



National Association of SARA Title III Program Officials

Concerned with the Emergency Planning and Community Right-to-Know Act

March 27, 2008

Electronically Submitted

Superfund Docket
Environmental Protection Agency
Mail Code: [2822T]
1200 Pennsylvania Ave, NW
Washington DC 20460

Re: Comments to Docket ID No. EPA-HQ-SFUND-2007-0469

Dear EPA:

The National Association of SARA Title III Program Officials (NASTTPO) is made up of members and staff of State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Local Emergency Planning Committees (LEPCs), various federal agencies, and private industry. Members include state, tribal, or local government employees as well as private sector representatives with Emergency Planning and Community Right to Know (EPCRA) program responsibilities, such as health, occupational safety, first response, environmental, and emergency management. The membership is dedicated to working together to prepare for possible emergencies and disasters involving hazardous materials, whether they are accidental releases or a result of terrorist attacks.

It is NASTTPO's position that this proposal endangers responders and the public by denying them information they would use to protect themselves from hazardous chemical releases. We feel strongly that EPA should withdraw this proposal.

Timothy R Gablehouse
President
410 17th St, Ste 1375
Denver CO 80202
(303) 572-0050

INTRODUCTION

As an organization, NASTTPO is not taking a position on the environmental compliance record of confined animal feeding operations or farms. Rather, NASTTPO is commenting because we believe the proposed action threatens the integrity of the accidental release reporting system. EPA misses the point when it notes that first responders rarely respond to releases from “farms”. That is only true when they know such facilities are the source.

The 911 call that comes in from a member of the public in the dark of night reporting a foul or chemical odor rarely contains information on the source. The responders are forced to guess at that source as they gage their response. “Immediate” release reporting by facilities under EPCRA provides crucial information to those responders. Without such information responders are forced to blindly drive through an area not knowing what they are looking for – is it a vehicle accident, a facility release or something worse will be the question in their minds.

EPA acknowledges that many of the hazardous chemicals that may be released by “farms” are the same as those that may be released during a vehicle or facility accident. The public and responders cannot distinguish between a hazardous chemical coming from a facility exempted under this proposal versus other sources without a report. It is frankly offensive for EPA to assume that responders somehow will be able to figure this out on a dark night and, therefore, not which to respond when the source is a “farm”.

ANALYSIS

CERCLA and EPCRA, combined, require any person in charge of a facility from which a hazardous substance has been released in a reportable quantity to immediately notify federal, state, and local governments. See 42 U.S.C.A. § 9603 (2002) and 42 U.S.C.A. § 11004 (2002). Ammonia (“NH₄”) and Hydrogen Sulfide (“H₂S”) are listed hazardous substances under CERCLA. 40 C.F.R. § 302.4, see also Sierra Club v. Seaboard Farms Inc., 387 F.3d 1167,

1170 (10th Cir. 2004). EPA has set the RQ for ammonia and hydrogen sulfide at one hundred pounds per day. 40 C.F.R. § 302.4. Courts have uniformly interpreted the term facility under CERCLA to encompass for any purpose, including reporting requirements imposed by § 103, “the entire site.” Sierra Club v. Seaboard Farms Inc., 387 F.3d 1167, 1169, 1176-78 (U.S. Ct. App. 10th Cir. 2004) (holding that the farm in its entirety, as opposed to individual barns or lagoons, constituted a “facility” under CERCLA Section 103 reporting requirements,)); see also Sierra Club, Inc. v. Tyson Foods, Inc., 299 F.Supp.2d 693, 710 -11 (W.D. Ky. 2003) (holding that “for purposes of the CERCLA Section 103 reporting requirements, each chicken production operation, including the separate chicken houses, is a facility)). Therefore, owner/operators of a facility have a duty to aggregate the quantity of all releases within the site and report if the aggregated amount exceeds the daily RQ. Seaboard Farms Inc., 387 F.3d at 1169, 1176-78; see also Tyson Foods, Inc., 299 F.Supp.2d at 710 -11 (holding that “[e]missions from the separate poultry houses are required to be added together to determine if a reportable quantity has been reached for the facility”).

