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Animal Waste and Hazardous Substances: Current Laws and Legislative Issues

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Summary

The animal sector of agriculture has undergone major changes in the last several decades: organizational changes within the industry to enhance economic efficiency have resulted in larger confined production facilities that often are geographically concentrated. These changes, in turn, have given rise to concerns over the management of animal wastes and potential impacts on environmental quality.

Federal environmental law does not regulate all agricultural activities, but certain large animal feeding operations (AFOs) where animals are housed and raised in confinement are subject to regulation. The issue of applicability of these laws to livestock and poultry operations — especially the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, the Superfund law) and the Emergency Planning and Community Right-to-Know Act (EPCRA) — has been controversial and recently has drawn congressional attention.

Both Superfund and EPCRA have reporting requirements that are triggered when specified quantities of certain substances are released to the environment. In addition, Superfund authorizes federal cleanup of releases of hazardous substances, pollutants, or contaminants and imposes strict liability for cleanup and injuries to natural resources from releases of hazardous substances.

Superfund and EPCRA include citizen suit provisions that have been used to sue poultry producers and swine operations for violations of those laws. In two cases, environmental advocates claimed that AFO operators had failed to report ammonia emissions, in violation of Superfund and EPCRA. In both cases, federal courts supported broad interpretation of key terms defining applicability of the laws' reporting requirements. Three other cases in federal courts, while not specifically dealing with reporting violations, also have attracted attention, in part because they have raised the question of whether animal wastes that contain phosphorus are hazardous substances that can create cleanup and natural resource damage liability under Superfund. Two of these latter cases were settled; the third, brought by the Oklahoma Attorney General against poultry operations in Arkansas, is pending.

These lawsuits testing the applicability of Superfund and EPCRA to poultry and livestock operations have led to congressional interest in these issues. In the 109th Congress, legislation has been introduced that would amend CERCLA to clarify that manure is not a hazardous substance, pollutant, or contaminant under that act and that the laws' notification requirements would not apply to releases of manure (H.R. 4341 and S. 3681). Proponents of the legislation argue that Congress did not intend that either of these laws apply to agriculture and that enforcement and regulatory mechanisms under other laws are adequate to address environmental releases from animal agriculture. Opponents respond that enforcement under Superfund fills critical gaps not addressed in other environmental laws and that enacting an exemption would severely hamper the ability of government and citizens to know about and respond to releases of hazardous substances caused by an animal agriculture operation.

Contents

Introduction	1
CERCLA and EPCRA	2
Enforcement Against AFOs	3
Congressional Interest	5
Issues in Pending Legislation	6
Conclusion	8

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Introduction

The animal sector of agriculture has undergone major changes in the last several decades, a fact that has drawn the attention of policymakers and the public. In particular, organizational changes within the industry to enhance economic efficiency have resulted in larger confined production facilities that often are geographically concentrated.¹ Increased facility size and regional concentration of livestock and poultry operations have, in turn, given rise to concerns over the management of animal wastes from these facilities and potential impacts on environmental quality, public health and welfare.

Animal manure can be and frequently is used beneficially on farms to fertilize crops and add or restore nutrients to soil. However, animal waste, if not properly managed, can adversely impact water quality through surface runoff and erosion, direct discharges to surface waters, spills and other dry-weather discharges, and leaching into soil and ground. It can also result in emission to the air of particles and gases such as ammonia, hydrogen sulfide, and volatile organic chemicals. According to the U.S. Department of Agriculture (USDA), in 1997, 66,000 operations had farm-level excess nitrogen (an imbalance between the quantity of manure nutrients produced on the farm and assimilative capacity of the soil on that farm), and 89,000 had farm-level excess phosphorus.² USDA believes that where manure nutrients exceed the assimilative capacity of a region, the potential is high for runoff, leaching of nutrients, and other environmental problems. Geographically, areas with excess farm-level nutrients correspond to areas with increasing numbers of confined animals.

