

### **Pulling the Superfund Trigger on Superfarms?**

In today's society the entertainment industry thrives on exaggerations, hyperbole, and the significance of things that appear to be insignificant. Examples include movies such as Die Hard Mission Impossible, and James Bond where the world is saved from destruction by one lone man; or the children's fairy tale where a small insignificant mouse removes the thorn from the lion's paw. The idea that an entire industry might be destroyed by a few simple and seemingly insignificant phrases in a statute may sound like the makings for a fantastic novel or movie. This is not the workings of a new movie but actually one of many conflicts over the wording found in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C. § 9601-9630 (1980). This particular conflict focuses on two, identical, proposed legislative bills and a proposed U.S. Environmental Protection Agency (EPA) Rule that would exempt Concentrated Animal Feed Operations (CAFOs) from the triggering mechanism of superfund for accumulated animal waste releases of hazardous materials into the air. H.R. 1398, 110<sup>th</sup> Cong. (Mar. 8, 2007), H.R. 807, 110<sup>th</sup> Cong. (Mar. 8, 2007), 72 F.R. 73700-01 (2007). A few phrases found in CERCLA which is a statute hundreds of pages long, over 25 years old, and are the main focus of the recently proposed rule. One particular phrase that is particularly controversial is the "normal application of fertilizer." 42 U.S.C. § 9601 (2002). This and other phrases have enormous importance to both the agriculture industry and those concerned with the negative environmental effects of animal waste.

Both sides of the legislative debate have valid interests and strong arguments. The owners and operators of large feeding operations argue that the statutory language was meant

and designed for their protection. The opponents argue that the protecting language of the law has since been eroded and abused and no longer applies. This paper discusses the positions of both sides of the debate and concludes that the proposed exemptions should not be seriously considered because the farming and agriculture industry itself has changed, the scope of the statute has shifted, and the current requirements are not overly burdensome on CAFO operators.

### **CERCLA Basics and Proposed Modifications**

Congress enacted CERCLA in 1980 “to facilitate the cleanup of hazardous waste sites, and to shift the costs of environmental response from taxpayers to the parties who benefited from the use or disposal of the hazardous substances.”\_68 Am. Jur. Trials 1 (2008). It generally holds Potentially Responsible Polluters (PRPs) strictly liable for the release of a hazardous substance from a facility. *Id.* As a result CERCLA has both the power to remedy existing hazardous sites and carry a strong deterrent effect against possible future pollution. *Id.* Early in 2007 the EPA announced a proposed rule that would exempt reporting of hazardous emissions from animal waste under CERCLA for air reporting standards. 72 Fed.Reg. 73700-01 (2007). Additionally, two identical bills were proposed to the U.S. Senate that would exempt manure being classified as a “hazardous substance” or a “pollutant or contaminant.” H.R. 1398, 110<sup>th</sup> Cong. (Mar. 8, 2007)., H.R. 807, 110<sup>th</sup> Cong. (Mar. 8, 2007).

The scope of the proposed EPA rule would exempt from reporting all hazardous substances that may be emitted to the air from animal waste at farms. 72 F.R. 73700-01 (2007). Animal waste is defined as “manure” (feces, urine, other excrement, and bedding produced by livestock that has not been composted), digestive emissions and urea. *Id.* Waste also includes animal waste that is mixed with bedding, compost, feed, soil and other materials typically found with animal waste. *Id.*

