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Superfund Exemption: The Agricultural Protection and Prosperity Act of 2007

by Sarah K. Ball

Editors' Summary: Under CERCLA, agricultural producers must report releases of volatile organic compounds, particulate matter, ammonia, hydrogen sulfide, methane, and other pollutants from decomposing animal manure. However, the so-called Superfund Exemption, proposed in March 2007 by Senator Lincoln, would amend CERCLA to exempt animal manure from the definition of hazardous substances. In this Article, Sarah Ball traces the legal treatment of the issue of animal waste as a pollutant. She begins her analysis by looking at the CWA as the first regulatory vehicle for agricultural operations, and then outlines the judicial actions of states, cities, and environmental groups who have sought enforcement of CERCLA against large agricultural operations for both air and water pollution. She examines arguments from pro-exemption farm groups and anti-exemption environmental advocates. Finally, she presents the EPA Air Compliance Agreement as an alternative policy for addressing the measurement, management, and regulation of agricultural pollution.

I. Introduction

On March 8, 2007, Sen. Blanche Lincoln (D-Ark.) introduced bipartisan legislation to amend the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund).¹ The proposed legislation, colloquially referred to as the Superfund Exemption, is titled the Agricultural Protection and Prosperity Act of 2007 (the Act) and would specifically exempt animal manure from the definition of hazardous substances under CERCLA §313.² At issue are the reporting requirements and cleanup provisions triggered under CERCLA and the Emergency Planning and Community Right-To-Know Act (EPCRA)³ when reportable quantities of hazardous substances are released into the environment. Decomposing manure from agricultural operations emits large quantities of toxic chemicals and gases (ammonia, hydrogen sulfide, and methane), particulate matter (PM), volatile organic compounds (VOCs), and other

hazardous air pollutants.⁴ Depending on the scale of these air emissions, agricultural producers are legally obligated to report releases to federal, state, and local authorities under CERCLA and EPCRA.⁵

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1. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405. Press Release, Senator Lincoln, U.S. Senate, Senate and House Sponsors Introduce Bipartisan Legislation to Protect Farmers Against Misuse of Superfund Law (Mar. 8, 2007) [hereinafter Lincoln Press Release].
2. S. 807, 110th Cong. (2007). An identical bill was simultaneously introduced in the U.S. House of Representatives, and has been referred to both the House Committee on Energy and Commerce and the House Committee on Transportation and Infrastructure. H.R. 1398, 110th Cong. (2007).
3. 42 U.S.C. §§11001-11050, ELR STAT. EPCRA §§301-330.

4. Claudia Copeland, *Air Quality Issues and Animal Agriculture: A Primer*, CRS 32498, U.S. Congressional Research Service (Apr. 11, 2007), at 2.

5. MICHELE M. MERKEL, THE USE OF CERCLA TO ADDRESS AGRICULTURAL POLLUTION (Environmental Integrity Project 2006), available at <http://www.environmentalintegrity.org/pub400.cfm>. Ammonia and hydrogen sulfide, two of the main toxic air emissions from decomposing animal waste, are regulated pollutants under the Clean Air Act (CAA). 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618. They are also classified as hazardous substances under CERCLA, and releases that exceed 100 pounds (lbs.) per day must be reported under §103 of CERCLA. *Id.* §9603; 40 C.F.R. §302.4 (2007). Section 304(a) of EPCRA requires that state and local officials be notified of the "release of an extremely hazardous substance" if "such release requires notification of section 103(a) of [CERCLA]." 42 U.S.C. §11004(a); 40 C.F.R. §355.40(b)(1) (2007). In terms of the scale of toxic chemicals released from decomposing manure, a dairy cow operation in Boardman, Oregon, reported emissions of 15,500 lbs. of ammonia per day; such emissions exceeded the number one manufacturing source of ammonia air pollution according to the 2003 Toxics Release Inventory. MERKEL, *supra* at 1. Measurements taken pursuant to a settlement agreement with Premium Standard Farms revealed releases of three million lbs. of ammonia annually (roughly 8,000 lbs. per day) from one of its facilities. *Id.* at 4. The National Association of Clean Air Agencies (NACAA) notes that animal feeding operations (AFOs) account for one-half of all ammonia emissions in the United States. Letter from S. William Becker, Executive Director, NACAA, to John D. Dingell, Representative, U.S. House of Representatives 2 (Mar. 20, 2007), available at