Federal environmental law does not regulate all agricultural activities. Some laws specifically exempt agriculture from regulatory provisions, and others are structured so that farms escape most, if not all, of the regulatory impact. Still, certain large animal feeding operations (AFOs) where animals are kept and raised in confinement are subject to environmental regulation. The primary regulatory focus on environmental impacts has been on protecting water resources and has occurred under the Clean Water Act. In addition, facilities that emit large quantities of air pollutants may be regulated under the Clean Air Act. Some livestock operations also

¹ For additional information, see CRS Report RL33325, *Livestock Marketing and Competition Issues*, by Geoffrey S. Becker.

² U.S. Department of Agriculture, Natural Resources Conservation Service, "Manure Nutrients Relative to the Capacity of Cropland and Pastureland to Assimilate Nutrients: Spatial and Temporal Trends for the United States," Publication no. nps00-579, December 2000, p. 85.

may be subject to requirements of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, the Superfund law) and the Emergency Planning and Community Right-to-Know Act (EPCRA).³ The issue of applicability of these laws to livestock and poultry operations — especially CERCLA and EPCRA — has been controversial and recently has drawn congressional attention.

This report describes the provisions of Superfund and EPCRA, and enforcement actions under these laws that have increasingly been receiving attention. Congressional scrutiny in the form of legislative proposals and a House hearing in the 109th Congress are discussed. Bills intended to exempt animal manure from the requirements of Superfund and EPCRA have been introduced (H.R. 4341 and S. 3681), and issues raised by the legislation are analyzed.

CERCLA and EPCRA

Both the Comprehensive Environmental Response, Compensation, and Liability Act (the Superfund law, 42 U.S.C. §§9601-9675) and the Emergency Planning and Community Right-to-Know Act (42 U.S.C. §§11001-11050) have reporting requirements that are triggered when specified quantities of certain substances are released to the environment.⁴ Both laws, which are administered by the Environmental Protection Agency (EPA), utilize information disclosure in order to increase the information available to government and citizens about the sources and magnitude of chemical releases to the environment. In addition to reporting requirements, CERCLA includes provisions authorizing federal cleanup of releases of hazardous substances, pollutants, or contaminants that may present an imminent and substantial danger to the public health or welfare (Section 104), and imposing strict liability for cleanup and damages for injury to, destruction of, or loss of natural resources resulting from releases of hazardous substances (Section 107). At issue today is how the reporting requirements and other provisions of these laws apply to poultry and livestock operations.

Superfund authorizes programs to remediate uncontrolled or abandoned hazardous waste sites and assigns liability for the associated costs of cleanup. Section 103(a) of CERCLA requires that the person in charge of a facility (as defined in Section 101(9)) that releases a “reportable quantity” of certain hazardous substances must provide notification of the release to the National Response Center.

EPCRA establishes requirements for emergency planning and notification for storage and release of hazardous and toxic chemicals. Section 304(a)(1) of EPCRA requires the owner or operator of a facility (as defined in Section 329(4)) to report to state and local authorities any releases greater than the reportable quantity of substances deemed hazardous under Superfund or extremely hazardous under

³ For additional information, see CRS Report RL32948, *Air Quality Issues and Animal Agriculture: A Primer*, by Claudia Copeland.

⁴ For additional information on Superfund and EPCRA, see CRS Report RL30798, *Environmental Laws: Summaries of Statutes Administered by the Environmental Protection Agency*, coordinated by Susan Fletcher, and CRS Report RL33426, *Superfund: Overview and Selected Issues*, by Jonathan Ramseur and Mark Reisch.

EPCRA. Under Superfund, the term “release” (Section 101(22)) includes discharges of substances to water and land and emissions to the air from “spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, dumping, or disposing into the environment.” Under EPCRA, the term “release” (Section 329(8)) includes emitting any hazardous chemical or extremely hazardous substance into the environment. Superfund excludes the “normal application of fertilizer” from the definition of release, and EPCRA excludes from the definition of hazardous chemicals any substance that is “used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.”