In general manure contains a number of hazardous materials as defined under CERCLA, including ammonia, hydrogen sulfide and phosphorus build up. 40 C.F.R. § 302.4 (2006). However, CERCLA currently allows an exemption for the “normal application of fertilizer.” 42 U.S.C. § 9601 (2002). This phrase has fueled the push for proposed legislations that exempt manure from being a “hazardous substance.” H.R. 1398, 110<sup>th</sup> Cong. (Mar. 8, 2007)., H.R. 807, 110<sup>th</sup> Cong. (Mar. 8, 2007). The EPA has Clarified the relationship between the fertilizer exemption and its relation to manure in correlating federal regulation: “The following solid wastes are not hazardous wastes: Solid wastes generated by any of the following and which are returned to the soils as fertilizers: [including]...The raising of animals, including animal manures. 40 C.F.R. § 261.4 (2008). Many owners and operators of CAFO’s argue that manure is widely used in various applications as a fertilizer. This is a generally accepted application. However, exemption opponents argue that there is a limit at which point any further application of such fertilizer no longer benefits the land, but harms it. Essentially the controversy boils down to the complex definition (or seemingly conflicted definition) of the term “release”- not only because manure results from natural processes, but also because of questions regarding its status as a “hazardous substance.”

### **CERCLA Purpose and its relationship to Agriculture**

When CERCLA was originally drafted, the EPA described the purpose of section 103 as to “alert the appropriate government officials to releases of hazardous substances that may require rapid response to protect public health and welfare and the environment.” 50 Fed.Reg. 13,456 (1985). Historically the EPA used CERCLA to clean up the worst of hazardous spills and regulate non-agriculture industries acting irresponsibly with their waste. 68 Am. Jur. Trials 1 (2008). Other laws govern the agriculture industry as well, including the Clean Air Act and the

Clean Water Act. 33 U.S.C. §1251 (2006 (CWA)),42 U.S.C. § 7401 (2006 (CWA)).

Additionally, within CERCLA itself, existing rules relax standards with respect to hazardous materials applied in agricultural contexts. One area is that of pesticides. 42 U.S.C. § 9607 (2002). In addition, CERCLA exempts “the normal application of fertilizer” from the definition of “release.” 42 U.S.C. § 9601 (2002). As a result, by way of specific agriculture laws and agricultural related exemptions, Congress has already segregated agriculture CAFOs from the normal reporting requirements of CERCLA. The general reasoning behind these exemptions is that materials such as pesticides and fertilizer are necessary for the agriculture industry to function at its most basic level.

However, it should be noted that farming itself has made drastic changes as well over the last 20 years. As a result of economic crunches and industry competition, farms have continued to increase their volume of production and simultaneously minimize the geographical area used to meet that demand. Bob Warwick, *Protect Communities’ Air and Water From Factory Farm Pollution*, <http://www.sierraclub.org/factoryfarms/factsheets/factoryfarms.asp> (access Feb. 8, 2008). The operation and environmental impacts of agriculture enterprises now more closely resembles, not traditional farming, but that of industrial operations for which CERCLA was originally intended. Tyson Foods’ facilities give perspective to the volume of a large CAFO site. *Sierra Club, Inc. v. Tyson Foods, Inc.* 299 F.Supp.2d 693, 700 (W.D.Ky. 2003). That single site consisted of 24 poultry houses. *Id.* Each house is approximately 40 feet wide and 400 – 500 feet long, approximately the length of one and one/ half football fields. Each house has a capacity to hold approximately 20,000 chickens. *Id.* Another example is Threemile Canyon Farms in Boardman, Oregon. The farm reported that its 52,300 dairy cow operation emits 15,500 pounds of ammonia per day, more than 5,675,000 pounds per year. That’s 75,000 pounds more than the

nation's number one manufacturing source of ammonia air pollution... according to the 2003 toxics release inventory.” Bob Warwick, *Protect Communities' Air and Water From Factory Farm Pollution*, <http://www.sierraclub.org/factoryfarms/factsheets/factoryfarms.asp> (access Feb. 8, 2008).