Farms produce animal waste that results in the release of hazardous substances to the air, mainly ammonia and hydrogen sulfide, both of which are by-products of the break-down of animal waste. When animal waste is stored in a lagoon, pit, or stockpile, at times they emit both ammonia and hydrogen sulfide in an amount that exceeds the RQ, triggering reporting requirements under CERCLA and EPCRA. The instant proposal entitled “CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste” (hereinafter, “Animal Waste ARE”) would completely exempt farms from all administrative reporting duties under these statutes when the RQ was met or exceeded. In addition to emitting odors many view as objectionable, these facilities also emit particulate pollution that causes adverse respiratory and heart problems. See Association of Irrigated Residents v. E.P.A., 494 F.3d 1027, 1028-29 (Cir. D.C., 2007).

Courts conduct a well-delineated analysis to determine the validity of an agency's rule. First, they determine whether or not the agency is acting within the scope of its statutory authority. Next, they analyze whether or not the agency followed the proper procedure. Finally, they review the agency's action under an arbitrary and capricious standard. If the rule falls within the scope of the agency's rulemaking authority, was enacted using the proper procedure, and based on competent evidence, the court gives deference to the agency and will uphold the rule.

I. EPA DOES NOT HAVE EXPRESS STATUTORY AUTHORITY TO EXEMPT FARMS FROM REPORTING AIR RELEASES OF HAZARDOUS SUBSTANCES FROM ANIMAL WASTE

First, this memo analyzes whether EPA has the statutory authority to exempt farms from the reporting requirements for air releases of hazardous substances from animal waste as established in CERCLA and EPCRA.

Courts have broadly interpreted EPA's rulemaking authority under environmental regulations. Bluewater Network v. E.P.A., 370 F.3d 1, 11 (Cir. D.C. 2004). When conducting an analysis of statutory authority under such, courts primarily concern themselves with whether or not EPA has shown that it has "examined the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts and the choice made." Bluewater Network, 370 F.3d at 11 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). The statutory language of 42 U.S.C.A. § 9602 clearly illustrates that Congress intended to mandate the reporting of releases of hazardous substances on a quantity basis when it directed that EPA "shall promulgate regulations establishing that quantity" and set a low threshold of one pound for all listed hazardous substances in the interim. 42 U.S.C.A. § 9602(a)-(b). However, to date, no court has directly addressed the question of whether "EPA's decision to exempt certain entities and industries and not others lacks a rational basis and the exemptions are therefore arbitrary and

capricious.” See Fertilizer Institute, 935 F.2d at 1310 (stating that the rule was not enacted using the proper notice and comment procedures, so it was unnecessary to address this claim)).

In Bluewater Network, the applicable statute was the Clean Air Act (“CAA”). CAA § 213(a)(3) gives EPA the authority to “promulgate (and from time to time revise) regulations containing standards applicable to emissions from those classes or categories of ... vehicles...” Bluewater Network, 370 F.3d at 12. The court first held that EPA’s decision to group snowmobiles with other land-based recreational vehicles with similar characteristics was within its authority because “EPA has discretion to define “reasonable “categories or classes” of vehicles under § 213(a)(3). Bluewater Network, 370 F.3d at 17. In addition, the court held that EPA’s snowmobile-only contribution finding was “supported by evidence” because it was based on data EPA compiled from the states of Alaska, Washington, and Michigan showing CO levels on certain snowmobile-traveled roads and trails. Bluewater Network, 370 F.3d at 15.

In contrast, CERCLA § 102(a) gives EPA the authority to: “promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 9603 of this title.” 42 U.S.C.A. § 9602(a). Hazardous substance is defined as any substance listed in 42 U.S.C.A. § 9601(14) and any other substance that “may present substantial danger to human health or welfare or the environment” when released. Id. The section goes on to state that EPA *may* fix one RQ regardless of the medium into which the hazardous substance is released. Id. Therefore, unlike CAA § 213(a)(3), CERCLA § 102(a) does not give EPA the discretion to promulgate reporting requirements according to “reasonable “categories or classes,” but only expressly allows for EPA to establish different RQ’s for each medium.

