

Challenging the EPA’s Authority To Exempt Concentrated Animal Feeding Operations from EPCRA’s Pollution Reporting Requirements

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I. INTRODUCTION

The residents of Arlington and Tonopah, Arizona have some very smelly neighbors—the millions of chickens at Hickman’s Egg Ranch (“Hickman’s”).¹ But an unpleasant odor is just one of the many environmental issues created by the concentrated animal feeding operation (“CAFO”).² These two small towns, located just west of Phoenix, also deal with excessive dust, flies, and hazardous chemical emissions.³ Some residents even complain of nausea and breathing difficulty due to the ammonia released from the decomposing manure in the chicken houses.⁴

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1. Laura Gómez, *Is the Smell from Hickman's Egg Farms Harmful? West Valley Residents Will Soon Find Out*, AZCENTRAL (Feb. 28, 2018), <https://www.azcentral.com/story/news/local/southwest-valley/2018/02/28/smell-hickmans-egg-farms-west-valley-residents-tonopah-air-quality/791164001/> [https://perma.cc/4PFC-STVY]; *Don’t Waste Ariz. Inc. v. Hickman’s Egg Ranch Inc.*, No. CV-16-03319-PHX, 2018 WL 6629657, at *1 (D. Ariz. Dec. 19, 2018) (“Although the figures vary from month to month, documents produced by Hickman’s show that the Arlington Facility housed as many as 4,127,267 laying hens in May 2013 while the Tonopah Facility housed as many as 3,344,877 laying hens in January 2017.”).

2. Gómez, *supra* note 1.

3. *Id.*

4. *Id.*; Connor Dziawura, *Hickman’s Embroiled in Ongoing Federal Court Case*, WEST VALLEY VIEW (Dec. 5, 2018), https://www.westvalleyview.com/news/hickman-s-embroiled-in-ongoing-federal-court-case/article_57ada3a6-f81e-11e8-84be-1b27d84789e3.html [https://perma.cc/2Y4X-JURG]; Elizabeth Whitman, *The Smell of Hickman’s Chicken Poop Is Killing This Rural Arizona Community*, PHX. NEW TIMES (Oct. 11, 2019), <https://www.phoenixnewtimes.com/news/smell-chicken-eggs-hickmans-tonopah-clint-maricopa-county-arizona-11356054> [https://perma.cc/2ALC-JXBT].

Searching for relief from these CAFO-related issues, residents filed complaints with government agencies at the county, state, and federal level.⁵ However, when it came to ammonia pollution, state and county officials responded that their agencies do not regulate those types of emissions.⁶ So, although residents of Arlington and Tonopah have brought nuisance lawsuits against Hickman's, local environmental regulations did not provide a complete remedy.⁷

On the other hand, *federal* regulations offer communities some protection from CAFO pollution.⁸ The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")⁹ and Emergency Planning and Community Right-to-Know Act ("EPCRA")¹⁰ both require that any facility that produces, uses, or stores hazardous chemicals report their emissions of certain pollutants.¹¹ The Environmental Protection Agency ("EPA") includes ammonia on its list of regulated pollutants under both acts.¹² The town residents were therefore able to seek relief under these federal environmental laws.¹³

Unfortunately for communities like Arlington and Tonopah, Congress and the EPA have carved out reporting exemptions for CAFOs in recent years.¹⁴ Without knowledge of what types of pollutants are emitted into their air, communities lost a valuable tool of environmental protection. In 2018, Congress amended CERCLA to exclude CAFOs; now, in a 2019 Final Rule,

5. Gómez, *supra* note 1; Nicole Garcia, *Hickman's Family Farms Sued in Federal Court*, FOX 10 PHOENIX (Oct. 17, 2018), <https://www.fox10phoenix.com/news/hickmans-family-farms-sued-in-federal-court> [<https://perma.cc/BG23-2QQQ>].

6. Gómez, *supra* note 1.

7. *See id.*

8. *Id.*

9. 42 U.S.C. §§ 9601–9675.

10. *Id.* §§ 11001–11050.

11. *Facilities Covered Under EPCRA 304*, EPA, [https://www.epa.gov/epcra/facilities-covered-under-epcra-304#:~:text=EPCRA%20section%20329\(4\)%20defines,in%20the%20definition%20of%20facility](https://www.epa.gov/epcra/facilities-covered-under-epcra-304#:~:text=EPCRA%20section%20329(4)%20defines,in%20the%20definition%20of%20facility) [<https://perma.cc/EU7S-UKD9>] ("EPCRA section 329(4) defines facility to include stationary structures on a single site, or on contiguous or adjacent sites owned or operated by the same person. For purposes of release reporting under EPCRA section 304, motor vehicles, rolling stock, and aircraft are included in the definition of facility. However, the only covered facilities are those that produce, use, or store a 'hazardous chemical.' In some circumstances, there are certain types of releases specifically excluded from reporting requirements under CERCLA.").

12. 40 C.F.R. § 302.4 (2022).

13. *Don't Waste Ariz. Inc. v. Hickman's Egg Ranch Inc.*, No. CV-16-03319-PHX, 2018 WL 6629657 (D. Ariz. Dec. 19, 2018); *see also* Dziawura, *supra* note 4.

14. *See infra* Part II.C.

the EPA argues that it has the authority to exclude them from EPCRA's reporting requirements as well.¹⁵

This Comment will argue that the EPA does not have the statutory authority to exempt CAFOs from EPCRA's reporting requirements. Furthermore, the EPA's 2019 Final Rule is arbitrary and capricious and therefore invalid.¹⁶ The District Court of the District of Columbia vacated a similar rule in 2017,¹⁷ and Congress' 2018 amendments to CERCLA¹⁸ have not been substantial enough to overcome that precedent. Therefore, the EPA's 2019 Final Rule should be vacated.

Part II describes CAFOs, the applicable federal environmental statutes, and the history of various exemptions to pollution reporting requirements. Part III explains two legal challenges that the EPA has faced in promulgating its CAFO reporting exemptions. Part IV argues that the EPA's current 2019 Final Rule is not entirely distinguishable from the previously vacated 2017 rule, and that the EPA therefore does not have the statutory authority to create the exemption. It also contends that the recent rule could be found invalid under the Administrative Procedure Act ("APA") as it is arbitrary and capricious. Finally, Part V concludes by looking to how the EPA might handle CAFO exemptions in the future.

II. FEDERAL REGULATION OF CAFOS

The trend toward large CAFOs has changed the way animal agriculture impacts the environment, and with it, the way the industry is regulated. Section A explains the development of CAFOs and explores their environmental impact. Section B discusses two significant federal environmental laws that generally require reporting and disclosure of pollution. Section C explores how the EPA has carved out specific reporting exemptions for CAFOs.

15. See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490; Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. 27533, 27533 (June 13, 2019) (codified as amended at 40 C.F.R. pt. 355 (2022)); see also Dziawura, *supra* note 4 (explaining that the Arizona district court would only hold Hickman's Egg Ranch liable for ammonia emission that occurred before the passage of the 2018 FARM Act).

