflects congressional intent). EPA has not—and cannot—make such a showing here.

Far from suggesting that Congress did not intend CERCLA's reporting obligations to apply to AFO animal waste emissions, the statute's text indicates that such emissions fall easily within the category of hazardous releases that Congress was concerned about. For example, in defining what constitutes a "facility" for purposes of the reporting requirement, Section 101(9) of CERCLA explains that the term includes, *inter alia*, "any . . . pit, pond, lagoon . . . or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). This definition unambiguously encompasses AFO manure "lagoons," as well as other locations where application and storage of animal waste may cause the release of hazardous pollutants, such as barns and land application areas. *See Sierra Club v. Tyson Foods*, 299 F. Supp. 2d at 708-11. Likewise, hazardous emissions from animal wastes easily fit within the statute's definition of "release," which includes "<u>any</u> . . . emitting . . .

discharging, injecting, escaping . . . dumping, or disposing into the environment." 42 U.S.C. § 9601(22) (emphasis added). Though the statute identifies a few limited exemptions from this broad definition of "release," none are relevant to animal wastes. *See id.*

EPA does not contest that AFO animal waste emissions fall within the above definitions, but instead contends that it is not "necessary or appropriate" for the government to take action under CERCLA to address such emissions. 72 Fed. Reg. at 73,704. According to EPA, such action should be reserved to circumstances "where the emergency may result in acute exposures," such as "releases from tanks, pipes, vents or in train derailment situations." *Id.* But EPA's contention that CERCLA is only intended to address emergency circumstances is refuted by the statute's plain language, which broadly defines "remove" or "removal" of hazardous substances to include, *inter alia*:

> [S]uch actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23) (emphasis added). Likewise, CERCLA defines "remedy" and "remedial action" as:

> [T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, <u>to prevent or minimize the release of hazardous substances</u> so that they do not migrate <u>to cause substantial danger to present or future public health or welfare or the environment.</u>

*Id.* at § 9601(24) (emphasis added).

Thus, far from restricting government action to "emergency" situations where exposures are "acute," the above statutory definitions unambiguously demonstrate Congress' intent for government authorities to act whenever necessary to "prevent, minimize, or mitigate damage to public health or welfare or to the environment," *id.* at § 9601(23), including as needed to guard against threats to "<u>future</u> public health or welfare or the environment," *Id.* at § 9601(24) (emphasis added). *See also, e.g., id.* at § 9604(i)(3) (requiring preparation of toxicological profiles of hazardous substances including "the levels of significant human exposure for the substances and the associated <u>acute, subacute, and chronic health effects</u>") (emphasis added). Significantly, EPA does not—and cannot—claim that hazardous emissions from animal waste do not pose a threat to public health and the environment. *See supra* at 6-9.

The statute goes on to identify specific examples of appropriate remedial actions, some of which would be applicable to hazardous emissions from AFO animal wastes. *See* 42 U.S.C. § 9601(24). For example, the statute identifies "confinement" of waste, *see id.,* which would encompass an action such as covering a lagoon to confine hazardous emissions. Other specified remedies include "diversion, destruction, [or] segregation of reactive wastes," *id.*, which easily

encompasses the installation of capture and control equipment such as biofilters on AFO barns. The statute further identifies an appropriate government response as the "permanent relocation of residents and businesses and community facilities," *id.*, which could be appropriate with respect to AFO emissions in extreme situations.

Of course, this statutory list is by no means exhaustive; Congress expressly declared that appropriate remedial measures "include[], in addition, without being limited to" the listed examples. *Id.* Thus, for example, government authorities could "prevent or minimize" AFO emissions by requiring reductions in animal numbers, requiring AFOs to inject manure into the ground rather than spraying it, and using feed additives to reduce ammonia emissions. *See supra* at 9-11. In sum, there are many remedial actions available to government authorities with respect to AFOs that easily fall within CERCLA's ambit. The statute offers no support whatsoever for EPA's self-serving claim that only "emergency" actions responsive to "acute" exposures, such as "evacuations and shelter-in-place," are appropriate under CERCLA. *See* 72 Fed. Reg. at 73,704.

While, as described above, CERCLA remedies unambiguously apply to all releases that threaten public health and the environment, not just releases that threaten "acute" harm, it is important to note that toxic air emissions from AFOs can lead to acute exposures causing serious effects and even death. *See supra* at 6-9. Nowhere in its rulemaking proposal does EPA offer any reasoned explanation for its apparent belief that hazardous emissions from AFO animal waste never cause such "acute" exposures.

EPA also argues that its proposed exemption is justified because "EPA has not initiated a response to any NRC notifications of ammonia, hydrogen sulfide, or any other hazardous substances released to the air where animal waste at farms is the source of that release," nor can it "foresee a situation where the Agency would take any future response action as a result of such notification." 72 Fed. Reg. at 73,704. But EPA's policy determination that it will not respond to such reports cannot override CERCLA's plain statutory language requiring sources to report releases that exceed reportable thresholds. *See New York v. EPA*, 443 F.3d at 889 ("'EPA may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'") (quoting *Engine Mfrs. Assn.,* 88 F.3d at 1089).

