



February 15, 2024

*Via regulations.gov*

The Honorable Michael S. Regan  
Administrator, Environmental Protection Agency  
1200 Pennsylvania Ave., NW (Mail Code 1101A)  
Washington, DC 20460

**Re:** *Potential Future Regulation for Emergency Release Notification Requirements for Animal Waste Air Emissions Under the Emergency Planning and Community Right-to-Know Act (EPCRA)*  
*(Docket No. EPA-HQ-OLEM-2023-0142; FRL-10285-01-OLEM)*

Dear Administrator Regan:

Earthjustice, together with Don't Waste Arizona, Humane Society of the United States, Rural Empowerment Association for Community Help, Sierra Club, and Waterkeeper Alliance, submits the following comments on the Advance Notice of Proposed Rulemaking, Potential Future Regulation for Emergency Release Notification Requirements for Animal Waste Air Emissions Under the Emergency Planning and Community Right-to-Know Act, 88 Fed. Reg. 80,222 (Nov. 17, 2023) (“Advance Notice”), published by the U.S. Environmental Protection Agency (“EPA” or the “Agency”).

EPA must use the information in these and other comments to develop a plan for promptly rescinding its rule exempting animal feeding operations (“AFOs”) from reporting their hazardous air emissions under the Emergency Planning and Community Right to Know Act (“EPCRA”). AFOs are industrial facilities that hold hundreds, thousands, or even over a million animals in confinement for the production of meat, eggs, and dairy. The animals in these facilities generate a tremendous amount of urine and feces, which, in turn, releases large quantities of ammonia and hydrogen sulfide. Indeed, animal waste at AFOs is responsible for about half of the natural and anthropogenic ammonia emitted in the United States annually.<sup>1</sup> In the Advance Notice, EPA recognizes that exposure to ammonia and hydrogen sulfide from AFOs causes death and other serious harms, especially among people of color, low-income individuals, and children. Yet, EPA has long exempted AFOs from even reporting their emissions, which impedes local emergency response agencies’ response to emergency releases and keeps community members in the dark about hazardous substances in the air they breathe.

EPA should eliminate the AFO reporting exemption for several reasons. *First*, the exemption is unlawful. The D.C. Circuit has held that EPCRA contains a “sweeping reporting mandate” that “require[s] notification of ‘any release . . . of a hazardous substance . . . in

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<sup>1</sup> See Congressional Rsch. Serv., *Air Quality Issues and Animal Agriculture: A Primer* 3 (2016), <https://crsreports.congress.gov/product/pdf/RL/RL32948>.

quantities equal to or greater than' the reportable quantities authorized under [the statute]”<sup>2</sup> and, thus, exempting AFOs from EPCRA reporting “can’t be justified . . . as a reasonable interpretation” of the statute.<sup>3</sup> The FARM Act does nothing to alter this obligation, as it makes no mention of EPCRA, and its legislative history shows that lawmakers did not intend to alter EPCRA’s reporting requirements.<sup>4</sup>

*Second*, EPA does not need to wait to rescind its unlawful exemption while it develops emissions estimating methodologies for AFOs. As discussed in detail below, there already exist several simple and reliable methods that EPA and AFO operators can use to estimate ammonia and hydrogen sulfide emissions from a variety of types of AFOs. In fact, EPA relies on one such method in the Technical Background Document (“TBD”) for the Advance Notice.

*Third*, reinstating EPCRA reporting would trigger reporting requirements for a very limited number of the largest AFOs, which together confine a huge proportion of the country’s food-producing animals. EPA’s own analysis shows that just *three percent* of farms nationwide are expected to be subject to reporting requirements, all of which confine hundreds, thousands, or more animals. For example, an AFO likely would have to confine over 151,000 “broiler” chickens, 92,000 turkeys, 11,300 “layer” chickens, 900 beef cows, 600 “finishing” swine, or 200 dairy cows to trigger EPCRA’s reporting requirements. These facilities are a far cry from the bucolic farms EPA seems concerned about burdening, but rather are enormous industrial operations that must comply with the same basic emission reporting requirements as any other polluting facility.

*Fourth*, complying with EPCRA will impose minimal burdens. EPA can ensure that burdens are low by establishing de minimis thresholds to identify operations that typically will not be required to report, developing a calculator to simplify estimating emissions, and defining certain AFO emissions as continuous releases to trigger reduced reporting requirements. According to EPA’s own estimates, the monetary cost to an operation of reporting would be only \$443 in the first year and \$4 for each of the following years. Even for operations that meet the Small Business Administration’s definition of small businesses, this first-year cost would be less than one percent of their annual sales, and the cost in subsequent years would be even more trivial.

*Fifth*, requiring AFOs to comply with EPCRA will bring significant benefits for community members. Reinstating reporting will allow community members to educate themselves and others about the threats that AFO emissions pose and take steps to protect against them, facilitate research on AFO emissions and the harms they cause, help local emergency response agencies develop emergency response plans and ensure that they can respond when a release occurs, and encourage facilities to adopt more protective practices and reduce the amount of hazardous substances they emit.

For all these reasons, EPA must promptly reinstate EPCRA reporting for AFOs. The undersigned organizations offer these comments to aid EPA in doing so.

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<sup>2</sup> *Waterkeeper All. v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017) (quoting 42 U.S.C. § 42 U.S.C. § 9603(a)).

<sup>3</sup> *Id.* at 537.

<sup>4</sup> See 115 Cong. Rec. S1925 (daily ed. Mar. 22, 2018).

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## STATUTORY BACKGROUND

EPCRA ensures that communities have adequate information about hazardous substances in the air they breathe. EPCRA requires facilities that release more than a threshold quantity of an “extremely hazardous substance” to report that release to local emergency response agencies, which must then make information from the reports available to the public.<sup>5</sup> EPA publishes a list of extremely hazardous substances that are subject to this reporting requirement and by regulation determines “reportable quantities,” (“RQs”) or threshold amounts of releases above which a report is required.<sup>6</sup> Ammonia and hydrogen sulfide are both “extremely hazardous substances” with RQs of 100 pounds per day.<sup>7</sup>

EPA provides for reduced reporting requirements for releases that are “continuous” and “stable in quantity and rate.”<sup>8</sup> A “continuous” release is one that (1) “occurs without interruption or abatement” or (2) “is routine, anticipated, and intermittent and incidental to normal operations or treatment processes.”<sup>9</sup> To be routine, a release must “occur[] during normal operating procedures or processes.”<sup>10</sup> A release is “stable in quantity and rate” if it is “predictable and regular in amount and rate of emission.”<sup>11</sup> For releases above the reportable quantity that qualify as continuous releases, a facility must provide (1) an initial telephone notification; (2) an initial written notification within 30 days of the telephone notification, which includes the upper and lower bounds of the normal range of the release over the previous year;<sup>12</sup> (3) notification of a release that exceeds the upper bound of the normal range; (4) notification of a change in the composition or source of the release; and (5) notification of a change in the normal range of the release.<sup>13</sup>

## PROCEDURAL BACKGROUND

For nearly two decades, EPA has repeatedly taken action to exempt AFOs from their congressionally mandated duty to report releases of ammonia and hydrogen sulfide under EPCRA. In 2005, EPA offered AFOs the opportunity to sign a “Consent Agreement and Final Order,” which allowed them to avoid liability for past and ongoing violations of EPCRA and two other federal laws governing air pollution: the Clean Air Act (“CAA”) and the Comprehensive

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<sup>5</sup> 42 U.S.C. §§ 11004, 11044(a).

<sup>6</sup> See 42 U.S.C. §§ 11002(a), 11004(a)(2)(B).

<sup>7</sup> 40 C.F.R. pt. 355, app. A.

<sup>8</sup> See 40 C.F.R. §§ 302.8, 355.32.

<sup>9</sup> *Id.* § 302.8(b).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> The initial written notification also must include: the name of the facility; the location of the facility, including latitude and longitude; the name and telephone number of the person in charge of the facility; the population density within a one-mile radius of the facility; the identity and location of sensitive populations and ecosystems within a one-mile radius of the facility, including elementary schools, hospitals, retirement communities, or wetlands; the name of the hazardous substance; the source of the release; the frequency of the release and the specific period over which it occurs; a brief statement of the basis for concluding that the release is continuous; an estimate of the total amount of the substance released in the previous year; and any environmental mediums affected by the release. *Id.* § 302.8(e).

<sup>13</sup> See *id.* §§ 302.8, 355.32.

Environmental Response, Compensation, and Liability Act (“CERCLA”).<sup>14</sup> Under the Agreement, EPA required participating AFOs to pay a nominal civil penalty and contribute to the cost of conducting a National Air Emissions Monitoring Study (“NAEMS”) to aid in the development of emissions estimating methodologies (“EEMs”).<sup>15</sup> Upon publication of the EEMs, EPA theorized, AFOs would be better able to estimate their ongoing emissions of air pollution and, thus, would be better equipped to come into compliance with longstanding federal law.<sup>16</sup> EPA initially estimated that the exemption would come to an end by 2010, at which point the Agency anticipated that it would have completed the EEMs and participating AFOs would have “assess[ed] their emissions, appl[ied] for any applicable CAA permits, and install[ed] any necessary emission reduction controls.”<sup>17</sup>

Although EPA anticipated ending the exemption by 2010, the Agency instead expanded it in 2008, finalizing a rule that excused all AFOs from reporting under CERCLA and all but the largest AFOs from reporting under EPCRA.<sup>18</sup> EPA concluded that reporting was “unnecessary because, in most cases, a federal response is impractical and unlikely (*i.e.*, [EPA] would not respond to [reported releases of hazardous substances from AFOs] since there is no reasonable approach for the response).”<sup>19</sup>

A coalition of community and environmental organizations petitioned the D.C. Circuit for review, alleging that the 2008 Rule violated CERCLA and EPCRA.<sup>20</sup> EPA then moved for voluntary remand without vacatur, representing to the court that it intended to consider vacating the challenged rule.<sup>21</sup> The court granted EPA’s motion,<sup>22</sup> but on remand, EPA did not vacate the rule and allowed its new rulemaking to stall based on its belief that a new rule was dependent on the not-yet-completed, already-overdue EEMs. In 2015, the petitioning organizations moved the D.C. Circuit to recall the mandate and decide the merits of the challenge.<sup>23</sup> The court granted the motion, recalled the mandate, and took up the merits, ultimately concluding that EPA lacked authority to create exemptions where Congress had unambiguously mandated reporting.<sup>24</sup> The court refused to accept EPA’s justification for the 2008 Rule, in part because the record showed that reporting could offer “real benefits” to AFO workers and people living nearby.<sup>25</sup>

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<sup>14</sup> See Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4959 (Jan. 31, 2005).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> EPA, Off. of Inspector Gen., Report No. 17-P-0396, Improving Air Quality: Eleven Years after Agreement, EPA Has Not Developed Reliable Emission Estimation Methods to Determine Whether Animal Feeding Operations Comply with Clean Air Act and Other Statutes, at 10 (Sept. 19, 2017), [https://www.epa.gov/sites/production/files/2017-09/documents/epa\\_ig\\_20170919-17-p-0396.pdf](https://www.epa.gov/sites/production/files/2017-09/documents/epa_ig_20170919-17-p-0396.pdf).

