

Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 17, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 24, 2008.

**Wayne Nastri,**

*Regional Administrator, Region IX.*

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

#### PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

*Authority:* 42 U.S.C. 7401 *et seq.*

#### Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(358) to read as follows:

##### § 52.220 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

(358) The 8-Hour Ozone Reasonable Available Control Technology State Implementation Plans (RACT)(SIP) for the following Air Quality Management Districts (AQMDs)/Air Pollution Control Districts (APCDs) were submitted on January 31, 2007, by the Governor's designee.

(i) Incorporation by reference.

(A) South Coast Air Quality Management District.

(1) Resolution 06-24 (A Resolution of the South Coast Air Quality Management District (SCAQMD) Board certifying that the SCAQMD's current air pollution rules and regulations fulfill the 8-hour Reasonably Available Control Technology (RACT) requirements, and adopting the RACT SIP revision, dated July 14, 2006.

(2) South Coast Air Quality Management District (SCAQMD) Staff Report, SCAQMD 8-Hour Ozone Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) Demonstration, including appendices, dated June 2006.

(3) Notice of Exemption from the California Environmental Quality Act, SCAQMD 8-Hour Ozone Reasonably Available Control Technology (RACT) State Implementation Plan (SIP), dated June 2, 2006.

(4) EPA comment letter to South Coast Air Quality Management District dated June 28, 2006, on 8-hour Ozone Reasonably Available Control Technology—State Implementation Plan (RACT SIP) Analysis, draft staff report dated May 2006, from Andrew Steckel, Chief, Rulemaking Office, U.S. EPA to Mr. Joe Cassmassi, Planning and Rules

Manager, South Coast Air Quality Management District.

\* \* \* \* \*

[FR Doc. E8-29641 Filed 12-17-08; 8:45 am]

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#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Parts 302 and 355

[EPA-HQ-SFUND-2007-0469; FRL-8753-9]

RIN 2050-AG37

#### CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This final rule provides an administrative reporting exemption from particular notification requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended. In addition, this final rule provides a limited administrative reporting exemption in certain cases from requirements under the Emergency Planning and Community Right-to-Know Act, also known as Title III of the Superfund Amendments and Reauthorization Act. Specifically, the administrative reporting exemption applies to releases of hazardous substances to the air that meet or exceed their reportable quantity where the source of those hazardous substances is animal waste at farms.

Nothing in this final rule changes the notification requirements if hazardous substances are released to the air from any source other than animal waste at farms (e.g., ammonia tanks), or if any hazardous substances from animal waste are released to any other environmental media, (e.g., soil, ground water, or surface water) when the release of those hazardous substances is at or above its reportable quantity. Also, the administrative reporting exemption under section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act, does not limit any of the Agency's other authorities under the Comprehensive Environmental Response, Compensation, and Liability Act sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any other provisions of the Comprehensive Emergency Response, Compensation, and Liability Act or the

**Emergency Planning and Community Right to Know Act.**

Accordingly, EPA believes this administrative reporting exemption not only leaves in place important Agency response authorities that can be used to protect human health and the environment if needed, but also is consistent with the Agency's goal to reduce reporting burden, particularly considering that Federal, State or local response officials are unlikely to respond to notifications of air releases of hazardous substances from animal waste at farms.

**DATES:** This final rule is effective on January 20, 2009.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. [EPA-HQ-SFUND-2007-0469]. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Superfund Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone

number for the Public Reading Room is (202) 566-1744, and the telephone number for the Superfund Docket is (202) 566-0276.

**FOR FURTHER INFORMATION CONTACT:** Lynn Beasley, Regulation and Policy Development Division, Office of Emergency Management (5104A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564-1965; fax number: (202) 564-2625; e-mail address: *Beasley.lynn@epa.gov*.

**SUPPLEMENTARY INFORMATION:** The contents of this preamble are listed in the following outline:

- I. General Information
  - A. Does This Action Apply to Me?
  - B. What Is the Statutory Authority for This Rulemaking?
  - C. Which Hazardous Substances Are We Exempting From the Notification Requirements of CERCLA and EPCRA?
- II. Background
- III. Summary of This Action
  - A. What is the Scope of This Final Rule?
  - B. How Does This Rule Differ From the Proposed Rule?
    - i. Exemption From CERCLA Section 103 Reporting
    - ii. Thresholds for Exemption From EPCRA Section 304 Reporting
    - iii. Continuous Release Reporting
  - C. Definitions
    - i. Animal Waste
    - ii. Farm
  - D. What Is Not Included Within the Scope of This Rule?
  - E. What Is EPA's Rationale for This Administrative Reporting Exemption?
  - F. What Are the Economic Impacts of This Administrative Reporting Exemption?

- G. Response to Comments
  - i. Comments Regarding Elimination of Reporting Requirement
  - ii. Comments Regarding Risk, Harm, and Exposure
  - iii. Comments Regarding the Agency's Statutory Authority to Issue This Rulemaking
  - iv. Comments Indicating a Misunderstanding of the Proposed Rule
  - v. Comments Regarding Definitions
    - (1) Animal Waste
    - (2) Farm
  - vi. Comments Regarding Other Facilities
  - vii. Comments Regarding Possible Situations That Would Necessitate a Response
- IV. Statutory and Regulatory Reviews
  - A. Executive Order 12866 (Regulatory Planning and Review)
  - B. Paperwork Reduction Act
  - C. Regulatory Flexibility Act
  - D. Unfunded Mandates Reform Act
  - E. Executive Order 13132 (Federalism)
  - F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)
  - G. Executive Order 13045 (Protection of Children From Environmental Health & Safety Risks)
  - H. Executive Order 13211 (Actions That Significantly Affect Energy Supply, Distribution, or Use)
  - I. National Technology Transfer Advancement Act
  - J. Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations)
  - K. Congressional Review Act

**I. General Information**

*A. Does This Action Apply to Me?*

Type of entity	Examples of affected entities
Industry .....	NAICS Code 111—Crop Production. NAICS Code 112—Animal Production.
State and/or Local Governments .....	State Emergency Response Commissions, and Local Emergency Planning Committees.
Federal Government .....	National Response Center.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is currently aware could potentially be affected by this action; however, other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the criteria in section III.A of this final rule and the applicability criteria in § 302.6 of title 40 of the Code of Federal Regulations (CFR) and 40 CFR Part 355, Subpart C—Emergency Release Notification.<sup>1</sup> If you have questions

<sup>1</sup> On November 3, 2008, EPA published a final rule, "Emergency Planning and Community Right-

to-Know Act; Amendments to Emergency Planning and Notification; Emergency Release Notification and Hazardous Chemical Reporting" ("EPCRA rule"). (See 73 FR 65452.) That rule included revisions to the Emergency Planning Notification, Emergency Release Notification and Hazardous Chemical Reporting regulations. One of the revisions included reorganizing the Code of Federal Regulations (CFR) so that it follows a plain language format. This final rule uses the CFR citations of the EPCRA rule.

Subpart C—Emergency Release Notification includes regulations for, "Who Must Comply" (355.30—What facilities must comply with the emergency release notification requirements? 355.31—What types of releases are exempt from the emergency release notification requirements of this subpart?, 355.32—Which emergency release notification requirements apply to continuous releases?, and 355.33—What release quantities of EHSs and CERCLA hazardous substances trigger the emergency release notification requirements of this subpart?) "How to Comply" (355.40—What

regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. What Is the Statutory Authority for This Rulemaking?*

Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986, gives the Federal government broad authority to respond

information must I provide?, 355.41—In what format should the information be submitted?, 355.42—To Whom Must I Submit the Information?, and 355.43—When Must I Submit the Information?).

to releases or threats of releases of hazardous substances from vessels and facilities. The term *hazardous substance* is defined in section 101(14) of CERCLA primarily by reference to other Federal environmental statutes. Section 102 of CERCLA gives the Environmental Protection Agency (EPA or the Agency) authority to designate additional hazardous substances. Currently, there are approximately 760 CERCLA hazardous substances, exclusive of Radionuclides, F-, K-, and Unlisted Characteristic Hazardous Wastes.