The stated purpose of the Act is to clarify original congressional intent regarding CERCLA.⁶ Proponents of the Act state that the U.S. Congress never intended for CERCLA to apply to agricultural operations, and that CERCLA and EPCRA were designed to regulate large industrial facilities.⁷ Farm groups, who pushed for the Act, worry about the economic ramifications of CERCLA if they are held liable for hazardous waste cleanup and statutory penalties.⁸ Opponents of the legislation say that CERCLA is the only law that can force agricultural operations to report their emissions, assume liability for cleanup costs, and keep the public informed about pollution levels.⁹

In this Article, I will trace the historical development of this issue from the use of the Clean Water Act (CWA) as the primary regulatory vehicle for agricultural operations to the judicial actions of states, cities, and environmental groups who have sought enforcement of CERCLA against large agricultural operations for both air and water pollution. I will present the viewpoints of both sides of the issue—farm groups and environmental advocates—and analyze the impact of the proposed legislation. Finally, I will look at the U.S. Environmental Protection Agency's (EPA's) Air Compliance Agreement as an alternative policy for addressing the measurement, management, and regulation of agricultural pollution.

II. History

Animal agriculture is an estimated \$100 billion per year industry in the United States.¹⁰ About one-fifth of all agricultural operations are considered animal feeding operations (AFOs), for regulatory purposes under the CWA.¹¹ An AFO is an agricultural operation where livestock and poultry are kept in high concentrations and raised in confinement.¹² As industry competition increases, agricultural producers have relied more heavily upon the use of AFOs to increase economic efficiency.¹³ The highly concentrated nature of AFOs results in high volumes of animal waste; the attendant pollution poses environmental and human health risks if the waste is improperly managed.¹⁴ Although the extent of pol-

lution from agricultural operations is unknown, it is estimated that AFOs produce 500 million tons of untreated manure every year, roughly three times the waste of the U.S. human population.¹⁵ Agriculture was identified as the leading contributor to water quality impairment in EPA's 2000 National Water Quality Inventory.¹⁶

Historically, regulatory authorities have focused on water pollution from agricultural runoff, so the CWA has been the principal statutory tool used to regulate the agricultural industry.¹⁷ The primary water pollutants associated with manure are nutrients (nitrogen and phosphorous), organic matter, solids, pathogens, and VOCs.¹⁸ The manure generated by AFOs can cause water pollution through a variety of avenues, including surface runoff and erosion, direct discharges into surface waters, spills, and leaching into soil and groundwater.¹⁹ Since the CWA distinguishes between point and nonpoint sources of pollution, and most agricultural operations are considered nonpoint sources, these operations are generally exempted from CWA permitting requirements.²⁰ Only large AFOs, known as concentrated animal feeding operations (CAFOs), are considered point sources under the CWA and must obtain either a specific national pollutant discharge elimination system (NPDES) permit or a general discharge permit for effluents.²¹

Use of the Clean Air Act (CAA) to regulate agricultural operations has been hindered by a combination of insufficient scientific data regarding the nature of agricultural emissions and inadequate air quality monitoring.²² Since air emissions from farms usually do not exceed specified thresholds for regulated pollutants, agricultural operations have avoided CAA regulation.²³ However, agricultural operations are not expressly exempt from the statute as they are in a majority of cases under the CWA.²⁴ Although the CAA does not list ammonia or hydrogen sulfide—two gases emitted from decomposing manure—as criteria pollutants, they are considered regulated air pollutants; EPA lists them as hazardous air pollutants under CERCLA.²⁵ To be subject to the provisions of the CAA, agricultural operations would have to meet the regulatory definition of a "major source," usually defined as a stationary source that emits 100 tons per year or more of any pollutant.²⁶ Environmental groups argue that many large agricultural operations qualify as major sources of air pollution under the CAA,

from AFOs include respiratory and cardiovascular irritation, increased rates of asthma and increased morbidity in vulnerable populations. Environmental impacts include oxygen depletion in aquatic systems from phosphorous and nitrogen loads, as well as haze, smog, and global climate change from VOC, PM, and methane. *Id.* at 2-5.