<sup>18</sup> See CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948-01 (Dec. 18, 2008) (“2008 Rule”).

<sup>19</sup> *Id.* at 76,956.

<sup>20</sup> See Pet. For Review, *Waterkeeper All. v. EPA*, No. 09-1017 (D.C. Cir. Jan. 15, 2009).

<sup>21</sup> See EPA’s Mot. for Voluntary Remand at 3–4, 5–6, *Waterkeeper All. v. EPA*, No. 09-1017 (D.C. Cir. Aug. 9, 2010).

<sup>22</sup> See Order, *Waterkeeper All. v. EPA*, No. 09-1017 (D.C. Cir. Oct. 19, 2010).

<sup>23</sup> See Mot. to Recall the Mandate or, in the Alternative, Pet. for Writ of Mandamus, *Waterkeeper All. v. EPA*, No. 09-1017 (D.C. Cir. Apr. 15, 2015).

<sup>24</sup> See *Waterkeeper All. v. EPA*, 853 F.3d 527, 537 (D.C. Cir. 2017).

<sup>25</sup> *Id.*

In September 2017, less than six months after the D.C. Circuit ruled that EPA lacked authority to exempt AFOs from reporting releases of hazardous air pollution under EPCRA, EPA's Office of Inspector General published a report criticizing the Agency's long delay in developing the EEMs and warning that, as a result of poor planning, "EPA is at risk of spending additional time and resources to develop EEMs that still are not sufficient for estimating AFO emissions nationwide."<sup>26</sup> Shortly thereafter, EPA published a series of guidance documents on its website, purporting to exempt all "farms," including AFOs, from EPCRA reporting.

In September 2018, community and environmental organizations challenged the guidance.<sup>27</sup> EPA then began a rulemaking process, which resulted in a rule that formalized the guidance and exempted AFOs from EPCRA reporting.<sup>28</sup> Plaintiffs amended their complaint to challenge the 2019 Rule.<sup>29</sup> In November 2021, EPA filed a motion for voluntary remand without vacatur, representing to the court that it had decided to revise or rescind the 2019 Rule,<sup>30</sup> and the court granted the motion.<sup>31</sup>

Now, nearly two years later, EPA recently *withdrew* a proposal to eliminate the exemption and, instead, issued the Advance Notice, which reveals that the Agency might not revise or rescind the 2019 Rule after all.<sup>32</sup> As a result of EPA's delay, AFO workers and people living nearby continue to be deprived of information about hazardous substances in the air they breathe and impeded in their ability to hold polluters accountable, advocate for stronger health protections, and make informed decisions to protect their health and the health of their family members.

## DISCUSSION

The following discussion addresses many of the issues on which the Advance Notice seeks input, with the relevant issue number identified in parentheses after the heading title. As discussed in greater detail below, ammonia and hydrogen sulfide emissions from AFOs cause serious health harms, often in communities of color and low-income communities. EPA has the tools it needs to reinstate EPCRA reporting for AFOs, as the D.C. Circuit has held it must, and reinstating reporting will impose minimal burdens while offering significant benefits. Accordingly, EPA should reinstate EPCRA reporting for AFOs without delay.

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<sup>26</sup> EPA, Off. of Inspector Gen., *supra* note X, at 23.

<sup>27</sup> See Compl., *Rural Empowerment Ass'n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Sept. 28, 2018).

<sup>28</sup> See EPA, Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. 27,533-01 (June 13, 2019) ("2019 Rule").

<sup>29</sup> See First Amend. Compl., *Rural Empowerment Ass'n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. July 9, 2019).

<sup>30</sup> See EPA Mot. to Remand Without Vacatur, *Rural Empowerment Ass'n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Nov. 23, 2021).

<sup>31</sup> See Mem. Order, *Rural Empowerment Ass'n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Feb. 14, 2022).

<sup>32</sup> See Stuart Parker, *Under OMB Pressure, EPA Shelves Plan Requiring AFO Emissions Reporting*, InsideEPA.com (Nov. 6, 2023) (reporting that, in April 2023, EPA submitted to the White House Office of Management and Budget ("OMB") both the Advance Notice and a proposed rule that would have rescinded the 2019 Rule, but "after a protracted review, OMB officials pressed EPA to proceed with only [the Advance Notice]").

## I. Health Impacts

### a. Ammonia and hydrogen sulfide emissions from AFOs pose serious risks to human health. (Issue 1)

The AFOs at issue here are nothing like the bucolic vision of a “farm” commonly presented in advertisements or political statements. Instead, they are industrial facilities that hold hundreds, thousands, or even over a million animals in confinement for the production of meat, eggs, and dairy. These facilities generate enormous quantities of urine and feces, in addition to animal carcasses. A single Large CAFO—that is, an AFO that meets the size threshold set by EPA<sup>33</sup>—can produce more waste than an entire city.<sup>34</sup> But, unlike a city that treats its sewage at wastewater treatment plants, industrial-scale AFOs store untreated animal waste in giant pits or piles and dispose of it by spreading it on fields. During storage and disposal, the waste releases the extremely hazardous gasses ammonia and hydrogen sulfide.<sup>35</sup>

As EPA recognizes, a large body of scientific evidence demonstrates that exposure to ammonia and hydrogen sulfide from AFOs can cause serious health harms in AFO workers and community members, including asthma, scarring of the respiratory tract, headaches, nausea, vomiting, diarrhea, and even death.<sup>36</sup> However, EPA overlooks at least three categories of serious harm. *First*, EPA does not consider psychological harm from exposure to these pollutants and their odors. Researchers have found that AFO neighbors who are regularly subjected to odors from the operations experience significantly higher rates of tension, depression, anger, confusion, and fatigue, as compared with otherwise similar people who do not live near CAFOs.<sup>37</sup> According to Max Wilson, a resident of Hickman, Kentucky who lives near at least three swine AFOs, “At times, the fumes become so overpowering that I feel a sense of physical panic and urgent desire to get away from the odor as quickly as possible.”<sup>38</sup>

*Second*, EPA does not account for injuries and deaths from acute ammonia and hydrogen sulfide exposure. According to a survey of reports and media releases, between 1975 and 2021, there were at least 409 instances of fatalities or serious injuries related to manure storage,

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<sup>33</sup> See 40 C.F.R. § 122.23(b)(4).

<sup>34</sup> See U.S. Gov’t Accountability Office, *Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern* 19 (2008), <https://www.gao.gov/assets/gao-08-944.pdf>.

<sup>35</sup> See TBD at 75; see also Virginia T. Guidry et al., *Hydrogen Sulfide Concentrations at Three Middle Schools Near Industrial Livestock Facilities*, 27 J. Exposure Sci. & Env’t Epidemiology 167 (2017).

<sup>36</sup> See TBD at 76–84. In the TBD, EPA cites just some of the many studies showing that exposure to ammonia and hydrogen sulfide from AFOs causes serious health harms. EPA should also consider the study titled *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, which references numerous additional scientific publications on the harms that ammonia and hydrogen sulfide cause. See Dick Heederik et al., *Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations*, 115 Env’t Health Persps. 298 (2007).

<sup>37</sup> See Susan S. Schiffman et al., *The Effect of Environmental Odors Emanating from Commercial Swine Operations on the Mood of Nearby Residents*, 37 Brain Rsch. Bull. 369 (1995).

<sup>38</sup> Decl. of Max Wilson ¶ 7, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 1.



handling, and transport equipment at AFOs.<sup>39</sup> Of those instances, 288 were fatal.<sup>40</sup> Many of the incidents likely were due to exposure to ammonia and hydrogen sulfide from the manure. As examples of just some of the many deaths, in 2015, a father and son in Iowa died from exposure to fumes when they were repairing a pump for a manure pit at a swine AFO.<sup>41</sup> In 2016, a Wisconsin man died from fumes when he was agitating a manure pit at a cattle AFO.<sup>42</sup> And in 2021, three brothers in Ohio died from asphyxiation when they were repairing a pump for a manure pit.<sup>43</sup>

*Third*, EPA ignores health harms from exposure to fine particulate matter (“PM2.5”),<sup>44</sup> which forms from AFO ammonia emissions.<sup>45</sup> EPA data reveals that levels of particulate matter near AFOs often exceed federal air quality standards.<sup>46</sup> For example, in California’s Central Valley—which has some of the worst air quality in the nation—ammonia emissions from animal waste are thought to be a major contributor to the region’s high PM2.5 concentrations.<sup>47</sup> Long-term exposure to particulate matter has negative impacts on the cardiovascular and respiratory systems and can lead to asthma, chronic obstructive pulmonary disease, lung cancer, strokes, heart disease, heart attacks, and respiratory infections.<sup>48</sup> In addition, a recent study found that particulate matter formed from ammonia emissions from livestock waste handling and storage causes at least 6,900 premature deaths per year, and particulate matter formed from ammonia emissions from fertilizer application, including manure, causes an additional 4,900 premature deaths per year.<sup>49</sup> Although these harms do not stem from direct exposure to AFO ammonia emissions, they are nonetheless a result of those emissions. And just as community members

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<sup>39</sup> See Mahmoud M. Nour et al., *Development of Methodology to Document and Code Farm-Related Injuries and Fatalities Involving Manure Storage, Handling and Transport – With Summary of 2017 Incidents*, 24 J. Agromedicine 90 (2018).