EPA addresses the single RQ issue in its proposal. 72 FR at 73702-03. EPA explains that the RQ of 100 pounds for ammonia is based on its aquatic toxicity level. Id. EPA determined that ammonia’s mammalian toxicity level, based on inhalation data, should be set at a RQ of 1000 pounds. Id. EPA goes on to explain that it most commonly uses the single RQ

approach afforded in § 102(a) because it is the simplest and least confusing approach to reporting. *Id.* at 73703. However, under the single RQ approach the lowest RQ across all mediums is the RQ used. *Id.* at 73702-03. While EPA implies that the single RQ method is the only option *feasibly available* to them, they are empowered to set a RQ for each medium. 42 U.S.C.A. § 9602(a). Thus, if EPA chose, it could set a 1,000 pound RQ for air releases of ammonia. However, from the statutory language, it does not appear that Congress intended to empower EPA to set RQs on a source by source basis. As seen in CAA § 213(a)(3), Congress has used this methodology before, and it follows that Congress was aware of this option but chose not to exercise it.

Thus, it is unlikely that a reviewing court, based on a reading of the plain language of CERCLA and EPCRA would hold that EPA has express statutory authority to specifically exempt farms from reporting air releases of hazardous substances from animal waste.

II. EPA IMPROPERLY INTERPRETS ITS STATUTORY AUTHORITY UNDER CERCLA TO ALLOW IT TO EXEMPT FARMS FROM REPORTING AIR RELEASES OF HAZARDOUS SUBSTANCES FROM ANIMAL WASTE

EPA has interpreted its authority under CERCLA to respond to releases of hazardous substances to mean that it may grant administrative reporting exemptions (AREs) when the release either: (1) poses little or no risk to human health and the environment or (2) that federal response to such a release is either (a) impracticable or (b) inappropriate.

A. EPA May Exempt the Release of a Hazardous Substance from CERCLA/EPCRA Reporting Requirements if EPA Shows That the Release Poses Little or No Risk to Human Health and the Environment

A review of EPA's application of its two-prong *OR* test for the basis on which it rests its decision to promulgate an ARE shows that to date the agency has never treated the test as an *OR* test, but in the past has only promulgated ARE's when both prongs were met.

EPA is allowed to determine what substances pose sufficient danger to the public to require inclusion on CERCLA's hazardous substance list. U.S. v. Serafini, 750 F.Supp. 168, 171 (M.D. Pa. 1990). The Court of Appeals for the District of Columbia (hereinafter, "the court") has uniformly held that EPA has the authority to add or remove a toxic chemical from the "hazardous substances" list applicable to certain environmental statutes. See, e.g., Dithiocarbamate Task Force v. E.P.A., 98 F.3d 1394, 1396, 1402 (Cir. D.C. 1996) (holding that adding a substance to the hazardous substances list is proper when EPA meets the minimum standards required by the APA and the governing statute); A.L. Laboratories, Inc. v. E.P.A., 674 F.Supp. 894, 899-900 (Dist. D.C. 1987) (holding that removal of hazardous substances that were listed due to a clerical error was proper in the absence of EPA presenting evidence indicating that the substance were in fact hazardous)).

The governing statute regarding listing procedures is CERCLA and EPCRA adopts CERCLA's list of hazardous substances for itself. 42 U.S.C.A. § 11104(a). Through EPCRA §§ 304 and 328 any administrative reporting exemption to CERCLA would likewise apply to EPCRA's reporting requirements. 42 U.S.C.A. §§ 11104, 110048. CERCLA and EPCRA present a simple formula for assessing reporting requirements for listed hazardous wastes: One who is in charge of a facility from which a CERCLA hazardous substance is released in a quantity that equals or exceeds the RQ must immediately notify the National Response Center ("NRC") of the release. 42 U.S.C.A. § 9603(a). Likewise, under EPCRA the release must also be simultaneously reported to the state and local emergency planning committees. 42 U.S.C.A. § 11104(a)-(b).