Proponents of the exemption put forward several justifications in favor of the new rule. First, proponents of the exemption argue that manure is a natural product and has been used as fertilizer by many cultures all over the world. Stacey Satterlee, *Superfund/ Regulation of Livestock Manure Under CERCLA/ EPCRA*, <http://www.beefusa.org/goveSuperfund.aspx> (accessed Feb. 25, 2008). Moreover, proponents assert that if this exemption were not to be granted then virtually every farm and livestock operation in the United States would be subject to strict liability under CERCLA. *Id.* This is a valid concern. There is the possibility that each farm could open itself to CERCLA liability. Exemption supporters also express a belief that congress never intended CERCLA for the agriculture industry because the original tax for funding cleanups was imposed only on the petrochemical and inorganic raw material industries. Tamara Thies, *Proposed Rule to exempt Animal Agriculture from Emergency Release Reporting Requirements under CERCLA and EPCRA*, <http://www.beefusa.org/goveCERCLAandairmissions.aspx> (accessed 2/25/08). However, as a practical matter the trigger is not likely to be pulled on a majority of farmers in the industry. The exemption holds true for the normal application of fertilizer. Additionally, the reporting requirements trigger only if there is a significant release of a hazardous material. Until these requirements have been breached then there is no liability under CERCLA.

### **Interpreting The “Application of Fertilizer” exemption**

In *Sierra Club, Inc. v. Tyson Foods, Incorporated* owners of land located near production farms together with an environmental group (Plaintiffs) brought action against farm owners and operators (Tyson) for the release of ammonia from chicken droppings in violation of CERCLA. *Sierra Club, Inc. v. Tyson Foods, Inc.* 299 F.Supp.2d 693, 700 (W.D.Ky. 2003). As a defense, Tyson argued that they should have been exempt from the ammonia release under “the normal application of fertilizer” exemption. *Id.* at 714. They specified that their release of ammonia to soils, water, or air were the consequence of spreading waste on fields as fertilizer and thus they had no obligation to report. *Id.* The EPA has indicated that this exemption is intended to “eliminate reporting of fertilizers... and other substances when applied, administered, or otherwise used as part of routine agricultural activities....” 52 Fed.Reg. 388344, 38349 (1987). The exemption for substances used in routine agricultural operations applies only to substances stored or used by the agricultural user.” *Id.* The court responded by agreeing with the Plaintiff’s assertion that the farm in this case was not *spreading*, but merely *venting* the ammonia directly from the storage houses and thus was required to report. *Sierra Club, Inc. v. Tyson Foods, Inc.* 299 F.Supp.2d 693, 714 (W.D.Ky. 2003). The court differentiated this venting of ammonia from the application to fields or storage of chicken manure. *Id.* As a consequence; both small CAFOs and large alike would be subject to CERCLA for venting animal waste; however, any operation that uses animal waste as a fertilizer for actual agricultural purposes would not trigger the mechanism and would have little worry of triggering the CERCLA reporting requirements. In essence all farms that continue to use manure or other substance solely for agriculture purposes would be exempt from the reporting requirement. The court narrowly defined that only when the animal waste is not properly used will the triggering effect occur.

## Alternative Sources of Regulation

One of the other major controversies arises from the fact that CAFOs are already regulated by the Clean Water Act, 33 USC §1251 et.seq. (2006) (CWA), and the Clean Air Act ), 42 U.S.C. § 7401 et.seq. (2006) (CAA). Many proponents of the exemption argue that CERCLA regulations are unnecessary for enforcement and remediation because of these alternative sources of regulation,. Stacey Satterlee, *Superfund/ Regulation of Livestock Manure Under CERCLA/ EPCRA*, <http://www.beefusa.org/goveSuperfund.aspx> (accessed Feb. 25, 2008). Opponents are quick to point out that CERCLA fills in many regulatory gaps missing from the CWA and CAA. Claudia Copeland, *Animal Waste and Hazardous Substances: Current laws and legislative issues*, <http://cnie.org/NLE/CRS/abstract.cfm?NLEid=1766> (last updated April 11, 2007). Some of the gaps filled by CERCLA include various chemicals that are identified as hazardous under CERCLA but not under the CAA or CWA. *Id.* Examples include ammonia, sulfur dioxide, and phosphorus. *Id.*