CERCLA section 103(a) calls for immediate notification to the National Response Center (NRC) when the person in charge of a facility has knowledge of a release of a hazardous substance equal to or greater than the reportable quantity (RQ) established by EPA for that substance. In addition to the notification requirements established pursuant to CERCLA section 103, section 304 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.*, requires the owner or operator of certain facilities to immediately report to State and local authorities releases of CERCLA hazardous substances or any extremely hazardous substances (EHSs) if they exceed their RQ (see 40 CFR 355.33). This final rule only applies to CERCLA section 103 notification requirements, including the provisions that allow for continuous release reporting found in paragraph (f)(2) of CERCLA section 103, and EPCRA section 304 notification requirements.

The Agency has previously granted such administrative reporting exemptions (AREs) under the CERCLA section 103 and EPCRA section 304 notification requirements where the Agency has determined that a Federal response to such a release is impracticable or unlikely. For example, on March 19, 1998, the Agency issued a final rule (see 63 FR 13459) that granted exemptions for releases of naturally occurring radionuclides. The rule, entitled Administrative Reporting Exemptions for Certain Radionuclide Releases ("Radionuclide ARE"), granted exemptions for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate (see 63 FR 13461).

The Agency relies on CERCLA sections 102(a), 103, and 115 (the general rulemaking authority under CERCLA) as authority to issue regulations governing section 103 notification requirements. The Agency relies on EPCRA section 304 as authority to issue regulations governing EPCRA section 304 notification requirements, and EPCRA section 328

for general rulemaking authority. The Agency will continue to require certain reports under EPCRA section 304, specifically for those facilities that meet the size thresholds in 40 CFR 355.31(g) and outlined below in section III.B.ii of this preamble.

### *C. Which Hazardous Substances Are We Exempting From the Notification Requirements of CERCLA and EPCRA?*

EPA is exempting certain releases of hazardous substances to the air from the notification requirements of CERCLA and to a limited extent EPCRA emergency notifications, as implemented in 40 CFR 302.6 and 40 CFR Part 355, Subpart C-Emergency Notification Requirement, respectively. Specifically, we are exempting those hazardous substance releases that are emitted to the air from animal waste at farms. The exemption to the CERCLA section 103 notification requirements will apply to all releases of hazardous substances to the air from animal waste at farms. However, to respond to comments expressing the desire to receive information regarding releases from large concentrated animal feeding operations (CAFOs), EPA is bifurcating these administrative reporting exemptions in order to continue to require EPCRA section 304 emergency notifications for those CAFO operations that confine the large CAFO threshold of an animal species or above, as defined in the National Pollutant Discharge Elimination System (NPDES) program regulations. As such, the exemption to EPCRA section 304 emergency notification requirements will apply to air releases of hazardous substances from animal waste at farms that are below the thresholds in 40 CFR 355.31(g) and for those farms that have animals that are not stabled or confined. (See 40 CFR 355.31(h)) For the purposes of this rule, EPA considers animals (*i.e.*, cattle) that reside primarily outside of an enclosed structure (*i.e.*, a barn or a feed lot) and graze on pastures, not to be stabled or confined, and thus are exempted from the reporting requirements under EPCRA Section 304.

Section 324 of EPCRA requires that the follow-up emergency notice shall be made available to the general public; thus emergency notifications filed under EPCRA section 304 will be available to the public. Farms that are required to report their releases under EPCRA section 304 emergency notifications may continue to use continuous release reporting as described in 40 CFR 355.32.

Ammonia and hydrogen sulfide are the most recognized hazardous substances that are emitted from animal waste. Specifically, ammonia is a by-

product of the breakdown of urea and proteins that are contained in animal waste, while hydrogen sulfide is another by-product of the breakdown of animal waste under anaerobic conditions. However, other hazardous substances, such as nitrogen oxide (NO) and certain volatile organic compounds (VOCs) may also be released from animal waste. This rule extends the administrative reporting exemption to all hazardous substances emitted to the air from animal waste at farms.

These hazardous substances can be emitted when animal waste is contained in a lagoon or stored in under-floor manure pits in some animal housing, manure stockpiles, or where animals are stabled or confined.

## **II. Background**

Under CERCLA section 103(a), the person in charge of a vessel or facility from which a CERCLA hazardous substance has been released into the environment in a quantity that equals or exceeds its RQ must immediately notify the NRC of the release. A release is reportable if an RQ or more is released into the environment within a 24-hour period (see 40 CFR 302.6). This reporting requirement serves as a trigger for informing the Federal government of a release so that Federal personnel can evaluate the need for a response in accordance with the National Contingency Plan (NCP) and undertake any necessary response action in a timely fashion.

The NRC is located at the United States Coast Guard (USCG) headquarters and is the national communications center for the receipt of all pollution incidents reporting. The NRC is continuously staffed for processing activities related to receipt of the notifications. The NCP regulations, 40 CFR 300.125, require that notifications of discharges and releases be made by telephone and state that the NRC will immediately relay telephone notices of discharges or releases to the appropriate pre-designated Federal on-scene coordinator (OSC). The NRC receives an average of approximately 34,000 notifications of releases or discharges per year, 99 percent of which are relayed to EPA.

Under EPCRA section 304(a), three release scenarios require notification.

- First, if a release of an extremely hazardous substance occurs from a facility at which a hazardous chemical is produced, used, or stored, and such release requires a notification under section 103(a) of CERCLA, the owner or operator of a facility shall immediately provide notice to the community emergency coordinator for the local

emergency planning committees (LEPC) for any area likely to be affected by the release and to the State emergency response commission (SERC) of any State likely to be affected by the release. (EPCRA section 304(a)(1))

- EPCRA section 304(a) also requires the owner or operator of the facility to immediately provide notice under EPCRA section 304(b) for either of the following two scenarios:

- If the release is an extremely hazardous substance, but not subject to the notifications under section 103(a) of CERCLA. (EPCRA section 304(a)(2))

- If the release is not an extremely hazardous substance and only subject to the notifications under section 103(a) of CERCLA. (EPCRA section 304(a)(3))

EPCRA notification is to be given to the community emergency coordinator for each LEPC for any area likely to be affected by the release, and the SERC of any state likely to be affected by the release. Through this notification, state and local officials can assess whether a response action to the release is appropriate. EPCRA section 304 notification requirements apply only to releases that have the potential for off-site exposure and that are from facilities that produce, use, or store a "hazardous chemical," as defined by regulations promulgated under the Occupational Safety and Health Act of 1970 (OSHA) (29 CFR 1910.1200(c)) and by section 311 of EPCRA.

Owners and operators of farms, like all other facilities, are required to report the release of hazardous substances into the environment in accordance with CERCLA section 103 and EPCRA section 304 when it meets or exceeds the RQ of the hazardous substance. For example, releases into the environment of ammonia or any other hazardous substance, from tanks located on a farm, at or above an RQ are required to be reported under CERCLA section 103 and EPCRA section 304.

In 2005, EPA received a petition (poultry petition) from the National Chicken Council, National Turkey Federation, and U.S. Poultry & Egg Association, seeking an exemption from the CERCLA and EPCRA reporting requirements for ammonia emissions from poultry operations. The Agency published a notice in the **Federal Register** on December 27, 2005 (70 FR 76452), that acknowledged receipt of the poultry petition and requested public comment. The comment period closed on March 27, 2006. This final rule does not address that petition. EPA will respond to the petition in a separate action.

