STUDENT ESSAY COMPETITION WINNER

STOPPING THE CAMPAIGN TO DEREGULATE FACTORY FARM AIR POLLUTION

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INTRODUCTION

In June 2008, the Minnesota Department of Health urged rural residents in Thief River Falls to evacuate their homes because of dangerous levels of hydrogen sulfide gas from the nearby 1,500 head Excel Dairy.[1] According to the Minnesota Pollution Control Agency, repairs and manure pit construction at the facility required transferring and agitation of the animal waste, leading to worse-than-usual odors and emissions.[2] By one measure, the hydrogen

[1] Press Release, Clean Water Action Alliance of Minnesota, Families in Thief River Falls Urged to Flee Homes: Toxic Gas from Factory Farm Hazardous to Health (June 10, 2008).

[2] *See* Stephanie Hemphill, *Morning Edition: Fumes From Dairy Cause Neighbors to Evacuate* (Minnesota Public Radio broadcast June 10, 2008), *transcript available at* http://minnesota.publicradio.org/display/web/2008/06/09/farm/.

sulfide fumes from the dairy had reached 6,800 parts per billion[3]—a level that poses an immediate public health threat.[4] Minnesota's state-owned hydrogen sulfide monitors only measure up to 90 parts per billion, however, and one such state monitor at the Excel Dairy hit its maximum on several occasions prior to the evacuation.[5] As a result, though repeated odor complaints had spurred the state to place one of its few air monitors at the site, the state received only a limited picture of the pollution the neighbors were facing. In June, the extremely high monitoring results, coupled with complaints from nearby residents sickened by the emissions, led the Health Department to act.[6] Following the evacuation, Minnesota's Attorney General and the Minnesota Pollution Control Agency jointly filed suit against Excel for nuisance and statutory emissions violations, seeking a court order to reduce the dairy's air pollution.[7]

The Excel Dairy is just one example of the perhaps surprising reality that some of the nation's leading sources of certain hazardous air pollutants are factory farms,[8] which to date have largely escaped regulation of their air emissions. Factory farms,

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[3] *Families In Thief River Falls Urged To Flee Homes: Toxic Gas From Factory Farm Hazardous To Health*, YANKTON DAILY PRESS & DAKOTAN, June 14, 2008, at 3B, *available at* http://tearsheets.yankton.net/june08/061408/061408_pg3B.pdf. Clean Water Action Alliance of Minnesota trained residents near the Excel facility to monitor its hydrogen sulfide emissions. *See* Hemphill, *supra* note 2.

[4] *Families In Thief River Falls Urged To Flee Homes*, *supra* note 3. The Minnesota Department of Health has correlated hydrogen sulfide levels as low as *ten* parts per billion with neurological damage, particularly in small children. Hemphill, *supra* note 2.

[5] Hemphill, *supra* note 2.

[6] Clean Water Action Alliance of Minnesota, *supra* note 1.

[7] Press Release, Office of Minn. Attorney Gen., Attorney General Lori Swanson and Minnesota Pollution Control Agency Jointly Sue Feedlot to Abate Public Nuisance and for Violations of Minnesota's Environmental Protection Laws (June 20, 2008), *available at* http://www.ag.state.mn.us/Consumer/PressRelease/080620Pollutioncontrolagency.asp.

[8] Livestock operations can emit staggering amounts of pollutants, including hydrogen sulfide and ammonia. For example, Threemile Canyon dairy near Boardman, Oregon reported ammonia emissions as high as 15,500 pounds per day in 2005, which is more than the nation's number one manufacturing source of ammonia. Michele M. Merkel, Senior Counsel, Envtl. Integrity Project, N.Y. State Bar Association presentation at Albany Law School: The Use of CERCLA to Address Agricultural Pollution, at 1 (Sept. 15, 2006), *available at* http://www.environmentalintegrity.org/pubs/The%20Use%20of%20Cercla%20to%20Address%20Agricultural%20Polluction.pdf.

known by regulators as Concentrated Animal Feeding Operations ("CAFOs"),[9] typically concentrate thousands or tens of thousands of animals at one site, store the massive quantities of waste generated in large pits called "lagoons," and dispose of the waste on cropland as fertilizer.[10] This concentration of animals and their waste has come at staggering environmental and social cost. Manure spills have contaminated thousands of stream miles with nutrients, metals, and pathogens,[11] air pollutants like hydrogen sulfide and ammonia sicken neighbors,[12] and ammonia re-deposits through rainfall, thereby contributing to nutrient pollution of waterways.[13] But as these facilities increase in number, size and

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[9] The Environmental Protection Agency's regulations define an Animal Feeding Operation ("AFO") as:

> a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
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> (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
>
> (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. § 122.23(b)(1) (2008).

CAFOs are, as a subdivision of AFOs, divided into Large, Medium, or Small categories. 40 C.F.R. § 122.23(b)(2), (9) (2008). For example, a Large CAFO confines at least 700 mature dairy cows, 2,500 grown swine, or 125,000 chickens in a dry manure handling system. 40 C.F.R. § 122.23(b)(4) (2008). A Medium CAFO confines between 200–699 mature dairy cows, 750–2,499 grown swine, or 37,500–124,999 chickens in a dry manure system, *and* discharges pollutants into a water of the United States. 40 C.F.R. § 122.23(b)(6) (2008). The appropriate authority may designate a farm that is not a Medium or Large CAFO as a Small CAFO if it is a significant contributor of pollutants to U.S. waters. 40 C.F.R. § 122.23(c) (2008). For the sake of simplicity, this note will use the terms "CAFO" and "factory farm" interchangeably.

[10] 40 C.F.R. § 122.23(b)(4) (2008); CLAUDIA COPELAND, CONG. RESEARCH SERV., AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: A PRIMER 6 (2008) [hereinafter AIR QUALITY ISSUES AND ANIMAL AGRICULTURE].

[11] ENVTL. PROT. AGENCY & U.S. DEP'T OF AGRIC., DRAFT UNIFIED NATIONAL STRATEGY FOR ANIMAL FEEDING OPERATIONS, § 2.2 (1998) [hereinafter EPA & USDA], *available at* http://water.usgs.gov/owq/cleanwater/afo/.

[12] *See* IOWA STATE UNIV. & UNIV. OF IOWA STUDY GROUP, IOWA CONCENTRATED ANIMAL FEEDING OPERATIONS AIR QUALITY STUDY (2002), *available at* http://www.public-health.uiowa.edu/ehsrc/CAFOstudy.htm.

[13] National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7181, 7236 (Feb. 12, 2003) [hereinafter 2003 CAFO Rule].

impact, the regulatory tools available to address them lag behind.

The Environmental Protection Agency (EPA) has repeatedly neglected to enforce major environmental statutes against factory farms.[14] For example, though Congress has defined factory farms as "point sources" of pollution under the Clean Water Act (CWA)[15] since 1972,[16] and EPA has had regulations to implement the CWA's National Pollutant Discharge Elimination System (NPDES) permitting program since 1974,[17] only a fraction of all large CAFOs currently have CWA permits.[18] EPA has focused even less on air pollution from livestock facilities, and it still does not apply Clean Air Act (CAA)[19] permitting requirements to the vast majority of CAFOs.[20] As this note will emphasize, EPA has similarly failed to enforce statutory emissions reporting requirements applicable to CAFOs, with the result that we know less about factory farm air emissions than about those of many other industrial polluters.

In contrast with EPA, environmental and community organizations have kept pace with the growth of the factory farm industry, and have explored diverse regulatory tools to achieve greater accountability for the water and air pollution these operations produce. Nuisance suits,[21] challenges to state Right to

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[14] The three primary statutes EPA uses to regulate industrial polluters are the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006); the Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006); and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992 (2006).

[15] 33 U.S.C. § 1362(14) (2006).

[16] 33 U.S.C. § 1362 (2006) (history section of statute).

[17] Feedlots Point Source Category: Effluent Guidelines and Standards, 39 Fed. Reg. 5703, 5704–07 (Feb. 14, 1974).

[18] As of 2001, EPA and states had issued only 2,520 NPDES permits, though at that time EPA estimated at least 13,000 CAFOs were required to obtain permits. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, Proposed Rule, 66 Fed. Reg. 2960, 2968–69 (Jan. 12, 2001). By 2003, EPA estimated 4,000 CAFOs had NPDES permits. CLAUDIA COPELAND, CONG. RESEARCH SERV., ANIMAL WASTE AND WATER QUALITY: EPA'S RESPONSE TO THE *WATERKEEPER ALLIANCE* COURT DECISION ON REGULATION OF CAFOS 3 (2008), *available at* http://ncseonline.org/nle/crsreports/08-Sept/RL33656.pdf.

[19] 42 U.S.C. §§ 7401–7671 (2006).

[20] *See generally* Sarah C. Wilson, Comment, *Hogwash! Why Industrial Animal Agriculture is Not Beyond the Scope of CAA Regulation*, 24 PACE ENVTL. L. REV. 439 (2007). *See also* CAA discussion *infra* Part II.

[21] *See* Susan M. Brehm, Comment, *From Red Barn to Facility: Changing Environmental Liability to Fit the Changing Structure of Livestock Production*,

Farm laws,[22] integrator liability suits,[23] and CWA permit challenges[24] have met with varying success. However, several factors have slowed citizens' ability to force regulation of CAFO air emissions, including the complexity of air pollution regulation;[25] a dearth of monitoring data about the quantity of pollutants emitted from these facilities;[26] and, of great recent significance, pressure from the factory farm industry to remove CAFO emissions from the jurisdiction of several pollution laws.[27]

In the last few years, environmental groups have begun using data reported under requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or "Superfund")[28] and the Emergency Planning and Community Right-to-Know Act (EPCRA)[29] to gain insight into factory farm emissions, publicize information regarding these emissions, and use the resulting information to create pressure for air pollution reductions.[30] These statutes and their implementing

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93 CAL. L. REV. 797, 815–19 (2005).

[22] Every state has adopted some form of Right to Farm law, restricting nuisance actions citizens can bring in response to certain agricultural activities. Terence J. Centner, *Governments and Unconstitutional Takings: When do Right-to-Farm Laws Go Too Far?* 33 B.C. ENVTL. AFF. L. REV. 87, 87 (2006). Recently, the Iowa Supreme Court invalidated Iowa's Right to Farm law in part, declaring it violated Iowa's Constitution. *See* Gacke v. Pork XTRA, L.L.C., 684 N.W.2d 168, 185 (Iowa 2004).

[23] For an overview of CAFO regulation and integrator liability, *see* Brehm, *supra* note 21, at 815–25. *See also* Sierra Club v. Tyson Foods, Inc, 299 F. Supp. 2d 693, 705 (W.D. Ky. 2003).

[24] *See, e.g.*, Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality, 747 N.W.2d 321 (Mich. Ct. App. 2008); Maple Leaf Farms, Inc. v. Wis. Dep't of Natural Res., 633 N.W.2d 720 (Wis. Ct. App. 2001).

[25] *See* AIR QUALITY ISSUES AND ANIMAL AGRICULTURE, *supra* note 10, at 10–12.

[26] *See* NAT'L ACAD. OF SCI., AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: CURRENT KNOWLEDGE, FUTURE NEEDS 10–12 (2003), *available at* http://www.nap.edu/openbook.php?isbn=0309087058.

[27] *See* Memorandum from John Thorne, Capitolink, and Richard Schwartz, Crowell & Moring, to David A. Nelson, Dir., Multimedia Enforcement Div., U.S. EPA, and Sally Shaver, Dir., Air Quality Strategies and Standards Div., U.S. EPA, Outline for a Possible Livestock & Poultry Monitoring and Safe Harbor Agreement (June 11, 2002), *available at* http://www.sierraclub.org/pressroom/cafo_papers/2003/safe_harbor_proposal.pdf; Poultry Industry Petition, *infra* note 202.

[28] 42 U.S.C. §§ 9601–9675 (2000).

[29] 42 U.S.C. §§ 11001–11050 (2000).

[30] *See* Sierra Club v. Tyson Foods, Inc., 299 F. Supp. 2d 693, 705 (W.D. Ky. 2003) (holding citizen plaintiffs are injured by CAFO failures to report ammonia

regulations require facilities emitting more than 100 pounds per day of certain hazardous pollutants—ammonia and hydrogen sulfide in the case of livestock operations[31]—to report those emissions to national, state, and local response centers.[32] EPCRA then makes this information publicly available.[33] However, as citizen interest in CAFO air emissions has increased,[34] CAFO industry groups have responded with a multi-faceted campaign to receive special treatment from EPA among air polluters.[35] As a result, EPA has taken actions that undermine CAFO air pollution regulation.