Ammonia and sulfur dioxide releases are technically covered by the CAA. However, they are only designated as precursors to particulate matter that falls into the 2.5 micron range. Tamara Thies, *Potential Regulation of Ammonia under the Clean Air Act*, <http://www.beefusa.org/goveAmmonia.aspx> (accessed April 11, 2008). Ammonia and sulfur dioxide when released into the air react with other chemicals and debris making larger particles that fall within the range that is governed by the CAA. *Id.* The EPA chooses not to otherwise regulate ammonia emissions under the clean air act. *Id.* Their reasoning concludes that ammonia is a distinguishable precursor from other substances that qualify as precursors. *Id.* Until evidence is presented to the EPA that shows ammonia as a significant contributor to formation of fine particulate matter, then they have no intention of regulating ammonia itself under the CAA. *Id.*

As a consequence of the EPA's CAA Position, the CERCLA reporting requirements are removed there would be little or no regulation of ammonia releases from animal waste.

Additionally the permit rules under the CWA apply to less than six percent of all Animal Feeding Operations (AFOs) in the United States. Copeland. The CWA "addresses the discharges of nutrients but not other components of manure waste (e.g. trace elements, metals, pesticides, pathogens)." *Id.* Moreover, neither the CWA nor the CAA provide for "recovery of costs for responding to or remediating releases nor for natural resource injuries." *Id.*

As mentioned above, Tyson foods was required to report emissions when they vented ammonia from their poultry houses despite arguments made for the fertilizer exemption. *Sierra Club, Inc. v. Tyson Foods, Inc.* 299 F.Supp.2d 693, 714 (W.D.Ky. 2003). The direction this court took illustrates that CAFOs are responsible for reporting all air releases of a hazardous substance above maximum limits regardless of origin. In *Sierra Club v. Tyson*, Plaintiffs argued that releases at the site exceeded the allowable 100 pounds per day maximum of ammonia. *Id.* at 708. While the court did not decide the actual amount being released, it did determine that the release constituted a significant nuisance to neighbors and those bringing the action had standing to sue. *Id.* at 703. The effect of releasing hazardous substances from animal waste is equivalent to damage caused by those substances released from any other source. CERCLA is designed to protect against harmful releases regardless of origin. As previously mentioned opponents point out that there is little enforcement under CAA and CWA with respect to clean up or remediation costs for the releases for natural resource injuries. Claudia Copeland, *Animal Waste and Hazardous Substances: Current laws and legislative issues*, <http://cnie.org/NLE/CRS/abstract.cfm?NLEid=1766> (last updated April 11, 2007). In contrast, CERCLA has the power to recover the costs that other acts cannot.

## Congressional Intent

Another concern is that of the courts interpreting the statute where congress is not explicit. The CERCLA definitions of “hazardous substance” and the “normal use of fertilizer” are highly scrutinized. CAFOs have also raised concerns with respect to other products such as phosphates that have triggered litigation as a result of manure discharge. *Id.* Although this is a valid concern, the interpretation is still limited to the scope of manure. Additionally, even if the manure is spread out on fields with the stated intent of fertilizing, there is a limit where the land can no longer sustain or benefit from the addition of the fertilizer. For example, phosphates are a benefit from manure when used as a fertilizer in low levels; they lose their associated benefit at higher levels. *Id.* The allowable limit for phosphorus is 100 pounds per day. *Copeland.* The interpretation by courts merely limits the opportunities for abuse of the manure exception in a manner other than actual fertilizer as intended by the plain language adopted by Congress as “normal use”.