Also, in 2005, EPA offered the owners and operators of animal agricultural

operations an opportunity to participate in the National Air Emissions Monitoring Study (air monitoring study), that is being conducted by an independent, non-profit organization and overseen by EPA, through a consent agreement with the Agency. The purpose of the air monitoring study is to develop emissions estimating methodologies for all animal agricultural operations. Over 2,600 animal feeding operations, representing over 14,000 farms, signed up to participate in the study. The monitoring study, which began in the spring of 2007 includes 25 representative sites (lagoons or barns) on 21 different farms in ten states (NC, NY, IA, WI, CA, KY, TX, WA, IN, and OK). The sites will be monitored for a period of two years, allowing the Agency to account for emissions variability by season, and for the effect of any seasonal operational changes (such as pumping out lagoons), that could have an effect on emission levels.

The consent agreement also requires that within 120 days after receiving an executed copy of the consent agreement, for any farm that confines more than ten times the large CAFO threshold of animal species, as defined in the NPDES program regulations, the animal feeding operation provide to the NRC and to the relevant State and local emergency response authorities written notice describing its location and stating substantially as follows:

"This operation raises [species] and may generate routine air emissions of ammonia in excess of the reportable quantity of 100 pounds per 24 hours. A rough estimate of those emissions is [ ] pounds per 24 hours, but this estimate could be substantially above or below the actual emission rate, which is being determined through an ongoing monitoring study in cooperation with the U.S. Environmental Protection Agency. When that emission rate has been determined by this study, we will notify you of any reportable releases pursuant to CERCLA section 103 or EPCRA section 304. In the interim, further information can be obtained by contacting [insert contact information for a person in charge of the operation]."

The requirement that these very large animal feeding operations (AFOs) immediately report estimated releases of ammonia was solely for the purposes of the air compliance agreement and not for purposes of reporting under CERCLA or EPCRA. (See 70 FR 4958, Jan. 31, 2005.)

At the end of the monitoring study, EPA will use the data along with other relevant available data to develop emissions estimating methodologies. The monitoring study results will be publicly available upon completion of the study. In addition, EPA will publish

the emissions estimating methodologies based on these results within 18 months of the study's conclusion. Thus, such information will be widely available to the public. Further details on the air monitoring study are available at <http://www.epa.gov/oecaagct/airmonitoringstudy.html>.

### III. Summary of This Action

#### A. What Is the Scope of This Final Rule?

The scope of this rule is limited to releases of hazardous substances to the air from animal waste at farms. Specifically, the Agency is issuing an administrative reporting exemption from the CERCLA section 103 notification requirements to the NRC (Federal government) as implemented in 40 CFR 302.6 and a limited administrative reporting exemption from the EPCRA section 304 notification requirements as implemented in 40 CFR Part 355, Subpart C—Emergency Notification Requirement. (See Section III.B.ii. for the thresholds that limit the administrative reporting exemption for EPCRA section 304.) The scope of this rule is intended to include all hazardous substances that may be emitted to the air from animal waste at farms that would otherwise be reportable under those sections. The Agency is not, in this rule, defining facility, normal application of fertilizer, or routine agricultural operations.

#### B. How Does This Rule Differ From the Proposed Rule?

On December 28, 2007, the Agency proposed an administrative reporting exemption from the CERCLA section 103 notification requirements and the EPCRA section 304 emergency notification requirements for air releases of hazardous substances that meet or exceed their RQ from animal waste at all farms. The public comment period lasted 90 days and closed on March 27, 2008. Through the public comment process, the Agency received approximately 12,900 comments. A substantial number of those comments (about 11,600) came in the form of 15 mass mail campaigns that either supported or opposed the proposed rule. We also received many comments from people who appear to have misunderstood the proposed rule, or assumed that the proposed rule was a response to the poultry petition. Our response to significant comments are generally addressed below in Section III.G of this preamble, with all comments addressed in a response to comment document, which is in the

docket (EPA-HQ-SFUND-2007-0469) to this final rule.<sup>2</sup>

i. Exemption From CERCLA Section 103 Reporting

This rule finalizes the administrative reporting exemption from the CERCLA section 103 notification requirements as proposed, but limits the administrative reporting exemption to EPCRA section 304 emergency notification requirements by adding a size threshold. That is, at or above the threshold adopted in this final rule, farms that generate animal waste that release hazardous substances to the air at or above the RQ must still report under EPCRA section 304, using the existing notification procedures, including the use of continuous release reporting. EPCRA section 304 notification requirements apply only to releases that have the potential for off-site exposure.

The Agency is finalizing the administrative reporting exemption from the CERCLA section 103 notification requirements because EPA continues to believe that Federal on-scene coordinators are unlikely to respond to notifications of air releases of hazardous substances from animal waste at farms.

The Agency also believes that State or local emergency response authorities are unlikely to respond to notifications of air releases of hazardous substances from animal waste at farms. However, the Agency did receive comments from the public, as well as from environmental groups, a coalition of family farmers and others expressing the desire for information regarding emissions of hazardous substances to the air from large animal feeding operations. Accordingly, EPA decided to bifurcate the administrative reporting exemption for EPCRA section 304 so as to retain certain emergency notifications for large CAFOs. In addition, we sought comment on possible alternative definitions for *farm*, indicating EPA might take factors such as size into account. Although not specifically addressing the definition of a *farm*, we did receive many comments asserting that very large farms are no different than other industrial sources and should be regulated as such. We believe that our threshold approach addresses those concerns.

ii. Thresholds for Exemption From EPCRA Section 304 Reporting

A *farm* is above the threshold if it stables or confines<sup>3</sup> animals in numbers

equal to or more than the numbers of animals specified for each category given in the NPDES program regulations for large CAFOs. These thresholds are discussed further in section III.E. below.

(1) 700 mature dairy cows, whether milked or dry.

(2) 1,000 veal calves.

(3) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs.

(4) 2,500 swine each weighing 55 pounds or more.

(5) 10,000 swine each weighing less than 55 pounds.

(6) 500 horses.

(7) 10,000 sheep or lambs.

(8) 55,000 turkeys.

(9) 30,000 laying hens or broilers, if the farm uses a liquid manure handling system.

(10) 125,000 chickens (other than laying hens), if the farm uses other than liquid manure handling system.

(11) 82,000 laying hens, if the farm uses other than a liquid manure handling system.

(12) 30,000 ducks (if the farm uses other than a liquid manure handling system).

(13) 5,000 ducks (if the farm uses a liquid manure handling system).

iii. Continuous Release Reporting

Continuous release reporting is available for those farms that are at or above the threshold described above in section II.B.ii. In general, the Agency believes that emissions from animal waste into the air are usually continuous and stable in quantity and rate to qualify as continuous releases pursuant to 40 CFR 302.8. The regulations implementing EPCRA section 304 are found in 40 CFR Part 355, Subpart C—Emergency Release Notification and describe the information required for the EPCRA emergency notifications. At the present time, EPA has not adopted conversion factors from which to derive quantities of common hazardous substances from numbers of particular species of farm animals. One purpose of the air monitoring study is to develop estimating methodologies. In the meantime, when reports are submitted pursuant to EPCRA section 304 for animal waste from farms, the Agency

graze on pastures are not stabled or confined.

Animals that are not stabled or confined at concentrated animal feeding operations are not counted toward the threshold. Any emissions to the air of hazardous substances from the waste of such animals while they are not stabled or confined are not counted towards the calculation of a reportable quantity at a farm that is above the threshold and subject to reporting, unless such waste is consolidated into a storage unit.

expects reports to reflect good faith estimates from reporting entities. In addition, EPA intends to issue guidance to assist those farms that are required to submit reports under EPCRA section 304 with continuous release reporting, as provided in 40 CFR 355, Subpart C—Emergency Release Notification.

C. Definitions

The Agency believes it is important to provide clarity with respect to the scope of the reporting exemption. Therefore, the Agency is providing definitions for *animal waste* and *farm* that only pertain to regulations promulgated pursuant to CERCLA section 103 and EPCRA section 304, specifically 40 CFR 302.3. and 40 CFR 355.61. These definitions are not promulgated to apply for any other purpose.

i. Animal Waste

Animal Waste—means manure (feces, urine, and other excrement produced by livestock), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil, and other materials typically found with animal waste.