EPA's responses to industry efforts have included a broad amnesty deal and a recent rule that exempts the livestock industry from most emissions reporting requirements.[36] These EPA actions will likely shape future citizen efforts to attain both procedural and substantive regulation of CAFO air emissions. To shed some light on the likely impacts of these actions, this note will explore the merits of a legal challenge to the reporting exemption, as well as its likely consequences, if and when it goes into effect.[37]

This note explores how aspects of the statutes and regulations applicable to CAFO air pollution are being systematically eroded

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emissions because information from reporting may be used to take precautions against the harms of toxic emissions exposure); *see also* Consent Decree, Citizens Legal Envtl. Action Network v. Premium Standard Farms, Case Nos. 97-6073-CV-SJ-6 and 98-6099-CV-W-6, at 1, 9–11 (W.D. Mo. Nov. 19, 2001), *available at* http://www.epa.gov/compliance/resources/cases/civil/mm/psf.html (pertaining to a CAA, CERCLA, and EPCRA citizen suit in which EPA intervened, resulting in a consent decree that requires two defendant companies' CAFOs to install technology to reduce hydrogen sulfide and ammonia emissions from manure lagoons and application fields).

[31] 40 C.F.R. §§ 302.4–302.5, 355.40, App. A to § 355 (2008).

[32] 42 U.S.C. § 9603 (2006); 42 U.S.C. § 11004 (2006).

[33] 42 U.S.C. § 11044 (2006).

[34] The Sierra Club, Waterkeeper Alliance, Farmers Against Rural Messes, and other groups have recently campaigned to bring CAFOs into compliance with emissions reporting requirements. *See* Earthjustice Public Comments, *infra* note 219.

[35] *See* Thorne, *supra* note 27; Poultry Industry Petition, *infra* note 202.

[36] *See* discussions *infra* Parts IV, V.

[37] Although EPA finalized the exemption rule on Dec. 18, 2008, *infra* note 206, the Obama Administration has stayed this rule along with other pending Bush Administration regulations. *See* Memorandum from Rahm Emanuel, White House Chief of Staff, to the Heads of Executive Dept's and Agencies (Jan. 20, 2009), *available at* http://abcnews.go.com/images/Politics/White_House_Memorandum.pdf.

before ever being widely enforced.[38] Specifically, it discusses opportunities to use CERCLA and EPCRA citizen suits against factory farms emitting large amounts of hydrogen sulfide and ammonia, and the quickly changing regulatory framework affecting those laws. Part I provides background on the CAFO industry, its growth, and its water and air pollution impacts. Part II reviews citizen and agency efforts to regulate CAFO pollution under environmental statutes. Part III provides an overview of CERCLA and EPCRA, explaining their applicability to industrial livestock production and the role these informational laws have played thus far in citizens' and regulators' efforts to achieve greater substantive regulation of factory farms. Part IV discusses EPA's recent Air Consent Agreement,[39] an amnesty deal that exempts thousands of factory farms from air pollution enforcement actions, and its impact on the regulatory reach of CERCLA and EPCRA over factory farms. Part V addresses industry-driven legislative and administrative efforts to exempt CAFOs from the reporting requirements of CERCLA and EPCRA, and the likely impact of the recent exemption rule. Part VI analyzes the merits of a legal challenge to EPA's proposed exemption rule, and argues that the final rule is arbitrary and capricious, and contrary to law in violation of the Administrative Procedure Act (APA).[40] Finally, this note concludes that, while the factory farm industry has so far had significant success in narrowing its obligations under CERCLA and EPCRA, EPA's dubious actions to limit its own authority over factory farms may not—and should not—survive judicial scrutiny.

I. FACTORY FARMS: A GROWING THREAT TO AIR AND WATER

Regulation of CAFO air and water pollution lags far behind as these facilities' environmental impacts grow. By defining CAFOs

[38] *See, e.g.*, Waterkeeper Alliance v. EPA, 399 F.3d 486, 524 (2d Cir. 2005) (invalidating Clean Water Act regulations that would have required all large CAFOs to seek permits, replacing it with a permit requirement only for CAFOs that have demonstrated discharge of pollutants into waters of the U.S., or that plan to discharge). EPA will also delay imposition of applicable CAA regulations on thousands of CAFOs for several years, pursuant to a recent amnesty agreement. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4959 (Jan. 31, 2005) [hereinafter Air Consent Agreement].

[39] Air Consent Agreement, *supra* note 38.

[40] 5 U.S.C. § 706(2)(A) (2006).

as "point sources" of water pollution,[41] the CWA brought factory farms into the realm of federal pollution control in 1972.[42] Over the past four decades, this inclusion of CAFOs among regulated polluters has increased in significance as CAFOs have grown in size and displaced family farm livestock production. Economies of scale in the livestock industry have led to larger facilities housing more animals, geographic concentration of those facilities, and concentration of animal wastes.[43] As a result, the environmental impact of factory farming—and the need for effective regulation of these facilities—has also grown. Animal wastes leak and spill into waterways with increasing frequency, and air emissions from waste impoundments and confinement structures increasingly threaten rural health and quality of life.[44]

A. *Factory Farming Increasingly Dominates Animal Agriculture*

In 1974, the Department of Agriculture census reported more than 2.3 million farms.[45] By 2002, that total number had declined to approximately 2.1 million.[46] Over the same time span, however, the number of farms in the two largest size and sales value categories had significantly increased, as had the number of corporate farms.[47] EPA has acknowledged that livestock production has followed this overall agricultural shift with a "continued trend toward fewer but larger operations, coupled with greater emphasis on more intensive production methods and specialization."[48] In fact, between 1982 and 1997, the total number of U.S. farms with confined livestock declined 27 percent, but the number of animals raised at large feedlots increased by 88 percent.[49]

Perhaps even more significantly, the number of large CAFOs

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[41] 33 U.S.C. § 1362(14) (2006).

[42] 33 U.S.C. § 1251 (history section of statute) (2006).

[43] AIR QUALITY ISSUES AND ANIMAL AGRICULTURE, *supra* note 10, at 7.

[44] *See* discussion *infra* Part I.B.

[45] U.S. DEP'T OF AGRIC., 2002 CENSUS OF AGRICULTURE, VOL. 1, GEOGRAPHIC AREA SERIES 6 (2002), *available at* http://www.agcensus.usda.gov/Publications/2002/USVolume104.pdf.

[46] *Id.*

[47] *Id.*

[48] 2003 CAFO Rule, *supra* note 13, at 7180.

[49] AIR QUALITY ISSUES AND ANIMAL AGRICULTURE, *supra* note 10, at 7.

increased by 58 percent over the same period.[50] Between 1978 and 1992, the average number of animals per operation increased dramatically in every major livestock category: cattle operations grew 56 percent, dairies grew 93 percent, turkey operations grew 129 percent, broiler chicken operations grew 148 percent, layer hen operations grew 176 percent, and hog operations grew 134 percent.[51] Livestock confinements have also become more spatially concentrated in discrete areas.[52]

Researchers have linked the trend towards food production concentrated on fewer, larger farms with vertical integration[53] of different agricultural sectors, noting that vertical integration has also become particularly prominent in livestock production.[54] Meat packer concentration has increased dramatically, with four companies controlling 56 percent of hog slaughter and 82 percent of steer and heifer slaughter in 2000.[55] These companies are also increasingly vertically integrated, meaning packing companies also control production through top-down contracts with CAFO operators, thereby decreasing competition.[56] This trend towards fewer, larger factory farms producing more and more of the nation's livestock has come at significant cost to health and the environment.

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[50] ROBERT L. KELLOGG ET AL., USDA, MANURE NUTRIENTS RELATIVE TO THE CAPACITY OF CROPLAND AND PASTURELAND TO ASSIMILATE NUTRIENTS: SPATIAL AND TEMPORAL TRENDS FOR THE UNITED STATES 18 (2000), *available at* http://www.nrcs.usda.gov/technical/NRI/pubs/manntr.pdf.

[51] EPA & USDA, *supra* note 11, at § 2.1.

[52] KELLOGG ET AL., *supra* note 50, at 89.

[53] The term vertical integration refers to "a form of legal coordination under which a single organization controls two or more adjacent stages of production, processing, or marketing of a commodity, typically through ownership but also through contractual arrangements." HARRISON M. PITTMAN, NAT'L AGRIC. LAW CTR., MARKET CONCENTRATION, HORIZONTAL CONSOLIDATION, AND VERTICAL INTEGRATION IN THE HOG AND CATTLE INDUSTRIES: TAKING STOCK OF THE ROAD AHEAD, 3 (2005), *available at* http://www.nationalaglawcenter.org/assets/articles/pittman_marketconcentration.pdf.

[54] Neil E. Harl, The Structural Transformation of Agriculture at 5 (Jan. 15, 2004) **(**unpublished manuscript**,** *available at* http://www.econ.iastate.edu/faculty/harl/StructuralTranAgforCanadaConf.pdf). Harl calls concentration and integration the "deadly combination" for independent farmers because both market trends continue to concentrate wealth in fewer corporate entities, while decreasing competition. *Id.*

[55] *Id.* at 5–6.

[56] *Id.* at 4–6.

B. *Factory Farms Create Significant Water and Air Pollution*

Factory farm pollution stems from livestock waste, and problems with waste concentration and management grow along with CAFO size and regional concentration. Animal Feeding Operations (AFOs) produce more than 500 million tons of manure each year in the U.S.,[57] which results in concentration of manure nutrients,[58] often above agronomic rates, with insufficient cropland available to assimilate the nutrients.[59] In addition to increasing CAFO sizes,[60] manure storage and application methods heighten the potential for surface and groundwater pollution.[61] CAFOs typically mix manure with water and store it in large impoundments called "lagoons." They then land-apply the manure with surface spreaders or sprinkler irrigation systems.[62] When applicators spread manure in excess of crop uptake rates or precipitation events occur shortly after application, manure nutrients may end up in surface water or groundwater.[63] Moreover, even when CAFO operators have sufficient land to accommodate their manure nutrients, manure spreaders frequently leak, spill, or tip.[64] Hundreds of manure spills from over-application, application accidents, and lagoon breaches have killed millions of fish and polluted thousands of stream miles.[65] The water pollution effects from CAFOs range from chronic pollution from frequent small spills to devastation of entire ecosystems from large spills. For example, Premium Standard Farms' CAFOs in

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[57] 2003 CAFO Rule, *supra* note 13, at 7179. This is more than three times the volume of human waste produced by all Americans. *Id*. at 7180.

[58] 2003 CAFO Rule, *supra* note 13, at 7180.

[59] *Id.* Agronomic application requires adding manure nutrients to soil at rates that allow the crops to utilize all of them. Applying manure nutrients in excess of assimilative capacity frequently results in runoff of nutrients the crops cannot uptake. *See* KELLOGG ET AL., *supra* note 50, at 91.

[60] *See* discussion *supra* Part I.A.

[61] 2003 CAFO Rule, *supra* note 13, at 7181.

[62] M.M. Al-Kasi et al., *Liquid Manure Application Methods*, No. 1.223, COLO. STATE UNIV. COOP. EXTENSION LIVESTOCK SERIES, Aug. 1998, at 1, *available at* http://www.cheboygancoop.com/animalscience/manure/1223.pdf.

[63] KELLOGG ET AL., *supra* note 50, at 92.

[64] *See* ENVTL. INTEGRITY PROJECT, THREATENING IOWA'S FUTURE: IOWA'S FAILURE TO IMPLEMENT AND ENFORCE THE CLEAN WATER ACT FOR LIVESTOCK OPERATIONS 20 (2004), *available at* http://www.environmentalintegrity.org/pub194.cfm.

[65] *Id.* at 14. Iowa alone experienced more than 300 manure spills between 1992 and 2002, which killed more than 2.6 million fish. *Id.*

Missouri experienced more than 160 documented hog waste discharges into surface waters over a ten-year period, and a Foster Farms facility discharged 11 million gallons of manure-contaminated wastewater into a National Wildlife Refuge in one incident.[66] CAFO operators have not kept the 500 million tons of animal waste produced each year from polluting waterways, and concentrated manure storage and application methods lie at the heart of these water pollution problems.