<sup>40</sup> *Id.*

<sup>41</sup> See Grant Rodgers & Donnelle Eller, *Iowa Father, Son Die from Manure Pit Fumes*, Des Moines Register (July 28, 2015), <https://www.desmoinesregister.com/story/money/agriculture/2015/07/28/iowa-father-son-die-manure-pit-fumes/30809037/>.

<sup>42</sup> See Chris Mueller, *Family Mourns Son Lost in Farming Accident*, Stevens Point J. (Aug. 24, 2016), <https://www.stevenspointjournal.com/story/news/local/2016/08/24/family-mourns-son-lost-farming-accident/89200084/>.

<sup>43</sup> See Joshua Rhett Miller, *3 Ohio Brothers Die after Getting Trapped in Manure Pit: Officials*, New York Post (Aug. 12, 2021), <https://nypost.com/2021/08/12/ohio-brothers-die-after-getting-trapped-in-manure-pit-officials/>.

<sup>44</sup> See TBD at 75.

<sup>45</sup> See A.N. Hristov, Technical Note: *Contribution of Ammonia Emitted from Livestock to Atmospheric Fine Particulate Matter (PM2.5) in the United States*, 94 J. Dairy Sci. 3130 (2011); see also Congressional Rsch. Serv., *Air Quality Issues and Animal Agriculture: A Primer* 2–3 (2016), <https://crsreports.congress.gov/product/pdf/RL/RL32948>.

<sup>46</sup> See Env’t Integrity Project, *Hazardous Pollution from Factory Farms: An Analysis of EPA’s National Air Emissions Monitoring Study Data 1–2* (2011), [https://environmentalintegrity.org/wp-content/uploads/2016/11/2011\\_HazardousPollutantsFromFactoryFarms.pdf](https://environmentalintegrity.org/wp-content/uploads/2016/11/2011_HazardousPollutantsFromFactoryFarms.pdf).

<sup>47</sup> See Brendan Borrell, *In California’s Fertile Valley, Industry and Agriculture Hang Heavy in the Air*, Undark, Dec. 3, 2018, <https://undark.org/article/air-pollution-california/>.

<sup>48</sup> See *Ambient (outdoor) Air Pollution*, World Health Org. (2022), [https://www.who.int/news-room/fact-sheets/detail/ambient-\(outdoor\)-air-quality-and-health](https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health); see also Susan Guthrie et al., RAND Corp. & The Royal Soc’y, *The Impact of Ammonia Emissions from Agriculture on Biodiversity* (2018), <https://royalsociety.org/-/media/policy/projects/evidence-synthesis/Ammonia/Ammonia-report.pdf>.

<sup>49</sup> See Nina G.G. Domingo et al., *Air Quality-Related Health Damages of Food*, 118 Proceedings Nat’l Acad. Scis., at 1, 2, Fig. 1 (2021).

need to know when they are exposed to reportable quantities of ammonia, they also need to know that they are likely exposed to PM2.5 due to those emissions.

**b. Ammonia and hydrogen sulfide emissions from AFOs often disproportionately burden environmental justice communities. (Issue 36)**

As EPA acknowledges, numerous scientific studies show that AFOs are disproportionately located in communities of color and low-income communities and, as a result, their hazardous air pollution disproportionately burdens members of those communities.<sup>50</sup> However, EPA's literature review is underinclusive, overlooking several studies showing the myriad ways AFOs cause environmental injustice in communities across the country. And EPA's analysis of the literature fails to recognize that in many states, larger AFOs are even more likely than AFOs in general to be disproportionately located in environmental justice communities, meaning that they are especially responsible for environmental injustice.

In addition to the studies that EPA included in its literature review, which focus on Delaware, Maryland, North Carolina, and Ohio, several other studies demonstrate that AFOs disproportionately burden environmental justice communities in California's Central Valley, Iowa, Mississippi, New Mexico and Wisconsin, and further document the grave harm that AFOs cause to environmental justice communities in North Carolina. Taken together with the limited materials EPA reviewed, this additional information makes clear that AFO air pollution causes environmental injustice across the country.

- Brandon M. Lewis et al., *Modeling and Analysis of Air Pollution and Environmental Justice: The Case for North Carolina's Hog Concentrated Animal Feeding Operations*, 181 *Env't Health Persps.* 087018-1 (2023). In the Duplin County region of North Carolina, exposures to ammonia and hydrogen sulfide from swine CAFOs were 66 percent higher for households where members spoke English less than "very well," 32 percent higher for adults without a high school diploma, 16 percent higher for people of color, and 13 percent higher for low-income households. In addition, the largest CAFOs were predominately located in areas where more than 56 percent of residents were people of color.
- Vanessa Ehrenpreis, et al., *Using Machine Learning to Map Concentrated Animal Feeding Operations in New Mexico* 2 (2021), <https://mappingforej.berkeley.edu/wp-content/uploads/2022/03/NM-CAFO-Report.pdf>. In New Mexico, communities with CAFOs are lower income, have lower rates of high school graduation, and have higher exposure to PM2.5.
- Niya Khanjar et al., *Environmental Justice and the Mississippi Poultry Farming Industry*, 15 *Env't Just.* 235, 243 (2022). In Mississippi, areas with poultry CAFOs have higher percentages of low-income people.

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<sup>50</sup> See TBD at 84.

- Arbor J.L. Quist et al., *Disparities of Industrial Animal Operations in California, Iowa, and North Carolina* (2022), [https://earthjustice.org/wp-content/uploads/quistreport\\_cafopetition\\_oct2022.pdf](https://earthjustice.org/wp-content/uploads/quistreport_cafopetition_oct2022.pdf). In California’s Central Valley and North Carolina, Large CAFOs are located disproportionately in communities of color and low-income communities. In Iowa, Large CAFOs burden the state’s most rural areas, which are characterized by a lack of easy access to grocery stores, physicians, and hospitals.
- Ji-Young Son & Michelle L. Bell, *Exposure to Animal Feeding Operations Including Concentrated Animal Feeding Operations (CAFOs) and Environmental Justice in Iowa, USA*, 1 *Env’t Rsch.: Health* 1, 7 (2023). In Iowa, areas with higher AFO exposure intensity—that is, where AFOs are larger and more dense—have higher percentages of Hispanic people, low-income people, and people with less than a high school education compared to areas with lower AFO concentrations.
- Ji-Young Son & Michelle L. Bell, *Concentrated Animal Feeding Operations (CAFOs) in Relation to Environmental Justice Related Variables in Wisconsin, United States*, J. *Exposure Sci. & Env’t Epidemiology* 1, 4 (2023). In Wisconsin, areas with higher AFO exposure intensity—that is, where AFOs are larger and more dense—have higher percentages of Hispanic people and Black people compared to areas with lower AFO concentrations.

Not only do these studies show the geographic range of the disparate harms that AFOs cause, but they likewise reveal the even greater environmental injustice that larger AFOs cause. For example, in North Carolina, the percent of Black, Hispanic, and American Indian residents living within three miles of a Large swine CAFO is 1.42, 1.57, and 2.20 times higher, respectively, than the percent of non-Hispanic Whites.<sup>51</sup> This translates into tens of thousands of people at greater risk.<sup>52</sup> And although Large swine CAFOs impose more of an unequal burden than swine CAFOs of all sizes, the percent of Black, Hispanic, and American Indian residents living within three miles of *any* swine CAFO in North Carolina is still disproportionately high, at 1.34, 1.37, and 2.05 times higher, respectively, than the percent of non-Hispanic Whites.<sup>53</sup>

Also problematic, Large swine CAFOs in North Carolina are disproportionately located in low-income census blocks—that is, census blocks in which more than 35 percent of households fall below the 200 percent poverty level.<sup>54</sup> The percent of North Carolina residents in low-income census blocks living within three miles of a Large swine CAFO is 15 times higher than the percent of residents in higher-income census blocks, where fewer than 20 percent of households are below the 200 percent poverty level.<sup>55</sup> The percent of North Carolina residents in

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<sup>51</sup> See Arbor J.L. Quist et al., *Disparities of Industrial Animal Operations in California, Iowa, and North Carolina* 5 (2022), at 5 [https://earthjustice.org/wp-content/uploads/quistreport\\_cafopetition\\_oct2022.pdf](https://earthjustice.org/wp-content/uploads/quistreport_cafopetition_oct2022.pdf), attached as Exhibit 2.

<sup>52</sup> If people of all races and ethnicities in the study area were exposed to Large swine CAFOs at the same rate, then approximately 53,000 fewer Black residents, 29,400 fewer Hispanic residents, and 16,000 fewer American Indian residents would live within three miles of a Large swine CAFO. *Id.*

<sup>53</sup> *Id.* at 27.