We sought comment on our proposed definition for *animal waste*, and whether an alternative definition may be more appropriate. A few commenters asked that we clarify that compost includes composted manure and manure-based compost. EPA agrees that the definition of *animal waste* does include such compost and to lend further clarity to the definition, we made a slight change. Other comments on our proposed definition for *animal waste*, along with our responses are addressed below in section III.G.v.1 of this preamble and in the response to comment document available in the docket (EPA-HQ-SFUND-2007-0469) to this rule.

ii. Farm

The Agency is limiting the reporting exemption to animal waste that is generated on farms, and is using a specific definition for *farm* for this administrative reporting exemption. For the purpose of this administrative reporting exemption only, EPA defines farm by using the same definition as that found in the National Agricultural Statistics Service (NASS) Census of Agriculture, and adopting it.

Farm—means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, \$1,000 or more of agricultural products during a year.

<sup>2</sup> The docket for EPA-HQ-SFUND-2007-0469 can be accessed through [www.regulations.gov](http://www.regulations.gov).

<sup>3</sup> Animals that reside primarily outside of an enclosed structure (*i.e.*, a barn or a feed lot) and

We sought comment on our proposed definition for a *farm*, and whether an alternative definition may be more appropriate. Based on the comments received, we concluded that the proposed definition for *farm* was not consistent with other Agency uses for the term; that is, we realized that the definition proposed had deviated from the NASS definition, as well as the definition used by the Agency in its Spill Prevention, Control and Countermeasure (SPCC) rule. As a result, the definition for this rule has now been modified. Other comments on our proposed definition for *farm*, along with our responses are addressed below in section III.G.v.2 of this preamble and in the response to comment document available in the docket (EPA-HQ-SFUND-2007-0469) to this rule.

#### *D. What Is Not Included Within the Scope of This Rule?*

As noted previously, the administrative reporting exemption from the CERCLA section 103 notification requirements is limited in scope to those releases of hazardous substances to the air that meet or exceed their RQ from animal waste at farms and in the case of Section 304 of EPCRA, only those releases of hazardous substances to the air from animal waste at farms that are below the thresholds in 40 CFR 355.31(g) are exempt. EPA is not exempting from the CERCLA section 103 or EPCRA section 304 notification requirements releases of hazardous substances from animal waste that meet or exceed the RQ to any other environmental media or at any other facilities other than farms (*i.e.*, meat processing plants, slaughter houses, tanneries). Thus, notifications must still be submitted if, for example, there was a release of any hazardous substances that meet or exceed the RQ from animal waste into water (*e.g.*, a lagoon burst) or if there was a release of any hazardous substances that meets or exceeds the RQ from animal waste into the air or water at a slaughter house or meat processing plant. Likewise, EPA is not exempting from the CERCLA section 103 or EPCRA section 304 notification requirements any release of hazardous substances to the air that meets or exceeds the RQ from any source other than animal waste at farms. Thus, for example, EPA is not proposing to exempt ammonia releases from ammonia storage tanks at farms.

The Agency believes that in these situations, the release of hazardous substances that meets or exceeds the RQ should continue to be reported because it is less clear that they will not result in a response action from Federal, State

or local governments. That is, such notifications would alert the government to a situation that could pose serious environmental consequences if not immediately addressed.

Finally, it should be noted that no CERCLA or EPCRA statutory requirements, other than the emergency hazardous substance notification requirements under CERCLA section 103 and EPCRA section 304, are included within this rule. The rule also does not limit the Agency's authority under CERCLA sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any other provisions of CERCLA and EPCRA to address releases of hazardous substances from animal waste at farms.

#### *E. What Is EPA's Rationale for This Administrative Reporting Exemption?*

EPA's rationale for this administrative reporting exemption is based on the purpose of notifying the NRC, and SERCs and LEPCs when a hazardous substance is released, and then the likelihood that a response to that notification would be taken by any government agency.

Upon receipt of a notification from the NRC, EPA determines whether a response is appropriate. See 40 CFR 300.130(c). If it is determined that a response is appropriate, the NCP regulations describe the roles and responsibilities for responding to the release. Thus, EPA considered whether the Agency would ever take a response action, as a result of such notification, for releases of hazardous substances to the air that meet or exceed their RQ from animal waste at farms. Based on our experience, the Agency believes that Federal on-scene coordinators are unlikely to respond to such notifications. Specifically, to date, EPA has not initiated a response to any NRC notifications of ammonia, hydrogen sulfide, or any other hazardous substances released to the air where animal waste at farms is the source of that release. Moreover, we can not foresee a situation where the Agency would initiate a response action as a result of such notification. Under this rule, however, EPA retains its authority to respond to citizen complaints or requests for assistance from State or local government agencies to investigate releases of hazardous substances from animal waste at farms and respond if appropriate. Furthermore, the Agency does not need to receive such notifications in order to enforce applicable Clean Water Act (CWA), Clean Air Act (CAA), Resource Conservation and Recover Act (RCRA),

and/or other applicable CERCLA and EPCRA regulations at farms. EPA retains the enforcement authority to address threats to human health and the environment.

Several States and localities also indicated that such response actions are unlikely to be taken as a result of a notification of releases of hazardous substances from animal waste at farms. Specifically, EPA received 13 comment letters from State and/or local emergency response agencies in response to our proposed rule, as well as comments from 10 state agricultural departments that agreed with the proposal to not require such notifications.<sup>4</sup> These commenters all affirmed EPA's belief that a response to a notification of air emissions of hazardous substances from animal wastes is highly unlikely. In fact, while we also received comment letters from government officials and others, including environmental groups, that the proposed rule is not appropriate due to potential harmful effects of air pollution emanating from animal feeding operations, we received no comments from any government official suggesting a response action should or would be taken.

The Agency did receive comments expressing a concern that air emissions of hazardous substances from animal waste at the largest animal feeding operations may pose a risk and therefore State and local governments and the public should continue to receive reports of such emissions. CERCLA and EPCRA do not require release reports under section 103 of CERCLA and 304 of EPCRA, respectively, to be made publicly available. However, section 324 of EPCRA does require the LEPC and the SERC to make publicly available each follow-up emergency notice provided under section 304(c).

Based on these comments, the Agency has bifurcated the final rule and is promulgating an administrative reporting exemption in order to maintain the EPCRA section 304 reporting requirements for the largest farms, that is, those farms that meet or exceed the thresholds described in section III.B.ii, above. For this rule, the threshold that will trigger reporting requirements is the same as the numbers of animals specified in the categories regulated by the NPDES program for

<sup>4</sup> The Agency also received 23 comment letters from State and/or local emergency response agencies in response to the December 2005 **Federal Register** notice that acknowledged receipt of the rulemaking petition from the National Chicken Council, the National Turkey Federation, and the U.S. Poultry and Egg Association which also agreed that such notifications were not necessary.

large CAFOs. Comments regarding the elimination of the reporting requirements are discussed below in section III.G.i.

*F. What Are the Economic Impacts of This Administrative Reporting Exemption?*

This administrative reporting exemption will reduce the costs to farms that release hazardous substances to the air that meet or exceed their RQ from animal waste. Entities that are expected to experience a reduction in burden and cost include both the farms that are no longer required to report those releases, as well as the Federal government. The economic analysis completed for this rule is available in the docket for this rulemaking and is based on the underlying economic analyses that were completed for the regulations that established the notification requirements. We estimate that this final rule will reduce burden on farms associated with making notifications under CERCLA section 103 and EPCRA section 304 by approximately 1,290,000 hours over the ten-year period beginning in 2009 and associated costs by approximately \$60,800,000 over the same period. We estimate that this rule will also reduce burden on government (including Federal, State and local governments) for receipt and processing of the notifications under CERCLA section 103 and EPCRA section 304 by approximately 161,000 hours over the ten-year period beginning in 2009 and associated costs by approximately \$8,110,000 over the same period. In evaluating the potential burden and cost savings to those farms that would no longer be required to make notifications under CERCLA section 103 and EPCRA section 304 and for the government entities that are no longer required to receive and process such notifications, we used the same universe as used in the 2008 CAFO Rule (see 73 FR 70417, Nov. 20, 2008).