The CERCLA definition of “hazardous substance” (Section 101(14)) triggers reporting under both laws. Among the reportable substances that may be released by livestock facilities are hydrogen sulfide, ammonia, and phosphorus. The reportable quantity (RQ) for both hydrogen sulfide and ammonia is 100 pounds per day, or 18.3 tons per year; the RQ for phosphorus is 1 pound per day. Section 109 of Superfund and Section 325 of EPCRA authorize EPA to assess civil penalties for failure to report releases of hazardous substances that equal or exceed their reportable quantities (up to \$27,500 per day under CERCLA and \$27,500 per violation under EPCRA).

Enforcement Against AFOs

EPA has enforced the Superfund and EPCRA reporting requirements against AFO release of hazardous pollutants in two separate cases. The first involved the nation’s second largest pork producer, Premium Standard Farms (PSF) and Continental Grain Company. In November 2001, EPA and the Department of Justice announced an agreement resolving numerous claims against PSF concerning principally the Clean Water Act, but also the Clean Air Act, Superfund, and EPCRA. More recently, in September 2006, the Department announced settlement of claims against Seaboard Foods — a large pork producer with more than 200 farms in Oklahoma, Kansas, Texas, and Colorado — and PIC USA, the former owner and operator of several Oklahoma farms now operated by Seaboard. Like the earlier PSF case, the government had brought complaints for violations of several environmental laws, including failure to comply with the release reporting requirements of CERCLA and EPCRA.

Both Superfund and EPCRA include citizen suit provisions that have been used to sue poultry producers and swine operations for violations of the laws (Section 310 of CERCLA and Section 326 of EPCRA). In two cases, environmental advocates claimed that AFO operators had failed to report ammonia emissions, putting them in violation of Superfund and EPCRA. In both cases, federal courts supported broad interpretation of key terms defining applicability of the laws’ reporting requirements.

In the first of these cases, a federal district court in Oklahoma initially ruled in 2002 that a farm’s individual barns, lagoons, and land application areas are separate “facilities” for purposes of CERCLA reporting requirements, rather than aggregating multiple emissions of pollutants across the entire site. This court held that Superfund’s reporting requirements would only apply if emissions for *each individual facility* exceed 100 pounds per day. However, the district court’s ruling was reversed on appeal (*Sierra Club v. Seaboard Farms Inc.*, 387 F.3d 1167 (10th

Cir. 2004)). The court of appeals ruled that the whole farm site is the proper entity to be assessed for purposes of CERCLA reporting and determining if emissions of covered hazardous substances meet minimum thresholds.

In the second case, a federal district court in Kentucky similarly ruled in 2003 that the term “facility” should be interpreted broadly to include facilities operated together for a single purpose at one site, and that the whole farm site is the proper entity to be assessed for purposes of the Superfund and EPCRA reporting requirements (*Sierra Club v. Tyson Foods, Inc.*, 299 F.Supp. 2d 693 (W.D. Ky. 2003)). While Superfund provides that a continuous release is subject to reduced reporting requirements, and EPCRA provides an exemption for reporting releases when the covered substance is used in routine agricultural operations or is used on other farms for fertilizer, the court found that these exemptions did not apply to the facts of this case. The ruling was not appealed.

EPA was not a party in either of these lawsuits. The U.S. Court of Appeals for the 10th Circuit invited EPA to file an amicus brief in the *Seaboard Farms* case in order to clarify the government’s position on the issues, but EPA declined to do so within the time frame specified by the court.