EPA and USDA have identified 35,000 stream miles contaminated by animal feeding operation pollution, and that only accounts for the twenty-two states that distinguish livestock operation pollution from other pollution sources.[67] Pollutants of concern in manure include nutrients such as nitrogen and phosphorus, which contribute to eutrophication[68] and algae growth in surface waters, pathogens such as *E. coli*, antibiotics, hormones, heavy metals, and sediment.[69] Pathogens like *E. coli*, *Salmonella*, and *Cryptosporidium* can sicken people through contaminated water, or through food, if contaminated water is used to irrigate cropland;[70] indeed, livestock manure contains more than 150 human pathogens.[71] Agricultural use of antibiotics in livestock feed worsens the potential for, and severity of, pathogen contamination by leading to the evolution of more antibiotic-resistant strains of these disease-causing bacteria.[72]

This unprecedented concentration of untreated waste and the application of untreated wastes on cropland also cause significant

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[66] SIERRA CLUB, THE RAPSHEET ON ANIMAL FACTORIES: CONVICTIONS, FINES, POLLUTION VIOLATIONS AND REGULATORY RECORDS ON AMERICA'S ANIMAL FACTORIES 9, 11 (2002).

[67] EPA & USDA, *supra* note 11, at § 2.2.

[68] According to EPA, eutrophication, the result of over-enrichment of waters by nutrients like nitrogen and phosphorus, is a leading source of impairment of the nation's waters. Excessive nutrients promote algae growth that chokes out other plant life and blocks sunlight from penetrating the surface of waterways. 2003 CAFO Rule, *supra* note 13, at 7238.

[69] EPA & USDA, *supra* note 11, at § 2.2.

[70] *Id.*

[71] CLAUDIA COPELAND, CONG. RESEARCH SERV., ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOS) 5 (Mar. 17, 2008) [hereinafter ANIMAL WASTE AND WATER QUALITY].

[72] *See generally* MARGARET MELLON ET AL., UNION OF CONCERNED SCIENTISTS, HOGGING IT: ESTIMATES OF ANTIMICROBIAL ABUSE IN LIVESTOCK (2001), *available at* http://www.ucsusa.org/publications/#Food_and_Environment.

air pollution, which can affect neighbors' quality of life and public health. Though there are numerous CAFO air pollutants of concern, including particulate matter, volatile organic compounds, odors, and airborne pathogens,[73] the two CAFO air pollutants clearly subject to emissions reporting requirements are ammonia and hydrogen sulfide.[74] As manure decomposes, it produces ammonia and hydrogen sulfide, which confinement buildings, manure lagoons, or other waste stockpiles then emit.[75] EPA estimates livestock waste contributes 80 percent of total U.S. ammonia emissions,[76] and the National Academy of Sciences estimates livestock emissions alone represent 50 percent of the U.S. ammonia emissions inventory.[77]

EPA and other federal agencies have identified ammonia and hydrogen sulfide as hazardous to human health,[78] and these agencies have extensively documented the health impacts of the chemicals.[79] Exposure to elevated levels[80] of ammonia causes respiratory problems and eye irritation.[81] At higher levels,

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[73] IOWA STATE UNIV. & UNIV. OF IOWA STUDY GROUP, *supra* note 12, at 35–42.

[74] *See* CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste, 72 Fed. Reg. 73700, 73701 (Dec. 28, 2007) [hereinafter Proposed Exemption Rule] (discussing the reporting requirements under CERCLA and EPCRA for ammonia and hydrogen sulfide, and also eliminating reporting requirements for other CAFO pollutants that may be identified as CERCLA hazardous substances).

[75] *Id.* at 73701–02.

[76] MICHIEL R.J. DOORN ET AL., EPA, REVIEW OF EMISSIONS FACTORS AND METHODOLOGIES TO ESTIMATE AMMONIA EMISSIONS FROM ANIMAL WASTE HANDLING 1 (2002), *available at* http://www.epa.gov/nrmrl/pubs/600r02017/600sr02017.pdf.

[77] NAT'L ACAD. OF SCI., *supra* note 26, at 51.

[78] EPA regulates both gases as hazardous substances under CERCLA, and as extremely hazardous substances under EPCRA. 40 C.F.R. §§ 302.4-302.5, 355.40, App. A (2008); *see also* AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, DEP'T OF HEALTH & HUMAN SERVS., TOXFAQS FOR AMMONIA 1 (2004) [hereinafter TOXFAQS FOR AMMONIA], *available at* http://www.atsdr.cdc.gov/tfacts126.pdf; AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, DEP'T OF HEALTH & HUMAN SERVS., TOXFAQS FOR HYDROGEN SULFIDE 1 (2006) [hereinafter TOXFAQS FOR HYDROGEN SULFIDE], *available at* http://www.atsdr.cdc.gov/tfacts114.pdf.

[79] *Id.*

[80] As examples of high ammonia levels, the Agency for Toxic Substances & Disease Registry lists those who may be exposed to using ammonia-based cleaning products, in an enclosed building with many livestock, or near a field with ammonia fertilizer. TOXFAQS FOR AMMONIA, *supra* note 78, at 1.

[81] *Id.*

ammonia causes burns on the skin, mouth, throat and lungs.[82] Low-level[83] hydrogen sulfide exposure can cause eye irritation, headache, and fatigue, while high-level exposures can be fatal.[84] Studies have documented these impacts from CAFO emissions. One study concluded that there is now "extensive literature documenting acute and chronic respiratory diseases and dysfunction among [CAFO] workers"[85] and found that both chemicals have been measured in the vicinity of livestock operations at concentrations of potential health concern for rural residents.[86]

In addition, ammonia poses a threat to air quality and exacerbates CAFO water pollution problems. Ammonia emissions impair visibility and contribute to acid precipitation by combining with nitrous oxides and sulfur dioxide to form the light scattering particles that comprise regional haze.[87] For example, the Oregon Department of Environmental Quality has identified ammonia emissions—specifically emissions from dairy CAFOs—as a significant contributor to regional haze and impaired visibility in the Columbia Gorge National Scenic Area.[88] State officials also recognize that ammonia's contribution to acid rain in the Gorge threatens cultural and natural resources.[89] Moreover, ammonia air emissions contribute to water pollution through redeposition in

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[82] *Id.*

[83] ATSDR states even a few breaths of air with a "high" concentration of hydrogen sulfide, more than 500 parts per million, may be fatal. However, far lower levels may pose significant health risks over longer exposure times. TOXFAQS FOR HYDROGEN SULFIDE, *supra* note 78, at 1; *see also* Hemphill, *supra* note 2. For a table of manure air pollutant concentrations and concurrent symptoms, *see* Howard J. Doss et al., *Beware of Manure Pit Hazards*, MICH. STATE UNIV. EXTENSION, May 1993, at 2, *available at* http://www.cdc.gov/nasd/docs/d001001-d001100/d001097/d001097.pdf.

[84] TOXFAQS FOR HYDROGEN SULFIDE, *supra* note 78, at 1. Numerous farmers and farm workers have asphyxiated from entering a manure pit with high levels of hydrogen sulfide, or attempting to rescue others who had. Doss et al., *supra* note 83, at 1.

[85] IOWA STATE UNIV. & UNIV. OF IOWA STUDY GROUP, *supra* note 12, at 5.

[86] *Id.* at 7.

[87] OR. DEP'T OF ENVTL. QUALITY, COLUMBIA GORGE AIR STUDY AND STRATEGY REPORT 5 (2008), *available at* http://www.deq.state.or.us/aq/gorgeair/docs/policydaypresentation.pdf.

[88] *Id.*

[89] *Id.* at 6. The agency has expressed its support for further research into the cultural resource impacts of ammonia-related acid deposition. *Id.*

rain,[90] a significant problem in light of the CAFO industry's dominant contribution to total national ammonia emissions.

Agriculture in the United States has changed dramatically over the past century, leading to equally dramatic social, economic, and environmental effects. Our food no longer comes primarily from independent family farms, and animal products in particular come increasingly from corporate-controlled factory farms. This transition of the country's livestock production has come at great cost to independent farmers, rural communities, and our air, water, and public health. As a result, citizen efforts to achieve effective regulation of factory farms as a group of industrial polluters have grown along with factory farming itself.

II. REGULATORY APPROACHES TO FACTORY FARM AIR AND WATER POLLUTION

Despite factory farms' industrial-scale pollution impacts, federal regulators have often failed to address these facilities through the federal regulatory framework established for industrial polluters. CAFOs have been subject to CWA permitting requirements since 1972,[91] but only recently has EPA taken steps to bring them into compliance with the permitting scheme.[92] A 2003 rulemaking would have established a presumption that CAFOs discharge pollutants into waters of the U.S., thereby requiring them to obtain NPDES permits. To escape the permit requirement under this rule,[93] a facility would have to demonstrate it had "no potential to discharge."[94] However, the Second Circuit invalidated this presumption in a consolidated challenge by environmental and industry organizations and remanded the rule to EPA.[95] The amended rule,[96] though adopting more protective

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[90] Press Release, Nat'l Acad. of Sci., U.S. Needs New Approach for Estimating Emissions From Livestock Operations (Dec. 12, 2002), *available at* http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=10586.

[91] 33 U.S.C. § 1362 (history section of statute) (2006).

[92] *See generally* 2003 CAFO Rule, *supra* note 13; *see also* COPELAND, *supra* note 18.

[93] 2003 CAFO Rule, *supra* note 13, at 7200.

[94] *Id.* at 7200. The presumption would have excluded "agricultural storm water," *see infra* note 135.

[95] Waterkeeper Alliance v. EPA, 399 F.3d 486, 505–06, 524 (2d Cir. 2005).

[96] Revised National Pollutant Discharge and Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision, 71 Fed. Reg.

permit requirements and allowing for more citizen review,[97] requires a smaller universe of CAFOs to seek permit coverage[98] and extends compliance deadlines into 2009.[99]

CAA CAFO regulation lags even farther behind. Livestock operations have not been required to monitor emissions, and several statutory exemptions have limited the Act's permitting programs' applicability to agriculture.[100] However, recent citizen lawsuits seeking to require CAA operating permits indicate air pollution regulation will increasingly apply to CAFOs. In *Idaho Conservation League v. Boer*,[101] the United State District Court for the District of Idaho held that the Idaho Department of Environmental Quality may regulate dust, animal dander, and other small particulate pollution as PM_{10},[102] a CAA criteria pollutant.[103] Emissions in excess of 100 tons per year of a criteria pollutant would qualify the Boer dairy CAFO as a CAA major stationary source, subject to operating permit requirements.[104] In 2007, a Federal District Court in California granted summary

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37,744 (June 30, 2006) (to be codified at 40 C.F.R. pts. 122 & 412).

[97] *Id.* at 37,751. The Court held EPA's rule must require Nutrient Management Plans, which are a CAFO NPDES permit's substantive enforceable requirements, to be part of the permit itself, and therefore to be subject to citizen input. *Id.*

[98] *Id.* at 37,748. EPA estimated its 2003 rule would have applied to approximately 15,500 of the nation's largest CAFOs; the 2006 rule will require permits of an estimated 14,100 CAFOs. AIR QUALITY ISSUES AND ANIMAL AGRICULTURE, *supra* note 10, at 9. Overall, EPA estimates the 2006 proposed rule will result in 25 percent fewer CAFOs receiving NPDES permits than under the 2003 proposed rule. ANIMAL WASTE AND WATER QUALITY, *supra* note 18, at 6.

[99] Revised Compliance Dates Under the National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 72 Fed. Reg. 40,245, 40,247–48 (July 24, 2007) (to be codified at 40 C.F.R. pts. 122 & 412).

[100] *See* Wilson, *supra* note 20, at 448–52.

[101] Idaho Conservation League v. Boer, 362 F. Supp. 2d 1211 (D. Idaho 2004).

[102] PM_{10} refers to particulate matter less than or equal to ten microns in diameter. 40 C.F.R. § 50.1(c) (2008).

[103] *Idaho Conservation League*, 362 F. Supp. 2d at 1217.

[104] *Id.* at 1214–17. The case settled in 2005, when the parties agreed to request the state promulgate a rule for CAA permitting of dairies. Stipulation for Dismissal, Idaho Conservation League v. Boer, No. CV-04-250-S-BLW (D. Idaho dismissed Mar. 3, 2005). Idaho has since approved a rule making it the first state to require CAA permits of dairies emitting more than 100 tons per year of ammonia. AIR QUALITY ISSUES AND ANIMAL AGRICULTURE, *supra* note 10, at 13.

judgment for environmental plaintiffs suing another dairy CAFO, finding the dairy had the potential to emit above the state's daily threshold for volatile organic compounds, an ozone precursor.[105] These emissions, in the absence of a CAA permit and installation of Best Available Control Technology, violate the state's CAA implementation plan.[106] EPA has also acknowledged that the CAA applies to certain CAFO emissions.[107]

The Resource Conservation and Recovery Act (RCRA)[108] has essentially never been applied to CAFOs,[109] and citizens have not focused significant resources on the statute as a potential regulatory hook to address CAFO pollution. Congress enacted RCRA in 1976 to reduce waste and the risks of hazardous waste disposal, and promote conservation of energy and natural resources.[110] One case has directly addressed the question whether over-application of manure on cropland can be regulated as "hazardous waste" under RCRA. In this case, *Waterkeeper Alliance v. Smithfield Foods*,[111] the Waterkeeper Alliance alleged RCRA violations from open dumping of manure; the claim survived summary judgment, but the case settled without action on RCRA or admission of RCRA liability by Smithfield.[112]

EPA and courts have established that factory farms discharge, dump, and emit pollutants regulated by the nation's primary pollution control statutes. Following some success in enforcing the CWA industry-wide, initial attempts to extend the CAA's

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[105] Ass'n of Irritated Residents v. C&R Vanderham Dairy, No. 1:05-CV-01593, 2007 WL 2815038, at *23 (E.D. Cal. Sept. 25, 2007).