15. MERKEL, *supra* note 5, at 1.

16. Copeland, *supra* note 4, at 9.

17. National Agricultural Law Center, *supra* note 14.

18. Copeland, *supra* note 4, at 9.

19. National Agricultural Law Center, *supra* note 14.

20. Copeland, *supra* note 4, at 8. One policy alternative worthy of investigation in terms of mitigating and monitoring water pollution is to enlarge the definition of point sources under the CWA to include more AFOs.

21. National Agricultural Law Center, *supra* note 14.

22. *Id.*

23. Copeland, *supra* note 4, at 10.

24. *Id.*

25. *Id.* at 12-13, 19.

26. *Id.* at 11-12.

<http://www.4cleanair.org/Documents/DingellletterFINALlthd.pdf> [hereinafter NACAA Letter].

6. Lincoln Press Release, *supra* note 1.

7. Daniel Cusick, *State Regulators Oppose EPA Plan to Exempt Feedlots*, E&E NEWS PM, Mar. 22, 2007.

8. Allison Winter, *EPA, Congress Considers Pollution-Rule Exemptions for Farms*, GREENWIRE, Mar. 12, 2007.

9. *Id.* at 1; Cusick, *supra* note 7, at 1.

10. Copeland, *supra* note 4, at 1.

11. *Id.*

12. *Id.* Large AFOs, defined as those facilities housing 300 or more animals, are classified as concentrated animal feeding operations or CAFOs. *Id.*

13. *Id.* While the total number of U.S. operations of confined livestock fell by 27% between 1982 and 1997, the number of animals raised in AFOs increased by 88% and the overall number of AFOs increased by more than 50%. Claudia Copeland, *Air Quality Issues and Animal Agriculture: EPA's Air Compliance Agreement*, CRS 32947, U.S. Congressional Research Service (Apr. 11, 2007), at 2.

14. National Agricultural Law Center, *Animal Feeding Operations (AFOs): An Overview*, <http://www.nationalaglawcenter.org/assets/overviews/afos.html> (last visited May 31, 2007). There are four general types of manure storage: deep pits, outdoor slurry storage, anaerobic lagoons, and solid stacks. The most widely used and cost-effective method for disposal of manure is land application to agricultural fields. Copeland, *supra* note 4, at 5-6. Human health impacts

yet they have remained a low priority for federal and state regulatory officials.²⁷

Recently, states, cities, and environmental groups have sought to enforce the provisions of CERCLA and EPCRA against AFOs. Both statutes mandate the reporting of releases of hazardous substances (excepting federally permitted releases) greater than the quantity deemed “hazardous” under CERCLA and “extremely hazardous” under EPCRA.²⁸ CERCLA also authorizes federal cleanup of hazardous waste sites and imposes strict liability for cleanup and associated damages.²⁹ It is this statutory provision that has caused the greatest concern among agricultural producers. While CERCLA excludes the “normal application of fertilizer” from the definition of hazardous releases, and EPCRA provides an exemption for any hazardous chemical or substance used “in routine agricultural operations,” both statutes have been used as the basis for lawsuits alleging natural resource damages and failure to report releases of hazardous substances.³⁰

In response to industry pressure, Congress has attempted to exempt CAFOs from CERCLA and EPCRA, first through riders to various appropriations legislation and more recently through amendments to CERCLA and the Superfund Amendments and Reauthorization Act of 1986.³¹ Current legislation seeks to clarify the reporting requirements under CERCLA and EPCRA and ultimately their application to agricultural operations.³² Under the proposed legislation, manure would be exempted from the definition of “hazardous substance” and “pollutant or contaminant” under CERCLA; manure would be redefined in broader terms to include associated wastewater and air emissions, and notification and reporting requirements under CERCLA and EPCRA would be eliminated for all releases associated with manure as defined in CERCLA §313.³³ The bill has been referred to the U.S. Senate Committee on Environment and Public Works.

