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# BEFORE THE SUBCOMMITTEE ON
# ENVIRONMENT AND HAZARDOUS MATERIALS
# UNITED STATES HOUSE OF REPRESENTATIVES
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Mr. Chairman and members of the Subcommittee, I am Barry Breen, Deputy Assistant Administrator for the Office of Solid Waste and Emergency Response at EPA. Thank you for inviting me to appear today to discuss environmental issues involving animal agricultural operations. My testimony will address issues regarding the application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-To-Know Act (EPCRA) to animal agricultural operations; or sometimes called animal feeding operations (AFOs).

## BACKGROUND

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 103(a) requires that any person in charge of a facility notify the National Response Center (NRC), as soon as he has knowledge, of the release of a hazardous substance from that facility in quantities equal to or greater than those determined under section 102(b) of CERCLA. Those quantities are called the Reportable Quantities or RQs. Similarly, EPCRA section 304 requires that the local emergency planning committee (LEPC) for any area likely to be affected, and the State emergency response commission (SERC) of any State likely to be affected by the release of an extremely hazardous substance listed under EPCRA Section 302 also be notified. Neither CERCLA nor EPCRA limit the industry or commercial sectors that need to report; therefore any facility releasing more than an RQ must report. With respect to AFOs, the CERCLA hazardous and EPCRA extremely hazardous substance most likely to trigger an RQ are (1) ammonia at 100 pounds per 24 hours, and (2) hydrogen sulfide also at 100 pounds per 24 hours. Ammonia is most

often used at a farm as fertilizer and thus, is stored in tanks and can be released. However, at AFOs, another likely release source of these hazardous substances is the agricultural waste that is either stored or placed on the facility.

The National Contingency Plan (NCP) at 40 CFR 300.125, sets forth the requirements for notification and communications with the National Response Center (NRC). The NRC is located at the United States Coast Guard Headquarters and is the continuously manned national communications center for handling activities that may require an emergency response action. The NRC acts as the single point of contact for all pollution incident reporting. Notices of releases are made to the NRC by telephone and are immediately relayed to the appropriate predetermined federal on-scene coordinator (OSC). The telephone report is distributed to any interested National Response Team member agency or federal entity that has established a written agreement or understanding with the NRC. The NRC also evaluates incoming information and immediately advises the Federal Emergency Management Agency (FEMA) of a potential major disaster situation.

As noted above, the purpose of the release reporting is to alert appropriate first responders and to keep state and local entities informed. However, not all chemical releases reported to the NRC are necessarily "emergencies." In addition, there are times when an industrial facility will release a hazardous or extremely hazardous substance at quantities above the RQ but for a longer duration than what might be judged to be in an emergency situation. In such a case, CERCLA section 103(f)(2) provides for exemptions from notice and penalty provisions for continuous releases of hazardous substances. Releases may be reported less frequently than otherwise would be required, if they are "continuous" and "stable in quantity and rate," and if notification has been given under section 103(a) "for a period sufficient to establish the continuity, quantity, and regularity" of the release. Hazardous substance releases that are continuous and stable in quantity and rate may be reported under a reporting scheme set forth in 40 CFR 302.8 – Continuous releases. The basic structure for continuous release reporting requires the owner or operator of the facility to make an initial telephone call to the NRC stating that he intends to submit a continuous release report. That initial call is followed by a written report, within 30 days, to the appropriate EPA Regional office where the release is occurring. Each year on the anniversary of

that report, the facility owner or operator must review the release report to determine if changes have occurred in any of the previously submitted information. For example, the rate of release, source, composition, contact information, or facility ownership may have changed since the previous report. If so, then the facility owner or operator must provide a follow-up notification report within 30 days of the anniversary that updates the information submitted in the original notification. The continuous release reports should also be submitted to the appropriate SERC and LEPC to satisfy the EPCRA section 304(c) notification requirements.

Section 109 of CERCLA and section 325 of SARA Title III authorizes EPA to assess civil penalties for failure to report releases of hazardous substances that equal or exceed their RQs. Section 103(b) of CERCLA, as amended, authorizes EPA to seek criminal penalties for failure to report releases of hazardous substances and for submitting false or misleading information in a notification made pursuant to CERCLA section 103. Except for the case described below where the Government settled with the nation's second largest pork producer, Premium Standard Farms, Inc. (PSF), and Continental Grain Company, Inc. when it intervened in a private party CWA case, EPA has never relied on these authorities as the primary reason to take action against an AFO facility owner or operator and in no case has any response been taken on an AFO related to releases of hazardous substances from manure.

Several recent court decisions have generated concern among some in the animal agricultural operations industry about the CERCLA and EPCRA notification and reporting requirements. However, EPA was not a party to the litigation. Further, EPA does not have positions on many of the issues in the litigation. The heightened attention has prompted the National Chicken Council, National Turkey Federation and U.S. Poultry & Egg Association to submit a petition for exemption from EPCRA and CERCLA reporting requirements for ammonia emissions from poultry operations. The Agency is currently reviewing this petition and will soon make this petition available for public comment through its docket. A Federal Register notice will announce the availability of the petition along with a specific request for public comment.

**EPA PROGRAM IMPLEMENTATION**

Under CERCLA, the U.S. Environmental Protection Agency, must be notified when there was a release of a hazardous substance into the environment. CERCLA defines what those hazardous substances are by referring to several other environmental statutes but it also gives the Agency the authority to designate additional hazardous substances which when released into the environment may present substantial danger to the public health or welfare or the environment. The Agency was also required by CERCLA section 102(a) to promulgate regulations establishing the quantity of any hazardous substance that if released shall be reported pursuant to CERCLA section 103(a). Every year, the NRC receives thousands of reports of releases of hazardous substances.