[106] *Id.* at *24–25.

[107] *See* Air Consent Agreement discussion *infra* Part IV.

[108] 42 U.S.C. §§ 6901–6992 (2006).

[109] EPA's regulatory framework for agriculture does not even address manure in its RCRA discussion. EPA, Hazardous Waste and Agriculture, http://epa.gov/agriculture/lrca.html (follow "Hazardous Waste and Agriculture" hyperlink under "Agriculture-Specific Requirements") (last visited May 2, 2009).

[110] 42 U.S.C. § 6903 (2006) (history section of statute); EPA, Basic Information: Office of Resource Conservation and Recovery, http://www.epa.gov/epawaste/basicinfo.htm (last visited May 2, 2009).

[111] Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc., No. 4:01-CV-27-H(3), 2001 WL 1715730 (E.D.N.C. Sept. 20, 2001).

[112] Consent Decree, Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc., Civil Action Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 4:02-CV-41-H(3), and 4:02-CV-42-H(3) (E.D.N.C. Jan. 20, 2006), *available at* http://www.waterkeeper.org/docs/consent-decree.pdf.

scope on a case-by-case basis are making some progress. Whether RCRA will emerge as a useful law to reduce CAFO pollution remains to be seen, but it has not played a significant role so far. Overall, enforcement of these laws for CAFOs has lagged, and agricultural air pollution remains almost completely unregulated.

III. THE ROLE OF CERCLA AND EPCRA: PROCEDURAL REQUIREMENTS THAT MAY LEAD TO SUBSTANTIVE PROGRESS

CERCLA and EPCRA provide an additional front on which citizens can fight CAFO pollution. Congress enacted CERCLA in 1980 to address pollution from closed and abandoned hazardous waste sites. The law required chemical and petroleum industries to support the Superfund cleanup trust fund, and also revised the National Contingency Plan, which provides procedures for responses to hazardous releases.[113] Congress enacted EPCRA in 1986 as part of the Superfund Amendments and Reauthorization Act,[114] which focuses on state and citizen involvement in hazardous waste cleanup, as well as on the human health impacts of hazardous waste sites.[115]

These laws differ fundamentally from the other federal schemes discussed, as the requirements they impose on factory farms are informational and do not involve pollution reduction requirements or emissions limits. Perhaps because citizen suits for CAFO violations of CERCLA and EPCRA cannot directly result in pollution reductions, environmentalists did not litigate CERCLA and EPCRA claims against CAFOs until 2000.[116] Citizen suits have proven successful so far,[117] however, and the regulations applying to factory farms have since come under attack.

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[113] EPA, CERCLA Overview, http://www.epa.gov/superfund/policy/cercla.htm (last visited May 2, 2009).

[114] EPA, Emergency Planning and Community Right-to-Know Act (EPCRA) Enforcement, http://www.epa.gov/compliance/civil/epcra/index.html (last visited May 2, 2009).

[115] EPA, SARA Overview, http://www.epa.gov/superfund/policy/sara.htm (last visited May 5, 2009).

[116] Citizens Legal Envtl. Action Network v. Premium Standard Farms, Inc., No. 97-6073-CV-SJ-6, 2000 WL 220464, at *1 (W.D. Mo. Feb. 23, 2000).

[117] *Id.* at *63. *See also* Sierra Club v. Seaboard Farms, Inc., 387 F.3d 1167, 1176 (10th Cir. 2004).

A. *Public Notification Requirements—Goals and Benefits of Emissions Reporting*

CERCLA requires facilities to immediately report releases[118] of EPA-designated hazardous substances to the National Response Center (NRC) if those emissions exceed the established reportable quantity threshold.[119] EPCRA adds the requirements that facilities must report releases of EPA-designated extremely hazardous substances to state and local emergency response authorities if those emissions exceed reportable quantities.[120] Toward this end, EPCRA mandates the designation of a State Emergency Planning Commission (SEPC) and the creation of Local Emergency Planning Committees (LEPCs).[121] The State Commission appoints the LEPCs, which must include state officials, law enforcement officers and firefighters, as well as first aid, hospital, environmental, transportation, and media representatives.[122]

Both statutes allow reduced reporting requirements for "continuous" releases, defined under CERCLA as emissions stable in quantity and rate.[123] EPA regulations elaborate that continuous releases are routine and incidental to normal operation, and that statistically significant increases in emissions must be reported.[124] To qualify for continuous release reporting, which requires only an initial telephonic and written report and a follow-up report after one year,[125] facilities must establish the continuity of their releases.[126] Though EPCRA also exempts continuous releases

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[118] CERCLA defines "release" broadly as "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22) (2006). A "release" under EPCRA includes emitting any hazardous chemical or extremely hazardous substance into the environment. 42 U.S.C. § 11049(8) (2006).

[119] 42 U.S.C. § 9603(a) (2006); 40 C.F.R. § 302.6 (2008).

[120] 42 U.S.C. § 11004(a)–(b) (2006); 40 C.F.R. § 355.40 (2008).

[121] 42 U.S.C. § 11001(a)–(c) (2006).

[122] *Id.*

[123] 42 U.S.C. § 9603(f)(2) (2006). 42 U.S.C. § 11004(a)(1) (2006) limits EPCRA reporting requirements of § 11002(a) extremely hazardous substances to those releases for which notification is required under CERCLA.

[124] 40 C.F.R. § 302.8 (2008). 40 C.F.R. § 355.40(a)(2)(iii) (2008) incorporates the CERCLA continuous release definition and exemptions into EPCRA by reference.

[125] 40 C.F.R. § 302.8(c) (2008).

[126] 40 C.F.R. §§ 302.8(d) (2008), 355.40(a)(2)(iii)(A) (2008).

from most reporting requirements,[127] it still requires initial notifications to LEPCs and SEPCs, just as CERCLA requires that polluters notify national officials in the event of a hazardous release.[128]

CERCLA and EPCRA's reporting requirements serve a dual purpose: first, the reports enable emergency responses at the national, state and local level;[129] and second, they provide citizens with information of potential relevance to their health.[130] Congress enacted EPCRA "to provide the public with important information on 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."[131] Though these reporting requirements are informational, researchers have observed substantive benefits from making emissions data publicly available. These include somewhat unquantifiable advantages such as transparency and community awareness, as well as concrete changes in the behavior of regulated entities through the deterrent effect of "naming and shaming."[132] These reports may also be the only source of emissions information necessary to impose CAA controls or substantiate a nuisance claim.[133] CERCLA and EPCRA's reporting requirements serve a valuable role in policing polluting

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[127] 40 C.F.R. § 355.40(a)(2)(iii) (2008).

[128] 40 C.F.R. § 355.40(a)(2)(iii)(A) (2008).

[129] United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982); *see also* Dedham Water Co. v. Cumberland Farms Dairy, 805 F.2d 1074, 1081 (1st Cir. 1986).

[130] H.R. REP. NO. 99-962, at 281 (1986).

[131] *Id. See also* Sierra Club v. Tyson Foods, Inc., 299 F. Supp. 2d 693, 704 (W.D. Ky. 2003) (Plaintiffs' alleged injury of failure to receive information was "precisely the type of injury. . .Congress intended to prevent by enacting the reporting requirements of both CERCLA and EPCRA."); Steel Co. v. Citizens for a Better Env't, 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 release.").

[132] *See generally* Warren A. Braunig, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. REV. 1505 (2005). One striking example of the deterrent effect of publicizing pollution data is the Toxics Release Inventory (TRI), established under EPCRA for certain industries, not including CAFOs. Between initial TRI reports in 1988 and 2002, total disposal of TRI chemicals decreased 49 percent even as the economy grew. *Id.* at 1526.

[133] *See* discussion *supra* Part II. CAFOs have not been required to report emissions.

industries; promoting transparency has tangible benefits.

B. *Applicability of CERCLA and EPCRA to Factory Farms*

Because CERCLA and EPCRA require notification of any hazardous substance release of a reportable quantity, releases from a CAFO into air or water or onto land may trigger the statutes' reporting requirements. For example, a CAFO's manure discharge into surface water would include phosphorus, a CERCLA hazardous substance and EPCRA extremely hazardous substance.[134] If the release were of sufficient volume to exceed the reportable quantity for phosphorus, it would trigger the reporting requirements for that individual facility.

However, agriculture related provisions in CERCLA, EPCRA, and the CWA largely restrict the reporting requirements' applicability to CAFO air emissions regulation. Manure application to land as fertilizer is expressly exempt from the reporting requirements.[135] While the possibility remains that certain land releases—such as over-applied manure disposed of on land—may not meet the exemption's requirements, land application will only trigger the reporting requirements for those individual CAFOs using poor manure management practices. Similarly, water releases do not trigger industry-wide CERCLA and EPCRA requirements. Large CAFOs are prohibited from discharging manure to water from land application areas as part of normal operations,[136] and production area discharges are prohibited without a NPDES permit and are virtually always prohibited by the terms of NPDES permits.[137] Thus, only CAFO

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[134] 40 C.F.R. §§ 302.4–302.5, 355.40, App. A to § 355 (2008).

[135] 42 U.S.C. § 9601(22) (2006); 42 U.S.C. § 11021(e)(5) (2006). Specifically, CERCLA excludes "normal application of fertilizer" from the definition of "release," while EPCRA exempts releases where the regulated substance is "used in routine agricultural operations." *Id.*

[136] As EPA clarified in its 2006 CAFO Rule, Water Quality Based Effluent Limitations, which set a limit for allowable pollutant levels in discharges, "are statutorily unavailable in [NPDES] permits for Large CAFOs with respect to precipitation related land application discharges because the only allowable discharge from a land application area is due to agricultural storm water which is by statute exempt from permitting requirements." 2006 CAFO Rule, *supra* note 96, at 37,744. For a CAFO land application area discharge to qualify as agricultural storm water, the CAFO must be applying its manure in compliance with a site-specific nutrient management plan, and the discharge must be due to precipitation rather than over-application. 40 C.F.R. § 122.23(e) (2008).

[137] *See* 40 C.F.R. § 412.31(a) (2008). As established, CAFOs frequently

air emissions typically exceed reportable quantities for all facilities of a certain size, and only air releases trigger CERCLA and EPCRA requirements industry-wide. Both CERCLA and EPCRA exempt air releases resulting from the land application of manure as fertilizer (in addition to the land application itself) from these reporting requirements.[138]

CAFOs emitting regulated CERCLA and EPCRA pollutants above their reportable quantities may have to comply with either episodic or continuous release requirements. Though only one case addresses the question, it appears CAFOs—like other regulated entities—bear the burden of demonstrating eligibility for the reduced reporting requirements of continuous releases for their production area air emissions.[139] CERCLA requires operators to demonstrate a "sound basis" for qualifying a release as continuous, either by "using release data, engineering estimates, knowledge of operating procedures, or best professional judgment" or by reporting "for a period sufficient to establish the continuity and stability of the release."[140] Thus, even if a CAFO operator's best professional judgment of emissions, based on stable animal numbers and consistent operating practices, suffices to qualify for reduced continuous release reporting, EPA should require operators to affirmatively seek continuous release status before reporting under these provisions.

As noted, the two main hazardous substances emitted into the air by CAFOs are ammonia and hydrogen sulfide.[141] Thus, any CAFO with production area air emissions at or above the

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discharge pollutants in waters illegally from production and land application areas, and these discharges may trigger CERCLA and EPCRA as well as the CWA. However, because these releases are prohibited and occur unpredictably at individual CAFOs, water and land releases only trigger CERCLA and EPCRA reporting requirements on a case-by-case basis, requiring fact-finding to determine whether a specific release exceeded a reportable quantity of a regulated pollutant.

[138] 42 U.S.C. § 9601(22) (2006); 42 U.S.C. § 11021(e)(5) (2006).