*G. Response to Comments*

The Agency received comments on: (1) The elimination of the reporting requirement; (2) the risk, harm, and exposure related to air emissions from animal waste at farms; and (3) the Agency's statutory authority to issue this rulemaking. Some comments also indicated a misunderstanding of the proposed rule. Lastly, the Agency sought specific comments in four areas. *Those were:* (1) Definitions (animal waste and farm); (2) whether it is appropriate to expand the reporting exemption to other facilities where animal waste is generated (*i.e.*, zoos and circuses); (3) whether there might be a

situation where a response would be triggered by such a notification of the release of hazardous substances to the air from animal waste at farms; and (4) if so, what an appropriate response would be. The following is our response to those substantive comments received. Comments not addressed in this preamble are addressed in the response to comment document that can be found in the Agency's docket for this rule (EPA-HQ-SFUND-2007-0469).

*i. Comments Regarding Elimination of Reporting Requirement*

We received mixed comments on whether it is appropriate for the Agency to eliminate the notification requirements under CERCLA section 103 and EPCRA section 304 for hazardous substances released to the air at farms where the source of those hazardous substances is animal waste.

Many commenters expressed general support for the proposed elimination of the reporting requirements under CERCLA section 103 and EPCRA section 304. Many of these commenters, including some local emergency response agencies, stated that reporting emissions of hazardous substances to the air that meet or exceed their RQ from animal waste is of little value as it is common knowledge that agricultural operations release ammonia on an ongoing basis and receipt of such notifications could prove to be a hindrance in performing their mission by overwhelming the system with notifications that will not be responded to. Many commenters supporting the elimination of the reporting requirements, particularly commenters representing the agricultural community, also stated that emissions reporting is costly and could put them out of business should they have to adhere to such a regulation. Moreover, these same commenters defended the proposal by pointing out that information about the location and emissions of CAFOs is already publicly available. For example, one could readily determine the number of laying hens there are in a particular county through county specific data published by the U.S. Department of Agriculture's (USDA's) National Agricultural Statistical Service. According to these commenters, CERCLA/EPCRA reporting does not add in any meaningful way to this knowledge base.

On the other hand, the Agency received many comments that were opposed to the elimination of the notification requirements under CERCLA section 103 and EPCRA section 304. Many commenters opposed the proposed elimination of these reporting

requirements on the grounds that reports provide good documentation, even if the content is not reviewed and no response is appropriate. Several commenters stated that reporting information about emissions enables citizens to hold companies and local governments accountable in terms of how toxic chemicals are managed and even allows agencies to identify a facility's proximity to schools where children may be at higher risk of adverse health effects due to exposure.

In addition, many commenters asserted that the proposed rule interferes with the public's right to know about large releases of toxic chemicals. Others stated that factory farms should not be protected from the laws that affect all other industries. Several commenters asserted that CAFOs are not family farms, arguing that they are industries that produce high amounts of pollutants and should be treated as such.

Finally, a commenter suggested that farms should be exempt from the monitoring and reporting of pollutant releases until measuring and testing procedures become more accurate and that the exemptions should apply until there are more feasible monitoring practices enacted. The commenter argued that it was unfair to require such reporting when the science surrounding ammonia releases is uncertain.

The Agency appreciates the perspectives of both sides of the reporting issue. We understand that the regulated community and some SERCs and LEPCs believe that, in general, the release reports are unnecessary, burdensome, and would not likely result in "new" information regarding emissions from farms. The Agency agrees. However, many commenters also argued that reporting, especially for large CAFOs, is important. Therefore, we have adopted a final rule that seeks to address both concerns. As such, farms would be exempt from reporting under CERCLA section 103 for the reporting of air releases of hazardous substances from animal waste to the NRC; but, at the same time, those farms that exceed the threshold established in 40 CFR 355.31(g), and described above in section III.B.ii of this preamble, will still be required to notify the community emergency coordinator for the LEPC for any area likely to be affected by the release and to the SERC of any State likely to be affected by the release under EPCRA section 304(b). We believe the threshold is appropriate to continue to make available information regarding large CAFOs sought by commenters. In accordance with 40 CFR 355.31(h), farms that have animals that

are not stabled or confined are also exempt from reporting under EPCRA section 304. For the purposes of this rule, EPA considers animals (*i.e.*, cattle) that reside primarily outside of an enclosed structure (*i.e.*, a barn) and graze on pastures not to be stabled or confined.

In addition, after completion of the Air Monitoring Study and the development and publication of emission estimating methodologies, the Agency intends to review the results and consider if the threshold for the EPCRA exemption is appropriate.

#### ii. Comments Regarding Risk, Harm, and Exposure

EPA's rationale for the proposed rule is based on the purpose of notifying the NRC, and SERCs and LEPCs when a hazardous substance is released, and then the likelihood that a response to that release would be taken by any government agency. The comments that cited risk, harm, and exposure were used to either support or oppose the proposed rule.

In supporting the proposed rule, many commenters provided general statements to the effect that emissions from CAFOs pose no threat to public health or the environment. Many other commenters also argued that there is no evidence or studies that emissions pose any public health risks or have environmental impacts that would warrant emergency release reports from farms to the Federal level.

In opposing the proposed rule, a number of commenters submitted studies to support their conclusion that emissions from some farms pose levels of risk, harm, and exposure that should be taken into consideration by the Agency. Several commenters specifically cited a 2002 study entitled, "Iowa Concentrated Animal Feeding Operations Air Quality Study," conducted by Iowa State University and the University of Iowa Study Group.<sup>5</sup>

Several commenters suggested delaying any decisions on finalizing the proposal until the Agency's air monitoring study is complete. These commenters argued that EPA may find that these airborne contaminants are more dangerous to human health than thought. Many of the commenters who opposed the proposed rule also provided information pertaining to the health impacts associated with CAFOs. Some provided anecdotal evidence, while others cited published literature drawing a causal link. Additional information regarding the anecdotal

evidence and published literature is provided in the response to comment document available in the docket (HQ-EPA-SFUND-2007-0469) to this rule. Finally, a number of commenters suggested that the adverse health effects that have been demonstrated should be sufficient to continue to mandate CERCLA and EPCRA reporting of "toxic air emissions" and step up enforcement, as well.

EPA appreciates the information provided by commenters, especially those who submitted study information indicating the potential health issues associated with the emissions from animal waste at farms. We would first note that a number of the studies or information provided addressed risk or health issues for workers on the farm; reporting under section 304 of EPCRA addresses releases that are off-site of the facility. In addition, as we noted previously, EPA is currently overseeing a comprehensive study of CAFO air emissions (air monitoring study) that is being conducted by an independent, non-profit organization. The purpose of the air monitoring study is to develop emissions estimating methodologies for all animal agricultural operations. Over 2,600 agreements, representing over 14,000 farms, signed up for the study. The monitoring study, which began in the spring of 2007, includes 25 representative sites (lagoons or barns) on 21 different farms in ten states (NC, NY, IA, WI, CA, KY, TX, WA, IN, and OK). The sites will be monitored for a period of two years, allowing the Agency to account for emissions variability by season, and for the effect of any seasonal operational changes (such as pumping out lagoons), that could have an effect on emission levels. At the conclusion of the air monitoring study, EPA will use the data along with any other relevant, available data to develop emissions estimating methodologies. The air monitoring study results will be publicly available upon completion of the study. In addition, EPA will publish the emissions estimating methodologies based on these results, within 18 months of the study's conclusion. The notification requirements under CERCLA section 103 would not provide the type of data required in order to draw the same conclusions that the more comprehensive air monitoring study can provide. This rule does not address how air emissions from CAFOs should be controlled.