Nor does EPA's contention that it will not act on reports of emissions from animal waste make submission of such reports absurd. Although it gave EPA discretion regarding whether to take action in response to a CERCLA report,[60] Congress mandated that facilities report hazardous substance releases that exceed reportable thresholds. *See* 42 U.S.C. § 9603(a). This dichotomy makes sense; even if EPA opts not to take emergency action, other benefits accrue from reports documenting hazardous substance releases. First, the fact that a facility is required to report such releases makes it more likely that the facility will take voluntary steps to reduce or eliminate these emissions.[61] Second, hazardous release reports are available to the public, and

[60] *See* 42 U.S.C. §§ 9604(a)(1) (stating that "the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance"), 9615 (authorizing the President to delegate his duties to agencies).

[61] *See* EPA, *Regulatory Impact Analysis of Reportable Quantity Adjustments Under Sections 102 and 103 of the Comprehensive Environmental Response, Compensation, and Liability Act*, Vol. 1 (Mar. 1985), at 34, Docket ID No. EPA-HQ-SFUND-2007-0469-0013-2 (hereinafter "EPA Regulatory Impact Analysis") ("[A]ssuming that

even if EPA is not interested in taking action, members of the public will have the option to take independent steps to protect themselves in light of such information.[62]

Finally, even if EPA opts not to take emergency action in response to certain reports, the data contained in these reports may form the basis for future regulation of hazardous air emissions from AFO animal waste. Indeed, EPA is currently relying on CERCLA and EPCRA reporting requirements for exactly that purpose. As discussed above, EPA issued an "Air Compliance Agreement" in 2005 in which it purportedly settled several thousand CERCLA and EPRCA reporting violations in exchange for sources agreeing to undertake monitoring to "produce a scientifically sound basis for measuring and estimating air emissions from AFOs." 70 Fed. Reg. at 4,959-60. EPA explained that it would use that information "to determine appropriate regulatory and nonregulatory responses to emissions." *Id.* at 4,961. Thus, not only does EPA admit that AFO emissions data would be helpful in determining whether to regulate such sources, but it has previously made use of its authority under CERCLA and EPCRA to enforce reporting requirements against AFOs for purposes of establishing more reliable data upon which to base future regulations. If EPA's proposed exemption were already in effect, that legal leverage would have been noticeably absent.

In conclusion, hazardous emissions from animal waste at AFOs fall squarely within the category of releases that Congress intended to trigger the reporting requirements in Section 103 of CERCLA and Section 304 of EPCRA. Requiring AFOs to report such releases has numerous benefits, and certainly does not lead to absurd results. Therefore, EPA cannot make the "extraordinarily convincing" showing needed to justify a departure from the plain statutory language in CERCLA and EPCRA requiring sources to report any release in excess of reportable thresholds. *See Appalachian Power Co.,* 249 F.3d at 1041.

## *C. EPA's Previously Issued Radionuclide Exemption Does Not Authorize the Proposed Animal Waste Exemption.*

EPA also seeks to justify its proposed administrative reporting exemption for hazardous emissions from animal waste on the basis that it previously granted a similar exemption "for releases of naturally occurring radionuclides." 72 Fed. Reg. at 73,701 (*citing* 63 Fed. Reg. 13459 (Mar. 19, 1998)). But no court has ever found EPA's radionuclide exemption to be lawful; apparently, no one challenged the regulation when it was issued in 1998. *But see Fertilizer Institute v. EPA*, 935 F.2d 1303, 1310 (D.C. Cir. 1991) (successfully challenging an earlier version of the exemption). That the 1998 radionuclide exemption escaped challenge does

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releasers are more likely to clean up a release that is greater than its RQ [reportable quantity] level, the lower RQ level should encourage releasers to clean up a release that would otherwise not have been cleaned up, or to clean up a release earlier than under a higher RQ."). Conversely, EPA also explains that "assuming that responsible parties are not as likely to clean up a release of a hazardous substance that is smaller than an assigned RQ, public health or welfare or environmental damages may occur under the higher RQ that would not have occurred under the lower RQ. Also, to the extent that early notification would allow or encourage mitigative measures, failure to notify appropriate authorities may increase subsequent environmental damage." *Id.*

[62] *See, e.g.*, EPA, *Renewal of Information Collection Request for Notification of Episodic Releases of Oil and Hazardous Substances*, ICR No. 1049.10 (May 13, 2004), at 3, Docket ID No. EPA-HQ-SFUND-2007-0469-0002 (hereinafter "OMB Report") ("The public use[s] release information to become aware of the releases that have occurred in their communities and throughout the nation and to learn of actions, if any, that are being taken to protect public health and welfare and the environment.").

not justify EPA's proposal to carve out additional reporting exemptions in contravention of the plain language in CERCLA and EPCRA. *See New Jersey, et al., v. EPA*, 2008 WL 341338, at *6 (D.C. Cir. 2008) ("EPA states in its brief that it has previously removed sources listed under section 112(c) without satisfying the requirements of section 112(c)(9). But previous statutory violations cannot excuse the one now before the court."); *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996) ("[W]e do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation.").