III. Judicial Actions

The impetus for legislation exempting agricultural producers from reporting requirements was a 2003 citizen suit involving the Sierra Club and Tyson Foods.³⁴ The case alleged

that Tyson Foods violated CERCLA and EPCRA by failing to report emissions of ammonia from its poultry operations.³⁵ The defendants argued that each poultry house or facility in question constituted a separate site for reporting purposes, and that when measured separately, ammonia emissions did not exceed the threshold for reporting.³⁶ However, the court disagreed, finding that “when multiple sources of hazardous substances are grouped together, the facility encompasses the entire area and extends to “the bounds of the contamination.”³⁷ Judge Joseph H. McKinley based this finding, in part, on the interpretation that “the purpose of Section 103 is best served by a broad definition. CERCLA is a remedial statute designed to protect human health and the environment from potentially hazardous substances.”³⁸

The defendants also argued that since no reliable method exists to measure emissions, then the issue of reporting itself is moot. In other words, if the technology does not exist to accurately measure the emissions from poultry operations, then no reporting is required. However the court disagreed, finding no statutory authority for the exemption of animal production facilities from the reporting requirements of CERCLA and EPCRA.³⁹ Although the defendants did not employ the argument used by the industry today to justify the exemption, namely, that Congress never intended CERCLA to apply to agricultural operations, dicta in the case effectively dismantled this argument. Judge McKinley found that “[i]f Congress had intended such a result it could have excluded animal production facilities, such as poultry and swine, from the reporting requirements. Congress clearly knew how to exempt certain items from the reporting requirements of CERCLA and EPCRA . . . from the definition of release.”⁴⁰ The case was settled in 2005 when the Sierra Club and Tyson Foods entered into an agreement requiring Tyson Foods to study and report on ammonia emissions from its poultry operations as well as to mitigate those emissions.⁴¹

In earlier government cases, *Citizens Legal Environmental Action Network, Inc. v. Premium Standard Farms, Inc.*⁴² and *Citizens Legal Environmental Action Network, Inc. v. Continental Grain Co.*,⁴³ EPA intervened in a CWA citizen suit to add violations of the CAA, CERCLA, and EPCRA. At issue were large emissions of PM, VOCs, hydrogen sulfide, and ammonia from manure storage lagoons.⁴⁴ Settlement of the case required monitoring of air emissions from selected pork housing facilities and waste lagoons.⁴⁵ Three

27. *Id.* at 12.

28. The reporting requirements for CERCLA are codified at 42 U.S.C. §9603(a). CERCLA requires reporting to the National Response Center for hazardous substance releases. 42 U.S.C. §9603(a). The reporting requirements for EPCRA are codified at 42 U.S.C. §11004. EPCRA requires notification of state and local agencies for extremely hazardous substance releases. 42 U.S.C. §11004(b).

29. Copeland, *supra* note 4, at 18.

30. *Id.*

31. MERKEL, *supra* note 5, at 7-8.

32. Copeland, *supra* note 4, at 20-21. The Act was drafted largely in response to farmers' concerns over CERCLA being used to address air pollution from AFOs, not water pollution. Sen. Pete V. Domenici's (R-N.M.) Agricultural Protection and Prosperity Act of 2006 is, with one exception, virtually identical to Senator Lincoln's Agricultural Protection and Prosperity Act of 2007. *See generally* S. 3681, 109th Cong. (2006). The one difference is that the definition of livestock in Senator Domenici's bill would change to include horse farms. *Compare id.* at §(2)(a) with S. 807, 110th Cong. §(2)(a) (2007).