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Id.* at 6.

low-income census blocks living within three miles of *any* swine CAFO is up to nine times higher than the percent of residents in higher-income census blocks.<sup>56</sup>

Like Large swine CAFOs in North Carolina, Large dairy cow CAFOs in California's Central Valley also disproportionately burden communities of color. The percent of Hispanic and American Indian residents living within three miles of a Large dairy cow CAFO in the Central Valley is 1.54 and 1.15 times higher, respectively, than the percent of non-Hispanic Whites,<sup>57</sup> while the percent of Hispanic and American Indian residents living within three miles *any* dairy cow CAFO is 1.32 and 1.05 times higher, respectively.<sup>58</sup> This amounts to hundreds of thousands of environmental justice community members unjustly exposed to toxic emissions from CAFOs.<sup>59</sup>

Similarly, Large dairy cow CAFOs disproportionately burden low-income communities in the Central Valley. The percent of residents in low-income census blocks living within three miles of a Large dairy cow CAFO is 2.5 times higher than the percent of residents in higher-income census blocks,<sup>60</sup> while the percent of residents in low-income census blocks living within three miles *any* Large dairy cow CAFO is up to 1.7 times higher than the percent of residents in higher-income census blocks.<sup>61</sup>

Even in states where AFOs do not overburden environmental justice communities at the statewide level, studies show that larger AFOs cause environmental injustice. For example, in parts of Iowa where AFOs are located, larger AFOs tend to be in areas where there are higher percentages of Hispanic people, low-income people, and people with less than a high school education.<sup>62</sup> Likewise, in areas of Wisconsin where AFOs are located, larger AFOs tend to be in areas with higher percentages of Hispanic people and Black people.<sup>63</sup>

Taken together, these studies make clear that AFOs—and larger operations, in particular—cause environmental injustice across the country. To help community members better protect themselves from toxic air pollution from AFOs, EPA must reinstate EPCRA reporting.

## **II. Implementation**

### **a. The EEMs are not necessary for EPCRA reporting. (Issues 2, 7, 8, 9, 41)**

EPA need not and should not wait for issuance of the EEMs to reinstate EPCRA reporting, as there already exist several reliable methods that EPA and AFO operators can use to

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<sup>56</sup> *Id.* at 28.

<sup>57</sup> *Id.* at 6.

<sup>58</sup> *Id.* at 27.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 28.

<sup>62</sup> See Ji-Young Son & Michelle L. Bell, *Exposure to Animal Feeding Operations Including Concentrated Animal Feeding Operations (CAFOs) and Environmental Justice in Iowa, USA*, 1 *Env't Rsch.: Health* 1, 7 (2023).

<sup>63</sup> *Id.*

estimate air emissions from a variety of AFO types.<sup>64</sup> Indeed, in the context of addressing PM<sub>2.5</sub> pollution under the CAA, EPA expressly rejected requests that it delay certain regulations until it finalizes the EEMs.<sup>65</sup> EPA explained that “[u]pdated emissions estimating methodologies for animal feeding operations are under development using data collected . . . pursuant to the [NAEMS study],” but it “disagree[d] that implementation planning should wait until NAEMS results are fully available.”<sup>66</sup> According to EPA, “the full use and implementation of new [emissions estimating] methods based on these data is not a prerequisite for progress on considering ammonia as a PM<sub>2.5</sub> precursor for the [National Ambient Air Quality Standards] implementation purposes.”<sup>67</sup> So too here.

In the TBD, EPA demonstrates that it already has methods to estimate ammonia and hydrogen sulfide emissions from a variety of types of AFOs. EPA’s approach in the TBD relies on a synthesis of emission factors, which reflect the expected amount of ammonia or hydrogen sulfide produced per day per animal. These emission factors are drawn from direct observations of emissions collected through the NAEMS study, as well as observations published in peer-reviewed literature. EPA then multiplies these emission factors by the number of animals in a facility to estimate the total mass of ammonia or hydrogen sulfide expected to be generated by a facility of a given size in a day. EPA uses this approach to determine the universe of potentially regulated facilities and assess the effects of AFO emissions on environmental justice communities, generating emission estimates at the county level, tribal level, and Census block group level for five states. As EPA summarizes in the TBD, there already exist emission factors for a variety of animal types, including beef cattle, dairy cattle, swine, sheep, turkeys, layers, and broilers.<sup>68</sup> Thus, EPA already has and uses scientifically sound methods to estimate emissions from a variety of types of AFOs.<sup>69</sup>

EPA should continue to refine its current methods of estimating emissions. To ensure the accuracy and reliability of its emission factors, EPA must use emission factors that reflect the full lifecycle of animal waste emissions, including for example, emissions from manure storage and field application.<sup>70</sup> In its current synthesis, EPA only includes emission factors representing emissions from swine confinement buildings. But facilities must be required to report emissions from each stage of animal waste handling, including storage in lagoons. EPA may also propose emission factors stratified by different geographic regions or different climate regimes, as explored by Li et al.<sup>71</sup> And, to ensure that its methods account for emissions from all the animal waste at a facility, EPA must require that if an operation accepts animal waste from another

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<sup>64</sup> See Decl. of Viney P. Aneja ¶¶ 9–12 (Feb. 12, 2024), attached as Exhibit 3 (“Viney Decl.”).

<sup>65</sup> See Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements, 81 Fed. Reg. 58010-01, 58032–33 (Aug. 24, 2016).

<sup>66</sup> *Id.* at 58032.

<sup>67</sup> *Id.* at 58033.

<sup>68</sup> See TBD at 10, Tbl. 2-2.

<sup>69</sup> See Viney Decl. ¶ 10.

<sup>70</sup> *Id.* ¶ 14; see also Lowry A. Harper, et al., *Changes in Swine Ammonia Emissions Associated with Improved Production Management*, 51 J. Env’t Quality 1118 (2022); Richard H. Grant & Matthew T. Boehm, *Hydrogen Sulfide Emissions from a Midwestern Manure Slurry Storage Basin*, 51 J. Env’t Quality 152 (2022); Viney P. Aneja et al., *Characterization of Atmospheric Ammonia Emissions from Swine Waste Storage and Treatment Lagoons*, 105 J. Geophysical Rsch. 11535 (2000).

<sup>71</sup> See Viney Decl. ¶ 15; see also G. Li, G. et al., *Evaluating Draft Environmental Protection Agency Emissions Models for Broiler Operations*, 32 J. Applied Poultry Rsch. (2023).

facility, it accounts for emissions from that waste. To do so, EPA could require the operation to estimate the number of animals that generated the waste and add that number to the number of animals confined at the operation.

While it is important to continue improving the accuracy of EPA's estimation methods, this should not delay implementation of EPCRA reporting requirements. The existing emission factors already provide an accurate, accessible, and ready-to-deploy method of estimating emissions for a range of facility types.<sup>72</sup> Indeed, they have already allowed EPA to determine the universe of potentially regulated facilities, and EPA can use the same approach to determine de minimis reporting thresholds and to aid AFO operators with reporting their emissions.<sup>73</sup>

More complex approaches, including statistical models that predict emissions based on meteorological data, facility information, and other predictors (such as those in the EEMs), and process-based models that predict emissions based in part by representing the actual biophysical processes generating emissions, are also available.<sup>74</sup> For example, Rumsey and Aneja developed a mass-transfer model to predict hydrogen sulfide emissions from manure at swine CAFOs.<sup>75</sup> Similarly, McQuilling and Adams developed process-based models to predict ammonia emissions from beef cattle, swine, and poultry operations.<sup>76</sup> EPA itself has relied on a separate, more complex methodology to estimate ammonia emissions from AFOs for the National Emissions Inventory.<sup>77</sup> EPA may continue to draw from these examples to develop more complex models to predict emissions in the future, but it should not delay implementation of EPCRA reporting while it does so, as there already exist reliable methods to estimate emissions in the meantime.

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<sup>72</sup> See Viney Decl. ¶ 11.

<sup>73</sup> *Id.* ¶ 13.

<sup>74</sup> See Ian C Rumsey & Viney P Aneja, *Measurement and Modeling of Hydrogen Sulfide Lagoon Emissions from a Swine Concentrated Animal Feeding Operation*, 48 *Env't Sci. & Tech.* 1609 (2014); see also Patrick T. O'Shaughnessy & Ralph Altmaier, *Use of AERMOD to Determine a Hydrogen Sulfide Emission Factor for Swine Operations by Inverse Modeling*, 45 *Atmospheric Env't* 4617 (2011); Alyssa M. McQuilling & Peter J. Adams, *Semi-empirical Process-based Models for Ammonia Emissions from Beef, Swine, and Poultry Operations in the United States*, 120 *Atmospheric Env't* 127 (2015); Bryan Bunton et al., *Monitoring and Modeling of Emissions from Concentrated Animal Feeding Operations: Overview of Methods*, 115 *Env't Health Persps.* 303 (2007); Richard H. Grant, *Variation in Hydrogen Sulfide Emissions from a U.S. Midwest Anaerobic Dairy Lagoon*, 50 *J. Env't Quality* 1063 (2021).

<sup>75</sup> See Ian C Rumsey & Viney P Aneja, *Measurement and Modeling of Hydrogen Sulfide Lagoon Emissions from a Swine Concentrated Animal Feeding Operation*, 48 *Env't Sci. & Tech.* 1609 (2014).

<sup>76</sup> See Alyssa M. McQuilling & Peter J. Adams, *Semi-empirical Process-based Models for Ammonia Emissions from Beef, Swine, and Poultry Operations in the United States*, 120 *Atmospheric Env't* 127 (2015).

<sup>77</sup> See EPA, *Technical Support Document (TSD): Preparation of emissions inventories for the version 7.1 2014 Emissions Modeling Platform for the National Air Toxics Assessment*, at 84–85 (2018), <https://www.epa.gov/air-emissions-modeling/2014-version-71-technical-support-document-tsd>; see also Zue, Henze, et al., *Constraining U.S. Ammonia Emissions using TES Remote Sensing Observations and the GEOS-Chem Adjoint Model*, 118 *J. Geophysical Rsch.: Atmospheres* 3355 (2013).

**b. EPA cannot further delay reinstating EPCRA reporting while it finalizes the EEMs. (Issue 2)**

The D.C. Circuit has made clear that EPCRA “set[s] forth a straightforward reporting requirement for any non-exempt release (over the reportable quantity).”<sup>78</sup> Exempting AFOs from EPCRA reporting “can’t be justified . . . as a reasonable interpretation” of the statute.<sup>79</sup> Despite this ruling, EPA has continued to allow AFOs to avoid reporting their dangerous emissions under EPCRA.<sup>80</sup> Delaying reinstating reporting until EPA finalizes the EEMs is not only unnecessary for the reasons above, but it also would further prolong EPA’s unlawful exemption.