Moreover, even if EPA's radionuclide exemption is somehow lawful, the legal rationale offered by EPA in support of that exemption is inapplicable to hazardous releases from AFO animal waste. As originally conceived, the radionuclide exemption was only for undisturbed land, and EPA sought to justify it based on Section 104(a)(3) of CERCLA, which generally precludes removal or remedial actions in response to a 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." *See* 63 Fed. Reg. at 13,462. Though EPA eventually broadened the exemption to include "land disturbance incidental to extraction activities" at most mines, as well as "releases to and from coal and coal ash piles," the agency continued to try to justify the exemption under CERCLA Section 104(a)(3) by insisting that "concentrations of naturally occurring radionuclides in the materials subject to the exemption . . . are generally within the range of 'typical' background concentrations in surface rocks and soils in the U.S." *Id*. Quite obviously, Section 104(a)(3)'s exemption is not designed to cover the massive and very unnatural amount of animal waste generated by crowding together huge numbers of animals at AFOs.

Likewise, while EPA suggests that radionuclide releases "pose little or no risk" to public health or the environment, 72 Fed. Reg. at 73,701, no such showing has been made with respect to hazardous emissions from animal waste. To the contrary, the record is replete with evidence that such emissions pose a substantial public health threat. *See supra* at 6-9. Finally, while EPA suggests that the radionuclide exemption was justified because a federal response to such releases is "infeasible or inappropriate," 63 Fed. Reg. at 13,462, EPA has not made—and cannot make—such a demonstration with respect to CAFO animal waste. *See supra* at 9-11, 14-15.

## *D. The Proposed Exemption is Contrary to the Primary Purposes of CERCLA and EPCRA.*

In the proposed rule, EPA asserts that its primary rationale for the administrative reporting exemption "is based on the purpose of notifying the NRC, and SERCs and LEPCs when a hazardous substance is released, and then the likelihood that a response to that release would be taken by any government agency." 72 Fed. Reg. at 73,704. Specifically, EPA claims that it has never "initiated a response to any NRC notifications of ammonia, hydrogen sulfide, or any other hazardous substances released to the air where animal waste at farms is the source of that release," nor can it "foresee a situation where the Agency would take" such response action. *Id.* Consequently, the agency concludes that "it is appropriate to propose to eliminate the reporting requirement under CERCLA section 103 and EPCRA section 304" for hazardous substances released to the air from animal waste. *Id*.

However, EPA's rationale disregards several key purposes of the notification requirements in CERCLA and EPCRA. First of all, these provisions unambiguously require reporting when a release satisfies all the elements of the statute, not simply when a federal response action is needed. As EPA has previously stated, "[a] primary function of [the reporting requirements in CERCLA] is to ensure that the government is made aware of any potentially serious release of a hazardous substance, so that the government has the opportunity to determine whether and how it needs to act." 50 Fed. Reg. 13,456, 13,462 (Apr. 4, 1985) (final rule establishing notification requirements, codified at 40 C.F.R. pts. 117, 302). Although federal personnel evaluate each notice, they "will not necessarily initiate a removal or remedial action in response to all reported releases, because the release of a reportable quantity will not necessarily pose a hazard to public health or welfare or the environment." *Id.* at 13,457.

EPA has also previously disagreed that it was a misuse of time and money to report releases which do not result in a federal removal or remedial action, or that the probability of a federal response action should be an important consideration in designing the notification system. *See id*. As the agency recently stated in a 2004 report to the White House Office of Management and Budget:

> EPA believes that the notification requirements specified under these regulations represent the minimum level of information necessary for Federal response officials to determine if a government response action is needed to prevent or mitigate any damage to public health or welfare or the environment. The regulatory requirements are satisfied by a toll-free telephone call to the NRC. A reduction in these reporting requirements for small businesses is not possible without jeopardizing the Federal government's ability to evaluate the threat posed by a release and determine if a Federal response is necessary.[63]

EPA has also previously reasoned that sources are more likely to prevent releases and voluntarily mitigate the damages caused by releases that occur if they are subject to the reporting requirements in CERCLA and EPCRA.[64]

Additionally, the legislative histories of both CERCLA and EPCRA demonstrate that a primary purpose of these statutes is to provide a source of information about hazardous releases in the United States and to notify the public about contaminants in their communities. For example, CERCLA's legislative history demonstrates that one of the main goals of Section 103 is to provide baseline information that the federal government and states can use to determine priority lists for future cleanup:

> In compiling and revising their list of priorities, it is expected that the States will consider hazardous substances released, discharged or disposed which are reported pursuant to section 3(a)(3) and those facilities or sites at which hazardous substances are stored or disposed which are reported pursuant to section

[63] *See* OMB Report at 9.

[64] *See* EPA Regulatory Impact Analysis at 34.