33. S. 807, 110th Cong. §2(a)-(b) (2007).

34. *Sierra Club v. Tyson Foods et al.*, 299 F. Supp. 2d 693 (W.D. Ky. 2003). Philip Brasher, *EPA Wants Exemption for Livestock Farms*, DES MOINES REGISTER, Mar. 21, 2007.

35. MERKEL, *supra* note 5, at 5.

36. *Sierra Club v. Tyson Foods* case; Judge Joseph H. McKinley Opinion 19-20 (2003), available at <http://www.indianalawblog.com/documents/tyson.pdf> [hereinafter McKinley Opinion]. The Sierra Club argued that each farm site—an aggregate of several poultry houses—released more than 100 lbs. of ammonia daily.

37. *Id.* at 20.

38. *Id.* at 23.

39. *Id.* at 15.

40. *Id.*

41. MERKEL, *supra* note 5, at 5-6.

42. No. 97-6073-CV-SJ-6 (W.D. Mo. Sept. 10, 2003). For a description of this case, see MERKEL, *supra* note 5, at 4.

43. No. 98-6099-CV-SJ-6 (W.D. Mo. Sept. 10, 2003). For a description of this case, see MERKEL, *supra* note 5, at 4.

44. *Continental Grain*, No. 98-6099-CV-SJ-6.

45. MERKEL, *supra* note 5, at 4.

other government cases, *City of Tulsa v. Tyson Foods, Inc.*,⁴⁶ *City of Waco v. Dennis Schouten et al.*,⁴⁷ and *State v. Tyson Foods, Inc.*,⁴⁸ alleged contamination of water supplies from large quantities of phosphorous. These cases centered on the application of excess poultry litter to land application areas, the improper management and disposal of dairy waste, and the improper dumping and storage of poultry waste, respectively.⁴⁹ While to date none of the above cases have resulted in an agricultural operation being held liable for cleanup or natural resource damages under CERCLA, the agriculture industry fears they will be exposed to liabilities and penalties if the courts continue to find that manure fits the definition of a hazardous substance under CERCLA.⁵⁰

Citizen suits and civil cases have exposed the enormity of the hazardous releases produced by large agricultural operations, as well as the agricultural industry's widespread non-compliance under CERCLA and EPCRA. While the agricultural industry has enjoyed lax enforcement of CERCLA and EPCRA reporting provisions, by legislating a categorical exclusion for manure under the definition of "hazardous substance" and "pollutant and contaminant" in CERCLA, the industry will constructively absolve itself from all responsibility for notification of hazardous releases, abatement actions and liability provisions.⁵¹ The above cases represent the only recourse the public has had to address agricultural pollution in the absence of regulatory enforcement. Essentially, the judicial system has been called upon to enforce the law because EPA has failed to do so. In his opinion in *Tyson Foods*, Judge McKinley noted that "the fact that the EPA has not chosen to enforce these provisions against animal production facilities does not prohibit a citizen enforcement suit for violation of the reporting requirements. . . . If the EPA were enforcing these provisions, this suit would not be necessary."⁵²

IV. Analysis

According to news reports, the Act is the result of intense lobbying efforts on behalf of the American Farm Bureau Federation (AFBF), as well as the special interest group, Farmers for Clean Air and Water.⁵³ Materials posted on the AFBF website identify the issue as one of congressional intent.⁵⁴ Congress never intended, they state, to use CERCLA or EPCRA to regulate agriculture, much less manure emissions.⁵⁵ Their support for this position is that CERCLA already contains an exemption for the application of chemical

fertilizers which contain the same ingredients as manure.⁵⁶ They and other proponents of the legislation reiterate that agricultural operations are already regulated under the CAA, the CWA, and various state laws that provide for permitting, enforcement, and remediation.⁵⁷ However, while the proponents of the Act emphasize that they do not seek exemptions under the CAA or the CWA, the agricultural industry has repeatedly fought attempts to be regulated under these statutes, and EPA has failed to enforce compliance under either statute.⁵⁸ According to an anonymous congressional aide, the main issue is whether it is appropriate to use CERCLA for enforcement just because EPA is not enforcing compliance under the CAA.⁵⁹ The aide said that such an issue "should be dealt with through regulatory laws, not through a punitive scheme such as CERCLA."⁶⁰