As we have discussed, EPA believes that a response to a notification about an air release of a hazardous substance from animal waste at a farm is unlikely and impracticable. We are therefore

exempting those notifications from CERCLA section 103 notification requirements and to a limited extent EPCRA section 304 emergency notification requirements. As discussed above, EPA does recognize that the public may have a separate use for the notifications, and therefore, the reporting exemption under Section 304 of EPCRA is limited to farms that fall below the threshold discussed in III.B.ii. Moreover, EPA is not limiting any of its response authorities in this rule (should a State or local agency request assistance), nor are we limiting any of our other authorities under CERCLA and EPCRA.

#### iii. Comments Regarding the Agency's Statutory Authority To Issue This Rulemaking

A number of commenters challenged EPA's legal authority to grant these exemptions by stating that CERCLA and EPCRA do not give EPA the authority to grant reporting exemptions. Another commenter argues that EPA may not rest its basis for the exemption solely on evidence that a Federal response to animal waste releases is unlikely.

EPA disagrees with the commenters that challenge our authority to provide administrative reporting exemptions. First, we would note that EPA has on two other occasions exercised its authority to extend administrative reporting exemptions to certain well-defined release scenarios. Specifically, on March 19, 1998, the Agency issued a final rule (see 63 FR 13459) that granted exemptions for releases of naturally occurring radionuclides. The rule entitled, Administrative Reporting Exemptions for Certain Radionuclide Releases ("Radionuclide ARE"), granted exemptions for releases of hazardous substances that pose little or no risk or to which a Federal response is infeasible or inappropriate (see 63 FR 13461). Moreover, on October 4, 2006, the Agency issued a final rule (see 71 FR 58525) that broadened the existing reporting exemptions to include releases of less than 1,000 pounds of nitrogen oxide (NO) and less than 1,000 pounds of nitrogen dioxide (NO<sub>2</sub>) to the air in 24 hours ("NO<sub>x</sub> ARE") that are the result of combustion. The NO and NO<sub>2</sub> exemptions were granted for releases of hazardous substances at levels for which the CAA regulates nitrogen oxides that are considerably higher than ten pounds.

EPA also disagrees that it is barred from basing its exemption on evidence that a Federal response to a notification of a release of hazardous substances to the air from animal waste releases is unlikely. Rather, for this rule, EPA has

<sup>5</sup> This study is available in the Superfund Docket at: EPA-HQ-SFUND-2007-0469-0531.8.

made a determination that these reports are unnecessary because, in most cases, a federal response is impractical and unlikely (*i.e.*, we would not respond to them since there is no reasonable approach for the response). We also believe that because this administrative reporting exemption is narrowly focused to the source (animal waste) and location (at farms) of the hazardous substance emissions, it is appropriate to base our rationale for this rule on the unlikelihood and inappropriateness of a response.

#### iv. Comments Indicating a Misunderstanding of the Proposed Rule

A number of the commenters seem to misunderstand what the Agency was proposing. For example, commenters expressed general opposition to removing air quality and clean air standards; removing clean air protections; reducing pollution or emission standards; exemptions to clean air standards; allowing farms to emit more pollutants; deregulation of hazardous emissions; and an exemption from the CAA and CWA. This rule would do none of this. Rather, this rule addresses only the notification requirements under CERCLA section 103 and in a limited manner, EPCRA section 304. EPA retains all other authorities under both CERCLA and EPCRA, and the CAA and CWA standards also are unaffected by this action.

#### v. Comments Regarding Definitions

In order to provide clarity with respect to the scope of the proposed reporting exemption, the Agency proposed definitions for *animal waste* and *farm*. The definitions, as proposed, would be limited in application to the regulations promulgated pursuant to CERCLA section 103 specifically 40 CFR 302.3 and 40 CFR 355.61. We solicited comment on those definitions.

##### (1) Animal Waste

Because the Agency does not have an existing definition for *animal waste*, EPA proposed to add a definition for *animal waste* to the Code of Federal Regulations. The definition for *animal waste* in the proposed rule was, “manure (feces, urine, other excrement, and bedding, produced by livestock that has not been composted), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other materials typically found with animal waste.” We sought comment from the public on the appropriateness, clarity and completeness of the definition.

In general, the public was generally supportive of our proposed definition of *animal waste*, as long as it is understood that this definition is used solely for the purposes of CERCLA and EPCRA reporting; however, there were a few requests for further clarification. In particular, several commenters requested clarification regarding the treatment of compost material, and specifically whether composted manure is included in the definition of *animal waste*. Similarly, other commenters suggested that EPA clarify that manure-based compost is included in the definition of *animal waste*. We have clarified in the discussion in section III.C.i., above, that such composted manure and manure-based compost is included in the definition of *animal waste*. Furthermore, we made a small change to the definition of *animal waste* to help clarify this point.

Several other commenters submitted alternative definitions. For example, to reflect the need for controlling emissions of dangerous and toxic emissions, a commenter suggested that *animal waste* be defined as “manure (livestock produced feces, urine, other excrement, and bedding that has not been composted), digestive emissions, and urea, which emit dangerous and/or toxic gases in any quantity. This definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other materials typically found in animal waste.” Another commenter suggested an alternate definition which would define *animal waste* as “all constituents and byproducts of the decomposition of manure (feces, urine, other excrement, and bedding, produced by livestock or poultry that has not been composted), digestive emissions, and urea.” This suggested definition would also include “animal waste when mixed or commingled with water, bedding, compost, feed, soil and other materials typically found with animal waste.” Still another commenter suggested the following definition for *animal waste*, “manure (feces, urine, or other excrement produced by livestock, and including bedding), and any other livestock digestive emissions, regardless of how stored, handled, composted or otherwise stockpiled. The definition includes animal waste used in biogas production or other treatment processes, or when mixed or commingled with bedding, compost, feed, soil, and other materials typically found with animal waste.”

While the Agency appreciates the suggestions provided by the commenters, we believe that the proposed definition of *animal waste* is

broad enough to serve the purpose of defining the source of hazardous substances emitted from farms for this administrative reporting exemption, with the one clarification noted above. The definitions proposed by the commenters do not offer additional clarity and in the case of “animal waste used in biogas production or other treatment processes,” suggest a broader use of manure that would extend to facilities other than farms, and thus, beyond the scope of the final rule.

##### (2) Farm

EPA proposed a definition for *farm* by slightly modifying the definition found in the National Agricultural Statistics Service (NASS) Census of Agriculture, as well as included Federal and State research farms that utilize farm animals subject to the conditions experienced on other farms (*e.g.*, poultry, swine, dairy, and livestock research farms). However, in the proposal, we incorrectly stated that the proposed definition was used by USDA. Thus, the proposed definition for *farm* was “(a) any place whose operation is agricultural and from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. Operations receiving \$1,000 or more in Federal government payments are counted as farms, even if they have no sales and otherwise lack the potential to have \$1,000 or more in sales; or, (b) a Federal or state poultry, swine, dairy or livestock research farm.” The purpose of specifying that Federal and State research farms that utilize farm animals subject to the conditions experienced on other farms was to respond to concerns that Federal and State research farms were included in the exemption. The Agency sought comment on the proposed definition, and whether an alternative definition may be more appropriate.

Commenters generally expressed support for the definition of *farm* because they understood it to be the definition used by USDA and because it promotes consistency in definitions between agencies; however, one commenter pointed out that the proposed definition is inconsistent with the definition of *farm* used by EPA in its SPCC rule (see 71 FR 77266, December 26, 2006) and therefore the Agency has two differing definitions that could place a hardship on the regulated community and gives the impression that the Agency is picking and choosing definitions without considering the regulatory implications of its decisions. The Agency agrees with this commenter and thus, EPA has decided to use for this rule the same

definition of *farm* as the definition used in the SPCC rule. This definition is also now the same definition found in the NASS Census of Agriculture. Although not specifically stated in the definition, this definition is broad and includes Federal or State poultry, swine, dairy or livestock research farms that were included in the proposed definition.