> 3(a)(4)….Thus the reporting provisions of this Act and existing law will serve as a baseline of information for compilation of priority lists.

S. Rep. No. 96-848 at 59-60.

Moreover, as EPA stated in its report to OMB, the hazardous substance release information collected under Section 103 of CERCLA "has a variety of different uses."[65] In addition to enabling federal officials to assess the need for a response action, this information "is used by EPA program offices and other Federal agencies to evaluate the potential need for additional regulations, new permitting requirements for specific substances or sources, or improved emergency response planning."[66] Furthermore,

> [R]elease notification information, which is stored in the national Emergency Response Notification System (ERNS) data base, is used by State and local government authorities, the regulated community, and the general public. State and local government authorities and the regulated community use release information to help inform local emergency response planning. The public use release information to become aware of the releases that have occurred in their communities and throughout the nation and to learn of actions, if any, that are being taken to protect public health and welfare and the environment.[67]

As noted above, the NRC provides the public with access to CERCLA release information, as well as statistics and other fact sheets, through its website.[68]

Likewise, the overarching purpose of EPCRA – the Emergency Reporting and Community Right-to-Know Act - is information dissemination to the public. As Congress explained in its committee report on the final legislation:

> The Senate amendment and House amendment both establish programs to provide the public with important information on the hazardous chemicals in their communities, and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals.

Senate-House Conference Committee Report, 99 Cong. Conf. Report H. Rep. 962, at 281 (Oct. 3, 1986) (emphasis added). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 86 (1998) ("EPCRA establishes a framework of state, regional and local agencies designed to inform the public about the presence of hazardous and toxic chemicals, and to provide for emergency response in the event of health-threatening releases.").

These statutory purposes were recently illustrated in an enforcement action brought against several poultry AFOs in Kentucky. In *Sierra Club v. Tyson Foods*, plaintiffs alleged that

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[65] OMB Report at 3.

[66] *Id*.

[67] *Id.* (emphasis added).

[68] *See* http://www.nrc.uscg.mil/foia.html.

defendants violated the reporting requirement in CERCLA and EPCRA by failing to report ammonia emissions from four chicken production operations. 799 F. Supp. 2d at 699-700. For purposes of standing, plaintiffs specifically asserted that this failure not only impaired the ability of government agencies to respond to hazardous releases, but also denied plaintiffs the right to critical information about contaminants that would allow them to take whatever precautionary steps were necessary. *Id.* at 703-04. The Court agreed, finding that "Plaintiffs have alleged precisely the type of injury - failure to receive information - that Congress intended to prevent by enacting the reporting requirements of both CERCLA and EPCRA." *Id.* at 704.

If EPA finalizes the proposed administrative reporting exemption, members of the public that suffer from animal waste emissions will be unable to obtain information about hazardous releases of contaminants in their communities. In most cases, these requirements provide the only source of information. AFOs are not required to report releases of hazardous substances under the Clean Air Act, the toxic release inventory requirements, or related provisions under EPCRA Sections 311, 312, and 313. Therefore, a reporting exemption will significantly impact the public's ability and right to know about hazardous releases.

# V. EPA's Proposed Administrative Reporting Exemption for Hazardous Air Emissions From AFO Animal Waste is Arbitrary and Capricious.

In addition to violating the plain language and purposes of CERCLA and EPCRA, EPA's adoption of the proposed AFO reporting exemption would be, for the reasons set forth below, "arbitrary, capricious, [and] an abuse of discretion." 5 U.S.C. § 706(2)(A).

## *A. EPA Arbitrarily Fails to Consider and Explain How its Proposed Exemption Would Implement the Purpose of CERCLA and EPCRA to Guard Against Danger to Public Health and Welfare and the Environment.*

The express purpose of CERCLA's directive in Section 102(a) that EPA identify hazardous substances and establish reportable quantities is to regulate substances "which, when released into the environment may present substantial danger to the public health or welfare or the environment." 42 U.S.C. § 9602(a) (emphasis added). Indeed, CERCLA repeats over and over again that the purpose of its many provisions is to guard against threats to public health and welfare and the environment.[69] Yet, despite this unambiguous Congressional intent, the rationale

[69] *See, e.g.,* 42 U.S.C. §§ 9605(a)(2) (requiring a national contingency plan for evaluating and responding to releases of hazardous substances which substantially endanger "the public health and the environment") (emphasis added), 9621(b)(1) (requiring the selection of remedial action "that is protective of human health and the environment") (emphasis added); 9604(i)(3) (requiring preparation of toxicological profiles of hazardous substances including "the levels of significant human exposure for the substances and the associated acute, subacute, and chronic health effects," [a] determination of whether adequate information on the health effects of each substance is available or in the process of development to determine levels of exposure which present a significant risk to human health of acute, subacute, and chronic health effects," and "[w]here appropriate, an identification of toxicological testing needed to identify the types or levels of exposure that may present significant risk of adverse health effects in humans.") (emphasis added).

offered by EPA in support of its exemption for AFO animal waste is devoid of any explanation for how the proposed rule would fulfill these purposes.