The Sierra Club has been at the forefront of efforts to address the environmental ramifications of voluminous amounts of animal waste and the associated emissions produced by AFOs. It counters the agricultural industry's argument that agricultural operations are regulated under the CAA and the CWA by pointing out that AFOs are, in fact, either poorly regulated under the CAA or specifically exempted from regulation under the CWA.⁶¹ Ed Hopkins, director of environmental quality for the Sierra Club, noted that according to EPA's own statistics, no CAA permits have been issued to CAFOs and only 8,500 of the estimated 18,800 CAFOs in existence have the required CWA permits.⁶² Aside from lax enforcement of existing regulations, the CWA remains an ineffective tool for regulating agricultural runoff and effluent discharges. Since most agricultural operations are considered nonpoint sources under the CWA, they escape regulation. In spite of a 2003 EPA rule requiring CAFOs to obtain NPDES permits and implement nutrient management plans by February 2006, the deadlines for compliance have been delayed until July 2007.⁶³

The latest issue of *FBNews*, the official newspaper of the AFBF, reports that "if normal animal manure were found to be a hazardous substance under Superfund law, then virtually every farm in the United States could be exposed to liabilities and penalties under the law, an outcome that . . . Con-

46. 258 F. Supp. 2d 1263, 33 ELR 20186 (N.D. Okla. 2003). For a description of this case, see MERKEL, *supra* note 5, at 4-5.

47. No. W-04-CA-118, 35 ELR 20178 (W.D. Tex. Mar. 29, 2005). For a description of this case, see MERKEL, *supra* note 5, at 4-5.

48. No. 4:05-CV-00329 JOE-SAJ (N.D. Okla. filed June 13, 2005). For a description of this case, see MERKEL, *supra* note 5, at 4-5.

49. *Id.*; see also *supra* notes 45 and 46.

50. *Farm Bureau Supports Bill to Exclude Livestock Waste From Superfund*, *FBNews*, Mar. 19, 2007, at 1.

51. MERKEL, *supra* note 5, at 8-9.

52. McKinley Opinion, *supra* note 36, at 15-16.

53. Allison Winter, *Farm Bill Extension to Get New Life This Session*, *E&E DAILY*, Mar. 7, 2007.

54. AFBF, *CERCLA AND EPCRA REGULATION OF ANIMAL MANURE* (2007), available at <http://www.fb.org/issues/docs/cercla07.pdf>.

55. *Id.* at 1.

56. *Id.*

57. *Id.*

58. Hopkins Letter, *infra* note 62; MERKEL, *supra* note 5, at 9-10. For example, EPA recently issued a proposed CWA regulation that would result in 25% fewer agricultural operations being permitted under the CWA than under its 2003 regulation. Revised NPDES Permit Regulation and Effluent Limitation Guidelines for CAFOs, 71 Fed. Reg. 37744, 37774 (proposed June 30, 2006) (to be codified at 40 C.F.R. pts. 122, 412).

59. Personal Communication from Anonymous Congressional Staff Source, to author (Mar. 23, 2007) (notes on file with author).

60. *Id.*

61. Sierra Club, *Clean Water & Factory Farms: Reports and Fact Sheets: Protect Communities' Water and Air From Factory Farm Pollution*, http://www.sierraclub.org/factoryfarms/factsheets/protect_communities.asp (last visited May 31, 2007).

62. Personal Communication from Ed Hopkins, Director, Sierra Club Environmental Quality Program, to author (Mar. 23, 2007) (notes on file with author) [hereinafter Hopkins Letter]. According to a *Federal Register* notice, EPA estimated that, as of 2001, only 2,520 CAFOs had CWA permits, while an estimated 13,000 CAFOs were required to have them. NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for CAFOs, 66 Fed. Reg. 2960, 2968-69 (proposed Jan. 12, 2001) (to be codified at 40 C.F.R. pts. 122, 412).