16. See Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. at 27533.

17. See *Waterkeeper All. v. EPA*, 853 F.3d 527 (2017).

18. See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490.

A. *The Severe Environmental Impact of CAFOs*

Historically, livestock was raised on small farms, a land- and labor-intensive process.¹⁹ But today, livestock production is concentrated in far fewer, but much larger, farms.²⁰ Technological advancements help explain this fundamental shift in the animal agriculture industry.²¹ With innovations in animal genetics, chemicals, and equipment, farms can substantially increase their output without additional labor or other inputs.²² From 1948 to 2017, even as the total amount of farmland in the United States shrank, total agricultural output almost tripled.²³ A 2009 study found that in the previous fifty years milk production doubled, meat production tripled, and egg production quadrupled.²⁴

One important result of this change in agricultural technology is the rise of CAFOs. An animal feeding operation (“AFO”) is defined as a facility where:

- (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
- (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.²⁵

CAFOs are large AFOs, meaning they have an even greater number of animals present on the lot.²⁶ For a facility to be designated as a CAFO, it must have more than one thousand cattle, ten thousand pigs or sheep, fifty-five thousand turkeys, or one hundred and twenty-five thousand chickens.²⁷

19. See *Farming and Farm Income*, U.S. DEP’T OF AGRIC. (Dec. 1, 2021), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/> [https://perma.cc/3WDH-CCUH].

20. *Id.*

21. See *Productivity Growth Is Still the Major Driver of U.S. Agricultural Growth*, U.S. DEP’T OF AGRIC. (Jan. 10, 2020), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58284> [https://perma.cc/NR4A-UY95].

22. *Id.*

23. *Id.*

24. CARRIE HRIBAR, NAT’L ASS’N OF LOC. BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES (2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf [https://perma.cc/T3DH-RK44].

25. 40 C.F.R. § 122.23(b)(1) (2022).

26. *Id.* § 122.23(b)(4).

27. *Id.*

The number of CAFOs is growing.²⁸ In 2019, the EPA reported more than twenty thousand CAFOs in the United States.²⁹ This trend poses a serious risk for the environment because CAFOs are a major source of pollution.³⁰ Livestock waste produces much of the pollution; therefore, as the number of animals on a farm increases, the amount of pollution grows as well.³¹ CAFOs are also often located in close proximity to each other, and this geographic concentration results in an even greater concentration of pollution.³²

Water pollution from CAFOs is one significant environmental concern.³³ To contain the large amounts of manure they produce, CAFOs mix the animal waste with water and store it in lagoons.³⁴ The waste either remains in the lagoon or is applied to crops through sprinkler irrigation systems.³⁵ This manure management method creates a risk for water contamination, whether from repeated small spills or catastrophic lagoon breaches.³⁶ Because of this huge amount of untreated waste, the Clean Water Act lists CAFOs as a point source of pollution.³⁷

CAFOs also contaminate the air with two types of pollution: particulate and gaseous emissions.³⁸ As animals move, they push particulate matter into the air, including dust, airborne pathogens, and other volatile organic compounds.³⁹ Further, decomposing animal manure emits hazardous gases.⁴⁰

28. Christopher Walljasper, *Large Animal Feeding Operations on the Rise*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (June 7, 2018), <https://investigatamidwest.org/2018/06/07/large-animal-feeding-operations-on-the-rise/> [<https://perma.cc/AF96-BSXU>].

29. EPA, NPDES CAFO PERMITTING STATUS REPORT: NATIONAL SUMMARY, ENDEAR 2019 (2020), https://www.epa.gov/sites/production/files/2020-08/documents/cafo_status_report_2019.pdf [<https://perma.cc/A88U-287Q>].

30. See LIVESTOCK, ENVIRONMENT AND DEVELOPMENT (LEAD) INITIATIVE, LIVESTOCK'S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS 4–6 (2006), <http://www.fao.org/3/a0701e/a0701e.pdf> [<https://perma.cc/3KES-RVLT>].

31. See D. LEE MILLER & GREGORY MUREN, NAT. RES. DEF. COUNCIL, CAFOS: WHAT WE DON'T KNOW IS HURTING US 6 (2019).

32. See HRIBAR, *supra* note 24, at 3; Tarah Heinzen, *Stopping the Campaign To Deregulate Factory Farm Air Pollution*, 17 N.Y.U. ENV'T L.J. 1482, 1490 (2009) (citing CLAUDIA COPELAND, CONG. RSCH. SERV., RL32948, AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: A PRIMER 6, 7 (2008)).

33. See LIVESTOCK, ENVIRONMENT AND DEVELOPMENT (LEAD) INITIATIVE, *supra* note 30, at 135–49.

34. *Id.* at 97.

35. MILLER & MUREN, *supra* note 31, at 7.

36. See LIVESTOCK, ENVIRONMENT AND DEVELOPMENT (LEAD) INITIATIVE, *supra* note 30, at 144.

37. 33 U.S.C. § 1362(14). While this Comment focuses on air pollution regulated by EPCRA and CERCLA, other environmental laws also regulate pollutants, such as the Clean Water Act.

38. HRIBAR, *supra* note 24, at 5.

39. *Id.*

40. *Id.*

Ammonia and hydrogen sulfide are two of the most dangerous pollutants released from manure, and CAFOs release these gases in large quantities.⁴¹ In one study by Iowa State University, researchers measured the amount of ammonia released through the ventilation systems of chicken houses.⁴² They found that two facilities emitted more than ten tons of ammonia in a single year.⁴³

In addition to direct air emissions from decomposing manure, the air around CAFOs is also polluted when animal waste is mixed with water and stored in open-air lagoons.⁴⁴ Furthermore, when that waste is spread on crops as fertilizer, it has yet another chance to release toxic substances into the air.⁴⁵ The air emissions from watering and fertilizing crops are not limited to the time the waste is sprayed—later, as the toxic substances in the soil break down, they are also released into the air.⁴⁶

The air emissions created by CAFOs' untreated manure threaten human health.⁴⁷ For example, exposure to high levels of ammonia in the air can irritate a person's skin, eyes, throat, and lungs.⁴⁸ It can even cause burns.⁴⁹ Hydrogen sulfide, another common emission from untreated manure, poses its own significant risk, as exposure to low levels can irritate the eyes, nose, and throat, making it difficult to breathe.⁵⁰ It also affects the nervous system, causing "headaches, poor memory, tiredness, and balance problems."⁵¹ At higher levels, a person might lose consciousness after even brief exposure.⁵² These health risks, of course, have serious consequences for farm workers, who work in close proximity to a CAFO's pollution, but there is also "evidence that CAFOs affect the ambient air quality of a community."⁵³

41. *See id.*; LIVESTOCK, ENVIRONMENT AND DEVELOPMENT (LEAD) INITIATIVE, *supra* note 30, at 83.

42. HRIBAR, *supra* note 24, at 5.

43. *Id.*

44. LIVESTOCK, ENVIRONMENT AND DEVELOPMENT (LEAD) INITIATIVE, *supra* note 30, at 97.

45. HRIBAR, *supra* note 24, at 5.

46. *Id.*

47. *Id.*

48. DIVISION OF TOXICOLOGY TOXFAQS: AMMONIA, U.S. DEP'T OF HEALTH & HUM. SERVS., AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (2004), <https://www.atsdr.cdc.gov/toxfaqs/tfacts126.pdf> [<https://perma.cc/C4FD-DNML>].