In lieu of a reasoned analysis of this core statutory factor, EPA merely asserts that the proposed exemption "is protective of human health and the environment." 72 Fed. Reg. at 73,700-01. But merely stating that a factor was considered is not a substitute for considering it. *See, e.g., Getty v. Federal Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986). As Congress plainly intended for EPA to consider impacts on public health and the environment when deciding which hazardous releases must be reported, EPA's failure to provide a reasoned analysis of that factor renders its proposal arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983).

According to EPA, "[t]he question that EPA considered [in deciding whether to propose the exemption] was whether the Agency would ever take a response action, as a result of such notification, for releases of hazardous substances to the air from animal waste at farms." 72 Fed. Reg. at 73,701. Concluding that it would not respond, EPA found the exemption to be appropriate. *Id.* But as EPA itself acknowledged in 1985 when initially establishing RQs of hazardous substances, whether the government will respond is only one of several factors affecting public health and the environment.[70] Specifically, EPA concluded that "public health or welfare or environmental damages may occur" if fewer reports are required, since sources are far more likely to mitigate their releases and undertake voluntary remedial measures when they are required to report them.[71] Furthermore, EPA has recognized that the public makes use of CERCLA reports to find out about hazardous releases in their communities.[72] The agency's myopic focus on whether it would take action in response to a report arbitrarily ignores these valuable environmental benefits of CERCLA and EPCRA reporting.

Moreover, EPA's explanation for why it would not itself take action in response to a release report documenting hazardous emissions from animal waste also omits any reasoned assessment of the health and environmental threat posed by such releases. Rather, EPA justifies its decision not to take action by declaring that "[i]n all instances the source (animal waste) and nature (to the air over a broad area) are such that on-going releases makes an emergency response unnecessary, impractical and unlikely." 72 Fed. Reg. at 73,704. EPA goes on to offer its view that CERCLA was designed to address "emergencies" that threaten "acute" exposures. *Id.*

However, as discussed above, CERCLA plainly addresses all types of releases that threaten public health or the environment, not just those releases that require emergency responses to address acute exposures. At no point in its proposal does EPA conclude that the hazardous releases it proposes to exempt do not pose a threat to public health or the environment. Indeed, releases of ammonia and other hazardous emissions from animal waste can have significant impacts on both human health and the environment. *See supra* at 6-9. Recognizing these negative impacts, EPA has previously brought enforcement actions against AFOs for

[70] EPA Regulatory Impact Analysis at 34.

[71] *Id*.

[72] OMB Report at 3.

failing to comply with CERCLA and EPCRA reporting requirements. *See supra* at 9-10. The agency's failure to take these impacts into account in proposing to exempt AFO animal waste cannot be viewed as anything other than arbitrary and capricious.

EPA's assurance that even with the reporting exemption, it would still retain its enforcement authority "to address threats to human health and the environment," *see* 72 Fed. Reg. at 73,704, is cold comfort given the agency's blanket declaration that that it would never take action in response to a report of hazardous emissions from animal waste. Moreover, the existence of such enforcement authority does nothing to remedy the harm caused by removing the incentive that reporting gives to sources to voluntary reduce their releases and remediate damages. Nor does it remedy the harm caused by the loss of public access to valuable information about hazardous releases in their communities.

Finally, EPA's proposed exemption is taking place at the same time that the agency is engaged in an "Air Compliance Agreement" to monitor hazardous emissions at AFOs and determine the best way to "bring the entire CAFO industry into compliance with…section 103 of CERCLA, and section 304 of EPCRA." *See* 70 Fed. Reg. at 4,959-61; 72 Fed. Reg. at 73,703. When it proposed this agreement, EPA acknowledged that AFOs "can have negative impacts on nearby residents, particularly with respect to objectionable odors and other nuisance problems that can affect their quality of life." 70 Fed. Reg. at 4,959. Given that EPA's monitoring study is not expected to be completed until spring of 2009, *see* 72 Fed. Reg. at 73,703, it is arbitrary for EPA to proceed with the proposed reporting exemption.

## *B. EPA Arbitrarily Proposes to Exempt Releases of Hazardous Substances from Animal Waste While Maintaining Reporting Requirements for the Same Releases from Other Sources.*

EPA's proposed reporting exemption is also arbitrary because the agency fails to offer a reasoned, statutorily valid explanation for why it is exempting hazardous emissions from animal waste at farms, but requiring reporting of the same emissions from other sources. *See* 72 Fed. Reg. at 73,700. "A long line of precedent has established that an agency action is arbitrary when the agency offered insufficient reasons for treating similar situations differently." *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996); *see also Independent Petroleum Ass'n of America v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.").

First, EPA fails to provide a reasoned explanation for exempting AFO emissions from animal waste, but continuing to require reporting of the same amount and type of emissions resulting from anything <u>other than animal waste</u>. EPA does not, and cannot, contend that hazardous air emissions are somehow not harmful to public health and the environment merely because they originate from animal waste. While EPA attempts to distinguish the source of emissions on the basis that non-animal waste emissions are more likely to require an "emergency response," 72 Fed. Reg. at 73,704, that distinction, even if it were true, is not a valid reason under the statute for exempting such releases from the reporting requirements.