Generally, there is a judicial process used in interpreting ambiguous statutory language. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The test is as follows: “whether Congress has directly spoken to the precise question at issue... If so, that is the end of the matter, and Congress' clear intent controls. If the statute is silent or ambiguous as to the specific issue before us, then we must defer to the agency's interpretation, if it is based on a permissible construction.” *Id.*

In *Sierra Club v. Seaboard Farms Inc.*, Sierra Club (Plaintiff) brought an action against Seaboard Farms Inc. (Seaboard) for failing to report ammonia emissions at a farming site for swine as required under CERCLA. *Sierra Club v. Seaboard Farms Inc.*, 387 F.3d 1167,1168 (Okla. 2004). Seaboard had two farms on a continuous site that each had eight houses for swine

that were spaced approximately 40 to 100 feet apart. *Id.* Together the two farms housed approximately 25,000 swine. *Id.* Seaboard responded stating that each “lagoon, barn and land application area is a separate facility.” *Id.* at 1169. Seaboard concluded that under that definition no single site was emitting more than the required quantity of 100 pounds of ammonia per day. *Id.* The court, however, mentioned that CERCLA is a remedial legislation and it should be construed liberally to carry out its purpose. *Id.* at 1172. The court then specified that Seaboard managed the farm as one facility with one particular site purpose which was to produce swine products. *Id.* at 1174. The court argued that if the farm were allowed to be separated by each individual house or lagoon, that ultimately every barrel of hazardous waste could count as a separate facility. *Id.* The court applied the *Chevron* test and concluded CERCLA’s definition of a “facility” “appears clear concise and straight forward.” *Id.* at 1170. There was no ambiguity and thus no deference needed to be given. *Id.*

While the case of *City of Tulsa v. Tyson Foods* illustrates a related issue in interpreting CERCLA’s reporting requirements, its holding was vacated as part of a settlement agreement and thus has no binding authority. *City of Tulsa v. Tyson Foods, Inc.* 258 F.Supp.2d 1263 (N.D.Okla.,2003). In *City of Tulsa v. Tyson Foods*, Tulsa Metropolitan Utility Authority (Plaintiffs) brought an action against Tyson Foods (Tyson) for long term application of waste fertilizers that can create a build up of phosphorus causing damage to the soil. *Id.* Specifically the Plaintiffs alleged that Tyson’s practice of the land application of manure had led to subsequent contamination of the city’s water supply. *Id.* at 1271. Contamination came in the form of phosphates, which led to an increase in algae growth causing problems with odor and taste of the water. *Id.* The issue was whether phosphates constitute a hazardous substance under the wording of CERCLA. *Id.* at 1284. The case never directly addressed the harmful levels or

limits of phosphates with within the scope of CERCLA liability. Phosphorus, in the form of phosphate, end up in watersheds through surface runoff.

Tyson argued that *phosphates* are not within the scope of CERCLA because CERCLA only identifies *phosphorus* as a hazardous substance. *Id.* at 1284; see 40 C.F.R. § 302.4 (2006). Phosphates in general are not considered hazardous substances and are not directly addressed in the act; “It is undisputed that elemental phosphorus is highly combustible, poisonous and so reactive it does not occur free in nature, and that phosphate is found in all living cells, is safe and vital to life processes.” 258 F.Supp.2d at 1283. Tyson further argued that when there is an element mentioned as hazardous in the wording of CERCLA, any compounds of that element are specifically identified as a hazardous substance. *Id.* Tyson concluded that because phosphorus had no such wording under CERCLA those phosphates (a compound of phosphorus) in manure should not be considered hazardous *Id.*

The court concluded to the contrary, it reasoned that because elemental phosphorus is highly combustible, poisonous and so reactive that it does not occur free in nature (an undisputed fact in this case), the EPA likely contemplated liability for phosphorus in real, not theoretical, releases. *Id.* at 1285. Further, as recognized by the Third Circuit, a compound does not have to be toxic or be released in any threshold quantity to be classified as a hazardous substance under CERCLA. *U.S. v Alcan aluminum Corp*, 964 F.2d 261-64(1992). The *City of Tulsa* court found that the phosphorus contained in poultry litter in the form of phosphate was a hazardous substance under CERCLA. *City of Tulsa v. Tyson Foods, Inc.* 258 F.Supp.2d 1263, 1285 (N.D.Okla., 2003). This case supports the position that there is not a need of further congressional clarification for what is meant by the act.