As a practical matter, however, EPA has concluded that in some instances these broad sweeping reporting requirements are over-inclusive and in response has granted exemptions. See 63 FR 13459. Exemptions to the reporting requirements imposed by CERCLA § 103 and EPCRA § 304 exist. Statutory exemptions exist for federally permitted releases. 42 U.S.C.A. § 9603(a). A federally permitted release exception applies to all air releases that are subject to

either a permit or a control regulation imposed by the Clean Air Act (“CAA”). 67 FR 18899, at 18904. EPA also utilizes Administrative Reporting Exemptions (“ARE’s”) when it deems that the release either: (1) poses little or no risk to human health and the environment or (2) that federal response to such a release is either (a) impracticable or (b) inappropriate. See 63 FR 13460 at 13461.

EPA first asserted that CERCLA § 102(a), 103, and 115 “together provide EPA with the authority to grant administrative reporting exemptions” (“ARE’s”) in its Administrative Reporting Exemption for Certain Radionuclide Releases (“Radionuclide ARE”) published on March 19, 1998. Id. EPA went on to explain that “such exemptions may be granted for releases it deems either: (1) pose little or no risk to human health and the environment or (2) that federal response to such a release is either (a) impracticable or (b) inappropriate. Id. Finally, EPA purported that by granting ARE’s EPA could decrease the burden imposed on the Federal response system by these useless reports. Id. Instead EPA believed that ARE’s would allow the federal response system to “more efficiently implement CERCLA and EPCRA and effectively focus on reports of releases that are more likely to pose a significant hazard to human health and the environment.” Id.

To date, EPA has only enacted a full ARE for “naturally occurring radionuclides releases from undisturbed land holdings, from certain land disturbance activities (construction, farming, and most types of mining), and to or from coal and coal ash piles.” Id. at 13472. EPA declared that its authority to grant an ARE to these “categories of releases” came from CERCLA §§ 102(a), 103, and 115. See 63 FR 13461, at 13461, 13474. The exemptions were first promulgated in final rule 54 FR 22524 on May 24, 1989. However, the final rule was challenged in Fertilizer Institute v. U.S. E.P.A., 935 F.2d 1303, 1310 (Cir. D.C. 1991). See 63 FR 13461, at 13461. Although the court held that the ARE was not promulgated through the proper notice and comment procedures, it nevertheless left the exemptions in place while EPA undertook notice and comment rulemaking. Id. The court stated its reasoning for allowing the exemption

to remain in place was in part due to the fact that “one of the primary motivations behind EPA’s decision to provide for exemptions was EPA’s conclusion that the exempted entities posed little hazard.” Fertilizer Institute, 935 F.2d at 1312.

After conducting a period of notice and comment, on March 19, 1998, EPA published a final rule that not only kept the exemptions in place as promulgated in the 1989 rule, but in some instances broadened them. 63 FR at 13461-62. EPA gave three reasons for its broadening of the exemptions. Id. at 13462. First, EPA presented data showed that the concentrations of the hazardous substances in the materials being exempted were in the range of “typical” background concentrations found in rock and soil throughout the U.S., thereby concluding that they did not pose a threat to human health and the environment. Id. at 13461-62, 13464-65. Next, EPA concluded that a response to these releases was “very unlikely and possibly infeasible or inappropriate due to the concentration level findings and additional evidence that these releases were “continuously low, spread over large areas, and widely dispersed.” Id. at 13461-62. Finally, EPA asserted that its intention in adopting broader reporting exemptions was to allow EPA to focus its resources on the most serious releases in order to protect public health more effectively and efficiently, while simultaneously eliminating unnecessary reporting burdens. Id.