Second, EPA offers no explanation whatsoever for distinguishing between animal waste at farms and the same waste at other facilities. As EPA confirms, facilities other than farms, such as meat processing plants, slaughter houses, and tanneries, would remain subject to CERCLA and EPCRA reporting requirements for hazardous air releases from animal waste. *See* 72 Fed. Reg. at 73,704. In light of EPA's failure to offer a reasoned explanation for treating these similar sources of hazardous air releases differently, its adoption of the proposed administrative reporting exemption for animal waste at AFOs would be arbitrary and capricious.

## *C. EPA Arbitrarily Disregards the Availability of Measures to Reduce and Mitigate Damages From Hazardous Emissions From AFO Animal Waste.*

In seeking to justify the conclusion that it is unlikely to ever take action in response to a notification of hazardous emissions from animal waste, EPA asserts that it would be "impractical" to take such action. 72 Fed. Reg. at 73,704. To support this claim, EPA identifies two possible responses to CERCLA and EPCRA reports—evacuation and shelter-in-place—and declares that neither are "a necessary or appropriate response to the release of hazardous substances to the air from animal waste at farms." *Id.* But as explained above, CERCLA provides EPA with authority to take a broad range of actions in response to a hazardous release notification, not just actions needed to avert an "emergency." *See supra* at 14-16. Furthermore, there are many actions that the agency could take to reduce hazardous releases from animal waste at AFOs and to mitigate damages from releases that occur. *See supra* at 9-11. EPA's failure to account for these potential control measures renders its proposed administrative reporting exemption arbitrary and capricious. *See State Farm Mut.*, 463 U.S. at 43 (agency decision is arbitrary if it "runs counter to the evidence before the agency.").

## *D. EPA's Reliance on Emergency Responder Comments on the Poultry Petition to Support its Conclusion that No Action Would be Taken in Response to Hazardous Air Releases From Animal Waste is Arbitrary.*

In maintaining that it is unlikely to ever take a response action for releases of hazardous emissions from animal waste, EPA also relies on comment letters that it received from twenty-six emergency response agencies on the 2005 petition from the National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association. *See* 72 Fed. Reg. at 73,704. According to EPA, "[a]ll of those commenters supported granting the poultry petition—that is, exempting from CERCLA and EPCRA reporting requirements for ammonia emissions from poultry operations." *Id.* EPA claims that "the comments received from state and/or local emergency response agencies is consistent with EPA's view" since those agencies "[g]enerally" supported the petition and "would not conduct an emergency response as a result of the notifications." *Id.*

EPA's reliance on these emergency responder comments on the Poultry Petition is arbitrary for three reasons. First, the 26 comment letters represent the views of only 0.6% of the 4,491 emergency response agencies listed in EPA's database.[73] Furthermore, 18 of the 26

[73] *See* Memorandum from Claudia Copeland, Congressional Research Service, to Richard Frandsen, House Energy and Commerce Committee (Jan. 28, 2008) at 2, (submitted to docket).

comment letters were nearly identical in content,[74] making it clear that they were not individually drafted by the agencies that submitted them. In sharp contrast to those comments, William Becker, Executive Director of the National Association of Clean Air Agencies, stated in a letter to the House Committee on Energy and Commerce that:

> We do not believe a blanket exemption is warranted given the demonstrated health effects associated with ammonia and hydrogen sulfide, the amounts of manure produced by AFOs and the usefulness of the data contained in CERCLA and EPCRA reports to State and local air agencies and the people living near these facilities.[75]

In short, it is misleading for EPA to assert that the comments letters from a few emergency responders are indicative of widespread agreement with the agency's position that response actions are unlikely to be taken for hazardous releases from animal waste at AFOs.

Second, EPA's reliance upon the 26 emergency response agency letters is arbitrary because those comments addressed only whether agencies would respond to notices from poultry operations, whereas EPA's current proposal extends to AFOs of all kinds. *See* 72 Fed. Reg. at 73,704. According to EPA's own inventory, poultry operations account for just 27% of total national ammonia emissions.[76] The current proposal would exempt multiple times the amount of ammonia emissions considered in the previous petition, making it inappropriate for EPA to rely on prior comments as support for its current proposal.

Finally, while the emergency responder letters addressed only ammonia emissions, EPA's proposed exemption would cover all hazardous emissions from AFOs. Aside from ammonia, AFOs emit other hazardous substances such as hydrogen sulfide, nitrous oxide, and volatile organic compounds possibly containing quinoline. *See id.* at 73,702 n.1. Similar to exposure to ammonia, these other substances can have serious health effects on surrounding communities. For example, exposure to small concentrations of hydrogen sulfide may result in eye, skin, and respiratory irritation, while higher levels of exposure (greater than 500 ppm) can cause a loss of consciousness and possibly death. *See supra* at 7. In sum, it is arbitrary and capricious for EPA to rely on previous comments regarding the Poultry Petition to justify its current proposed reporting exemption.