63. Copeland, *supra* note 4, at 12.

gress never intended.”⁶⁴ AFBF President Bob Stallman states that “Superfund was enacted . . . to rein in industrial polluters and clean up toxic waste sites, not to be imposed on America’s farmers and ranchers.”⁶⁵ However, the perceived threat against “America’s farmers and ranchers” from legal action is unwarranted. To date there have been only six lawsuits against AFOs involving CERCLA claims. None of the suits resulted in actual penalties or payment of cleanup costs; rather, settlement usually involved improved monitoring, reporting, or waste management practices.⁶⁶ Also, the lawsuits have targeted industry giants such as Tyson Foods, Premium Standard Farms, and Seaboard Farms rather than small, family owned farms. Perhaps the ultimate irony of the agriculture industry’s claim that the exemption is necessary to ensure their economic viability in the face of potential lawsuits is that, if one is operating in compliance with a federally issued permit, one is not liable under the provisions of CERCLA to begin with.⁶⁷

Opponents of the legislation, like the Sierra Club, point out that maintaining the provisions of CERCLA and EPCRA is necessary since they serve as complements to federal permitting statutes, addressing hazardous pollutants that would not be regulated otherwise.⁶⁸ They believe that CERCLA provides the only mechanism for municipalities like Tulsa, Oklahoma, and Waco, Texas, to recover cleanup costs for damages caused by agricultural pollution, and that the Act would strip agricultural producers of their responsibility for pollution and deprive the public of critical information regarding toxic releases.⁶⁹ As such, Ed Hopkins characterizes the proposed legislation as a way for “agricultural producers to offload their responsibility.”⁷⁰ Joining the ranks of the opponents of the Superfund exemption is the National Association of Clean Air Agencies (NACAA) who state that a “blanket exemption is [not] warranted given the demonstrated health effects associated with ammonia and hydrogen sulfide, the amounts of manure produced by AFOs, and the usefulness of data contained in CERCLA and EPCRA reports to state and local air agencies and the people living near these facilities.”⁷¹

Potentially, the agricultural industry faces an uphill battle on this issue; the enormity of the problem in terms of environmental damage and human health impacts is real. If passed, the Act would undermine existing public health safeguards by exempting AFOs from reporting toxic releases and effectively shift liability for hazardous waste cleanup from agricultural producers to federal, state, and local agencies.⁷² It would seem that the agricultural industry would be better advised either to obtain the necessary permits to avoid CERCLA liability or establish that their air emissions and effluent discharges are below the threshold required for a permit. However, the more expedient route seems to be lobbying for wholesale exemption from any CERCLA liability or EPCRA notification. As such, the

sponsors of the Superfund exemption rely on industry arguments to justify the legislation.

For example, the AFBF’s position is echoed in the press release issued by Senator Lincoln on March 8, 2007, the day the Act was introduced into Congress. The press release reiterates the industry arguments that: (1) no exemptions from the CAA, the CWA, or other federal or state laws are sought; (2) that Congress never intended CERCLA to apply to manure; and (3) continued judicial actions under CERCLA could threaten the economic viability of America’s farmers.⁷³ Senator Lincoln’s interest in passage of this legislation is clear: the state of Arkansas ranks 2nd in the sale of poultry and eggs and 17th in the sale of hogs. The market value of Arkansas’ agricultural products for 2002 was \$3.3 billion.⁷⁴ Likewise, previous sponsors of similar legislation represent states with large agricultural operations.⁷⁵ Given the genesis of this legislation, as well as its adverse human and environmental health consequences if passed, it is difficult to envision its efficacy as anything other than a regulatory pass for the largest and most influential segments of the agricultural industry.