Three other cases in federal courts, while they do not include reporting violations, also have drawn attention, in part because they raised the question of whether animal wastes that contain phosphorus are hazardous substances that can create cleanup and natural resource injury liability under Superfund.⁵ Animal wastes typically contain low levels of phosphorus, and animal wastes are beneficially used as fertilizer on farms. Over the long term, however, the application of animal waste fertilizers may result in phosphorus buildup in soils which may be released to watersheds through surface runoff. In 2003, a federal court in Oklahoma held that phosphorus contained in poultry litter in the form of phosphate is a hazardous substance under Superfund and thus could subject poultry litter releases to provisions of that law (*City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, (N.D. Okla. 2003)). This ruling was later vacated as part of a settlement agreement, but some observers believe that the court’s reasoning may still be persuasive with other courts. The second case, *City of Waco v. Schouten* (W.D. Tex., No. W-04-CA-118, filed April 29, 2004), was a suit by the city against 14 dairies alleging various causes of action based on disposal of wastes from those operations. It was resolved by a settlement agreement early in 2006.

The third case, *State of Oklahoma v. Tyson Foods, Inc.* (N.D. Okla, No. 4:05-cv-00329, filed June 13, 2005), is still pending. This suit, brought by the Oklahoma Attorney General, asserts various claims based on the disposal of waste from 14 poultry operations in the Illinois River Watershed. The state principally seeks its past and present response costs and natural resource injuries under CERCLA due to release of wastes from these facilities.

⁵ Unlike the citizen suit cases discussed above, these lawsuits do not address what is a “facility,” for purposes of determining whether a release has occurred. EPA also is not a party in any of these cases.

The net result of these lawsuits is growing concern by the agriculture community that other legal actions will be brought and that the courts will continue to hold that the Superfund and EPCRA reporting requirements and other provisions apply to whole farm sites, thus potentially exposing more of these operations to enforcement under federal law.

Congressional Interest

The court cases testing the applicability of Superfund and EPCRA to poultry and livestock operations have led to congressional interest in these issues. In March 2004, a number of senators wrote to the EPA Administrator to ask the agency to clarify the reporting requirements of the two laws so as to limit their impact on poultry operations. The senators' letter said that because of unclear regulations and a lack of scientific information about emissions, poultry and livestock producers are uncertain about the laws' requirements and are vulnerable to enforcement actions.⁶ In report language accompanying EPA's FY2006 appropriations, the House Appropriations Committee urged EPA to address the issues.

The Committee continues to be concerned that unclear regulations, conflicting court decisions, and inadequate scientific information are creating confusion about the extent to which reporting requirements in [CERCLA] and [EPCRA] cover emissions from poultry, dairy, or livestock operations. Producers want to meet their environmental obligations but need clarification from the Environmental Protection Agency on whether these laws apply to their operations. The committee believes that an expeditious resolution of this matter is warranted.⁷

Also in 2004, some in Congress considered proposing legislation that would amend the definition of "release" in Superfund (Section 101(22); 42 USC §9601(22)) to clarify that the reporting requirements do not apply to releases from biological processes in agricultural operations and to amend EPCRA to exclude releases of hazardous chemicals produced through biological processes in routine agricultural operations. For some time, there were indications that an amendment containing these statutory changes would be offered during debate on FY2005 consolidated appropriations legislation, but this did not occur.⁸

Some Members sought to amend the FY2006 Agriculture appropriations bill, H.R. 2744 (P.L. 109-97), with a provision exempting releases of livestock manure from CERCLA and EPCRA. The proposal was promoted by Senate conferees on the bill, but it was not accepted by House conferees. Proponents, including Senator Larry Craig, contended that the proposed language is consistent with current law,

⁶ Senator Blanche L. Lincoln et al., letter to Michael Leavitt, EPA Administrator, March 12, 2004.

⁷ U.S. Congress, House Committee on Appropriations, *Report accompanying H.R. 2361, Department of the Interior, Environment, and Related Agencies Appropriation Bill, 2006*, H.Rept. 109-80, 109th Cong., 1st sess., p. 87.