As detailed above, developing the EEMs has taken EPA well beyond its first estimated time of completion in 2010, and it still has not completed them.<sup>81</sup> Even when EPA finalizes the EEMs, they almost certainly will be subject to litigation, causing further—and likely lengthy—delay. All the while, at-risk community members will remain in the dark about hazardous substances in the air they breathe. Because linking reinstating reporting to finalizing the EEMs would result in further delay and, thus, further extension of EPA’s unlawful exemption, EPA must promptly reinstate reporting using one of the already existing methods for estimating emissions described above.

**c. Very few small operations will exceed the RQs and be subject to reporting requirements. (Issues 31, 34)**

As EPA notes in its analysis of the potential universe of regulated facilities, only approximately three percent of farms nationwide are expected to be subject to reporting requirements,<sup>82</sup> all of which confine hundreds, thousands, or even more animals.<sup>83</sup> For example, according to EPA’s analysis:<sup>84</sup>

- Only broiler chicken operations with over 151,000 chickens are expected to produce 100 pounds or more of ammonia per day, and no broiler chicken operation would ever produce over 100 pounds of hydrogen sulfide per day.
- Only turkey operations with over 92,000 turkeys are expected to produce 100 pounds or more of ammonia per day, and no turkey operation would ever produce over 100 pounds of hydrogen sulfide per day.
- Only layer chicken operations with over 11,300 chickens are expected to produce 100 pounds or more of ammonia per day, and no layer chicken operation would ever produce over 100 pounds of hydrogen sulfide per day.

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<sup>78</sup> *Waterkeeper All.*, 853 F.3d at 535.

<sup>79</sup> *Id.* at 537.

<sup>80</sup> *See supra* Procedural Background.

<sup>81</sup> *See* EPA, *National Air Emissions Monitoring Study* (Nov. 20, 2023), <https://www.epa.gov/afos-air/national-air-emissions-monitoring-study>.

<sup>82</sup> *See* TBD at 12.

<sup>83</sup> *Id.* at 11, Tbl. 2-4.

<sup>84</sup> *Id.* at 10, Tbl. 2-2.



- Only beef feedlots with over 900 cows are expected to produce 100 pounds or more of ammonia per day, and no beef feedlot would ever produce over 100 pounds of hydrogen sulfide per day.
- Only swine finishing operations with over 600 pigs are expected to produce 100 pounds or more of ammonia per day, and no swine finishing operation would ever produce over 100 pounds of hydrogen sulfide per day.
- Only dairy cow operations with over 200 cows are expected to produce 100 pounds or more of ammonia per day, only dairy cow operations with over 2,500 cows would ever produce over 100 pounds of hydrogen sulfide per day.

Only 2,999 of the operations that are expected to be required to report are considered “small”<sup>85</sup> (although, as shown above, those operations still confine hundreds of animals), which represents just 0.2 percent of farms nationwide.<sup>86</sup> Most of the smaller operations that likely would be covered confine swine (75 percent) or dairy cows (25 percent).<sup>87</sup> These smaller swine AFOs represent only about three percent of all swine farms,<sup>88</sup> and the smaller dairy AFOs represent about 1.4 percent of all dairy farms.<sup>89</sup>

**d. EPA should develop an online emissions calculator that directs to a continuous release reporting webform. (Issues 4, 5)**

EPA should develop an online emissions calculator that uses one of the methods described *supra* in Section II.a to generate emissions estimates. A calculator based on one of those methods would simplify emissions estimating for AFOs, as it would require AFO operators to input only a few pieces of information that they already possess, such as the location of the operation, the species and number of animals confined, and the amount of outside waste accepted, if any. If the calculator generates an estimate above the RQs, it should direct the user to a continuous release reporting webform, as most AFO emissions meet the definition of continuous releases, for the reasons discussed *infra* in Section II.f. Providing AFO operators with an emissions calculator that directs them to a continuous release reporting webform will minimize any burdens from emissions estimating and reporting.

**e. EPA should develop de minimis thresholds below which reporting is not required. (Issue 10)**

EPA should develop de minimis thresholds that reflect the sizes at which different types of operations typically will not exceed the RQs and, thus, are not required to report. For the vast majority of small farms, this would eliminate the need to even estimate their emissions, thereby significantly reducing any burdens to them from reinstating reporting. EPA can use the available

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<sup>85</sup> *Id.* at 11, Tbl. 2-4.

<sup>86</sup> *Id.* at 11, Tbl. 2-4, 12.

<sup>87</sup> *Id.* at 11, Tbl. 2-4.

<sup>88</sup> *Id.* at 11, Tbls. 2-3, 2-4.

<sup>89</sup> *Id.*



methods described *supra* in Section II.a. to develop the thresholds. Specifically, just as it did to determine the universe of potentially regulated facilities and to estimate emissions for its environmental justice analysis, EPA can perform a simple calculation using the number of animals and the relevant emission factor to determine the sizes at which different types of operations could not conceivably emit above the RQs. While EPA may choose a more complex model—such as the draft EEMs, as it does in Appendix E—to account for meteorological and other sources of variation in emissions, the simpler, already-available method provides an easy and ready-to-implement approach.

Should EPA decide to implement de minimis thresholds, it must ensure that AFOs are not able to use these thresholds to avoid reporting obligations, in violation of EPCRA. *First*, EPA must specify that the de minimis threshold does not apply to atypical releases that do exceed the RQs, for example when pit agitation causes a spike in otherwise below-RQ emissions. In such cases, the facility size would not exempt it from reporting the emission. *Second*, EPA must ensure that if an operation accepts animal waste from another facility, it accounts for that waste when it assesses whether it falls below the threshold. *Third*, EPA must ensure that AFOs that are otherwise above the threshold are not able to avoid reporting by dividing themselves into smaller entities for reporting purposes such that each separately falls below the threshold. EPA could do this by making the threshold inapplicable to operations that are under the same ownership and located on contiguous properties.<sup>90</sup>

**f. EPA should define certain AFO emissions as continuous releases. (Issues 13, 14, 15, 16)**

EPA should define some—but not all—AFO emissions as continuous releases. Emissions from many aspects of AFO waste storage and handling are anticipated, intermittent, and occur during normal operating procedures and, thus, meet the definition of continuous releases.<sup>91</sup> For example, emissions from ventilating confinement buildings, storing waste in pits and piles, and applying waste to fields pursuant to a nutrient management plan (“NMP”) satisfy EPA’s definition. Defining these types of emissions as continuous releases aligns with the emission estimation methods discussed *supra* in Section II.a, which are based on emissions factors reflecting the range of emission rates observed over a longer period of time. Thus, EPA and AFO operators could use one of these methods to determine whether an AFO releases above the RQs *and* to determine the upper and lower bounds of its normal range of releases, as required for continuous release notification.

However, not all AFO emissions are continuous releases. Emissions from waste storage structure overflows and failures and from overapplying waste to fields do not occur during normal operating procedures and, thus, do not qualify. In addition, emissions from agitating waste storage pits should not constitute continuous releases. While those emissions may be

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<sup>90</sup> This approach aligns with courts’ interpretation of “facility” under EPCRA. *See Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 711 (W.D.Ky. 2003) (“Each of defendants’ chicken production operations is a facility under this definition. The chicken production operations include multiple chicken houses that are located on single or adjacent sites within a concentrated area. These chicken houses are owned by the same person for purposes of producing chickens. Accordingly, each of defendants’ chicken production operations is clearly a facility under EPCRA from which ammonia releases must be reported on a site-wide basis.”).

<sup>91</sup> *See* 40 C.F.R. § 302.8(b).

routine, anticipated, and incidental to normal operations, multiple studies show that their levels typically far exceed those from other routine waste storage and handling practices.<sup>92</sup> Treating emissions from waste storage pit agitation as continuous releases would greatly increase the upper bound of an AFO's normal range of releases. As a result, an AFO would be able to escape notifying local emergency response agencies and the public of even a very high release when it occurs, creating a serious risk of harm to workers and community members and undermining the purpose of EPCRA.

If EPA defines any AFO emissions as continuous releases, it should require Local Emergency Planning Committees and State Emergency Response Commissions to make all written continuous release notifications available to the public. As EPA recognizes, EPCRA “has an important community right-to-know component that provides for public availability of release notifications.”<sup>93</sup> However, EPCRA's public availability provisions do not extend to continuous release notifications.<sup>94</sup> To ensure that defining AFO emissions as continuous releases does not impede the public's ability to access information necessary for protecting their health, EPA must require local emergency response agencies to make all written continuous release notifications available to the public.

To ensure that defining some AFO emissions as continuous releases is useful to the public and does not hide dangerous spikes in emissions, EPA must limit an AFO's continuous releases to emissions from ventilating confinement buildings, storing waste in pits and piles, and applying waste to fields pursuant to an NMP. This approach will ensure that AFOs are still required to report spikes in emissions from events such as waste pit agitation and waste pit overflows. The public will benefit from knowing the range of releases from the routine activities of the AFOs in their community. This information will allow community members to better understand how much ammonia and hydrogen sulfide they may be exposed to and which operations and areas pose especially serious threats. For example, Doctor Melissa Siebke, who is a resident of Steele County, Minnesota, where there are at least 20 AFOs, explains that if she had access to information on the AFOs' emissions, she would use it to “avoid areas where there are [AFOs] releasing high levels of pollutants when [she] drive[s] to work and in other aspects of [her] day-to-day life.”<sup>95</sup> And, community members will still receive notification when an AFO's emissions spike above the normal range. With this information, they will be able to advocate for stronger health protections and make informed decisions to protect their health and the health of their family members.<sup>96</sup>

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<sup>92</sup> See Steven J. Hoff et al., *Emissions of Ammonia, Hydrogen Sulfide, and Odor before, during, and after Slurry Removal from a Deep-Pit Swine Finisher*, 56 J. Air Waste Mgmt. Assoc. 581 (2006); see also Hongjian Lin et al., *Simulation of Hydrogen Sulfide Emission from Deep-Pit Manure Storage During Agitation*, 61 Transactions of the ASABE 1951 (2018).