In 2006, EPA published a final rule that provided an ARE for certain air releases of Nitrogen Oxides (“NOX ARE”). EPA purported that its statutory authority for the rule came from the broad authority it was delegated under CERCLA “to respond to releases or threats of releases of hazardous substances from vessels and facilities.” 71 FR 58525, at 58526. The rule was enacted to relieve small facilities (those not required to hold a federal permit for NOX because the level released from those facilities is so minimal that it does not pose a risk to human health or the environment) from the reporting of NOX releases that exceeded the RQ. Id. at 58526. However, the ARE did not fully excuse reporting of an air release of NOX. Id.

The final rule raised the RQ from 10 pounds to 1,000 pounds per 24 hours and was applied to all air releases from combustion or combustion-related activities. Id. at 58527. EPA explained that it chose this level because it was the threshold that the human health risk data supported. Id. at 58528. In addition to its evaluation of the data that a 1,000 pound RQ for NOX would not endanger human health, EPA also based its conclusion to enact the ARE on data that showed a CERCLA response to the report of a release below this level was “very unlikely and possibly infeasible or inappropriate.” Id. at 58527. EPA supported this assertion on the basis that a release below 1,000 pounds is generally below the level regulated by the Clean Air Act (“CAA”) and that EPA itself does not generally respond to reports at this level. Id.

In its Animal Waste ARE proposal, similar to its Radionuclide and NOX ARE’s, EPA again purports that under CERCLA it has the broad authority to respond to releases of hazardous substances. EPA specifically relies on §§ 102(a), 103, and 115 for the authority to grant the Animal Waste ARE. 72 FR at 73701. EPA asserts that the “agency has previously granted such AREs where the Agency has determined that a federal response to such a release is either or impracticable or unlikely.” 72 FR at 73701 (citing the Radionuclide ARE, 63 FR 13460). However, EPA fails to mention that the Radionuclide ARE was also premised on rock and soil data that showed that the concentrations of the hazardous substances in the materials being exempted did not pose a threat to human health and the environment. See 63 FR at 13461-62, 13464-65. Unlike the Radionuclide and NOX AREs, in its Animal Waste ARE, EPA presents no data that the releases of hazardous substances from animal waste on farms that it proposes to exempt do not pose a threat to human health or the environment.

In light of the fact that there is currently no available evidence that EPA can leverage to show that the Animal Waste ARE is based on valid data, see § III(A), that shows the proposed exempted-releases pose little or no risk to human health and the environment, EPA cannot meet the first prong of its two-prong ARE test.

B. EPA May Not Solely Rest its Basis for the Exemption on Evidence that Federal Response to Animal Waste Releases are Unlikely

Due to EPA's application of its two-prong *OR* test as an *AND* test and in light of the legislative purpose behind CERCLA and EPCRA, see § III(A), EPA cannot solely base the Animal Waste ARE on evidence that a federal, state, or local response to the release of a hazardous substance from animal waste at a farm is *unlikely*.

When explicit numerical benchmarks exist within the governing statute and the applicable regulations ignore those benchmarks because of the weight and consideration it gives to "softer" issues, EPA has retained too much discretion and thus its decision becomes arbitrary and capricious. Dithiocarbamate Task Force, 98 F.3d at 1402. In Dithiocarbamate Task Force, RCRA was the governing statute and EPA had issued rules that specifically laid out procedures for identifying hazardous waste subject to RCRA. Dithiocarbamate Task Force, 98 F.3d at 1396-97; see also 40 CFR 261. The rules both set forth threshold levels and laid out various factors that EPA was to consider when making a listing determination. Dithiocarbamate Task Force, 98 F.3d at 1397. The court struck down EPA's addition of certain carbamates because EPA failed to abide by the benchmark figures and did not "adequately address listing factors." Dithiocarbamate Task Force, 98 F.3d at 1402. Directly on point, in Fertilizer Institute, the court stated that its reasoning for allowing the Radionuclide ARE to remain in place was in part due to the fact that the ARE would allow EPA to possibly respond more adequately to serious safety hazards, but only because it was convinced that "one of the primary motivations behind EPA's decision to provide for exemptions was EPA's conclusion that the exempted entities posed little hazard." Fertilizer Institute, 935 F.2d at 1312.