[139] In *Sierra Club v. Tyson Foods*, the court found Tyson Foods had not met its burden of demonstrating its releases were continuous, and therefore until continuity was established the CAFO must report releases as episodic under both CERCLA and EPCRA. 299 F. Supp. 2d 693, 712 (W.D. Ky. 2003).

[140] 40 C.F.R. § 302.8(d) (2008).

[141] However, EPA acknowledges CAFOs may emit other hazardous chemicals regulated under CERCLA and EPCRA, such as volatile organic compounds, at or above the reportable quantity. *See* Proposed Exemption Rule, *supra* note 74, at 73,702.

reportable quantity—100 pounds per day—of either of these gases[142] must at a minimum file an initial report and one-year follow-up report to remain in compliance with the statutes.[143] The industry-wide nature of CAFO air emissions creates a significant opportunity to use CERCLA and EPCRA to gain knowledge about emissions from thousands of facilities with potential human health impacts. This industry-wide data could also make broad implementation of CAFO CAA controls more feasible.

C. *CERCLA and EPCRA Actions Against Factory Farms*

Though CERCLA and EPCRA impose industry-wide reporting requirements on CAFOs emitting the reportable quantity of ammonia or hydrogen sulfide, EPA has left the factory farm industry almost wholly unregulated, and voluntary compliance has been almost non-existent.[144] However, a few noteworthy actions by citizens, state and local governments, and EPA have heightened awareness of CERCLA and EPCRA as regulatory tools to address CAFO pollution.

State and local government actions under CERCLA and EPCRA have focused on facility-specific water discharges, rather than industry-wide air emissions.[145] EPA has taken civil judicial

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[142] *Id.*

[143] 40 C.F.R. § 302.8(c) (2008).

[144] National Response Center Queries for all continuous release reports since 2000 for ammonia and hydrogen sulfide showed CAFO reports predominantly from Seaboard Farms, Premium Standard Farms, and Buckeye Egg facilities, all of which have been subject to CERCLA and EPCRA enforcement actions. *See* discussion *infra* Part III.C. Only a handful of facilities, including Iowa Select Farms, have reported their releases absent citizen or EPA action. Nat'l Response Ctr., Query Standard Reports, http://www.nrc.uscg.mil/ (last visited May 3, 2009) (Access "Query Standard Reports" under "Services", limit search to "continuous" release type, "ammonia" or "hydrogen sulfide" material name and "air" medium affected). *See also* Erica Werner, *Lawmakers Criticize Adminstration Plan to Cut Pollution Reporting Requirements for Farms*, ASSOCIATED PRESS, Mar. 19, 2008 (reporting that EPA testimony to Congress estimated 140 AFOs reported ammonia releases in 2006, and 130 reported in 2007).

[145] Three states and municipalities have sued CAFOs for water pollution under CERCLA and EPCRA. In 2003, Tulsa, Oklahoma, sued Tyson Foods for phosphorus (a CERCLA hazardous substance) pollution of lakes that serve as drinking water sources. The case settled, vacating the District Court ruling that phosphorus from the CAFOs was a CERCLA hazardous substance. City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263, 1285 (N.D. Okla. 2003) (vacated pursuant to settlement, July 16, 2003). In 2004, Waco, Texas sued dairy CAFOs for phosphorus pollution of another drinking water source. The District Court

action only twice.[146] EPA first acted against Premium Standard Farms for failing to report its three million pounds of annual ammonia emissions.[147] The case arose through EPA's intervention in a CWA and CERCLA citizen suit.[148] After intervening, EPA added EPCRA claims and the parties settled, requiring Premium Standard Farms to monitor air emissions of particulate matter, volatile organic compounds, hydrogen sulfide, and ammonia from representative barns and lagoons.[149] EPA more recently settled claims under several statutes, including failure to report emissions under CERCLA and EPCRA, against Seaboard Foods.[150] The consent decree requires more than 200 Seaboard hog CAFOs to report emissions under CERCLA and EPCRA.[151]

Citizen suits have had some similar results. Since *Citizens Legal Environmental Action Network*, discussed above, the Sierra Club has filed two significant citizen suits against companies that failed to report ammonia emissions. One of these suits led to actual reductions in air emissions.[152] In that case, Sierra Club sued Tyson Foods in Kentucky,[153] and entered a settlement in 2005.[154] The settlement required Tyson to study, report, and consider options for mitigating ammonia emissions.[155] In the other Sierra Club suit, against Seaboard Farms, the Tenth Circuit held

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held phosphorus was a CERCLA hazardous substance, and the case subsequently settled. City of Waco v. Schouten, 385 F. Supp. 2d 595, 602 (W.D. Tex. 2005). Finally, in 2005 Oklahoma sued Tyson Foods for phosphorus pollution in the Illinois River. The case has not yet been decided. Oklahoma v. Tyson Foods, Inc., No. 05-CV-329-JOE-SAJ, 2005 WL 2915048 (N.D. Okla. 2005).

[146] AIR QUALITY ISSUES AND ANIMAL AGRICULTURE, *supra* note 10, at 19.

[147] Citizens Legal Envtl. Action Network v. Premium Standard Farms, Inc., No. 97-6073-CV-SJ-6, 2000 WL 220464 (W.D. Mo. 2000).

[148] *Id.* at *1.

[149] Consent Decree, Citizens Legal Envtl. Action Network, Inc. v. Premium Standard Farms, Inc., Case Nos. 97-6073-CV-SJ-6 and 98-6099-CV-W-6, at Appendix F (W.D. Mo. 2001), *available at* http://www.epa.gov/enforcement/resources/decrees/civil/mm/psfcd.pdf.

[150] Consent Decree, *Citizens Legal Envtl. Action Network*, at 1; Consent Decree, United States v. Seaboard Foods LP., Civil Action No. 06-CV-00989-R (10th Cir. 2006), *aff'd* 387 F.3d 1167, *available at* http://www.epa.gov/compliance/resources/decrees/civil/mm/seabord-cd-060915.pdf.

[151] Consent Decree, *Seaboard Foods*, *supra* note 150, at Appendix B.

[152] Sierra Club v. Tyson Foods, Inc., 299 F. Supp. 2d 693 (W.D. Ky. 2003).

[153] *Id.*

[154] Consent Decree, Sierra Club v. Tyson Foods, Inc., Civil Action No. 4:02 CV-073-M4 (W.D. Ky. Jan. 27, 2005) (on file with journal).

[155] *Id.* at 5–6.

Seaboard's entire 25,000 head hog operation was one "facility" under CERCLA, and therefore Seaboard must report emissions from the site's manure pits and confinements in the aggregate.[156]

CERCLA and EPCRA's requirement that polluters must report ammonia and hydrogen sulfide emissions over 100 pounds per day applies to only the country's largest factory farms.[157] Though these requirements do not impose administrative burdens on the vast majority of livestock producers, EPA has failed to enforce the provisions for CAFOs even where applicable. The handful of EPA, state, municipal, and citizen lawsuits to enforce CAFO emissions reporting have not gone unnoticed, however; these increasingly successful cases have acted as a catalyst for industry, Congressional, and EPA initiatives to exempt factory farms from CERCLA and EPCRA reporting obligations.

IV. EPA'S RESPONSE: AMNESTY FOR ILLEGAL FACTORY FARM AIR POLLUTION

In 2002, the livestock industry responded to the environmental community's growing awareness of CERCLA and EPCRA as tools to regulate CAFOs by approaching EPA with a confidential proposal for a safe harbor agreement.[158] The industry groups proposed EPA provide CAFOs protection from CAA and CERCLA actions for air emissions, in exchange for participation in an emissions monitoring program.[159] Ostensibly, the study would result in a usable method to estimate emissions for regulated pollutants released from different types of facilities, management practices, and livestock types, providing EPA with the data necessary to bring CAFOs into compliance with the statutes.[160]

In early 2005, EPA proceeded to enact a consent agreement mirroring the industry proposal,[161] which allowed any animal

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[156] Sierra Club v. Seaboard Farms, Inc., 387 F.3d 1167, 1176 (2004); *see also* Sierra Club v. Tyson Foods, Inc., 299 F. Supp. 2d 693, 710–12 (W.D. Ky. 2005) (holding that Tyson must report emissions from its contiguous chicken buildings in the aggregate under CERCLA and EPCRA).

[157] EPA bases reportable quantities on public health risk. EPA, Superfund Reportable Quantities (RQs), http://www.epa.gov/oem/content/reporting/rqover.htm (last visited May 3, 2009). As a result, only those CAFOs emitting unsafe levels of pollutants must report, and small family farms are safeguarded.

[158] *See* Thorne, *supra* note 27.

[159] *Id.*

[160] *Id.*

[161] *See generally* Air Consent Agreement, *supra* note 38.

feeding operation to sign up, if the operation helped fund and agreed to participate in an emissions monitoring study, as well as pay a small penalty.[162] In exchange, EPA granted participating operations immunity from civil actions for past and ongoing violations of CAA, CERCLA, and EPCRA.[163] More than 2,600 operators, representing more than 14,000 individual farms, signed up for the study.[164] However, the emissions monitoring study, currently underway, includes only twenty-five total sites, on twenty-one farms in only ten states.[165] Consequently, as many as 14,000 CAFOs received amnesty for simply paying a minimal fee.

A. *Why Let Polluters off the Hook? EPA's Flawed Rationale for Amnesty*

EPA put forth several reasons for its consent agreement, but none of these rationales withstand scrutiny. EPA primarily justified its grant of widespread immunity from clean air statutes by claiming the agency lacks credible scientific data necessary to regulate the industry.[166] EPA asserted that its limited knowledge of CAFO emissions currently necessitates case-by-case air pollution monitoring and enforcement actions, which delay industry-wide CAA, CERCLA, and EPCRA implementation more than the amnesty and monitoring study will.[167] EPA also relied on a National Academy of Sciences report identifying continued uncertainty over animal feeding operation emissions;[168] the Academy report concluded that EPA needs a new, science-based method to estimate these emissions.[169] EPA has used this report to justify its grant of immunity to the CAFO industry.

The Air Consent Agreement, however, failed to address the fact that some CAFOs have begun reporting emissions.[170] Indeed, EPA has acted in reliance on the accuracy of those reports, and

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[162] *Id.* at 4959.

[163] *Id.* at 4958–60. Amnesty for ongoing CERCLA and EPCRA reporting violations does not expire until EPA develops emissions factors based on the monitoring study, and the facility reports its emissions. *Id.* at 4959.

[164] Proposed Exemption Rule, *supra* note 74, at 73703.

[165] *Id.* The monitoring study began in Spring 2007, *id.*, and lasted two years. Air Consent Agreement, s*upra* note 38, at 4959.

[166] Air Consent Agreement, *supra* note 38, at 4958.

[167] *Id.*

[168] *See generally* NAT'L ACAD. OF SCI., *supra* note 26.

[169] Press Release, Nat'l Acad. of Sci., *supra* note 90.

[170] *See* Nat'l Response Ctr., *supra* note 144.

thus has demonstrated its belief that CAFO operators can accurately estimate emissions, by basing enforcement actions on reported emissions.[171] This undermines EPA's assertion that it cannot use current data to bring CAFOs into compliance with CERCLA and EPCRA's reporting requirements or applicable CAA regulations.[172]

EPA further asserted that its amnesty deal is the most efficient, effective way to begin requiring facilities to estimate their emissions and subsequently impose any applicable CAA requirements.[173] However, the Agency has the authority to conduct an emissions study and require compliance without granting immunity.[174] EPA never explained why it needed or wanted an immunity provision to do what it already has legal authority to do.[175] Finally, EPA defended the plan by emphasizing that it retains authority to bring criminal actions and respond to "imminent and substantial endangerment to public health, welfare or the environment,"[176] though the agency did not elaborate as to what response it may take or what penalties it may impose on CAFO violators.

Perhaps the most significant question the Agreement raises, however, is whether the study will result in usable emissions data and widespread compliance with clean air laws. Two main factors cast doubt on the study's merit: the role of the industry in conducting the monitoring,[177] and the small number of facilities monitored.[178] The Agreement places responsibility for the study largely in the hands of the industry by requiring participating operations to establish and fund a non-profit organization, which in turn will hire an Independent Monitoring Contractor to run the study.[179] EPA's hands-off approach to the monitoring study's data collection has already hurt the data's credibility in the eyes of the

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[171] *See* discussion *supra* Part III.C. EPA has entered and approved settlements requiring CAFOs to report ammonia and hydrogen sulfide emissions.

[172] Neither EPA nor industry presents evidence that facilities currently over-report emissions.

[173] Air Consent Agreement, *supra* note 38, at 4958.

[174] 42 U.S.C. § 7414(a)(1)(D) (2006) authorizes EPA to require any emissions source to sample its emissions.