⁸ "Spending Bill Excludes Proposal for Farms; Craig Plans Separate Legislation Next Year," *Daily Environment Report*, Nov. 23, 2004, p. A-10.

because in their view CERCLA and EPCRA were never intended to apply to agriculture. Environmentalists objected to the language, arguing that it could prevent public health authorities from responding to hazardous substance releases from AFOs, would block citizen suits against agriculture companies for violations of reporting requirements, and would create an exemption from Superfund liability for natural resource injuries that might result from a large manure spill. EPA's congressional affairs office released an unofficial analysis criticizing the bill. It argued that, by eliminating federal liability for manure releases under Superfund and EPCRA, the provision could interfere with EPA's Air Compliance Agreement, because companies would have much less incentive to participate in the agreement. The agreement is a plan that EPA announced in January 2005 to collect air quality monitoring data on animal agriculture emissions.⁹ The House and Senate gave final approval to H.R. 2744 in November 2005, without the language that Senate conferees had proposed.

Also in November 2005, legislation was introduced that would amend CERCLA to clarify that manure is not a hazardous substance, pollutant, or contaminant under that act and that CERCLA's notification requirements would not apply to releases of manure (H.R. 4341). The bill is similar to the legislative language that Senator Craig had proposed to conferees as a provision of the FY2006 Agriculture Appropriations bill with a broad definition of "manure" that includes, for example, bedding commingled with animal waste.

H.R. 4341 was introduced the same day that a House Energy and Commerce subcommittee held a hearing on animal agriculture and Superfund. The Subcommittee on Environment and Hazardous Materials heard from agriculture industry witnesses who urged Congress to provide policy direction on the issue that has developed as a result of recent and potential litigation. Other witnesses testified that the reporting and notification requirements of Superfund and EPCRA provide a safety net for making information on releases available to government and citizens, and that other environmental laws, such as the Clean Air Act, cannot function in that manner. An EPA witness said that the agency is considering ways to reduce the paperwork burdens for large AFOs to report their emissions, but has not yet formalized a proposal. H.R. 4341 was discharged from the Energy and Commerce Committee in September 2006;¹⁰ the Transportation and Infrastructure Committee, to which the bill also was referred, has not acted. Similar legislation was introduced in the Senate on July 18 (S. 3681); no further action has occurred.

Issues in Pending Legislation

Supporters and opponents of this legislation have raised a number of arguments for and against the proposals. For example, proponents of the exemption proposed in H.R. 4341 and S. 3681, representing the agriculture industry, especially livestock and poultry producers, say that animal manure has been safely used as a fertilizer and

⁹ For information, see CRS Report RL32947, *Air Quality Issues and Animal Agriculture: EPA's Air Compliance Agreement*, by Claudia Copeland.

¹⁰ Personal communication, House Energy and Commerce Committee staff, October 17, 2006.

soil amendment by many cultures all over the world for centuries and thus should not be considered a hazardous substance. Opponents — including environmental activists, public health advocates, and state and local governments — agree that when properly managed, manure has beneficial uses, but say that when improperly managed and in the massive amounts produced at today's large feedlot operations, animal waste can release a number of polluting substances to the environment. Releases to surface water, groundwater, and the atmosphere may include nutrients, organic matter, solids, pathogens, volatile compounds, particulate matter, antibiotics, pesticides, hormones, gases that are associated with climate change (carbon dioxide and methane), and odor.

Proponents of the legislation argue that neither Superfund nor EPCRA was intended by Congress to apply to agriculture and that the pending legislation would simply clarify congressional intent. CERCLA exempts “normal application of fertilizer” from the definition of “release” and also exempts releases of “naturally occurring organic substances.” Animal waste arguably was intended to be covered by these existing exemptions, they say. Opponents respond that there is little firm evidence either way on this point, as there is limited legislative history concerning this language. The exemption for “normal application of fertilizer,” enacted in CERCLA in 1980, applies to application of fertilizer on crops or cropland for beneficial use, but does not mean dumping or disposal of larger amounts or concentrations than are beneficial to crops.¹¹

EPA has not issued guidance to interpret what constitutes “normal application of fertilizer,” and the only court decision so far addressing this issue (the vacated 2003 *City of Tulsa* case discussed above) held that neither plaintiffs nor defendants in that case had presented evidence sufficient for a fact-based determination of what constitutes “normal application.” Opponents of the legislation also argue that animal manure consists of a number of substances that are nutritional and pharmaceutical elements of the feed provided to animals (trace elements, antibiotics, nutrients), and releases are the result of inadequate waste disposal, not “naturally occurring” substances and activities.