EPA expressly states that its sole rationale for the Animal Waste ARE is based on the purpose behind CERCLA and EPCRA to notify federal, state and local authorities of these releases based on the likelihood of whether or not one of these bodies would respond to the

report. 72 FR at 73704. In the Animal Waste ARE, EPA presents evidence that shows a Federal Response to the notification of ammonia or hydrogen sulfide release from animal waste is unlikely. Id. EPA cites the fact that to date EPA has not initiated a response to any NRC notifications of ammonia or hydrogen sulfide when animal waste is the source of the release. Id. Further, EPA has received letters from state and local emergency response agencies stating that they too would not initiate an emergency response action in their jurisdiction for the same. Id. Moreover, EPA's proposal asks commenters that support continued reporting to describe why these reports are useful if there is no federal response. However, EPA does acknowledge that it has set a RQ level of 1000 pounds for ammonia in regard to its mammalian toxicity level due to inhalation. Similar to Dithiocarbamate Task Force, EPA ignores its own "benchmark" figures, 1000 pound RQ for mammalian toxicity of inhaled ammonia, and bases its proposal on "softer" issues, such as administrative efficiency and reduced paperwork. Moreover, EPA misstates the purpose behind the reporting notices required under CERCLA and EPCRA, see § III(A).

Thus, regardless of evidence that a federal, state, or local response is unlikely, if challenged, the court will likely find that EPA's basis for the Animal Waste ARE gives the agency too much discretion and thus renders the proposal arbitrary and capricious.

III. EPA'S DECISION TO EXEMPT AIR RELEASES OF HAZARDOUS SUBSTANCES FROM ANIMAL WASTE IS NOT ARBITRARY AND CAPRICIOUS IF IT CAN SHOW STATUTORY CONSISTENCY, REASONED FACT-BASED EVALUATION, AND CONSISTENT INTERNAL REASONING

Finally, this memo analyzes whether EPA's proposal to exempt air releases of hazardous substances, in particular, ammonia and hydrogen sulfide, from animal waste at farms, is arbitrary and capricious. To show that its decision is not arbitrary and capricious EPA must show that the decision is: (A) consistent with the mandates of both CERCLA and EPCRA; (B) founded on a reasoned evaluation of the relevant factors; and (C) not inconsistent with other applicable internal agency reasoning.

A. Agency Decisions must be Consistent with the Governing Statute

A reviewing court will likely hold that, on its face, EPA's Animal Waste ARE is not consistent with CERCLA and EPCRA.

Under the Administrative Procedure Act ("APA"), agency decisions may not be inconsistent with the governing statute. 5 U.S.C.A. § 706(2)(A). EPCRA was passed by Congress to protect local communities against releases of hazardous substances that posed a risk of injury to their persons and their property. A.L. Laboratories, Inc., 674 F.Supp. at 899. Moreover according to the United States District Court for the District of Columbia:

Part of Congress' scheme for protecting local communities was to prevent the revision of the Right-to-Know list until the EPA had considered the short- and long-term effects of substances proposed for addition to or deletion from the list.

Id. at 899 -900 (citing 42 U.S.C.S. § 11002(a)(4)* (Law.Co-op.1987)). In A.L. Laboratories, Inc., the court held that EPA's refusal to remove certain substances that only appeared on the hazardous substance list due to a clerical error was "arbitrary, capricious, and contrary to the provisions of the Right-to-Know Act." The court opined that unless the agency had any evidence that the substances were in fact hazardous then its action could not be deemed "reasoned." Id. at 900.