<sup>93</sup> Advance Notice at 80,225.

<sup>94</sup> See 42 U.S.C. § 11044(a).

<sup>95</sup> Decl. of Doctor Melissa Siebke ¶¶ 11, 18, *Rural Empowerment Ass'n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 4.

<sup>96</sup> See *infra* Section III.b.

**g. Citizen suits offer important protections without threatening excessive or burdensome litigation. (Issues 18, 19)**

Citizen suits are an important tool for holding polluters accountable for failing to comply with the law. Indeed, Congress’s inclusion of citizen suit provisions in statutes reflects its position that “citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.”<sup>97</sup> Although there are very few instances of citizen suits against AFOs for violating EPCRA’s reporting requirements, the existing cases show that citizen suits give community members the opportunity to challenge particularly egregious reporting violations. For example, in *Don’t Waste Arizona, Inc. v. Hickman Egg Ranch, Inc.*, neighbors of a poultry AFO that confined millions of chickens brought a citizen suit against the operation for failing to report emissions of over 1,500 pounds of ammonia per day,<sup>98</sup> which is over 15 times the 100-pound-per-day RQ for ammonia. In *Humane Society of the United States v. Hanor Co. of Wisconsin, LLC*, neighbors of a swine AFO that confined over 8,500 pigs brought a citizen suit for its failure to report emissions of up to 600 pounds of ammonia per day over a period that spanned approximately three years.<sup>99</sup> And in *Sierra Club, Inc. v. Tyson Foods, Inc.*, neighbors of poultry AFOs that confined 400,000 to 600,000 chickens brought a citizen suit for its failure to report emissions of over 200 pounds of ammonia every day, over double the RQ.<sup>100</sup> The parties ultimately entered into a settlement agreement that required Tyson to study, report, and consider options for mitigating its ammonia emissions.<sup>101</sup>

Although citizen suits are an important tool, they are also subject to limitations that ensure that they do not overwhelm regulated parties or courts with excessive or burdensome litigation. *First*, citizens must provide the AFO and the federal and state government with 60 days’ notice of an alleged violation prior to filing suit, so that the AFO may correct the violation or the government may pursue an enforcement action.<sup>102</sup> If the government diligently pursues enforcement, citizens cannot bring suit.<sup>103</sup> In this way, “the purpose of citizen suits is . . . to step in when local agencies fail to exercise their enforcement responsibility.”<sup>104</sup> *Second*, under *Steel Co. v. Citizens for a Better Environment*, citizens are likely to face difficulties establishing standing to maintain suits for “purely past violations” of EPCRA.<sup>105</sup> In other words, if community members submit a 60-day notice and the AFO remedies the alleged violation by submitting the required reports, the community members are unlikely to have standing to sue.<sup>106</sup> Given the very low burden of submitting release reports, AFOs almost certainly will be able to

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<sup>97</sup> *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

<sup>98</sup> See *Don’t Waste Arizona, Inc. v. Hickman Egg Ranch, Inc.*, No. CV-16-03319-PHX-GMS, 2018 WL 1318874, at \*1 (D. Ariz. Mar. 1, 2018).

<sup>99</sup> See Compl. ¶¶ 26, 49, 57, *Humane Society of the U.S. v. Hanor Co. of Wisconsin, LLC*, 289 F. Supp. 3d 692 (E.D.N.C. 2018).

<sup>100</sup> See Compl. ¶¶ 18–21, 42, *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693 (W.D.Ky. 2003); see also *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp.2d at 707.

<sup>101</sup> See Tarah Heinzen, *Stopping the Campaign to Deregulate Factory Farm Air Pollution*, 17 N.Y.U. Env’t L. J. 1482, 1505 (2009).

<sup>102</sup> See 42 U.S.C. §§ 11046(d)–(e).

<sup>103</sup> *Id.* § 11046(e).

<sup>104</sup> *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d at 706.

<sup>105</sup> See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 106–10 (1998).

<sup>106</sup> See *id.*

remedy alleged violations and thereby prevent citizen suits. For the same reason, the frequency or number of 60-day notices submitted to AFOs is not reflective of any significant burdens on them. *Third*, if EPA defines certain AFO emissions as continuous releases, the reduced reporting requirements would mean even fewer instances in which community members could bring a citizen suit.

Community members are unlikely to bring a citizen suit to challenge an inaccurate estimate in an AFO's emergency release report. *First*, citizen suits require a significant amount of time and money, and community members are unlikely to put these resources toward minor inaccuracies. *Second*, EPCRA and its implementing regulations present challenges for suits over inaccurate estimates. EPCRA allows for suits under only four specific circumstances, which do not include inaccuracies in follow-up emergency release notifications.<sup>107</sup> Moreover, EPA's regulations allow facilities to update their emergency release notifications, and facilities may continue to provide updates as more information becomes available.<sup>108</sup> So, even if a facility's initial or follow-up notifications contain inaccurate estimates, the facility can correct the estimates and thereby avoid a citizen suit.

For all these reasons, citizen suits serve an important but narrow role in vindicating EPCRA's protections.

**h. Reinstating EPCRA reporting will not present privacy concerns for small operations. (Issues 22, 23)**

As shown by EPA's own analysis, very few small operations emit above the RQs,<sup>109</sup> so reinstating reporting will not present privacy concerns for the overwhelming majority of small operations. And for all operations, EPA and local emergency response agencies can eliminate privacy concerns by excluding the name and telephone number of the person in charge of the operation from the information they make available to the public. This type of personal identifying information is regularly reported to the government and yet remains protected from disclosure.

**i. EPA should develop a National EPCRA Database. (Issues 24, 27)**

EPA should develop a national database to receive release notifications and other EPCRA submissions—including continuous release reports—and make them available to the public. Under EPCRA, state and local emergency response agencies must make release notifications available to the public at a location designated by the agency.<sup>110</sup> Agencies can satisfy this obligation by requiring members of the public to submit written records requests for the information.<sup>111</sup> However, public records requests do not always result in access to the requested records. For example, researchers studying the availability of information on air pollution from

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<sup>107</sup> See 42 U.S.C. § 11046(a)(1)(A).

<sup>108</sup> See 40 C.F.R. § 355.40(b).

<sup>109</sup> See Advance Notice at 80,233.

<sup>110</sup> See 42 U.S.C. § 11044(a).

<sup>111</sup> See State of North Carolina Governor Roy Cooper, Exec. Order No. 242 (Dec. 17, 2021), <https://governor.nc.gov/executive-order-no-242/open>.

AFOs submitted requests for EPCRA release reports in seven states but did not receive any records from two states.<sup>112</sup> New York—one of the top five dairy-cow producing states<sup>113</sup>—reported that the records could not be found, and North Carolina—one of the top five pig-producing states<sup>114</sup>—did not respond to the request.<sup>115</sup>

A national database would allow the public to more quickly and easily access information on AFO releases. Making this information available to the public in an easily accessible and digestible format could also reduce health risks from AFO releases. A study of data collected through the Toxic Release Inventory Program, which gathers annual data on releases of certain toxic chemicals, found that the toxic risk—that is, the total releases adjusted to reflect the toxicity of each chemical—was 14.2 percent lower when states processed the data and presented it alongside information on health effects, rather than releasing only the raw data.<sup>116</sup> EPA’s national database could also process the data and adjust it to reflect the toxicity of ammonia and hydrogen sulfide to reduce the toxic risk they pose.

A national database would also facilitate research on AFO emissions and their effects on communities, including environmental justice communities. As EPA recognizes, state and local agencies currently use a patchwork of systems to collect EPCRA submissions and make them available to the public,<sup>117</sup> making it difficult to access data across multiple states. This, in turn, makes it challenging for scientists and public health researchers to study AFO emissions and their effects on a large scale.<sup>118</sup> A national database would help correct this problem by compiling data from across the country and making it easily accessible to researchers.

### III. Costs and Benefits

In both the Advance Notice and the TBD, EPA gives much greater attention to the costs of reinstating EPCRA reporting than the benefits. Four of EPA’s requests for information concern burdens, while only two concern benefits, and those two ask for only limited information on environmental justice benefits and indirect benefits.<sup>119</sup> EPA also estimates the monetary value of the burdens of reinstating reporting but does not estimate the value of the

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<sup>112</sup> See Tyler J. S. Smith et al., *Availability of Information about Airborne Hazardous Releases from Animal Feeding Operations*, 8 PLOS ONE 1, 5 (2013).

<sup>113</sup> See Univ. of Iowa Dep’t of Geographical & Sustainability Scis., *CAFOs in the US: The Wheres and Whys of Industrial Meat Production in the United States*, <https://cafomaps.org/index.html> (drawing from the 2017 Census of Agriculture).

<sup>114</sup> *Id.*

<sup>115</sup> See Smith et al, *supra* note 112, at 5.

<sup>116</sup> See Hyunhoe Bae et al., *Information Disclosure Policy: Do State Data Processing Efforts Help More than the Information Disclosure Itself?*, J. Policy Analysis & Mgmt. 163, 174 (2010).

<sup>117</sup> See Advance Notice at 80,231.

<sup>118</sup> See Congressional Rsch. Serv., *Air Quality Issues and Animal Agriculture: A Primer* 1 (2016) (describing a “lack of adequate, accurate, scientifically credible data on air emissions from AFOs, data that are needed to gauge possible adverse impacts and subsequent implementation of control measures”).

<sup>119</sup> See Advance Notice at 80,232–33.

benefits. Despite this imbalance, EPA’s analysis still shows that the burdens will be low. And, once EPA fully accounts for all the benefits, as it must,<sup>120</sup> the benefits will be significant.