49. *Id.*

50. HYDROGEN SULFIDE - TOXFAQS, U.S. DEP'T OF HEALTH & HUM. SERVS., AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (2016), <https://www.atsdr.cdc.gov/toxfaqs/tfacts114.pdf> [<https://perma.cc/B2JU-DHG4>].

51. *Id.*

52. *Id.*

53. HRIBAR, *supra* note 24, at 5–7.

B. *Environmental Legislation: CERCLA and EPCRA*

Due to their significant contributions to pollution, CAFOs are regulated by several environmental statutes.⁵⁴ Regarding air pollution, CAFOs fall within the general reporting requirements of two federal statutes: the Comprehensive Environmental Response, Compensation, and Liability Act and the Emergency Planning and Community Right-to-Know Act.⁵⁵ Both laws protect the public and the environment by monitoring harmful emissions.⁵⁶ Prompt reporting of toxic emissions above the threshold level helps protect the communities closest to CAFOs, since authorities can respond and help clean up any spills or prevent future pollution.⁵⁷ Beyond facilitating clean-up efforts, reporting requirements may also encourage polluters to voluntarily limit their emissions.⁵⁸

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980

CERCLA aims to clean up sites that have been contaminated by hazardous waste by holding polluters liable for damages, while also seeking to prevent future contamination.⁵⁹ Perhaps most importantly, the statute created a “Superfund” to help pay for the cleanup of hazardous-waste sites.⁶⁰ It also gives the EPA authority to find the parties responsible for the accidents, spills, or other emergency releases of pollutants.⁶¹ The EPA has the power to

54. 42 U.S.C. §§ 9601–9675, 11001–11050.

55. *Id.*

56. *See id.*

57. *See What Is EPCRA?*, EPA, <https://www.epa.gov/epcra/what-epcra> [<https://perma.cc/FP4J-RCY7>].

58. *See* First Amended Complaint for Declaratory and Injunctive Relief at 16, Rural Empowerment Ass’n for Cmty. Help v. EPA, No. 18-cv-02260 (D.D.C. July 9, 2019), <https://www.courtlistener.com/recap/gov.uscourts.dcd.200509/gov.uscourts.dcd.200509.29.0.pdf> [<https://perma.cc/5JNL-528S>]. *But see* Kathryn E. Durham-Hammer, *Left To Wonder: Reevaluating, Reforming, and Implementing the Emergency Planning and Community Right-to-Know Act of 1986*, 29 COLUM. J. ENV’T L. 323, 348 (2004) (“Underlying EPCRA’s reporting requirements is the assumption that companies will change their use and release of hazardous waste because they are ashamed of being flagrant polluters in comparison to their competitors. However, this assumption is not based on convincing empirical evidence. In fact, though touted as one of EPCRA’s important mechanisms for reducing pollution, it is pure speculation.”).

59. *See* 42 U.S.C. §§ 9601–9675.

60. *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, EPA, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> [<https://perma.cc/MT5N-VX2X>].

61. *Id.*

ensure that the responsible parties cooperate in cleaning up the contaminated sites.⁶²

CERCLA also requires facilities to report hazardous substances emitted in excess of the reportable quantity to the National Response Center (“NRC”).⁶³ The NRC must then “convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.”⁶⁴ At that point, the EPA decides how to respond.⁶⁵ The agency “is authorized to initiate appropriate response activities when . . . any hazardous substance is released or there is a threat of such a release into the environment.”⁶⁶

CERCLA includes a list of hazardous substances,⁶⁷ but it also requires that the EPA designate additional hazardous substances and set the reportable quantities.⁶⁸ Pursuant to the statute, the EPA must promulgate a revised list of hazardous substances that “may present substantial danger to the public health or welfare or the environment.”⁶⁹ The EPA has designated ammonia and hydrogen sulfide as hazardous substances, each with a reportable quantity of one hundred pounds per day.⁷⁰ The agency therefore has the statutory authority to respond to excessive emissions from CAFOs.⁷¹

2. Emergency Planning and Community Right-to-Know Act of 1986

EPCRA concerns emergency planning and response to chemical releases, and it requires disclosure of information about chemical hazards to communities.⁷² Congress passed EPCRA in response to public concern about the handling and storage of toxic chemicals after a disastrous chemical spill in India killed or injured more than two thousand people.⁷³ The EPA recognizes that the community right-to-know provisions of the Act “help increase the public’s knowledge and access to information on chemicals at individual facilities, their uses, and releases into the environment. States and

62. *Id.*

63. *See Waterkeeper All. v. EPA*, 853 F.3d 527, 531 (D.C. Cir. 2017); 42 U.S.C. § 9603.

64. 42 U.S.C. § 9603(a).

65. *Waterkeeper All.*, 853 F.3d at 531.

66. 40 C.F.R. § 300.130(c) (2022).

67. 42 U.S.C. § 9601(14).

68. *Id.* § 9602(a).

69. *Id.*

70. 40 C.F.R. § 302.4 (2022); *Waterkeeper All.*, 853 F.3d at 531.

71. *See Waterkeeper All.*, 853 F.3d at 537.

72. *See* 42 U.S.C. §§ 11001–11050.

73. *What Is EPCRA?*, *supra* note 57; *see also* Durham-Hammer, *supra* note 58, at 325.

communities, working with facilities, can use the information to improve chemical safety and protect public health and the environment.”⁷⁴

Like CERCLA, EPCRA compels facilities to report releases of “extremely hazardous substance[s].”⁷⁵ These substances are designated by the EPA, as the statute requires that the agency “publish a list of extremely hazardous substances.”⁷⁶ The agency must also create a regulation that “establish[es] a threshold planning quantity for each substance on the list.”⁷⁷ If an extremely hazardous substance “is present at the facility in an amount in excess of the threshold planning quantity established for such substance,” that facility is subject to regulations under EPCRA and must report directly to state and local officials.⁷⁸ Because the EPA recognizes ammonia and hydrogen sulfide as extremely hazardous substances, CAFOs fall within the scope of EPCRA.⁷⁹

C. CAFO Reporting Exemptions

Although CAFOs fall within the statutory scope of both CERCLA and EPCRA, the EPA has not strictly or consistently enforced the reporting requirements related to CAFOs—in fact, the agency has carved out specific exemptions for CAFOs.⁸⁰ Left mostly unregulated, the CAFO industry has not voluntarily complied with those requirements either.⁸¹ This Section describes the various exemptions created by the EPA in the past two decades. These exemptions include: a 2005 safe harbor agreement for CAFOs in exchange for their participation in an emissions monitoring program;⁸² a 2009 Final Rule that exempted most CAFOs from CERCLA and EPCRA, but which was ultimately vacated;⁸³ and the most recent 2019 Final Rule, which created an exemption from EPCRA.⁸⁴

74. *What Is EPCRA?*, *supra* note 57.

75. 42 U.S.C. § 11004(a).

76. *Id.* § 11002(a)(2).

77. *Id.* § 11002(a)(3)(A).

78. *Id.* §§ 11002(b)(1), 11004(b).

79. *See* 40 C.F.R. § 302.4 (2022).

80. Heinzen, *supra* note 32, at 1504–05.

81. *Id.* at 1504.

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

83. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948 (Dec. 18, 2008) (codified at 40 C.F.R. pts. 302, 355).

84. Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-

1. 2005 Air Compliance Agreement

By the early 2000s, many communities had learned of the regulatory utility of CERCLA and EPCRA.⁸⁵ Citizens, states, and local governments brought a number of actions against CAFOs.⁸⁶ In response to this increase in regulation and litigation, the livestock industry sought to make a deal with the EPA.⁸⁷ CAFOs asked for a confidential safe harbor agreement in which the EPA would not enforce air emission regulations and, in exchange, the CAFOs would join an emissions monitoring program.⁸⁸

The EPA agreed to provide such a safe harbor to CAFOs in 2005 in exchange for their participation in the National Air Emissions Monitoring Study (“NAEMS”).⁸⁹ It reasoned that the agreement benefitted both the agency and CAFOs because the EPA lacked the necessary scientific data to properly regulate the industry.⁹⁰ The EPA’s Final Order on the matter noted that the consent agreement would offer the following:

AFOs that choose to sign the Air Compliance Agreement will share responsibility for funding an extensive, nationwide emissions monitoring study. The monitoring study will lead to the development of methodologies for estimating emissions from AFOs and will help AFOs to determine and comply with their regulatory responsibilities under the Clean Air Act (CAA); [CERCLA]; and [EPCRA]. Once applicable emission estimating methodologies have been published by EPA, the Agreement will also require each participating AFO to certify that it is in compliance with all relevant requirements of the CAA, CERCLA and EPCRA.⁹¹

Not surprisingly, this consent agreement proved popular among the livestock industry, and the EPA approved the participation of 2,600 AFOs,

Know Act, 84 Fed. Reg. 27,533, 27,535–37 (June 13, 2019) (codified as amended at 40 C.F.R. pt. 355 (2022)).

85. See Heinzen, *supra* note 32, at 1506.

86. See *id.* at 1505–06.

87. See *id.* at 1506.

88. *Id.*

89. *Id.*; Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4958 (Jan. 31, 2005); *National Air Emissions Monitoring Study*, EPA, <https://www.epa.gov/afos-air/national-air-emissions-monitoring-study> [<https://perma.cc/U32S-LP5R>].

90. See Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4958; Heinzen, *supra* note 32, at 1506–07. It is not clear that the EPA actually lacked enough data to enforce regulations under CERCLA and EPCRA because some CAFOs were already reporting air emissions, and the EPA had acted in reliance of the reports in enforcement actions against CAFOs. *Id.* at 1507–08.

91. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4958.

made up of 14,000 facilities.⁹² However, NAEMS only actively collected emissions data from twenty-five sites over the course of two years.⁹³ The overwhelming majority of the participating AFOs therefore received regulatory amnesty for the price of a small fee, while the EPA only collected a small amount of data on air emissions.⁹⁴

2. 2009 CERCLA and EPCRA Exemptions

A few years later, the EPA created an even broader CAFO exemption.⁹⁵ In a Final Rule that became effective in January 2009, the EPA exempted all releases of hazardous air pollutants produced by CAFOs' animal waste from CERCLA and EPCRA reporting requirements.⁹⁶ The EPA believed this rule was "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."⁹⁷ The EPA did not provide any detailed explanation as to why it would not respond to hazardous air pollution from CAFOs.⁹⁸

The EPA did solicit public comments "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 from animal waste at farms, and if so, what an appropriate response would be."⁹⁹ The responses revealed public concern about emissions from CAFOs, but these concerns only convinced the EPA to amend the rule regarding EPCRA.¹⁰⁰ The Final Rule therefore exempted smaller farms from reporting under EPCRA but still required reporting from CAFOs.¹⁰¹ The public comments did not sway the EPA's decision to exempt CAFOs from reporting under CERCLA.¹⁰² Instead, the EPA argued that the rule reflected a compromise—a position between

92. *National Air Emissions Monitoring Study*, *supra* note 89.

93. *Id.*

94. *See* Heinzen, *supra* note 32, at 1507.

95. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,948 (Dec. 18, 2008) (codified as amended at 40 C.F.R. pts. 302, 355).

96. *Id.*

97. *Id.* at 76,949.

98. *Id.*; *see* *Waterkeeper All. v. EPA*, 853 F.3d 527, 537 (D.C. Cir. 2017).

99. *Waterkeeper All.*, 853 F.3d at 532 (quoting CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste, 72 Fed. Reg. 73,700, 73,704–05 (proposed Dec. 28, 2007) (to be codified at 40 C.F.R. pts. 302, 355)).

100. *Id.* at 532.

101. *Id.*

102. *Id.*

reporting requirements that were “burdensome, and would not likely result in ‘new’ information regarding emissions from farms,” and public concerns about CAFO emissions.¹⁰³

As discussed below, environmental groups challenged the rule.¹⁰⁴ It was ultimately found to exceed the EPA’s authority and therefore vacated.¹⁰⁵ The EPA amended the rule in the Federal Register to comply with this decision on August 1, 2018.¹⁰⁶

3. 2019 EPCRA Exemption

After the defeat of the EPA’s first CAFO exemption in 2017, reporting exemptions moved forward in the legislature.¹⁰⁷ The 2018 Consolidated Appropriations Act included an explicit exemption for CAFOs from reporting under CERCLA.¹⁰⁸ CERCLA’s § 9603(e)(1)(B) now provides that “air emissions from animal waste (including decomposing animal waste) at a farm” are not subject to the statute’s notification requirements.¹⁰⁹

In 2019, the EPA again created a reporting exemption for CAFOs with a new Final Rule.¹¹⁰ This time, it explicitly exempted CAFOs’ air emissions from animal waste from EPCRA’s reporting requirements.¹¹¹ The agency reasoned that its rule was proper because it made EPCRA reporting requirements consistent with the legislative amendments to CERCLA.¹¹²

The rule now states that “[a]ir emissions from animal waste (including decomposing animal waste) at a farm” are the “types of releases . . . exempt from the emergency release notification requirements” of EPCRA.¹¹³ It

103. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,954 (Dec. 18, 2008) (to be codified as amended at 40 C.F.R. pts. 302, 355).

104. *See infra* Part III(A).

105. *See infra* Part III(A).

106. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 34.

107. *See CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms*, EPA, <https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms> [<https://perma.cc/9TNL-8576>].

108. Consolidated Appropriations Act, Pub. L. No. 115-141, § 1102, 132 Stat. 348, 1147–48 (2018) (codified at 42 U.S.C. § 9601(e)).

109. 42 U.S.C. § 9603(e)(1)(B).

110. Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. 27,533, 27,533 (codified as amended at 40 C.F.R. pt. 355).

111. *Id.*

112. *Id.* at 27,533–34.

113. 40 C.F.R. § 355.31(g) (2022).

further clarifies that a farm includes a site that is used for “[t]he raising or selling of animals (including any form of livestock, poultry, or fish).”¹¹⁴

In its official response to public comments opposing its proposal of this Final Rule, the EPA wrote:

While EPA recognizes commenters’ concerns regarding animal waste emissions, this amendment is based on the statutory language in EPCRA section 304 and its relationship to CERCLA section 103 release reporting requirements. The basic purpose of emergency release notification requirements under EPCRA section 304 is for facilities to inform state and local agencies of accidental releases so that these agencies can exercise the local emergency response plan if necessary. This may include, but is not limited to, providing shelter or evacuating the community to prevent acute exposure from accidental releases of chemicals. EPCRA section 304 serves as a notification requirement for chemical accidental releases, it is not intended to regulate emissions.¹¹⁵

In short, the EPA does not believe that CAFOs’ emissions of ammonia and hydrogen sulfide create the type of acute environmental emergency EPCRA is designed to regulate.¹¹⁶ It interprets the statute as only applying to certain forms of chemical release, rather than focusing on the hazardous substances themselves.¹¹⁷ The EPA therefore believes the form of emissions from CAFOs allows the agency to create an EPCRA reporting exemption.¹¹⁸

III. LITIGATION CHALLENGING THE EPA’S RULEMAKING AUTHORITY

The EPA’s exemptions have not gone unchallenged.¹¹⁹ Because CAFOs are such large polluters,¹²⁰ many parties fear that exempting them from reporting regulations will cause severe environmental harm.¹²¹ Environmental

114. *Id.* § 355.61.

115. Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. at 27,538.

116. *Id.* at 27,535.

117. *Id.* at 27,538.

118. *See id.*

119. *See Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017); Complaint for Declaratory and Injunctive Relief, Rural Empowerment Ass’n for Cmty. Help v. EPA, No. 18-cv-02260 (D.C. Cir. Sept. 28, 2018), https://earthjustice.org/sites/default/files/files/Complaint_Challenging_Factory_Farm_Pollution_Exemption.pdf [<https://perma.cc/T55W-F526>].

120. *See supra* Part II(A).

121. *See Waterkeeper All.*, 853 F.3d at 529–33; Complaint for Declaratory and Injunctive Relief, *supra* note 119, at 1–4.

advocacy organizations have led these legal challenges.¹²² In 2017, the United States Court of Appeals for the District of Columbia Circuit, adjudicating Waterkeeper Alliance’s suit against the EPA, vacated the EPA’s 2009 Final Rule.¹²³ The EPA’s 2019 Final Rule, which once again exempts CAFOs from complying with EPCRA’s reporting requirements, is likewise being challenged in a lawsuit filed by the Rural Empowerment Association for Community Help.¹²⁴

A. Waterkeeper Alliance v. EPA: *Challenging the EPA’s 2009 Final Rule*

Waterkeeper Alliance and other environmental advocacy organizations challenged the EPA’s 2009 Final Rule, which exempted CAFOs from air emission compliance under CERCLA and EPCRA,¹²⁵ in *Waterkeeper Alliance v. Environmental Protection Agency*.¹²⁶ The plaintiffs “[claimed] that the *Final Rule* ran afoul of the underlying statutes (and was therefore outside the EPA’s delegated authority).”¹²⁷

In its analysis, the D.C. Circuit emphasized the fact that CAFO emissions would normally require reporting under CERCLA and EPCRA.¹²⁸ It reasoned that because ammonia and hydrogen sulfide are classified by the EPA as “hazardous substances” under CERCLA and “extremely hazardous substances” under EPCRA,¹²⁹ if either substance is released at one hundred pounds per day, the statutes require the emission to be reported.¹³⁰ All the parties agreed that CAFO emissions rise above that limit and therefore require reporting.¹³¹ Measuring these types of air emissions precisely is a difficult task, but CERCLA “accommodates the problem a bit” by instead allowing for annual notices of continuous release.¹³²

Waterkeeper Alliance claimed that the EPA did not actually have authority to create reporting exemptions under CERCLA and EPCRA and, even if it did, the Final Rule was arbitrary and therefore invalid.¹³³ It argued the rule

122. See *Waterkeeper All.*, 853 F.3d at 529; Complaint for Declaratory and Injunctive Relief, *supra* note 119.

123. *Waterkeeper All.*, 853 F.3d at 537–38.

124. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 2.

125. See *supra* Part II(C)(2).

126. 853 F.3d at 530.

127. *Id.*

128. *Id.* at 531.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 532.

was arbitrary “because it treats air releases from animal waste at farms more favorably than those from other sources (like a leaky ammonia tank) or other locations (like animal waste at zoos, circuses or slaughterhouses).”¹³⁴

To determine whether the Final Rule was within the EPA’s rulemaking power, the court “review[ed] the *Final Rule* for reasonableness under the familiar standard of *Chevron*.”¹³⁵ As the court explained, the *Chevron* analysis “means (within its domain) that a ‘reasonable agency interpretation prevails’” when a statute’s meaning is ambiguous.¹³⁶ However, “if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”¹³⁷

The court began its *Chevron* analysis by determining whether the statutes were ambiguous.¹³⁸ Here, the EPA argued that because the statutes included other unrelated exemptions, there was ambiguity “as to whether the EPA can create *new* exemptions.”¹³⁹ The court disagreed.¹⁴⁰ While Congress’s inclusion of some exceptions does not always mean it prohibits others, the court looked to how they interacted with reporting requirements:

But here Congress paired those specific exemptions with a sweeping reporting mandate. It made clear that the statutes require notification of “*any* release . . . of a hazardous substance . . . in quantities equal to or greater than” the reportable quantities authorized under § 9602. Read together those statutory provisions set forth a straightforward reporting requirement for any non-exempt release (over the reportable quantity). Conspicuously missing is any language of delegation, such as that reports be “as appropriate,” “effective,” “economical,” or made “under circumstances to be determined by the EPA.”¹⁴¹

Therefore, according to the court, the fact that the statutes included some exemptions did not create ambiguity about the EPA’s rulemaking authority.¹⁴²

134. *Id.*

135. *Id.* at 534 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

136. *Id.* (quoting *N. Nat. Gas Co. v. Fed. Energy Regul. Comm’n*, 700 F.3d 11, 14 (D.C. Cir. 2012)).

137. *Id.* (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009)).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 535 (citations omitted).

142. *Id.*

The court further reasoned that the explicitly granted authority in the statutes did not include the authority to create reporting exemptions.¹⁴³ Congress merely gave the EPA authority to “designate *additional* hazardous substances and establish reportable quantities,”¹⁴⁴ as well as the power “to promulgate any regulations necessary to carry out the[ir] provisions.”¹⁴⁵ The language in those provisions did not justify the EPA’s rule.¹⁴⁶ The EPA argued that its Final Rule logically flowed from its rulemaking authority because, as it understood it, Congress’s intent was to “minimiz[e] the burden on both regulated entities and government response agencies.”¹⁴⁷ The court was not sympathetic to this reasoning, as it concluded, “We have no doubt that a desire for efficiency motivated some of the exceptions Congress provided, but those concerns don’t give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren’t worth the trouble.”¹⁴⁸

Although not explicitly stated in the EPA’s defense, the court recognized that the agency also relied on the doctrine of *de minimis* authority—an implied authority to create statutory exemptions “when the burdens of regulation yield a gain of trivial or no value.”¹⁴⁹ The ultimate legal question was therefore “whether the record adequately support[ed] the EPA’s conclusion that these animal-waste reports [were] truly ‘unnecessary.’”¹⁵⁰ The court found that CERCLA and EPCRA reports were not “nearly as useless” as the EPA claimed and vacated the Final Rule.¹⁵¹

In reasoning that the EPA could not use its *de minimis* power to create a reporting exemption, the court noted that an agency cannot use the authority “to create an exception where application of the literal terms would ‘provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs.’”¹⁵² While the EPA argued there was no regulatory benefit to enforcing reporting requirements for CAFOs, the court agreed with commenters who pointed out

143. *Id.*

144. *Id.* (citing 42 U.S.C. §§ 9602(a), 11002(a)).