V. Conclusion

In early 2005, EPA, in light of its failure to enforce the CAA, CERCLA, and EPCRA against CAFOs, negotiated an administrative consent agreement with the agricultural industry, called the Air Compliance Agreement (ACA).⁷⁶ The ACA would offer participating AFOs immunity from past and future violations under the CAA, CERCLA, and EPCRA in exchange for monitoring at selected sites and the payment of a small fine.⁷⁷ EPA has pointed out that insufficient data exist to fully analyze the significance of air emissions from AFOs; the ACA would supply the data needed to determine which AFOs are subject to compliance.⁷⁸ EPA’s position is that “the agreement is the quickest and most effective way to address the current uncertainties regarding air emissions and to bring the entire AFO industry into compliance with the CAA, CERCLA, and EPCRA, in contrast to lengthy litigation. . . .”⁷⁹ However, if the proposed Superfund exemption is passed, there would be no incentive for agricultural producers to monitor and report their emissions.⁸⁰

73. Lincoln Press Release, *supra* note 1.

74. U.S. Department of Agriculture, *Arkansas Agriculture Statistics Service, 2002 Census of Agriculture State Profile, Arkansas—Ranked Items Within U.S. 2002*, http://www.nass.usda.gov/Statistics_by_State/Ag_Overview/AgOverview_AR.pdf (last visited May 31, 2007).

75. For example, Sens. Larry Craig (R-Idaho) and Domenici and Rep. Ralph M. Hall (D-Tex.).

76. MERKEL, *supra* note 5, at 6.

77. *Id.*

78. Copeland, *supra* note 13, at 1. The ACA study period is two years, after which EPA will codify emission-estimating methods for AFOs that will be used to determine compliance with the CAA. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4958-60 (proposed Jan. 31, 2005). Critics of the ACA point out that the agreement protects AFOs from any liability, does not require AFOs to reduce air pollution, and fails to include research or testing into manure management practices. MERKEL, *supra* note 5, at 7.

79. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4958 (proposed Jan. 31, 2005).

80. MERKEL, *supra* note 5, at 10.

64. *Supra* note 50.

65. *Id.*

66. *Id.* at 10.

67. Hopkins Letter, *supra* note 62.

68. MERKEL, *supra* note 5, at 10.

69. Hopkins Letter, *supra* note 62; Sierra Club, *supra* note 61.

70. Hopkins Letter, *supra* note 62.

71. NACAA Letter, *supra* note 5.

72. MERKEL, *supra* note 5, at 8-9.

While the ACA is a positive step toward addressing the issue of air emission measurement, it is clear that more action, especially in terms of research into estimating and measuring emissions, as well as research into emission reduction technologies, is needed.⁸¹ However, congressional interest in underwriting such research is unclear.⁸² Unfortunately, passage of the Act would obviate the need for research into the accurate measurement of AFO air emissions or the development of abatement technologies or mitigation techniques for controlling those emissions.

In response to the Act's failure to pass, EPA has proposed an administrative exemption for AFOs from CERCLA and EPCRA reporting requirements for their manure emissions.⁸³

81. Copeland, *supra* note 4, at 25-26.

82. *Id.*

83. *EPA Developing Exemption for Manure Emissions*, CQ.COM, Feb. 28, 2007, <http://public.cq.com/docs/cqm/cqmday110-000002459658.html>.

The Agency cites the need to eliminate the burden of emergency responders to toxic releases and the uncertainty of reporting requirements as the reasons for the proposed rule changes.⁸⁴ While the legislative action on this issue has received bipartisan support, the latest EPA proposal can be viewed as another example of the Bush Administration's gutting of environmental regulations for industry benefit. Ultimately, the Act or EPA's proposed regulations would not be so objectionable if EPA's regulatory enforcement of the CAA and the CWA were not so lax. However, in light of the available evidence of the large amounts of air and water pollution generated by agricultural operations and the lack of EPA enforcement of the CAA, CERCLA, the CWA, and EPCRA against AFOs, the Act is simply unsound public policy.

84. *Id.*