**a. Any burdens to operations will be minimal. (Issues 32, 33)**

As discussed above and in the TBD, EPA can take many steps to minimize any burdens from reinstating EPCRA reporting. *First*, establishing de minimis thresholds will allow the smallest operations to avoid even estimating their emissions. *Second*, developing an emissions calculator will simplify estimating emissions for other operations. *Third*, defining certain AFO emissions as continuous releases will lower the burden of reporting for operations that emit above the RQs, as continuous releases are subject to reduced reporting requirements. And, as EPA notes, AFO operators already have the information they would need to use the emissions calculator and complete the continuous release notifications, such as the location of the operation, the species and number of animals confined, the amount of outside waste accepted, the hazardous substance released, and the source and frequency of the release.<sup>121</sup>

EPA’s estimate of the monetary cost of reinstating EPCRA reporting confirms that costs will be minimal. All told, the cost to an operation of reporting—including becoming familiar with the reporting requirements, determining whether the requirements apply, and submitting the required continuous release notifications—would be only \$443 in the first year and \$4 for each of the following years.<sup>122</sup> Even for operations that meet the Small Business Administration’s definition of small businesses, this first-year cost would be less than one percent of their annual sales, and the cost in subsequent years would be trivial.<sup>123</sup> And for operations that fall below the de minimis threshold or do not emit above the RQs, the cost of reinstating reporting would be even lower.<sup>124</sup>

**b. Reporting will offer significant benefits, particularly in environmental justice communities. (Issues 36, 37)**

EPCRA’s reporting requirements offer significant benefits, which EPA acknowledges for other industries.<sup>125</sup> Yet, EPA gives the benefits of reporting relatively little attention in the Advance Notice. When deciding whether to reinstate EPCRA reporting, EPA must consider all the benefits,<sup>126</sup> including: (1) allowing community members to educate themselves and others

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<sup>120</sup> See *Chamber of Commerce of the U.S. v. SEC*, 85 F.4th 760, 770 (5th Cir. 2023) (explaining that a regulation is arbitrary and capricious if the agency fails to consider an important aspect of the problem, which “includes, of course, considering the costs and benefits associated with the regulation” (quoting *Mexican Gulf Fishing Co. v. U.S. Dep’t of Commerce*, 60 F.4th 956, 973 (5th Cir. 2023))).

<sup>121</sup> See TBD at 17, 21.

<sup>122</sup> *Id.* at 24, Tbl. 3-11.

<sup>123</sup> See Advance Notice at 80,233.

<sup>124</sup> See TBD at 24, Tbl. 3-11.

<sup>125</sup> See, e.g., EPA, *EPA Ensuring Community’s Right to Know through Two Rhode Island Settlements* (Nov. 28, 2003), [https://www.epa.gov/newsreleases/epa-ensuring-communitys-right-know-through-two-rhode-island-settlements#:~:text=28%2C%202023\)%20%E2%80%93%20Under%20recently,Act%20\(EPCRA\)%20and%20the%20process](https://www.epa.gov/newsreleases/epa-ensuring-communitys-right-know-through-two-rhode-island-settlements#:~:text=28%2C%202023)%20%E2%80%93%20Under%20recently,Act%20(EPCRA)%20and%20the%20process) (explaining that settlements for two metal manufacturing facilities’ EPCRA violations “protect communities, employees, first responders, and the environment from accidental hazardous exposure through raised awareness”).

<sup>126</sup> See *Chamber of Commerce of the U.S.*, 85 F.4th at 770.

about the threats that AFO emissions pose and take steps to protect against them, (2) facilitating research on AFO emissions and the harms they cause, (3) helping local emergency response agencies develop emergency response plans and ensuring that they can respond when a release occurs, and (4) encouraging facilities to adopt more protective practices and reduce the amount of hazardous substances they emit. Given that AFO emissions often disproportionately burden communities of color and low-income communities,<sup>127</sup> these benefits are essential to addressing this environmental injustice.

*First*, reinstating EPCRA reporting would give community members the information they need to educate themselves and others about threats from AFO pollution and take steps to protect themselves. Indeed, one of EPCRA’s “two central objectives” is providing “public access to centralized information . . . concerning hazardous chemicals used, produced or stored in the community.”<sup>128</sup> According to Cynthia Parke, for example, who lives near multiple chicken CAFOs in Randolph County, Arkansas, she could use information on the AFOs’ emissions to “organize with [her] neighbors” and “be informed about effects to [her] property value, environment, and personal health.”<sup>129</sup> If she knew when an emergency release occurred, she “would keep [her] clothes off the line in the yard and stay inside.”<sup>130</sup> Candice Cook, who lives near a turkey CAFO with an estimated 20,000 to 25,000 turkeys in Huntingburg, Indiana, explains that if the CAFO reported its emissions, she “would be better equipped to protect [her] health and avoid the[] toxic gasses and smells.”<sup>131</sup> Judy Jolin, a resident of Pickett, Wisconsin who lives near a dairy cow CAFO with at least 10,000 cows, says that she would share information about the CAFO’s emissions with her doctor, so they could make informed decisions about her health.<sup>132</sup> And Devon Hall, a resident of Duplin County, North Carolina, where there

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<sup>127</sup> See *supra* Section I.b.

<sup>128</sup> *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 746 (W.D.N.Y. 1991); see *Ctr. for Biological Diversity, Inc. v. BP Am. Production Co.*, 704 F.3d 413, 430 (5th Cir. 2013) (explaining that EPCRA makes “vital health information available in one easily accessible place”).

<sup>129</sup> Decl. of Cynthia Parke ¶ 14, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 5.

<sup>130</sup> *Id.* ¶ 13.

<sup>131</sup> Decl. of Candice Cook ¶ 13, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 6; see also Decl. of Robert Hudkins ¶ 15, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 7 (“I would use the information . . . to inform myself; my family and my community about the air contaminants, including ammonia being released from the facility; to ascertain our risks of exposure as a result of those releases; and to reasonably evaluate my safety, and the safety of anyone who I may be with, while enjoying the area surrounding this facility.”); Decl. of Heather Jacobs Deck ¶ 14, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 8 (“If information about the emissions from animal waste at livestock operations had to be reported in the same way that emissions from other industrial emissions were reported, emergency responders would be better able to protect the health and safety of the surrounding communities, and Sound Rivers and its members could use this information to take actions to protect their health.”).

<sup>132</sup> See Decl. of Judy Jolin ¶ 23, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 9; see also Decl. of Rosemary Patridge ¶ 16, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 10 (“I would be able to make wiser decisions about when we need to leave our house, avoid having people over to our home, or avoid being outside on our farm. It would also help me and my husband inform our doctor about issues that may be affecting our health, and could help us determine whether the CAFO emissions are causing or contributing to our ongoing health issues.”).

are over 520 AFOs, explains that “[d]aycare centers and schools might decide to keep kids inside on days when the air quality is especially bad.”<sup>133</sup>

*Second*, reinstating reporting would facilitate research on AFO emissions and the harms they cause. According to the Union of Concerned Scientists, “[b]y not collecting the data [on AFO emissions], scientists, political leaders, and concerned citizens are robbed of information that can help reduce or prevent serious health problems in nearby communities.”<sup>134</sup> The lack of data on AFO emissions also obscures the full extent to which they disproportionately burden environmental justice communities. According to one scholar, “EPCRA’s informational mandate is more salient than ever to the cause of environmental justice, as environmental and public health scholars continue to discover linkages between race, class, place, and environmental and health outcomes.”<sup>135</sup>

*Third*, reinstating reporting would help local emergency response agencies develop emergency response plans and ensure that they can respond when a release occurs. The second of EPCRA’s “two central objectives” is using the information “to formulate and administer local emergency response plans in case of a hazardous chemical release.”<sup>136</sup> Defining certain AFO emissions as continuous releases would help local agencies develop emergency response plans by informing them of the range of releases from each of the AFOs in their locality. This would, in turn, alert them to the areas where emergency releases could occur and allow them to prepare a more informed response plan. When an emergency release occurs, the agency would be notified, allowing it to respond and take steps to mitigate any harms.

*Fourth*, reinstating reporting would encourage AFOs to adopt more protective practices and reduce the amount of hazardous substances they emit. Adopting more protective practices can come about as a result of EPA enforcement actions against AFOs that fail to comply with EPCRA. For example, in 2001, EPA entered into a consent decree with the owner of multiple swine CAFOs that had failed to report their releases under EPCRA.<sup>137</sup> The consent decree required the owner to monitor the operations’ ammonia and hydrogen sulfide emissions.<sup>138</sup> Emissions reductions could occur due to public pressure in response to the reported releases. Indeed, several studies show that “consumer and community activism . . . contribute[] markedly” to a decrease in releases.<sup>139</sup> For example, between 1988, when facilities were first required to report under the Toxic Release Inventory Program, and 2002, total disposal and release of toxic

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<sup>133</sup> Decl. of Devon Hall ¶ 13, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 11.

<sup>134</sup> Union of Concerned Scientists, *EPA Stops Collecting Data on Pollutants Released from Farms* (2019), <https://www.ucsusa.org/resources/attacks-on-science/epa-stops-collecting-data-pollutants-released-farms>.

<sup>135</sup> Danielle M. Purifoy, *EPCRA: A Retrospective on the Environmental Right-to-Know Act*, 13 *Yale J. Health Policy, Law, & Ethics* 375, 379 (2013).

<sup>136</sup> *Atlantic States Legal Found.*, 772 F. Supp. at 746.

<sup>137</sup> See Consent Decree, *Citizens Legal Env’t Action Network, Inc. v. Premium Standard Farms, Inc.*, Case Nos. 97-6073-CV-SJ-6 & 98-6099-CV-W-6, 2000 WL 220464 (W.D. Mo. 2001), <https://www.epa.gov/sites/default/files/documents/psfcd.pdf>.