Another definition suggested by a commenter was to expand the definition to include “[any] operation that produces eggs, poultry, swine, dairy, or other livestock in any amount,” as well as all production areas and land application areas. Another commenter suggested that the definition be expanded to include non-Federal or State research facilities. EPA disagrees with the commenters that suggested an expanded definition of farm. We believe that the definition in this rule encompasses the universe of operations that the commenters are suggesting without adding confusion to the regulated facilities, especially in light of the SPCC regulations.

#### vi. Comments Regarding Other Facilities

The Agency is aware that animal waste is also generated at other facilities, such as zoos and circuses. Because the focus of the proposal was on animal waste generated or found at farms, EPA did not propose to expand the reporting exemption beyond such facilities. However, because the potential for release to the air of hazardous substances from animal waste at other such facilities may present the same issues that are presented by animal waste at farms, we did specifically request comment on whether the administrative reporting exemption should be expanded to include other types of facilities that also generate animal waste, and if so, what other types of facilities should be included in the reporting exemption.

There was general support by the commenters for including within the exemption other types of facilities (besides farms) that produce animal waste. That is, while commenters generally agreed that the rule should stay narrowly focused, they also argued that other types of facilities that produce animal waste should also be included within the exemption. Several other commenters stated that because the generation of animal waste is a normal biological process, all animals’ waste should be administratively excluded from reporting.

EPA appreciates the commenters’ arguments that all animals’ waste should be excluded; however, we have decided to limit the final rule to animal waste generated or produced at farms,

and not include other types of facilities, because the Agency has not looked sufficiently at these other types of facilities to determine the likelihood that the Agency would take a response action, if there was such a release to the air of hazardous substances that meet or exceed their RQ from animal waste.

#### vii. Comments Regarding Possible Situations That Would Necessitate a Response

EPA specifically sought comment on whether there might be a situation where a response would be triggered by such a notification of the release of hazardous substances to the air that meet or exceeds the RQ from animal waste at farms, and if so, what an appropriate response would be to such notifications. Several commenters responded that there are no circumstances where a manure-related release of emissions would trigger an emergency response.

On the other hand, there were some commenters that offered scenarios that described the importance of receiving the notifications. Specifically, one commenter noted that extreme weather fluctuations and various pit pumping techniques may cause emissions to exceed reportable quantities. Such fluctuations (e.g., differences in temperature, rainfall frequency and intensity, wind speed, topography and soils) could impact the amount of air emissions released from farms. Another commenter cited a 2004 study entitled, *Concentrated Animal Feeding Operations: Health Risks from Air Pollution Institute for Agriculture and Trade Policy*,<sup>6</sup> which noted that “when pits are agitated for pumping, some or all of these gases are rapidly released from the manure and may reach toxic levels or displace oxygen, increasing the risk to humans and livestock.”

With respect to responses, one commenter stated that responses may be needed to protect children who live in nearby homes and communities from elevated levels of airborne ammonia and/or the fine particulates that result from the ammonia releases. The commenter suggests that adequate monitoring will provide facility operators with sufficient warning to take remedial actions that will reduce ammonia formation and release before regulatory thresholds are exceeded.

Finally, one commenter stated that EPA has not examined such situations that may arise when maintaining feeding operations and that the Agency

has not proven that emergency personnel would not benefit from continuous release reports of hazardous substances from these operations when attempting to save lives or prevent injury quickly in the future.

From a CERCLA section 104 response perspective, based on EPA’s experience, the Agency would rarely respond to such scenarios. In any event, we retain our response authorities and would assist State and local officials in their response, if requested. State or local agencies (i.e., SERCs and LEPCs) also may require information for emergency planning purposes under section 303(d) of EPCRA and make this information available to the public under section 324 of EPCRA.

## IV. Statutory and Regulatory Reviews

### A. Executive Order 12866 (Regulatory Planning and Review)

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action” because it has been determined that it raises novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

### B. Paperwork Reduction Act

This action does not impose any new information collection burden. Rather, this final rule represents a reduction in burden for both industry and the government by administratively exempting the reporting requirement for releases of hazardous substances to the air that meet or exceed their RQ from animal waste at farms from the CERCLA section 103 notification requirements and to a limited extent, the EPCRA section 304 emergency notification requirements.

However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulation 40 CFR 302 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2050–0046, EPA ICR number 1049.11 for 40 CFR 302.6 (Episodic releases of oil and hazardous substances), OMB control number 2050–0086, EPA ICR number 1445.07 for 40 CFR 302.8 (Continuous release reporting requirements) (pending approval) and OMB control

<sup>6</sup> This document is available on line at: <http://www.healthobservatory.org/library.cfm?refID=37388>.

number 2050–0092, EPA ICR number 1395.06 for 40 CFR 355 (Emergency planning and notification). The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

We estimate that this final rule will reduce burden on farms associated with the notification requirements under CERCLA section 103 and EPCRA section 304 by approximately 1,290,000 hours over the ten year period beginning in 2009 and associated costs by approximately \$60,800,000 over the same period. We estimate that this rule will also reduce burden on government (including Federal, State and local governments) for receipt and processing of the notifications under CERCLA section 103 and EPCRA section 304 by approximately 161,000 hours over the ten year period beginning in 2009 and associated costs by approximately \$8,110,000 over the same period. In evaluating the potential burden and cost savings to those farms that would no longer be required to make notifications under CERCLA section 103 and EPCRA section 304 and for the government entities that are no longer required to receive and process such notifications, we used the same universe as used in the 2008 CAFO Rule (see 73 FR 70417, Nov. 20, 2008).

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, *small entity* is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Under the statutory and regulatory analyses of the Regulatory Flexibility Act for the proposed rule, we concluded that EPA expects the net reporting and recordkeeping burden associated with reporting air releases of hazardous substances that meet or exceed their RQ

from animal waste at farms under CERCLA section 103 and EPCRA section 304 to decrease. We stated that this reduction in burden will be realized by businesses of all sizes. Although we concluded that the rule will relieve regulatory burden for all affected small entities as the statute requires, EPA requested comment on the potential impacts of the proposed rule on small entities and on issues related to such impacts.

One commenter explicitly concurred with EPA's analysis and conclusion that the proposed rule will provide relief from regulatory burden for small entities, stating that: "Small farms should not be affected even if the reporting requirements stay in place because these farms do not generally have a large enough herd of animals to reach the requisite levels of toxins." EPA appreciates the commenter's perspective that small farms would probably not be affected by the reporting requirements, even if we did not issue this administrative reporting exemption.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any additional requirements on small entities. Rather, this rulemaking will relieve regulatory burden because we are eliminating the reporting requirement for releases of hazardous substances to the air that meet or exceed their RQ from animal waste at farms under the CERCLA section 103 notification requirements and for those entities below the large CAFO threshold of animal species, as defined under the NPDES program regulations, under the EPCRA section 304 notification requirements. We expect the net reporting and recordkeeping burden associated with reporting air releases of hazardous substances from animal waste at farms under CERCLA section 103 and EPCRA section 304 to decrease. This reduction in burden will be realized by both small and large businesses. We have therefore concluded that this final rule will relieve regulatory burden for all affected small entities.

#### D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory

requirements that might significantly or uniquely affect small governments. That is, the final rule imposes no enforceable duty on any State, local or tribal governments or the private sector; rather, this final rule will result in burden reduction in the receipt of notifications under section 103 of CERCLA and for those entities below the large CAFO threshold of animal species, as defined under the NPDES program regulations, under section 304 of EPCRA notification requirements of the release to the air of hazardous substances, primarily ammonia and hydrogen sulfide, that meet or exceed their RQ from animal waste at farms.