Moreover, the purpose of the reporting requirements under CERCLA and EPCRA are to respectively provide EPA and the public with information from which they can properly "assess hazards and mitigate potential injury from releases." Tyson Foods, Inc., 299 F.Supp.2d at 705 (holding that citizens who used the environment affected by alleged ammonia releases from chicken farms sustained "injury" from potential exposure to releases and could seek enforcement of reporting requirements under CERCLA and EPCRA)). The court further stated that "without the required notices of alleged releases, regulatory agencies are without

* Section 11002(a)(4) states: Revisions. The Administrator may revise the list and thresholds under [section 11002(a)(2) & (3)] from time to time. *Any revisions to the list shall take into account the toxicity, reactivity, volatility, dispersability, combustability, or flammability of a substance.*

knowledge of the releases; and are consequently impeded from adequately mitigating the releases,” which is the intent of reporting requirements under both statutes. Id.

In its Animal Waste ARE proposal, EPA does not advance any scientific data regarding the level of risk posed by the hazardous substances it proposes to exempt other than the information that ammonia’s mammalian toxicity level, based on inhalation data, was set by EPA at a RQ of 1000 pounds. 72 FR at 73702-03. However, EPA plainly asserts, without explanation, that “this administrative reporting exemption is protective of human health and the environment.” Id. at 73700. Yet, the proposal does not provide any data that illustrates that these air releases do not pose risk to human health or the environment. In contrast, EPA states that the inhalation data shows that ammonia is toxic to humans when the RQ of 1000 pounds is met or exceeded. Id. at 73702.

Moreover, in 2005 EPA launched a monitoring study[†] of farms emitting hazardous substances from animal waste because at that time there was “no existing methodology to measure reliably a [farms] emissions.” Association of Irrigated Residents, 494 F.3d at 1029-30; see also 72 FR at 73703. The study commenced in the spring of 2007 on 21 farms in 10 states and the monitoring is slated for 2 years. 72 FR at 73703. EPA projects that it will have gathered all the necessary data by 2009, at which time it begin to develop emissions estimating methodologies. Id. Without a reliable methodology to capture the level of emissions from farms, EPA cannot proclaim that these releases are harmless.

Thus, it is most likely that a reviewing court will hold that EPA’s decision to promulgate the Animal Waste ARE is in direct conflict with the general and specific notification goals of CERCLA and EPCRA.

[†] EMISSIONS FROM ANIMAL FEEDING OPERATIONS ET AL., NAT’L RESEARCH COUNCIL, AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: CURRENT KNOWLEDGE, FUTURE NEEDS (2003), *available at* <http://www.nap.edu/catalog/10586.html>; *Consent Agreement*, 70 Fed.Reg. at 4958.

B. Agency Decisions must be Founded on a Reasoned Evaluation of the Relevant Factors

EPA will have a hard time establishing that its decision to exempt air releases of hazardous substances from animal waste at farms is founded on a reasoned evaluation of the relevant factors.

Agency decisions must be founded on a reasoned evaluation of the relevant factors. Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, Bureau of Land Management, 273 F.3d 1229, 1236-37 (9th Cir. 2001) (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)). In W.R. Grace & Co., the court held that EPA's order setting a cleanup standard of 1.2 milligrams per liter for ammonia in drinking water was "arbitrary and capricious and not supported by a rational basis" because "no technical study or explanation was offered for the standard." W.R. Grace & Co. v. U.S. E.P.A., 261 F.3d 330, 333 (3d Cir. 2001).

In 2005, EPA received a petition requesting an exemption from CERCLA and EPCRA's reporting requirements for ammonia from poultry operations from the National Chicken Council, National Turkey Federation, and the U.S. Poultry & Egg Association's. 72 FR at 73703. In response, EPA offered farms the option to sign up for an air monitoring study. Id. The study commenced in the spring of 2007 on 21 farms in 10 states and monitoring is slated for 2 years. Id. At the conclusion of the study, which is predicted for 2009, EPA plans to use the data that it gathers to develop emissions estimating methodologies. Id. Similar to W.R. Grace & Co., EPA has no technical study to offer as evidence that its decision to promulgate the Animal Waste ARE is supported by a rational basis.

Thus, it is most likely that a reviewing court will hold that EPA's Animal Waste ARE is premature, and thus arbitrary and capricious, because until the study results are available, a reasoned evaluation of the relevant factors cannot be made.