### **Defining CAFO Facilities**

Additional clarification concerns have gathered attention as well. Under CERCLA the maximum amount of ammonia, hydrogen sulfide, and phosphorus permissibly released is 100 pounds per 24 hour period. Both the *Sierra Club v. Tyson Foods, Inc.* and *Sierra Club v. Seaboard farms Inc.* decisions raised an issue concerning the definition of the term “facility.” F.Supp.2d at 709; 387 F.3d at 1176. The courts’ clarification presents a major factor in calculating whether or not a farm or plant site is emitting substances at a level requiring reporting under CERCLA. The *Sierra Club v. Tyson* court ruled that where there were several poultry houses on a contiguous site, the whole farm site, rather than each poultry house, constituted a regulated CERCLA “facility” for purposes of reporting. *Sierra Club, Inc. v. Tyson Foods, Inc.* 299 F.Supp.2d 693, 708 (W.D.Ky. 2003). The Tyson court quoting *Cytec Industries v. B.F. Goodrich Co.* concludes “that usually, although perhaps not always, the definition of facility will be the entire site or area, including single or contiguous property, where hazardous wastes have been deposited as part of the same operation or management.” *Sierra*, 299 F.Supp.2d at 709 quoting 232 F.Supp.2d 821, 836 (S.D.Ohio.2002). The court reasoned that under the facts of the case that each one of the houses functioned together for a singular purpose. 299 F.Supp.2d at 709. Additionally, chickens were delivered and picked up from the site as a whole. *Id.* “Since each chicken production operation operates as a single operation, it is a single facility for CERCLA purposes. *Id.*”

On its face it may appear to be a bit harsh on the companies that have multiple buildings or operations on one site to be bound to the 100 pound per day limit. However, the context in which these rules are applied is just as important. The farms in the previous cases are sites where there are multiple facilities with a high volume of animals living in a confined area. For example, on the various sites in the Tyson case, the poultry houses ranged from 16 to 24 per site.

*Id.* at 700. Plaintiffs estimated that the larger of the sites emitted approximately 235 pounds of ammonia per day. *Id.* at 707. Under Tyson's interpretation of "facility" the houses would release just ten pounds of ammonia per day if they had been allowed to separate and not aggregate the houses. *Id.* at 710. In *Sierra Club v. Seaboard Farms Inc.*, the Court reached a similar conclusion of non-aggregation of facilities. 387 F.3d 1167,1176. The ultimate effect, if allowed to fall under the exemption, would be released with no ability to recover for damages from the original polluter.

### **Feasibility of Monitoring Emissions**

A related debate is the scientific feasibility of monitoring releases from facilities. Closely connected with the monitoring issues are arguments to exempt releases that pose little or no risk and for to which federal response is infeasible or inappropriate. *Proposed Rule to exempt Animal Agriculture from Emergency Release Reporting Requirments under CERCLA and EPCRA*, <http://www.beefusa.org/goveCERCLAandairemissions.aspx> (accessed 2/25/08). Accordingly supporters of the exclusions propose exemptions using factors such as (1) continuous low level emissions over large areas; (2) rapid dispersion in the environment; (3) acceptable exposure risk; and (4) infeasibility of and inappropriateness of response. *Id.* In *Sierra Club v. Tyson*, Tyson raised similar arguments. 299 F.Supp.2d at 703. Specifically, they stated that the government was aware of the ammonia releases from chicken houses and was currently investigating to identify if the current state of scientific knowledge is sufficient for establishing a reliable emission factor. *Id.* The emission factor could then be used to determine whether reporting would be required. *Id.* The court dismissed this argument noting Tyson's failure to cite any EPA authority to exempt facilities from the reporting requirements under CERCLA. *Id.* at 706.

