

LEGAL UPDATES

PUBLISHED: APRIL 12, 2017

## Services

Animal Health &  
Production

Environmental

# D.C. Circuit Strikes Down Rule on Animal Farm Air Pollution

On April 11, 2017, the U.S. Court of Appeals for the District of Columbia Circuit vacated a U.S. Environmental Protection Agency (EPA) rule that exempted farms from complying with air pollution reporting requirements for releases of hazardous substances from animal waste. Unless the EPA petitions the U.S. Supreme Court for certiorari, animal farms will be required to report air emissions of substances like ammonia and hydrogen sulfide beginning in July 2017.

## Background

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) requires parties to immediately notify the National Response Center (NRC) when a reportable quantity of a hazardous substance is released. The Emergency Planning and Community Right-to-Know Act (EPCRA) has a parallel reporting mandate; it requires parties to notify state and local authorities whenever covered pollutants are released into the environment.

In 2008, the EPA issued a final rule that exempts farms from CERCLA and EPCRA reporting requirements for air releases from animal waste. The agency justified the rule on the grounds that the EPA had never acted in response to a notification of air releases from animal waste and could not foresee a situation in which it would respond. “In all instances,” the agency said, “the source and nature are such that ongoing releases make an emergency response unnecessary, impractical and unlikely.”

In response to public comments seeking information about emissions from concentrated animal feeding operations (CAFOs), EPA changed the final rule to require certain large-scale CAFOs to continue reporting air emissions under EPCRA but not under CERCLA, while other farms were exempted from both reporting requirements.

## **Waterkeeper Alliance v. EPA**

Environmental groups challenged the final rule in *Waterkeeper Alliance v. EPA*, arguing that EPA does not have authority under CERCLA and EPCRA to grant reporting exemptions. The environmental groups also challenged the rule as arbitrary because it treated air released from animal waste at farms more favorably than emissions from animal waste at zoos, circuses, slaughterhouses and other locations.

D.C. Circuit reviewed the rule under the standard adopted by the U.S. Supreme Court in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, which held that an agency decision deserves deference when a statute is ambiguous and the agency's interpretation of that ambiguity is reasonable. The D.C. Circuit found that the statutes do not create an ambiguity as to whether EPA can create new exceptions to the reporting requirements, because the statutes require notification of *any* release of a hazardous substance in reportable quantities. And while the statutes do include several exemptions, the court said those exemptions “don't give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble.”

The D. C. Circuit also found that the public comments on the proposed rule undermined the EPA's primary justification for the final rule—namely, that notifications of animal waste-related releases serve no regulatory purpose because it would be “impractical or unlikely” to respond to such a release. According to the Court, the EPA had not done enough to demonstrate why it would be impractical for the EPA to investigate or issue abatement orders in cases where pumping of lagoons or other actions release toxic levels of hazardous substances such as ammonia and hydrogen sulfide into the air.

## **What This Means to You**

The EPA is expected to file a petition for certiorari with the U.S. Supreme Court. If the EPA does not petition for cert or cert is not granted, the rule will be vacated and large animal farms will be required to report air pollution from animal waste under CERCLA and EPCRA. If required to report such releases, owners or operators of affected animal farming operations should also consider providing notice of a “continuous release,” where releases are continuous and stable in quantity and rate.

## **Contact Us**

For more information about how changes to the CERCLA and EPCRA release reporting requirements may impact your organization, contact Robert Wilkinson or Megan McLean of Husch Blackwell's Environmental team.