C. Agency Decisions must be Consistent with Other Applicable Internal Agency Reasoning

EPA will have a hard time establishing that its decision to exempt air releases of hazardous substances from animal waste at farms is consistent with its other decisions regarding such releases.

Generally: “internally contradictory agency reasoning renders resulting action arbitrary and capricious under the Administrative Procedure Act.” Defenders of Wildlife v. U.S. Environmental Protection Agency, 420 F.3d 946, 959-60 (9th Cir. 2005); see also Gen. Chem. Corp. v. United States, 817 F.2d 844, 857 (D.C. Cir.1987) (holding that “internally inconsistent and inadequately explained” agency action “arbitrary and capricious”). In Defenders of Wildlife, the court held that EPA’s approval of an application was arbitrary and capricious because the agency relied on “contradictory positions regarding its section 7 obligations” under the Endangered Species Act (“ESA”) in administrative proceedings. Defenders of Wildlife, 420 F.3d at 959-60. EPA’s reasoning was “internally inconsistent and inadequately explained” and thus could have no rational basis. Defenders of Wildlife, 420 F.3d at 959-60 (citing Gen. Chem. Corp., 817 F.2d at 857).

In 2005, EPA received a petition requesting an exemption from CERCLA and EPCRA’s reporting requirements for ammonia from poultry operations from the National Chicken Council, National Turkey Federation, and the U.S. Poultry & Egg Association’s. 72 FR at 73703. In response, EPA offered farms the option to sign up for an air monitoring study. Id. The study commenced in the spring of 2007 on 21 farms in 10 states and monitoring is slated for 2 years. Id. At the conclusion of the study, which is predicted for 2009, EPA plans to use the data that it gathers to develop emissions estimating methodologies. Id.

Similar to Defenders of Wildlife, EPA’s proposed Animal Waste ARE is based on “contradictory positions,” is “internally inconsistent,” and is “inadequately explained.” It is contradictory and internally inconsistent to continue a study aimed at developing emissions

estimating methodologies for emissions that you are simultaneously proposing to exempt from reporting requirements. In the Animal Waste ARE, EPA does *not* purport that it plans to abandon the study, but instead asserts that it will make the results of the study available to the public within 18 months of its completion. Id. Moreover, identical to W.R. Grace & Co., EPA has no technical study to offer as evidence that its decision to promulgate the Animal Waste ARE is supported by data that illustrates how this ARE is protective of human health and the environment. It is impossible for EPA to have data of this nature when it still is determining estimating methodologies for the emissions. Id.

Thus, it is almost certain that a reviewing court will hold that EPA's decision is arbitrary and capricious because EPA's proposal to exempt emissions from animal waste is in direct conflict with its decision to continue developing emissions estimating methodologies.

CONCLUSION

EPA cannot successfully defend against claims that the Animal Waste ARE exceeds its rulemaking authority and that it acted arbitrarily and capriciously in proposing such. Although EPA has broad rulemaking authority to regulate reporting requirements under CERCLA, and therefore EPCRA, the court has consistently held that EPA must act in accordance with the governing statute and put forth a reasoned evaluation for its proposals. First, CERCLA does not expressly give EPA the authority to grant reporting exemptions by any means other than by: (1) de-listing the substance as hazardous or (2) creating different RQ thresholds for different mediums. Next, a reviewing court will likely find that EPA's two-prong ARE test is a valid interpretation of its authority to regulate reporting requirements if it is deemed an *AND* test. As an *AND* test, it meets the purpose of the statute, to inform the government and local emergency responders of hazardous releases in order to protect human health and the environment. It does not meet this goal as an *OR* test, because a reviewing court is likely to find that the second-prong considerations relevant, but not dispositive on their own. Finally, due to the current state of the scientific data regarding the release of hazardous substances from animal

waste and the fact that EPA is simultaneously exempting and studying these releases, it is almost certain that a reviewing court would find this contradiction is in and of itself arbitrary and capricious.