145. *Id.* (quoting 42 U.S.C. § 9615).

146. *Id.*

147. *Id.* (quoting Final Brief of Respondent at 33, *Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (No. 09-1017)).

148. *Id.*

149. *Id.* at 530 (quoting *Pub. Citizen v. Fed. Trade Comm’n*, 869 F.2d 1541, 1556 (D.C. Cir. 1989)).

150. *Id.* (quoting CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,956 (Dec. 18, 2008) (codified at 40 C.F.R. pts. 302, 355)).

151. *Id.*

152. *Id.* at 535 (quoting *Ala. Power Co. v. Costle*, 636 F.2d 323, 361 (D.C. Cir. 1979)).

that the reported information could help local officials respond to dangerous levels of pollution and protect communities.¹⁵³ Because the regulation did provide a potential benefit, the application of the *de minimis* doctrine was not proper.¹⁵⁴

In conclusion, the court held that the EPA's actions were not justified.¹⁵⁵ Neither statutory ambiguity nor the *de minimis* doctrine gave the agency authority to create the CERCLA and EPCRA exemptions.¹⁵⁶ The court granted Waterkeeper Alliance's petition and vacated the rule.¹⁵⁷

B. Rural Empowerment v. EPA: Challenging the 2019 Final Rule

The EPA's 2019 Final Rule is currently being challenged in the District Court for the District of Columbia, just as the 2009 version was in *Waterkeeper Alliance*.¹⁵⁸ The plaintiffs consist of a group of nonprofit organizations, including Rural Empowerment Association for Community Help, Animal Legal Defense Fund, Center for Biological Diversity, Center for Food Safety, Don't Waste Arizona, Inc., Environmental Integrity Project, Food & Water Watch, Humane Society of the United States, Sierra Club, Sound Rivers, and Waterkeeper Alliance.¹⁵⁹ The plaintiffs seek relief based on the fact that CAFOs emit toxic pollution, which can potentially harm communities when left unregulated.¹⁶⁰ The lawsuit is still pending, but several of the plaintiffs' claims for relief survived the EPA's motion to dismiss in May 2020.¹⁶¹

The lawsuit first challenged guidance that the EPA issued on October 26, 2017, which informed CAFOs that they were exempt from reporting under EPCRA.¹⁶² It also challenged the EPA's later Final Rule on the matter: the Amendment to Emergency Release Notification Regulations on Reporting

153 *Id.* at 536.

154 *Id.* at 537.

155 *Id.* at 537–38.

156 *Id.*

157 *Id.*

158. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 2.

159. *Id.*

160. *Id.* at 3.

161. Order Granting in Part and Denying in Part Defendant's Motion To Dismiss, Rural Empowerment Ass'n for Cmty. Help, No. 18-cv-02260 (May 15, 2020), <https://www.courtlistener.com/recap/gov.uscourts.dcd.200509/gov.uscourts.dcd.200509.40.0.pdf> [<https://perma.cc/B95H-SS9C>]; see also *Challenging Factory Farms' Exemption from Pollution Reporting Requirements*, ANIMAL LEGAL DEF. FUND (June 29, 2020), <https://aldf.org/case/challenging-factory-farms-exemption-from-pollution-reporting-requirements/> [<https://perma.cc/2HCW-LFC8>].

162. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 2.

Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act.¹⁶³

The first three claims for relief focused on the guidance issued by the EPA.¹⁶⁴ The first claim for relief alleged that the EPA violated the APA by failing to comply with rulemaking procedures when it issued its guidance on the EPCRA exemption before publishing a Final Rule.¹⁶⁵ The second claim argued that the EPA exceeded its statutory authority in issuing the guidance, violating both the APA and EPCRA.¹⁶⁶ The third claim alleged that the action was arbitrary and capricious.¹⁶⁷

However, as the defendants noted in their motion to dismiss, the EPA withdrew its guidance after the initial challenge.¹⁶⁸ The defendants argued that because the guidance was withdrawn, the plaintiffs' claims concerning it were now moot, as "the issues presented [we]re no longer live or the parties lack[ed] a legally cognizable interest in the outcome."¹⁶⁹ The court seemed to agree, at least partially.¹⁷⁰ It granted the defendants' motion in part by dismissing the first and third counts of the plaintiffs' Amended Complaint.¹⁷¹ The second count, alleging that the EPA exceeded its statutory authority, survived the motion to dismiss.¹⁷²

The remaining claims for relief addressed the EPA's Final Rule, rather than the guidance.¹⁷³ The fourth claim for relief argued that the rule exceeded the agency's statutory authority and is therefore a violation of the APA and EPCRA.¹⁷⁴ Citing *Waterkeeper Alliance*, the plaintiffs highlighted how the court previously described EPCRA as having a "sweeping" reporting mandate.¹⁷⁵

163. *Id.*

164. *Id.* at 34–38.

165. *Id.* at 34–36.

166. *Id.* at 36–37.

167. *Id.* at 37–38.

168. EPA's Motion To Dismiss Claims 1-3 of the Amended Complaint at 6, Rural Empowerment Ass'n for Cmty. Help, No. 18-cv-02260 (July 23, 2019), <https://www.courtlistener.com/recap/gov.uscourts.dcd.200509/gov.uscourts.dcd.200509.30.0.pdf> [<https://perma.cc/X4QT-5VEW>].

169. *Id.* (quoting *Larsen v. U.S. Navy*, 525 F.3d 1, 3–4 (D.C. Cir. 2008)).

170. Order Granting in Part and Denying in Part Defendant's Motion To Dismiss, *supra* note 161, at 1.

171. *Id.*

172. *Id.*

173. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 58, at 38–40.

174. *Id.* at 38.

175. *Id.* (quoting *Waterkeeper All. v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017)).

The fifth claim stated that the rule further violates the APA and EPCRA because it is arbitrary and capricious.¹⁷⁶ It alleged that the EPA issued the rule “without recognizing that it was changing its position and without supplying a reasoned analysis for its change in position.”¹⁷⁷ In addition, the plaintiffs argued that the EPA issued the rule “in contravention to clear legislative intent” and “without substantial evidence supporting” it.¹⁷⁸ The plaintiffs claimed that, “[a]ccordingly, the Final Rule is an agency action that violates EPCRA, is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’ in violation of the APA.”¹⁷⁹ Per the APA, they argued, the court must find such an arbitrary and capricious rule unlawful.¹⁸⁰

As of January 2022, this matter was still being litigated.¹⁸¹ If the EPA wants to succeed, it will have to overcome the precedent set by *Waterkeeper Alliance*.¹⁸²

IV. THE EPA'S INCONSISTENT STATUTORY INTERPRETATION MAKES THE 2019 FINAL RULE UNREASONABLE, ARBITRARY, AND CAPRICIOUS

The EPA's various CAFO reporting exemptions each rely on different statutory interpretations. Section A compares these different legal rationales for exempting CAFOs from reporting requirements under CERCLA and EPCRA, and it argues that the EPA has not adhered to a consistent statutory interpretation. Section B then contends that this inconsistent approach reflects an arbitrary and capricious statutory interpretation, so the 2019 Final Rule should be vacated in *Rural Empowerment v. EPA*.