Absent such authority, if Tyson had actual or constructive knowledge of a release triggering CERCLA reporting standards then they needed to report. *Id* at 707.

The argument for low level emissions over a large area is already a difficult standard for large CAFOs to meet. Large CAFO's by their general nature lead to the triggering effects under CERCLA because they most often operate with a large volume of live stock in a small geographic area. The rapid dispersion into the environment appears to be a vague standard with respect to air emissions. Intuitively the rate of dispersion for ammonia and sulfur dioxide is likely dependant on the weather patterns of wind and temperature. However, the amounts that are safely emitted have already been set for both ammonia and sulfur dioxide at 100 pounds per day per facility. 72 F.R. 73700-01 (2007). Acceptable exposure and risk as an exemption does not squarely fit within the scope of large CAFOs. The poultry houses by design are fitted with vents and exhaust fans strictly for the reason that it is not healthy for the birds. *Sierra Club, Inc. v. Tyson Foods, Inc.* 299 F.Supp.2d at 700. On a large scale houses that are all exhausting ammonia the acceptable exposure and risk has already been set at 100 pounds per day.

Proponents for exemption argue infeasibility and inappropriateness for reporting because there is no immediate or emergency remedy to releases that exceed the limit. However, under reporting standards that are already in place, the farms have the ability to control the amount of waste and releases by controlling the number of livestock per facility.

### **Industry economic concern**

Lastly, there are concerns of legal liability and the economic survival of the industry if the reporting standards are enforced. Currently, CAFOs receive immunity from CERCLA liability for failing to report air emissions under an air compliance agreement (compliance agreement) that farm groups signed two years ago. Allison Winter, *Agriculture: EPA, Congress*

*consider pollution-rule exemptions for farms,*

<http://www.eenews.net/Greenwire/print/2007/03/12/13>. The Compliance Agreement gives temporary amnesty to farms against federal actions for reporting current and past air emissions until the study of the industry is complete and standards are set. *Id.* The CAFO operators argue economic hardship because reporting violations are subject to fines of up to \$27,500 per day.

Claudia Copeland, *Animal Waste and Hazardous Substances: Current laws and legislative issues*, <http://cnie.org/NLE/CRS/abstract.cfm?NLEid=1766> (last updated April 11, 2007).

However, it should be remembered that in fact only farms with large CAFOs such as a site with more than 200,000 chickens are likely to trigger the reporting requirements. Additionally, *responsible* companies would not be found in violation of reporting requirements only violators. As a consequence, the language of the law only subjects large CAFOs that are acting irresponsibly or contrary to the existing exemptions to harsh economic sanctions.

Overall the exemption as worded, and interpreted by the courts, is quite narrow in application. As narrowly applied the regulation is reasonable not only for the reasons laid out above, but also because such treatment is effectively the equivalent of the treatment of any other industrial polluter who is exceeding the allowable limit. While it is understood that manure is the result of a natural process, the farming industry has accumulated it in a way that is very unnatural. High volumes and little space creates just as much waste and damage in some aspects as various other industries for what many believe to be at heart of CERCLA. Agriculture in the livestock area has become in scope the equivalent of what the main focus of CERCLA is: industrial pollution. It gives the government the power to regulate and protect against hazardous waste contaminating the earth and the air. Similarly, the undue burden that the mega CAFOs report is not likely to cause much of a true oppression or loss of business. The industry has come

this far with the requirement to report and the major lawsuits that have been raised against those offenders are still in business and will likely continue to grow. The CWA and CAA have their place, but CERCLA provides an effective gap filler to regulate and remedy when unfortunate events occur. Additionally the proposed EPA rule and the proposed legislations will merely lead to further exploitation of the already established exceptions. These proposals will widen the scope of regulation bit by bit until there is little left to regulate. The exception will become the rule. In conclusion there seems to be little reason beyond that of a small inconvenience to go ahead and push through the exemption legislation.

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