Section 300.130 of the NCP sets forth the requirements to determine whether to initiate a response. In the past, federal response has been limited to the release of ammonia or hydrogen sulfide to air from animal agricultural operations from chemicals stored on-site in tanks. EPA is examining whether changes should be made to reduce the burden on the industry. The CERCLA and EPCRA release reporting requirements provide useful information for State and local planning committees and serve the public and the Agency in identifying facilities that release reportable quantities of hazardous substances.

To date, there has only been a single matter in which EPA has issued a finding of violation (FOV) against a farm for violations of CERCLA 103 and EPCRA 304, although the FOV primarily focused on CWA section 301 and CAA section 110 violations. In that case, the Government settled with the nation's second largest pork producer, Premium Standard Farms, Inc. (PSF), and Continental Grain Company, Inc. The settlement resolved alleged violations of the Clean Water Act (CWA), CAA, CERCLA and EPCRA that occurred at a number of the companies' factory farms in northwest Missouri. It is important to note that the Government intervened in a private party CWA case and the government did not initiate the action.

After an NAS study found that that scientifically sound and practical protocols for measuring air emissions from AFOs needed to be developed, EPA concluded that the better course was

developing the AFO Agreement, followed by emissions estimating methodology. EPA may use CERCLA authority to respond to certain catastrophic releases of hazardous substances or wastes such as from a lagoon failure near a public waterway.

**AFO AGREEMENT**

In late 2001, discussions began between EPA and representatives from the AFO industry on the concept of a voluntary enforcement agreement that would ensure compliance with federal laws pertaining to air emissions. In December of 2001, EPA and the U.S. Department of Agriculture also asked the National Academy of Sciences (NAS) to review and evaluate the scientific basis for estimating emissions of various air pollutants from AFOs. The NAS issued a final report in February, 2003 concluding that scientifically sound and practical protocols for measuring air emissions from AFOs needed to be developed. The NAS also found that existing methodologies for estimating air emissions from AFOs are generally inadequate because of the limited data and site specific factors on which they are based. In response to the 2003 NAS report, EPA began revising the conceptual enforcement agreement to specifically address the data and emission-estimating methodology needs, thus beginning to address the needs cited by the NAS, and determining AFO regulatory responsibility under the CAA, CERCLA, and EPCRA. Over the next two years, EPA sought input and comment on drafts of the enforcement agreement from many groups, including state officials, representatives from the agricultural industry, environmental organizations, and local citizen groups.

On January 31, 2005, EPA published a notice in the Federal Register offering animal agricultural operations an opportunity to sign a voluntary Consent Agreement and Final Order. The deadline to sign the proposed Agreement was August 12, 2005. Approximately 2,700 proposed Agreements have been submitted to EPA, covering over 6,000 pork, poultry, and dairy farms. In its January 31, 2005 notice, EPA also requested public comment on the proposed Air Compliance Agreement, and received over 600 unique comments.

Under the AFO Air Compliance Agreements, Respondents pay a penalty to resolve potential civil liability and participate in funding an extensive, national AFO air monitoring study by

contributing up to $2,500 per farm into an EPA-approved monitoring program. The civil penalties range from $200 to $1000 per farm covered, depending on the size of the farm, with an absolute penalty cap of $100,000 per Respondent regardless of how many farms are covered.

The monitoring study will lead to the development of methodologies for estimating emissions from AFOs and will allow Respondents to determine and comply with their regulatory responsibilities under the CAA, CERCLA, and EPCRA. Once applicable emission-estimating methodologies have been published by EPA, the liability release in the proposed Agreement is contingent on the Respondent certifying that it is in compliance with all relevant requirements of the CAA, CERCLA, and EPCRA. In return, Respondents receive a release and covenant not to sue for the specific violations identified by applying the relevant emissions-estimating methodologies as long as the participating animal agricultural operations comply with all of their obligations under the Agreement.

The AFO Air Compliance Agreement is an important part of EPA's strategy to address air emissions from AFOs. In addition to resolving the compliance status of AFOs under the relevant statutes, it will provide critical data that will allow EPA to quantify emissions coming from AFOs and, if necessary, to identify appropriate regulatory and nonregulatory responses for controlling those emissions.

On November 9, 2005, EPA submitted the first set of AFO Air Compliance Agreements to the Environmental Appeals Board for approval. We anticipate that the Board will consider the submitted Agreements within the next several months. Assuming Board approval, EPA has made a determination that there is adequate participation and representation to warrant proceeding with the national air monitoring study for egg-layer and swine AFOs. We are still processing and reviewing Agreements from the other animal sectors and have not made a decision yet of adequate participation and representation for dairy and meat-bird AFOs, but expect to do so soon.

**CONCLUSION**

In conclusion, I would like to emphasize that the notification provisions under CERCLA and EPCRA allow for the Federal government to evaluate and appropriately respond to releases of hazardous substances. EPCRA specifically, allows the public to participate through its community involvement and community right-to-know provisions. EPA appreciates that there remain a number of issues of interest by the agricultural community yet to be addressed by the Agency and that there is also significant Congressional and public interest in the outcome as well. Let me assure you that EPA is actively working to resolve these issues consistent with the mission of the U.S. Environmental Protection Agency to be protective of human health and the environment.