A. Comparing the EPA's Reporting Exemptions

Each of the EPA's CAFO reporting exemptions, including the 2005 Air Compliance Agreement, the 2009 Final Rule, and the most recent 2019 Final

176. *Id.* at 38–39.

177. *Id.* at 39.

178. *Id.*

179. *Id.* (citations omitted).

180. *Id.*; see 5 U.S.C. § 706(2)(A), (C), (D), (E).

181. *Rural Empowerment Association for Community Help v. United States Environmental Protection Agency* (1:18-cv-02260), COURTLISTENER, https://www.courtlistener.com/docket/7961777/rural-empowerment-association-for-community-help-v-united-states/?filed_after=&filed_before=&entry_gte=&entry_lte=&order_by=desc [<https://perma.cc/SGM3-SDAF>] (Jan. 20, 2022, 2:31 PM); see *Challenging Factory Farms' Exemption from Pollution Reporting Requirements*, *supra* note 161.

182. *Waterkeeper All. v. EPA*, 853 F.3d 527, 537–38 (D.C. Cir. 2017).

Rule, rely on different rationales. This inconsistency undermines the credibility of the EPA's statutory interpretation in making such exemptions.

First, the EPA offered the Air Compliance Agreement in exchange for participation in an emissions study, with a goal of compliance with EPCRA and CERCLA.¹⁸³ This indicates that the EPA was interested in limiting air emissions from CAFOs, or it would not have clarified that “once applicable emission estimating methodologies have been published by EPA, the Agreement will also require each participating AFO to certify that it is in compliance with all relevant requirements of . . . CERCLA and EPCRA.”¹⁸⁴ While the agency argued it did not have all the data it needed to properly regulate CAFOs, it was still ultimately working towards regulating air emissions.

Next, the 2009 Final Rule created a reporting exemption to CERCLA because the EPA concluded, “[b]ased on [its] experience, . . . [f]ederal on-scene coordinators are unlikely to respond” to notifications of a hazardous substance release from CAFOs.¹⁸⁵ The agency could not foresee any situation where a chemical release event from a CAFO would trigger an emergency.¹⁸⁶

However, it did consider the public's concerns about exempting the largest CAFOs from EPCRA.¹⁸⁷ Again, like the earlier Air Compliance Agreement, the EPA's actions indicated that it recognized air emissions from CAFOs should be regulated under the statutes' reporting requirements, since CAFOs release hazardous substances. But it argued its exemptions to smaller AFOs were still proper under the *de minimis* doctrine because the rule was impractical to enforce.¹⁸⁸ That reasoning did not hold up in court, as the D.C. Court of Appeals vacated the Rule in 2017.¹⁸⁹

After the 2009 Final Rule was vacated, the EPA could not rely on the same *de minimis* reasoning to create yet another exemption. Instead, the agency now bases the EPCRA exemption on an entirely new statutory interpretation.¹⁹⁰ Citing the changes Congress made to CERCLA, it argues

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

184. See *id.*

185. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,953 (Dec. 18, 2008) (codified as amended at 40 C.F.R. pts. 302, 355).

186. *Id.*

187. *Id.*

188. *Id.*

189. See *Waterkeeper All. v. EPA*, 853 F.3d 527, 537–38 (D.C. Cir. 2017).

190. See Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. 27,533, 27,535–37 (June 13, 2019) (codified as amended at 40 C.F.R. pt. 355 (2022)).

that the *types* of releases allow the agency to exempt CAFOs from reporting requirements.¹⁹¹

These three exemptions reveal the EPA's inconsistent approach to hazardous substances released from CAFOs. The first two are at least somewhat reconcilable, as they acknowledge that CAFOs produce hazardous substances that generally bring them within the statutory scope.¹⁹² The Air Compliance Agreement explicitly stated that participating facilities would eventually be subject to CERCLA and EPCRA.¹⁹³ And, the 2009 Final Rule still required CAFOs to report under EPCRA—it only argued that smaller facilities should not be regulated due to the burden on the administrative system.¹⁹⁴

The 2019 Final Rule is a complete departure from the EPA's previous acknowledgement that CAFOs are polluters under EPCRA. Instead, the agency now says that even if CAFOs produce ammonia and hydrogen sulfide in excess of the reportable quantities, that is not the type of pollution regulated by the statute.¹⁹⁵ In the agency's words, "EPCRA section 304 serves as a notification requirement for chemical accidental releases, it is not intended to regulate emissions."¹⁹⁶ The EPA implies that only accidental releases will lead to the kind of emergency where the public might have "acute exposure" to such chemicals.¹⁹⁷

Overall, the reasoning behind each exemption is inconsistent. Since the EPA agreed to the regulation of CAFOs under the 2005 Air Compliance Agreement, it does not follow that the EPA would consider emissions from those same facilities to be too hard to regulate as it later claimed in defense of its 2009 Final Rule. And, if the EPA only created the 2009 Final Rule under the *de minimis* doctrine, then it must have still recognized that CAFOs do generally fall within the scope of EPCRA—contrary to its current claim that they do not because they do not cause acute chemical release emergencies.

191. *Id.* at 27,535–36.

192. *See* Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4,958, 4,958 (Jan. 31, 2005); CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. at 76,950.

193. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4,958.

194. CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. at 76,953.

195. Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. at 27,535.

196. *Id.* at 27,538.

197. *See id.*

Finally, it is difficult to see how an accidental emergency release of ammonia or hydrogen sulfide differs from any other type of release. Any release of a hazardous substance above the reportable quantity would pose the same health risks to the affected community. That is the exact situation that EPCRA was designed to address. Exempting an entire class of facilities from the statute is not consistent with the statutory intent, nor is it consistent with the EPA's previous interpretation of the statute.

B. The Impact of the EPA's Statutory Interpretation in Rural Empowerment v. EPA

Under the APA, an agency's rule will be found unlawful if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁹⁸ With a historically inconsistent approach to interpreting EPCRA, the EPA has not created a strong basis for its current reporting exemption. Indeed, its varying rationales behind each exemption make the current Final Rule arbitrary and capricious.

Section 1 explains why the EPA does not have statutory authority to create such an exemption, despite the recent amendments to CERCLA. Section 2 argues that even if the EPA has statutory authority, the 2019 Final Rule is arbitrary and capricious. The rule should therefore be vacated.

1. EPA's Statutory Authority

To promulgate a rule, an agency must first have the statutory authority to do so.¹⁹⁹ That authority might be explicitly stated by the legislature, or the authority to interpret a statute could be implied.²⁰⁰ In reviewing such an interpretation, courts will apply the *Chevron* analysis.²⁰¹ For an agency to assert its own interpretation, there must be some ambiguity in Congress' intent.²⁰² If there is ambiguity, only a "reasonable agency interpretation prevails."²⁰³

198. 5 U.S.C. § 706(2)(C), (A).

199. *Id.* § 706(2)(C); *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

200. *Chevron*, 467 U.S. at 843–44.

201. *See id.*

202. *See id.* at 845.

203. *Waterkeeper All. v. EPA*, 853 F.3d 527, 534 (D.C. Cir. 2017) (quoting *N. Nat. Gas Co. v. Fed. Energy Regul. Comm'n*, 700 F.3d 11, 14 (D.C. Cir. 2012)).

