

EPA Proposes to Exempt Animal Waste From Reporting Requirements

EPA is currently reviewing comments on its November 14, 2018 proposed rule to exempt livestock farms from reporting routine farm air emissions under the Emergency Planning and Community Right-to-Know Act (EPCRA) and intends to issue a final rule this spring. The rule is the final piece in the implementation of the Fair Agricultural Reporting Method (FARM) Act, which addressed regulatory confusion created in April 2017 when the U.S. Court of Appeals for the D.C. Circuit rejected a 2008 EPA rule that exempted reporting of animal-waste air emissions at farms under EPCRA and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The FARM Act exempted farmers from CERCLA; the proposed rule will exempt them from EPCRA.

In this update, we provide background on the rule, detail the rule's scope and review a few of the public comments submitted.

Background

Under EPCRA and CERCLA, parties must notify the National Response Center (for CERCLA) or state and local government agencies (for EPCRA) of releases of hazardous substances that meet or exceed reportable quantities within a 24-hour period. *See* 42 U.S.C. § 9603 (CERCLA); *id.* § 11004 (EPCRA). The purpose of the notification is for federal, state or local officials to evaluate the need for an emergency response to mitigate the effects of a release to the community.

An issue arose related to the application of these statutes to animal waste. At least two byproducts of animal waste - ammonia and hydrogen sulfide - fall under the CERCLA definition of "hazardous substances" and EPCRA's definition of "extremely hazardous substances" to which the statutory reporting requirements apply. *See* 40 C.F.R. § 302.4(a) (CERCLA); *id.* pt. 355 App. A (EPCRA). Under both statutes, the reportable quantity for ammonia and hydrogen sulfide is set at 100 pounds per day, levels that are routinely exceeded at commercial farms. 40 C.F.R. § 302.4(a); *id.* pt. 355 App. A (EPCRA); *see Waterkeeper Alliance v. EPA*, 853 F.3d 527, 531 (D.C. Cir. 2017).

In 2008, EPA passed a final rule exempting all farms from CERCLA reporting requirements and exempting all farms except concentrated animal feeding operations (CAFOs) from state and local reporting requirements under EPCRA (the 2008 Rule). [73 Fed. Reg. 76,948 \(Dec. 18, 2008\)](#) (codified at 40 C.F.R. pts. 302 & 355). The 2008 Rule was challenged by environmental groups, and in 2017, the D.C. Circuit vacated the rule as unlawful. *Waterkeeper Alliance*, 853 F.3d at 537-38. In vacating the rule, the court found that EPA could not rely on general rulemaking authority or a *de minimis* exception to issue an administrative reporting exemption for this category of releases, particularly where EPA had failed to identify any statutory ambiguity as the basis for its interpretation of the reporting requirements. *Id.*

Before the *Waterkeeper Alliance* court issued its mandate vacating the 2008 Rule, Congress passed the FARM Act, which was signed into law on March 23, 2018. [83 Fed. Reg. 37,444 \(Aug. 1, 2018\)](#). The FARM Act expressly exempts reporting of animal-waste air emissions at a farm from CERCLA but is silent on EPCRA. *See*

id. In August 2018, EPA published a final rule to amend its CERCLA regulations (40 C.F.R. pt. 302) by adding the reporting exemption for air emissions from animal waste at farms and adding definitions of "animal waste" and "farm" to the FARM Act. *See id.* EPA also separately provided [guidance](#) that animal waste reporting was exempt under EPCRA.

Scope of the Proposed Rule

The proposed rule codifies EPA's interpretation that air emissions from animal waste at farms are not subject to EPCRA's release reporting by explicitly exempting releases from animal waste into the air at farms from reporting. *See* [83 Fed. Reg. 56,791 \(Nov. 14, 2018\)](#). The proposed rule continues EPA's goal of a consistent reporting exemption for animal-waste emissions at farms under both EPCRA and CERCLA. [See id. - List of subjects](#)

The scope of this proposed rulemaking is limited to air emissions from animal waste, including decomposing animal waste, at a farm. [See id. at 56,795](#). The proposed rule does not apply to releases of substances from animal waste into non-air environmental media; thus, a release from animal waste into water (e.g., a lagoon breach) might trigger reporting requirements if the release exceeds the applicable reportable quantities. *Id.*

Public Comments

EPA received over 87,000 comments on the proposed rule during the public comment period, which closed on December 14, 2018.

Industry groups such as the American Farm Bureau Federation (AFBF), the National Chicken Council (NCC) and the National Cattlemen's Beef Association (NCBA) submitted comments in favor of the proposed rule. EPCRA "was never intended to govern agricultural operations, where emissions from livestock are a part of everyday life," AFBF said in [comments submitted to EPA last month](#). NCC and other poultry and egg industry groups focused their [comments on the benefits of the proposed rule](#) - the proposal, they say, will eliminate "an unnecessary burden on thousands of farmers" and "avoid a misappropriation of manpower and potential unneeded emergency responses by [local emergency response committees] and first responders." [NCBA's comments](#) went even further, arguing that it is "impossible for all cattle producers to comply" with EPCRA's reporting requirements. NCBA also urged EPA "to clarify that this proposal does not create a new administrative exemption from the law, but rather codifies the effect of the statutory exemption in the recently enacted [FARM Act](#)." *Id.*

Others, including Senate Democrats, environmentalists and public health advocates, called on EPA to withdraw the proposed rule and continue to require reporting by animal feeding operations under EPCRA. According to comments from nine Democrats on the Senate Committee on Environment and Public Works, led by ranking committee member Senator Tom Carper (D-Del.), the proposed rule "vastly exceeds EPA's statutory authority and countermands unambiguous Congressional intent," because it "relies on a statutory interpretation that was considered, and specifically rejected by Congress, when it enacted the Farm Act into law." Environmental health scientists at the Johns Hopkins Bloomberg School of Public Health [argued](#) that the proposed rule ignores scientific literature demonstrating the real health risks from CAFO emissions and the importance of public access to information about these emissions.

EPA is currently reviewing the comments on the proposal and intends to issue a final rule this spring. EPA will address the comments received in a response to comments document that will be developed and published as part of the final rule.

Key Takeaways

- The *Waterkeeper Alliance* case serves as a reminder that comments made during an agency rulemaking do matter. In *Waterkeeper Alliance*, the court relied on comments made by citizens during the notice and comment period of rulemaking in reaching its decision. See *Waterkeeper Alliance*, 853 F.3d at 536-37.
- While the proposed rule is good news for the agricultural industry, it remains unclear whether the proposed rule will be promulgated as-is. Even if it is, there will almost certainly be a challenge in federal court. Environmentalists have already filed a [lawsuit contesting the related guidance issued in 2017](#) by the Trump administration. That case has been put on hold until the government shutdown has been resolved. See *Rural Empowerment Ass'n for Cmty. Help v. EPA*, 1:18-cv-02260-TJK, Dec. 31, 2018 Minute Entry (ECF No. 19) (text entry only).
- If the *Waterkeeper Alliance* decision is any indication, courts will remain an important independent evaluator of executive branch authority, and the language used by Congress in enacting the statutes on which agency actions are based is a very real and very powerful limit on agency actions.

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