[175] *See generally* Air Consent Agreement, *supra* note 38.

[176] *Id.* at 4958.

[177] *Id.* at 4960.

[178] Proposed Exemption Rule, *supra* note 74, at 73,703.

[179] Air Consent Agreement, *supra* note 38, at 4960.

environmental community.[180] Environmental organizations have perceived conflicts of interest within the monitoring organization,[181] and as a result question the legitimacy of the process and the integrity of the emissions information.[182]

To achieve the widespread compliance EPA seeks, the monitoring study must generate data sufficient to allow hog, laying hen, broiler chicken, dairy, and turkey AFO operators of all types and in all regions to estimate their emissions of various gases. However, though EPA identified numerous site-specific factors affecting emissions from each type of facility,[183] the study will monitor only twenty-one sites in ten states.[184] This calls into question whether sites selected can represent all regulated operations. If, after EPA completes its analysis of the study, it has insufficient data to establish emissions factors for all CAFOs, the only consequence is delay until EPA has sufficient information, which for all practical purposes means prolonged immunity for all participating AFOs.[185] EPA has no incentive to ensure the study will result in adequate emissions factors; amnesty does not end at the close of the monitoring period, and so the industry has an incentive to delay the regulatory process.

B. *EPA's Amnesty Agreement Will Limit the Use of CERCLA and EPCRA*

Due to the large number of livestock operations signed up for EPA's Agreement, its several year timeframe, and its practical effect on citizen suits, the scheme will largely stifle CERCLA and EPCRA claims against CAFOs for its duration. The monitoring study ended in Spring 2009, giving EPA 18 months to publish

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[180] BRENT NEWELL ET AL., COMMENTS OF ASSOCIATION OF IRRITATED RESIDENTS, CENTER ON RACE, POVERTY & THE ENVIRONMENT, ENVIRONMENTAL DEFENSE, ENVIRONMENTAL INTEGRITY PROJECT, AND SIERRA CLUB ON ANIMAL FEEDING OPERATIONS CONSENT AGREEMENT AND FINAL ORDER 14–15 (2005), *available at* http://www.environmentalintegrity.org/pub289.cfm.

[181] *Id.* The comments note potential researcher ties to industry and lack of peer review. *Id.* at 14.

[182] *Id.* at 14–15.

[183] Air Consent Agreement, *supra* note 38, at 4977. EPA identifies feed, animal genetics, lagoon design, temperature, climate, stocking density, management cycle, storage duration, and several other variables as influences on emissions. *Id.*

[184] Proposed Exemption Rule, *supra* note 74, at 73703.

[185] Air Consent Agreement, *supra* note 38, at 4964.

Emissions-Estimating Methodologies.[186] Participants then have 120 days to report qualifying releases of hydrogen sulfide and ammonia, but this can be extended by agreement of both parties.[187] As a result, CAFOs will be immune from enforcement actions for failure to report emissions until at least early 2011, and potentially much longer.

This immunity will also likely prevent citizens from bringing suit, though the Agreement does not prohibit citizen suits outright.[188] Because industry attorneys advised participating operations they would effectively be shielded from citizen suits as well as EPA suits,[189] both proponents and critics of the Agreement have argued courts would respond unfavorably to a citizen suit against a participating CAFO.[190] Because these operators are taking part in a study portrayed by EPA as a solution to air quality problems, they may be perceived to be responsible industry actors. At the least, the Agreement coupled with these industry assurances may deter citizens from making claims, if they reasonably perceive the claim as unlikely to succeed. This chilling effect on citizen action, and possible unfavorable treatment from courts towards those who do file suits, will extend the reach and significance of EPA's already broad amnesty agreement.

A facial challenge to the Agreement failed in 2007, when the D.C. Circuit rejected environmental groups' argument that EPA's agreement constituted a rulemaking in violation of APA[191] rulemaking procedures.[192] The Circuit Court held the Agreement was an enforcement action, as EPA asserted, and not a rulemaking, and thus EPA had acted within its authority.[193] Consequently, the

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[186] *Id.* at 4960; Final Exemption Rule, *infra* note 206, at 76,951.

[187] *Id.* at 4964. The agreement does not elaborate on the extension process. *Id.*

[188] *Id.* at 4959. The agreement does not address citizen suits directly, and grants immunity only from EPA action. *Id.*

[189] *See* Brownfield Ag News for America, Webcast: EPA Clean Air Compliance (Apr. 19, 2005), http://old.brownfieldagnews.com (follow "Archives" hyperlink; then follow "2005: Indiana Pork Producers Teleconference" hyperlink) (last visited May 3, 2009). Industry lawyers promoted the Air Consent Agreement as a defense against citizen suits.

[190] *Id.*

[191] 5 U.S.C. §§ 551–559 (2006).

[192] Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1030–31 (D.C. Cir. 2007).

[193] *Id.* at 1031, 1036.

court upheld the Agreement,[194] and opponents will have to weather the resulting air pollution amnesty for most U.S. factory farms.

V. LEGISLATIVE AND REGULATORY ATTEMPTS TO PERMANENTLY EXEMPT MANURE FROM CERCLA AND EPCRA

Even though the Consent Agreement has delayed CAA, CERCLA, and EPCRA implementation for thousands of CAFOs for several years, industry and sympathetic legislators continue attacking CERCLA and EPCRA's reporting requirements from multiple fronts. Repeated attempts to exempt all CAFO pollution from CERCLA and EPCRA by statutory amendment have failed so far, leading industry to appeal to EPA for a permanent exemption. The poultry industry found a sympathetic audience in the agency, which has proposed a rule to exempt all CAFO air emissions from the statutes' reporting requirements.

A. *Congress's Failed Attempts to Eliminate Notice Requirements for Manure Releases*

For some members of Congress, the broad exemptions granted by EPA's Air Consent Agreement do not sufficiently shield the factory farm industry from environmental regulation.[195] Led by Minnesota Representative Collin Peterson and Arkansas Senator Blanche Lincoln, legislators have repeatedly fought to broadly and permanently exempt manure releases from CERCLA and EPCRA, including those statutes' emissions reporting requirements.[196] This legislation would remove all constituents of manure from CERCLA and EPCRA's definition of hazardous substances.[197] As a result, the reporting exemption would extend even to clean-up actions in response to water releases, such as those that have caused state and municipal emergency responses

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[194] *Id.* at 1037.

[195] *See* Dale Hildebrant, *Bi-partisan Effort to Remove Livestock Manure From Superfund*, FARM & RANCH GUIDE, Mar. 18, 2007, *available at* http://www.farmandranchguide.com/articles/2007/03/18/ag_news/regional_news/news12.txt.

[196] *See* Agricultural Protection and Prosperity Act of 2007, H.R. 1398, S. 807, 110th Cong. § 2 (2007); Agricultural Protection and Prosperity Act of 2006, S. 3681, 109th Cong. § 2 (2006); CONG. RESEARCH SERV., ANIMAL WASTE AND HAZARDOUS SUBSTANCES: CURRENT LAWS AND LEGISLATIVE ISSUES 5–6 (2006) (explaining Sen. Craig's attempt to amend the FY2006 agriculture appropriations bill).

[197] H.R. 1398, S. 807, 110th Cong. § 2 (2007).

and enforcement actions.[198]

The most recent bill, proposed in 2007, gained 133 co-sponsors in the House of Representatives and 29 co-sponsors in the Senate.[199] As in previous years, however, the bill ultimately failed.[200] Congress has strong advocates on either side of the issue,[201] and the industry did not sit back and wait for the legislative handout their allies in Congress have been unable to deliver.

B. *The Poultry Industry's Bid for Special Regulatory Treatment*

In August 2005, the National Chicken Council, National Turkey Federation, and U.S. Poultry and Egg Association petitioned EPA to exempt the poultry industry from CERCLA and EPCRA reporting requirements for ammonia.[202] The petitioners argued reporting requirements for poultry operations were "unwise public policy" and have no public health or environmental benefits.[203] EPA made the petition public in December 2005, with a notice of data availability, seeking public input on poultry emissions data and whether EPA should grant the exemption.[204]

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[198] *See* discussion of CERCLA and EPCRA enforcement actions for water releases *supra* note 145.

[199] S. 807, 110th Cong. (2007), http://www.thomas.gov/cgi-bin/bdquery/z?d110:s.00807: (bill summary and status) (last visited August 1, 2009); H.R. 1398, 110th Cong. (2007), http://www.thomas.gov/cgi-bin/bdquery/z?d110:h.r.01398: (bill summary and status) (last visited August 1, 2009).

[200] *Id. See also* MICHELE M. MERKEL, ENVTL. INTEGRITY PROJECT, EPA AND STATE FAILURES TO REGULATE CAFOS UNDER FED. ENVTL. LAWS 4 (Sept. 11, 2006), *available at* http://www.environmentalintegrity.org/pub401.cfm (last visited Apr. 7, 2009).

[201] *See* Letter from Rep. John D. Dingell, Chairman, House Comm. on Energy and Commerce to Stephen L. Johnson, Adm'r, EPA (Mar. 18, 2008) [hereinafter Letter from Rep. John D. Dingell], *available at* http://energycommerce.house.gov/images/stories/Documents/PDF/Letters/EPA.031808.Johnson.Animal_Feeding_Ops.JDD.ARW.HLS.pdf; *see also* legislation cited *supra* note 196.

[202] Letter from George Watts et al., Pres. Nat'l Chicken Council, to Stephen L. Johnson, Adm'r, EPA, Docket ID EPA-HQ-SFUND-2005-0013-0002 (Aug. 5, 2005), *available at* http://www.regulations.gov/search/index.jsp (search Docket ID) [hereinafter Poultry Industry Petition].

[203] *Id.*; *see also* Editorial, *Exempting Factory Farms*, EUGENE REG. GUARD, Feb. 27, 2008.

[204] 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).

The notice gave no indication EPA would consider exemptions or other courses of action beyond what the poultry petitioners proposed.[205]

C. *EPA's Response—Proposing Even Broader Exemptions*

In late December 2007, EPA issued a surprising response to the poultry petition.[206] The agency proposed and subsequently finalized a rule exempting all "releases of hazardous substances to the air from animal waste at farms,"[207] thereby exempting all CAFOs—not just poultry facilities—from all CERCLA and EPCRA continuous air release reporting requirements—not just those for ammonia.[208] The Final Rule mirrors the proposed rule, with the exception that large CAFOs will be required to report emissions to state and local authorities under EPCRA.[209] However, the Rule fails to address the widespread non-compliance with EPCRA to date, and does not propose a plan to bring Large CAFOs into compliance with the retained reporting requirements.[210] Moreover, this threshold approach ignores EPCRA's entire approach to emissions reporting, which is based on emissions produced, not facility size, and ignores the fact that the statute's emissions threshold requirement already protects the majority of facilties from the requirement to report emissions.

EPA's rationale for the reporting exemption is that emergency response action to a CAFO air release would be unnecessary, impractical, and unlikely.[211] Moreover, the agency asserted that it does not need release notifications to enforce CERCLA and EPCRA requirements for livestock operations.[212] Finally, in issuing its proposed rule, EPA relied on twenty-six comments from state and local emergency response agencies, received in support

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[205] *Id.*

[206] Although EPA claims its Exemption Rule is not a response to the Poultry Petition, the Rule grants the poultry industry's request, and the agency has not substantiated claims that the two are unrelated. *See* CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,951 (Dec. 18, 2008) [hereinafter Final Exemption Rule].

[207] *Id.* at 76,950.

[208] Proposed Exemption Rule, *supra* note 74, at 73,703.

[209] Final Exemption Rule, *supra* note 206, at 76,952.

[210] *Id.*

[211] *Id.*

[212] *Id.* at 76,953.

of the much narrower poultry industry petition, to defend the rule and the assertion that no emergency response scenario could take place at a CAFO.[213] The Final Rule essentially follows this path, relying on comments from only thirteen state and local response agencies, and ten state agricultural departments, supporting the exemption.[214]

EPA received numerous negative responses to the proposed rule,[215] which it finalized on December 18, 2008.[216] In March, 2008, several Representatives from the House Committee on Energy and Commerce wrote EPA, criticizing the rule as "nothing more than a favor to big agribusiness at the expense of public health," challenging its scientific basis, and requesting detailed information on facts relied on by the agency.[217] Media reports on the rule and its impetus have pointed to the Bush Administration's lax stance on environmental enforcement, and have speculated the rule will not withstand judicial review.[218] Dozens of environmental and citizens' groups commented in opposition to the rule, emphasizing past uses of the continuous release reports, the health impacts of hydrogen sulfide and ammonia from factory farms, and legislative intent to include CAFOs in the scope of CERCLA and EPCRA reporting requirements.[219] Indeed, the Waterkeeper Alliance, the Sierra Club, and several other environmental organizations have already challenged the Final Rule.[220]

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[213] Proposed Exemption Rule, *supra* note 74, at 73,704.