EPCRA does not explicitly give the EPA authority to create reporting exemptions for CAFOs, so the court must determine whether Congress' intent is ambiguous. The general legislative intent of EPCRA is clear, and it does not lead to obvious ambiguity—the statute protects communities from harmful chemical releases.²⁰⁴ The EPA's 2019 Final Rule therefore encounters the same problem its 2009 Final Rule met in *Waterkeeper Alliance*. EPCRA's "sweeping" reporting mandate does not provide much room for ambiguous interpretations.²⁰⁵ The plain language of the statute, and its overall intent to protect communities from harmful pollution, weighs against finding the ambiguity necessary for an agency's interpretation to prevail.

Congress' explicit CAFO reporting exemption under CERCLA may have created that ambiguity. As the EPA notes, "EPCRA section 304 reporting depends, in part, on whether reporting is required under CERCLA section 103."²⁰⁶ The EPA explains that "[i]f a release is *not* subject to notification under CERCLA section 103(a), the release may nonetheless be subject to reporting under EPCRA if the release meets the requirements of EPCRA section 304(a)(2),"²⁰⁷ which only requires reporting if the release:

- "[I]s not a federally permitted release as defined in section 101(10) of CERCLA,"
- "[I]s in an amount in excess of a quantity which the [EPA] Administrator has determined (by regulation) requires notice," and
- "[O]ccurs in a manner that would require notification under section 103(a) of CERCLA."²⁰⁸

The EPA concludes that even though air emissions from CAFOs satisfy the first two requirements, the recent amendments to CERCLA make it impossible to meet the third.²⁰⁹

At the very least, basing the "manner" of emission that requires reporting on CERCLA's requirements creates some ambiguity as to whether any kind

204. *What Is EPCRA?*, *supra* note 57.

205. *Waterkeeper All.*, 853 F.3d at 535.

206. Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. 27,533, 27,535 (June 13, 2019) (codified as amended at 40 C.F.R. pt. 355 (2022)).

207. *Id.*

208. 42 U.S.C. § 11004(a)(2).

209. Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. at 27,536.

of emission from CAFOs could satisfy the requirement. In *Chevron*, the Court noted that there is no ambiguity “[i]f the intent of Congress is clear,” but there may be ambiguity if “Congress has not directly addressed the precise question at issue.”²¹⁰ Here, because Congress has not directly indicated how the changes to CERCLA should affect EPCRA, some ambiguity exists. Therefore, the legislature’s explicit CAFO exemptions under CERCLA likely created enough statutory ambiguity to allow for a reasonable agency interpretation.

However, the EPA’s interpretation is not reasonable. Its reasonableness is undermined by the Final Rule’s apparent lack of concern for the environmental impact of CAFOs’ pollution. While the agency’s earlier attempts at exempting CAFOs still recognized the negative impact they could have, the current version does not. This makes it more difficult for the EPA to argue that their interpretation is rational and reasonable, as it does not even follow their own historical approach. Because the agency’s interpretation is unreasonable, it lacks statutory authority to promulgate the 2019 Final Rule.

2. Arbitrary and Capricious

The 2019 Final Rule should also be vacated because it is arbitrary and capricious. Again, this version of the rule is likely to face the same issue as its predecessor in *Waterkeeper Alliance*. Exempting reporting of ammonia and hydrogen sulfide from CAFOs, when these emissions are still reportable from other sources, is on its face an arbitrary interpretation of the statute.²¹¹ The harm to communities does not change simply based on the source of the hazardous substance.

Furthermore, the EPA rationalizes the 2019 Final Rule by explaining that the manner of emission from CAFOs is not the manner of emission that is meant to be regulated by EPCRA. This is another arbitrary distinction. A CAFO that routinely emits 125 pounds of ammonia per day has the same negative health impact as a facility that has an emergency release of the same amount.²¹²

210. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

211. *See Waterkeeper All. v. EPA*, 853 F.3d 527, 532 (D.C. Cir. 2017).

212. *See, e.g., Don’t Waste Ariz. Inc. v. Hickman’s Egg Ranch Inc.*, No. CV-16-03319-PHX, 2018 WL 6629657, at *1 (D. Ariz. Dec. 19, 2018) (“Hickman’s acknowledged the Arlington Facility ‘may generate routine air emissions of ammonia in excess of the reportable quantity of 100 pounds per 24 hours,’ and that ‘a rough estimate of those emissions is approximately 125 pounds per 24 hours, but this estimate could be substantially above or below the actual emission rate.’”).

The EPA might be able to argue that Congress's inclusion of a CAFO exemption in CERCLA makes the rule less arbitrary, since it is based on some form of legislative intent. But overall, EPCRA's purpose is still to provide local officials with access to information, so that they are better prepared to protect against "imminent and substantial danger to the public health or welfare of the United States."²¹³ Just because reporting is no longer mandated at a federal level under CERCLA does not mean Congress also meant to remove any local reporting requirements under EPCRA.

On the whole, exempting CAFOs from EPCRA's pollution reporting requirements is an arbitrary action. The 2019 Final Rule should therefore be vacated, as it violates the APA.

V. CONCLUSION

With the Biden administration in office, it seems likely that the EPA will backtrack on these types of broad CAFO exemptions to environmental laws. While running his vice-presidential campaign with President Obama, President Biden supported even stricter regulation of CAFOs.²¹⁴ Currently, his administration pledges to focus on environmental issues, including requiring community notification.²¹⁵ However, as of October 2021, the EPA still directed readers to the 2019 Final Rule and its CAFO exemption.²¹⁶

Even if the new administration does not change its approach, the *Rural Empowerment* court should vacate the 2019 Final Rule. The EPA lacks the statutory authority to exempt CAFOs from EPCRA's reporting requirements, as its interpretation is unreasonable. And even if it had statutory authority to create CAFO exemptions, the 2019 Final Rule is arbitrary and capricious. The court in *Rural Empowerment* should therefore vacate the rule, just as it

213. 40 C.F.R. § 300.130(c) (2022).

214. OBAMA FOR AMERICA, BARACK OBAMA AND JOE BIDEN: PROMOTING A HEALTHY ENVIRONMENT 5, [https://perma.cc/H7HX-666G] ("In the Obama Administration, the Environmental Protection Agency will strictly monitor and regulate pollution from large CAFOs, with fines for those who violate tough air and water quality standards.").

215. *The Biden Plan To Secure Environmental Justice and Equitable Economic Opportunity*, BIDEN FOR PRESIDENT, [https://perma.cc/UYW9-VJ92] ("In line with Congresswoman Blunt Rochester's Alerting Localities of Environmental Risks and Threats (ALERT) Act, Biden will direct the EPA to create a community notification program requiring 'industries producing hazardous and toxic chemicals to engage directly with the community where they are located to ensure residents have real-time knowledge of any toxic release and ensure that communities are engaged in the subsequent remediation plan.'").

216. *CERCLA and EPCRA Continuous Release Reporting*, EPA, [https://perma.cc/6MG3-6KMG]; *CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms*, *supra* note 107 (explaining that the "EPA interprets EPCRA section 304 to not require reporting of air emissions from animal waste at farms").

did in *Waterkeeper Alliance*. CAFOs are major polluters, and the high quantities of hazardous substances emitted should be subject to EPCRA's regulations. Without federal environmental reporting requirements, communities like Arlington and Tonopah may continue to breathe unsafe air.