Additionally, EPA has determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments. This final rule reduces regulatory burden and the private sector is not expected to incur costs exceeding \$100 million. Thus, the final rule is not subject to the requirements of Sections 202 and 205 of UMRA.

#### E. Executive Order 13132 (Federalism)

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." Policies that have federalism implications are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. There are no State and local government bodies that incur direct compliance costs by this final rule. Thus, Executive Order 13132 does not apply to this rule.

#### F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule does not significantly or uniquely affect the communities of Indian tribal governments, nor would it impose substantial direct compliance

costs on them. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045 (Protection of Children From Environmental Health & Safety Risks)*

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

*H. Executive Order 13211 (Actions That Significantly Affect Energy Supply, Distribution, or Use)*

This action is not a “significant energy action” as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This final rule will reduce the burden associated with the notification of releases to air of hazardous substances that meet or exceed their RQ from animal waste at farms.

*I. National Technology Transfer Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

*J. Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations)*

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their

mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. As discussed in the Background section of the preamble for this final rule, the requirement to notify the government under CERCLA section 103 or EPCRA section 304 does not require the notifying entity to take any specific action to address the release. Therefore, because EPA has determined that a response action would be unlikely, EPA does not believe that exempting these releases from CERCLA section 103 notification requirements or to a limited extent EPCRA section 304 emergency notification requirements will have a disproportionately high and adverse human health or environmental effect on minority or low-income populations, especially since the Agency is not limiting any of its other authorities under CERCLA, such as CERCLA sections 104 (response authorities), 106 (abatement actions), 107 (liability), or any other provisions of CERCLA or EPCRA. The Agency also retains its authority to apply existing statutory provisions in its efforts to prevent minority and or low-income communities from being subject to disproportionately high and adverse impacts and environmental effects. We therefore have determined that this final rule does not have disproportionately high and adverse human health or environmental effects on minority or low-income populations.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a “major rule” as defined by 5 U.S.C. 804(2). This rule will be effective January 20, 2009.

**List of Subjects**

*40 CFR Part 302*

Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

*40 CFR Part 355*

Air pollution control, Chemicals, Disaster assistance, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: December 12, 2008.

**Stephen L. Johnson,**  
*Administrator.*

■ For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

**PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION**

■ 1. The authority citation for part 302 continues to read as follows:

**Authority:** 42 U.S.C. 9602, 9603, 9604; 33 U.S.C. 1321 and 1361.

■ 2. Section 302.3 is amended by adding in alphabetical order the definitions of “Animal waste” and “Farm” to read as follows:

**§ 302.3 Definitions.**

\* \* \* \* \*

*Animal Waste* means manure (feces, urine, and other excrement produced by livestock), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other typical materials found with animal waste.

\* \* \* \* \*

*Farm* means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, \$1,000 or more of agricultural products during a year.

\* \* \* \* \*

■ 3. Section 302.6 is amended by adding paragraph (e)(3) to read as follows:

**§ 302.6 Notification requirements.**

\* \* \* \* \*

(e) \* \* \*

(3) Releases to the air of any hazardous substance from animal waste at farms.

#### **PART 355—EMERGENCY PLANNING AND NOTIFICATION**

■ 4. The authority citation for part 355 continues to read as follows:

**Authority:** 42 U.S.C. 11002, 11003, 11004, 11045, 11047, 11048 and 11049.

■ 5. Section 355.31 is amended by adding paragraphs (g) and (h) to read as follows:

#### **§ 355.31 What types of releases are exempt from the emergency release notification requirements of this subpart?**

\* \* \* \* \*

(g) Any release to the air of a hazardous substance from animal waste at farms that stable or confine fewer than the numbers of animal specified in any of the following categories.

(1) 700 mature dairy cows, whether milked or dry.

(2) 1,000 veal calves.

(3) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs.

(4) 2,500 swine each weighing 55 pounds or more.

(5) 10,000 swine each weighing less than 55 pounds.

(6) 500 horses.

(7) 10,000 sheep or lambs.

(8) 55,000 turkeys.

(9) 30,000 laying hens or broilers, if the farm uses a liquid manure handling system.

(10) 125,000 chickens (other than laying hens), if the farm uses other than liquid manure handling system.

(11) 82,000 laying hens, if the farm uses other than a liquid manure handling system.

(12) 30,000 ducks (if the farm uses other than a liquid manure handling system).

(13) 5,000 ducks (if the farm uses a liquid manure handling system).

(h) Any release to the air of a hazardous substance from animal waste at farms from animals that are not stabled or otherwise confined.

■ 6. Section 355.61 is amended by adding in alphabetical order the definitions of “Animal waste” and “Farm” to read as follows:

#### **§ 355.61 How are key words in this part defined?**

*Animal Waste* means manure (feces, urine, and other excrement produced by livestock), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other

typical materials found with animal waste.

\* \* \* \* \*

*Farm* means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, \$1,000 or more of agricultural products during a year.

\* \* \* \* \*

[FR Doc. E8-30003 Filed 12-17-08; 8:45 am]

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## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Office of the Secretary**

#### **45 CFR Part 144**

[ASPE:LTCI-F]

RIN 0991-AB44

#### **State Long-Term Care Partnership Program: Reporting Requirements for Insurers**

**AGENCY:** Office of the Assistant Secretary for Planning and Evaluation (OASPE), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule sets forth reporting requirements for private insurers that issue qualified long-term care insurance policies in States participating in the State Long-Term Care Partnership Program established under the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109-171). Section 6021 of the DRA requires that the Secretary of Health and Human Services (the Secretary) specify a set of reporting requirements and collect data from insurers on qualified long-term care insurance policies issued under the program and the subsequent use of the benefits under these policies. Under a State Long-Term Care Partnership Program, an amount equal to the benefits received under the long-term care insurance policy is disregarded in determining the assets of an individual for purposes of Medicaid eligibility and estate recovery.

**DATES:** *Effective Date:* This final rule is effective on April 17, 2009.

**ADDRESSES:** *Electronic Access:* This **Federal Register** document is also available from the **Federal Register** online database through *GPO Access*, a service of the U.S. Government Printing Office. Free public access is available on a Wide Area Information Server (WAIS) through the Internet and via asynchronous dial-in. Internet users can

access the database by using the World Wide Web; the Superintendent of Documents' home page address is <http://www.gpoaccess.gov/>, by using local WAIS client software, or by telnet to swais.access.gpo.gov, then login as guest (no password required). Dial-in users should use communications software and modem to call (202) 512-1661; type swais, then login as guest (no password required).

**FOR FURTHER INFORMATION, CONTACT:** Hunter McKay, (202) 205-8999.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Issuance of a Proposed Rule**

On May 23, 2008 (73 FR 30030), the Department of Health and Human Services (the Department) published in the **Federal Register** a proposed rule with a 60-day comment period that described the reporting requirements that we proposed to require of all insurers that issue qualified long-term care insurance policies under the State Long-Term Care Partnership Program. We received three timely pieces of correspondence in response to the proposed rule. Each piece of correspondence addressed multiple issues relating to the provisions of the proposed rule. We summarize these public comments and present the Department's responses to them under the applicable subject-area headings below. In addition, we have posted, for reviewers' convenience, all of the public comments received on the following Web site: <http://www.regulations.gov>.

##### **II. Scope of the Proposed Rule and This Final Rule**

The proposed rule and this final rule describe the reporting requirements that the Department is requiring of all insurers that issue long-term care insurance policies under a State Long-Term Care Partnership Program for a State with as Medicaid State plan amendment approved after May 14, 1993. We point out that neither the proposed rule nor this final rule requires participating insurers to report data from States with a Partnership Medicaid State plan amendment approved as of May 14, 1993. In addition to the promulgation of the proposed rule and this final rule, the Department anticipates taking other actions to further the implementation of the Long-Term Care Partnership Program. One such action is publication of a separate **Federal Register** notice containing Partnership State Reciprocity Standards. These standards outline an agreement whereby States can provide Medicaid asset disregards for