## *E. EPA Arbitrarily Claims that the Reporting Requirements of CERCLA and EPCRA Place an Undue Burden on Industry and Government Agencies.*

In the proposed rule, EPA also attempts to justify the proposed administrative reporting exemption by claiming that it will reduce the regulatory burden on both the AFO industry and

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[74] *Id.*

[75] Letter from S. William Becker, Executive Director, National Association of Clean Air Agencies, to John D. Dingell, Chairman, House Committee on Energy and Commerce (Mar. 20, 2007) at 3, Attachment 1 to Dingell Letter.

[76] *See* EPA*, National Emission Inventory—Ammonia Emissions from Animal Agricultural Operations*, Revised Draft Report (Apr. 2005), at Table 4-3 (listing 2002 ammonia emissions projections for cattle, swine, poultry, sheep, goat, and horse husbandry operations), (submitted to docket).

government agencies. 72 Fed. Reg. at 73,704. Specifically, EPA asserts that "the private sector, state and local, and the Federal governments spend approximately three hours per release to prepare and process episodic notifications and 24.5 hours to process continuous release notifications." *Id.* The agency estimates that the proposed exemption will reduce the burden on farms by approximately 3,432,000 hours and associated costs by $160,173,000 over a ten-year period beginning in 2009, as well as saving 161,000 hours and $8,109,000 for federal, state, and local governments over the same period. *Id.* at 73,705. EPA further alleges that the exemption is "consistent with the Agency's goal to reduce reporting burden" when emergency response is unlikely, thus "allow[ing] emergency response officials to better focus on releases where the Agency is more likely to take a response action." *Id.* at 73,700.

However, there is little factual support for EPA's assertion that the reporting requirements in CERCLA and EPCRA place an undue burden on the regulated community and government agencies, or that the exemption proposed will better serve the purposes of these statutes. The administrative burden that arises from the reporting requirements under CERCLA and EPCRA is extremely low. Section 103 of CERCLA provides that any facility from which a hazardous substance has been released in a reportable quantity must immediately notify the NRC. 42 U.S.C. § 9603(a). For example, releases of ammonia and hydrogen sulfide from animal waste at farms that exceed 100 pounds per day must be reported under section 103. *Id.*; *see* 40 C.F.R. § 302.4. One toll-free telephone call or online report submission to the NRC fulfills this reporting requirement under CERCLA.[77]

In addition, Section 304 of EPCRA requires facilities to provide immediate notice of such releases to designated state and local officials. 42 U.S.C. § 11004(a). One telephone call to the appropriate state and local authorities also fulfills the initial requirement to report releases of hazardous substances under EPCRA. In addition, the statute requires a written follow-up notice to state and local officials "as soon as practicable after the release" to update the initial information. *Id.* As EPA itself states, "[t]he single RQ approach was adopted to provide a relatively simple reporting system that does not unduly burden either EPA or the regulated community." 72 Fed. Reg. at 73,703.

Indeed, EPA appears to have arbitrarily determined the amount of time and cost to the regulated community that such notifications require. For example, regarding initial telephone notification for episodic releases under CERCLA, the agency found in its report to OMB that "[m]ost of the facilities stated that the evaluation was relatively straightforward, requiring well under one hour . . . . Other facilities responded that it would probably take 15 minutes to ½ hour of managerial time to determine whether a call to the NRC was required."[78] Yet EPA went on to estimate that the initial telephone notification to the NRC "requires approximately one hour of technical personnel time and one hour of managerial time," for a total of two hours.[79] EPA also assumed, without any justification, that recordkeeping would require "2.1 burden hours per

[77] Section 103(f)(2) of CERCLA further provides for relaxed reporting requirements for continuous releases. 42 U.S.C. § 9603(f). If a person can demonstrate that the releases are continuous or stable in quantity and rate, then notice of the release is only required to be given annually. *Id.*

[78] OMB Report at 10.

[79] *Id*.

release."[80] For continuous reporting, EPA estimates that the burden associated with the initial telephone call is three hours, consisting of 45 minutes of management time and two hours of technical time to determine if a release is continuous and 15 minutes for the actual call.[81] No explanation is provided for these discrepancies.

Furthermore, EPA fails to reveal the number of reports now being filed with the NRC and state and local agencies regarding hazardous emissions from animal waste at AFOs, making it impossible to tell whether its calculations regarding the total number of hours and costs reduced by the proposed exemption are accurate. In its 2004 report to OMB, EPA estimated that the total annual burden from all of the reporting required by Section 103 of CERCLA was 98,736 hours and $7,230,537 for industry and 24,082 hours and $950,998 for government.[82] Yet for the reporting exempted by its proposed rule, which should account for just a small subset of the required notifications, EPA claims an annual savings for farms of 343,000 hours and $16,017,300, as well as 16,100 hours and $810,900 for government.[83] 72 Fed. Reg. at 73,705.