Proponents argue that enforcement and regulatory mechanisms exist under the Clean Water Act (CWA) and other media-specific statutes, such as the Clean Air Act (CAA), making it unnecessary to rely on Superfund or EPCRA for enforcement or remediation. In particular, both the Clean Water Act and Clean Air Act require that regulated facilities obtain permits that authorize discharges or emissions of pollutants. Enforcement of permit requirements has been an important tool for government and citizens to address environmental concerns of animal agriculture activities.

Opponents respond that enforcement under Superfund fills critical gaps in these other environmental laws, because not all pollutants are covered by other laws. For example, releases of ammonia and hydrogen sulfide are listed under CERCLA but are not currently regulated as hazardous pollutants under the CAA. Clean Water Act

¹¹ U.S. Senate, Committee on Environment and Public Works, *Environmental Emergency Response Act, Report to Accompany S. 1480*, 96th Cong., 2nd sess., S.Rept. 96-848, p. 46.

AFO permits primarily address discharges of nutrients, but not other components of manure waste (e.g., trace elements, metals, pesticides, pathogens). Moreover, neither of these laws provides for recovery of costs for responding to or remediating releases, nor for natural resource injuries. Opponents also argue that, while “federally permitted releases” are exempt from CERCLA’s reporting requirements, CWA and CAA permit requirements apply only to facilities that meet specified regulatory thresholds (for example, CWA permit rules apply to about 14,000 large AFOs, less than 6% of all AFOs in the United States).¹²

Finally, proponents of the legislation argue that if animal manure is considered to be a hazardous substance under Superfund, farm operations potentially could be exposed to costly liabilities and penalties. Opponents note that the purpose of release reporting is to keep federal, state, and local entities informed and to alert appropriate first responders of emergencies that might necessitate response, such as release of hazardous chemicals that could endanger public health in a community. The exemption proposed in H.R. 4341 and S. 3681, they point out, would apply not only to CERCLA and EPCRA reporting requirements but also to other provisions (such as Superfund’s authority for federal cleanup of releases, cleanup liability, and liability for natural resource injuries).

According to states and some other interest groups, liability, which arises when manure is applied in amounts that exceed what is beneficial to support crops, is necessary to bring about improvements in waste handling practices of large AFOs. Enacting an exemption would severely hamper the ability of government to appropriately respond to releases of hazardous substances and pollution caused by an animal agriculture operation, they argue. On the issue of penalties, opponents note that penalties are not available under Superfund for removal or remedial actions (except for failure to comply with information gathering and access related to a response action), regardless of whether initiated by government or a private party. CERCLA does authorize civil penalties for violation of the Section 103 reporting requirements (up to \$27,500 per day), but neither of the two key citizen suit cases decided thus far (*Sierra Club v. Tyson Foods, Inc.*, and *Sierra Club v. Seaboard Farms Inc.*) involved penalties for failure to report releases.

Conclusion

Issues concerning the applicability of Superfund and EPCRA to animal agriculture activities have been controversial and have drawn considerable attention. Bills pending in the 109th Congress have gained much support (as of mid-October, H.R. 4341 has 189 co-sponsors, and S. 3681 has 35 co-sponsors), but they also have drawn opposition from environmental advocacy groups and state and local governments. Thus far, the Bush Administration has not presented an official position on the legislation. If these issues are not resolved by the conclusion of the 109th Congress, it is likely that they will recur in the 110th Congress.

¹² U.S. Environmental Protection Agency, “National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs); Final Rule,” 68 *Federal Register* 7179, February 12, 2003.