<sup>138</sup> *Id.*

<sup>139</sup> Warren A. Braunig, *Reflexive Law Solutions for Factory Farm Pollution*, 80 *N.Y.U. L. Rev.* 1505, 1526 (2005); see Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions*, 32 *J. Env’t Economics & Mgmt.* 109 (1997).



chemicals decreased by 49 percent.<sup>140</sup> Community members and environmental advocacy organizations confirm that they would use AFO release information to push for reductions in emissions.<sup>141</sup> Max Wilson, a resident of Hickman, Kentucky who lives near at least three swine AFOs, says, “I would make use of this information to support my advocacy efforts to persuade these local large animal feeding operations to take steps to reduce or even eliminate such releases.”<sup>142</sup> As Devon Hall puts it, “As long as [AFOs] can keep their emissions a secret from community members and government regulators, these facilities have no incentive to clean up.”

EPA must estimate the monetary value of these benefits, to the extent feasible, and describe any benefits that it cannot monetize or quantify.<sup>143</sup> Contrary to EPA’s position in the TBD, EPA can monetize at least some of the benefits of reporting. For example, EPA can use the studies showing that the Toxic Release Inventory Program has brought about reductions in emissions and health risks to estimate similar reductions from reinstating reporting. EPA could then monetize the estimated reductions.<sup>144</sup>

#### IV. Small Operations

##### a. EPA may not exempt small operations from EPCRA reporting. (Issues 38, 39, 40, 41, 42)

The D.C. Circuit has made clear that EPA lacks the authority to exempt AFOs from EPCRA.<sup>145</sup> EPCRA contains a “sweeping reporting mandate” that “require[s] notification of

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<sup>140</sup> See Braunig, *supra* note 139, at 1526.

<sup>141</sup> See Decl. of Abel Russ ¶ 8, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 12 (explaining that the Environmental Integrity Project “uses public pollution data to advocate on behalf of the public for policies promoting environmental protection and the well-being of rural communities impacted by pollution from AFOs”); see also Decl. of Daniel E. Estrin ¶ 14, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 13 (explaining that Waterkeeper Alliance would use AFO emissions data “to advocate for better regulation of AFO’s and CAFOs’ air emissions”); Decl. of Jane Williams ¶ 10, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 14 (“This lack of information hampers Sierra Club’s efforts to inform its members about the harms of CAFO air emissions and to advocate for decreases or better protections from these emissions.”); Decl. of Lori Ann Burd ¶ 14, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 15 (“This information would help the [Center for Biological Diversity] and its members advocate for more effective regulation of AFOs and to hold AFO operators accountable for hazardous emissions.”); Decl. of Mark Walden ¶ 15, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 16 (“This information would empower [the Animal Legal Defense Fund] and its members to advocate for more effective regulation of AFOs and to hold AFO operators accountable for hazardous emissions.”); Decl. of Rebecca Jim ¶ 11, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 17 (“L.E.A.D. Agency and its members would use this data to advocate for better regulation of AFO’s and CAFOs’ air emissions, as well as distribute this information to our members who have a right to know about the hazardous air pollutants released from the operations near their homes and in their communities . . . .”); Decl. of Wenonah Hauter ¶ 21, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 18 (“[Food and Water Watch] would use this information to advocate for stronger regulation of dangerous AFO air pollution and to otherwise help address the suffering that our members living on the fence lines of AFOs are forced to endure.”).

<sup>142</sup> Wilson Decl. ¶ 10.

<sup>143</sup> See Office of Management and Budget, Circular No. A-4, at 27–28 (2023).

<sup>144</sup> See Circular No. A-4, at 48–51.

<sup>145</sup> See *Waterkeeper All.*, 853 F.3d at 534–35.

‘any release . . . of a hazardous substance . . . in quantities equal to or greater than’ the reportable quantities authorized under [the statute].”<sup>146</sup> Accordingly, EPA’s 2008 Rule exempting all but the largest AFOs from EPCRA reporting “[could not] be justified [] as a reasonable interpretation” of the statute.<sup>147</sup> The same would be true of a rule exempting any “small” operations that emit above the RQs from reporting. Whether the operations are deemed “small” due to their size, waste management methods, revenue, or number of employees, if they emit above the RQs, EPCRA requires them to report their emissions and does not give EPA the authority to exempt them from doing so.<sup>148</sup>

**b. Adjusting the RQs for ammonia and hydrogen sulfide emitted from animal waste would harm community members and offer minimal benefits to small operations. (Issues 44, 45)**

EPA should not adjust the RQs for ammonia and hydrogen sulfide emitted from animal waste, as doing so would put workers and community members at even greater risk of harm from AFO air pollution. The existing RQs are based on “specific scientific and technical criteria that relate to the possibility of harm from the release of a hazardous substance in a reportable quantity.”<sup>149</sup> The RQs for ammonia and hydrogen sulfide thus reflect levels at which exposure to these pollutants can cause harm. Raising the RQs would leave local emergency response agencies and community members unable to learn of and take precautions against these dangerous emissions.

EPA cannot point to any differences between ammonia and hydrogen sulfide emitted from animal waste and the same pollutants emitted from other sources to justify raising the RQs for emissions from animal waste. The threat that exposure to ammonia and hydrogen sulfide poses does not vary depending on the source of the emission. Indeed, in EPA’s responses to comments on the 2008 Rule, it acknowledged that “a toxic material is a toxic material and has the same health and environmental effects regardless of the source.”<sup>150</sup> Thus, it would be unreasonable to raise the RQs for ammonia and hydrogen sulfide emitted from animal waste.

Raising the RQs for emissions from animal waste would offer minimal benefits to “small” operations that emit above the existing RQs. As detailed above, EPA can reinstate EPCRA reporting without imposing significant burdens. AFOs that exceed the de minimis thresholds can use EPA’s online calculator to estimate their emissions, and if they emit above the RQs, they need only comply with the reduced reporting requirements for continuous releases. Moreover, the existing RQs already reflect EPA’s effort to “reduce the burdens of reporting on the regulated community, allow EPA to focus its resources on the most serious releases, and protect public health and welfare and the environment more effectively.”<sup>151</sup> Raising the RQs

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<sup>146</sup> *Id.* at 535 (quoting 42 U.S.C. § 9603(a)).

<sup>147</sup> *Id.* at 537.

<sup>148</sup> *See id.* at 534–35.

<sup>149</sup> EPA, Notification Requirements; Reportable Quantity Adjustments, 50 Fed. Reg. 13,456, 13,465 (April 4, 1985). Although EPA made this statement when it established RQs for the purpose of CERCLA reporting, the ammonia and hydrogen sulfide RQs for CERCLA reporting are the same as for EPCRA reporting.

<sup>150</sup> EPA, *Response to Comment Document CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms* 23 (2008), attached as Exhibit 19.

<sup>151</sup> 50 Fed. Reg. at 13,456.

would disrupt the balance that EPA already has struck between these goals, almost exclusively to the detriment of community members and the environment.

**c. Reports of emissions above the existing RQs are useful to state, tribal, and local emergency response agencies. (Issue 43)**

EPA cannot conclude that AFO release reports are not useful to local emergency response agencies. Indeed, the D.C. Circuit has already rejected this conclusion.<sup>152</sup> When EPA issued its proposed rule exempting AFOs from EPCRA reporting in 2007, it received multiple comments from local agencies explaining why release reports are useful to them. For example, the Oklahoma Hazardous Materials Emergency Response Commission opposed the rule, concurring with other commenters that release reporting provides crucial information to those responding to the release.<sup>153</sup> And, as the D.C. Circuit highlighted, the National Association of Clean Air Agencies, which represents hundreds of air pollution control agencies, “submitted Congressional testimony from an Iowa regulator saying that the [rule] ‘prevent[s] local, state, and federal emergency responders from having critical information about potentially dangerous releases’ and limits the ability of federal or state authorities to take action through ‘investigations or clean-up[s]’ or ‘issuing abatement orders.’”<sup>154</sup> In light of these comments, the D.C. Circuit explained that reporting offers “real benefits.”<sup>155</sup>

Since the D.C. Circuit’s decision, local emergency response agencies have reiterated the value of AFO release reports. Stephen Brittle, a long-time member of a Local Emergency Planning Committee, explains that “[t]he [committee] would use the daily release amounts reported by CAFOs to calculate the off-site consequences, generally using the [Areal Locations of Hazardous Atmospheres] software developed by EPA that determines the footprint of the release into affected areas downwind. Then there should be planning for an emergency response.”<sup>156</sup>

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AFOs emit the extremely hazardous gasses ammonia and hydrogen sulfide, and these emissions pose serious threats to people living nearby, including people living in communities of color and low-income communities. EPCRA requires facilities to report emissions of extremely hazardous substances, and EPA has unlawfully exempted AFOs from EPCRA reporting for far too long. EPA must rescind its unlawful exemption and reinstate EPCRA reporting for AFOs without further delay.

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<sup>152</sup> See *Waterkeeper All.*, 853 F.3d at 537.

<sup>153</sup> See Comment from Montressa Jo Elder, Oklahoma Hazardous Materials Emergency Response Commission, to Superfund Docket, U.S. EPA (Mar. 27, 2008), Docket No. EPA-HQ-SFUND-2007-0469-0994; see also Comment Letter from Timothy R. Gablehouse, Pres., Nat’l Ass’n of SARA Title III Program Officials, to Superfund Docket, U.S. EPA at 2 (Mar. 27, 2008), Docket No. EPA-HQ-SFUND-2007-0469-0990.

<sup>154</sup> *Waterkeeper All.*, 853 F.3d at 536 (quoting *Human Health, Water Quality, and Other Impacts of the Confined Animal Feeding Operation Industry: Hearing Before the S. Env’t & Pub. Works Comm.*, 110th Cong. 1 (2007)).

<sup>155</sup> *Id.* at 537.

<sup>156</sup> Decl. of Stephen Brittle ¶ 16, *Rural Empowerment Ass’n for Cmty. Help v. EPA*, No. 18-2260 (TJK) (D.D.C. Dec. 23, 2021), attached as Exhibit 20.

Respectfully submitted,

Don't Waste Arizona

Earthjustice

Humane Society of the United States

Rural Empowerment Association for Community Help

Sierra Club

Waterkeeper Alliance