Finally, EPA's suggestion that reducing the reporting burden would allow government officials "to better focus on releases where the Agency is more likely to take a response action" runs counter not only to the fact that responses may very well be necessary for hazardous emissions from animal waste, but also to the purposes of CERCLA and EPCRA in providing a source of information for the government to evaluate releases and consider future regulation of such emissions. *See* 72 Fed. Reg. at 73,700. As EPA explained in its final rule establishing the notification requirements:

> Reportable quantities have been established so that the Agency is alerted promptly to situations that may warrant a government response. While EPA will not initiate a removal or remedial action for every release that is reported, EPA must obtain the information it needs to determine who has response authority, to assess whether there is a need for a federal response action, and to check that action is properly taken by others where appropriate.

50 Fed. Reg. at 13,456. Given the increasing body of scientific evidence demonstrating the dangers posed by hazardous air emissions from animal waste, it is important that agencies continue to receive such information to evaluate and address potential threats to public health and the environment.

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[80] *Id*. at 11.

[81] EPA, *Renewal of Information Collection Request for the Continuous Release Reporting Requirement*, ICR No. 1445.06 (Oct. 1, 2004) at 14, (submitted to docket).

[82] OMB Report at 2.

[83] Given that EPA claims to have never initiated a response to notifications of hazardous emissions from animal waste, and supposedly cannot even foresee such a situation in the future, *see* 72 Fed. Reg. at 73,704, it is entirely unclear why these alleged savings would be so substantial.

# VI. EPA Failed to Fulfill its Obligation to Assess the Environmental Justice Impacts of its Proposed Reporting Exemption.

Executive Order 12898 requires EPA to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations. 59 Fed. Reg. 7,629 (Feb. 16, 1994). The analysis offered by EPA in its current proposal, *see* 72 Fed. Reg. at 73,707, fails to fulfill the agency's obligations under that directive.

Instead of assessing any disproportionate health or environmental impacts of the proposed exemption, EPA attempts to dismiss its obligation by contending that CERCLA and EPCRA hazardous release notifications are "not specifically designed to protect human health or the environment and EPA has determined that a response action would be unlikely." 72 Fed. Reg. at 73,707. Thus, in EPA's view, its proposed reporting exemption "does not affect the level of protection provided to human health and the environment." *Id.* This attempt to divorce hazardous release notifications from their relationship to the protection of public health and the environment is absurd and cannot justify EPA's failure to assess the environmental justice impacts of its proposed rule.

First, CERCLA Section 102(a) makes it crystal clear that the purpose of EPA's identification of hazardous substances and establishment of RQs is to regulate substances "which, when released into the environment may present substantial danger to the public health or welfare and the environment." 42 U.S.C. § 9602(a). Notwithstanding EPA's claim that the reporting thresholds "do not reflect the determination that a release of a substance will be hazardous at the RQ level and not hazardous below that level," 72 Fed. Reg. at 73,707, the agency expressly recognized in 1985 that its selection of a threshold impacts public health and the environment, declaring that "public health or welfare or environmental damages may occur under the higher RQ that would not have occurred under the lower RQ."[84]

Second, regardless of whether EPA takes action in response to a report of hazardous emissions from animal waste at AFOs, the agency has itself observed that the reporting requirements make it more likely that a source will avoid the release in the first place, or at least voluntarily mitigate damages if a release occurs.[85] Additionally, these reports benefit members of the public by notifying them of hazardous releases and making it possible to track any action to address such releases. *See supra* at 18-20. Thus, EPA's declaration that it is unlikely to take action in response to hazardous emissions from animal waste fails to demonstrate that the proposed exemption will have no negative impacts on public health and the environment.

Finally, while current EPA officials are apparently uninterested in protecting public health and the environment from hazardous emissions at AFOs, future EPA leaders may be interested in doing so. Moreover, only a small fraction of the thousands of emergency response

[84] EPA Regulatory Impact Analysis at 34.

[85] *Id*.

agencies across the country have notified EPA that they agree with its view regarding the necessity of responding to notices of ammonia emissions from poultry operations. This extremely limited survey of emergency response agencies cannot serve to show that AFO reports under CERCLA and EPCRA would never prompt government action to address public health and environmental threats posed by hazardous emissions from animal waste.

In sum, both the statutory language of CERCLA and EPCRA and EPA's own prior statements demonstrate that reports of hazardous releases provide significant public health and environmental benefits. EPA's attempt to avoid its duty to assess the environmental justice impacts of its proposal on the basis that these reports do nothing to protect public health or the environment is unlawful.

## CONCLUSION

In sum, EPA's proposed administrative reporting exemption for hazardous emissions from animal waste at AFOs is unlawful and arbitrary and should not be finalized. Instead, EPA should ensure that AFO operators understand and comply with their reporting obligations. In addition, we ask that EPA reassess its position that reports of hazardous releases from animal waste at AFOs do not warrant any government response. Prompt action should be taken to reduce these highly toxic releases and to mitigate damages to public health and the environment in the areas where such releases occur.

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