[214] Final Exemption Rule, *supra* note 206, at 76,953.

[215] Elizabeth Williamson, *Farms May Be Exempted from Emission Rules*, WASH. POST, Feb. 24, 2008, at A3.

[216] Final Exemption Rule, *supra* note 206.

[217] Letter from Rep. John D. Dingell, *supra* note 201.

[218] *See* Williamson, *supra* note 215; *see also Exempting Factory Farms*, *supra* note 203.

[219] Press Release, Earthjustice, Groups Oppose Pollution Reporting Exemption for Factory Farms (Mar. 27, 2008). *See also* Letter from Earthjustice to EPA (Mar. 27, 2008), *available at* http://www.earthjustice.org/library/legal_docs/signed-final-cafo-comments.pdf [hereinafter Earthjustice Public Comments].

[220] Press Release, Earthjustice, Groups Challenge Bush Administration's Factory Farm Exemption (Jan. 15, 2009), *available at* http://www.earthjustice.org/news/press/2009/groups-challenge-bush-administration-s-factory-farm-exemption.html.

D. *Impacts of EPA's Exemption Rule*

Because CERCLA and EPCRA impose no limits on actual emissions from CAFOs, the rule will eliminate citizens' only source of—and only citizen suit recourse to obtain—factory farm emissions information for specific facilities.[221] Moreover, without access to emissions estimates for facilities, citizen suits for CAA regulation will be significantly hindered, as potential plaintiffs may be dissuaded from bringing an uncertain suit against a polluter of unknown dimensions.[222] Further impacts of EPA's exemption rule may include a legal challenge to invalidate the rule under the APA,[223] bids from other regulated industries for similar exemptions, or legislative action to clarify the intent and scope of CERCLA and EPCRA reporting requirements. Such legislative action could invalidate the rule, if Congress clarifies that these laws' reporting requirements do in fact extend to CAFOs, by expressly denying EPA discretion to construe it as ambiguous.

VI. PROTECTING CERCLA AND EPCRA AS TOOLS TO REGULATE CAFO EMISSIONS

EPA's exemption rule will severely limit citizens' access to information relevant to their health and environment. The public will still have access to some limited emissions data, but the rule will also limit opportunities to use that remaining information. To protect this data and keep it in the public domain, as EPA requires of other industrial polluters, environmental groups have taken EPA to court, challenging the legality of the rule itself.[224] This challenge could have several outcomes. The Court could vacate the rule in whole or in part, or uphold the rule. Alternatively, the delay provided by litigation could allow the new Administration to change EPA's priorities and rethink the Rule through the ongoing

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[221] EPA asserts that emissions information reported by large CAFOs under EPCRA need not even be made publicly available, and that state and local agencies need only make follow-up emergency notices publicly available. Final Exemption Rule, *supra* note 206, at 76,953. EPA has also stated its plans to publicize the Air Consent Agreement monitoring study results and emissions factors, once it finalizes them. Proposed Exemption Rule, *supra* note 74, at 73703.

[222] *See* Braunig, *supra* note 132, at 1521.

[223] 5 U.S.C. §§ 551–559 (2006).

[224] *See* Earthjustice Press Release, *supra* note 219.

rule review process.[225] This part analyzes the merits of a potential facial challenge.

Would-be environmental and citizen plaintiffs have several compelling arguments that EPA's proposed exemption rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in violation of the APA.[226] The APA argument that EPA's rule is not in accordance with law—that it violates CERCLA and EPCRA's own terms—should succeed, because these statutes unambiguously require regulation of CAFO emissions, and thus EPA's interpretation receives no *Chevron* deference.[227] The APA arbitrary and capricious claim requires plaintiffs to show the agency's decision to regulate, or in this case to rescind regulation, lacked adequate bases or was unreasonable.[228] The proposed exemption rule fails under this standard of review because it contravenes the plain meaning and legislative intent of CERCLA and EPCRA, its rationale is not based in fact, and it is illogical and unreasonable when considered in the context of EPA's Air Consent Agreement.

A. *The Exemption Rule Violates the Legislative Intent of CERCLA and EPCRA*

EPA's rule fails under the *Chevron* test because Congress has demonstrated unambiguous intent to provide the public with emissions information and to regulate CAFOs under CERCLA and EPCRA in furtherance of this goal. As established in case law[229] and EPCRA's legislative history,[230] CERCLA and EPCRA's

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[225] *See supra* note 37.

[226] 5 U.S.C. § 706(2)(A) (2006).

[227] Chevron v. Natural Res. Defense Council, Inc., 467 U.S. 837, 865 (1984). To determine whether EPA's rule violates the legislative intent of, and therefore is contrary to, CERCLA and EPCRA, a court will apply the two-part test established by the Supreme Court in *Chevron v. NRDC*. First, the court considers whether Congress has spoken to the specific question at issue. If so, the analysis ends, because courts must give effect to the clear intent of Congress. However, if Congress has been silent or ambiguous on a relevant issue, the court upholds the agency action if its interpretation of the statute is reasonable, even if not the best interpretation in the eyes of the court. *See also* discussion *infra* Part VI.A.

[228] *See* discussion *infra* Part VI.B.

[229] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 86–87 (1998); Sierra Club v. Tyson Foods, Inc., 299 F. Supp. 2d 693, 710–12 (W.D. Ky. 2003).

[230] H.R. REP. NO. 99-962, at 281 (1986). Congress determined, in enacting EPCRA, that CERCLA was insufficient because it did not require information

reporting requirements serve a two-fold purpose: the notices serve both to allow emergency responses to hazardous releases and to inform citizens about those releases. EPA's proposed exemption rule errs by ignoring the latter legislative purpose. The rule should fail under *Chevron's* first step if challenged: CERCLA and EPCRA's reporting requirements unambiguously apply to CAFO emissions, so no interpretive role remains for EPA. *Chevron* permits agencies to reasonably interpret ambiguous statutory provisions, but does not permit agencies to narrow unambiguous requirements or otherwise act contrary to legislative intent.[231]

EPA asserts that the proposed exemption rule conforms with the legislative purpose of the reporting requirements, which it defines as "notifying the NRC, and SERCs and LEPCs when a hazardous substance is released."[232] EPA justifies the rule by asserting that in no foreseeable circumstances would emergency response authorities need to respond to a CAFO air emission,[233] so CAFO reporting requirements do not further the legislative goal. While enabling emergency responses is one legislative purpose of the reporting requirements, however, the proposed rule does not conform with the second goal of public notification. EPA's rule downplays the informational goal of hazardous release reporting, though the agency has elsewhere stated that "inform[ing] communities and citizens of chemical hazards in their areas" is EPCRA's "primary purpose."[234] The agency's rationale is therefore not in fact based on the reporting requirements' purposes, because the rule incorrectly interprets CERCLA and EPCRA by limiting their reporting purposes to enabling emergency response. Because the legislative intent to provide citizens with information is not contingent on the need for emergency response actions,[235]

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reported be made available to citizens or reported to local authorities. S. REP. NO. 99-11, at 1–4 (1985).

[231] *Chevron*, 467 U.S. at 843 (1984).

[232] Final Exemption Rule, *supra* note 206, at 76,953.

[233] *Id.* The recent Health Department evacuation to protect rural Minnesota residents from dairy air emissions, discussed *infra* Part VI.B.1, clearly disproves this EPA assertion. *Supra* notes 1–7.

[234] EPA, What Is the Toxics Release Inventory (TRI) Program, http://www.epa.gov/tri/triprogram/whatis.htm (last visited May 3, 2009).

[235] Congress discusses the two goals of EPCRA as distinct and independent. H. Rep. No. 99-962, at 281 (1986). Moreover, the very idea of requiring routine emissions reports that do not result in state or EPA action supports the independent goal of public notification. For example, EPCRA's Toxics Release Inventory, discussed *supra* notes 132 & 234, creates a public pollution database

EPA cannot eliminate access to this information in conformity with the statutes' goals. EPA's arbitrary threshold approach to EPCRA emissions reporting does not solve this fundamental problem in the agency's approach.

CERCLA and EPCRA's limited agricultural exemptions demonstrate Congress's unambiguous intent to extend CERCLA and EPCRA continuous release reporting requirements to CAFO air emissions. CERCLA and EPCRA both exempt emissions resulting from the use of manure as fertilizer from notification requirements:[236] CERCLA exempts "normal application of fertilizer" from its definition of "release,"[237] and EPCRA exempts manure "used in routine agricultural operations."[238] The clear inference from these limited exemptions is that Congress intended to subject other manure-related releases to CERCLA and EPCRA reporting requirements.

The Supreme Court has made clear that where Congress has established express exemptions from statutory requirements, courts may not read additional exemptions into a statute.[239] EPA's proposed exemption for CAFOs from CERCLA and EPCRA violates this convention of statutory construction. Indeed, following this rule of statutory construction, courts have held non-fertilizer emissions from CAFOs are subject to the reporting requirements.[240] Put simply, Congress would have expressly exempted CAFOs from emissions reporting requirements if it had

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to "empower citizens, through information, to hold companies and local governments accountable," What Is the Toxics Release Inventory (TRI) Program, *supra* note 234, rather than to enable state or EPA emergency response.

[236] *See* discussion of exemptions *supra* Part III.B.

[237] *Id.*

[238] *Id.*

[239] *See* Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980) (holding that where Congress has enumerated specific exemptions to a general prohibition, a court may not infer additional exemptions); *see also* United States v. Rutherford, 442 U.S. 544, 552 (1979) (holding that inferring exceptions in clear statutes is generally disfavored and only acceptable when necessary to prevent absurd results).

[240] *See* Sierra Club v. Tyson Foods, Inc., 299 F. Supp. 2d 693, 714 (W.D. Ky. 2003) (holding ammonia released into the air did not qualify Tyson Foods' chicken CAFO for the normal application of fertilizer exemption, because the ammonia was not applied to farm fields as fertilizer). Similarly, in *City of Waco v. Schouten*, a Texas District Court held that phosphorous from cow manure is a CERCLA hazardous substance, and water releases must be reported under the statute because the release was not the "normal application of fertilizer." 385 F.Supp. 2d 595, 602 (W.D. Tex. 2005).

intended to do so.[241] CERCLA and EPCRA therefore unambiguously include CAFOs under their reporting requirements.

Because EPA's rule still obligates CAFOs to report certain releases of hazardous substances from manure to media other than air, as well as certain air emissions from Large CAFOs under EPCRA,[242] it seems even EPA acknowledges Congress's intent to regulate CAFOs under CERCLA and EPCRA. Consequently, EPA's proposed rule leads to absurd results: the agency acknowledges congressional intent to regulate CAFO releases that do not fit the fertilizer exemption, yet EPA has selected air releases for exemption in direct contradiction of this intent. Even if EPA believes CAFO discharges to water and land, but not to air, may necessitate emergency response, the agency has not effectively reconciled this position with CERCLA and EPCRA's plain language and express goal of providing public information on all hazardous releases.[243]

B. *EPA's Exemption Rule is Arbitrary and Capricious*

EPA's proposed rule is arbitrary and capricious in violation of the APA. This standard of review for agency action "require[s] the reviewing court to engage in a . . . thorough, probing in-depth review."[244] To determine whether an agency acted arbitrarily and capriciously, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[245] The proposed exemption rule fails even under this narrow standard; it arbitrarily ignores critical factors such as the demonstrated value of emissions information, misleadingly claims widespread state and local support, assumes without evidence that emergency responses to CAFO air emissions will never be necessary, and clearly errs by ignoring EPA's own research on the public health risks of ammonia and hydrogen sulfide. EPA also cannot reconcile the proposed rule with its Air Consent Agreement.

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[241] Sierra Club v. Tyson Foods, Inc., 299 F. Supp. 2d at 714.

[242] Final Exemption Rule, *supra* note 206, at 76,953.

[243] In fact, the Final Exemption Rule's rationale does not even address Congressional intent regarding CAFO air emissions. *Id.*

[244] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

[245] *Id.* at 416.

1. *EPA's Rationale for the Exemption Rule Has No Basis in Fact*

The recent evacuation due to Minnesota's Excel Dairy emissions demonstrates the potential need for emergency responses to factory farm pollution.[246] This evacuation would not have been possible but for the emissions monitoring data collected by concerned citizens; EPA's rule offers no evidence that many more similar evacuations would not occur if emissions data were available for all CAFOs exceeding CERCLA and EPCRA's reporting thresholds. Moreover, emissions information generated by CERCLA and EPCRA has demonstrated value to EPA itself. EPA's own past CERCLA and EPCRA enforcement actions, as well as citizen actions,[247] have resulted in consent decrees requiring best management practices and air monitoring.[248] EPA was clearly willing to rely on those industry estimates of emissions as bases for civil liability, and should continue to require the information that will allow it to do so into the future.

One of EPA's primary justifications for the proposed rule is a series of comments received from state and local emergency response authorities, indicating their belief that emergency response actions to CAFO air releases are unlikely.[249] The Agency's use of these comments as support for the proposed rule is misleading, however, because they represent a small fraction of emergency response agencies, which critics suspect were organized by a single party, and most significantly, because EPA ignores the National Association of Clean Air Agencies' (NACAA) opposition to CAFO exemptions from CERCLA and EPCRA.

In its proposed rule, EPA notes the fact that emergency response authorities submitted the twenty-six comments in favor of emissions reporting exemptions. These comments, however, were submitted in support of the poultry petition, not the proposed exemption rule.[250] The authorities are on record as supporting only a poultry industry exemption from the ammonia reporting requirements of CERCLA and EPCRA; EPA's attempt to extrapolate this into support for a CAFO exemption from all air

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246 *See supra* notes 1–2.
247 *See* discussion *supra* Part III.C.
248 *Id.*
249 Final Exemption Rule, *supra* note 206, at 76,953.
250 *Id.*

emissions reporting defies credibility.[251] Moreover, these twenty-six comments represent only 0.6 percent of 4,491 total state and local emergency response agencies,[252] so extrapolating to assume they represent significant support is, again, unreasonable.[253] The comments also come from a highly suspect source. Eighteen of the twenty-six comments were essentially identical,[254] leading critics to suspect an industry-orchestrated campaign.[255] Two of the remaining eight did not take a position on the poultry petition at all, despite EPA's claim they supported it.[256]

EPA's focus on these twenty-six comments in its proposed rule, and twenty-three state and local comments in its final rule, becomes particularly unreasonable when viewed in light of NACAA's opposition to regulatory and legislative CAFO exemption proposals.[257] NACAA represents air pollution control agencies in fifty-three states and territories and over 165 major metropolitan areas across the United States.[258] This expert state agency opposition to the proposed rule and similar actions substantially outweighs state and local support even for reporting exemptions, yet EPA falsely claims that state and local comments "all affirmed EPA's belief that a response to a notification of air emissions of hazardous substances from animal waste is highly unlikely."[259]

EPA's reasoning on the likelihood of an emergency response similarly lacks substance. EPA fails to support its argument that emergency responses to CAFO air emissions are unnecessary in all forseeable circumstances with any facts, and instead simply assumes that state and local authorities will fail to respond to air releases. As discussed, however, state officials recently conducted

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[251] *Id.*

[252] Letter from Rep. John D. Dingell, *supra* note 201.

[253] *See* CATHARINE FITZSIMMONS, IOWA DEP'T OF NATURAL RES. AIR QUALITY BUREAU, TESTIMONY BEFORE THE SENATE ENV'T AND PUBLIC WORKS COMM.: HUMAN HEALTH, WATER QUALITY AND OTHER IMPACTS OF THE CONFINED ANIMAL FEEDING OPERATION INDUS. 5 (Sept. 6, 2007) (on behalf of the Nat'l Ass'n of Clean Air Agencies) [hereinafter NACAA Comments], *available at* http://www.4cleanair.org/Documents/CAFO.pdf.

[254] Letter from Rep. John D. Dingell, *supra* note 201.

[255] Williamson, *supra* note 215.

[256] Letter from Rep. John D. Dingell, *supra* note 201.

[257] *See* NACAA Comments, *supra* note 253.

[258] NACAA, About Us, http://www.4cleanair.org/about.asp (last visited June 8, 2009).

[259] Final Exemption Rule, *supra* note 206, at 76,953.

an emergency response to CAFO emissions in Minnesota,[260] undermining EPA's position. In the proposed exemption rule, EPA relies on the fact that it has not yet initiated a response to a National Response Center notification for CAFO air emissions, and cannot foresee doing so.[261] This rationale disregards the key roles of state and local response authorities, which EPCRA created in part to enable more efficient and effective emergency response than the NRC could accomplish.[262] Indeed, state authorities and legislators believe that emergency responses to CAFO air emissions may be necessary and that reporting information is valuable to response agencies.[263]

NACAA opposes the proposed exemption in part because it would prevent response authorities—including its membership of air regulators and enforcement officials—from obtaining "critical information" about dangerous releases that could affect their communities, and because it would prevent them from taking necessary response actions and conducting investigations.[264] Similarly, John Dingell and other representatives emphasize the demonstrated usefulness of emissions reports, not only to citizens living near factory farms, but also to state and local response authorities.[265] The legislators further point out that EPA's denial of any possibility of a response action is illogical when considered along with EPA's own acknowledgement that continuous releases have very real and significant health impacts.[266] EPA's argument also fails to account for facilities like Oregon's Threemile Canyon Farms, a dairy with more than 40,000 cows and as many as 700 workers on-site.[267] EPA claims that the nature of CAFO emissions distinguishes these facilities from other industrial sources that are

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[260] Hemphill, *supra* note 2.

[261] Proposed Exemption Rule, *supra* note 74, at 73704.

[262] H.R. REP. NO. 99-962, at 281 (1986).

[263] Letter from Rep. John D. Dingell, *supra* note 201; NACAA Comments, *supra* note 253, at 6.

[264] NACAA Comments, *supra* note 253, at 6.

[265] Letter from Rep. John D. Dingell, *supra* note 201.

[266] *Id.*

[267] *See* Threemile Canyon Farms, "Our products" and "Our partners," http://www.threemilecanyonfarms.com (last visited May 3, 2009) (click on "Customized milk contracts" under "Our Products," and click on "Our employees" under "Our Partners"). Though the Final Rule will require Threemile Canyon to report under EPCRA, EPA's reduction in reporting obligations will not likely create the incentive for this facility to come into compliance.

still subject to continuous release requirements. Presumably, EPA bases this distinction on the potentially affected population, and assumes emissions will disperse to safe levels before affecting rural residents.[268] The proposed rule offers no explanation why an urban ammonia source may trigger an emergency response for its continuous releases, while a factory farm with on-site workers or neighbors in close proximity may not. This distinction does not apply to a facility like Threemile Canyon Farms, with hundreds of potentially affected workers on-site, and certainly did not apply in Thief River Falls, Minnesota.

Finally, the proposed exemption rule lacks basis in fact by ignoring the health risks posed by CAFO air emissions and EPA's own findings that existing continuous release requirements are necessary to protect public health. In 2004, EPA scientist Roy L. Smith examined the health effects of hydrogen sulfide emissions at the reportable quantity of 100 pounds per day.[269] He reported that emissions at this level lead to ambient hydrogen sulfide concentrations substantially above the threshold for adverse health effects;[270] further, respiratory and central nervous system effects were not limited to those in close proximity of a waste lagoon or confinement building, but rather could extend to downwind populations more than a mile away.[271] Similarly, Smith reported that ammonia levels even slightly above the reportable quantity cause respiratory symptoms.[272] Based on these findings, Smith concluded the reporting requirements were "appropriately protective, though not overprotective" of public health.[273] This demonstrates that EPA's experts recognize the connection between continuous release reporting and protection of public health, independent of emergency response actions, yet the rule ignores these recommendations.

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[268] The Proposed Exemption Rule does not elaborate on this rationale, beyond stating that "in all instances" manure emissions "to the air over a broad area" make emergency response actions unnecessary. Proposed Exemption Rule, *supra* note 74, at 73,704. The Final Rule merely stresses the fact that reporting requirements only apply when emissions off-site pose a threat. Final Exemption Rule, *supra* note 206, at 76,952.

[269] *See* Letter from Rep. John D. Dingell, *supra* note 201.

[270] *Id.*

[271] *Id.*

[272] *Exempting Factory Farms*, *supra* note 203.

[273] Williamson, *supra* note 215.

2. *The Exemption Rule is Irreconcilable with EPA's Air Consent Agreement*

Common sense dictates EPA should not exempt factory farms from pollution reporting requirements in the wake of initiating a major CAFO emissions study.[274] Air quality regulators have pointed out the contradiction of acknowledging an information gap in quantifying CAFO emissions, while proposing an exemption from emissions reporting that will continue even after the agency has established emissions factors.[275] To move forward with both the amnesty agreement and the exemption rule, EPA must first refuse to enforce CERCLA and EPCRA due to a dearth of emissions data, and then assert, before even collecting the data, that it has adequate information to safely exempt all livestock facilities from the reporting obligations. By so doing, EPA ignores the terms of its own amnesty agreement.

As noted, EPA based its agreements for temporary immunity from CAA, CERCLA and EPCRA claims on the premise that it was the most efficient and effective way to establish emissions estimates and "bring all participating AFOs into compliance with all applicable regulatory requirements."[276] Of course, when EPA and participants entered these agreements, applicable regulatory requirements included the CERCLA and EPCRA continuous release reporting for all facilities emitting more than the threshold amount of ammonia or hydrogen sulfide. The exemption, which EPA will enact during the monitoring study, is unreasonable, and critics have rightly called the proposed rule premature.[277]

EPA statements reaffirming its commitment to bringing participants into full compliance emphasize the arbitrary nature of exempting CAFOs who participated in the amnesty agreement. In the course of the Association of Irritated Residents' challenge to the agreement,[278] EPA told the D.C. Circuit Court "the release and covenant [not to sue] are contingent on the participating AFOs' full compliance with the consent agreement, including undertaking whatever actions may be required to come into compliance with

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[274] *See generally* Air Consent Agreement, *supra* note 38.
[275] *See* NACAA comments, *supra* note 253.
[276] Air Consent Agreement, *supra* note 38, at 4958.
[277] AIR QUALITY ISSUES AND ANIMAL AGRICULTURE, *supra* note 10, at 21.
[278] Ass'n of Irritated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. 2007).

any applicable statutory requirements."[279] Though CAFOs participating in the Consent Agreement surely will not object to this change in their own obligations, EPA misled the public and the court about the nature and scope of the agreement by attempting to undermine its effect after it withstood judicial review.

Finally, the exemption will undermine more than the CERCLA and EPCRA aspects of the consent agreement. As asserted by NACAA, the exemption rule will hinder EPA's alleged goal of using the monitoring study results to impose applicable CAA requirements.[280] Without receiving continuous release reports, EPA shifts the burden of determining which facilities trigger the CAA from the CAFOs to itself, states, and citizens. Because EPA will now have to calculate emissions estimates for facilities one-by-one before imposing CAA requirements, the agreement will not likely result in industry-wide CAA compliance. If EPA were to enforce CERCLA and EPCRA for all CAFOs, on the other hand, the agency would have reports from all facilities whose size warrant reporting, and it could enforce the CAA for a large number of CAFOs who exceed relevant thresholds. Thus, not only is EPA tying its own hands with respect to CERCLA and EPCRA emergency responses, it is rendering its own compliance agreement and monitoring study essentially toothless.

CONCLUSION

As factory farms proliferate, grow larger, and ever more closely resemble other industrial polluters, citizens need more avenues to protect their health and communities. CERCLA and EPCRA's reporting requirements were created to protect citizens, by requiring transparency and accountability from polluters. Factory farms deserve no special treatment; the people CAFOs affect need access to information essential to their health and environment, and the courts or the new Administration must compel EPA to make this information more, not less, available.

But perhaps the more significant impact of EPA's irresponsible rule will be delay and hindrance of CAA controls

[279] Brief for Respondent at 11, Ass'n of Irritated Residents v. EPA, 494 F.3d 1027 (D.C. Cir. Feb. 2, 2007) (No. 05-1177); *see also* Letter from Rep. John D. Dingell, *supra* note 201.

[280] NACAA Comments, *supra* note 253, at 5.

over even the most egregious factory farm polluters. The air pollution from these facilities has escaped regulation for far too long, and if EPA finalizes its proposed rule, information about factory farms emissions, as well as regulation and reduction of these emissions, will grow further out of reach. Recent actions in Idaho and California show that CAA permits and controls apply to certain CAFOs. However, effective CAA implementation will require emissions estimates for any facility that EPA or a state agency seeks to regulate, and industry-wide emissions reports could expedite a nationwide CAA permitting process. Rural citizens and CAFO workers need information about the pollution they breathe everyday. They also need real solutions that protect public health and the environment. It is past time for EPA to start treating factory farming as the polluting industry it is, and bring these facilities into the 21st Century of pollution control regulation.